

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

CONCERNED PASTORS FOR SOCIAL  
ACTION, et al.,

Plaintiffs,

v.

NICK A. KHOURI, et al.,

Defendants.

Case No. 16-10277

Hon. David M. Lawson

**Expedited Consideration  
Requested**

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**PLAINTIFFS' FOURTH MOTION TO ENFORCE SETTLEMENT  
AGREEMENT**

Plaintiffs Concerned Pastors for Social Action, Melissa Mays, American Civil Liberties Union of Michigan, and Natural Resources Defense Council respectfully move the Court to order relief necessary to ensure the City of Flint complies with its obligations under the Settlement Agreement to (1) conduct excavations and service line replacements at all eligible addresses in Flint, prioritizing specific addresses likely to have lead and galvanized steel service lines; (2) comply with the monitoring requirements of the Lead and Copper Rule; (3) timely report information about its service line replacement activities, including its in-person outreach to residents; and (4) conduct mail and in-person outreach to residents to obtain their permission to conduct excavations and replacements.

Plaintiffs respectfully seek expedited consideration of this motion because it concerns violations of the City's obligations to complete service line excavations and replacements at homes in Flint that are currently scheduled to end on November 30, 2020. Plaintiffs only recently obtained information confirming that the City is violating these obligations. Flint residents must also submit a form giving the City permission to replace their service lines by September 18, 2020. Although the Court may order extensions of these deadlines to remedy the City's violations of the Agreement—and indeed, that may be necessary—that would likely extend the service line replacement program through spring 2021 because of the City's inability to conduct service line work during the winter. Plaintiffs thus seek to resolve the issues raised in this motion as soon as possible, so as not to further delay relief to Flint residents, while also ensuring that residents have every opportunity to receive the service line excavation to which they are entitled as part of the Agreement. Plaintiffs therefore respectfully request an expedited hearing and resolution of the issues raised in this motion.

On September 2, 2020, counsel for Plaintiffs communicated with opposing counsel in accordance with Local Rule 7.1(a) explaining the nature of the relief sought in this motion and seeking concurrence in the relief. As described in the brief accompanying this motion, Plaintiffs and the City reached a preliminary agreement on one issue, regarding the City's violation of its obligation to conduct

in-person outreach to residents to obtain permission for service line replacements. However, given the pipe replacement program's fast-approaching deadlines, Plaintiffs include a discussion of this issue in their brief to preserve their ability to promptly seek relief on this issue. After the City provides documentation to Plaintiffs demonstrating full compliance with the Agreement's outreach requirements, Plaintiffs will promptly inform the Court and not seek further relief on this issue.

The parties were otherwise unable to resolve the majority of the disputed issues. Beyond the relief relating to outreach, counsel for the City indicated that the City would oppose the relief requested in the motion. Counsel for State Parties did not provide a position, stating that he had not yet had the opportunity to discuss the relief requested with State Parties.

Dated: September 4, 2020

Respectfully submitted,

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**PLAINTIFFS' BRIEF IN SUPPORT OF FOURTH MOTION  
TO ENFORCE SETTLEMENT AGREEMENT**

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## **CONCISE STATEMENT OF THE ISSUE PRESENTED**

To protect Flint residents from lead exposure, the Settlement Agreement in this case requires the City of Flint to excavate water service lines at all eligible homes where residents have given the City permission to conduct work on their properties; conduct outreach to residents at all eligible homes to obtain permission to conduct this work; regularly monitor the City's tap water for lead in compliance with the Lead and Copper Rule; and provide reports to Plaintiffs showing the City's compliance with the Agreement. The City is violating these requirements by (1) refusing to conduct excavations at certain eligible homes; (2) violating the Lead and Copper Rule's tap-water monitoring requirements; (3) neglecting to timely provide Plaintiffs with required reports; and (4) failing to conduct required outreach at homes to obtain residents' permission to conduct service line excavations. Given the service line replacement program is scheduled to end on November 30, 2020, should the Court order the relief requested by Plaintiffs in this motion, which is designed to ensure the City's immediate and continued compliance with the Settlement Agreement?

**CONTROLLING AUTHORITY**

*Shy v. Navistar Int'l Corp.*, 701 F.3d 523 (6th Cir. 2012)

## INTRODUCTION

In March 2017, the parties entered into a Court-ordered Settlement Agreement resolving Plaintiffs' claims under the Safe Drinking Water Act concerning lead contamination in Flint's tap water. The Agreement required the City to remove lead and galvanized steel service lines in Flint to reduce the long-term risk of lead exposure to residents.

