UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AMENDMENTS

STATUTES

RULES

CONCISE STATEMENT OF THE ISSUES PRESENTED

1. Should the Court grant Class Plaintiffs leave to amend the Operative Consolidated Amended Complaint in light of the Court's August 1st Opinion, new information obtained during the course of litigation, and changes to Michigan law, where amendment is timely, would not be futile, and would not prejudice Defendants?

   Class Plaintiffs' Answer: Yes

2. Should the Court permit Class Plaintiffs to amend the class definition because no class has yet been certified, and the Court has the authority to modify the class definition at any point prior to the entry of final judgment?

   Class Plaintiffs' Answer: Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Foman v. Davis, 371 U.S. 178 (1962)

Fed. R. Civ. P. 15

Louisiana School Emps.' Ret. Sys. v. Ernst & Young, LLP, 622 F.3d 471 (6th Cir. 2010)

Martin v. Behr Dayton Thermal Prods., 896 F.3d 405, *reh'g en banc denied*

SUMMARY OF ARGUMENT

In light of the Court's recent August 1, 2018 Order granting in part and denying in part Defendants' motions to dismiss, Class Plaintiffs seek leave to amend their Operative Complaint.[1] The August 1, 2018 Order, in dismissing some of Class Plaintiffs' claims, set forth a roadmap for allegations that Class Plaintiffs would need to assert in order to meet the various legal standards at issue.

In response to the Court's guidance, to new information obtained during the course of this litigation, and to changes in Michigan law, Class Plaintiffs' Proposed Amended Complaint, attached as Exhibit A, supplements prior allegations asserting a bodily integrity claim against Defendant Richard Snyder and equal protection claims against a number of government defendants, including Richard Snyder, Daniel Wyant, Liane Shekter-Smith, Michael Prysby, and Stephen Busch. Class Plaintiffs also propose adding a claim of gross negligence against certain government defendants. The Court should grant Plaintiffs leave to amend because this case is still early in terms of its procedural posture, there is no undue delay or prejudice to Defendants, and the amendments follow the Court's guidance in the August 1, 2018 Order and state valid claims that should be considered on the merits.

[1] The "Operative Complaint" refers to the Consolidated Amended Class Complaint for Injunctive and Declaratory Relief, Money Damages, and Jury Demand (ECF No. 349).

Additionally, Class Plaintiffs propose a modification to the class definition contained in the Operative Complaint to add a subclass of African American residents and provide an alternative refined definition that includes four distinct classes, including an issue class for common issues among class members who have suffered personal injury damages. The Court should permit the revised class definition because no class has yet been certified, and the Court has the authority to modify the class definition at any point prior to the entry of final judgment.[2]

[2] Class Plaintiffs have also added allegations regarding Defendant Ed Kurtz, and allegations related to certain putative class representatives that were dismissed as to the Veolia Defendants. As this Court has acknowledged, Defendant Kurtz did not move to dismiss Class Plaintiffs' claims; in light of this and of the amended allegations, the Court should reinstate Kurtz as a Defendant. Plaintiffs also ask the Court to reinstate Plaintiffs Rhonda Kelso and K.E.K.'s claims against the Veolia Defendants in light of the amended allegations that respond to the concerns raised in the Court's August 1st Order.

The Proposed Amended Complaint also includes ministerial changes to the complaint to, for example, correct typos and include information regarding the race of the class plaintiffs. Class Plaintiffs have attached as Exhibit B to this motion a version of the Proposed Amended Complaint that reflects substantive additions in red ink. A redline is not attached because formatting changes and other minor modifications reduced the usefulness of the redline. Class Plaintiffs will submit a redlined version upon the Court's request.

Class Plaintiffs also note that the Proposed Amended Complaint continues to include certain defendants and claims that the Court dismissed in its August 1st Order and as to which Class Plaintiffs do not seek to add additional allegations or reference legal authority. Because Plaintiffs' claims were not dismissed with prejudice, these claims and defendants are included in the amended complaint in order to preserve them for appeal. *See Hayward v. Cleveland Clinic Found*., 759 F.3d 601, 617 (6th Cir. 2014) (noting the "trend in other circuits" not to require repleading claims dismissed with prejudice in an amended complaint); *see also*

LEGAL STANDARD

Under Federal Rule of Civil Procedure 15(a)(2), "the court should freely give leave [to amend a complaint] when justice so requires." The Supreme Court has held that "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Similarly, the Sixth Circuit has noted that Rule 15 "plainly embodies a liberal amendment policy," *Louisiana School Emps.' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 486 (6th Cir. 2010), and "[t]he thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings." *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982); *see also Howard v. Kerr Glass Mfg. Co.*, 699 F.2d 330, 333 (6th Cir. 1983) ("[A]mendments to pleadings, particularly where there is no surprise to the adversary party, are viewed with liberality by the courts.").

