UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Elnora Carthan, *et al.,*	§	Case No. 5:16-cv-10444-JEL-MKM
	§	
Plaintiffs,	§	
	§	Hon. Judith E. Levy
v.	§	Mag. Judge: Mona K. Majzoub
	§	
Rick Snyder, et al.,	§	
	§	
Defendants.	§	

LAN DEFENDANTS' OPPOSITION TO CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

STATEMENT OF ISSUES PRESENTED

1. Should the Court certify the proposed Principal Class?

   LAN answers: No
   Plaintiff answer: Yes

2. Should the Court certify the proposed Minor Subclass?

   LAN answers: No
   Plaintiff answer: Yes

3. Should the Court certify the proposed Residential Property Subclass?

   LAN answers: No
   Plaintiff answer: Yes

4. Should the Court certify the proposed Business Subclass?

   LAN answers: No
   Plaintiff answer: Yes

5. Should the Court certify an issue subclass?

   LAN answers: No
   Plaintiff answer: Yes

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INTRODUCTION

Lockwood, Andrews & Newnam, Inc., Lockwood, Andrews & Newnam, P.C. and Leo A. Daly Company (collectively "LAN" or the "LAN Defendants") oppose the Class Plaintiffs' Motion for Class Certification and would respectfully show the Court as follows:

Plaintiffs propose an extraordinary procedure whereby the claims of over 100,000 individuals and businesses arising from the Flint water crisis are to be combined in a single adjudication. The proposed class encompasses claims for various types of personal injury, personal damages and economic loss.

The massive "Principal Class" Plaintiffs propose fails from the outset because the separate forms of injury allegedly sustained by persons and entities within in the class does not present a common issue under Supreme Court authority.

Beyond this basic problem, class litigation of any subclass claim would not further the efficient and fair resolution of the litigation. Indeed, a separate adjudication of each claim would still be necessary because causation and fact-of-injury, an essential element of the sole claim Plaintiffs raise here, cannot be determined on a class-wide basis. Plaintiffs concede that this is true for some claims but in other instances try to improvise commonality by dubious expert testimony or by constructing complicated subclasses that, according to Plaintiffs, allow subclass-wide proof of causation. These approaches, dubious in themselves, ignore the fact that

Defendants are entitled to *contest* causation on an individual basis. Because resolution of this issue is both individualized and complex, any common issues cannot predominate.

Damages also pose an individual issue that weighs against predominance. Here too, Plaintiffs ignore differences among class members and attempt to peddle expert opinion that purports to calculate damages to the subclass as a whole, rather than the loss sustained by the class members. But a class is not an entity capable of asserting a claim; no subclass is entitled to damages or any other remedies. *Each* class member must establish entitlement to relief and the amount of damages the class member sustained. Ultimately, plaintiffs cannot satisfy the Supreme Court's requirement of a valid class-wide damages model that matches Plaintiffs' liability theory.

Nor does a class action provide a superior form of adjudication. The proposed subclasses would all face significant manageability issues stemming from the need to prove individual causation and damages. A class action is not necessary for an efficient adjudication. This is not a small-damages case where there is no incentive to file individual suits. Literally thousands of individual suits pertaining to the Flint water crisis have already been filed. Individual litigation, managed through the designated bellwether process holds more promise for a timely and fair resolution of the claims than the dubious class proposals Plaintiffs submit. Indeed, with the need

for so many individual factual determinations, it is not clear that class litigation creates any efficiency advantage at all.

The proposed minor subclass poses special problems in manageability as Michigan law contains special requirements for protecting the rights of minors that would be difficult or impossible to implement on a class-wide basis. Michigan law also restricts a parent or guardian's ability to bind a child contractually, making resolution of the claims difficult. Even the exercise of opt-out rights are problematic as it is unclear who, if anyone, has the authority to exclude minor plaintiffs from any money damages class action. Adding to the manageability problems is the improper subjective definition of the minor subclass, which would ostensibly require the submission of affidavit proof to establish membership. The proposed definition is so complicated that determining class membership would remain a recurring problem.

I. FACTUAL BACKGROUND

The basic facts underlying the Flint water crisis are well known to the court and need no extended elaboration. The LAN Defendants will concentrate on particular facts pertinent to their role with regard to the Flint Water Treatment Plant ("FWTP").

The Flint water crisis has spawned lawsuits in both state and federal court. The present action asserts claims against both governmental entities and individuals for alleged constitutional violations and against engineering firms hired by the City for alleged professional negligence. After the filing of their motion for class certification,

Plaintiffs herein, along with numerous Plaintiffs pursuing claims on an individual basis reached a tentative settlement with the governmental defendants, one hospital, and one of the engineering firms. They have moved for approval of this settlement and the motion remains pending with the Court.

A. LAN and LAD's Limited Role: The City Excludes LAN From Water Quality Decisions

LAN will review some of the facts particular to its role with the Flint water system. Plaintiffs' assertion regarding LAN and LAD are overly simplistic and in some cases simply false. They assert that LAN's initial contract with the City of Flint required LAN to "determine the steps that the City needed to take to prepare for switching from its use of Lake Huron water treated by DWSD to using Flint River water treated by FWTP." In fact, LAN did not operate FWTP, a preexisting water plant that had been operating as a backup or emergency water supply for decades. Before that it had served as a primary water plant for decades. The initial contract between LAN and the City of Flint required LAN to perform only two tasks—participate in an initial plant test run and prepare an engineering planning report based on date generated by the test run. LAN's contract specifically provided that, "Contractor recognizes that the City does not guarantee it will require any set amount of services. Contractors' services will be utilized as needed and as determined solely by the City of Flint."

The City was unable to complete the initial test run in the summer of 2013 because of equipment problems at the plant, including issues with the ozone system and the softening equipment. Consequently, the City did not require LAN to produce an engineering planning report following the initial test run because the test run failed to produce reliable data.

LAN's role in the project was the subject of further discussion in the summer of 2013. Change Order No. 2 in November, 2013 narrowed LAN's role to focus on six specific tasks. Representatives of the City and the Michigan Department of Environmental Quality (MDEQ) met (without LAN being present) to review the project and to determine the specific tasks LAN would be asked to perform. The City and MDEQ accepted responsibility for completing the tasks not assigned to LAN that were necessary to upgrade the Flint Water Treatment Plant and for water quality. LAN's scope of work was further modified by Change Order No 3 in October, 2014, Change Order No. 4 in April, 2015, and Change Order No. 5 in December, 2015. None of these Change Orders gave LAN responsibility for water quality.

LAN's work on the six specific tasks were done properly. These tasks have not given rise to complaints and no one has raised LAN's actual work as the cause of the problems related to Flint water.

Other facts confirm that the City and MDEQ took responsibility for water quality and that LAN was not asked to address water quality issues. In fact, LAN was

basically shut out from water quality decision-making. LAN was not asked to participate in a subsequent test run the City is believed to have conducted in September-October, 2013. The MDEQ performed Contact Time calculations for the City during 2013. The City, in turn, worked directly with its suppliers to investigate potential alternative coagulants and polymers. LAN was not asked to participate in any final test run in spring 2014, prior to distribution of water to the public. Nor was LAN consulted the following summer when the City began receiving complaints from residents regarding the color, odor, and taste of the water from the FWTP. The City did not consult with LAN when it issued boil-water advisories to the public in the late summer of 2014 regarding e-coli and coliform bacteria in the water or when General Motors informed the City in October, 2014 that it was discontinuing use of the water from the FWTP due to concerns about the corrosiveness of the water for its manufacturing operations.

The City did not consult LAN in February, 2015 when it obtained high lead test results at the Walters residence and when the City discussed internally that such results may indicate a wide spread systemic problem with lead. Specifically, the City never informed LAN that a Veolia representative told the Mayor that Veolia was concerned that the City was making corrosive water that would lead to problems down the road. LAN was not consulted regarding and had no input into sampling and testing protocols for the two six-month monitoring tests required by the MDEQ

pursuant to the Lead and Copper Rule. Nor was it consulted about the City's and MDEQ's decision to remove at least two high lead test results from the results they employed to demonstrate compliance with the Lead and Copper Rule.

LAN representatives made efforts to inquire how things were going at the water plant after the change-over to the Flint River water. Over the course of a year or more, the City repeatedly told the LAN representatives that the City was "making its numbers," that it was working closely with MDEQ, and that the City was in compliance with the Lead and Copper Rule. LAN was not even provided with the results of the Lead and Copper testing until the fall of 2015 when it assisted the city in designing and implementing a phosphate feed system.

While Plaintiffs attempt to broadly fault LAN for a supposed failure to recommend the use of corrosion control at the Flint Water Treatment Plant, the evidence shows that the City was or should have been well aware of the need for such controls. In the early 2000s, the MDEQ required that the FWTP operate using carbonate and non-carbonate softening utilizing both lime and soda ash. Lime softening, used alone or in combination with soda ash, together with pH adjustment, is a form of corrosion control recognized by the EPA. Acting as sub-consultant to Rowe Professional Services in 2011, LAN was asked to prepare a cost estimate for operating the FWTP using Flint River water. The cost estimate included costs for lime and soda ash for carbonate and non-carbonate softening and separate costs for phosphates,

which was intended as a "placeholder" to cover the costs of whatever appropriate corrosion control chemical additive was determined to be appropriate through testing.

