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

Mag. J. Stephanie Dawkins Davis

PLAINTIFFS' 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's and City Administrator's immediate compliance with the Settlement Agreement ordered by the Court on March 28, 2017. *See* ECF Nos. 147-1, 147-2, 152.

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. Defendants oppose the motion.

Dated: December 27, 2017 Respectfully submitted,

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT

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CONCISE STATEMENT OF THE ISSUE PRESENTED

The City of Flint and City Administrator have repeatedly failed to comply with the requirements in a court-ordered Settlement Agreement to submit timely, accurate, and complete status reports to Plaintiffs and to respond to Plaintiffs' reasonable requests for information relating to the Agreement's implementation. Should the Court enforce the Settlement Agreement by ordering the City and City Administrator to take additional, specific actions to comply with their obligations under the Agreement?

CONTROLLING AUTHORITY

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

Waste Mgmt. of Ohio, Inc. v. City of Dayton, 132 F.3d 1142 (6th Cir. 1997)

INTRODUCTION

In March 2017, following extensive mediation, Plaintiffs, the City of Flint, State Defendants, and the State of Michigan agreed to resolve this Safe Drinking Water Act citizen suit through a court-ordered Settlement Agreement. In that Agreement, the City of Flint and City Administrator (together, the City) committed to, among other things, replace thousands of lead service lines in Flint within three years. The Agreement also requires the City to work with the State to ensure that Flint residents have access to safe tap water through properly installed and maintained faucet filters. The City must document compliance with its obligations by providing periodic status reports to Plaintiffs and timely responding to Plaintiffs' reasonable requests for other information relating to the Agreement's implementation. These information-sharing requirements are critical to ensuring that Plaintiffs—and ultimately the Court—can hold the City accountable to its commitments under the Agreement.

For nine months, the City has consistently violated the Agreement's disclosure provisions. The City has repeatedly provided late, incomplete, and inaccurate status reports. *See infra* pp. 4-12. And it has routinely dragged its feet in responding to Plaintiffs' basic and concrete questions about how the City keeps records on its compliance and who maintains them. *See infra* pp. 4-13.

These delays and inaccuracies have masked violations of the Agreement's

other terms by making it more difficult and resource-intensive to identify those violations and their causes. Plaintiffs cannot ensure that Flint residents receive the full benefits of the Agreement, including protections designed to reduce exposure to lead in drinking water, if the City does not provide correct, timely, and complete information about its compliance efforts.

In view of the magnitude of judicial resources the Court has devoted to this case, Plaintiffs do not seek additional relief lightly. Plaintiffs have attempted to resolve these issues with the City through countless letters, emails, and conferences, and repeated requests for the same information. But the City simply refuses to comply with its disclosure obligations, which makes it impossible for Plaintiffs to monitor compliance with the rest of the Agreement. Plaintiffs therefore respectfully request that the Court order the City to employ a more robust reporting and certification process, overseen by the Court, to address the systemic deficiencies in its collection and disclosure of information under the Agreement.

STATEMENT OF FACTS

I. The Court-ordered Settlement Agreement

On March 28, 2017, the Court approved a Settlement Agreement resolving this case. Order Approving Settlement Agmt. & Dismissing Case 2, ECF No. 152. In doing so, the Court issued an order incorporating the Agreement in full, retaining jurisdiction to enforce it, and dismissing the case with prejudice. *Id.*

The Agreement provides short- and long-term relief to Flint residents to help address lead contamination in the City's tap water. For long-term relief, the Agreement requires the City to conduct excavations to determine the service line composition at 18,000 Flint households, and to replace those service lines confirmed to be lead or galvanized steel. Settlement Agmt. (Agmt.) ¶¶ 8-20, ECF No. 147-1. To ensure that as many residents as possible participate in the service line replacement program, the City must track the addresses at which residents refuse to grant the City permission to replace their service lines. *Id.* ¶ 16. This recordkeeping requirement is important: if followed, it enables Plaintiffs to conduct outreach to residents who refuse service line replacement, to understand and ideally resolve any concerns the residents may have about removing their lead or galvanized steel service lines. *See* Chaudhary Decl. Ex. W at 1-2.

