UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELNORA CARTHAN, et al., on behalf of themselves and all others similarly situated; 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

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THE VNA DEFENDANTS' MEMORANDUM OF LAW CONCERNING INTERIM CO-LEAD CLASS COUNSEL'S MOTION FOR REPLACEMENT OF CO-LIAISON COUNSEL AND CO-LIAISON COUNSEL'S CROSS-MOTION TO DISCHARGE INTERIM CO-LEAD CLASS COUNSEL

INTRODUCTION

Defendants Veolia North America, LLC, Veolia North America, Inc., and Veolia Water North America Operating Services, LLC (collectively, "the VNA Defendants") submit this memorandum of law in response to the Court's invitation to the defendants to offer comments on matters of concern to them raised in the cross-motions of Interim Co-Lead Class Counsel and Plaintiffs' Co-Liaison Counsel to remove each other from their respective leadership roles. As the VNA Defendants have previously explained, they do not have access to information sufficient to enable them to take a position on whether either Interim Co-Lead Class Counsel or Plaintiffs' Co-Liaison Counsel Hunter Shkolnik should be removed from the positions to which the Court appointed them.

The VNA Defendants are concerned, however, that some of the documentary materials attached to Co-Liaison Counsel Shkolnik's cross-motion indicate that both Interim Co-Lead Class Counsel and Mr. Shkolnik may have taken advantage of their positions to engage in inaccurate or otherwise misleading communications to members of the Flint community. The VNA Defendants do not have enough reliable information about the full context of the communications evidenced by the documents submitted by Mr. Shkolnik to assess what corrective action may be necessary to ensure that similarly misleading communications are not disseminated in the future or to cure the effects of past misleading

communications. The VNA Defendants believe, however, that the documents Mr. Shkolnik submitted warrant further inquiry by the Court to determine whether corrective notices might be warranted or whether judicial review of future statements by Interim Co-Lead Class Counsel directed at putative class members may be appropriate.

I. The Duties of Counsel When Communicating With Putative Class Members

Rule 23 permits interim class counsel to communicate with putative class members so long as those communications are not "misleading, abusive, or coercive." 3 Newberg on Class Actions § 9:6 (5th ed., Dec. 2017 update) (footnotes omitted). Underlying this limitation is the concern that putative members not be misled "regarding the status, purposes and effects of the class action" and that what interim class counsel communicates to them will be "objective, neutral information." *Hinds Cty., Miss. v. Wachovia Bank N.A.*, 790 F. Supp. 2d 125, 134, 135 (S.D.N.Y. 2011). Accordingly, Rule 23(d) empowers courts to limit class counsel's communications with putative class members. *See Tolmasoff v. Gen. Motors, LLC*, 2016 WL 3548219, at *10 (E.D. Mich. June 30, 2016).

A communication can be misleading in several ways. It may "present one-sided assertions as undisputed or unqualifiedly true." *Bouder v. Prudential Fin., Inc.*, 2007 WL 3396303, at *3 (D.N.J. Nov. 8, 2007). It might "communicate a

gratuitous air of urgency" by setting arbitrary deadlines for putative members to take action regarding their representation or participation. *In re McKesson HBOC, Inc. Secs. Litig.*, 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000). Or it can omit critical information, such as putative class members' option to "contact counsel of their own choice" and "pursue their own action." *Jones v. Casey's Gen. Stores*, 517 F. Supp. 2d 1080, 1088 (S.D. Iowa 2007). Suggestions that putative members must join a class to recover damages likewise are suspect. *Self v. TPUSA, Inc.*, 2008 WL 4372928, at *3 (D. Utah Sept. 19, 2008).[1]

A court has three options to address misleading communications to putative class members. First, it can issue a protective order to regulate those communications. 3 Newberg on Class Actions § 9.6. "[A]n order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties" (*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981)) and should be as narrowly drawn as possible while still providing adequate relief (*see Tolmasoff*, 2016 WL 354219 at *11). Second, the court "may require the provision of a corrective notice if previously