The evidence makes clear that MDEQ was in the "driver's seat" with regard to the use of corrosion controls and that the cost-conscious City would not do anything that the MDEQ did not require. At an initial meeting with LAN in May, 2013, representatives of the City stated that they had already discussed using the Flint River as a water source with MDEQ representatives and that MDEQ had approved the plan. LAN recommended the use of lime and soda ash for softening in its initial proposed scope of work. However, Emergency Manager Kurtz stated the City did not plan to use soda ash for softening because the MDEQ did not require it. When LAN's representative, Warren Green attempted to explain that the recommendation to use soda ash for softening was based on a treatability study in the early 2000s and was required by the MDEQ at that time, Kurtz responded that the City was not going to spend money on anything unless currently required to do so by MDEQ.

At a meeting on June 26, 2013 attended by representatives of the City, LAN, MDEQ and others, the Superintendent of the FWTP asked the MDEQ representatives whether a corrosion control additive such as phosphates was required. Mr. Busch and Mr. Prysby of MDEQ conferred and responded that phosphates would not be required until the City had first completed two six-month monitoring rounds of lead and copper sampling and testing, after which any need for specialized corrosion control chemicals

would be assessed and determined. Asked for the basis of this decision, the MDEQ representatives stated that this was the way Michigan implemented the Lead & Copper Rule and that lime softening and pH control, which would be used during the one-year sampling period, was itself an approved form of corrosion control. After the meeting, LAN's representative approached the City's Utilities Director and asked to further discuss the use of a corrosion control additive. Just as the Emergency Manager had done a month earlier, the Director responded that the City would not do anything that was not required by the MDEQ.

In December 2013, the City asked LAN to provide cost estimates for the operation of the FWTP to Raftelis Financial, which was conducting a rate study for the City. After receiving authorization from the City for this work (as the task was otherwise outside of LAN's contracted scope of work), LAN provide an estimate of the chemical costs for operating the water treatment plant, once again including the cost of phosphates as a placeholder for an appropriate control additive.[1]

As part of its work for the City in the first quarter of 2015, Veolia made several recommendations to the City (including taking action on corrosion control). LAN recommended that the City implement these recommendations. The City decided to take action on only one of the recommendations--to change the filter media to

[1] Based on information and belief, it appears that the cost of phosphates was included in the rate study by Raftelis Financial and was thus ultimately included in the rates charged to customers of City water.

granular activated charcoal--and said it would "get back to" LAN on the other recommendations. It never did. Thereafter, LAN proposed to place a water quality engineer at the plant full time (via a contractual change order) but the City declined the offer. In the second quarter of 2015, LAN again followed up with recommendations that the City implement corrosion control, but once again the City took no action.

In mid-August 2015, MDEQ sent a letter to the City directing it to start using phosphates. In response to that directive from MDEQ, the City contracted with LAN to design a phosphate feed system for the treatment plant. LAN fast-tracked the design and the system began operating in December, 2015, a month ahead of the MDEQ's deadline,

Thus, far from ignoring corrosion control, the evidence shows that LAN repeatedly advised the City of the need for such controls but was repeatedly rebuffed. MDEQ, the state agency charged with enforcing the federal Lead and Copper Rule, was the controlling voice in determining water treatment strategies for the FWTP. It advised the City that it did not have to implement corrosion controls and the cash-strapped City chose not to do so.

B. Responsibility of the Governmental Defendants

As Plaintiffs' Memorandum points out at considerable length, there is no question that the Flint water crisis was predominately, "a failure of government at all

levels: local, state and federal officials."[2] Indeed, the State of Michigan's own Flint Water Advisory Task Force characterized the crisis as "a story of government failure, intransigence, unpreparedness, delay, inaction and environmental injustice."[3] The Flint Water Treatment Plant was owned and operated by the City of Flint. It was governmental officials who made the decision to switch to Flint River water, despite knowledge of water quality issues. It was governmental officials who persisted in that decision despite complaints from residents regarding the water quality. It was governmental officials who failed to implement corrosion controls, and who falsely assured Flint residents the water was safe. Plaintiffs accuse the Governmental Defendants of intention and reckless violations of their constitutional rights. By contrast, they only charge LAN with professional negligence, and much of the alleged negligence consists of the supposed failure to influence the Governmental Defendants and steer them away from the harmful course they were already taking. LAN mentions these facts here because they show that comparative fault is a serious and viable defense to the case in this particular factual context.

C. Plaintiffs' Claims and Requested Certification

Plaintiffs are individuals and businesses who alleged that they sustained some type of harm as the result of the Flint water crisis. The nature and degree of the harm

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[2] Pl. Mem. at 7, quoting Task Force Report, Ex. 124, Mar.-23-2020 GOV0129358 at GOV0129362.
[3] Task Force Report, p. 1.

asserted varies considerably by Plaintiffs. For example, minor Plaintiff T.W. allegedly sustained premature birth and developmental delays. Minor Plaintiff K.C. allegedly sustained hair loss and skin rashes and an elevated blood lead level.[4] None of the adult Plaintiffs allege that they have sustained physical injuries. The business plaintiffs include a landlord asserting loss of rental income, a restaurant contending that it sustained a loss of income, and another restaurant that asserts that it was forced to close its Flint location.[5] Plaintiffs asserted claims against the Government Defendants for violating the right to bodily integrity under the Fourteenth Amendment of the United States Constitution. They also asserted professional negligence claims against the Engineering Defendants.

Plaintiffs seek certification of a Principal Class, consisting of all current and former Flint residents who received water from the City of Flint at any time between April 25, 2014 and October 16, 2015 and three subclasses: a Minor Subclass, consisting of children who meet a complex set of age and exposure criteria, a Residential Subclass, consisting of individuals and entities who owned residential property within the City of Flint from April 25, 2014 to the present, and a Business Subclass, consisting of persons and entities that owned and operated a business in Flint as of April 25, 2014.[6] While Plaintiffs contend that all subclass members are all

[4] Pl. Mem. p. 39.
[5] Id. p. 40
[6] Pl. Mem. p. 32-33.

members of the Principal Class, the subclasses include “entities,” which would not be members of a class of “residents.”

II. STANDARDS GOVERNING CLASS CERTIFICATION

A class action “is an exception to the usual rule that litigation is conducted by and on behalf of the individual named plaintiffs only.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 343 (2011)(quoting *Califano v. Yamasaki*, 442 U.S. 82, 700-01 (1979)). The proposed class must satisfy the four requirements of Federal Rule of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequate representation—and satisfy at least one of the requirements of Rule 23(b). *Zehentbauer Family Land, LP v. Chesapeake Exploration, L.L.C.*, 935 F. 3d 496, 503 (6th Cir. 2019). In cases where more than incidental monetary relief is sought, the applicable subsection is Rule 23(b)(3), which authorizes certification where “questions of law or fact common to class members predominate over any questions affecting individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

Certification is permissible only if the Court is satisfied, after a rigorous analysis, that all requirements of Rule 23 have been satisfied. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Rule 23 does not set forth a mere pleading requirement; the party seeking certification must affirmatively demonstrate compliance with rule. *Wal-Mart* 564 U.S. at 350; *see also Sandusky Wellness Center,*

LLC v. ASD Specialty Healthcare, Inc. 863 F. 3d 460, 466-67 (6th Cir. 2017). In deciding the certification issues, it may be necessary for the court to probe behind the pleadings, and the analysis may require considerations "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast*, 569 U.S. at 34 (quoting *Wal-Mart*, 564 U.S. at 351).

A class action is simply a procedural device. Under the Rules Enabling Act, procedural rules such as Rule 23 may not abridge, enlarge, or modify any substantive rights. 28 U.S. C. § 2072(b); *see Diaz-Ramos v. Hyundai Motor Co.*, 501 F. 3d 12, 16 (1st Cir. 2007) (collecting cases); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F. 3d 780, 794 (6th Cir. 2016). Whatever the putative class members would have to establish to prevail upon a substantive claim as individual litigants must still be established in the class context. Moreover, a class action may not operate to deprive the defendant of an opportunity to litigate an available defense. *Wal-Mart*, 564 U.S. at 367. As will be shown below, this creates a dilemma for Plaintiffs here. Any valid trial plan must preserve the Engineering Defendants' right to contest causation and damages on an individual basis. Yet, this will essentially ensure the existence of thousands of mini-trials, the very result that Plaintiffs profess that class certification is designed to avoid.

