

STATE OF INDIANA )  
 ) SS:  
COUNTY OF MARION )

IN THE MARION SUPERIOR COURT  
CIVIL DIVISION, ROOM NO. 7  
CAUSE NO. 49D07-0804-CC-018081

JASON BOND, )  
DAVID LEAR, and )  
LESLIE BRIDGES, )  
individually and as )  
class representatives of all those )  
similarly situated, )

Plaintiffs, )

v. )

VEOLIA WATER NORTH AMERICA )  
OPERATING SERVICE, LLC, )  
VEOLIA WATER INDIANAPOLIS, LLC, )  
and )  
THE CITY OF INDIANAPOLIS, )  
DEPARTMENT OF WATERWORKS, )

Defendants. )

FILED

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JUN 15 2010

*Elizabeth C. White*  
CLERK OF THE  
MARION CIRCUIT COURT

**BRIEF IN SUPPORT OF PLAINTIFFS'**  
**PETITION FOR CERTIFICATION OF CLASS**

Plaintiffs, Jason Bond, David Lear, and Leslie Bridges (collectively "Representative Plaintiffs"), individually and on behalf of all others similarly situated, by counsel, respectfully submit their Brief in Support of their Petition for Certification of Class, pursuant to Trial Rule 23.

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

This action is a classic case warranting class certification. There are thousands of putative class members, each with the same issues regarding the Defendants. Moreover, the Defendants have acted in the same manner with respect to each potential class member. Although caused by the same legal wrong, the damage claims of each affected individual are relatively small, and it would not be economical or feasible to separately pursue litigation. A

class action is not only desirable, but necessary to permit these individuals to vindicate their legal rights. It is also in the Defendants' best interest to concentrate this litigation in one forum and receive one answer as to the legality of their conduct.

Pursuant to Trial Rule 23, the Representative Plaintiffs respectfully request this Court to certify this matter as a class action.

## II. FACTUAL BACKGROUND

For over one hundred years, the Indianapolis Water Company, ("IWC") was the sole provider of water for the City of Indianapolis ("City") pursuant to a franchise agreement entered into between IWC and the City. The City purchased the assets of IWC from IWC Resources Corporation on April 30, 2002. As a result of the purchase, the City County Council created the City of Indianapolis Department of Waterworks ("Department") to oversee the operation of the utility. The Department was established in 2001 and was created to receive and manage the water utility assets obtained, once the City's purchase of the water utility was completed. (*Revised Code of the Consolidated City and County, Indianapolis/Marion County, 273-101, 273-102, 273-103*). It is the Department's duty to provide for an adequate supply of water to customers within its jurisdiction. (*Revised Code of the Consolidated City and County, Indianapolis/Marion County, 273-104*).

In an attempt to fulfil these duties and responsibilities, the Department, on March 21, 2002, entered into a twenty (20) year Management Agreement<sup>1</sup> ("Management Agreement") with U.S. Filter Operating Services, Inc., whereby U.S. Filter Operating Services, Inc. took over the operation, maintenance and management of the Department's assets. U.S. Filter Operating Services, Inc. created U.S. Filter Indianapolis, LLC ("USFIW") and the newly organized entity

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<sup>1</sup> The Management Agreement is attached to the First Amended Complaint as Exhibit "A." Because the Management Agreement is over 300 pages and already part of the record, the Representative Plaintiffs will not burden the record with an additional copy.

began managing and operating the Department's assets. On January 29, 2004, a Certificate of Amendment was filed in Delaware to change the name of USFIW to Veolia Water Indianapolis, LLC ("VWI" or "Veolia"), one of the Defendants in this case. The other Defendant is the parent company of VWI.

Defendant VWI, formerly USFIW, has operated and managed the day-to-day activities and operations of the local water utility and the Department's assets since May 1, 2002. Pursuant to the Management Agreement, VWI oversees all of the day-to-day operation and management of the Water Works by managing, operating, repairing, and maintaining all water treatment facilities, pumping and distribution systems for the water utility. (*Management Agreement*, 4.01(a), pp. 15-28). VWI's activities on behalf of the Department include providing water to the public and fire departments, and monitoring water quality and safety. VWI's responsibilities under the Management Agreement encompass the totality of the tasks necessary and attendant to the water utility. The Department retains only high level oversight functions.