To that end, the Agreement, as later modified by the Court, requires the City to complete service line excavations at all eligible homes in Flint and replace those service lines found to be lead or galvanized steel. To maximize participation in the program, the City must conduct robust outreach by mail and in person to obtain residents' permission to complete work at their homes. By October 31, 2020, the City must complete work at specific homes more likely to have lead and galvanized steel service lines based on predictive modeling. By November 30, 2020, the City must complete work at all eligible addresses in Flint.

As the pipe replacement program is nearing a close, the City is violating the Agreement in three ways that frustrate the commitments it made to the parties, the community, and the Court. First, the City is refusing to conduct service line excavations at homes in certain neighborhoods in Flint because City staff "know" that all of those homes have copper service lines. But the City cannot unilaterally

exclude these homes from the pipe replacement program. The residents who live in these homes are entitled to have their service lines checked and replaced if needed.

Second, the City is violating the requirements of the Agreement and the Safe Drinking Water Act to properly monitor Flint's tap water for lead. The City still is not collecting tap-water samples from a pool of high-risk sites most likely to show a lead contamination problem. These violations compromise Flint's ability to accurately measure the amount of lead in its tap water. Even though the City will have removed most of its lead service lines through the pipe replacement program, lead contamination remains a concern because residents may have interior lead plumbing, and lead service lines may remain in the ground. Tap-water sampling will be an essential part of the City's ongoing obligations to prevent further lead exposure to its citizens, but the City still lacks a plan to conduct this monitoring.

Third, the City is failing to timely report information on its attempts to obtain consent from residents to complete service line excavations. This lack of transparency prevents Plaintiffs from promptly identifying compliance problems and working with the parties to remedy them.

Additionally, the City has not yet complied with the Agreement's outreach requirements. The City is required to visit residents' homes multiple times to ensure every resident is aware of their right to participate in the service line replacement program. While the City and Plaintiffs have reached a preliminary

agreement to remedy this violation, given the upcoming deadline in two weeks for residents to give the City permission to conduct service line excavations, Plaintiffs have included discussion of this issue in this motion. *See infra* pp. 13-15, 22-24.

Taken together, the City's lapses in compliance threaten to exclude residents from the pipe replacement program, leave hundreds of lead and galvanized steel service lines in the ground, and undermine residents' confidence in the City's declining lead levels in tap water. Plaintiffs therefore seek the Court's intervention. Because of the upcoming deadlines of the City's service line replacement program, Plaintiffs respectfully request expedited consideration of this motion.

## **STATEMENT OF FACTS**

### **I. Service line excavations and replacements**

#### **A. The City's obligation to complete excavations and service line replacements at all eligible homes in Flint**

In March 2017, Plaintiffs, the City of Flint, State Defendants, and the State of Michigan entered into a Court-ordered Settlement Agreement (Agreement) resolving Plaintiffs' claims under the Safe Drinking Water Act. *See* Settlement Agmt. (Agmt.), ECF No. 147-1. A key goal of the Agreement is to replace all lead and galvanized steel service lines in Flint to reduce lead contamination in the City's tap water. Agmt. 3, PageID.7355; *see* City Defs.' Resp. to Pls.' Mot. to Enforce Settlement Agmt. 7, ECF No. 157, PageID.7936. To that end, the Agreement requires the City to excavate thousands of service lines at homes in

Flint and replace those made of lead or galvanized steel. *See* Agmt. ¶¶ 8-20, PageID.7365-7371. It requires State Defendants and the State of Michigan (together, “the State”) to provide up to \$97 million to fund this work. *Id.* ¶¶ 21-22, 27, PageID.7371-7372, 7376.

In 2018, Plaintiffs sent the City a Notice of Violation regarding its failure to focus its service line excavations at homes likely to have lead or galvanized steel service lines. Tallman Decl. Ex. A; *see* Pls.’ Post-Hr’g Br. Regarding Mot. to Enforce Paras. 29 & 30 of Settlement Agmt. 2, ECF No. 203, PageID.10157. As a result of this misfocus, the City dug up nearly 2,000 copper service lines that did not need to be replaced before conducting work at homes that likely needed pipe replacements. 2d Suppl. Woods Decl. ¶ 5, ECF No. 186-3, PageID.9488.

To resolve the issues raised in the Notice of Violation, in March 2019, the Court ordered modifications to the Agreement, agreed to by the parties, requiring the City to prioritize excavations at homes most likely to have lead and galvanized steel service lines. Stipulation & Notice, ECF No. 207; Order Amending Settlement Agmt. (2019 Order), ECF No. 208. To identify which homes the City would target, the parties agreed to use a statistical model developed by Professors Eric Schwartz and Jacob Abernethy that accurately predicts the likelihood that a home in Flint has a lead or galvanized steel service line (the Model). *See* 2019 Order ¶¶ 1, 3, PageID.10345-10347.

