UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re Flint Water Cases	Case No.: 5:16-cv-10444-JEL-MKM Hon. Judith E. Levy Magistrate Judge Mona K. Majzoub

REPLY BRIEF IN SUPPORT OF INTERIM CO-LEAD CLASS COUNSEL'S MOTION FOR REPLACEMENT OF CO-LIAISON COUNSEL AND OPPOSITION TO CO-LIAISON COUNSEL'S CROSS-MOTION TO DISCHARGE INTERIM CO-LEAD CLASS COUNSEL

Interim Co-Lead Class Counsel (hereinafter "Co-Lead Counsel") filed a Motion to replace Hunter Shkolnik from his position as Co-Liaison Counsel for the individual actions for a straightforward reason: Mr. Shkolnik has not "act[ed] fairly, efficiently, and economically in the interests of all parties and parties' counsel and s[ought] to oversee the activities of Plaintiffs' counsel working on this matter to promote its efficient litigation and avoid unnecessary expenditures of time and expense." *See* Order Delineating the Duties of Interim Co-Lead Class Counsel and Co-Liaison Counsel for the Individual Actions at ¶ 1.C.(viii) (Oct. 26, 2017), ECF No. 234.

The role of Co-Liaison Counsel is a position of trust and authority that requires knowledge of the law, a commitment to fairness and honesty with co-

counsel, and adherence to the highest ethical standards and integrity in representing the residents of Flint who have been affected by the water crisis. Contrary to Mr. Shkolnik's Response, the issues Co-Lead Counsel brought to this Court's attention have nothing to do with competing for fees or clients. Rather, they are a result of Co-Lead Counsel's legitimate concerns that Mr. Shkolnik's actions violated the Michigan Rules of Professional Conduct and caused confusion among the people of Flint.

Instead of fully addressing the matters raised in Co-Lead Counsel's Motion, Mr. Shkolnik's Response makes false and misleading accusations—based on Mr. Shkolnik's unsworn and uncertified declaration[1]—and by casting false aspersions against Co-Lead Counsel based on what in fact are wholly appropriate litigation activities that (1) are routine and necessary parts of class action litigation, and (2) serve the interests of litigating these cases efficiently and effectively for the benefit of the residents of Flint. Co-Lead Counsel have diligently represented the interests of the class in this case, including through briefing and preliminary discovery. Mr. Shkolnik's baseless and misleading accusations provide no support for his request

[1] Mr. Shkolnik's declaration purports to be made "under 28 U.S.C. § 1746." ECF No. 444-2 ("Shkolnik Decl.") at 1. But § 1746 allows a declaration to have the force and effect of a sworn declaration only if the declarant certifies "under penalty of perjury" that the contents are "true and correct." 28 U.S.C. § 1746(2). Mr. Shkolnik's declaration does not contain this certifying language.

to discharge Co-Lead Counsel, nor should they detract from the legitimate and important issues raised in Co-Lead Counsel's Motion.[2]

Mr. Shkolnik all but acknowledges that certain of his actions were improper because his Response discusses how he has fixed or otherwise stopped engaging in some of the activities that form the basis for Co-Lead Counsel's Motion. At the same time, Mr. Shkolnik has continued to engage in certain activities and make communications on his website that create the false impression that there are impending "deadlines" that create a need for residents to retain lawyers and submit claims now, and that Napoli Shkolnik is operating an official "claim center" for such individuals. These activities are resulting in unnecessary and duplicative legal work, and if not addressed could subject individuals to unnecessary litigation burdens and higher contingent fees than they would likely incur if they remained in the proposed class.

It is important that the residents of Flint have accurate and truthful information about this litigation. To that end, in addition to the relief requested in Co-Lead Counsel's Motion and in consideration of the conduct described in that

[2] Mr. Shkolnik falsely asserts that Co-Lead Counsel misrepresented the number of plaintiffs' counsel who supported their Motion. ECF No. 444 ("Shkolnik Resp.") at 12-13. Co-Lead Class Counsel consulted with the Plaintiffs' Executive Committee and other plaintiffs' counsel prior to filing the Motion and at that time, the majority of plaintiffs' counsel and the Plaintiffs' Executive Committee supported the Motion. Ex. A, Declaration of Michael Pitt ("Pitt Decl.") ¶ 18.

Motion and herein, further corrective measures that the Court deems appropriate may be warranted.[3]

STATEMENT OF FACTS

Mr. Shkolnik's Response misrepresents both the reasons for Co-Lead Counsel's Motion and the disagreements he claims prompted the filing of that Motion.