III. THE PROPOSED CLASS DOES NOT PRESENT COMMON ISSUES

A. The Class Does Not Meet *Wal-Mart's* "Same Injury" Requirement

Because the predominance inquiry largely subsumes the commonality requirement of Rule 23(a)(2), LAN will focus its argument on that requirement, especially as it relates to the request to certify the subclasses. However, predominance turns in large part on the characterization of an issue as individual or common. Hence, it is vital to define what a "common question" is for purposes of Rule 23. In brief, a common question is one for which the answer must be the same regardless of the identity of the particular class member, the resolution of which significantly contributes to the resolution of the case as a whole. The Supreme Court has emphasized that "[w]hat matters to class certification…is not the raising of common 'questions'—even in droves—but rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (ellipsis and emphasis in original)(quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009)).

Critically, Wal-Mart set forth a "much more rigorous and thus more difficult to meet" standard for commonality. *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355 at *8 (E.D. Ky. Mar. 29, 2018)(quoting Erwin Chemerinsky, "New Limits on Class Actions", 47 Trial 54, 54 (2011)). At minimum, commonality requires that the

class members have suffered the same injury. *Wal-Mart*, 564 U.S. at 349-50.[7] The court in *Modern Holdings* found that the commonality requirement had not been met where the plaintiffs alleged that class members had sustained a number of different physical ailments, financial and property losses and damages for diminution in the value of their property from exposure to toxic chemicals released in a spill. 2018 WL 546355 at *2, 7. The same problem afflicts the proposed class here. The vast master class combines claims for individuals asserting they sustained personal injury with claims for property damage and economic loss. Not every class member alleges every form of injury. Business entities such as Plaintiffs Angelo's Coney Island or 635 South Saginaw LLC obviously did not sustain a personal injury. Most of the individual class members did not sustain the business losses alleged by those entities. Consequently, no common injury unites their claims.

Moreover, the Complaint alleges distinct forms of personal injury harms ranging from skin rashes to legionella exposure. Even if the court considers only the personal injury claims of the minor subclass, the trier of fact would have to consider causation as to numerous potential effects ranging from small IQ decrements to serious behavioral disorders. In short, the proposed master class does not present a common question capable of class resolution.

[7] The "same injury" requirement also relates to the typicality requirement. The class representative must "possess the same interest and suffer the same injury" as the unnamed class representatives. *Gen. Tel. Co., v. Falcon*, 457 U.S. 147, 156 (1982)

The sole claim against the Engineering Defendants is professional negligence. Under Michigan law professional negligence requires proof of (1) the existence of a professional relationship; (2) negligence in the performance of duties within that relationship; (3) proximate cause; and (4) the fact and extent of injury. *Broz v. Plante & Moran*, *PLLC* 331 Mich. App. 39, 951 N.W. 2d 64 (2020); *see also In re NM Holdings Co., LLC*, 622 F. 3d 613, 618 (6th Cir. 2010).

B. Duty Does Not Present a Common Issue

The existence of a professional relationship between the Engineering Defendants and the City of Flint may be regarded as a common question but is one that deserves very little weight in the predominance analysis. Most of the Engineering Defendants do not dispute that they had some form of professional relationship with the City.[8] In any event, the issue would take up little time and effort.

The larger duty question—whether the Engineering Defendants owed a duty to the class members—is not a common issue. Duty is essentially a matter of policy. "Duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Buczkowski v. McKay*, 441 Mich. 96, 100-01 (1992). The ultimate inquiry is whether the social benefits of imposing a duty outweigh the social costs of imposing that duty, a determination that involves considering the relationship of the parties, the

[8] Leo A Daly Company does deny that it contracted to perform or actually performed any services for the City of Flint.

foreseeability of the harm, the burden on the defendant and the nature of the risk presented. *In re Certified Question from the Fourteenth Dist. Court of Appeals of Texas*, 479 Mich. 498, 505 (2007). While foreseeability is required to impose a duty, it does not follow that a duty exists in any situation in which harm is foreseeable. *Id*. at 508.

At some point, the absence of a relationship and the specter of limitless liability counsel against the imposition of a legal duty. For instance, in *Certified Question*, the Michigan Supreme Court held that defendants who were owners of property on which asbestos-containing products were located did not owe a duty to a member of an employee's household who never came near the property to protect her from exposure to asbestos fibers carried home on the employee's clothing.

Similarly, in *Henry v. Dow Chemical Co*., 473 Mich. 63 (2005), the Supreme Court held that mere exposure to a potentially hazardous chemical did not give rise to a negligence action, largely based on the determination that allowing a claim based on exposure without present physical injury "would create a potentially limitless pool of plaintiffs." *Id*. at 83.

Even if it is assumed that the Engineering Defendants, who had no contractual or other relationship with the class members, owed them a duty not to negligently expose them to bodily harm, it does not follow that a negligence duty would extend to every member of the putative Principal Class. The court could well find that

Engineering Defendants owed no duty to protect a landlord from the loss of rental income caused by a general economic downturn or to avoid economic conditions forcing the closure of a hot dog restaurant or to maintain the value of undamaged residential property against potential community stigma—all claims present in this suit. Even within particular subclasses, variable duty issues persist. For instance, the court may determine that business interruption losses directly caused by the need to repair property damages was within the scope of duty, whereas inchoate losses associated with the alleged generalized business downturn caused by the Flint water crisis were not.[9]

C. Breach of Duty Does Not Present a Common Question

The question of whether Defendants were negligent in the performance of their professional services may appear on the surface to pose a common question but a closer look dispels that facile judgment. Plaintiffs allege that the Engineering Defendants were negligent in a number of respects. Some of the alleged negligent acts or omissions took place after the City switched to Flint River water and pertained to attempts to address problems that had already occurred. For example, Plaintiffs

[9] This problem can also be conceptualized through the lens of causation. The Michigan Supreme Court has emphasized that some indirect consequences of allegedly negligent acts are simply too remote to constitute a legal cause of damages. In *Page v. Klein Tools, Inc.*, 461 Mich. 703 (2000) the Michigan Supreme Court declined to recognize a cause of action for educational malpractice. In doing so, it held that even where there is a complete, direct chain of causation, public policy may deny recovery where the injury is too remote from the negligence, the injury is wholly out of proportion to the culpability and other factors. *Id*.

have criticized the Engineering Defendants' response to an assignment to address high reported Total Trihalomethane (TTHM) levels. LAN was not retained to assist the City with TTHM until fall, 2014 and did not provide even a draft report on the issue until November of that year. By that time, the City had been using Flint River Water for several months and, according to Plaintiffs' factual theories and their own experts, the class members had already sustained injuries.

This is significant because the Court cannot assume the basis, if any, upon which the jury would find negligence as to any particular defendant. If the jury confined its negligence findings to acts that only occurred in late 2014 or 2015 (many months after the City had begun using the Flint River), then those negligent acts could not be the legal cause of any injuries that had already occurred. Under those circumstances, the negligence findings would not necessarily be the same for all class members.

D. Comparative Fault Does Not Present a Common Issue

Equally important, the comparative fault issue requires assessment of the relative responsibility of the Engineering Defendants and the Governmental Defendants, which could also vary between the class members depending on the particular injury sustained by the class member and when it occurred. There is no question that the lion's share of responsibility for the Flint water crisis rests with various governmental actors. Plaintiffs, the Engineering Defendants and even the

state of Michigan are united on this contention. Accordingly, a major part of the Engineering Defendants' defense will be that the acts and omissions of the governmental actors were the principle cause of the injuries sustained by class. Of course, Michigan law permits such a comparative fault defense. M.C.L. §§ 600.2956, 600.2957, 600.6304; *see generally Estate of Goodwin by Goodwin v. Northwest Michigan Fair Assoc.*, 325 Mich. App. 129, 139-41 (2018).

Plaintiffs allege that class members sustained injury through exposure to at least four different substances: lead, *E-coli*, trihalomethanes and *legionella*. The relative fault of the parties is not necessarily the same for each substance. The Court need look no further than Plaintiffs' Memorandum's statement of facts concerning the alleged wrongful acts of the City and State actors to see that many of the Plaintiffs' complaints are grounded in the decision to switch to Flint River water with its known propensity for contamination from E-coli and other contaminants.[10] The Engineering Defendants did not make the decision to use Flint River water or to persist in its use after water quality problems became apparent. It is quite possible that the trier of fact would assess the degree of responsibility for E-coli related harms differently than lead-related harms. Consequently, the "one fell swoop" liability determination Plaintiffs advocate is an illusion.

