

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

Concerned Pastors for Social Action, et al., Case No. 16-10277
Plaintiffs, Hon. David M. Lawson

v.

Nick A. Khouri, et al.,
Defendants.

**CITY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO
ENFORCE SETTLEMENT AGREEMENT**

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STATEMENT OF THE ISSUES PRESENTED

- 1) Will requiring that counsel for the City Defendants certify that “under penalty of perjury, based on information and belief formed after reasonable inquiry, that the statements and information contained on this form and in the attached documents are true, accurate, and complete,” further the purpose of the Settlement Agreement, in a more efficient way, without upsetting the basic agreement of the parties?

- 2) Will filing of Plaintiffs’ proposed forms further the purpose of the Settlement Agreement, in a more efficient way, without upsetting the basic agreement of the parties?

CONTROLLING AUTHORITY SUPPORTING MOTION
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I. INTRODUCTION

The City of Flint and City Administrator R. Steven Branch¹ (“City Defendants”) respectfully oppose Plaintiffs’ Motion to Enforce Settlement Agreement (Dkt 155). This motion seeks to force the City to adopt Plaintiffs’ proposed status report forms and file copies of those forms with the Court. Contrary to Plaintiffs’ implications, the City Defendants oppose only two aspects of Plaintiffs’ requested relief: (1) the proposed forms’ requirement that counsel for the City Defendants certify “under penalty of perjury, based on information and belief formed after reasonable inquiry, that the statements and information contained on this form and in the attached documents are true, accurate, and complete,” and (2) the filing of those proposed forms with the Court. The City Defendants concurred with the use of the forms themselves (excepting the aforementioned certification requirement) and with other amendments to the Settlement Agreement proposed by Plaintiffs.

Despite Plaintiffs’ motion, its inflammatory characterizations of the underlying facts, and its misleading implications, the City continues to meet and confer with Plaintiffs, with the goal of addressing the root causes of their concerns

¹ R. Steven Branch was recently appointed City Administrator. Since this case names the City Administrator only in his/her official capacity, Mr. Branch automatically substitutes in for his predecessor, pursuant to FED. R. CIV. P. 25(d).

in a mutually agreeable and satisfactory manner. The City Defendants respectfully request that this Court deny Plaintiffs' Motion without prejudice and allow the parties to continue their collaborative efforts to develop the protocols and procedures for the City of Flint's 2018 and 2019 service line replacements.

II. FACTUAL BACKGROUND

In February 2016, over a year before the Settlement Agreement was approved by this Court, Mayor Karen Weaver and the City of Flint launched the FAST Start pipe replacement program aimed at replacing all lead and galvanized steel service lines in the City of Flint. Through this FAST Start program, the City has contracted with various private firms to replace lead and galvanized steel service lines. During 2016 and 2017, Brigadier General Michael McDaniels (ret) led the City's FAST Start office as it coordinated service line replacement activity, including community outreach, review and development of accurate city records, public relations efforts, excavation and examination of service lines, management of contractors, pipe replacement, reporting, and post-replacement restoration work across the city.

By early 2017, Phases I through III of the FAST Start program resulted in the replacement of 899 lead or galvanized steel service lines. In addition, excavations by City contractors identified an additional 280 homes with a copper to copper connection that did not require replacement. Lessons learned from these early phases

were incorporated into the planning for Phase IV, the planned service line replacement activity in 2017.

The City issued an initial “Request for Proposal” (“RFP”) for Phase IV in January 2017; however, various issues led to that RFP being amended and reissued on February 16, 2017. *See Exhibit A: Phase IV FAST Start RFP*. Bids from contractors were due on March 3, 2017. *See id.* at 10. The City quickly selected the winning bids, and the Phase IV contracts were approved by the Flint City Council on March 23, 2017, and by the Receivership Transition Advisory Board (RTAB) on March 29, 2017, one day after this Court entered the Settlement Agreement in this action. *See Exhibit B: Flint City Council Resolution 170155*.