The Agreement also includes a faucet filter services program designed to protect drinking water in the short term, while pipe replacements are ongoing. *See* Agmt. ¶¶ 38, 66-92. The State,[1] through its Community Outreach and Resident Education (CORE) program, must periodically visit homes in Flint through 2018 to provide filter education, installation, and maintenance services. *See id.* To ensure that CORE staff can promptly visit households with new residents, the Agreement

[1] Plaintiffs refer to State Defendants, the State of Michigan, and the Michigan Department of Environmental Quality collectively as "the State."

provides that the City "shall notify CORE staff of any new Flint Water System customer within 30 days after activation of a new water account for the customer's household." *Id.* ¶ 85. In addition, to protect residents from lead spikes that may occur immediately following service line replacement, Chaudhary Decl. Ex. I at 2, the Agreement requires the City and State to make good-faith efforts to ensure "that each household has a properly installed Faucet Filter immediately after its service line replacement is complete." Agmt. ¶ 38.

The Agreement further contains a series of disclosure requirements to allow the parties to monitor compliance with its provisions. The City must provide status reports to Plaintiffs one month and two months after the Agreement becomes effective, and every three months thereafter. *Id.* ¶ 117. The status reports must include, among other information: (i) the total number of service lines replaced since March 28, 2017; (ii) for each household at which a service line was replaced, "whether proper installation of a Faucet Filter after replacement was verified"; and (iii) the number and addresses of households at which the resident refused service line replacement. *Id.* ¶ 117.c.i-iii. The City must also provide "additional information, documents, or records related to implementation of th[e] Agreement" within fourteen days of a reasonable and specific request from Plaintiffs. *Id.* ¶ 118.

II. The City's status reports and disclosures under Paragraphs 117 and 118

Since the Agreement went into effect, the City has established a pattern of

nonresponsiveness, delay, and noncompliance with the Agreement's information-sharing provisions. The City has repeatedly failed to provide timely, complete, and accurate status reports. It routinely delays responding to Plaintiffs' basic questions about how it maintains records concerning its compliance, requiring Plaintiffs to ask repeatedly—often over the course of months—for the same information. Plaintiffs' attempts to work with the City to implement the Agreement have revealed that the City is not undertaking adequate efforts to ensure that relevant City staff both understand the Agreement's obligations and track the information they are required to report. As a result, Plaintiffs cannot know whether the City is administering the Agreement's pipe replacement program in a comprehensive and health-protective way.

Plaintiffs focus here on three examples of the City's inadequate reporting and information-sharing to illustrate this systemic and recurring noncompliance: (A) verifying filter installations at Flint homes following service line replacements; (B) maintaining a list of addresses at which residents have refused to grant the City permission to replace their service lines; and (C) timely notifying CORE staff of new water system customers so that CORE can promptly provide filter services. But these are only a few instances of the City's troubling approach to tracking and reporting information required by the Agreement. *See, e.g.*, Chaudhary Decl. Exs. F at 3, J at 3, K at 2, L at 3; Tallman Decl. ¶ 3 (documenting the City's five-month

delay in posting a form on its webpage to allow residents to opt-in to the pipe replacement program online and Plaintiffs' repeated requests for information documenting compliance); Chaudhary Decl. Exs. F at 1, J at 2, K at 1, L at 2, M at 1, R at 4-5 (detailing Plaintiffs' repeated requests over months for documentation concerning the City's recordkeeping relating to its obligation to maintain a list of abandoned homes ineligible for pipe replacement); *id.* Exs. L at 3, P, R at 3, T-V (documenting the City's more than two-month delay in responding to Plaintiffs' repeatedly asked basic question of whether the City or its contractors are tracking the dates on which residents refuse pipe replacement).