VWI is also responsible for all customer service functions associated with the Water Works. Among these responsibilities are managing and operating all meter reading functions, managing and operating all billing and collection functions, responding to customer inquiries, correcting of billing errors, processing customer work orders, and being "responsive to customer needs and concerns in both standard and unusual operating situations." (*Management Agreement*, 4.01). Additionally, VWI is required to "provide customer service hours on a 24-hour a day, 7 day a week basis in compliance with the Customer Service Plan." (*Management Agreement*, 4.01(11), p.22).

The three individual plaintiffs are residential customers who receive their water from Indianapolis Water.<sup>2</sup> Their claims are based on the same operative allegations. First, they allege that Veolia is obligated to read their meters at least once every two months, and that Veolia has failed to do so. Second, they allege that Veolia, when it estimated their water usage, did so in a way that was not approved by the Indiana Utility Regulatory Commission (“IURC”) and which method tended to unreasonably overestimate the volume of water used, which in turn caused the Representative Plaintiffs to pay for water they did not use. Finally, the Representative Plaintiffs allege that the late charges imposed by Veolia were similarly inflated because the late charges are calculated as a percentage of the base water charge.

On May 17, 2010, the Court ruled on Veolia’s Motion for Summary Judgment<sup>3</sup> and the Department’s Motion to Dismiss. After these rulings, the following claims remain against each of the Defendants. First, against Veolia, the Representative Plaintiffs have a breach of contract and Deceptive Practices Act claim. As to the Department, the Representative Plaintiffs have a breach of contract claim. The breach of contract claim against both the Department and Veolia is based on the tariff as the contract. In the tariff, Veolia and/or the Department promised to 1) read meters at least once every two months, and 2) estimate water bills according to a certain formula. The Representative Plaintiffs allege that this promise was breached when Veolia and/or the Department failed to read meters at least once every two months and failed to utilize the tariff estimation logic from September 11, 2002 to present.

The Representative Plaintiffs’ claim based on the Deceptive Practices Act alleges that Veolia engaged in certain deceptive practices relating to the estimation methodology utilized.

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<sup>2</sup> The water utility owned by the Department and operated by VWI shall be referred to herein generically as “Indianapolis Water.”

<sup>3</sup> The Representative Plaintiffs incorporate by reference their Brief and Designated Materials in Opposition to VWI’s Motion for Summary Judgment herein.

The misrepresentations were made both to the public in general, as well as in each customer's billing statement.

The Representative Plaintiffs seek certification of both the contract and Deceptive Practices Act claims.

### III. ARGUMENT

#### A. Requirements for Class Certification under Trial Rule 23(A)

Pursuant to Trial Rule 23, the Representative Plaintiffs petition the Court to certify this matter as a class action. As such, the Representative Plaintiffs must satisfy the requirements of Trial Rule 23(A) and one or more of the requirements of Trial Rule 23(B). *Perdue, et al. v. Murphy*, 915 N.E.2d 498, 504 (Ind. Ct. App.). T.R. 23(A) provides that a plaintiff may sue as a representative on behalf of a class if the following four requirements are met:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Trial Rule 23(B) lists the following three additional prerequisites, any one of which may be used to support a class certification:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of:
  - (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
  - (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interest of the other members not

- parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
  - (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
    - (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
    - (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
    - (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
    - (d) the difficulties likely to be encountered in the management of a class action.

According to Trial Rule 23(C)(1), the class certification determination is to be made "[a]s soon as practicable after the commencement of an action brought as a class action." In determining whether a class action will be allowed, the substantive allegations of the complaint should be taken as true. *Rene v. Dr. Suellen Reed*, 726 N.E.2d 808, 818 (Ind. Ct. App. 2000). The Court should resolve any doubt regarding the propriety of certification "in favor of allowing the class action," so that it will remain an effective vehicle for deterring corporate wrongdoing. *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968);<sup>4</sup> accord, *In re Folding Cartons Antitrust Lit.*, 75 F.R.D. 727 (N.D. Ill. 1977). The determination whether an action should be maintained

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<sup>4</sup>Federal decisions and authorities construing Rule 23 of the Federal Rules of Civil Procedure are persuasive because Trial Rule 23 of the Indiana Rules of Procedure is patterned after the Federal Rule. *Chicago Title Ins. Co. v. Gresh*, 888 N.E.2d 779, 782 (Ind. Ct. App. 2008).

as a class action is committed to the sound discretion of the trial court. *Connerwood Health Care, Inc. v. Estate of Herron*, 683 N.E.2d 1322, 25 (Ind. Ct. App. 1997), trans. denied.