The City has used Phase IV of the FAST Start program as the vehicle for complying with its obligations, under the Settlement Agreement, to conduct a minimum of 6,000 excavations in 2017 and replace all lead or galvanized steel service lines identified as a result of those excavations. *See Settlement Agreement*, Dkt 147-1 at ¶¶19-20. While Phase IV was originally scheduled to be complete by mid-November, unseasonably warm weather allowed the City and its contractors to continue service line replacements into December. In total, during Phase IV, the City conducted excavations² at 7742 addresses and replaced 5357 lead or galvanized steel

² Including hydrovac excavations.

service lines that were identified through those excavations. Altogether, in Phases I-IV, the City's FAST Start program conducted 8,877 excavations and replaced 6,256 lead and galvanized steel service lines, exceeding by almost 3,000 the City's obligations under the Settlement Agreement.

During 2016 and 2017, the City's FAST Start office had only three staff members, *including* Brigadier General McDaniels. The remaining two staff members were Michigan National Guardsmen assigned to the City of Flint. The FAST Start office was responsible for coordinating the activity of numerous independent contractors and city inspectors conducting excavations and service line replacements city-wide, dealing with various unexpected events, and ensuring that the project was meeting its projected goals and staying within budget. Measured by the total excavations and service line replacements, the City's efforts were a smashing success. The City's FAST Start office not only met its target numbers for 2017, but completed, in a single year, almost half of the City's obligations under the three-year Settlement Agreement.

While of the success of Phase IV can be attributed, in part, to the lessons learned in Phases I-III, the scale of Phase IV brought its own challenges, many of which did not become evident until work was well underway. In addition, the City had to work within the structure of the bids and proposals that had been generated prior to the entry of the Settlement Agreement to fulfil the City's obligations under

that Settlement Agreement. Finally, the City continues to operate under well-known financial constraints. Many of the reporting issues raised by Plaintiffs can be attributed to one or more of those challenges.

Throughout 2017, one of the largest challenges faced by the City in meeting its reporting obligations was this: the information requested by Plaintiffs has not been within the City's *direct* possession and control. Instead, the City had to request information from the contractors who were conducting the actual service line replacements. Those contractors, in many cases, had to retask or reassign personnel to gather that information and forward it to the FAST Start office. If clarifications of that information was needed, the request for clarifications and the response would have to travel out "to the field" and back again.

As a practical matter, the specific reporting requirements under the Settlement Agreement could not be "built in" to the City's contracts with its contractors for the simple reason that bids on those contracts were solicited before the Settlement Agreement was finalized. Thus, the City was forced to improvise data collection protocols, within a pre-existing framework, in order to satisfy the requirements of the Settlement Agreement. Additionally, in some circumstances, replacement of lead and galvanized steel service lines were prioritized over gathering and reviewing data. For example, the City's November 28, 2017 status report was delayed for eight days,

as the FAST Start office and the City's contractors utilized the unseasonably warm weather to continue service line replacement activities for as long as possible.³

In December 2017, Brigadier General McDaniels and his team successfully completed Phase IV and turned the FAST Start office over to AECOM, an internationally renowned engineering firm with experience in managing large-scale public works projects retained by the City of Flint to manage service line replacement activity in 2018 and beyond. AECOM has hit the ground running and is working to bring their expertise to bear. With the Settlement Agreement's requirements known at the outset, AECOM personnel can incorporate those obligations into their planning in a way not previously possible.

III. ARGUMENT

Plaintiffs' request for relief comes in two parts. First, they ask that the Court order the City to adopt their proposed "Status Report Certification Form" for use with the City's quarterly status reports. Second, they ask that the Court order that these certification forms be filed with the Court. The Court should deny these requests because Plaintiffs have failed to show how either will advance the purposes of the settlement agreement or not upset the basic agreement of the parties.