In January 2018, Co-Lead Counsel Michael Pitt learned that Mr. Shkolnik had filed a complaint against the Environmental Protection Agency (EPA) that was identical to a complaint filed by Mr. Pitt in 2017, and that listed some of Mr. Pitt's clients as plaintiffs. Ex. A, Declaration of Michael Pitt ("Pitt Decl.") ¶¶ 7-8. When one of these clients informed Mr. Shkolnik that she had not authorized him to file that case on her behalf, Mr. Shkolnik's office forwarded her a retainer agreement that included an electronic signature that the client did not recall providing nor did she have any intent to retain Mr. Shkolnik. Ex. B; Pitt Decl.¶ 10.

It was from this retainer agreement that Mr. Pitt learned of the excessive fees charged in Mr. Shkolnik's retainer agreements that violate the Michigan Court Rules and Michigan Rules of Professional Conduct, which he relayed to Co-Lead Counsel Mr. Leopold. Pitt Decl. ¶ 10; Ex. C, Declaration of Theodore Leopold

[3] Co-Lead Counsel suggest exemplar corrective measures for the Court to consider below.

("Leopold Decl.") ¶ 5. This ethical violation—in conjunction with Mr. Shkolnik's failure to cure the violation, as well as his conduct at a Town Hall and before this Court in February 2018—is the basis for Co-Lead Counsel's Motion to Replace Mr. Shkolnik as Co-Liaison Counsel. Mar. 13, 2018, ECF No. 404 ("Motion"). Co-Lead Counsel's Motion was not, as Mr. Shkolnik claims, a result of disagreements over a common benefit order.[4]

Moreover, in contending that he has been "steadfast" in not discussing issues relating to the allocation of any fees that may be recovered in these cases, Mr.

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[4] Although Plaintiffs have submitted a proposed order addressing submission of time and expense information, a common benefit order is not required for the administration of a class action case. Indeed, the more common practice in class action cases in the Eastern District of Michigan has been to go without such orders. The following class action cases have been fully litigated and resolved without a common benefit order. *In re Automotive Parts Antitrust Litigation*, No. 12-md-02311 (E.D. Mich.) (Hon. Marianne O. Battani) ($604 million dollars in settlements reached to date with approval of $34.2 million settlement pending among others); *In re CMS Energy Securities Litigation*, No. 02-cv-72004 (E.D. Mich.) (Hon. George Caram Steeh) ($200 million dollar settlement resolving eighteen consolidated class actions); *Cason-Merenda et al., v. VHS of Michigan, Inc., d/b/a/ Detroit Medical Center et al.*, No. 06-cv-15601 (E.D. Mich.) (Hon. Gerald E. Rosen) (over $90 million in settlements collected from various Defendants and distributed to classes); *In re Cardizem CD Antitrust Litigation*, MDL No. 1278 (E.D. Mich.) (Hon. Nancy G. Edmunds) ($80 million dollar settlement to resolve lawsuits asserted on behalf of consumers, states and third party payers); *In re Refrigerant Compressors Antitrust Litigation***,** No. 09-md-02042 (E.D. Mich.) (Hon. Sean F. Cox) ($48.4 million dollar settlement resolving five (5) years of litigation brought by direct purchaser plaintiffs); *In re Packaged Ice Antitrust Litigation*, No. 08-md-01952 (E.D. Mich.) (Hon. Paul D. Borman) (approximately $30 million dollars in settlements in multidistrict litigation spanning eight (8) years involving both direct and indirect purchaser plaintiffs).

Shkolnik in his Response and Declaration does not accurately represent his discussions with Co-Lead Counsel that he asserts led Co-Lead Counsel to file the Motion. For several months in late 2017, Co-Lead and Co-Liaison Counsel discussed a possible time and expense order, with all parties agreeing that such an order would be appropriate. Pitt Decl. ¶ 20; Leopold Decl. ¶¶ 16-17. It was the initial draft circulated by Mr. Shkolnik that raised the issue of creating a common benefit fund to pay attorney fees for common benefit work. Leopold Decl. ¶ 16.

In January 2018, Co-Lead Counsel and Co-Liaison Counsel, along with other attorneys working with Co-Lead Counsel, spoke by telephone about Mr. Shkolnik's common benefit proposal. Pitt Decl. ¶ 21; Leopold Decl. ¶ 20. During this discussion, Mr. Shkolnik insisted that each member of the court-appointed leadership team should be eligible to receive 20% of any future common benefit fee awarded by the Court—that is, that he and Mr. Stern would receive 40% of any common benefit fee even though they have been appointed as liaison counsel for the individual cases and are not serving as class counsel. Pitt Decl. ¶ 22; Leopold Decl. ¶ 20. Mr. Shkolnik further proposed that Co-Liaison Counsel receive this portion of the common benefit fund in addition to receiving their contingency fees in their individual cases. Pitt Decl. ¶ 22; Leopold Decl. ¶ 20. And it was Mr. Shkolnik who, during this conversation and earlier, proposed imposing a 10%

"tax" or "surcharge" on individual cases to contribute to a common benefit fund. Pitt Decl. ¶ 22; Leopold Decl. ¶ 19.