Lacey v. Maricopa Cty., 693 F.3d 896, 928 (9th Cir. 2012) (en banc) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we will consider those claims to be waived if not repled.").

ARGUMENT

Class Plaintiffs propose three key changes to the claims alleged. The first two changes respond to the Court's guidance in its August 1, 2018 Order on Defendants' motions to dismiss. Plaintiffs offer an amended set of allegations supporting claims that Governor Rick Snyder violated Class Plaintiffs' substantive due process rights to bodily integrity, and a set of Government Defendants violated Plaintiffs' rights to Equal Protection under the Fourteenth Amendment as well as the Elliott-Larsen Civil Rights Act. Third, Class Plaintiffs propose adding a claim of gross negligence against certain Governmental Defendants.

The final changes relate the propose Class Definition. Class Plaintiffs propose adding a subclass of minority residents. Additionally, Class Plaintiffs propose an alternative refined class definition, which would divide the proposed class into three more particularized classes, each seeking more specific relief: (a) a class of property owners seeking, among other things, property damages, (b) a class of property owners seeking injunctive relief, (c) a class of persons who suffered personal injury as a result of Defendants' actions, and (d) a class of persons who reside or attend school in Flint seeking to certify a Rule 23(c)(4) class to resolve common issues related to liability and causation. Each of these proposed amendments satisfies the liberal amendment policy governed by Rule 15.

I. The Court Should Allow Plaintiffs' Proposed Amendments Responding to the Court's August 1, 2018 Order

In the August 1, 2018 Order, the Court dismissed bodily integrity claims against Defendant Snyder and dismissed all Equal Protection claims in the Operative Complaint. In so doing, the Court offered a roadmap of the allegations required to state each of these claims. Plaintiffs' first two sets of proposed amendments seek to follow the Court's roadmap and provide additional allegations that satisfy the legal standards articulated in the August 1, 2018 Order.

Courts routinely allow plaintiffs an opportunity to amend a complaint in response to an order dismissing claims. As one court explained:

> In the ordinary case, a plaintiff is put on notice of the deficiencies in his complaint when a defendant moves to dismiss. The judicial opinion and order granting the motion highlights the reasons for the deficiencies in the complaint and provides a roadmap to successful amendment. Thus, the plaintiff is on notice of the reasons his claims are deficient. A plaintiff may be given leave to amend two or three times, or more, if he does attempt to correct the deficiencies in his complaint.

Despot v. Keystone Insurers Grp., Inc., Civ. No. 08-cv-166, 2008 WL 3837395, at *8 (M.D. Pa. Aug. 13, 2008) (citations omitted). This practice follows the "liberal amendment policy" and recognizes the principle that "'cases should be tried on their merits.'" *Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir. 1997) (quoting *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987)).

Here, there is no reason to depart from the usual practice to allow Class Plaintiffs an opportunity to amend their complaint following guidance provided in a

motion to dismiss. Defendants have no valid objection based on undue delay. The Court dismissed a subset of Plaintiffs claims for the first time on August 1, 2018. Class Plaintiffs reviewed the August 1, 2018 Court Order and promptly informed the Court of their intent to file an amended complaint on August 29, 2018. *See* ECF No. 584. The Court set a deadline of October 5, 2018 to file the motion seeking leave to file the Proposed Amended Complaint, ECF No. 609, and the Class Plaintiffs complied.

Further, Defendants have no valid objection based on unfair prejudice. Full-scale discovery has not yet begun in this case, as the Government Defendants have repeatedly sought to delay discovery and asked the Court to stay the case pending various appeals. *See, e.g.*, ECF No. 202 (seeking protective order to quash written discovery requests); ECF No. 426 ("State Defendants continue to object to any discovery in both the combined class action and the individual cases based on Eleventh Amendment immunity, state sovereignty and qualified immunity."); ECF No. 604 (seeking to stay all party discovery and class certification proceedings pending appeals). Moreover, the claims in Class Plaintiffs' Proposed Amended Complaint are similar in character to the claims in the Operative Complaint, which means that Defendants have been on notice of the nature of these claims since well before Class Plaintiffs filed the Operative Complaint.