Pursuant to the 2019 Order, Plaintiffs provided the City with a list of about 4,000 unexcavated addresses with the highest likelihood of having lead or galvanized steel service lines according to the Model (the “Prioritized Addresses”). *See id.* ¶ 1, PageID.10345. The Order states that the City “shall” conduct excavations at “all” the Prioritized Addresses. *Id.* ¶ 3, PageID.10346-10347. After a delay because of the COVID-19 pandemic, the parties agreed that the City would complete all required work at the Prioritized Addresses by October 31, 2020. Order Modifying Settlement Agmt. ¶ 1 (2020 Order), ECF No. 217, PageID.10409. The City must conduct service line excavations and replacements at all other eligible homes in Flint by November 30, 2020. 2020 Order ¶ 1, PageID.10409.<sup>1</sup>

**B. The City’s refusal to conduct service line excavations in the University Park and Smith Village neighborhoods**

In August 2019, the City informed Plaintiffs that it had not assigned addresses located in two neighborhoods in Flint—University Park and Smith Village—to its contractors for service line excavations and replacements. *See Tallman Decl.* ¶ 2. The City sought an exemption of the Agreement’s requirements based on its belief that all homes in these two neighborhoods have copper service

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<sup>1</sup> Under the Agreement, an “eligible” home is one that either currently has an active water service account with the City, or had an active water service account as of March 28, 2017 (regardless of any subsequent water shutoff). Agmt. ¶¶ 11, 14, PageID.7365-7367; 2020 Order ¶ 4, PageID.10411 (requiring City to allow residents to participate in the service line replacement program by submitting a consent form through at least September 18, 2020).



lines because they were built in the 1990s. *Id.* Plaintiffs said that they would not agree to the exemption, and asked that the City produce documents proving that each home in these neighborhoods had a full copper service line installed at the time of construction. *Id.*; *id.* Exs. B, C.

Over the next several months, Plaintiffs repeatedly told the City they would not allow homes in University Park and Smith Village to be exempted from the program and asked for the relevant documentation. The City did not respond. *See, e.g., id.* ¶ 3 & Exs. C, D, E, F. Plaintiffs reiterated their position after the City resumed its pipe replacement work, following a delay due to the COVID-19 pandemic. *See id.* ¶ 4. On August 7, 2020—nearly a year after Plaintiffs initially requested the information, and as final negotiations on the closeout of the pipe replacement program were underway—the City finally sent Plaintiffs a spreadsheet with information for the University Park and Smith Village homes. *See id.* Ex. G.

The spreadsheet was incomplete and did not contain information verifying the service line material for each home. For about two-thirds of the homes, the spreadsheet appeared to show the material for only half of the service line (service lines have both a public and private portion). *See id.* at ATT-01, -05, -09, -13, -17 (see entries in column D). For many of these homes, the other half of the service line is either listed as “?” or left blank. *Id.* (see entries in column D). Meanwhile, the spreadsheet says that the service line material for certain homes has been

“assumed” because there are no written records of service line material. *See, e.g., id.* at ATT-26, -27 (comments for cells D57, D59, D67). The spreadsheet further acknowledges that the City is missing written records of service line material for most homes in these two neighborhoods. *See id.* at ATT-26 (noting that “hardly any” of the cards for these homes have the “line size” field filled out); *see also id.* Ex. H (email from City stating that certain information in the spreadsheet was assumed for these homes and that there were no existing service line material records at the time these homes were built).

On August 18, 2020, Plaintiffs again informed the City that they would not agree to exempt addresses in University Park and Smith Village from the pipe replacement program. *Id.* Ex. I. Although the City has since stated that it would consider conducting excavations at certain homes in University Park and Smith Village, the City is still refusing to conduct excavations at all homes in these neighborhoods. *Id.* Ex. CC. Thus, to date, the City has not completed work at those homes, or conducted the required outreach to residents to inform them of their right to participate in the pipe replacement program.

## **II. Tap-water monitoring**

### **A. The City’s obligations to conduct tap-water monitoring in compliance with the Lead and Copper Rule**

The Agreement requires the City to comply with the tap-water monitoring requirements in the Lead and Copper Rule (Rule), a set of regulations issued by

EPA under the Safe Drinking Water Act. *See* Agmt. ¶¶ 46-49, PageID.7384-7385.

The Rule requires water systems of Flint's size to collect at least 60 tap water samples every six months, between January and June and between July and December. 40 C.F.R. § 141.86(c), (d).