When Co-Lead Counsel objected that allocating 40% of any common benefit fee to Co-Liaison Counsel in addition to the contingency fees in their individual cases would be disproportionate to the relative contributions of class counsel and counsel in the individual cases to common issues, Mr. Shkolnik abruptly ended the conversation. Pitt Decl. ¶¶ 23-24; Leopold Decl. ¶ 21.[5]

Co-Lead Counsel proposed alternative percentages in the context of these conversations, and Co-Lead Counsel considered the "tax" or "surcharge" component of Co-Liaison Counsel's proposal to be within a reasonable range. Leopold Decl. ¶¶ 19, 22.

Co-Lead Counsel never demanded a percentage of a common benefit fund nor did they threaten to have Mr. Shkolnik removed as Co-Liaison counsel if he

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[5] There is nothing unusual or unseemly in the fact that Co-Lead Counsel and Co-Liaison Counsel held discussions about the allocation of any ultimate fee. Reaching early agreement on fee issues can allow for the efficient allocation of work, minimize duplicative litigation activities, avoid unnecessary disputes after any recovery is obtained, and serve the interests of the putative class and individual litigants in the management of the litigation. Of course, the Court ultimately has inherent authority to cap class or individual attorney fees in MDL and class action cases. *See*, *e.g.*, Ex. D, Memorandum at 2-3, *In re: National Football League Players' Concussion Injury Litigation*, No. 2:12-md-02323 (E.D. Pa. Apr. 5, 2018), ECF No. 9862 (capping attorneys' fees for individual plaintiffs' attorneys at 22% and observing, "a court has the authority to impose a fee cap derived from both the power of a court presiding over an MDL or class action and the ability of a court to review individual fee awards.").

did not agree Co-Lead Counsel's fee allocation proposals. Pitt Decl. ¶ 25; Leopold Decl. ¶ 22.

ARGUMENT

I. CO-LIAISON COUNSEL HAS NOT ADEQUATELY ADDRESSED THE BASIS FOR HIS REPLACEMENT

Co-Lead Counsel's Motion raises serious ethical concerns about Mr. Shkolnik's conduct. In particular, Mr. Shkolnik entered into excessive fee agreements with Flint residents, appeared to use his appointed position for his own financial benefit, and made numerous misleading statements to Flint residents—including about participation in the class case and about possibly impending deadlines to sign retainer agreements with individual attorneys.

Importantly, Mr. Shkolnik does not deny this conduct. Instead, he makes excuses (or claims he has stopped the improper conduct) and attempts to deflect the Court's attention from his own misconduct with misleading assertions about Co-Lead Counsel.

A. Mr. Shkolnik Does Not Deny that he Entered into Excessive Fee Agreements with Flint Residents

Mr. Shkolnik does not deny the countless ethical breaches he committed by entering into contracts which provided that Napoli Shkolnik would collect attorney fees of 40% of a Flint plaintiff's gross recovery. Instead, he blames a clerical error—that apparently resulted in years of unlawful retainer agreements—and

contends these ethical breaches should have no consequence because he has allegedly corrected these unlawful fee agreements.

But Mr. Shkolnik's response misunderstands both the applicable ethical rules and Co-Lead Counsel's concerns. The Michigan Rules of Professional Conduct prohibit both *entering into an agreement for*, and charging or collecting an illegal or excessive fee. MPRC 1.5 (a) ("A lawyer shall not enter into an agreement for, charge, *or* collect an illegal or clearly excessive fee.") (emphasis added). The rule's disjunctive language highlights the concern not only with attorneys charging excessive fees, but also with attorneys who *enter into agreements* to do so. To conclude that there is no misconduct so long as the agreements are corrected before any fees are paid disregards the plain language of this rule.

The Declaration of Robert E. Hirshon ("Hirshon Decl.") (Apr. 9, 2018), ECF No. 444-4, relies upon Mr. Shkolnik's representation that this was a mere "clerical error," and similarly ignores the rule's clear language. Professor Hirshon does not address the lapses that would be necessary for an attorney to enter into unethical agreements for years, including failure to notice and correct multiple and repetitive "clerical errors" in the contract. And, the purported clerical error upon which Professor Hirshon bases his opinion— "a vendor mailing out the wrong form"—

appears nowhere in Mr. Shkolnik's own declaration. *See* Hirshon Decl. ¶ 19; *see also generally* Shkolnik Decl.

