UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CLASS PLAINTIFFS' REPLY MEMORANDUM REGARDING UPDATED PROPOSED CLASS DEFINITIONS

Veolia's response to Class Plaintiffs' modified Class definitions repeats many of the same arguments raised in its 150-page opposition to class certification, none of which undermine the simple truth that resolving core liability questions on a class-wide basis is the most efficient mechanism for moving this case forward. In its recent filing, Veolia highlights five potential problems with the revised Class definitions all of which, as demonstrated herein, are illusory.

First, Class Plaintiffs ("Plaintiffs") have provided a means for addressing Veolia's asserted "temporal problem" as it pertains to the proposed Subclasses in footnote six of Class Plaintiffs' Memorandum Regarding Updated Proposed Class Definitions.[1] Thus, Veolia's suggestion that the Minors, Residential Property, or Business Subclasses would be overly broad as to Veolia is entirely specious.

Second, contrary to Veolia's assertion, the key element to establishing membership in the Class is direct exposure to the water. Thus, a person who touches a faucet may indeed be a member of the General Issue Class *if they also owned the faucet in question* and claimed the faucet was damaged from the exposure. Veolia takes words and phrases out of context in an attempt to render the General Issue Class definition "incoherent" in their view. Plaintiffs have never suggested that simply touching a faucet could give rise to claims against Veolia, but Plaintiffs have

[1] Class Pls.' Mem. Regarding Updated Proposed Class Definitions at 4 n.6, ECF No. 1829, PageID.65283.

provided significant evidence that the contaminated water damaged residential property including, specifically, plumbing. The Class definition need only, "describe objective criteria that allows a prospective class member to identify himself or herself as having a right to recover or opt out based on the description." *Rikos v. Procter & Gamble Co.*, No. 1:11-cv-226, 2014 WL 11370455, at *5 (S.D. Ohio June 19, 2014), *aff'd*, 799 F.3d 497 (6th Cir. 2015).

Third, the General Issue Class definition, and specifically the definition of "exposure," satisfies the Sixth Circuit's ascertainability requirement. All that is required is that the Class membership be defined by objective criteria; a list of Class members is not required. As the Southern District of Ohio explained:

> Ascertainability requires only the existence of objective criteria upon which class membership is based. . . . To illustrate the difference between ascertainability and susceptibility to individualized inquiry, consider, for example, a class defined as 'all people in the State of Ohio who currently have a pint of mint chocolate chip ice cream in the freezer.' Such a class is certainly ascertainable: every Ohioan either is a class member, or she is not. The inquiry is an objective one. But—at least to this Court's knowledge—there is no centralized list of Ohioan mint chocolate chip ice cream enthusiasts that would obviate the need for an individualized inquiry to compile the class.

McNamee v. Nationstar Mortg., LLC, No. 2:14-CV-1948, 2018 WL 1557244, at *4 (S.D. Ohio Mar. 30, 2018) (citing *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538-39 (6th Cir. 2012)).

As explained, exposure could be established by medical records, water records, or, in some cases, affidavits—all acceptable means for establishing class

membership in the Sixth Circuit. Class Cert. Reply at 127-30, ECF No. 1581, PageID.60917-60920. Direct notice could be made to current and former residents, property owners, and Flint water customers. Direct notice could be supplemented by publication notice in order to reach potential Class members for whom direct notice is not possible. Due Process and Rule 23 require only that "the best notice that is practicable" be provided, not that every class member be identified and directly notified. *See, e.g.*, *Rikos*, 2014 WL 11370455, at *5.

Veolia suggests that it may not, as a matter of law or policy, owe a duty to all members of the General Issue Class. Veolia Br. at 12, ECF No. 1854, PageID.66088. But Veolia will have the opportunity to make these very arguments in a summary judgment motion or at trial. It is possible that the Court or jury could decide that Veolia's duty was limited to some subset of Class members. Critically, however, that decision would be binding on *all* members of the General Issue Class eliminating the need to determine the scope of Veolia's duty in subsequent proceedings and potentially limiting the scope of subsequent proceedings related to individual causation and damages.[2]

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[2] The Court's Order allowing Class Plaintiffs to modify the proposed Class definitions provided Defendants an opportunity to submit a 10-page response brief. ECF No. 1811, PageID.64747. Without court approval, Veolia filed a 16-page memorandum. Accordingly, the Court need not address Veolia's remaining arguments. As demonstrated herein, even if these arguments were appropriately before the Court, they would not pose intractable hurdles to certification.

Fourth, Veolia provides no factual or legal support for its argument that including non-residents in the revised General Issue Class renders the Class definition overbroad. *See* Veolia Br. at 11-12, PageID.66087-66088. Instead, Veolia concocts what it believes to be examples of the Class definition's overbreadth, such as "a visitor who spent one night at a hotel in Flint." *Id.* at 11, PageID.66087. But Veolia provides *no* explanation of why such individuals should not be included in a general class for which Plaintiffs seek issue certification. To the extent Veolia suggests that such persons suffered no damages, their argument ignores that the Subclass definitions for Class members seeking damages are significantly narrower. *See also supra* pp. 1-2 ("*Second*").

Veolia's incorrect assertion that common questions would not predominate for Flint residents and non-residents, *see* Veolia Br. at 12, PageID.66088, similarly ignores the actual common questions for which Plaintiffs seek issue certification. Questions regarding the role of LAN and Veolia in creating the contamination of Flint's water supply, and other questions about LAN and Veolia's conduct for which Plaintiffs seek issue certification,[3] would not differ between Flint residents or visitors and Veolia has not demonstrated otherwise, instead seeking to redefine the questions for which Plaintiffs seek certification.

[3] *See* Class Cert. Reply at 9-11, PageID.60799-60801.

Nor does the revised General Issue Class definition "call into question" class certification requirements such as adequacy and typicality. *See* Veolia Br. at 13, PageID.66089. Veolia fails to explain why the proposed Class representatives would have any incentive to raise arguments limiting the scope of Veolia's duty extends to all those were exposed to the water. Hypothetical concerns such as this do not render certification inappropriate. Regardless, one of the proposed Class representatives—Frances Gilcreast—lived outside of Flint and would be well positioned to advance the interests of any non-residents should this become an actual issue in the future. Fifth Consolidated Am. Class Action Compl. ¶ 28, ECF No. 1175-3, PageID.28604.

Finally, Veolia's argument that Plaintiffs have failed to adequately explain the end date for the revised General Issue Class, Veolia Br. at 14-15, PageID.66090-66091, is meritless. Veolia merely rehashes timing issues that Plaintiffs have already demonstrated do not warrant denial of certification, *see* Class Cert. Reply at 124-26, PageID.60914-60916, and further fails to provide *any* legal support for its contention that a revised end date renders the issue class overbroad.

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The Court should reject Veolia's attempts to sow confusion into a class definition that is both clear and based on objective criteria. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (rejecting defendants' arguments that class was overbroad where defendants provided "no indication how many such individuals actually exist").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above case were served via the ECF filing system on July 6, 2021.

Dated: July 6, 2021

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