[1] *Bouder*, *Casey's General Stores*, and *Self* were collective actions under the Fair Labor Standards Act, but counsel in such cases are subject to the same requirements as counsel in Rule 23 class actions. *See Perkins v. Benore Logistics Sys., Inc.*, 2017 WL 445603, at *2-3 (E.D. Mich. Feb. 2, 2017) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100, 102 (1981)).

disseminated materials were misleading." *Id.* Finally, the court may discipline counsel who run afoul of ethical rules, "including prohibitions on representation of certain parties to the litigation." *Id.*; *see also In re Am. Exp. Anti-Steering Rules Antitrust Litig.*, 2015 WL 4645240, at *18 n.46 (E.D.N.Y. Aug. 4, 2015) (removing interim counsel for disseminating confidential information in apparently intentional violation of protective orders).

II. Co-Liaison Counsel Has Raised a Valid Concern About Interim Class Counsel's Communications With Putative Class Members

The VNA Defendants have not seen all of Interim Co-Lead Class Counsel's communications with putative class members. Nevertheless, the ones submitted by Co-Liaison Counsel Shkolnik raise questions as to whether they comport with the requirements outlined above.

These communications—which are publicly available on a website run by Interim Co-Lead Class Counsel—are replete with language implying that putative class members are parties to this litigation—they are not unless they happen to be a named plaintiff in either the *Carthan* action or one of the individual actions for which Interim Co-Lead Class Counsel have no responsibility—and that Interim Co-Lead Class Counsel's legal team represents them. The May 2017 update began with the salutation "Dear Class" and announced the team's plan to circulate monthly emails to "increase transparency between the legal team and *our clients*." Ex. 1, at 1 (emphasis added). Later in 2017, Interim Class Counsel's team notified

readers—identified as "Class Members"—that the Sixth Circuit's *Mays* decision would allow "*your claims*" against Flint and the State of Michigan to proceed. Ex. 2, at 1 (emphasis added).

Communications such as these suggest that members of the Flint community already are represented in this litigation, thus potentially deterring them from seeking advice from their own lawyers in order to understand how best to protect their own interests. Furthermore, the characterization of them as already being class members could easily lead them "to speculate and possibly conclude that a class was certified." *Babbitt v. Albertson's Inc.*, 1993 WL 150300, at *8 (N.D. Cal. Mar. 31, 1993).

Other communications imply that defendants' "liability is already settled, a matter which is far from undisputed." *Casey's General Stores*, 517 F. Supp. 2d at 1088. For instance, in April 2017, Interim Class Counsel's team announced that they would refile "claims against the engineering firms *who committed professional negligence*." Ex. 3 at 3-4 (emphasis added).

Finally, nearly all of these communications encourage contacting Interim Co-Lead Class Counsel without informing readers that they are free to contact their own counsel to learn how a person in their particular circumstances might best pursue their legal rights relating to the contamination of the City of Flint's water supply.

It appears that, in response to Co-Liaison Counsel's cross-motion, Interim Class Counsel recently have taken steps to address these concerns. Their April 12, 2018 update—issued three days after Co-Liaison Counsel Shkolnik first brought to the Court's and the defendants' attention the misleading prior "updates"—is now addressed to "*Proposed* Class Members" and contains a section explaining the "Class Action Process." Ex. 4 at 1-2 (emphasis added). Among other things, this section informs readers that they may "want to retain a lawyer to pursue an individual lawsuit outside of the class action." *Id.* at 2. The update thus attempts to correct *some* of the misimpressions created by prior communications. But it does not correct all of them, and the limited information the VNA Defendants have prevents them from assessing whether it adequately corrects even the misimpressions that it does address. Nor do the circumstances of the correction's issuance give the VNA Defendants confidence that the greater accuracy reflected in it will continue in future communications. The VNA Defendants therefore believe that the Court should undertake further inquiry the details of Interim Co-Lead Class Counsel's past communications with putative class members and into what, if any, measures should be taken to ensure that future communications are limited to objective, neutral information.