Further, Professor Hirshon's declaration appears to rely on incorrect and misleading statements. For example, Professor Hirshon relies on the proposition that when the excessive fee agreements were brought to Mr. Shkolnik's attention, Mr. Shkolnik quickly corrected them. Hirshon Decl. ¶ 19. Not so.

On February 15, 2018, Mr. Shkolnik was advised, in a filing in *Burgess v. USA*, No. 4:17-cv-11218-LVP-RSW, that the retainer agreements he had entered into with Flint residents were excessive for several reasons, including that they assessed that fee on the gross settlement and that they provided for dispute resolution using New York law. Motion of 53 Burgess Plaintiffs to Strike All Allegations (Feb. 15, 2018), ECF No. 32.[6] But Mr. Shkolnik did not immediately correct these errors. Instead, the retainer agreements circulated by Mr. Shkolnik to Flint residents at the February 18, 2018 Town Hall—after this filing—continued to assess the contingency on the gross settlement and to apply New York law. Pitt Decl. ¶ 13 & Ex. 1.[7]

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[6] This motion was later re-filed in *Thomas v. USA*. Motion of 53 Burgess Plaintiffs to Strike All Allegations, *Thomas v. USA*, No. 4:18-cv-10243-LVP-RSW (Mar. 9, 2018), ECF No. 8.

[7] Professor Hirshon also contends that "[a]s soon as attorney Shkolnik discovered that mistake, he corrected the retainer agreement in his office and also provided the company in charge of forwarding retainer agreements to potential

Moreover, it is not even clear from Mr. Shkolnik's response whether this issue has been fully remedied. Mr. Shkolnik contends in his Response that he "sent an addendum correcting errors to all retained clients who had previously signed incorrect retainers," Shkolnik Resp. at 8, but attaches only an undated addendum without any affirmation as to when or to whom it was sent. *See* ECF No. 444-5. And neither Mr. Shkolnik nor Professor Hirshon addresses the inability of an addendum—presumably placed in the mail without acknowledgment of receipt—to cure an unlawful contract that the clients did not agree to.[8]

B. Mr. Shkolnik Made, and Continues to Make, Misleading Statements to Flint Residents

Co-Lead Counsel's Motion also raised several concerns arising out of a Town Hall meeting Mr. Shkolnik held in Flint on February 18, 2018. Mr. Shkolnik

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clients with the correct information." Hirshon Decl. ¶ 19. But this factual assertion is absent from Mr. Shkolnik's own declaration.

[8] The law is clear that these riders cannot create a newly valid contract or retainer agreement where none previously existed. A retainer agreement is a contract, subject to the law of contracts. *See Island Lake Arbors Condo Ass'n v. Meisner & Assocs. PC*, 301 Mich. App. 384, 392-93 (Mich. Ct. App. 2013). Since the *Thomas* retainer agreements violate several Michigan laws, they are unenforceable. *Nallaballi v. Achanta*, No. 298042, 2011 WL 2555717, at *3 (Mich. Ct. App. June 28, 2011), *appeal denied*, 491 Mich. 887 (Mar. 26, 2012) ("Courts may not enforce a contract if enforcement would violate a statute.") (citing *Sands Appliance Servs. v. Wilson*, 463 Mich. 231, 239 (2000)); *see also* Restatement 2d of Contracts § 178 (1981). A unilateral addendum cannot cure an unlawful contract because there is no meeting of the minds to form a new contract. *See Kamalnath v. Mercy Memorial Hosp. Corp.*, 194 Mich. App. 543, 548 (Mich. Ct. App. 1992), *appeal denied*, 441 Mich. 923 (Jan. 29, 1993) ("It is hornbook law that a valid contract requires a 'meeting of the minds' on all the essential terms.").

contends that Co-Lead Counsel have mischaracterized the February 18th Town Hall meeting in order to "manufacture" claims against him. Shkolnik Resp. at 9-10. As it turns out the unofficial "transcript" of what actually was said at the event (which is attached to Mr. Shkolnik's Response) supports Co-Lead Counsel's Motion. *See* ECF No. 444-7 ("Transcript") at 5.

A chief concern raised in Co-Lead Counsel's Motion was that Mr. Shkolnik had provided misleading information to Flint residents in order to solicit them as clients. *See* Mot. at 9-10. The unofficial transcript filed by Mr. Shkolnik bears out this concern, showing that Mr. Shkolnik did indeed attempt to dissuade residents from remaining in the class and instead to sign retainer agreements—which were handed out at the Town Hall. Here is what Mr. Shkolnik told the crowd:

> What we're talking about here is that we want to represent, and we do represent, individuals who have individual injuries, who all should be representing themselves in the case. *You shouldn't be saying*, "Well, 10 people who you don't know are going to be your representative in the lawsuit, in the class action format."