Under the Rule, water systems must test for lead at residents' taps under worst-case conditions, including by testing at homes that have the highest risk of elevated lead levels. *See* Maximum Contaminant Level Goals and National Primary Drinking Water Regulations, 56 Fed. Reg. 26,460, 26,514 (June 7, 1991). Sampling at high-risk homes helps accurately detect elevated lead levels in tap water, because lead is not uniformly distributed throughout a water system. *See id.* Rather, lead particles may break away from lead-containing service lines, plumbing, or solder and travel into a home without dissolving and spreading evenly throughout the system. Sampling at high-risk homes thus makes it more likely that a water system will detect whether lead is breaking off or leaching from pipes and solder. Indeed, the City's disregard of this very requirement delayed detection of lead contamination at the start of the water crisis. *See* Op. & Order Granting Prelim. Inj. 8-11, ECF No. 96, PageID.6298-6301; Tallman Decl. Ex. J.

Under the Rule and its Michigan counterpart, water systems must collect tap-water samples from a pool of targeted sites that meet specific high-risk criteria. 40 C.F.R. § 141.86(a)(1); Mich. Admin. Code R. 325.10710a(1)(c)-(d). The pool

must be large enough to ensure the water system can collect the minimum required number of samples during each monitoring period. *Id.* The homes in the pool must be “Tier 1 sites,” which are single-family structures that either are served by lead service lines or contain interior lead plumbing. Mich. Admin. Code R.

325.10710a(1)(c); 40 C.F.R. § 141.86(a)(3).<sup>2</sup> If there are insufficient Tier 1 sites in the system to ensure an adequate number of samples, the sampling pool may include “Tier 2 sites,” which are multiple-family residences that are either served by a lead service line or contain interior lead pipes. Mich. Admin. Code R.

325.10710a(1)(d); 40 C.F.R. § 141.86(a)(4).

Water systems must report the results for each six-month monitoring period to the state regulating agency, here the Michigan Department of Environment, Great Lakes, and Energy (EGLE), ten days after the monitoring period ends (i.e., by January 10 and July 10 each year). 40 C.F.R. § 141.90(a)(1). Reporting must include the location of each sampling site and an identification of the high-risk criteria under which the site was selected for the system’s sampling pool. *Id.* The

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<sup>2</sup> Michigan’s Lead and Copper Rule has more stringent high-risk criteria than the federal Rule. Under the federal Rule, Tier 1 and Tier 2 sites may also include homes with copper plumbing with lead solder. Compare 40 C.F.R. § 141.86(a)(3), *with* Mich. Admin. Code R. 325.10710a(1)(c)-(d). Since Flint is required to comply with both the Michigan and federal regulations, Plaintiffs present Michigan’s stricter criteria.

state regulating agency uses the monitoring results to calculate the 90th percentile lead level, a statistical measure of the lead in the water system.

**B. The City's monitoring lapses over the past three monitoring periods**

Although the State conducted tap-water monitoring for Flint's water system during the height of the water crisis, the City resumed its own testing as of July 2018. Tallman Decl. Ex. K. During three of the next four monitoring periods, the City has failed to meet its tap-water monitoring obligations.

For the January to June 2019 monitoring period, the City did not sample from a pre-established pool of high-risk homes. Although it collected 129 samples during the monitoring period, as of the reporting deadline (July 10, 2019), it had verified that only 35 of the sites met the Rule's high-risk criteria, well below the minimum of 60 sites. *Id.* Ex. L. Other sites the City sampled were invalidated or not verified by the City as meeting the Rule's high-risk criteria, indicating that the City was not sampling based on pre-verified Tier 1 sites. *Id.* EGLE issued a notice of violation to the City, and, based on this set of 35 verified samples, calculated the 90th percentile lead level for the City's water as 3 parts per billion (ppb). *Id.*

The City ultimately verified that an additional 26 sites met the Tier 1 criteria, raising the total verified sites to 61. *Id.* Ex. M. With the full set of 61 sites, the 90th percentile lead level doubled to 6 ppb. *Id.* Plaintiffs conferred with the City about this non-compliance to discuss how the City would resolve these issues

and identify sufficient high-risk sites for its sampling pool. *See id.* Ex. N. Although the City discussed these issues with EGLE, as of September 2019, “[n]o decisions” had been made “regarding how the City will meet its [Lead and Copper Rule] monitoring obligations going forward.” *Id.* Ex. O.

During the next monitoring period (July–December 2019), the City collected only 49 samples from verified Tier 1 homes, *see id.* Ex. P, again below the minimum required 60 samples. On March 3, 2020, EGLE issued a notice of violation of the Rule’s requirements. *Id.* EGLE also instructed the City to provide an updated version of its sampling plan for the next six-month monitoring period. *Id.* Ex. Q. Recent amendments to the Michigan version of the Lead and Copper Rule (Michigan Rule) separately required water systems to submit a new sampling pool to the State by January 1, 2020, identifying “sufficient sites to ensure the water supply can collect the number of tap samples required” under the Michigan Rule. Mich. Admin. Code R. 325.10710a(1)(a).

