

# NRDC

July 28, 2018

**By ECF**

Honorable Katharine S. Hayden  
District Court Judge, District of New Jersey  
Honorable Cathy L. Waldor  
Magistrate Judge, District of New Jersey  
50 Walnut Street, Room 4040, Courtroom 4  
Newark, New Jersey 07101

Re: Letter Requesting Court to Order City Defendants to File Responsive Pleading in *NEW Caucus v. City of Newark*, 18-CV-11025-KSH-CLW

Dear District Judge Hayden and Magistrate Judge Waldor:

We write regarding the City Defendants'<sup>1</sup> failure to respond to Plaintiffs' complaint in the above-referenced matter by July 24, 2018, the deadline for responsive pleadings under the Federal Rules of Civil Procedure.<sup>2</sup> The City Defendants' disregard for the responsive pleading deadline is alarming because the City Defendants' alleged violations of the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300-j-27, and its implementing regulations, the

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<sup>1</sup> Plaintiffs use "City Defendants" to refer to the City of Newark, the Newark Department of Water and Sewer Utilities, the Mayor of the City of Newark, Ras Baraka, and the Director of the Newark Department of Water and Sewer Utilities, Andrea Hall Adebawale. The only other defendant in this matter, the Commissioner of the New Jersey Department of Environmental Protection, Catherine R. McCabe, referred to herein as "State Defendant," filed a timely request for an extension in the time to file a responsive pleading on July 23, 2018. *See* ECF No. 9.

<sup>2</sup> Plaintiffs submit this letter in lieu of immediately responding to Defendants' motion for an extension, ECF No. 11, because they seek resolution on an expedited basis. On July 27, 2018, Plaintiffs' counsel placed a telephone call to Magistrate Judge Waldor's clerk to ask how to expedite resolution of City Defendants' failure to file a response to Plaintiffs' complaint. The clerk with whom counsel spoke informed counsel that a letter raising time-sensitive concerns would ensure consideration well in advance of the August 20, 2018 motion date for which City Defendants have noticed their motion for an extension. As such, Plaintiffs request that this Court accept this letter, in lieu of a brief, pursuant to Local Rule 7.1(d)(4).

Lead and Copper Rule, 40 C.F.R. §§ 141.80-141.91, have caused extremely high levels of lead in the City of Newark's drinking water for a sustained period. *See* ECF No. 1. The levels of lead present in the City's drinking water can be devastating to the human body, especially to children's developing brains.

Plaintiffs contacted City Defendants' counsel about City Defendants' failure to file a responsive pleading the day after their responsive pleading was due and those discussions continued through yesterday, Friday, July 27, 2018. Plaintiffs offered a reasonable two-week extension from the original July 24, 2018, deadline to allow City Defendants to respond. Instead, City Defendants moved for an extension in their time to file a responsive pleading by more than one month, citing the "excusable neglect" standard under Federal Rule of Civil Procedure 6(B)(1)(b). *See* ECF No. 11.

City Defendants' conduct is a far cry from the "excusable neglect" required to satisfy Rule 6(B)(1)(b) and the jurisprudence of this Court. Indeed, "the concept of 'excusable neglect' . . . requires 'a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules.'" *Khorozian v. McCullough*, 186 F.R.D. 325, 329 (D.N.J. 1999), citing *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995). City Defendants have made no such demonstration.

Given the pressing public health implications of exposure to Newark's lead-contaminated drinking water, the City Defendants' pattern of delay tactics, their failure to retain "special" counsel when they were aware of Plaintiffs' claims for at least eight months, and their repeated false assurances to Newark residents that the City's water is "safe to drink," Plaintiffs respectfully request that this Court consider this letter on an expedited basis and order City Defendants to submit a responsive pleading by no later than August 7, 2018, the same date the State Defendant's responsive pleading is now due.

#### **I. The high levels of lead in Newark, New Jersey's drinking water**

Sampling conducted by the City shows that the City's drinking water has exceeded the 15 parts per billion federal "action level" for lead, set by the U.S. Environmental Protection Agency (EPA), for at least the past three six-month monitoring periods (18 months in total). ECF No. 1 ¶¶ 6-7. In 2017, more than ten percent of the City's drinking water samples exceeded 26 parts per billion. *Id.* That pattern continued into 2018, with numerous homes testing above 30 parts per billion, and at least one home testing as high as

182 parts per billion this year, more than 12 times the federal action level. *Id.* ¶ 7. The Newark Public School district continues to report the presence of lead at levels as high as 15.4 parts per billion in accessible, non-decommissioned drinking water sources at certain schools, including elementary schools. ECF No. 1 ¶¶ 3, 64. The New Jersey Department of Environmental Protection has issued at least three notices of non-compliance to the City as a result of the City's repeated lead action level exceedances, but has not taken further enforcement action. *Id.* ¶¶ 69-73. Plaintiffs allege that the City's failure to comply with federal law has been ongoing since at least 1997. *Id.* ¶¶ 88, 136.