Finally, Defendants have no valid objection based on futility. Each of the proposed amendments follows the Court's guidance in the August 1, 2018 Order, and supplements Plaintiffs' allegations in order to state valid claims against Defendant Governor Snyder for violation of Class Plaintiffs' rights to bodily integrity and equal protection, and against Daniel Wyant, Liane Shekter-Smith, Michael Prysby, Stephen Busch, Jeffrey Wright, Edward Kurtz, Dayne Walling, Gerald Ambrose, Darnell Earley, and Andy Dillon for violating Class Plaintiffs' right to equal protection under the Court's reasoning.

A. Plaintiffs' Proposed Amendments Supporting a Bodily Integrity Claim Against Defendant Snyder Are Not Futile

In the August 1, 2018 Order, the Court dismissed Class Plaintiffs' bodily integrity claim against Defendant Snyder because, while "Plaintiffs allege that Governor Snyder was a critical part of Flint's switch from the DWSD to the Flint River," "plaintiffs do not allege that Governor Snyder was aware of the dangers of the Flint River when that decision was made." August 1, 2018 Order at 55-56, ECF No. 546. The Court further differentiated the allegations against Snyder from the allegations against other defendants, based on alleged knowledge of the dangers posed by the switch to the Flint River:

> Plaintiffs have alleged that other defendants involved in the top-level decisions surrounding the switch to the Flint River knew of and disregarded risks to the health and safety of Flint's water users. But they have not made those same allegations with regard to Governor Snyder. For these reasons, plaintiffs have failed to plausibly assert a bodily

> integrity claim against Governor Snyder, and he is dismissed from this case.

Id. at 58.

The Proposed Amended Complaint follows this guidance, and adds extensive allegations that, if true, set forth a valid claim against Defendant Snyder. These allegations establish that Defendant Snyder was aware of significant risks posed by the Flint water to the people of Flint by at least October 2015 and likely as early as April 2015 and, despite that knowledge, Defendant Snyder's Administration repeatedly issue statements that downplayed these risks in an effort to cover up Defendant Snyder's misconduct. Specifically, the Proposed Amended Complaint alleges:

- On April 28, 2015, Defendant Snyder's Chief of Staff Dennis Muchmore emailed Governor Snyder that "The water issue continues to be a danger flag." Proposed Amended Complaint ¶ 258.

- In the Summer of 2015, Defendant Snyder's Director of Urban Initiatives Harvey Hollins informed Defendant Snyder directly of "growing concerns among Flint residents that they were being exposed to toxic levels of lead." *Id.* ¶ 269.

- In December 2015, "Governor Snyder was advised by Harvey Hollins that in addition to the elevated levels of lead in Flint water, there was also a public health threat from potential exposure to Legionella." *Id.* ¶ 293.

- Defendant Snyder declared a State of Emergency related to the Flint water on January 5, 2016, but did not disclose his direct knowledge that Flint water exposed Flint residents to Legionella until January 13, 2016. *Id.* ¶¶ 295-96.

- "Governor Snyder was directly aware of potential exposure of Flint's residents to Legionella bacteria and for, a period of at least three weeks, failed to disclose those risks to the citizens of Flint. Governor Snyder was also aware by the Summer of 2015 that lead contaminants in Flint Water posed a significant public health threat to the citizens of Flint. In spite of this knowledge, Governor Snyder's Administration continued to issue statements that misleadingly, and dangerously, downplayed the public health threat of consuming Flint Water until January 5, 2016 (for lead) and January 13 (for Legionella)." *Id.* ¶ 297.

- After further investigation and discovery, there will likely be evidentiary support that Defendant Snyder knew personally of the imminent public health hazards posed by Flint Water, its role in causing lead poisoning, and "public assurances provided by members of his Administration that Flint's water was 'safe' were recklessly false, and caused or contributed to the poisoning of Flint's citizenry." *Id.* ¶ 308.