Tr. at 5 (emphasis added).

Mr. Shkolnik similarly implied at this Town Hall that residents would be better served by individual lawyers with whom they would have "a fee that [they] negotiate," rather than class lawyers "who will take a class fee," Tr. at 13, without informing attendees that a fee to class attorneys must be approved by the court after it is disclosed in a notice to all class members who have the right to object.

See Fed. R. Civ. P. 23(h). And although Mr. Shkolnik has experience with class actions, as he filed class cases in the instant litigation,[9] he represented that individuals would have no say in a class action settlement, without addressing opportunities to object or opt-out.[10] *See* Tr. at 13 ("With a class action… it's the lawyers who are making the determination. They have a few people that are representing them saying they're representing the whole."); Tr. at 19 (Mr. Shkolnik's partner Paul Napoli stating, "If it's a class and the class settles it, and the class is approved, you're stuck with the settlement, and that's the difference."). These statements—made at a Town Hall at which Napoli Shkolnik handed out retainer agreements—were clearly misleading about how class actions proceed.

The unofficial transcript provided by Mr. Shkolnik likewise supports other concerns raised in Co-Lead Counsel's Motion. For example, the emcee Hill Harper told attendees that their retainers with other attorneys were not binding, and

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[9] *See, e.g.*, *McMillian v. Snyder*, No. 5:16-cv-10796-JEL-MKM; *Rogers v. Lockwood, Andrews & Newnam, P.C.*, No. 5:17-cv-10360-JEL-MKM.

[10] Mr. Shkolnik's claims at the Town Hall that he did not think residents should remain in the class, and that "I'm not a class action guy. I represent individual people. Myself and another lawyer were appointed by Judge Levy to represent all the individuals," Tr. at 13, are particularly misleading given that Mr. Shkolnik filed several class action complaints in this matter before the cases were consolidated, and that until just before he filed his Response, his firm's Flint Claim Center website implied that his firm was signing people up to participate in a class action case. *See* Ex. E (Screen shot of website from March 30, 2018).

encouraged people to sign up with Napoli Shkolnik.[11] The Town Hall also propagated the false impression that there is an urgent deadline for individuals to retain an individual attorney,[12] and Mr. Shkolnik invoked his court-appointed position as Co-Liaison Counsel at this meeting.[13]

Co-Lead Counsel did not raise these issues merely because Mr. Shkolnik held a Town Hall meeting. Rather, they brought this to the Court's attention because taken together, the statements made by Mr. Shkolnik and others at the Town Hall create the misleading impression that there is an urgency for Flint residents to sign individual retainer agreements and that Flint residents should not choose to remain in a putative class.

And contrary to Mr. Shkolnik's statement in his Declaration to this Court, Mays Team member Trachelle Young did not "refute" Co-Lead Counsel's ethical concerns or compliment Mr. Shkolnik's Town Hall. *See* Shkolnik Resp. at 10 n.2; Shkolnik Decl. at ¶ 17 n.11. Indeed, Ms. Young did not even attend the Town Hall

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[11] *See* Tr. at 16 ("[A] relationship with a lawyer is a purely elected relationship. There's nothing binding about anything."); *id*. at 23-24 ("There are a lot of people that are here that need this. What we want to do is a couple things. I think we've run out of retainer agreements. We still have more? . . . If we have more then take an extra. If there's somebody that's not here with you, let them sign [inaudible 01:16:53]. We also email it out.").

[12] Tr. at 10 (Councilman Eric Mays stating, "Only 15,000 or so people have signed up. You've got 100,000 or more, and the time is running out, and we need 15,000, 20,000, 40,000, 50,000 because together we move mountains.").

[13] Tr. at 13 (Mr. Shkolnik stating, "Myself and another lawyer were appointed by Judge Levy to represent all the individuals.").

where Mr. Shkolnik swears she made these statements. Ex. F at 22-23 (Declaration of Trachelle Young ¶¶ 3-6).

Moreover, misleading communications continue to appear on Mr. Shkolnik's Flint Claim Center website, which urges people to sign up quickly with Napoli Shkolnik, stating:

> To give as many people as possible an opportunity to join the litigation, the judge has not yet set a deadline. But many in government and elsewhere are pressuring the court to make such a move as quickly as possible. Once the judge makes a decision, there will be almost no time left to sign up. For many, their last, best hope for justice will be gone.

Ex. G (Flint Claim Center Website as of April 26, 2018, at 2).[14]

Through these actions, Mr. Shkolnik has fundamentally damaged the trust that Co-Lead Counsel previously placed in him in supporting his appointment as Co-Liaison Counsel and has raised serious questions about his ability and willingness to cooperate with Co-Lead Counsel in pursuing these actions for the common benefit of the residents of Flint.