This is an action by a group of customers against Defendants. Consumer class actions, under certain circumstances, serve important social purposes. As the Illinois Appellate Court stated in *Eshaghi v. Hanley Dawson Cadillac Co.*, 574 N.E.2d 760 (Ill Ct. App. 1991):

In a large and impersonal society, class actions are often the last barricade of consumer protection . . . To consumerists, the consumer class action is an inviting procedural device to cope with frauds causing small damages to large groups. The slight loss to the individual, when aggregated in the coffers of the wrongdoer, results in gains which are both handsome and tempting. The alternatives to the class action -- private suits or governmental actions -- have been so often found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously contend that they are truly effective. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured and deterrence to the wrongdoer. (574 N.E.2d at 764-766)

The Representative Plaintiffs are not required to show a likelihood of success on the merits in order to have this action certified as a class action. *Rene*, at 817. The Representative Plaintiffs must show that they have satisfied each of the four prerequisites for a class action under T.R. 23(A). The four requirements are commonly referred to as the prerequisites of “numerosity”, “commonality”, “typicality” and “adequacy of representation.” Moreover, it is the Representative Plaintiffs’ burden to show that one of the circumstances under Trial Rule 23(B)(1)-(3) are present. Finally, an action may be brought or maintained as a class action with respect to particular issues or a class may be divided into subclasses and each subclass treated as a class. *Wal-Mart Stores, Inc. v. Bailey*, 808 N.E.2d 1198, 1202 (Ind. Ct. App. 2004), reh. denied, trans. denied. Applying these terms and requirements to the allegations presented in this

case, the Representative Plaintiffs satisfy the requirements of Trial Rule 23. Accordingly, this action should be certified as a class action.

**1. Class Definition**

A properly defined class is necessary from the outset because a judgment in a class action has a res judicata effect on absent class members. *Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 981 (Ind. Ct. App. 1996). A class definition must be specific enough for the Court to determine whether or not an individual is a class member. *Perdue*, 915 N.E.2d at 505. Without a properly defined class a class action cannot be maintained. *Id.*

The Representative Plaintiffs propose the following two class definitions be certified:

1. All residential customers of Indianapolis Water from September 11, 2002 to present who received and paid a water bill that incorporated an estimated water consumption value that was calculated using the higher of either a twelve month average or the average of the last two months, excluding the Judge in this case, and counsel for the Representative Plaintiffs (“Estimated Bill Class”).
2. All residential customers of Indianapolis Water from January 1, 2007 to December 31, 2009 who had their water usage estimated in at least two consecutive months without a valid skip code terminating in an actual read with a negative consumption bill excluding the Judge in this case, and counsel for the Representative Plaintiffs (“Meter Reading Class”).

**2. Numerosity**

T.R. 23(A)(1) requires that the class be “so numerous that joinder of all members is impracticable.” The numerosity analysis does not rest on a magic number but permissive joinder is usually deemed impracticable where class members number 40 or more. *Rene*, 726 N.E.2d at 817; *Schmitt v. U.S.*, 203 F.R.D. 387 (S.D. Ind. 2001) (approving class of 100-200); *Swanson v. American Consumer Industries*, 415 F.2d 1326, 1333 (7th Cir. 1969) (40 sufficient). It is not

necessary that the precise number of class members be known. "A class action may proceed upon estimates as to the size of the proposed class." *In re Alcoholic Beverages Lit.*, 95 F.R.D. 321 (E.D.N.Y. 1982). The determination of whether joinder is impracticable is not simply a test of numbers, but requires an examination of the specific facts and circumstances of each case. *Northern Ind. Pub. Serv. Co. v. Bolka*, 693 N.E.2d 613, 616 (Ind. Ct. App. 1998), trans. denied. Proponents of the class are not required to specify the identities or exact number of persons included in the proposed class, but they may not rely on conclusory allegations that joinder is impracticable or upon speculation as to the size of the class. *Id.* Instead, they must supply facts or demonstrate circumstances which provide support or a reasonable estimate of the number of class members. *Id.* A finding of numerosity may be supported by common sense assumptions. *Id.*