The City belatedly submitted its sampling pool in February 2020. Tallman Decl. Ex. R. Only thirteen sites are listed as Tier 1 sites served by lead service lines. *Id.* The remaining 392 sites listed are categorized as Tier 2, with the service line material listed as “tbd,” and the interior plumbing material left blank. *Id.*

From January to June 2020, the most recent monitoring period, the City again failed to collect at least 60 samples from pre-verified high-risk sites. Instead,

as of August 31, after again attempting to verify whether addresses met the Rule's high-risk criteria *after* it collected samples from those sites, the City could verify that only 49 of its samples were from Tier 1 or Tier 2 sites. *See id.* Exs. S, H.

**III. The City did not timely report required information concerning its outreach efforts**

The Agreement requires the City to report its progress on the pipe replacement program monthly to Plaintiffs. The City's reports must include (1) the date and recipient address of any letter sent requesting a resident's permission to conduct a service line excavation and replacement; and (2) the date, time, and result of any in-person outreach attempts to obtain a resident's permission to conduct a service line excavation and replacement. 2019 Order ¶ 6.v, PageID.10349. Plaintiffs use this information to monitor the City's compliance and to inform their own outreach, supplemental to the City's, to further encourage hard-to-reach residents to participate in the pipe replacement program. *Cf.* Tallman Decl. Exs. T, U (noting that Plaintiffs use data in the City's reporting on residents who have declined replacement to guide Plaintiffs' community outreach).

The City failed to timely report information on its outreach activities in December 2019 and all of 2020. The City's pipe replacement program was active in December 2019 and in February, March, June, and July 2020. Nonetheless, the City did not report any information on its written and in-person consent attempts in December 2019 and in 2020 until August 11, 2020. *See* Tallman Decl. ¶ 5 & Exs.

U, V. This was so despite requests from Plaintiffs to provide the required status reports. *See, e.g., id.* Exs. U, W. Even after receiving Plaintiffs' Notice of Violation on this issue on August 18, the City inexplicably again failed to include the required data when it submitted its August 2020 status report on August 31. Tallman Decl. ¶ 29 & Ex. X. On September 1, the City stated that it would "make every reasonable effort to comply with its reporting obligations." *Id.* Ex. CC.

#### **IV. Outreach to obtain residents' permission to conduct excavations and pipe replacements**

The Agreement requires the City to undertake "reasonable efforts" to contact residents to obtain their permission to conduct a service line excavation (and replacement, if needed) on their property. Agmt. ¶ 15, PageID.7367. Residents provide the City with permission to excavate and replace a lead line by completing a City-provided consent form. "[R]easonable efforts" to obtain consent include at least two in-person attempts to contact the resident at the address, "with at least one of the two attempts being made during the evening (after 5 p.m.) or on a weekend (Saturday or Sunday)." Order Amending Settlement Agmt. ¶ 15.a, ECF No. 174, PageID.8711. The Agreement required the City to complete these outreach efforts by late 2018. *See* Agmt. ¶ 15.b, PageID.7368 (requiring completion of outreach by September 2018, 18 months after the Agreement's Effective Date).



The Agreement requires two in-person visits because people may not be home when the City first happens to come by. The requirement that the City conduct one outreach visit either after 5 p.m. or on the weekend is important for people who are not at home during normal business hours. And a mailing captures people who have missed both in-person visits, or who are otherwise reluctant to answer their door.

By early 2019, the City still had not yet satisfied these outreach obligations and had not yet received permission to conduct service line excavations at thousands of homes in Flint. To address this problem, in February 2019, Plaintiffs and the City agreed to modify the Agreement to give the City additional time to conduct outreach to residents that had not yet given the City permission to conduct a service line excavation, and to reach back out to residents the City purportedly had not been able to contact. 2019 Order ¶ 15, PageID.10355.

On August 11, 2020, the City provided Plaintiffs with a list of about 800 so-called “non-responsive” homes (“Non-Responsive List”). *See* Tallman Decl. Ex. V. The City informed Plaintiffs that it had made the additional required outreach (mailing and in-person visits) to these 800 homes, but was unable to contact the residents to get permission to conduct a service line excavation. *See id.* Ex. Y. When the City provided the Non-Responsive List to Plaintiffs, the City said that it

was not requiring its contractors to revisit these homes to try to obtain permission for a service line excavation. *Id.*

The City's data did not match its claims of compliance. Rather, the Non-Responsive List included 466 homes where the City either made only one in-person visit (instead of the required two), or did not visit the home after 5 p.m. or on the weekend, as required. Tom Decl. ¶¶ 14, 16. About 189 homes did not receive any mailing from the City before being placed on the Non-Responsive List, as the Agreement required, although the City later sent letters to these homes, as required by the 2020 Order. *Id.* ¶¶ 20, 22; 2020 Order ¶ 5, PageID.10412.

