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

PLAINTIFFS' REPLY IN SUPPORT OF FOURTH MOTION TO ENFORCE SETTLEMENT AGREEMENT

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INTRODUCTION

As Flint's water service line replacement program nears its end, Plaintiffs ask the Court to hold the City accountable to the settlement terms it negotiated and to which it agreed. First, the City must excavate water service lines at all occupied homes in Flint. Though the City concedes the Settlement Agreement's terms are clear, it now seeks to evade them by inventing a "mutual mistake" and relying on records that do not show what the City claims. Second, the City must fix its tap water monitoring system. That the State is working with the City to improve its tap water monitoring program does not preclude this Court's intervention. The State may be willing to accept nearly 18 months of noncompliance by the City, but Plaintiffs are not. Third, the City must improve its dismal outreach efforts to Flint residents. This issue is not moot, as the City claims, simply because the City agreed to remedy the violations. The City's documents show that many Flint residents still have not been properly advised of their right to a service line inspection and replacement. Finally, the City must provide timely compliance reports to Plaintiffs. The City's choice of a slow and laborious method of data entry is no excuse.

Plaintiffs respectfully request that the Court grant Plaintiffs' motion and compel the City to finish the job the Court ordered it to do.

ARGUMENT

I. The City is obligated to conduct excavations in University Park and Smith Village because the Agreement's requirements are not premised on the availability of historical records

When enforcing a settlement agreement, the first objective is to "honor the intent of the parties." *Rasheed v. Chrysler Corp.*, 517 N.W.2d 19, 29 n.28 (Mich. 1994). Here, there is no doubt that the parties intended to require excavation of service lines at all occupied homes in Flint. The language of the Agreement and its modifications is "plain and unambiguous." *See Wyandotte Elec. Supply Co. v. Elec. Tech. Sys. Inc.*, 881 N.W.2d 95, 103 (Mich. 2016); Settlement Agmt. (Agmt.) ¶¶ 8-9, ECF No. 147-1, PageID.7365; Order Modifying Settlement Agmt. (2020 Order) ¶ 1, ECF No. 217, PageID.10409. That the City now regrets the terms it negotiated and agreed to—as recently as one month ago, s*ee* Pls.' Mot. 3-5, ECF No. 218, PageID.10428-10430; Stipulation & Notice ¶ 1, ECF No. 216, PageID.10398—does not turn the parties' shared intent into a mutual mistake.

A "mutual" mistake of fact requires both parties to be mistaken about facts in existence when the agreement was executed. *See Brown v. Cnty. of Genesee*, 872 F.2d 169, 171, 174 (6th Cir. 1989) (per curiam). That is not the case here. Plaintiffs were keenly aware that the City had some records on service line composition when the Agreement was executed and modified. Compl. ¶ 149, ECF No. 1, PageID.47; Order Granting Pls.' Mot. Prelim. Inj. 10-11, ECF No. 96,

PageID.6300-6301. With good reason, however, Plaintiffs negotiated terms that did not rely solely on those records. The City's records are often unreliable and do not show conclusively whether the public and private sides of a service line are made of lead, galvanized steel, or copper. *See, e.g.*, Tallman Decl. Ex. O, ECF No. 218-2, PageID.10593 (response to question 3); Aug. 21, 2018 Hr'g Tr. 108:22-109:7, ECF No. 193, PageID.9944-9945 (City project manager testimony that "obviously the most certain information we have on the materials is after we excavate and take photographs" and "validate" historical records). Flint residents also do not trust the City's records—a reasonable skepticism in view of the records' generally low reliability and the misrepresentations of government officials that led to the water crisis. Pls.' Post-Hr'g Br. Supp. Mot. Prelim. Inj. 11, ECF No. 89, PageID.5863.