Taking these extensive allegations as true, Defendant Snyder was well aware of the serious risks posed by the contaminated Flint River Water, and yet Governor Snyder failed to warn the people of Flint for months while they drank and bathed in the contaminated water, his Administration continually and directly downplayed those risks to the people of Flint, and he declared a State of Emergency on January 5, 2016 that was at least nine months late and seriously incomplete. The people of Flint should have an opportunity to be heard on the merits of these allegations against their own governor.

B. Plaintiffs' Proposed Amendments Supporting an Equal Protection Claim Are Not Futile

Class Representatives Elnora Carthan, Rhonda Kelso, Barbara and Darrell Davis, Marilyn Bryson, and Tiantha Williams ("African American Plaintiffs") on

behalf of a proposed subclass of African American persons defined in paragraphs 448 and 450 of the Proposed Amended Complaint, seek leave to amend allegations related to the Equal Protection and ELCRA claims in response to the Court's August 1 Order. In that Order, the Court explained that a viable Equal Protection claim required that African American Plaintiffs "allege facts sufficient to infer that the defendants had jurisdiction" over both Flint and those areas that African American Plaintiffs assert were treated differently than Flint on account of race or another protected basis. Order at 91. The proposed amendment responds to this requirement in two ways.

1. African American Plaintiffs' Proposed Equal Protection and ELCRA Claims Against the Governor and MDEQ Officials are Viable.

First, African American Plaintiffs have proposed additional factual allegations demonstrating that Governor Snyder and several MDEQ officials[3] did not afford the predominantly African American citizens of Flint equal protection of the law in violation of the Fourteenth Amendment and ELCRA. The Proposed Amended Complaint expressly includes allegations that Governor Snyder was vested with the authority to issue Emergency Declarations for any part of Michigan. ¶ 364. Likewise, the Proposed Amended Complaint explains how MDEQ had authority for

[3] These officials include Defendants Wyant, Shekter-Smith, Prysby, and Stephen Busch.

enforcing the Michigan Safe Drinking Water Act in Flint and the rest of the State. ¶ 362.

The Proposed Amended Complaint goes on to explain how the Governor treated Flint, a predominantly African American city, differently than other affluent, white areas in the rest of the State by unreasonably waiting months to declare a state of emergency—thereby denying the citizens of Flint access to key state resources. ¶ 414-21. As alleged in the Proposed Amendment Complaint, Governor Snyder responded to other emergency situations within days or weeks of the situation coming to light. *Id*.

Not only did the Governor's enforcement of his powers for declaring an emergency disproportionately affect persons of color, these actions substantially deviate from his response to similar situations where the affected populations were affluent and white. Additionally, the Proposed Amended Complaint alleges that Governor Snyder's most senior advisor—Chief of Staff Dennis Muchmore—was made aware of Flint citizens' concerns about lead in the water months before the Governor admits having been informed of the issue. He dismissed the concerns of Flint leaders as simply reflective of, "old time negative racial experiences." Had their concerns been taken seriously—as seriously as the emergencies Governor Snyder responded to throughout the State – resources could have been provided to Flint's citizens at least a year earlier.

African American Plaintiffs' allegations regarding the disproportionate impact of Governor Snyder's actions, his substantial deviation from prior actions and procedures, the history of racial discrimination and segregation in Flint, and the culture among Governor Snyder's most-senior-officials of dismissing the concerns of African Americans warrants an inference of discriminatory intent, *see, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), and has no rational basis.

Likewise, African American Plaintiffs' proposed amendments related to MDEQ officials Wyant, Shekter-Smith, Prysby, and Busch are not futile. The Proposed Amended Complaint contains extensive, detailed allegations explaining how these officials treated the predominantly poor and African American citizens of Flint differently than their affluent, white neighbors. Specifically, the Proposed Amended Complaint explains how MDEQ did not afford Flint's African American citizens equal protection of the laws by:

> (1) granting a fraudulent Administrative Consent Order to allow Flint to borrow funds to participate in the KWA despite MDEQ having no existing enforcement actions against Flint; (2) issuing the Flint Water Treatment Plant a permit pursuant to the Michigan Safe Drinking Water Act without observing the statutorily mandated 45-day notice and comment period; (3) failing to comply with sampling and optimized corrosion control protocols as required under the State and Federal Lead and Copper Rule; and (4) lacking any nondiscrimination policy for more than 30 years and ignoring EPA requirements to update its policy for years.

¶ 363.