A. Failure to report information verifying filter installations following service line replacements

The Agreement requires the City and State to work together to ensure that faucet filters are installed "immediately" after pipe replacements are complete and to document compliance with this filter-verification requirement. Agmt. ¶¶ 38, 117.c.ii.5.[2] Although Plaintiffs raised this issue at least *eight* separate times in writing over four months, Chaudhary Decl. Exs. B, D, E, F at 5-6, I, J at 3, L at 4, M, the City's nonresponsiveness and incomplete reporting have prevented Plaintiffs from verifying whether this term of the Agreement is being fully

[2] Paragraph 117 imposes reporting obligations on Government Parties collectively, giving the City and State flexibility to coordinate with each other to determine which party will report each piece of required information. Agmt. ¶ 117.

implemented.

The City's first status report was both late and inaccurate. The City did not submit its report by the Agreement's April 28, 2017 deadline, and it incorrectly reported that zero service lines had been replaced between March 28 and April 28, 2017. *Id.* Exs. B, C. Plaintiffs subsequently notified the City that, based on visual observations in Flint in mid-April, at least some service lines had been replaced during the reporting period. *Id.* Ex. D. Plaintiffs asked the City to revise its report to accurately disclose information about pipe replacements during the reporting period, including whether the City or State had verified that a filter had been properly installed at each household where a service line was replaced, as required under the Agreement. *Id.* After the City did not respond within the two weeks provided under the Agreement, Plaintiffs repeated their request that the City revise its status report to fix its inaccuracies. *Id.* Ex. F at 6.

Plaintiffs continued to pursue this issue because the City's nonresponsiveness suggested it was not complying with the filter-installation requirements in Paragraph 38. Agmt. ¶ 38. Indeed, at a May 18 meeting, the City indicated that officials were communicating with CORE staff approximately once every two weeks about the addresses at which pipe replacements had occurred, Chaudhary Decl. Ex. F at 5, meaning that homes could be unprotected from lead spikes that can occur immediately following pipe replacement. The day after that

meeting, Plaintiffs sent a letter to both the City and State seeking additional clarification on when and how the City was coordinating with CORE. *Id.* Ex. E.

It wasn't until four weeks after Plaintiffs' initial request for the service line replacement and filter-verification data that the City provided a partial response (submitted with its next status report on May 30). *Id.* Ex. G at 1 n.1 (reporting the number of pipe replacements completed since March 28). However, the status report was also incomplete, because it failed to include any information about whether the City or State had verified that a filter had been properly installed at each of the nearly 400 homes where service lines had been replaced during the reporting period. *Id.* at 1 n.2. Despite being on notice for a month that this required information was missing from the City's disclosures, the City's report stated only that, "[t]o the best of the City'[s] knowledge, the [Department of Environmental Quality] is tracking this data and dispatching CORE staff" to install the filters. *Id.*[3]

Following receipt of this report, Plaintiffs repeated their request that the City provide information concerning verification of filter installations, and emphasized the need to "coordinate" with the State to ensure that Government Parties report

[3] In contrast, the State's status reports state that the City will report the filter-verification information required under Paragraph 117.c.ii.5. *E.g.*, Chaudhary Decl. Ex. A at 3. And, although the State wrote on May 26 that CORE staff were scheduling filter services visits "within 24 hours of the State receiving notice" that a pipe replacement had been completed, the State did not confirm whether the City was providing sufficient notice to CORE of pipe replacement completions to facilitate "immediate" filter installation following replacement. *See id.* Ex. DD.

the required information. *Id.* Exs. I, J at 3-4. On July 10, nearly two months after Plaintiffs requested the information, the City stated that "CORE has been given access to the City's [lead service line] replacement database and is able to conduct visits to ensure that each household has a properly installed faucet filter." *Id.* Ex. K at 2. The City did not include any data or records documenting whether the City or State had timely verified filter installations at the homes at which pipe replacements had been completed.

Plaintiffs raised the issue of the City's failure to report the required filter-verification data again on August 4, and yet again on August 23. *See id.* Exs. L at 4, M. On August 28, three months after Plaintiffs first notified the City that this reporting information was missing, the City provided the filter-verification data with its third status report. *Id.* Ex. N at 1 n.1 (noting attachment of data to status report). However, the City's next status report (submitted in December 2017) again failed to contain the required information. *See id.* Ex. Z. The report stated again that, "[t]o the best of the City's knowledge, the [State] is tracking this data and dispatching CORE staff" to install filters. *Id.* at 1 n.1. To date, Plaintiffs still have not been able to verify whether filter installations after pipe replacements are being tracked comprehensively in accordance with the terms of the Settlement.