IV. COMMON ISSUES DO NOT PREDOMINATE FOR THE PRINCIPAL CLASS OR ANY SUBCLASS

[10] Pl. Mem. pp. 5-7

Because Rule 23(b)(3) is framed for situations in which class treatment is less clearly allowed than Rule 23(b)(1) or (b)(2), courts have a duty to take a "close look" to determine whether common issues predominate over individual ones. *Comcast*, 569 U.S. at 34. It is a more demanding inquiry than that governing commonality under Rule 23(a)(2). *Id.* The inquiry is a test of whether proposed classes are sufficiently cohesive to warrant adjudication by representation. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Predominance is a qualitative, rather than a quantitative, inquiry asking "whether common, aggregation-enabling issues in the case are more prevalent or important than the non-common aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The court must take into account the claims, defenses, relevant facts and applicable substantive law to determine the degree to which the resolution of class-wide issues will further each class member's claim against the defendant. *Klay v. Humana, Inc.*, 382 F. 3d 1241, 1254 (11th Cir. 2004), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

Plaintiffs assume they can establish that causation, injury, or other issues are common issues merely by identifying some admissible evidence applicable to all class members. This assumption is incorrect. The Court can and must look to the arguments and evidence that the party opposing the class can bring to bear on the issue as well. As the Sixth Circuit held in *Sandusky Wellness Center*, the key to the

predominance inquiry is to "identify[] the substantive issues that will control the outcome." Consequently, "courts should consider how a trial on the merits would be conducted if a class were certified." 863 F. 3d at 468 (quoting *Gene & Gene, LLC v. BioPay LLC*, 541 F. 3d 318, 326 (5th Cir. 2008)). In that case, the Court of Appeals affirmed the denial of certification of a case alleging that the defendants had violated the Telephone Consumer Protection Act by sending an unsolicited fax advertisement to large number of physicians. *Id.* at 462. The district court found that the predominance requirement was not met because the defendant could defend the claims by showing that the recipients consented to receive the faxes—an issue that could only be decided on an individual basis. Because it was apparent that the consent issue was the most significant issue in the litigation, the district court correctly determined that the predominance requirement had not been met. *Id.* "Regardless of other questions that may be common to the class, identifying which individuals consented would undoubtedly be the driver of the litigation." *Id.*

Finally, in assessing predominance, damages matter. The mere fact that damages vary among the class members is not, in itself, fatal to certification. Nevertheless, the Court must consider how the need to determine damages individually effects the predominance calculation. *Comcast*, 569 U.S. at 34; see *Gawry v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 942, 958 (N.D. Ohio 2009)(class certification not warranted where the proposal to calculate individual

damages is clearly inadequate or requires significant inquiry to determine necessary variables). Moreover, where the class proponent proposes a purported class-wide damages model that model must match the theory of liability.

A. Causation and Fact-of-Injury Present Predominate Individual Issues Precluding Certification

Attempts to litigate toxic tort cases on a class-wide basis ordinarily fail because causation and injury present predominate individual issues. The "overwhelming majority of post-*Amchem* decisions in federal and state court have rejected class certification in mass tort and related property damage cases irrespective of the claims asserted by plaintiffs." 1 *McLaughlin on Class Actions* § 5:41 (13th ed. 2016). Certification is particularly inappropriate in complex cases where no single set of operative facts establishes liability and "no single proximate cause equally applies to each potential class member and each defendant." *Sterling v. Velsicol Chem. Corp.*, 855 F. 2d 1188, 1197 (6th Cir. 1988).

Under Michigan law a negligence claimant must establish that the defendant's breach of duty was a proximate cause of his or her injury. This concept incorporates the requirements of cause in fact and legal cause. *Craig ex rel. Craig v. Oakwood Hosp.*, 417 Mich. 67, 86 (2004). "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be

legally responsible for such consequences." *Skinner v. Square D. Co.*, 445 Mich. 153, 163 (1994).

In cases alleging harm from a toxic substance, there are two distinct causation requirements. General causation inquires whether a particular substance is capable of causing the claimant's injury at the level of exposure the claimant experienced. *Powell-Murphy v. Revitalizing Auto Communities Environmental Response Trust*, 2020 WL 4722070 at * 5 (Mich. App. Aug. 13, 2020). Specific causation requires the plaintiff to show that the substance caused the individual's injury. *In re Dow Corning Corp.*, 541 B.R. 643, 654 (E.D. Mich. 2015). Both forms of causation involve scientific assessments that must be established through the testimony of experts. *Pluck v. BP Oil Pipeline Co.*, 640 F. 3d 671, 677 (6th Cir. 2011).

It is apparent that causation for any personal injury must be established on an individual basis. Plaintiffs assert that the defendant's action created exposure to at least four different toxic substances or pathogens and allege multiple health effects ranging from skin rashes to death from *legionella* exposure. They identify no common evidence that would prove either general or specific causation as to the Principal Class as a whole. Plaintiffs only point to generic evidence that exposure to certain substances caused certain kinds of injury to persons within the class. But such evidence would not establish proximate cause or existence of injury for any particular member of the class. Each class member must show that he or she sustained injury as

the result of the defendant's negligence, a requirement that is not satisfied by showing some *other* person sustained an injury. *See Gates v. Rohm and Haas Co*., 655 F. 3d 255, 266 (3d Cir. 2011) ("Plaintiffs cannot substitute evidence of exposure of actual class members with evidence of hypothetical, composite persons in order to gain class certification.").

For general causation, any claimant would have to establish that exposure to a harmful substance was sufficient to cause the injury alleged. This would require an analysis of *that person's* exposure. Defendants could, of course, dispute the underlying facts of exposure. Specific causation would require proof that an individual's injury would require proof that exposure to the substance (as opposed to something else) caused the injury. Here too, the Defendants could bring to bear any evidence indicating that other causes were responsible for the alleged injury. The Court may look to the experiences of the named Plaintiffs to demonstrate how important the causation determinations would be.

B. Common Issues Do Not Predominate as to the Minor Subclass

While Plaintiffs concede that causation cannot be litigated on a class-wide basis for the principal class, they theorize that they can do so for the proposed Minor Subclass. Plaintiffs attempt to manufacture predominance by creating a convoluted subclass designed to enable their experts to opine that every child within the subclass suffered a lead-related injury. The attempt fails for a number of reasons detailed

below. At the outset, it is important to note that the proposed subclass definition leaves many Flint children behind. It excludes, for instance, any child over the age of ten and most children residing in housing stock built after 1986. These children are members of the principal class only, and Plaintiffs concede that no class-wide diagnosis is possible and that causation and damages must be determined individually.

The putative Minor Subclass is a complex proposition. The first step in the proposed subclass definition is to identify "potentially exposed plaintiffs," defined as those children who, during the relevant period of exposure, (1) lived, attended school or day care in Flint for 90 or more days; (2) were in utero or up to ten years of age; and (3) can present an affidavit attesting that the child consumed unfiltered Flint tap water for 14 or more days during the 90-day exposure period.[11]

Next, Plaintiffs would attempt to identify the "subclass of injured children," those "potentially exposed plaintiffs" who lived in a Flint domicile built on or before 1986, or who lived in a Flint domicile with documented elevated tap water lead, or who attended Flint school or daycare facilities with documented elevated tap water lead.[12] According to Plaintiffs' expert, Dr. Howard Hu, children meeting these minimum criteria "are expected to have experienced lead exposure as a result of the Flint water crisis of a sufficient duration and magnitude to have sustained non-

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[11] Hu Decl. ECF No. 1208-90 ¶¶ 17-19 Plaintiffs' expert define the relevant period of exposure as May 1, 2014 to January 5, 2016.
[12] *Id*. at ¶ 21.

negligible impairment of the neurobehavioral development."[13] The proposed mass diagnosis is made without consideration of any actual water lead level measurement in the environment to which the child was exposed and without regard to any actually measured blood level for any child. While Dr. Hu speaks broadly of "impairment of the neurobehavioral development," the only actual consequence of lead exposure he is willing to diagnose is a decrease in IQ, in many instances less than one point.[14]

Underlying this opinion is a proposed triple-estimation methodology. First, for any child it is necessary to estimate the water lead level to which the child was actually exposed. It is unclear how exactly this will be accomplished in the absence of reliable measurements for the particular exposure location. The estimate, however, derived, must then subtract the assumed pre-crisis water lead level to determine the increase in water lead level caused by the Flint water crisis.

The next step is to convert estimated water lead levels to estimated blood levels. Plaintiffs reply upon a matrix provided by another expert, Dr. Panos Georgopoulous. The matrix is derived from the EPA's Integrated Exposure and Uptake Biokinetic (IEUBK) model for children from 0-7 years of age, and an alternative model for adult women from 20-25 years of age (to estimate in-utero exposure). A further subtraction must then be made to account for the pre-crisis blood lead level.[15]

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[13] *Id*. at ¶ 22.
[14] *Id*. at p. 25.
[15] *Id*. p. 22, subparagraph 22(b).

Finally, the methodology translates the blood level estimate into lost IQ by applying a further estimate, supplied by Dr. Lanphear, that a 1 microgram per deciliter increase in blood lead is associated with a loss of 0.51 IQ points.[16]

Interestingly, applying the matrix results in very small IQ losses in most cases. In three of the four "exemplars" selected in Dr. Hu's report the IQ loss was less than one point—and in one instance only 0.08 points.[17] Such tiny impacts are not even measurable in IQ testing, strongly suggesting that these children would not have sustained the kind of present physical injury that Michigan law requires. *Henry*, 473 Mich. at 72-73.