The Proposed Amended Complaint further explains how MDEQ's refusal to enforce various environmental protections in Flint differed from its treatment of affluent, white Michiganders and deviated from the law and its own internal procedures. Additionally, the proposed amendments include references to the EPA's 2017 letter which expressly found, "that the preponderance of evidence supports a finding of discriminatory treatment of African Americans by MDEQ in the public participation process for the GPS permit considered and issued from 1992 to 1994." ¶ 406. The EPA's 2017 letter further explained how MDEQs newly drafted nondiscrimination policy contained numerous, fundamental deficiencies which, despite EPAs having raised the flaws with MDEQ on several occasions MDEQ had failed to rectify. ¶¶ 406-12. Notably, the Proposed Amended Complaint alleges these same deficiencies exist today—MDEQ has made no effort to alter its nondiscrimination policy for more than a year since receiving the EPA's letter. ¶¶ 411; 413.

MDEQ's history of discrimination against African Americans, flagrant refusal to take steps to protect minorities' rights and prevent discrimination, refusal to enforce State and federal environmental laws in Flint, and deviations from its own operating procedures warrant an inference of discriminatory intent. *See, e.g.*, *Arlington Heights*, 429 U.S. at 266. Moreover, no rational basis exists for ignoring

the law as MDEQ did on multiple occasions as it relates to Flint. Accordingly, African American Plaintiffs' proposed amendments with regard to MDEQ officials' violation of the Equal Protection clause of the Fourteenth amendment and ELCRA are not futile.

2. African American Plaintiffs Have Satisfied the Court's Requirements with Regard their Equal Protection, ELCRA, and § 1985 Claims Against Defendants Snyder, Dillon, Wright, Walling, Ambrose, Kurtz, and Earley.

The Proposed Amended Complaint contains detailed allegations explaining the contractual relationship between Flint and Genesee county such that Genesee County agreed to purchase water exclusively from Flint. ¶¶ 85-89. Because the decision to switch Flint's water to the Flint River—and provide the predominantly white citizens of Genesee County clean water—was made while that contractual relationship existed, Flint and Genesee County were effectively a single governmental jurisdiction with regard its water distribution at the time the decision to treat Flint differently than Genesee County was made. As this Court explained when it considered the effect of a contractual relationship between Flint and Genesee County in its August 1st Order:

> If that were the case, then Flint (and those who governed Flint) may have had jurisdiction for Equal Protection purposes over Genesee County's water supply, because Flint as a governmental unit supplied Genesee County's water. The decision to switch to the Flint River while that pre-switch agreement was still effective would have been a decision to treat the water users of Flint

> differently from the water users of Genesee County while all residents were, for the purposes of their water supplies, under Flint's jurisdiction.

Order at 92. Because that was *precisely* the case, Class Plaintiffs' proposed amendment with regard the Equal Protection and ELCRA claims against Defendants Snyder, Dillon, Wright, Walling, Ambrose, Kurtz, and Earley are not futile.

Likewise, the Proposed Amended Complaint has satisfied the Court's requirement with respect to African American Plaintiffs' claims against Defendants Snyder, Dillon, Wright, Walling, Ambrose, Kurtz, and Earley for violating African American Plaintiffs' rights under 42 U.S.C. § 1985. In the August 1st Order, the Court dismissed these claims "[b]ecause the suspect class identified as the subject of the § 1985(3) conspiracy is not a class based on race." Order at 100. The amendments asserts these claims on behalf of a class of African American Plaintiffs as defined by paragraphs 448 and 450 of the Proposed Amended Complaint, and thus are not futile.

C. Class Plaintiffs' Gross Negligence Claim is not Futile.

Class Plaintiffs propose adding a claim of gross negligence against Defendants Snyder, Dillon, Lyon, Shekter-Smith, Rosenthal, Busch, Cook, Prysby, Wurfel, Wright, Kurtz, Earley, Ambrose, Croft, Johnson, and Glasgow. Given that this Court recently found that Class Plaintiffs had plausibly alleged claims of bodily integrity against these Defendants, or Plaintiffs have subsequently added allegations

warranting the Court's allowing a bodily integrity claim against these Defendants to go forward, it stands to reason that these same allegations suffice to plausibly allege their gross negligence.