Lead is a powerful toxin that is devastating to the human body. Young children are especially vulnerable to lead exposure. *Id.* ¶¶ 1, 47. The EPA, the Centers for Disease Control and Prevention, the World Health Organization, and the American Academy of Pediatrics all agree that there is no safe level of lead exposure. *Id.* ¶ 10. In children, even low levels of lead exposure can cause a wide array of problems, including reduced IQ scores, poorer academic performance, developmental delays, Attention Deficit and Hyperactivity Disorder (known as ADHD), and other behavioral and learning problems. *Id.* ¶¶ 46-53. Exposure to lead also harms adults, including by causing nerve disorders, decreased kidney function, reproductive problems, and gastrointestinal damage. Adults exposed to lead may also suffer from muscle and joint pain, memory and concentration problems, and high blood pressure. *Id.* ¶ 50. Some of these effects are irreversible. *Id.* ¶ 47.

## **II. Plaintiffs have given more than adequate notice to City Defendants of their impending lawsuit**

### *A. Plaintiffs' unsuccessful attempts to communicate with City Defendants about lead in the City's drinking water since August 2017*

After learning that the City triggered a lead action level exceedance on June 30, 2017, Plaintiffs' counsel approached the City to seek information regarding the high levels of lead in the City's drinking water. On August 2, 2017, Plaintiff Natural Resources Defense Council (NRDC) submitted the first of four Open Public Records Act (OPRA) requests to the City about lead in the City's drinking water. City Defendants failed to adequately respond to Plaintiffs' OPRA requests within the time required under OPRA, and after numerous emails and telephone calls, NRDC was forced to file a complaint in New Jersey Superior Court to compel the City to provide public records. Compl., *Nat. Res. Def. Council v. City of Newark et al.*, No. ESX-L-002906-18 (N.J. Super. Ct. filed Apr. 24, 2018). In its

answer, the City conceded that “documents remain outstanding and OPRA’s deadline has been violated.” Answer, *Nat. Res. Def. Council v. City of Newark et al.*, No. ESX-L-002906-18 (N.J. Super. Ct. June 1, 2018). The Honorable Judge Beacham agreed that the City engaged in a pattern and practice of violating OPRA and ordered the City to produce all requested records within 20 days. Court Order, *Nat. Res. Def. Council v. City of Newark et al.*, No. ESX-L-002906-18 (N.J. Super. Ct. June 22, 2018). The City failed to meet this deadline, as well, necessitating a motion to enforce the court order, which is expected to be heard on August 3, 2018.

While Plaintiff NRDC’s OPRA requests were pending, Plaintiffs attempted to express the serious nature of the lead contamination to City Defendants. On September 13, 2017, counsel for Plaintiffs and a coalition of New Jersey and Newark community organizations sent a letter to City Defendants demanding that the City take specific steps to address the lead in Newark’s drinking water. Later that month, Plaintiffs’ counsel began corresponding with representatives of the Newark Department of Water and Sewer Utilities about the high levels of lead, and Defendants’ failure to respond to Plaintiffs’ OPRA requests. Plaintiffs’ counsel then met with City representatives on October 27, 2017, to discuss Plaintiffs’ claims. City Defendant Andrea Hall Adebowale and Assistant Corporate Counsel for the Department of Water and Sewer Utilities, Tiffany Stewart, were both present during, and participated in, the October 27, 2017, meeting with Plaintiffs’ counsel. During that meeting, Plaintiffs’ counsel advised City representatives, including the City’s attorney, of Plaintiffs’ contention that City Defendants were in violation of the Safe Drinking Water Act and the Lead and Copper Rule.

Between November 2017 and April 2018, City Defendants refused to meaningfully discuss Plaintiffs’ requests for information about the causes of the lead action level exceedances and the City Defendants’ violations of the Safe Drinking Water Act and the Lead and Copper Rule.