The approach used by Plaintiffs' experts piles estimates and assumptions to dizzying heights in order to derive its IQ loss estimates. It is certainly subject to challenge on reliability grounds. However, the proposed methodology is described in some detail here for another purpose—to demonstrate how readily the underlying assumptions might be attacked *when examining a particular claim.*

All children in Flint were exposed to lead in some degree before the Flint crisis. Lead was present not only in the drinking water but also in the soil and through

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[16] *Id*. p. 23. Dr. Hu readily concedes that the estimates of IQ decrements are averages to be expected in a large population and not necessarily reflective of the IQ loss sustained by any particular child. "[T]here may be some children who lose only 0.31 points of IQ, yet others who lose 0.71 points of IQ, based on inter-individual variations in susceptibility." *Id*. p. 37, subparagraph 33(e).

[17] While Dr. Hu opines that even small decreases in IQ may have social significance when multiplied over an entire population, it is not clear how a reduction of less than a single IQ point would have an effect on the life of the particular person involved.

sources such as lead paint. The degree of exposure for any particular child depends on a host of factors ranging from age to type of housing stock to the existence of dust-disturbing renovations occurring in or near the home.

Some Flint children doubtless had high baseline levels of lead before the crisis that vary significantly from the assumed levels in Plaintiffs' experts' methodology. Not all increments of lead exposure are equally harmful. Plaintiffs' experts postulate the existence of a "decelerating dose response curve" with respect to the effect of lead exposure on IQ in children.[18] According to this theory, the greatest degree of injury is associated with the lower levels of exposure. For example, an increase in blood lead from less than one microgram per deciliter to 30 micrograms was associated with a loss of 9.2 IQ points but the largest fraction of the deficit (6.2 points) occurred below the 10 microgram per deciliter level.[19] Consequently, to evaluate the effect of the Flint water crisis on any particular child it would be important to know how far along the dose-response curve the child was *before* exposure to Flint water. If the child already had a relatively high blood lead level, incremental increases would have less effect than if the child had a relatively low level.

[18] Georgopoulos Decl. 32, ECF No. 1208-90 Hu Dep. pp. 192-93 ECF No 1369-46

[19] Lanphear BP, Hornung R, Khoury J, et al. "Low-level Environmental Lead Exposure and Children's Intellectual Function: An International Pooled Analysis," 113 Environ. Health Perspect. 894, 898 (2005).

It may well be possible for Defendants to establish for a given child, even one that meets all the subclass criteria, that there was not significant exposure to Flint water containing harmful levels of lead. Dr. Hu concedes that exposure is likely to vary spatially across the City depending on factors such as the condition and type of service lines, and likely to vary over time as well. Moreover, the frequency and the individual's consumption of water may vary. The proposed methodology assumes that every home in Flint built in or before 1986 contains lead plumbing fixtures, presumably because amendments to the Safe Drinking Water Act banned such fixtures during that year. Defendants may be able to show, however, that particular homes were not constructed with such fixtures or that they were replaced before the Flint water crisis. If the assumptions of the methodology are incorrect as to any particular child, it will not yield an accurate estimate of the child's blood level and the resulting harm.

Plaintiffs' proposed model does not distinguish between occasional ingestion of water at a school or day care with every-day ingestion of water at home. It does not take into account situations in which families switched to bottled water or acquired a water filter or when they did so. Moreover, individuals vary in their absorption of lead based on such factors as age and nutritional status. Measured blood levels, where available, may show that the estimated level according to the proposed methodology was incorrect as to a particular individual. In short, neither Defendants nor the jury are

forced to accept Plaintiffs' experts' proposed subclass-wide diagnosis. Defendants can and are entitled to litigate the causation issue on an individual basis.

C. Common Issues Do Not Predominate as to the Residential Property and Business Owner Subclasses

1. Average Loss Calculations Do Not Establish Fact of Injury or Amount of Damages

The same injury in fact and causation issues plague the proposed Residential Property and Business Owner Subclasses. In addition, establishing damages poses special problems for these subclasses. Plaintiffs attempt to circumvent these problems by resorting to certain dubious techniques. They offer to prove some forms of damages by calculating the *average* loss. This is the approach used by Plaintiffs' expert Dr. David Keiser, who calculates an average diminution of value on a percentage basis for single-family residences in Flint.[20] He estimates that single-value housing prices in Flint fell, on average, 26% relative to similar cities.[21]

Leaving aside serious methodological concerns, evidence of an average loss in value does not establish that any *particular* property sustained a loss or the amount of that loss. Where a loss did occur, it could be greater or less than the calculated amount. After all, that is the nature of averages.

To the extent that Plaintiffs attempt to use the average loss calculation as a substitute for a determination of loss for a particular property, they create a classic

[20] Keiser Report, Plaintiffs' Motion, Ex. 114 p. 2.
[21] *Id.*

Comcast mismatch. The damages model no longer fits the theory of liability. A professional negligence Plaintiff must establish that the alleged negligence was a proximate cause of *his* damages, not a composite damages figure derived from a large number of other persons. See M. Civ. JI 30.03 (stating that the plaintiff has the burden of showing that *the plaintiff* sustained injury and damages and that the professional negligence of the defendant was a proximate cause of injuries and damages *to the plaintiff*).

2. Aggregate Damages Calculations Do Not Establish Fact of Injury or Amount of Damages

Another approach Plaintiffs attempt is to calculate a total or "aggregate" amount of damages for the class as a whole. This is the method used by Dr. Simons to determine a loss of almost $90 million allegedly sustained by businesses in 26 identified business subsectors.[22] Again, the problem is that the total amount says nothing about whether a particular business lost profits during the relevant period. Nor does it quantify the amount of loss profits for any particular business. Here, too, there is no "fit" between the liability theory and the damages model.

Proof of actual lost profits of a business is a notoriously fact-intensive endeavor, depending on objective facts, figures and data. *See Wiese v. Pro Am Services, Inc*., 317 S.W. 3d 857 (Tex. App. 2010); *see also Ask Chemicals, LP v. Computer Packages, Inc.* 593 Fed. Appx. 506, 511 (6th Cir. 2014)("demonstrating

[22] Pl. Mem pp. 78-79.

lost profits to a reasonable certainty requires the use of detailed evidence, for example, expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises and the like"). With no valid class-wide damages model, it is likely that the need to prove lost profits on a business-by-business basis will weigh heavily against predominance.

Critically, plaintiffs cannot simply rely upon an aggregate damages figure coupled with some sort of distribution plan to circumvent the problem of individualized damages. That was the improper approach taken in *McLaughlin v. American Tobacco Co.*, 522 F. 3d 215 (2d Cir. 2008), where the district court adopted a "fluid recovery" plan whereby smokers would prove collective damages on a class-wide basis and then individual smokers would claim shares of the fund. The Court of Appeals held that such a plan would inevitably alter the defendants' substantive right to pay damages reflective of their actual liability and would thus violate the Rules Enabling Act and the Due Process Clause. *Id* at 231; *See also In re Hotel Tel. Charges*, 500 F. 2d 86, 90 (9th Cir. 1974).

Oddly, Plaintiffs and their expert also use aggregate estimates to quantify the cost of buying bottled water in response to the Flint water crisis. One would think that the methodology for such out-of-pocket expenses would be simplicity itself: (1) find out if the individual purchased bottled water beyond that which would have been purchased absent the crisis, and (2) determine how much the individual actually paid

for the excess water. This obvious approach is, however, inherently individual and weighs against predominance to some extent.

3. Refund Theories Do Not Establish Fact of Injury or Amount of Damages

Plaintiffs also contend that class members were injured for paying water bills to Flint for water that had no value because it was unsafe.[23] Apart from the individualized nature of the inquiry, the theory of loss is itself serious flawed. It assumes that Flint water was completely valueless because of the potential health risks.[24] Water is a metered commodity; customer pay only for the water they choose to use. If the water had no value to the class members they would not have used it. Moreover, Plaintiffs do not present evidence that Flint water did not fulfill the purposes for which water was actually used—hydration or washing clothes or watering the lawn. The fact that the water posed a health risk, if ingested, does not mean that it lacked any value, especially if the risk does not materialize in a particular individual. The "worthless water" theory espoused by Plaintiffs is closely akin to the full refund model where the product challenged has some value to potential purchasers even if it has some attribute criticized by the plaintiff. *See e.g. In re POM Wonderful LLC*, 2014 WL 1225184 at *3 n. 2 (C.D. Cal. Mar. 25, 2014)(because Plaintiffs

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[23] Pl Mem. p. 69.
[24] Pl Mem.

received some benefit from allegedly mislabeled fruit juice, full refund model did not accurately measure class-wide damages).