According to the Model, nearly 90 homes that have not received the minimum in-person outreach from the City have a greater than 25% chance of having a lead service line. Webb Decl. ¶ 20. If the City does not make further attempts to get consent from these homes to excavate and replace the service lines, lead service lines at many of these homes will be left in the ground.

\* \* \*

On August 18, 2020, Plaintiffs sent the City a Notice of Violation describing the City's non-compliance with its obligations under the Agreement. *Id.* Ex. I. After the parties conferred, the parties reached a preliminary agreement for the City to remedy the outreach violations by completing additional in-person visits after 5 p.m. or on a weekend to homes on the Non-Responsive List that have not

yet received the required visits by September 9. Tallman Decl. Ex. CC. Plaintiffs requested that the City provide documentation of its completion of these visits by September 16.

Because the City has in the past failed to meet the Agreement's outreach deadlines, and in light of the upcoming September 18 deadline for residents to grant the City permission to conduct work at their properties, Plaintiffs include the outreach claim here to preserve their ability to promptly seek relief on this issue, should the City not provide the requested documentation.<sup>3</sup>

The parties have been unable to resolve the remaining violations.

### **STANDARD OF REVIEW**

The Settlement Agreement operates as a consent decree. *See Pedreira v. Sunrise Children's Servs. Inc.*, 802 F.3d 865, 871 (6th Cir. 2015). As such, the Agreement is "a prospective form of relief involving continuous court oversight." *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1094 (6th Cir. 2016). The Court has "broad equitable remedial powers" to enforce the Agreement. *Shy v. Navistar Int'l Corp.*, 701 F.3d 523, 533 (6th Cir. 2012) (internal quotation marks omitted); *see Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004).

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<sup>3</sup> As soon as the City provides verification that it has cured the violation in full, Plaintiffs will inform the Court and withdraw their claim as to the in-person outreach violations.

## ARGUMENT

### **I. The City is violating its obligations to conduct outreach and excavations in the University Park and Smith Village areas**

The City is violating the Agreement by refusing to conduct excavations at hundreds of homes in the University Park and Smith Village neighborhoods. The City's obligations are clear: The City must conduct service line excavations, and if necessary, replacements at all eligible homes in Flint by November 30, 2020, or as many as the Agreement's \$97 million in funding will cover. 2020 Order ¶ 1, PageID.10409-10410; Agmt. ¶ 28, PageID.7376. The City must complete this work at all Prioritized Addresses by October 31, 2020. 2020 Order ¶ 1, PageID.10409. The City's disregard of these terms will shut out more than a hundred Flint residents from the pipe replacement program.

The City's refusal to conduct outreach and excavations at these homes is also a public health concern. The Model the parties agreed to use to guide the pipe replacement program predicts that at least 48 homes in these areas have a lead or galvanized steel service line. Webb Decl. ¶ 23. Skipping these homes would thus present significant public health risks. It would also exclude residents from a benefit the Agreement guarantees to them, based solely on the City's say-so.<sup>4</sup>

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<sup>4</sup> To be sure, the Model also predicts that many of the service lines in University Park and Smith Village are copper. *See* Webb Decl. ¶ 23. But the City cannot ignore its obligation to conduct work at all homes in Flint just because not all of them will have lead or galvanized steel service lines.

The City's unsubstantiated belief that homes in University Park and Smith Village have copper service lines does not excuse its violations. The City has offered no credible evidence that all homes in these two areas have verified, full copper service lines. *See supra* pp. 6-7 (noting gaps in the documentation the City offered, including blanks, "?" notations, and "assumed" values for service line composition). Indeed, the City previously conducted eight service line excavations at homes in these two neighborhoods, and three of those homes needed to have their service lines replaced because they were made of lead or galvanized steel. *See Webb Decl.* ¶ 24. And the Model predicts that there are more unexcavated lead or galvanized steel service lines left in these neighborhoods. *See id.* ¶ 23.

Even if the City could support its assumptions that all remaining unexcavated homes in these neighborhoods have copper service lines, Flint residents in University Park and Smith Village are entitled to a service line excavation if they want one. Plaintiffs fought for these terms because the City's historical records on service line composition have been notoriously unreliable, and because Flint residents—after being lied to by government officials about the safety of their water—deserve incontrovertible proof that their water service lines are not made of lead. *See Tallman Decl. Exs. J, O* (City's response to Question 3).