The parties thus agreed to physical excavations—holes dug in the ground—as the *only* permissible method to verify service line composition under the Agreement. Agmt. ¶¶ 8-9, PageID.7365. And they agreed that excavations would be done at all eligible homes. 2020 Order ¶ 1, PageID.10409. The City has offered no evidence—let alone "clear and satisfactory" proof, *Johnson Family Ltd. P'ship v. White Pine Wireless, LLC*, 761 N.W.2d 353, 363 (Mich. Ct. App. 2008)—that the parties intended otherwise.

An examination of the records attached to the City's brief confirms the wisdom of the parties' approach, as these documents fall short of proving that all homes in University Park and Smith Village have copper service lines. The plot files, for example, offer no information about the composition of the private side of the service lines. They also say nothing about the pipe materials that were *installed* on the public side; as the City concedes, the files at most show what the City and contractors *planned* to do. City's Resp. to Pls.' 4th Mot. to Enforce (City Resp.) 7, ECF No. 222, PageID.10777. The plot files are also missing entire streets where the City seeks to exclude addresses from the program; for those homes, the documents provide no information about service line material, much less confirm that they are made of copper.[1] The gaps in these documents are not academic: they represent the homes of residents who, after enduring Flint's water crisis, still do not know for certain whether they have a lead service line.

The declaration from the City's data technician does not fill these gaps. Mr. Roberts appears to assume that many disputed homes have copper service lines because they are newer homes. *See* City Resp. Ex. C, PageID.10793-10794. But

[1] *Compare* City Resp. Ex. C, ECF No. 222-4, PageID.10797-10798 (listing University Park homes on Loyola and Columbia Lanes), *with* Ex. D, ECF No. 222-5, PageID.10801-10820 (University Park plans, missing Loyola and Columbia Lanes); *compare id.* Ex. C, PageID.10798 (listing Smith Village homes on Martin Luther King Ave.), *with* Exs. E & F, ECF Nos. 222-6 & 222-7, PageID.10821-10885 (Smith Village plans, missing Martin Luther King Ave.).

that some of these homes were built or redeveloped after 2000, *see* City Resp. 7, PageID.10777, does not prove they have copper service lines. Indeed, the City has excavated 100 homes in other areas where records say the home was built in 2000 or later, but found lead service lines at two of them. Ex. 1, Suppl. Webb Decl. ¶ 4.

Moreover, not all homes in these areas are newly built. In Smith Village, dozens of homes were built prior to the 1990s, and the City has already discovered lead or galvanized steel service lines at some of them. *See* Webb Decl. ¶ 24, ECF No. 218-4, PageID.10729. And for homes in Smith Village that Mr. Roberts has identified as "old," the City offers only a date of alleged service line replacement without supporting documentation. *See* City Resp. Ex. C, PageID.10797-10799.

Meanwhile, contrary to the City's claims, excavating service lines in University Park and Smith Village would not place an "unwarranted burden" on residents or "force[]" them to do anything. City Resp. 8-9, PageID.10778-10779. Residents are free to decline an excavation. But, under the Agreement's clear terms, Flint residents make those choices, and some residents in these neighborhoods want their service lines excavated. *E.g.*, Ex. 2, Hubbard Decl. ¶ 5.

Finally, even if the City had shown a mutual mistake, its failure to exercise reasonable diligence precludes modification of the Agreement. *Homesales, Inc. v. Miles*, No. 326835, 2016 WL 902832, at *4 (Mich. Ct. App. Mar. 8, 2016). The City does not claim that it was unaware of the University Park and Smith Village

plot files at the time the Agreement was negotiated. To the contrary, it concedes that it "likely had" these records but insists it was "unable to locate them" until after Plaintiffs filed their motion. City Resp. 7, PageID.10777. The City's failure to locate these records sooner is egregious considering the parties have been discussing this issue for over a year. *See* Pls.' Mot. 5-6, PageID.10430-10431.

In sum, the parties made no mistake: they believed that the City lacked comprehensive, reliable records on service line composition, and the filings show that is true. That the City now wishes it made a different contract does not require the Court to modify a key, bargained-for settlement term. *See Brown*, 872 F.2d at 174.