4. Property Damage Claims Do Not Present a Predominant Common Issue

The fact and amount of property damage claims are also obviously individual questions, turning on the actual effect of exposure on the particular property. Plaintiffs attempt to avoid this problem by testimony from their expert Dr. Larry Russell that (1) every building in Flint has sustained damage to its plumbing and appliances as a result of the Flint water crisis, and (2) the only remediation is the complete replacement of the plumbing systems and appliances.[25] There are numerous reliability problems with this approach, and LAN is confident that the opinion will ultimately be excluded. For present purposes, it is sufficient to note that Dr. Russell rendered his opinions without ever actually inspecting any plumbing or appliances in any Flint residences to determine whether the postulated damage actually existed, although such examinations are his usual practice. Moreover, he has no knowledge of the pre-crisis state of the plumbing systems and appliances. It is undisputed that Flint had periods of high water lead levels before the crisis, and it is entirely possible that a given plumbing system was already damaged before any acts of the Defendants could have affected it.

At any rate, the mere fact that Plaintiffs have found an expert willing to state these astounding opinions does not automatically convert the question of property damage to a common issue justifying class certification. Defendants get a turn at

[25] Pl. Mem pp. 67-68.

presenting evidence, too. They have the absolute right to contest the issue on an individual basis by introducing evidence that a particular property's plumbing system has not sustained damage or that the system was already damaged before the onset of the Flint water crisis.

V. CLASS LITIGATION IS NOT A SUPERIOR FORM OF ADJUDICATION

To determine whether a class action represents the superior method for fair and efficient adjudication, the district court should consider the difficulties in managing a class action. Class litigation carries certain well-known costs. It strips the class members of choice and autonomy in the prosecution of their claims. It also imposes unique costs through the class notice process and potentially threatens the defendant's ability to mount a defense by creating a threat of ruinous liability. Consequently, the district court should also compare other means of disposing of the suit to determine if the class action is sufficiently effective to justify the judicial time and energy that must be expended to adjudicate a class action and to assume the risk of prejudice to the persons not directly before the court. *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F. 3d 618-30-31 (6th Cir. 2011).

The text of Rule 23 also provides a non-exclusive list of relevant considerations for evaluating superiority, including: (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3). None of these superiority factors favor certification.

A. Interest of the Class Members Counsels Against Certification

First, the class members have a strong interest in controlling the prosecution of their claims. Unlike the small-damages cases that make up many class actions, there is no question that individual litigation related to the Flint water crisis is feasible. Thousands of claims have already been brought. Moreover, the nature of the most significant claims—potential long-term developmental injury to children—are intensely personal to the families involved. The strong emotional stakes involved weigh against class certification. *See Abby v. City of Detroit*, 218 F.R.D. 544, 549-50 (E.D. Mich. 2003). Nor can it be assumed, as Plaintiffs blithely do, that just because the class members have not yet asserted individual claims that they have no interest in asserting them. The minor children have years to assert their claims; limitations are extended until a year after the child's 18th birthday. M.C.L. § 600.5851(1). Parents or other guardians may well prefer wait to see if a particular child displays symptoms associated with lead exposure. They may have even made a rational decision to await the outcome of the bellwether trials before committing to any particular course of action.

B. The Extent of Individual Litigation Counsels Against Certification

Second, the extent of the individual litigation already conducted clearly establishes the feasibility of individual litigation. A large number of individual cases arising from the Flint water crisis have already been filed in state and federal courts.

An infrastructure for addressing this litigation has been constructed. The litigation has attracted high-quality plaintiffs' counsel to represent Flint residents. The state and courts have developed procedures to organize the claims and the first bellwether trials have already been scheduled. There is no question that such litigation is feasible and that the denial of certification would strike the death knell for any individual claim. Moreover, counsel for the individual plaintiffs have already indicated that they would opt-out of any class action. This greatly undermines any benefits of class litigation.

C. Geographical Considerations Do Not Support Certification

Third, the litigation is going to be concentrated in Michigan regardless of whether the case is certified. Class certification would made resolution of the Flint litigation more difficult, not less. Certification of the class will necessarily result in the disqualification of the vast majority of Flint residents from jury duty in all Flint water litigation. Virtually all residents of the City would be actual parties to the case. Denial of certification would make thousands of jurors potentially available to serve in individual litigation.

D. The Proposed Minor Subclass Cannot Be Litigated Manageably On A Class Basis

1. **Health Effects Must Be Determined on an Individual Basis**

There are several intractable problems plaguing Plaintiffs proposal to litigate the claims of the putative Minor Subclass on a class-wide basis. As shown, the only potential health effect of lead exposure Plaintiffs propose to litigate on a class wide

basis is IQ decrement on behalf of the injured minor subclass. No other effect of lead exposure may, under *Plaintiffs*' expert's views, may be determined through a class-wide diagnosis. Plaintiff allege that lead exposure has the potential to cause of host of problems including Attention Deficit Hyperactivity Disorder and serious behavioral disorders these effects can only be determined through an individualized diagnosis.[26] A finding in favor of the class on the IQ decrement issue would not establish any class member's right to a judgment embracing other negative consequences such as ADHD or other behavioral issues. Plaintiffs do not indicate how they intend to address the other alleged injuries.

To the extent that Plaintiffs propose to litigate health effects other than IQ decrement in a subsequent trial, the attempt would run afoul of the Seventh Amendment, because the second jury would necessarily have to consider causation anew. Moreover, the same evidence as to exposure would have to be repeated, essentially destroying any efficiency value of the class procedure.

If the court enters a judgment limited to the IQ decrement harm, the rules against claims splitting would preclude the Minor Subclass members from subsequently seeking relief for other conditions. *See generally Walters v. Challenge*

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[26] Hu Decl, p. 22 ("[A]n opinion could theoretically be rendered regarding impacts of 'Flint water crisis-associated elevation in blood lead levels' on an individual's diagnosis of a neurobehavioral disorder. *This would depend on the specific diagnosis that is established as well as the timing of onset or worsening of the condition in relation to the individual's period of exposure*.")(emphasis added).

Mfg. Co., 2020 WL 5821906 at *2 (W.D. Mich. Sept. 15, 2020). These risks counsel against class litigation as the superior form of adjudication.

2. **The Minor Subclass is Not Ascertainable**

Another substantial challenge is created by the subclass definition.[27] An implied requirement of Rule 23 is that a proposed class must be ascertainable. That is, it must be "administratively feasible for the court to determine whether a particular individual is a member." *Young v. Nationwide Mut. Ins. Co.*, 693 F. 3d 532, 538 (6th Cir. 2012). The proposed Minor Subclass does not meet this criteria. First, although most of the criteria may be viewed as "objective," they are so numerous and interlocking that it may be difficult to determine class membership. For instance, a parent or guardian might not know whether the child's school or daycare had a qualifying water lead level measurement. Such a parent would not know whether the child was a subclass member and hence whether it was necessary to decide whether to exercise an opt-out right or to assert any non-IQ related damages on behalf of the child.

[27] The ascertainability of class membership is an implied requirement of Rule 23. *Cole v. City of Memphis*, 839 F. 3d 530, 541 (6th Cir. 2016). As the court noted in *Sandusky Wellness Center,* courts take different approaches in analyzing the requirement. Some courts analyze the issue as part of the predominance requirement while others analyze it as part of the superiority requirement. 863 F. 3d at 471. While the LAN Defendants have placed their discussion of the issue in the context of superiority, the precise procedural pigeonhole applicable does not appear to matter.

The most important problem with the class definition is that it depends entirely on self-identification to establish one of the criteria—that the child ingested unfiltered Flint water for at least fourteen days with a 90 day period. The suggestion that the issue could be resolved by having the parents or guardians submit affidavits attesting to the necessary consumption is inappropriate. Courts have generally rejected proposals that base class membership solely on the class members' self-identification. *See Sandusky Wellness Ctr.*, 863 F. 3d at 472; *Hayes v. Wal-Mart Stores, Inc.*, 725 F. 3d 349, 356 (3rd Cir. 2013).

3. **Concerns About Minor Autonomy Militate Against Class Certification**

The Court has questioned whether the proposed class would adequately protect the rights of minors to pursue and control their own claims. It directed the parties to address the issue in their certification briefing. In particular, it asked to the parties to consider (1) whether the Court could identify each member of proposed Minor Subclass and appoint individual representatives during the proposed opt-out period; (2) whether minors can be bound by a class adjudication of liability; and (3) whether minors can be bound by a class settlement. Order on Supplemental Briefing, p. 6, (citing *Woodman v. Kera*, 280 Mich. App. 125 (2008)). The legal context of the order is the strong Michigan policy protecting a minor's right to "pursue and control" his or her claim. *Woodman ex rel. Woodman v. Kera LLC*, 486 Mich. 228, 253 (2010)(opinion of Young, J.). Accordingly, a parent or guardian cannot bring a claim

on the minor's behalf without an order from a court appointing the person as the minor's representative. Mich. Ct. R. 2.201(E)(1); *see Kilda v. Braman*, 278 Mich. App. 60, 71 (2008). The representative cannot waive or settle claims without court approval and a determination that the settlement is fair and in the child's best interest. Mich. Ct. R. 2.420.