³ The City notified Plaintiffs on November 30 of this delay and provided a partial status report at that time. *See Exhibit C: 11/30 Preliminary City Status Report.*

In their motion, Plaintiffs cite to numerous cases that stand for the proposition that courts retain jurisdiction to enforce consent decrees. Accepting *arguendo* that the Settlement Agreement here can be analyzed as a consent decree resulting from the mutual agreement of the parties, the Sixth Circuit has stated that:

“To modify such [agreements], the court need only identify a defect or deficiency in its original [agreement] which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, or because circumstances and conditions have changed which warrant fine-tuning the decree. A modification will be upheld if it furthers the original purpose of the [agreement] in a more efficient way, without upsetting the basic agreement between the parties.”

Heath v. De Courcy, 888 F.2d 1105, 1110 (6th Cir. 1989). The Sixth Circuit further explained that the trial court must balance “the interest in preserving [agreements] between private parties against the public interests sought to be achieved through modification.” *Id.*

The main purpose of the Settlement Agreement can be found in its recitals:

WHEREAS, all Parties agree that replacing all lead and galvanized steel water service lines in the City of Flint with copper water service lines will help reduce lead contamination in the City’s drinking water;

Settlement Agreement, Dkt 147-1, at 7. The reporting provisions are not an independent purpose of the Settlement Agreement, but are instead (admittedly important) mechanisms to further the overall purpose of the Settlement Agreement. Furthermore, the basic agreement of the parties, as set forth in the Settlement

Agreement, is clear: the City will conduct service line replacements with funding provided by the State of Michigan.⁴ Plaintiffs' request for relief must be analyzed in light of these purposes and the basic structure of the Settlement Agreement.

A. PLAINTIFFS' REQUESTED RELIEF WILL NOT FURTHER THE PURPOSES OF THE SETTLEMENT AGREEMENT IN A MORE EFFICIENT WAY, NOR WILL IT PRESERVE THE BASIC STRUCTURE OF THE AGREEMENT

Plaintiffs argue that they are entitled to certain reports and information under the Settlement Agreement, and the City does not dispute that they are so entitled. However, as previously noted, the City Defendants oppose only two aspects of Plaintiffs' requested relief: (1) the proposed status report form's inclusion of a signed certification requiring counsel for the City Defendants to "certify under penalty of perjury, based on information and belief formed after reasonable inquiry, that the statements and information contained on this form and in the attached documents are true, accurate, and complete," and, (2) the requirement that the proposed certification forms be filed with the Court. Plaintiffs fail to show how either of these proposals will further the original purpose of the Settlement Agreement in a more efficient way or how their proposed reliefs will not upset the basic agreement between the parties. Absent such a showing, their requested relief is not warranted.

⁴ The State of Michigan, of course, agreed to assume other obligations as well.

In regards to their proposed form's certification, Plaintiffs have refused to specify what they would consider to be "reasonable inquiry." Instead, they have made only generalized references to Rule 11 of the Federal Rules of Civil Procedure.

That rule provides, in pertinent part, that:

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

...

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

FED. R. CIV. P. 11(b).

Applying Rule 11 to the situation here, a signed certification would only serve to establish that the signer believes, after an inquiry "reasonable under the circumstances," that the factual contentions have evidentiary support. Such certification would essentially be meaningless, as any counsel could truthfully and correctly assert that evidentiary support exists when their client provides them with information. *Id.* Assuming that counsel for Plaintiffs would not be satisfied with this position, counsel for the City Defendants is left to assume that an active and thorough audit of all information received will be necessary to avoid unwarranted accusations of perjury or other sanctions.

Such audits would be burdensome and time consuming. They would unnecessarily add to the cost of conducting service line replacements and would thus frustrate the purpose of the Settlement Agreement by reducing the funds available to actually conduct service line replacements. Furthermore, even discounting the cost and burden of conducting such an audit, Plaintiffs' proposed certification would necessarily increase the time needed to generate the required status reports and collect requested information.

For example, the status reports required under Paragraph 117 of the Settlement Agreement will be due on the 28th of February, May, August, and November. Auditing those reports will either require that those reports be delayed (to allow the auditors time to review all necessary files and reports) or the information will need to be gathered far in advance of the reporting dates, thus making the data incomplete. Neither outcome furthers the purpose of the settlement agreement in a more efficient way.