Factors the Court can consider for determining whether a class is so numerous to make joinder impracticable include: the size of the potential class, ease of identifying the potential members, and determining their addresses, their geographic distribution, and whether their individual claims are so small as to inhibit them from pursuing their own claims. *Young v. Magnequench, Intern'l Inc.*, 188 F.R.D. 504 (S.D. Ind. 1999). "[T]he court may assume sufficient numerosity where reasonable to do so in absence of a contrary showing by defendant, since discovery is not essential in most cases in order to reach a class determination . . . . Where the exact size of the class is unknown, but it is general knowledge or common sense that it is large, the court will take judicial notice of this fact and will assume joinder is impractical." *2 Newberg on Class Actions* (3d ed. 1992), §7.22.A.

There is little doubt that both of the classes have more than enough members to satisfy the numerosity requirement. The Estimated Bill Class includes all Indianapolis Water customers

from September, 2002 to present who received and paid an estimated bill utilizing an estimating logic other than the estimating logic provided for in the tariff. It is commonly known, and beyond dispute, that there are currently in excess of 300,000 residential customer accounts. In the approximately eight years since the current tariff was filed, there have undoubtedly been numerous customers who have moved away and no longer are customers, and numerous others which have moved into Indianapolis Water's service territory. The net of these new and closed accounts, plus the current customer base, will intuitively result in a number higher than 300,000 customer accounts.

The 2007 Meter Reading Class also numbers more than enough to satisfy the numerosity requirement. This class results from Veolia's "Blitz" effort in December, 2007 to focus attention on long time estimated customers. (Exhibit "A") During the month of December, 2007, approximately 10 full business days (and parts of other days) were devoted to the Blitz. (Exhibit "B"). During the Blitz days, the normal meter reading routes were abandoned. (Exhibit "C"). The most impacted areas include a band on the northwest side of the service territory, and another band on the northeast side of the service territory. (Exhibit "D"). Normally, Veolia reads approximately 160,000 meters per month. According to an internal document entitled "Missed Reads (residential) Summary" from Veolia, there were 31,157 residential customers who were affected by missed reads. (Exhibit "E"). Again, 31,157 residential customers is more than enough to satisfy the numerosity requirement of this class.

Another factor to consider is whether the individual claims are too minimal to justify each individual to pursue their own claims separate from the class action. Class actions enable plaintiffs to pool relatively small claims and pursue claims that are otherwise uneconomical to litigate individually. *Phillips Petroleum, Co. v. Shutts*, 472 U.S. 797 (1985). In *Schmitt v. U.S.*,

the Court reasoned that the numerosity requirement was met, in part, due to the putative class claims being relatively small making it difficult to institute individual actions. *Schmitt v. U.S.*, 203 F.R.D. at 401.

The contract claims of all proposed classes will likely be relatively small. For the most part these claims are based on the time value of money with interest being the primary means to calculate damages. So, if a customer overpaid \$250, and did not receive a credit back until 6 months later, this would amount to \$9.86 at 8% simple interest. This amount could hardly be characterized as sufficient for individuals to pursue in an economical way. Even the claims under the Deceptive Consumer Practices Act (“DCPA”) against Veolia amount to a maximum of \$1,500 per violation. Again, these amounts, even though substantial on an aggregate basis, cannot be reasonably characterized as sufficient to motivate large numbers of individuals to file separate lawsuits.

### 3. Commonality

Trial Rule 23(A)(2) requires that the action raise questions of law or fact common to the class. The commonality prerequisite focuses on the characteristics of the class and this requirement is satisfied if the individual Plaintiffs’ claims are derived from a common nucleus of operative fact, described as a common course of conduct. *Rene*, 726 N.E.2d at 818; *Connerwood Healthcare, Inc.*, 683 N.E.2d at 1327. “Common nuclei of operative fact are typically manifest where . . . the defendants have engaged in standardized conduct toward members of the proposed class.” *Keele v. Wexler*, 149 F.3d 589, 594 (7<sup>th</sup> Cir. 1998).