B. Failure to adequately maintain and disclose the Refusal List

Plaintiffs are also unable to confirm that the City is providing complete and

accurate information regarding residents that have refused to grant the City permission to replace their service lines. *See* Agmt. ¶ 117.c.iii. On May 18, the City stated that it had not yet prepared a list of addresses at which residents had refused pipe replacement (the Refusal List), as required under the Agreement. Chaudhary Decl. Ex. F at 3; Agmt. ¶ 16. Although the Agreement had been in place for nearly six weeks, the City did not yet have a plan for how it would systematically collect refusal addresses and dates from its contractors and maintain an up-to-date list of such addresses. Tallman Decl. ¶ 2. On May 25, Plaintiffs requested under Paragraph 118 that the City provide an update with documentation demonstrating its compliance with this obligation. Chaudhary Decl. Ex. F at 3, 6. The City did not respond within the fourteen-day deadline. *Id.* Ex. J at 1-2 & n.1. Six weeks after Plaintiffs' request, the City responded with a single sentence: "The City's [lead service line] contractors have been asked to collect this information, and the City has received spreadsheets with this data from two of the City's contractors." *Id.* Ex. K at 2. But the City has more than two contractors.

Because the City's belated response did not indicate that the City was maintaining a complete and up-to-date Refusal List, on August 4, Plaintiffs requested that the City provide an "update documenting the City's compliance" with this obligation. *Id.* Ex. L at 3. After the City failed to respond within fourteen days, on August 23, Plaintiffs initiated the Agreement's dispute resolution

procedures. *Id.* Ex. M. On September 13, four months after Plaintiffs initially raised this issue, the City reported that its contractors had been directed to provide information concerning the addresses at which residents had refused service line replacement, but that "[c]onfirmation (and/or corrections, if any)" concerning the completeness and accuracy of information provided to date "has not yet been received." *Id.* Ex. S at 2, *see id.* Ex. R at 3.

Moreover, the limited disclosures the City did provide during this correspondence were inaccurate. The City purported to provide the Refusal List with its May status report; that list included 29 addresses at which residents had refused service line replacement. (Fewer than 400 replacements were completed during the reporting period.) *Id.* Exs. G, H. The City provided the *same* list of 29 addresses with its August status report, meaning that the City reported that no additional residents had refused replacement during the preceding three months, notwithstanding a large ramp-up in the pace of pipe replacements. (More than 3000 additional pipe replacements were completed during the reporting period.) *Id.* Exs. N, O. These reports suggested inadequacies in the City's recordkeeping.

Plaintiffs confirmed these inadequacies after they conducted outreach to the residents on the City's purported Refusal List. *Id.* Ex. W. Plaintiffs discovered that at least 13 of the 29 residents reported either that they had a copper service line, and thus were ineligible for pipe replacement, or that they had not declined service

line replacement. *Id.* Following discussions with the City, Plaintiffs learned that the Refusal List the City provided with its prior status reports was inaccurate, and was both under-inclusive (it excluded some homes at which residents had affirmatively refused pipe replacement) and over-inclusive (it included addresses where residents had not refused pipe replacement). *Id*. ¶¶ 26-27.

After months of negotiation, Plaintiffs finally obtained on December 6 what the City claims is an updated copy of the Refusal List. *Id*. Ex. AA. But that list appears to have been last updated on October 26, nearly six weeks before the City provided the list. *Id.* (column labeled "Date of Last Update"). Questions remain about whether this latest Refusal List is complete and up to date, and whether the City is complying with its obligation to "maintain records sufficient to comply with the reporting and disclosure requirements under the Agreement." Agmt. ¶ 36.