[14] As discussed in Footnote 10, *supra*, until recently, this website further implied that residents were signing up to participate in a class action case. Ex. E.

II. The Purported Concerns Mr. Shkolnik Raises About Co-Lead Counsel Are Groundless and Provide No Basis for Challenging Co-Lead Counsel's Position

Co-Lead Counsel have zealously represented the proposed class' interests in litigating this matter. Mr. Shkolnik's baseless assertions of unethical conduct are nothing but a red herring and provide no basis for removing Co-Lead Counsel.

A. Representation of the Class and Individuals Does Not Support Removal of Co-Lead Counsel

As detailed in Co-Lead Counsel's Motion for consolidation and appointment of interim co-lead class counsel, Co-Lead Counsel have extensive class action experience and knowledge of the substantive issues and law in this case. *See generally* Joint Motion to Appoint Interim Co-Lead Class Counsel (June 9, 2017), ECF No. 136. Co-Lead Counsel have worked diligently in the interests of the putative class, and Mr. Pitt's representation of individual clients does not negate that, nor does it render him inadequate to serve as Co-Lead Counsel.

Representation of a class and individuals, standing alone, does not present an actual conflict that bears on the adequacy of class counsel. Rather, "[i]n general, class counsel may represent multiple sets of litigants—whether in the same action or in a related proceeding—so long as the litigants' interests are not inherently opposed." 1 Newberg on Class Actions § 3:75 (5th ed.) (footnote omitted); *see also Mehl v. Canadian Pac. Ry. Ltd.*, 227 F.R.D. 505, 515 (D.N.D. 2005) ("Plaintiffs' counsel's representation of other individual personal injury plaintiffs does not

preclude them from providing adequate representation to the potential class members."). Indeed, class counsel generally represent both the class and the individual class representatives. This is an essential part of the process, and does not result in any disqualifying conflict. Representing additional individual class members who may ultimately serve as witnesses or additional class representatives or simply absent class members and claimants—as Co-Lead Counsel do here—does not raise any serious additional concern.

Here, the interests of the class and individual claimants are not opposed. Indeed, as courts have recognized in other cases, "[r]epresenting multiple clients in parallel proceedings will also benefit the class to the extent that class counsel gain useful legal and factual knowledge in pursuing the concurrent action." 1 Newberg on Class Actions § 3:75 (5th ed.) (footnote omitted).

Moreover, the hypothetical possibility of a conflict at a later point does not warrant removal of Mr. Pitt as Co-Lead Counsel. *See* Ex. H, Declaration of Charles Wolfram ("Wolfram Decl.") ¶¶ 9-12. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), on which Mr. Shkolnik relies, does not counsel otherwise. That case—which addressed conflicts regarding certification of a class for settlement—involved a factual situation in which the parties had essentially negotiated a settlement on behalf of a broad range of plaintiffs, which included both present and future claimants whose interests were in conflict, before even filing a lawsuit. *See*

id. at 601-02. Moreover, that case—which addressed actual existing conflicts—is inapposite where, as here, Mr. Shkolnik raises no actual conflict that has arisen or is likely to arise. And to the extent *Amchem* raises questions about potential subclasses, it would be premature to address whether subclasses are appropriate, and certainly premature to determine whether a hypothetical future conflict would warrant removal of class counsel.[15]

B. Co-Lead Counsel Has Not Provided Misleading Notices

Similarly unconvincing is Mr. Shkolnik's attempt to disparage Co-Lead Class Counsel Mr. Pitt's efforts to provide important updates based on use of the term "class members" and "Flint Water Class Action Legal Team." Shkolnik Resp. at 16-20. In communicating with clients and putative class members, Mr. Pitt and the Mays Team are largely addressing non-lawyers who are not familiar with the difference between a class and a putative class. Wolfram Decl. ¶¶ 13-16. The Mays Team has not represented that a class has been certified, and in fact has worked

[15] Mr. Shkolnik also makes the bizarre assertion that Co-Lead Counsel have a conflict as a result of "demanding that Interim Counsel receive a cut of every individual case under a proposed settlement," thereby putting their desire for fees above the Class' interests. Shkolnik Resp. at 16. As discussed *supra*, Co-Lead Counsel discussed assessments for the common benefit as part of conversations which Mr. Shkolnik initiated; indeed, Mr. Shkolnik even proposed a 10% assessment on any recovery in individual cases to provide compensation for the portion of any recovery that would be attributable to common benefit work.

with these clients in an effort to assure them that they will be represented regardless of the procedural posture of the case. Pitt Decl. ¶ 33.[16]

While Mr. Shkolnik and Professor Carroll decry the use of the term "class members" or use of "The Flint Water Class Action Team" as misleading, there is no support for these assertions. Professor Carroll expresses concerns, based on a few limited documents, that individuals could be misled. Declaration of Maureen Carroll ¶¶ 18-23 (Apr. 9, 2018), ECF No. 444-3. However, Professor Carroll is not aware of the work being done to keep people informed about the status of the case by Co-Lead Counsel. *See* Pitt Decl. ¶ 3. Mr. Shkolnik's baseless assertion that Co-Lead Counsel made misleading statements should not divert attention from his own misleading statements.[17]

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[16] Indeed, even its own orders, the Court does not place "putative" in front of every reference to class counsel or the class case.