II. The State's and EPA's ineffectual efforts to coax the City to comply with the Lead and Copper Rule's monitoring requirements do not obviate the need for relief to enforce the Agreement

The State contends that the City is complying with the Lead and Copper Rule (Rule) despite failing to collect tap water samples from an established pool of high-risk sites. Resp. of State Parties to Pls.' 4th Mot. to Enforce (State Resp.) 3-4, ECF No. 221, PageID.10740-10741. The Rule's plain text refutes this claim. The Rule requires Flint to "identify a pool of targeted sampling sites that meet[]" the Tier 1, 2, or 3 high-risk criteria as appropriate. 40 C.F.R. § 141.86(a)(1), (3)-(5). "All sites" where the City collects samples "shall be selected from this pool." *Id.* § 141.86(a)(1). Of course, creating such a pool requires verifying in advance that

the sites in the pool meet the Rule's high-risk criteria. The City's failure to do so violates the Rule and the Agreement. *Contra* State Resp. 4, PageID.10741.

That the City is replacing lead services lines, and thus removing potential Tier 1 sampling sites, does not excuse its noncompliance. *Contra* City Resp. 10-11, PageID.10780-10781. This decrease in Tier 1 sites was foreseeable in 2017, when the City began replacing pipes under the Agreement. The City should have planned accordingly and identified Tier 2 sites for its sampling pool, as the Rule contemplates. 40 C.F.R. § 141.86(a)(4). The City's complaint that it is difficult to find residents willing to collect samples, *see* City Resp. 10, PageID.10780, is also unpersuasive. If participation is low, the City could enhance its outreach and engagement with community leaders, or identify and distribute sampling kits to additional potential sites that meet the Rule's high-risk criteria. Throwing up its hands and suggesting it need not comply is not a permissible option.

The Court should not entirely defer to the State's and EPA's oversight efforts. State Resp. 5, PageID.10742; City Resp. 11-13, PageID.10781-10783; *cf.* Op. & Order Den. Defs.' Mots. to Dismiss 13-17, ECF No. 62, PageID.2695-2699 (rejecting similar arguments). Those efforts have been ongoing since Plaintiffs filed this case in 2016. *E.g.*, U.S. EPA Emergency Admin. Order ¶ 59.a, ECF No. 23-2, PageID.314 (requiring oversight in 2016 of the City's monitoring plans); Pls.' Mot. 10-12, PageID.10435-10437 (describing City's continuing monitoring

violations). While EGLE appears to have recently increased its focus on this issue, *see* State Resp. Ex. 3, ECF No. 221-4, PageID.10764-10765, the City's violations are likely to continue, especially when compliance has been elusive following consecutive Notices of Violation from EGLE.

After three monitoring periods of noncompliance, intervention by the Court is needed. The Court has broad authority to enforce the Agreement's monitoring terms, including by ordering "additional affirmative conduct" not required by the underlying order. *Roman v. Korson*, 307 F. Supp. 2d 908, 919 (W.D. Mich. 2004); *Shy v. Navistar Int'l Corp.*, 701 F.3d 523, 533 (6th Cir. 2012). Plaintiffs' requested remedy is tailored to ensuring the City complies with the Rule, including by developing an adequate pool of high-risk sites at which to conduct sampling after completion of the pipe replacement program. *See* Pls.' Mot. 24, PageID.10449. Such relief will ensure Flint can accurately assess lead levels in its tap water in the long term and take prompt action to reduce any contamination identified.