The threshold of “commonality” is not a high one. 1 *Newberg on Class Actions*, (3d Ed. 1992) §3.10 (“the test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative - that is, there need be only a single issue common to all members of the

class”). Complete identity is not required. *See*, Wright & Miller, Federal Practice & Procedure, §1763 (“this provision does not require that all questions of law and fact raised by the dispute be common”). The requirement of commonality may still be met even when there are some questions of law and fact unique to certain class members. *All-Bromine Antitrust Pltfs. v. All-Bromine Antitrust Defts.*, 203 F.R.D. 403, 409 (S.D. Ind. 2001).

The case at bar satisfies the commonality requirement. With respect to the contract claim, it is alleged that Veolia and or the Department breached the tariff when they 1) utilized an unapproved estimation logic to calculate estimated water bills, and 2) when they failed to read meters at least once every two months. As to the first general allegation, all customers have their water bills estimated at some point during their relationship with the defendants. Moreover, the tariff applies to all customers. Therefore, all customers have the same operative nucleus of fact. That is, a determination that 1) the tariff requires bills to be estimated a certain way, and 2) the defendants failed to utilize the appropriate methodology, would apply to all Indianapolis Water customers in the same way. Likewise, failure to read meters once every two months is a fact common to tens of thousands of class members in 2007/2008 time frame.

The claim against Veolia under DCPA is equally common to the class<sup>5</sup>. This claim is based on allegations of false and deceptive information disseminated by Veolia both to the public in general, via its customer service representatives, representatives and in the water bills themselves. Common issues regarding this claim would include the content of the statements themselves, whether Veolia knew they were false and deceptive at the time, whether Veolia intended to mislead its customers and whether or not Veolia’s statements themselves were false

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<sup>5</sup> I.C. 24-5-0.54(b) of the DCPA specifically recognizes the right of an aggrieved individual to seek class certification pursuant to the T.R. 23.

and deceptive. Again, these common questions, once resolved, would be applicable to the class as a whole.

#### 4. Typicality

Trial Rule 23(A)(3) requires that the claims of the Representative Plaintiffs be typical of the claims of the class:

A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. The typicality requirement may be satisfied even if there are factual distinctions between the claims of the representative plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact.

*De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citation omitted); *accord, Rosario v. Livaditis*, 963 F.2d 1018 (7th Cir. 1992). As long as the claims “resemble or exhibit the essential characteristics of those of the representatives”, Rule 23(A)(3) will be satisfied. *Kas v. Financial General Bankshares Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1984); *Corelo Indian Community v. Watt*, 551 F. Supp. 366, 377 (D.D.C. 1982); *Lewis v. National Football League*, 146 F.R.D. at 5 (D.D.C. 1992). Subdivision (A)(3) does not require a showing that all plaintiffs’ claims be identical but is satisfied if the representative’s claims are neither in conflict with nor antagonistic to the class as a whole. *Rene*, 726 N.E.2d at 818; *Edward D. Jones & Co. v. Cole*, 643 N.E.2d 402, 407 (Ind. Ct. App. 1994), trans. denied.

“The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through pursuit of their own goals.” *All-Bromine Antitrust Pltfs. v. All-Bromine Antitrust Defs.*, 203 F.R.D. at 409 quoting *In re Prudential Ins. Co. of Amer. Sales Practices Litig.*, 148 F.3d 283, 311 (3d Cir. 1998). The representatives’ claims need not be identical to the claims of the class members, rather, it is

sufficient that the claims of the representatives and class members are substantially similar. *Id.* The size of each claim, whether large or small, does not matter because the similarity of legal theory may control even in the face of differences of fact. *Id.* at 410 quoting *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 232 (7<sup>th</sup> Cir. 1983).