The City agreed to the terms of the 2019 and 2020 Orders, most recently just one month ago. *See Stipulation & Notice*, ECF No. 216, PageID.10398. These

terms prevent the City from declining to go to certain homes that are eligible to have their service line excavated, regardless of whether the City believes those homes have copper service lines. 2019 Order ¶ 3, PageID.10346-10347 (the City “shall” conduct excavations at all Prioritized Addresses); 2020 Order ¶ 1, PageID.10409 (the City “will” conduct excavations at all remaining homes in Flint). The Court should reject the City’s attempt to modify the Agreement “based upon events that actually were anticipated at the time it entered into [the Agreement].” *United States v. Wayne Cnty.*, 369 F.3d 508, 513 (6th Cir. 2004) (internal quotations and citations omitted).

In sum, the City’s decision to unilaterally exclude the University Park and Smith Village homes from the pipe replacement program violates the Agreement.

## **II. The City is violating the Agreement’s tap-water monitoring requirements by failing to comply with the Lead and Copper Rule**

Since resuming responsibility for tap-water monitoring in mid-2018, the City has persistently failed to comply with the Rule’s monitoring requirements, also violating the Agreement. Agmt. ¶¶ 46-48, PageID.7384-7385.

The City still has not established a sampling pool with a sufficient number of high-risk homes that meet the Rule’s criteria. For most of the sites in the City’s sampling plan, the applicable high-risk criteria are listed as “tbd” or blank.

Tallman Decl. Ex. R. As a result, in each of the past three monitoring periods, the City has either failed to collect the Rule’s minimum required number of samples

from high-risk sites or attempted to verify whether its sampling sites meet the Rule's high-risk criteria *after* sampling at those sites. *See supra* pp. 10-12. This after-the-fact approach to validating its sampling sites is contrary to the Rule's mandate to sample based on a pre-established pool of high-risk sites. 40 C.F.R. § 141.86(a).

That the City is facing challenges identifying high-risk sites because it is replacing lead service lines is no excuse for its non-compliance. *See Tallman Decl. Ex. AA*. Those challenges were foreseeable and could have been remedied over the past three years. The City knew in March 2017 that it would be replacing its lead service lines on a fast timetable, thereby shrinking over time the potential pool of Tier 1 sites. It has had years to plan for this and identify Tier 1 sites (or Tier 2 sites, if necessary) for its sampling pool.

The City's noncompliance limits its ability to promptly detect lead contamination in its tap water. Indeed, the City's same failure to monitor at high-risk sites masked the extent of the water crisis to begin with. *See supra* p. 8. The impact can also be seen in the July to December 2019 monitoring period: the City's 90th percentile lead level was 3 ppb when based on 35 samples, but 6 ppb when it was based on 61 samples. Tallman Decl. Exs. M, L.

That the City is replacing its lead and galvanized steel service lines also does not eliminate the risks to Flint residents from contaminated drinking water.

Despite the parties' efforts to structure the Agreement's pipe replacement terms to facilitate removal of as many lead and galvanized steel service lines as possible, some will remain in Flint after the City completes its obligations. Some lead service lines will remain at abandoned homes, and some residents will decline a pipe replacement. *See id.* Ex. X (reporting 491 homes where the resident declined a pipe replacement). Still other homes may have lead-containing interior pipes or plumbing that the Agreement did not address. In short, lead-containing water infrastructure will remain in Flint after the Agreement terminates and will present a continuing risk to residents, even if the City maintains optimal corrosion control treatment. This is why the Rule requires ongoing monitoring for all water systems, and why the City must immediately remedy its monitoring violations.

### **III. The City is violating its obligations to report its outreach attempts to Plaintiffs**

The City is violating its obligation to report monthly on its outreach attempts to obtain permission from residents to complete service line excavations and replacements. *See supra* pp. 12-13. The City did not report any information on these outreach attempts in 2020, a glaring failure to comply with the Agreement's clear requirements. 2019 Order ¶ 6.v, PageID.10349.

The City's timely compliance with its reporting obligations is critical during the last few months of the pipe replacement program. Plaintiffs use the City's reporting to ensure that the City fully meets its commitment to attempt to obtain



consent from every home in Flint, to maximize the number of lead and galvanized steel service lines the City is able to find and replace. *See, e.g.*, Pls.’ Mot. to Enforce Paras. 38 & 117 of Settlement Agmt., ECF No. 173, PageID.8507-8508 (identifying failures in ensuring filter installation based on reporting). Without timely disclosures, Plaintiffs lack transparency about the City’s activities and cannot confer with the City to promptly resolve problems.<sup>5</sup>

**IV. The City is violating its obligations to conduct in-person outreach to obtain consent from residents to conduct pipe replacements**

The City has failed to conduct the required outreach—a mailing and two in-person visits—to homes where residents have not yet given the City permission to conduct a service line excavation. *See* 2019 Order ¶¶ 14-15, PageID.10354-10355. Although the City has preliminarily agreed to remedy this violation, *see supra* pp. 15-16, given the importance of this outreach and fast-approaching deadlines, Plaintiffs raise this issue with the Court now in the event that the parties are unable to fully resolve this dispute by the time the Court hears this motion.