C. Failure to timely provide information concerning Paragraph 85 compliance

For four months, the City ignored Plaintiffs' requests for information documenting its compliance with the Agreement's requirement to "notify CORE staff of any new Flint Water System customer within 30 days after activation of a new water account." Agmt. ¶ 85. As of May 18, six weeks after the Agreement went into effect, the City was not complying with this term, and was not tracking new water accounts for purposes of complying with the Agreement. Chaudhary Decl. Ex. F at 5-6. On May 25, Plaintiffs asked the City to provide information

documenting its compliance with the requirement. *Id.* at 6. The City did not respond to the request within fourteen days, by June 8. *Id.* Ex. J at 3-4.

On June 16, Plaintiffs repeated their information request. *Id.* The City did not respond until July 10, more than six weeks after Plaintiffs' initial request, and again confirmed that it did not have a system to notify CORE staff of new water accounts. *See id.* Ex. K at 3 (stating the City is "confirming" to whom it should send the new accounts list). Plaintiffs followed up on August 4 to again request the City's compliance with Paragraph 85 and documentation of that compliance. *See id.* Ex. L. The City did not respond within fourteen days. *Id.* Ex. M at 1. Plaintiffs discussed this issue with the City on September 6, and again repeated their request for documentation by letter on September 8. *Id.* Ex. R at 2. *Four* months after Plaintiffs notified the City about this noncompliance, and after repeated delays in responding to requests for updates, the City provided documentation showing its correspondence with CORE staff about new water accounts. *Id.* Ex. S.

Although the City has since documented its compliance with this requirement, Plaintiffs had to follow up with the City more than five times over the course of months to resolve this issue. As the list of new accounts the City disclosed in September shows, there were more than 600 new water customers between March 28 and July 6, 2017, the first time the City provided the list to CORE staff. *Id.* Ex. Q (see "TOTAL" at end of list). During the City's months-

long period of noncompliance, CORE teams may have been unable to promptly visit residents at these addresses to ensure that they had properly installed filters.

III. Dispute resolution pursuant to the Agreement

Over the past nine months, Plaintiffs have initiated the Agreement's dispute resolution process several times to raise and address concerns with the City's compliance with the Agreement's disclosure and reporting requirements. *Id*. Exs. M, X. Most recently, on December 1, 2017, Plaintiffs sent the notice required under Paragraph 128 describing disputes over the City's violations of Paragraphs 117 (status reports) and 118 (information requests). *Id.* Ex. Y. Plaintiffs proposed modifications to the Agreement to improve information sharing among the parties and increase accountability for meeting the Agreement's deadlines. *Id.* Ex. BB. The parties then conferred by phone in a good-faith attempt to resolve the dispute, but were unable to do so. *Id.* ¶¶ 32, 34.

STANDARD OF REVIEW

The Court's order incorporating the Agreement is a consent decree. *See Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 871 (6th Cir. 2015). The Court both "expressly retained jurisdiction to enforce compliance with the settlement's terms" and "incorporat[ed] the settlement" into its dismissal order. *Id.*; Order 2, ECF No. 152. As a consent decree, the order "operate[s] as an injunction," *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983), which "compels the

approving court to . . . protect the integrity of the decree with its contempt powers." *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994); *see Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1146 (6th Cir. 1997) (courts "have a duty to enforce" their consent decrees).

The Court thus has the authority to remedy violations of the Agreement: "Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004); *see also Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1095 (6th Cir. 2016). The court "has broad equitable remedial powers" when enforcing a consent decree. *Shy v. Navistar Int'l Corp.*, 701 F.3d 523, 533 (6th Cir. 2012) (internal quotation marks omitted). It "may take such steps as are appropriate given the resistance of the noncompliant party," *Berger v. Heckler*, 771 F.2d 1556, 1569 (2d Cir. 1985), including ordering "additional affirmative conduct" not required by the underlying order, *Roman v. Korson*, 307 F. Supp. 2d 908, 919 (W.D. Mich. 2004).

ARGUMENT

I. The City is violating the Settlement Agreement

The City's failure to submit timely, complete, and accurate status reports is a plain violation of Paragraph 117 of the Agreement. That section sets forth clear deadlines for the City to submit its status reports as well as requirements for their

content. Agmt. ¶ 117. To date, *all* of the City's status reports have been late, incomplete, inaccurate, or a combination thereof. *See supra* pp. 4-12. Only after Plaintiffs' repeated prompting, phone calls, and correspondence has the City sometimes disclosed the required information, and even then the accuracy of the disclosures has been questionable. *See supra* pp. 4-12.