In addition, the basic agreement between the parties is that the City will conduct service line replacements, with State-provided funding, while the Plaintiffs provide oversight. By seeking to impose on the City Defendants' counsel an obligation to audit all information provided by their client, Plaintiffs seek to shift their oversight responsibilities onto the City's counsel (and thus shift this burden onto the City itself). This clearly upsets the basic agreement between the parties.

Similarly, Plaintiffs fail to make any showing of how having certification forms filed with the Court will further the purpose of the Settlement Agreement in a more efficient way, nor do they make any showing of how this will not upset the basic agreement between the parties. Filing such forms with the Court cannot correct previous shortcomings, but can only constitute attempt to have the Court interject itself in future disputes without the need to have Plaintiffs request the Court's intervention. This also clearly upsets the basic agreement of the parties, which calls for the parties to work collaboratively to further the purposes of the Settlement Agreement, with the Court as an arbiter of last resort.

B. THE COURT SHOULD ALLOW THE CITY DEFENDANTS TO CONTINUE WORKING WITH PLAINTIFFS TO DESIGN AND IMPLEMENT IMPROVED DATA COLLECTION AND REPORTING PROCESSES AND PROTOCOLS

Despite opposing the specific relief sought by Plaintiffs, the City recognizes that the Plaintiffs are entitled to accurate and timely reports and information, as specified in the Settlement Agreement. In the spirit of working collaboratively with all Parties to the Agreement, the City has continued to engage with Plaintiffs as the City's new FAST Start project management team from AECOM develops the protocols and procedures for Phases V and VI.⁵ In essence, the City and AECOM are incorporating, among other things, the necessary data collection and reporting

⁵ The service line replacements to occur in the 2018 and 2019, respectively.

protocols as a core factor in planning and development, instead of grafting them onto an existing plan. This will result in increased efficiency and accuracy, benefiting all parties and the general public.

For example, AECOM's initial process flow development has mapped out the service line replacement process from start to finish, and has identified 18 points at which time-stamped data will be collected and logged in a centralized database to facilitate reporting. **See Attachment D: AECOM Draft Process Flowchart.** While the full details of Phase V's protocols are currently being developed, this development process represents the implementation of a number of lessons learned from Phases I-IV, including but not limited to:

- Centralizing data collection, to the extent possible, instead of relying on the recordkeeping and reporting of the City's contractors by request or as otherwise needed.
- Collecting necessary and/or critical data in real time, to the extent possible, instead of periodically gathering that information from the City's contractors.
- Collecting data on non-responses to requests for consent to replace service lines, in addition to recording formal declinations;

In short, the City submits that the purpose of the Settlement Agreement will be more efficiently furthered by collaborating with Plaintiffs to develop a process to

better manage the replacement of lead and galvanized service lines in the City of Flint. By working collaboratively, the Parties can ensure that the protocols and processes that will be utilized will accurately capture, record, and report the necessary data. In addition to more efficiently furthering the purpose of the Settlement Agreement, implementing these protocols on the front end will greatly reduce or eliminate the need for judicial intervention in the future, thus respecting the basic agreement between the parties.

At minimum, there is no pressing need for immediate action by this Court. While the Parties next status reports are due on February 28, winter prevents any significant service line replacement activity from occurring until spring. The parties thus have time to collaboratively develop and implement mutually acceptable protocols and procedures that will prospectively ensure that the required data is accurately captured and timely reported. Should Plaintiffs ultimately be unsatisfied with the protocols and procedures that result from this collaborative endeavor, they would retain the right to seek judicial relief at a later time.

IV. CONCLUSION

For the reasons stated, the City Defendants respectfully request that this Court deny, without prejudice, Plaintiffs' motion, and allow the City and its new project management team to continue working collaboratively with Plaintiffs to most

efficiently achieve the shared goal of all parties to the Settlement Agreement: the replacement of all lead and galvanized service lines in the City of Flint.

Respectfully submitted,

/s William Y. Kim (P76411)

Dated: January 17, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2018, I electronically filed the foregoing pleadings using the ECF system which will send notification of such filing to the counsels of record.

Dated: January 17, 2018

/s William Y. Kim (P76411)