[17] Hours before Co-Lead Counsel filed the instant reply, the Veolia Defendants submitted a response in which they purport to be "concerned" about Co-Lead Counsel's communications with putative class members. The VNA Defendants' Memorandum of Law Concerning Interim Co-Lead Class Counsel's Motion for Replacement of Co-Liaison Counsel (April 30, 2018), ECF No. 469 at 1. As their own filing recognizes, however, "they do not have access to information sufficient to enable them to take a position" regarding Co-Lead Counsel's removal. *Id*. Indeed, their filing was made without the information and clarifications provided herein about Mr. Pitt's and the Mays Team's communications regarding the case. However, to the extent the Court has questions about these communications, Co-Lead Counsel can address them in a future filing or at argument.

C. Co-Lead Counsel Did Not Make "Ultimatums"

As detailed in the Statement of Facts and in the Declarations of Messrs. Pitt and Leopold, Co-Lead Counsel did not demand a percentage of fees from a common benefit fund, and certainly did not threaten Mr. Shkolnik with a motion to replace him as liaison counsel if he refused to agree to that percentage. As part of the discussions on a potential common benefit order—which Mr. Shkolnik initiated—Co-Lead Class Counsel discussed possible percentage breakdowns of a common benefit fund largely in response to Mr. Shkolnik's own demand that he and Mr. Stern receive 40% of any such fund. Leopold Decl. ¶ 22.

Similarly, Mr. Shkolnik's contention that Co-Lead Counsel demanded that he and Mr. Stern stop signing up clients is devoid of context. In January 2018, Co-Lead Counsel and members of the Plaintiffs' Executive Committee had conversations with Co-Liaison Counsel about how to manage the Flint water litigation in a way they would best serve the interests of Flint residents and putative class members. Leopold Decl. ¶ 14. In that context, Co-Lead Counsel asked Co-Liaison Counsel not to sign up additional individual clients *without first advising them of their right* to remain in the class until the Court decided class certification and therefore to choose at a later date whether to pursue individual claims. Leopold Decl. ¶ 14; *see also Phipps v. Wal-Mart Stores, Inc*., 792 F.3d 637, 643 (6th Cir. 2015) ("The timely filing of a class-action complaint

commences suit and tolls the statute of limitations for all members of the putative class who would have been parties had the suit been permitted to continue as a class action.") (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974)). Co-Lead Counsel thus did not believe that entering into additional individual retention agreements that, in the event of a settlement, could result in *higher* fees than individuals would pay if they remained in the proposed class was consistent with working towards the common benefit of the people of Flint.

Co-Lead Counsel's intention in making this request was to counter misleading information provided by Mr. Shkolnik on his website—and later at the Town Hall—about a purported urgency to sign retainer agreements with individual attorneys, and to ensure that putative class members were receiving accurate information about their rights and options before entering into any retention agreement. Leopold Decl. ¶ 14.

Mr. Shkolnik's claims that Co-Lead Counsel demanded that he stop signing up clients or abandon his individual clients misrepresent the conversations Co-Lead Counsel and Co-Liaison Counsel have had about how to proceed efficiently with this case and provide no basis for discharging Co-Lead Counsel.[18]

[18] Professors Hirshon and Carroll's opinions based on these nonexistent threats are therefore inapposite.

D. Mr. Shkolnik's Remaining Misrepresentations Provide No Support for Removing Class Counsel

Mr. Shkolnik makes a number of additional unsupported and misleading assertions in his Response and uncertified Declaration. Chief among them is Mr. Shkolnik's allegation that Mr. Pitt's team sent "bands of solicitors," or "mappers," to solicit residents already represented by Co-Liaison Counsels' firms. *See* Shkolnik Decl. ¶¶ 17 n.7, 18-19. The actions Mr. Shkolnik describes simply did not occur. *See generally* Ex. F (Declarations of Cynthia Lindsey, William Goodman, Teresa Bingman, Deborah LaBelle, Julie Hurwitz, Paul Novak, and Trachelle Young).