The City’s own data show that it has not yet met these requirements for hundreds of homes. There are 466 homes on the City’s Non-Responsive List—the list of homes where the City claims it failed to obtain permission despite

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<sup>5</sup> Although the City recently said it would make “every reasonable effort to comply” with the reporting obligations, Tallman Decl. Ex. CC, the City hasn’t shown how these reasonable efforts are a change from what the City has done in the past, which has resulted in repeated non-compliance.

conducting all required outreach—where the City either did not conduct two in-person visits or failed to conduct at least one in-person visit during the evening or on the weekend. Tom Decl. ¶¶ 14, 16. Meanwhile, 189 homes had not received the required letter from the City at the time they were placed on the Non-Responsive List, raising questions about whether the City’s processes for tracking outreach will ensure compliance. *Id.* ¶ 20.

The City’s failure to conduct this outreach has deprived many Flint residents of their right to a service line replacement. Indeed, more than 200 homes on the Non-Responsive List likely have lead service lines that need to be replaced. *See* Webb Decl. ¶ 18. It is therefore essential for the City to do the required outreach not only because that is what this Court’s order requires, but also because of the potential public health consequences of failing to reach residents at these homes.

After the parties conferred regarding the relief sought in this motion, the City agreed to complete all required outreach that has not yet been completed for homes on the Non-Responsive List by September 9, 2020. Tallman Decl. Ex. CC. Meeting this deadline is critical, because the Agreement sets a deadline of September 18, 2020, for Flint residents to give the City permission to conduct a service line excavation at their property. 2020 Order ¶ 4, PageID.10411. Plaintiffs, however, note that the City has struggled to comply with these provisions of the Agreement, such that Plaintiffs have renegotiated these terms twice in an effort to

bring the City into compliance. *See supra* pp. 13-15; *see also* 2020 Order ¶ 5, PageID.10412. If the City does not promptly cure this violation, Plaintiffs respectfully seek relief from this Court as described below.

**V. Summary of requested relief**

To remedy the City's violations of the Agreement, as amended by this Court, Plaintiffs respectfully request that the Court order the City to:

(1) conduct excavations at all University Park and Smith Village homes by the deadlines set forth in the Agreement, as modified, or within 30 days after the Court grants the relief sought in this motion. *See* 2020 Order ¶ 1, PageID.10409 (setting deadlines of October 31, 2020 for Prioritized Addresses and November 30, 2020 for all other remaining addresses);

(2) (A) within 30 days, submit to the parties a sampling pool of at least 90 sites that the City has confirmed (by hydro-excavation, visual inspection, or other definitive means) meet the Rule's Tier 1 (or Tier 2 or Tier 3 as necessary) high-risk criteria; and (B) submit to the parties a detailed written plan explaining the City's processes for identifying and recruiting residents at the identified high-risk sites to participate in tap-water monitoring on an ongoing basis;

(3) comply with the disclosure requirements in Paragraph 6 of the 2019 Order and Paragraphs 5, 6, and 7 of the 2020 Order. 2020 Order ¶¶ 5-7, PageID.10412-10413; 2019 Order ¶ 6, PageID.10348-10349; and

(4) make at least one additional in-person visit to all homes that have not yet received the required in-person visits within one week of the Court's order. The additional visits must occur between 5 p.m. and 8 p.m. or on the weekend. The City must also send letters seeking permission to conduct a service line excavation to all homes that did not previously receive a letter from the City, as required by the Agreement. The City must conduct excavations at these homes if the City gets permission to do so, even if the September 18, 2020 deadline in the Court's 2020 Order has passed. *See* 2020 Order ¶ 4, PageID.10411. The City must document and report these efforts to Plaintiffs on a weekly basis until the work is complete.

Plaintiffs also respectfully request that the Court modify the Agreement by waiving the 14-day period before a party can file a motion to enforce relating to the issues raised in this motion as long as the movant has made at least one good-faith attempt to confer with the other parties prior to filing the motion and has given the parties seven days' notice of the motion. *See* Agmt. ¶¶ 129-30, PageID.7424.

### CONCLUSION

For the foregoing reasons, Plaintiffs' motion to enforce the Court-ordered Agreement should be granted.

Dated: September 4, 2020

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on September 4, 2020, I electronically filed Plaintiffs' Fourth Motion to Enforce Settlement Agreement and accompanying Brief and exhibits with the Clerk of the Court using the ECF system.

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