The claims pursued by the Representative Plaintiffs are identical to the claims of the class members as a whole. All of the claims of the Representative Plaintiffs and class members arise under the same legal theories and operative facts applicable to all class members. Each of these claims is typical if not identical to the claims of the class members. Attached to each affidavit of the Representative Plaintiffs is their individual transaction report with Indianapolis Water. Each of the Representative Plaintiffs had estimated water bills, and had at least two consecutive months in which their water usage was estimated without an actual read.

**5. Adequacy of Representation**

T.R. 23(A)(4) requires that the Representative Plaintiffs provide fair and adequate protection for the interests of the class. The adequacy requirement of (A)(4) has three sub-requirements: 1) the chosen class representative cannot have antagonistic or conflicting claims with other members of the class; 2) the representative must have a sufficient interest in the outcome to ensure vigorous advocacy; and 3) counsel for the representative plaintiff must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously. *Rene*, 726 N.E.2d at 818; *Northern Indiana Public Service Co. v. Bolka*, 693 N.E.2d 613, 618 (Ind.App. 1998).

**a. Representative Plaintiffs' Claims are not in Conflict with the Claims of the Members of the Class.**

As shown *supra*, the Representative Plaintiffs' claims are common and typical, if not identical, to the claims of the class members. There is no reason to assert that the Representative

Plaintiffs' pursuit of their claims are antagonistic to or in conflict with the claims of the class members. There is no risk that their claims will somehow adversely affect the rights of the class members. For example, there is no potential for comparative fault among the class members in this case. Additionally, the requirements under T.R. 23(E) for court review and approval and notification to the class of any settlement or intent to dismiss the case ensure that the Representative Plaintiffs will not be induced by Veolia to compromise the claims of the class members for their own benefit.

One purpose for determining whether the Representative Plaintiffs will adequately represent the class members is to uncover any conflicts between the Representative Plaintiffs and the class members they seek to protect. *Schmitt v. U.S.*, 203 F.R.D. 402. Moreover, it is not foreseeable that the amount of damages sought by one class member will affect the ability for another class member to fully recover because the relatively small value of each claim. For all these reasons, the interests of the representative parties are the same and consistent with the interests of the class members.

b. **Representative Plaintiffs Have a Sufficient Interest in the Outcome of this Matter.**

The inquiry into the named representative's interest in the outcome is to ensure that the "representative in a class action is not a fictive concept." *Hill v. Priority Financial Serv., Inc.*, 2000 U.S. Dist LEXIS 18590 \*1, No. IP 98-1319-C-B/S (S.D. Ind. Dec. 22, 2000). The Representative Plaintiffs' knowledge about the matters stated in the Complaint and their genuine interest in the outcome of this litigation are sufficient to make them adequate representatives of the class. *Id.* at \*5. To adequately represent the class, it is not necessary that the class representatives be knowledgeable of either the allegations or the legal theories on which the law of their case rests. *All-Bromine Antitrust Pltfs. v. All-Bromine Antitrust Defs.*, 203 F.R.D. at 411.

As long as the Representative Plaintiffs have some basic knowledge of the lawsuit and are capable of making intelligent decisions based upon the advice of their attorney there is no reason that the Representative Plaintiffs may not delegate further factual and legal investigation to their attorney. *Id. citing Kaplan v. Pomerantz*, 131 F.R.D. 118, 122 (N.D. Ill. 1990).

Each of the Representative Plaintiffs has executed an Affidavit which leaves no doubt that they are adequate representatives of the proposed class. (Exhibit "F"). They have been and continue to be customers of Indianapolis Water. They have cooperated with the undersigned counsel to move this case forward. All three Representative Plaintiffs actively participated in the unsuccessful mediation of this case in April, 2010. All three Representative Plaintiffs have committed to providing testimony at a deposition or at trial. They have already established their willingness to pursue these claims on behalf of the class by their involvement to retain an attorney to draft and file the Second Amended Complaint in this matter and by their active monitoring of the status of this case. The Representative Plaintiffs have a sufficient interest in the outcome of this matter and their claims are not in conflict with the claims of the class. Thus, the Representative Plaintiffs will adequately represent the class members' interests.

c. **Plaintiffs' Counsel is Experienced, Competent, and Will Adequately Represent the Representative Plaintiffs and the Members of the Class.**

The Indiana Rules of Professional Conduct provide, in part, "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably necessary* for the representation." Ind. R. Prof. Conduct 1.1 (italics added). The comment to the rule reads:

Competent handling of a particular matter includes...use of methods and procedures meeting the standards of competent practitioners. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

The Representative Plaintiffs have retained counsel with substantial experience in class action litigation, complex litigation, and the substantive subject-matter of the Complaint.