Professor Hirshon relies on the unattributed and unsupported assertions that Mr. Shkolnik was "advised," received "reports," and "became aware of" this unfounded assertion that bands of class attorneys were going door to door and employing people as "mappers to ring doorbells in order to solicit individual representations." Hirshon Decl. ¶¶ 37, 39. But such events never occurred, and Professor Hirshon's opinion on the matter is thus irrelevant.

Nor is there any basis for Mr. Shkolnik's conclusion that Co-Lead Counsel have assigned work based on "secret side-fee deals." Shkolnik Resp. at 4. Co-Lead Counsel have assigned work based on the experience and knowledge of the attorneys working with Co-Lead Counsel. Pitt Decl. ¶¶ 29-30; Leopold Decl. ¶ 25. Although some Plaintiffs' counsel have agreements regarding attorneys' fees, such

agreements are appropriate, and are often entered into in class cases to promote efficiency and disincentivize overbilling. Pitt Decl. ¶ 30; Leopold Decl. ¶ 26.

Mr. Shkolnik's representation that some class representatives in the unrelated *Allen* litigation "recently moved" to remove Kit Pierson as lead counsel in that litigation for allegedly "conspiring with the defendants" and other purported misdeeds, Shkolnik Resp. at 23, is a clear example of the baseless, indeed reckless, nature of the arguments advanced in Mr. Shkolnik's Response. In making this claim, Mr. Shkolnik omits to mention that: (a) the motion was filed years ago and was denied by the District Court after an evidentiary hearing and a finding that there was no support for the allegations, Ex. I, Opinion and Order Denying Subclass Representatives' Motion for New Counsel, *Allen v. Dairy Farmers of America*, No. 5:09-cv-230 (D. Vt. June 30, 2015), ECF No. 667; (b) the same movants made numerous and equally baseless allegations of purported misconduct by many other counsel (at four law firms), other class representatives, the defendants, state legislators with no involvement in the case, and even the District Court Judge; and (c) all of the allegations against counsel and various other targets were baseless and none were credited by the district court or the Second Circuit when it unanimously upheld the settlement in *Allen* as a fair and reasonable settlement for the class. *Haar v. Allen*, 687 F. App'x 93, 95 (2nd Cir. 2017), *cert.*

denied, 138 S. Ct. 745 (Jan. 16, 2018).[19] Remarkably, in his effort to discredit Co-Lead Counsel, none of these facts are mentioned in Mr. Shkolnik's response.

Mr. Shkolnik also raises allegations pertaining to the unrelated *Anthem* litigation, Shkolnik Resp. at 22-23, that are still under review in that case and that do not bear on Co-Lead Counsel's commitment to act in the best interest of the class. Indeed, in that case, the Judge was clear that her "discussion [of attorneys' fees was] not meant to suggest that Plaintiffs have not obtained a good result for the class," which she described as "the largest settlement reached in a data breach class action in the United States." Ex. J, Order Granting Motion to Appoint Special Master at 5-6, *In re Anthem, Inc. Data Breach Litig.*, No. 5:15-md-02617 (Feb. 2, 2018), ECF No. 972.

Mr. Shkolnik's aspersions against Co-Lead Counsel provide no basis for Co-Lead Counsel's removal and should not distract from the serious and misleading conduct in which he has engaged.

III. Co-Lead Counsel Wish to Proceed with This Litigation in the Best Interests of the People of Flint

Co-Lead Counsel filed their Motion to bring important matters to the Court's attention and to remedy certain misconduct by Mr. Shkolnik. It is in the interest of

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[19] The Second Circuit approved the $50 million settlement—which followed an earlier $30 million settlement with another Defendant—with extensive equitable relief. *Allen*, 687 F. App'x at 95; *See also* Ex. K (copy of Eric Kroh, *2nd Circ. Affirms $50M Milk Price-Fixing Settlement*, Law360 (Apr. 18, 2017)).

efficient management of this case that this matter be addressed in a way that corrects any confusion caused by Mr. Shkolnik's statements and conduct.

To that end, the Court may wish to take additional measures, such as (1) requiring corrective disclosures to remedy the confusing statements made about participation in the class and the class action process, and to clarify that there is no impending deadline that requires an individual to enter into a retention agreement or file a claim now; (2) instructing all counsel to ensure that any website they may have that purports to provide information to Flint residents about their options in this litigation provides clear and accurate information; and (3) any other measures the Court deems necessary or appropriate.

CONCLUSION

Co-Lead Counsel respectfully request that the Court grant their Motion and deny Co-Liaison Counsel's Cross-Motion.

Dated: April 30, 2018

Respectfully submitted,

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Interim Co-Lead Class Counsel for the *Flint Water Cases* Consolidated Proposed Class

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 April 30, 2018.

/s/ Jessica Weiner