The answer to the first question is clearly no. Plaintiffs provide no basis by which the minors in the defined subclass *and their guardians* could be identified within the proposed 75-day opt-out period. The problem is significantly exacerbated by the complexity and uncertainty of the class definition. Even if every minor in Flint could be identified on a timely basis, a determination of whether the child met the age, exposure, housing and ingestion requirements of the subclass would require considerable time.

The question Plaintiffs wholly fail to answer is how an intelligent and binding decision as to whether to remain or opt out of the class can be made without an appointed representative. Plaintiffs argue that Federal Rule of Civil Procedure 17(c) permits a "general guardian" to sue on behalf of a minor without court approval. This is no answer. A federal court must follow federal procedural rules *unless* doing so would alter a state substantive right. *Whitlock v. FSL Mgmt., LLC*, 843 F. 3d 1083,

1091 n.2 (6th Cir. 2016).[28] The Michigan requirement that a representative be appointed is a substantive rule because, without such an appointment, no person has authority to bring the claim. The cause of action is a property right of the minor. *Woodman*, 486 Mich. at 240. A parent can assert control over the claim only through a judicial appointment. *Id*. at 241.

The suggestion that the Court simply appoint master representatives for the class is an exaltation of form of substance. First, the representative of a child under 14 must be a next of kin unless the court finds that the proposed representative is unsuitable. Mich. Ct. R. 2.20(E)(2). But even more important, there is no way that a small group of "representatives" could make an informed and intelligent decision regarding whether to remain in or opt out of the class for tens of thousands of minor class members in a period of less than three months.

The court's second question is whether minors can be bound to class liability determinations. A judgment with respect to a money damages claim can bind unnamed class members only where the class members has received notice and an opportunity to opt out of the proceeding. *Phillips Pet. Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The very purpose of the notice procedures of Rule 23 is to enable

[28] The controlling framework for determining the issue of a conflict between a federal procedural rule and a state substantive provision is set forth by Justice Stevens' concurring opinion in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). *See Danielkiewicz v. Whirlpool Corp.*, 426 F. Supp. 2d 426, 437 (E.D. Mich. 2019)(majority of circuit and district courts view Justice Stevens' concurrence as controlling).

class members to make an informed choice regarding participation in class litigation. See *Bremiller v. Cleveland Psychiatric Inst.*, 898 F. Supp. 572, 581 (N.D. Ohio 1995). Unless due process is to be reduced to a meaningless form, some person must be empowered to make the informed choice. In Michigan, the appointment of a proper representative is what creates the necessary authority. The court cannot bind the Minor Subclass without complying with that requirement.

Finally, the Court asked whether minors can be bound to a class settlement. The ability to bind a minor to a settlement depends upon compliance with exacting requirements. Absent a finding of good cause, each minor would have to appear in court personally and the court must determine that the settlement is fair and in the best interest of the minor. Mich. Ct. R. 2.420(B). There is no provision for the best interest determination to be made on mass basis. The court must find that the settlement is in the best interest of each particular minor, not merely a group of minors. The fairness determination is particularly important where the representative is also a claimant asserting a right to relief for the representative's own injury. This creates a potential conflict of interest. This is the traditional rationale for the appointment of a guardian ad litem. *See Williams v. City of Flint*, 2008 WL 220626 at *1 (E.D. Mich. Jan. 25, 2008). In most instances, the parents and guardians of the putative Minor Subclass members will be members of the putative Principal Class and/or the putative

Residential Owner subclass asserting claims for their own alleged injuries. Consequently, the protections of the Rule are *more*, not less, necessary in this case.

Plaintiffs cite a number of cases where courts have certified cases involving claims by minors. But the authority is inapposite. Some of the cases involved injunctive classes under Rule 23(b)(2) where there are no opt out rights to be considered and potential conflicts between minors and their representatives did not exist. None of the cases involved Michigan law with its especially robust requirements for protecting the claims of minors.

In short, Michigan law has provided mechanisms for protecting the rights of minors that must be respected in this case. The need to do so strongly militates against the certification of the proposed subclass. In this regard, it is immensely telling that the proposed settlement involving the Governmental Defendants, Rowe Engineering and McLaren Hospital does not attempt to settle the claims of minors on a class-wide basis. That settlement would, if approved, bind only those minor plaintiffs who chose to participate. Presumably, the parties determined that the costs and risks associated with litigating those claims on a class basis was not justified. There is no reason they would be justified with regard to claims against the Engineering Defendants.

E. The Residential Property Owner and Business Subclasses Cannot Be Litigated Manageably On a Class Basis

Because individual questions predominate as to causation, injury, damages and other issues certification of the Principal Class and the proposed Subclasses as indicated in Section IV(C)-(D) *infra*, there is no prospect that certification will expedite resolution of the case.

VI. THE COURT SHOULD NOT CERTIFY AN ISSUE CLASS

The Sixth Circuit has adopted the majority viewpoint that the proponent of an issue class need not show that common issues predominate as to all issues in the class but may certify an issue class where the questions related to those selected issue are predominantly common. *Martin v. Behr Dayton Thermal Prods.*, LLC, 896 F. 3d 405, 411 (6th Cir. 2018). This does not mean, as Plaintiffs apparently believe, that the district court must, or should, certify any particular issues it evaluates as common.

Indeed, there are two significant limitations upon a court's ability to certify an issues class. First, the bifurcation must have the potential for expediting the fair resolution of the claims as a whole. If the class issues are not truly severable from the individual issues and would have to be revisited in the individual proceedings "there is no efficiency to be gained through the class proceeding, and the burdens and expenses of the class action for naught." *Millman v. United Techs. Corp.*, 2019 WL 6112559 at *6 (N.D. Ind. Nov. 18, 2019)(*citing Gates v. Rohm & Haas Co.*, 655 F. 3d 255, 273 (3d Cir. 2011)); *see also In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab.*

Litig., 209 F.R.D. 323, 352 (S.D.N.Y. 2000)(need to determine specific causation individually in subsequent proceedings destroyed any efficiency advantage of issue class).

Second, the bifurcation must not violate the Seventh Amendment's Reexamination Clause. An issue decided by one jury may not be revisited by a subsequent fact-finder. Plaintiffs are correct that a *properly* conducted trial does not necessarily run afoul of the Reexamination clause. *Martin*, 896 F. 3d at 417. However, they do not show how the bifurcation they propose avoids the problem. As one court expressed, any bifurcation must "carve at the joint" to prevent Reexamination Clause issues. *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F. 3d 1293, 1302 (7th Cir. 1995); *see also In re Welding Fume Prods. Liab. Litig*. 245 F.R.D. 279, 312 (N.D. Ohio 2007).

Both of these considerations counsel against certification of a Rule 23(c)(4) issue class here. First, even if the question of breach of duty were identical for all class members the resolution of that question would not significantly advance the case where serious causation and damages would have to be litigated individually. This case is far different from *Martin*. There, plaintiffs alleged that defendant had released toxic volatile organic chemicals into the groundwater underlying their property. Plaintiffs did not assert a present physical injury from ingesting the water, but only the potential of vapor intrusion in their houses creating the risk that class members would

inhale harmful substances. *Martin*, 896 F. 3d at 409. The district court had certified several specific issues pertaining to (but insufficient in themselves to establish) liability and reserved individualized issues relating to fact-of-injury, proximate causation and damages. The Court of Appeals held that the district court had not abused its discretion. There was no indication that the evidence pertaining to the issues certified would vary with the class members, and the district court could have determined that a resolution of the common issues would materially advance the litigation which, without which certification may not have viable at all. *Id*. at 416.

Martin involved only a single type of injury—risk of disease caused by the vapor intrusion of volatile chemicals into the class members' homes. The facts did not suggest that adjudicating causation or injury would be particularly difficult or time-consuming once the common issues were resolved. Similarly, in *Olden v. Lafarge*, 383 F. 3d 495 (6th Cir. 2004), another case cited by Plaintiffs, the principal personal injury complaint related to the risk of future disease. *Id*. at 508. The existence of minor personal injuries such as headaches and wheezing did not pose such a significant issue as to preclude certification. Neither did specific minor property damages allegations when the main claim was that cement dust covered the property of the class members. *Id* at 508-09.

The claims brought here are far different. According to Plaintiffs, the class members have a multitude of potential present, significant injuries that they attribute

to exposure to Flint water. Diagnosis and causation could be contested for each of these claims on individual grounds. To take but one example, a claim that a child's behavioral problems were caused by exposure to lead in the Flint water crisis would require a complex assessment relating not only to the role that the crisis had in increasing the child's lead exposure but whether the behavioral problems were actually caused by lead or some other factor. Indeed, such determinations would almost certainly require expert evidence. The matters that cannot be determined on a common basis outweigh in number, significance, and complexity any issues that can be so determined.