Evidence that counsel has been adequate in the past ordinarily is persuasive evidence that the attorney will be adequate again. *Young v. Magnequench*, 188 F.R.D. at 508. Moreover, “experience in the field in which the litigation is brought can suffice as evidence of the attorney’s adequacy.” *Id.* The Representative Plaintiffs and the class members will be represented by Peter S. Kovacs, a partner with the law firm of Stewart & Irwin, P.C. The Representative Plaintiffs’ attorney has been involved with numerous other class actions and has represented other plaintiffs, defendants and class members in class actions litigation. Representative Plaintiffs’ attorney is in good standing with the Bar of the State of Indiana. The affidavit of Peter S. Kovacs is attached hereto as Exhibit “G”, which outlines this experience.

Representative Plaintiffs have shown that each of the four prerequisites under T.R. 23(A) are met. Next, Representative Plaintiffs must demonstrate that one of the conditions listed under T.R. 23(B) are present.

**B. Certification under Trial Rule 23(B)**

In addition to the requirements under T.R. 23(A), T.R. 23(B) provides that an action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied and, in addition, other requirements are met. Thus, subsection (B) identifies three separate (although not mutually exclusive) types of class actions. A class action is appropriate if, but only if, in addition to all the requirements of subsection (A) one (or more) of three additional conditions are found to exist. *Bowen v. Sonnenburg*, 411 N.E.2d 390, 398 (Ind. Ct. App. 1980).

An action may be maintained under T.R. 23(B)(3) if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only

individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”

The Representative Plaintiffs request certification of this action as a Trial Rule 23(B)(3) class action. As the Indiana Court of Appeals stated:

There is no precise test for determining whether common questions of law or fact predominate; instead Indiana Trial Rule 23(B)(3) requires a pragmatic assessment of the entire action and all of the issues involved. In making this decision, we consider whether the substantive elements of class members’ claims require the same proof for each class member; whether the proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interests; whether the resolution of an issue common to the class would significantly advance the litigation; whether one or more common issues constitute significant parts of each class member’s individual cases; whether the common questions are central to all of the members’ claims; and whether the same theory of liability is asserted by or against all class members, and all defendants raise the same basic defenses.

*7-11, Inc. v. Bowens*, 857 N.E.2d 382, 393-94 (Ind. Ct. App. 2006).

The predominance test really involves an attempt to achieve a balance between the value of allowing individual actions to be instituted so that each person can protect his own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis. *Associated Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 685 (Ind. 2005). In cases involving the predominance issue, the existence of a common course of conduct by the defendant has been central in determining that certification is warranted. *Wal-Mart Stores, Inc. v. Bailey*, 808 N.E.2d 1198, 1206 (Ind. Ct. App. 2004), trans. denied.

The predominance and superior method analysis under T.R. 23(B)(3) includes four factors that the Court should consider in making its findings. Those considerations are: (a) the interests of the members of the class in individually controlling the prosecution or defense of

separate actions; (b) the extent and nature of any litigation concerning a controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forums; and (d) the difficulties likely to be encountered in the management of the class action. In considering the factors specifically identified in T.R. 23(B)(3), the Court should take into consideration whether class members have a strong interest in individually controlling the prosecution of separate actions and the amount of damages. *Noon v. Sheriff Clyde R. Sailor*, 2000 U.S. Dist. LEXIS 7419, No. NA 99-56-C H/G \*1 (S.D. Ind. March 14, 2000).

As previously outlined in this and other briefing before the Court, this action involves relatively small individual claims. Consequently, there is little likelihood that individuals will be motivated to file separate claims. This is illustrated by the fact that, to the best of the undersigned's knowledge, no other lawsuit has been filed asserting the same theories as this one in the over two years since this action was filed. There is simply no evidence that individual members of the class have an interest in controlling, via separate actions, the prosecution of their small claims.