A claim of gross negligence was previously dismissed by this Court in *Guertin v. Michigan*, Civ. No. 16-cv-12412, 2017 WL 2418007 (E.D. Mich. June 5, 2017), *appeal filed*, in part because existing Michigan case law at the time held that it was, "not enough to say any defendant's actions were "among" those that caused plaintiffs' harm." *Id.* at *27. Rather, to viably state a claim of gross negligence, "the test is whether a jury could reasonably find, if plaintiffs proved their allegations, that a defendant, individually, was the most direct cause of the harm." *Id.*

Since the Court issued its opinion in *Guertin*, the law in Michigan has changed. In *Ray v. Swagger*, the Michigan Supreme Court rejected prior precedent holding that a valid claim of gross negligence required a showing that the alleged defendant was "the" proximate cause, holding that proximate cause is satisfied where, "it was foreseeable that the defendant's conduct could result in harm to the victim." *Ray v. Swager*, 501 Mich. 52, 65 (2017). Because Class Plaintiffs have sufficiently alleged that the harms alleged were foreseeable—otherwise Class Plaintiffs' claims of bodily integrity would surely fail—Class Plaintiffs' claim of gross negligence is not futile.

II. The Court Should Allow Plaintiffs to Modify the Class Definition

Class Plaintiffs seek to modify the proposed class definition in the Operative Complaint to add a subclass of African American residents. Additionally, Class Plaintiffs seek to include an alternate definition that separates out distinct classes. The proposed classes include (a) a Property Damage Class, which consists of Flint property owners seeking damages including diminution of the value of their properties and costs to remediate the dangerous conditions that resulted from defendants' actions, (b) a personal injury damages class, which consists of Flint residents who suffered personal injury as a result of Defendants' actions, (c) a Personal Injury class of Flint residents and students seeking issue certification under Federal Rule of Civil Procedure 23(c)(4) of common issues related to liability and causation, and (d) injunctive relief classes seeking injunctive relief for these discrete classes under Federal Rule of Civil Procedure 23(b)(2), and (c).

The main modification in the proposed alternative class definition is to separate out the Personal Injury Class and allege a set of common issues that can be certified under Federal Rule of Civil Procedure 23(c)(4). The proposed Rule 23(c)(4) issue class follows the guidance of the Sixth Circuit in *Martin v. Behr Dayton Thermal Prods.*, 896 F.3d 405, *reh'g en banc denied*, in a case decided less than three months ago on July 16, 2018. In *Martin*, the Sixth Circuit affirmed a district court's certification of an issue class of property owners in Dayton, Ohio, who

alleged claims related to groundwater contamination. *Id.* at 407. The court found that certification of a set of seven common issues related to liability and causation satisfied the requirements of Rule 23, even where the predominance requirement is not satisfied with respect to the entire action. *Id.* at 410–13. In affirming the district court's ruling that an issue class was the superior to other available methods, the court explained:

> Indeed, the record indicates that the properties are in a low-income neighborhood, meaning that class members might not otherwise be able to pursue their claims. Even if the class members brought suit individually, the seven certified issues would need to be addressed in each of their cases. Resolving the issues in one fell swoop would conserve the resources of both the court and the parties. Class treatment of the seven certified issues will not resolve Defendants' liability entirely, but it will materially advance the litigation.

Id. at 416. The Sixth Circuit's analysis could just as easily be applied to the Class Plaintiffs, who are victims of the Flint water crisis. Similar to the class affirmed in *Martin*, the proposed alternative issue class would allow Flint residents and students to materially advance their claims for personal injuries by resolving a series of common issues in one fell swoop. *See* Exhibit A ¶ 454.

The Court need not resolve the requirements of Federal Rule of Civil Procedure 23 prior to Class Plaintiffs' motion for class certification. At this stage, the Court should permit the modified class definition because Rule 23(c)(1)(C) permits a court to alter or amend an order granting class certification at any point prior to the entry of final judgment. The Court "retains flexibility and is free to

modify a class definition in light of developments during the course of litigation." *Astiana v. Kashi Co.*, Civ. Nos. 11-cv-1967 & 11-cv-2890, 2013 WL 12064549, at *1 (S.D. Cal. Nov. 22, 2013) (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). Especially considering the early stage here, prior to full-scale discovery and class certification, the Court should permit Plaintiffs to modify the class definition.

CONCLUSION

For the reasons set forth above, Class Plaintiffs respectfully request that the Court grant Class Plaintiffs' motion for leave to file an amended complaint.

Dated: October 5, 2018

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 October 5, 2018.

Dated: October 5, 2018

/s/ Emmy L. Levens
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