Where the remaining individual issues are so significant that the litigation of a few common issues does not further judicial economy, the main purpose of Rule 23(c)(4) is not met. *See McLaughlin v. American Tobacco Co.*, 522 F. 3d at 234 (2d Cir. 2008)(issue certification would not promote judicial economy where significant issues remained to be litigated). *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (M.D. Fla. 2001)(issue class not warranted where complex issues including causation would remain for determination); *see also* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal *Practice and Procedure* § 1790 (issue certification improper if "noncomon issues are inextricably entangled with the common issues, or…the uncommon issues are too unwieldy or predominant to be handled adequately on a class action basis.").

Moreover, it would be exceedingly difficult in this especially dense factual context to avoid Seventh Amendment problems. It is difficult to determine how to "carve at the joint" to escape Reexamination Clause violations. Clearly, some issues must be tried together to avoid a prohibited reexamination. For example, comparative fault could not be separated from breach of duty or causation because in assessing comparative fault the jury would necessarily be examining relative degrees of both culpability and causation. Nor could causation be separated from fact of injury. With so many issues that must remain together, it is difficult to see a bifurcation plan that significantly advances the litigation.

VII. THE COURTS SHOULD NOT CERTIFY AN INJUNCTIVE CLASS UNDER RULE 23(b)(2)

A. Because Plaintiffs Seek Individualized Money Damages the Proposed Class Must Meet the Predominance and Superiority Requirements of Rule 23(b)(3)

Rule 23(b)(2) permits the court to certify a class action where the defendant has acted or refused to act on grounds applicable to the class, thereby making appropriate final injunctive or declaratory relief applicable to the class as a whole. *Coleman v. General Motors Acceptance Corp.*, 29 F. 3d 443, 446 (6th Cir. 2002). It does not authorize class certification when each class member would be entitled to an individualized award of money damages. *Wal-Mart*, 564 U.S. at 360-61. Individualized monetary claims belong in subsection Rule 23(b)(3) because due process bars binding an injunctive class without notice and an opportunity to opt out.

Clemons v. Norton Healthcare Inc. Retirement Plan, 890 F. 3d 254, 279 (6th Cir. 2018). Any request for monetary relief makes use of subsection (b)(2) inappropriate unless such relief in incidental to the injunctive relief. *In re FCA US LLC Monostable Electronic Gearshift Litig.*, 334 F. R. D. 96, 107-08 (E.D. Mich. Dec. 9, 2019).

Plaintiffs seriously misread *Wal-Mart* in asserting that the case requires courts to assess requests for a 23(b)(2) injunctive class completely independent from the requirements of 23(b)(3) where significant monetary relief is sought. In fact, *Wal-Mart*'s holding is to the contrary. It found that the case could not be certified under Rule 23(b)(2) for the very reason that Plaintiffs sought non-incidental monetary relief in the form of back pay. *Wal-Mart*, 564 U.S. at 361. Moreover, *Wal-Mart* expressly rejected the use of a "predominance" of equitable relief test to determine whether Rule 23(b)(2) could be employed, finding that it produced perverse incentives and that the predominance of injunctive relief did not justify depriving class members of the notice and opt-out protections of Rule 23(b)(3). *Id.* at 363-64.

The Complaint here seeks individualized monetary relief to each of the members of the subclasses. The relief sought is far from incidental to injunctive relief. It is the principal thrust of the case. Under such circumstances the Plaintiffs must satisfy the predominance and superiority requirements of Rule 23(b)(3).[29]

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[29] Plaintiffs cite cases where the district court issued hybrid certification orders, certifying classes under both Rules 23(b)(2) and 23(b)(3). Some of the cases predate *Wal-Mart* and are entitled to little precedential weight. Other cases have certified

B. Class-wide Injunctive Relief Is Not Appropriate

Moreover, the proposed class does not satisfy the requirement that the defendants' conduct makes injunctive relief appropriate. This is true for several reasons. First, at least as to the Engineering Defendants, the proposed "injunction" is not an actual injunction and is not authorized by Michigan law. Plaintiffs do not seek an order prohibiting the Engineering Defendants from doing anything in the future. Moreover, they do not seek an order requiring Engineering Defendants to do any affirmative act *other than to pay to money* to the proposed "coordinating body" which ostensibly would then provide certain services to "the people of Flint." (Pl. Br. p. 86, Ex. 119-120). An order to pay money in compensation for a wrong done by the defendant in the past is a legal remedy, not an injunction. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 (2002).

Second, no particular plaintiff or class member would be entitled to an order of the type sought here even if that plaintiff or class member prevailed on the substantive claim that was pleaded. If the person established all the elements of a professional negligence claim he or she would be entitled to recover compensation for the damages actually sustained, including sums for medical care that the person would, in reasonable medical probability, incur in the future as a result of the injury. *Mott v. Michigan Cab Co.*, 274 Mich. 437, 441 264 N.W. 855 (1936). This award constitutes

"hybrid" classes based upon a finding that the case satisfied both subsections. *See e.g. McDonald v. Franklin County, Ohio* 306 F.R.D. 548, 559-60 (S.D. Ohio 2015).

an adequate legal remedy and forecloses equitable relief such as an injunction. *See Pontiac Fire Fighters Union Local 376 v. City of Pontiac*, 428 Mich. 1, 753 N.W. 2d 595 (2008).[30]

This case is a far cry from cases like *Baby Neal ex rel. Kanter v. Casey*, 43 F. 3d 48 (6th Cir. 1994) and the copious prisoner litigation cited by Plaintiffs. Those cases involved situations where a state actor had an on-going relationship with the class members and the plaintiffs were alleging constitutional violations. Here, the Engineering Defendants have no on-going relationship with the class members and no constitutional violation has been or could be alleged. Plaintiffs cite no authority holding that a programmatic injunction of the type they envision can be ordered against a private litigant for an ordinary tort. Claims of the kind brought here are routinely addressed by money damages awards.

Finally, the requested relief represents an attempt to circumvent Michigan substantive law. Michigan does not recognize a claim for medical monitoring based on exposure to a toxic substance. In *Henry v. Dow Chemical Co*., 473 Mich. 63, 701 N.W. 2d 684 (2005), the Michigan Supreme Court considered the claims of plaintiffs seeking to represent a putative class of thousands of Midland, Michigan residents.

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[30] In addition to the state law requirements for injunctive relief, a claim for equitable relief in federal court must also satisfy traditional federal equity standards, including the requirement that the plaintiff establish the lack of an adequate legal remedy. *Sonner v Premier Nutrition Corp.*, 971 F. 3d 834, 841 (9th Cir. 2020)(citing *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 105-06 (1945)).

The Henry plaintiffs alleged that Dow had negligently released dioxin, a chemical potentially hazardous to human health. Plaintiffs sought the creation of a program to be funded by Dow and administered by the court to monitor the class for future manifestations of dioxin-related disease. *Id*. at 68. The Supreme Court held that plaintiffs failed to state a claim on which relief may be granted. In order to state a negligence claim, the plaintiffs had to establish the traditional elements of "duty, breach of that duty, causation, and damages." *Id*. at 72, *quoting Fultz v. Union-Commerce Assoc.*, 470 Mich. 460, 463, 683 N.W. 2d 587 (2004). Implicit in these elements is the necessity to establish a present physical injury and because the plaintiffs did not allege that they sustained any present physical harm they could not establish a negligence-based cause of action. *Id*. at 72-73.

Much of the proposed "programmatic" relief described in Plaintiffs' Brief is simply thinly veiled medical monitoring and directly precluded by *Henry*. The demand for "diagnostic and assessment services" is not a permissible recovery of damages for a present physical injury but an attempt to determine *whether* an injury has occurred as the result of exposure to Flint water.

The remainder of the injunctive relief request is, if anything, even more impermissible—an attempt to circumvent the elements of the negligence claim itself. Plaintiffs assume that merely showing the Engineering Defendants violated a standard of care would entitle them to injunctive relief. This assumption is implicit in a trial

plan that purports to establish class-wide injunctive relief *before* the subsequent trials necessary to determine causation and damages are even conducted. However, an injunction is not a cause of action but a remedy *for* a cause of action. *Wert v. Vanderbilt Univ*., 2020 WL 5039466 at *2 (M.D. Tenn. Aug. 26, 2020); *Terlecki v. Stewart*, 278 Mich. App. 644, 754 N.W. 2d 899, 912 (2008). No class member is entitled to any remedy, including injunctive relief unless and until the cause of action is established—including the necessary elements of causation and damages.

CONCLUSION

For the reasons stated, the LAN Defendants respectfully request that the Court deny Plaintiffs' Motion for Class Certification in its entirety.

Respectfully submitted,

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ATTORNEYS FOR LOCKWOOD, ANDREWS & NEWNAM, INC., LOCKWOOD, ANDREWS & NEWNAM, P.C. and LEO A. DALY COMPANY Dated: January 7, 2021	

<u>CERTIFICATE OF SERVICE</u>

The undersigned certifies that the foregoing instrument was filed via the U.S. District Court's CM/ECF electronic system on January 7, 2020, by which a copy thereof was served upon all counsel of record.

<u>/s/ David C. Kent</u>
David C. Kent