III. Relief is necessary to ensure Flint residents are not cut off from the pipe replacement program without having received required outreach

The City concedes that it has failed to conduct required outreach to obtain residents' permission for service line excavations. *See* City Resp. 13-15, PageID.10783-10785; Pls.' Mot. 13-15, PageID.10438-10440. Instead, the City asserts that its "agree[ment]" to cure its noncompliance obviates the need for Court intervention. City Resp. 13, PageID.10783. But the City *still* has not remedied this

violation, despite committing to do so by September 9. Recent reporting shows that the City has not completed required in-person outreach at 86 homes (out of 466) Plaintiffs identified in their motion. Ex. 3, Rolnick Decl. ¶ 22; *see* Pls.' Mot. 14-15, PageID.10439-10440. Considering the City's repeated promises and persistent failures to complete this outreach, the City's claim that its "agree[ment]" to comply is enough rings hollow. *Cf. Chilcutt v. United States*, 4 F.3d 1313, 1321-22 (5th Cir. 1993) (sanctions appropriate after defendant "strung [plaintiff] along" with repeated "vain assurances of its alleged intent to comply" with discovery orders).

The City's continued failure to comply with its outreach obligations is especially concerning because Plaintiffs have not yet received documentation on the City's outreach attempts at thousands of homes in Flint. It is likely, given the City's track record, that the City did not complete required outreach at many of these homes. Meanwhile, the City has been informing residents that September 18, 2020, was the deadline for opting into the service line replacement program. Ex. 4, Suppl. Tallman Decl. Ex. B. The perverse result is that many residents who have not received the required outreach may mistakenly believe they can no longer sign up for a service line excavation (because the September 18 deadline has lapsed).[2]

[2] Although some news sources suggest that the City may extend this deadline, *see* Ex. 4, Suppl. Tallman Decl. Ex. A, the City must engage in widespread messaging about the extension to counter its previous announcements that September 18 was the deadline to submit consent forms.

The Agreement requires the City to hold open the deadline for participation in the pipe replacement program for the 86 homes Plaintiffs identified. *See* 2020 Order. ¶¶ 2, 4, PageID.10410-10411. But, because there are likely many more residents who have not received the required outreach, the City should extend the deadline to sign up for the pipe replacement program for *all* residents, until it provides Plaintiffs with documentation that it has complied with its obligations.

IV. The City's lack of planning does not excuse its reporting violations

The City has not shown that complying with the Agreement's reporting requirements is impossible, and indeed, concedes it collects the data it must report. *See* City Resp. 14, PageID.10784. Yet the City claims that it cannot commit to complying because of "shortcomings" in its software that make reporting "time and labor intensive." *Id.* Even if true, this would not excuse the City's failures to submit required reports for months on end. *See* Pls.' Mot. 12-13, PageID.10437-10438. Rather, the City's repeated reporting violations reflect a pattern of poor recordkeeping and lack of diligence, and the City must be ordered to comply.

CONCLUSION

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

Dated: September 28, 2020

Respectfully submitted,

/s/ Sarah C. Tallman
Sarah C. Tallman

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)

Natural Resources Defense Council
20 North Wacker Drive, Suite 1600
Chicago, IL 60606
(312) 651-7918
stallman@nrdc.org

Dimple Chaudhary
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
(202) 289-2385
dchaudhary@nrdc.org

Counsel for Plaintiffs Concerned Pastors for Social Action, Melissa Mays, and Natural Resources Defense Council, Inc.

Jolie D. McLaughlin
Natural Resources Defense Council
20 North Wacker Drive, Suite 1600
Chicago, IL 60606
(312) 995-5902
jdmclaughlin@nrdc.org

Adeline Rolnick*
Natural Resources Defense Council
1152 15th Street, NW, Suite 300
Washington, DC 20005
(202) 513-6240
arolnick@nrdc.org
**Admitted only in New York; supervision by Dimple Chaudhary, a member of the D.C. Bar*

Of Counsel for Plaintiff Natural Resources Defense Council, Inc.

American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org

Counsel for Plaintiff American Civil Liberties Union of Michigan

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2020, I electronically filed Plaintiffs' Reply in Support of Fourth Motion to Enforce Settlement Agreement and exhibits with the Clerk of the Court using the ECF system.

/s/ Sarah C. Tallman

Sarah C. Tallman
Natural Resources Defense Council
20 North Wacker Drive, Suite 1600
Chicago, IL 60606
(312) 651-7918
stallman@nrdc.org