*B. Plaintiffs’ notice of intent to sue, complaint, and City Defendants’ misleading statements to Newark residents*

After months of attempting to communicate with City Defendants and their counsel, Plaintiffs determined that this Court’s intervention was required to secure safe drinking water for Plaintiffs’ members, and all Newark’s residents. Plaintiffs submitted a 60-day notice of intent to sue to all Defendants on April 24, 2018, pursuant to the Safe Drinking

Water Act. *See* 42 U.S.C. § 300j-8(b). In response, on or around April 26, 2018, City Defendants issued several statements regarding Plaintiffs' notice of intent to sue, including a telephonic robocall to Newark residents, stating:

“[a]n organization has made absolutely and outrageously false statements about Newark's water. The truth is that the water supplied by the City is safe to drink . . . . Our water is safe. In fact Newark has some of the best water in the State of New Jersey.”

*See* ECF No. 1 ¶ 8. Likewise, on April 27, 2018, the City issued a written press release titled “Newark's water is absolutely safe to drink,” which again encouraged Newark residents to drink the water without taking precautions. City Defendants also held a press conference, during which they again encouraged Newark residents to drink the City's water. Thus, as of April 26, 2018, Defendants had received notice of the lawsuit, and responded to the lawsuit in the press.

During the 60-day notice period, counsel for Plaintiffs attempted to contact counsel for City Defendants to discuss the claims set forth in Plaintiffs' notice of intent to sue. Plaintiffs sent an email on May 1, 2018, requesting a meeting with City Defendants' counsel and providing several dates on which Plaintiffs' counsel could be available for such a meeting. *See* ECF No. 1 ¶ 128. City Defendants did not respond. *Id.* On June 12, 2018, Plaintiffs' counsel called the City Attorney's office and spoke with First Corporation Counsel, Avion M. Benjamin. Ms. Benjamin declined to meet with Plaintiffs in person, per Plaintiffs' request, but indicated that Plaintiffs would receive a written response to their notice of intent to sue before the close of the 60-day notice period. *See* ECF No. 1 ¶ 129. Plaintiffs did not receive any such response from City Defendants. *Id.*

As a result, on June 26, 2018, after the expiration of the 60-day notice period, Plaintiffs filed the complaint in this case. ECF No. 1. On the same day, Defendants held a press conference and Defendant Andrea Hall Adebowale issued a press statement. Defendant Adebowale's statement again encouraged residents to drink the water, stating “the truth is that the water supplied by the city is pure [and] safe.” Ms. Adebowale made these statements while admitting that the “City received a violation for Lead Level Exceedance” and that “the average for water samples taken from January to June of last year from these homes was 27 parts per billion.” City Defendants were undoubtedly aware that Plaintiffs filed their complaint on June 26, 2018.

On July 3, 2018, Plaintiffs served the summons and complaint on the City Defendants by personal service. The service materials were accepted for service by Christian Everett, Deputy Clerk, City Clerk's Office. Plaintiffs filed proof of service with this Court on July 18, 2018. *See* ECF Nos. 4-7. The deadline for City Defendants to file their responsive pleading under the Federal Rules of Civil Procedure was July 24, 2018.

*C. Plaintiffs' attempts to obtain a responsive pleading from City Defendants*

The day after City Defendants failed to file a timely responsive pleading, Plaintiffs' counsel called Newark's Law Department to inquire why the City Defendants had failed to answer within the time required under the Federal Rules of Civil Procedure. Counsel was unable to reach an attorney, and left a voicemail on the Newark Law Department's main telephone line. Again, on July 26, 2018, counsel for Plaintiffs called Newark's Law Department. Counsel spoke to Gary Lipshutz, Assistant Corporate Counsel for the City of Newark, who was not aware that the time to respond to the complaint had passed.

Subsequently, on July 26, 2018, counsel for Plaintiffs received a call from Mr. Joseph Maraziti, who reported that he had recently been retained by City Defendants on a temporary basis while City Defendants search for permanent counsel. City Defendants' counsel requested that Plaintiffs agree to an extension of the City's Defendants deadline to respond to Plaintiffs' complaint, until August 21, 2018. However, City Defendants' counsel had not consulted with the permanent counsel he expected City Defendants to retain to determine whether a further extension would be necessary and, in fact, indicated that a further extension would likely be necessary. Plaintiffs' counsel responded that, given the public health implications of ongoing exposure to elevated lead levels, the seriousness of Plaintiffs' claims, and the delays Plaintiffs have already experienced in attempting to communicate with City Defendants to resolve the claims alleged in the complaint, Plaintiffs could not agree to such a lengthy extension. Plaintiffs' counsel reported that Plaintiffs were amenable to a two-week extension, until August 7, 2018, which would put City Defendants on the same schedule as the State Defendant, pursuant to the State Defendant's request for extension. *See* ECF No. 9. City Defendants then filed a motion for an extension in time to file a responsive pleading until August 28, 2018, more than a month after the City Defendants' initial deadline. *See* ECF No. 11.