The City is similarly violating Paragraph 118. The examples described above include more than ten violations of the City's obligation to respond to requests for information within fourteen days. The City is not exercising diligence in responding to Plaintiffs' reasonable requests for information necessary to enforce the Agreement.

II. The City's violations frustrate implementation of the Agreement

The City's violations are not merely procedural or formalistic. They frustrate the very purpose of the Agreement by impeding Plaintiffs' ability to monitor and enforce its other terms. Without the disclosures required by the Agreement, Plaintiffs cannot verify that the City is replacing Flint's service lines in a comprehensive and health-protective way, or that it is adequately coordinating with the CORE program to ensure all Flint residents have properly installed filters that effectively remove lead.

The City, for example, must work with the State to confirm that filters are installed after each service line replacement. Agmt. ¶ 117.c.ii.5. Plaintiffs

requested this disclosure to ensure residents are protected during the critical period immediately after pipe replacement, when there is an elevated risk of exposure to lead in drinking water. Chaudhary Decl. Ex. CC at 14. The City's repeated failure to report this information or to coordinate with the State on the status of the filter installations means that Plaintiffs do not know whether residents are being protected from a serious health harm. *See generally* Lanphear Decl., ECF No. 27-9.

Similarly, the City must include in its status reports the number and addresses of households that have refused pipe replacement. Agmt. ¶ 117.c.iii. The purpose of this provision is to track the health risk posed by the remaining lead and galvanized steel service lines in Flint and to allow Plaintiffs to conduct community outreach to encourage more residents to allow the City to replace their pipes. After omitting the information from its first status report and ignoring repeated requests from Plaintiffs under both Paragraphs 117 and 118, the City finally reported—five months after the Agreement went into effect—that 29 residents had refused replacement. *See supra* pp. 9-11. Plaintiffs then spent considerable time and resources contacting those residents, only to learn that the City's disclosure was not accurate and most of those residents should not be on the Refusal List. The City did not even attempt to correct its mistake until Plaintiffs brought it to the City's attention. *Supra* pp. 11-12. Because of the City's poor recordkeeping, for eight months, Plaintiffs have been unable to reach out to residents to discuss their

refusal to participate in the replacement program. These residents are not receiving the benefits they are owed under the Agreement.

In the same way, for months, the City ignored its obligation to notify CORE staff at least monthly of new water system customers. Agmt. ¶ 85; *see supra* pp. 12-13. Through in-person meetings, letters, calls, and emails, Plaintiffs repeatedly requested that the City immediately comply with this obligation by sending a list of new water accounts to CORE at least every 30 days. Providing each Flint resident with filter installation and education services is critical to protect residents from lead exposure. *See* Op. & Order Granting Pls.' Mot. for Prelim. Inj. 22-24, ECF No. 96. Although the City ultimately began to comply with its obligation under Paragraph 85, its lack of diligence resulted in a months-long violation of the Agreement. In the meantime, Plaintiffs could not confirm whether CORE and the City were visiting the homes of new water customers within the timeframe set forth in the Agreement to verify that they had properly working filters.

The City's violations reflect a pattern of noncompliance. *See supra* pp. 4-13. Even if individual requests for information are ultimately resolved after months of correspondence and follow-up (as some of the examples discussed above were), these repeated violations show systemic deficiencies in the City's documentation and reporting and a disregard for important terms in this Court's order.

In response to Plaintiffs' repeated attempts to address these issues, the City

refuses to do more. It insists that the City's counsel should not be obligated to undertake a reasonable inquiry to ensure the information received from City contractors and employees is complete and accurate. Chaudhary Decl. ¶ 35. This is not true. The Agreement's disclosure requirements should come as no surprise: the City negotiated these terms and agreed to provide this information. *Cf. Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co.*, 744 F. Supp. 2d 561, 570 (S.D.W. Va. 2010) (assuming defendant "entered into the Consent Decree in good faith with confidence it could meet the deadline it was agreeing to"). In doing so, the City and its counsel also implicitly agreed to undertake reasonable diligence to verify the accuracy of the information the City provides under this Court-ordered settlement. *See id.* at 574 (finding that lack of diligence in efforts to comply with consent decree and resultant violations warranted civil contempt).