Also, unlike the need for individual control in a personal injury matter, there will not be any emotional involvement that will affect damages and trial strategy. Additionally, the small amount of damages expected for each individual class member is further evidence that a class action is superior to joinder or other methods. Again, considering the amount of damages expected to be recovered for each individual it is more economical and judicially efficient for this matter to proceed as a class action.

The geographically-centralized location of this Court is desirable for the Representative Plaintiffs and other Veolia consumers to maintain their claims against Veolia. By definition, all

of the class members are residential customers located within Indianapolis Water's service territory. All potential class members are located within a one hour drive of this Court, and would be available for hearings, depositions, and trial. Moreover, the Defendants' administrative operations and employees are all located within Marion County.

The centralized nature of all the information relating to the Defendants' conduct, and the computerization of those records makes this case manageable, and makes the case ideal for treatment as a class action. One centralized action will avoid redundant and duplicative discovery and evidence issues, inconsistent outcomes and rulings, and will promote judicial economy and efficiency. It is only logical that Veolia should be held accountable for any liability to Indiana residents in the Indiana courts. Also, some of the common trial management concerns of internal disputes among the class members, multi-state cases, state law variations and problems with notification are not present.

There is also abundant evidence that the issues resolvable through the class action mechanism predominate over individual issues. For example, the Estimated Bill class includes a number of issues that are ideally suited to resolution on a class wide basis. Among these issues is the applicability of the tariff to the asserted wrongful acts, whether the same estimation methodology was applied to all class members, and to what magnitude did the estimation formula actually utilized by the Defendants tend to overestimate the class' water usage. While the actual damages suffered by each class member will vary, this alone is not a reason to find the class issues do not predominate. Because each class member's historical information is maintained in the Defendants' computer systems, damages can easily be determined from the application of simple calculations to this data.

Similarly, the DCPA claim against VWI will lend itself to class wide determinations which will predominate over individual issues. This claim relates to misleading statements and/or omissions concerning the estimation methodology utilized by VWI and whether that methodology was “IURC approved”. VWI affirmatively asserted, through the media, and its customer service representatives<sup>6</sup> that it calculated its estimated bills using an IURC approved methodology. (Exhibit “H”). Moreover, it failed to disclose on its bills that it was using an unapproved estimation formula. This campaign of misinformation and deception lends itself to class wide determinations. For example, the content of VWI’s bills, including statements and/or omissions contained within them, is subject to class wide determinations. The veracity of statements made through the media or other channels are susceptible to class wide determinations. These and other class wide issues predominate over individual ones.

This case is particularly suited to class action treatment under T.R. 23(B)(3). In fact, anything but class action treatment would do nothing to compensate those residential consumers in Indiana who have been harmed by Veolia’s conduct, but who, because of the relatively small dollar amount of their claim, are prevented from bringing legal action for economic reasons.

Representative Plaintiffs have met each requirement under T.R. 23 (A)(1)-(4) and (B)(3). Accordingly, the Court should certify this matter as a class action.

#### IV. CONCLUSION

Considering the facts alleged in Representative Plaintiffs’ Second Amended Complaint as true, the Representative Plaintiffs request the Court enter an Order determining that this action may proceed against the Defendants as a class action, pursuant to T.R. 23(B)(3). Accordingly,

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<sup>6</sup> VWI’s customer service representatives are trained to follow scripted materials in communications to its customers which lends uniformity to the message, and consequently the misrepresentations, at issue in this case. (Exhibit “I”).

this Court should conclude and order that two classes be certified as defined in Plaintiffs' Petition for Certification of Class, and grant all other appropriate relief.

**STEWART & IRWIN, P.C.**

Dated: 6/15/10

By 

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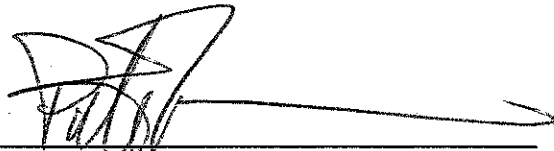
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record, via first class mail, postage prepaid, on the 15<sup>th</sup> day of June, 2010:

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