### III. City Defendants have not demonstrated “excusable neglect” that would permit an extension beyond August 7, 2018

City Defendants argue that this Court should grant an extension of over a month because of their alleged “excusable neglect” in failing to file a timely responsive pleading. *See* ECF No. 11. In deciding whether a party’s conduct rises to the level of “excusable neglect” under Federal Rule of Civil Procedure 6(B)(1)(b), courts consider the “the danger of prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Manley v. Mem’l Hosp. of Salem*, No. 11–2117-JEI-KMW, 2012 WL 1191139, at \*1 (D.N.J. Apr. 10, 2012) citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993). In order to satisfy the “excusable neglect” standard, City Defendants must make a “a demonstration of good faith” and offer “some reasonable basis for noncompliance within the time specified in the rules.” *Khorozian v. McCullough*, 186 F.R.D. 325, 329 (D.N.J. 1999) (citations omitted).

City Defendants make no attempt to show that they have acted in good faith or that there is some reasonable basis for their failure to respond or seek an extension. Instead, they merely state that their failure to respond was due to inadvertence, ECF No. 11-2 ¶ 12, and suggest they may be prejudiced if the Court does not grant a lengthy extension. To the contrary, it is the City’s residents, including members of the Plaintiffs’ groups, not the City Defendants, who are prejudiced by the City’s inaction, and will be prejudiced if the Court grants the extension the City Defendants seek. *See Pioneer Inv. Servs. Co.*, 507 U.S. at 395 (describing prejudice to non-movant as a factor that militates against granting an extension). As discussed above in Section I, the levels of lead in the City’s drinking water present a public health emergency, particularly for those Newark residents who are most vulnerable to lead exposure, including pregnant women and children.

Moreover, the City’s failure to file a responsive pleading is inexcusable because the ability to timely respond was well within the City Defendant’s “reasonable control.” *See Pioneer Inv. Servs. Co.*, 507 U.S. at 395. City Defendants do not attempt to explain why they failed to retain counsel during the eight months they have been aware of Plaintiffs’ claims, or even during the pendency of the 60-day notice period. Counsel for City Defendants began participating in discussions about Plaintiffs claims as of October 2017, and have had numerous exchanges with Plaintiffs’ counsel since that date. The City Defendants’ neglect is not excusable where their attorneys participated in meetings about Plaintiffs’ claims and

were reminded, on multiple occasions, of upcoming deadlines. *See generally United States v. Tuerk*, 317 F. App'x 251, 253-54 (3d Cir. 2009).

Indeed, City Defendants have issued press statements, including statements directly responding to Plaintiffs' notice of intent to sue and complaint, evidencing clear knowledge that this litigation was forthcoming, but did not attempt to retain the "special" counsel they now say is necessary. Fortunately, the City Defendants have counsel from the City's Law Department, attorneys within the Department of Water and Sewer Utilities, and retained counsel, Mr. Maraziti, who may handle the initial phases of this matter. *See e.g., Fastener Sys., Inc. v. MBNA Am.*, 48 F. App'x 418, 420 (3d Cir. 2002) (A party's "failure to respond to a motion because of unfamiliarity with federal practice is not 'excusable neglect.'"). The City's "inaction does not constitute excusable neglect." *James v. City of Jersey City*, 187 F.R.D. 512, 517 (D.N.J. 1999).

Plaintiffs have urged City Defendants to act in a timely and good faith manner, yet City Defendants have repeatedly employed delay tactics, failed to communicate, and have issued press statements assuring Newark's residents that "our water is safe to drink" and that it "is some of the safest water in New Jersey." City Defendants' failure to submit a responsive pleading or a request for an extension within the time required under the Federal Rules of Civil Procedure is yet another example of the City's failure to take this urgent matter seriously. Further, City Defendants' proposed extension is unreasonably protracted and is likely to harm the City's residents, including members of Plaintiff groups, as they continue to suffer from exposure to extremely high levels of lead in their drinking water. This litigation must proceed as soon as possible and another lengthy delay is not warranted.

For the foregoing reasons, Plaintiffs respectfully request that this Court consider this letter on an expedited basis and order City Defendants to file a responsive pleading by August 7, 2018.

Respectfully submitted,

s/ Sara E. Imperiale  
Sara E. Imperiale, SBN 077832013  
Claire Woods, PHV forthcoming  
Natural Resources Defense Council