Indeed, the City's failure to provide basic information in a timely way raises larger questions about its competency. If the City cannot collect critical, easily identifiable data and provide it within the agreed-upon timeframes, how can Plaintiffs trust that the City is competent to execute the much larger and urgent task of service line replacement in Flint? With every accumulated reporting violation, it becomes more important that Plaintiffs verify whether the City is in fact meeting its obligations under the Agreement. The City's lackadaisical approach to its reporting obligations contrasts sharply with the seriousness of the

issues at hand.

III. Further action by the Court is necessary to enforce the Agreement

Plaintiffs seek targeted modifications to the Agreement to improve the City's diligence and timeliness in collecting and reporting information. *See* Chaudhary Decl. Ex. BB. In view of the City's limited financial resources, Plaintiffs do not seek relief such as contempt sanctions or civil penalties that may harm the City's other functions. Plaintiffs instead request as a remedy a more extensive reporting and certification process, overseen by the Court, to ensure that the City provides Plaintiffs with the information needed to make the Agreement work as all the parties and the Court intended.

Plaintiffs seek this additional relief from the Court as a last resort. For months, Plaintiffs have attempted to work collaboratively with the City and avoid motion practice through countless phone calls, conferences, and correspondence. *See supra* pp. 4-14. But the City refuses to implement meaningful changes in its data collection and reporting practices to meet its obligations under this Court's order. Such violations warrant further relief: "A defendant who has obtained the benefits of a consent decree—not the least of which is the termination of the litigation—cannot then be permitted to ignore such affirmative obligations as were imposed by the decree." *Berger*, 771 F.2d at 1568. Plaintiffs, accordingly, now seek the relief described below.

Status reports. Plaintiffs request that the Court order the City to complete a form titled, "City of Flint Status Report Certification Form," and submit it to Plaintiffs with each required status report. *See* Chaudhary Decl. Ex. BB. This form obligates the City, for each of Paragraph 117's disclosure requirements, to indicate whether the required information was indeed reported to Plaintiffs, the date of the disclosure, and the substance of the disclosure. If no such disclosure was made, the City must explain why. *Id.* The City should also be required to file future status reports, including the certification forms, with the Court.

Both the City and State oppose Plaintiffs' request that the City file its status reports and certification forms with the Court. While Plaintiffs do not want to add to the Court's administrative burden, the Agreement alone has not been sufficient to compel the City's diligence and compliance. The submission of status reports to courts is a well-established tool to "ensure sufficient public and judicial oversight" of the implementation of a consent decree. *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 239 (D.D.C. 2011). Increased transparency in the City's compliance reporting is a logical next step to improve accountability and protect the integrity of the Court's order. *Cf. Putnam v. Oakland Unified Sch. Dist.*, 980 F. Supp. 1094, 1098 (N.D. Cal. 1997) (requiring reporting to the Court, instead of solely to plaintiffs, to remedy noncompliance with consent decree).

Requests for information under Paragraph 118. Plaintiffs request that the

Court order the City to similarly certify its responses to requests for information under Paragraph 118. Plaintiffs propose that, for each such request, Plaintiffs will first complete the relevant portions of a form titled, "Paragraph 118 Certification Form," *see* Chaudhary Decl. Ex. BB. Within fourteen days of receiving such a form, the City would be required to return the completed form indicating whether it provided a full response to Plaintiffs and, if not, why not. *Id.* All such forms will become part of Paragraph 117's disclosure requirements and be included in the status report materials filed by the City with the Court.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court order the above-described relief to enforce the Court-ordered Settlement Agreement.

Dated: December 27, 2017

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2017, I electronically filed Plaintiffs' Motion to Enforce Settlement Agreement and accompanying Brief and exhibits with the Clerk of the Court using the ECF system.

/s/ Dimple Chaudhary
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