III. Certain of Co-Liaison Counsel's Communications With Putative Class Members Also Appear to be Potentially Misleading

Of course, all lawyers—even outside the class context—have a responsibility to communicate to the public without making misleading statements. That responsibility is especially important when an attorney communicates about his own services. Michigan Rule of Professional Conduct 7.1(a), for instance, stresses that such a communication should not "contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading." The comments to the analogous ABA Model Rule of Professional Conduct stress that even a truthful statement can be misleading "if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading." ABA Model R. Prof. Conduct 7.1, cmt. 2.

Here, in marketing themselves at the public meeting in the City of Flint on February 18, 2018, Co-Liaison Counsel made several statements—reliably documented in the transcript Co-Liaison Counsel Shkolnik attached as Exhibit F to his cross-motion—about their role in the case, the nature of the class and individual actions, and the relief that could be expected. Co-Liaison Counsel informed the crowd at that meeting, for instance, that "[m]yself and another lawyer were appointed by Judge Levy to represent all the individuals. She said two lawyers for the individuals, two lawyers for the class." *See* Dkt. 444-7, at 13. In

distinguishing his "individual" case from class cases, counsel stated that it was "the lawyers who are making a determination" about settlement in the class setting, depriving individual claimants of individual choice. *Id.* Meanwhile, another attorney at the same firm talked of settlement as an inevitability, describing the "educational programs" and "occupational programs" that will be put in place "[o]nce the settlement comes down." *Id.* at 6. And the same lawyer, after arguing that an undefined "they" wanted the group "to believe … that you don't have damages," told the crowd that "[p]art of [Co-Liaison Counsel's] job today [wa]s to correct those misinformation [sic] and provide you with a little bit more of the truth." *Id.* Co-Liaison Counsel also offered several characterizations of the nature of various defendants' conduct, both inside and outside litigation.

These statements could be misleading; indeed, the statements appear misleading for many of the same reasons that Interim Co-Lead Class Counsel's statements appear misleading. Co-Liaison Counsel's "town hall" statements could suggest that the role of Co-Liaison Counsel is to personally represent each individual plaintiff who chooses not to take part in a class action. *But see* Dkt. 234 (describing the duties of individual liaison counsel in this case); *In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, 223-24 (D.N.J. 1999) ("It appears the responsibilities of liaison counsel typically involve advising lead counsel on local procedural matters, coordinating administrative matters, distributing communications between

the Court and other counsel, convening meetings of counsel and advising parties of developments in the case.") (internal quotation marks omitted). The statements imply a binary choice between two groups of lawyers. The statements could further imply that class actions deprive class members of individual choice or control over their claims. They describe the settlement as something that is forthcoming. And they suggest that Co-Liaison Counsel are the only actors who are offering the truth. Not only do such statements contain misleading elements, but they also appear "likely to create an unjustified expectation about the results the lawyer can achieve[.]" Mich. R. Prof. Conduct 7.1(b).

Counsel appointed to "lead roles" such as liaison counsel "assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel." MANUAL FOR COMPLEX LITIGATION § 10.22 (2004). When counsel fails to satisfy those duties, the Court can take appropriate remedial action. *See In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 440-42 (S.D. Tex. 1999) (voiding class settlement opt-outs where counsel for putative class in related action sent misleading solicitation letter encouraging opt-outs); *see generally* Dkt. 234 at ¶¶ 1(c)(viii) and (ix) (requiring both Interim Co-Lead Class Counsel and Plaintiffs' Co-Liaison Counsel to "act fairly, efficiently, and economically in the interests of all parties and parties' counsel" and retaining authority to modify the order appointing them "at

any time"). In this case, the VNA Defendants believe that corrective communications from Co-Liaison Counsel are necessary to clarify their role in the case, the nature of the individual actions, and the present status of settlement.

CONCLUSION

The Court should order Interim Co-Lead Class Counsel and Plaintiffs' Co-Liaison Counsel to correct each and every misimpression that their prior communications with members of the Flint community may have caused.

Respectfully submitted,

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Dated: April 30, 2018.

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF System, which will send notification to the ECF counsel of record.

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