

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. 1
CAUSE NO. 49D01-0804-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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Elizabeth J. White
CLERK OF THE MARION CIRCUIT COURT

**PLAINTIFFS' CONSOLIDATED¹ BRIEF IN REPLY TO DEFENDANTS'
OPPOSITION TO PETITION FOR CLASS CERTIFICATION**

Plaintiffs, Jason Bond, David Lear, and Leslie Bridges (“Named Plaintiffs” or collectively “Plaintiffs”), by counsel, respectfully submit their Consolidated Brief in Reply to Defendants’ Opposition to Petition for Class Certification.

I. INTRODUCTION

Veolia Water Indianapolis, LLC and Veolia Water North America Operating Service, LLC (collectively “Veolia”) and The Consolidated City of Indianapolis, Department of Waterworks (“Department”) both assert similar arguments against certification of this case under Trial Rule 23. They assert that the Named Plaintiffs are neither sufficiently knowledgeable nor diligent in the prosecution of their claims. They have asserted that the breach of contract claim,

¹ Defendants filed separate briefs in opposition to Plaintiffs’ Petition for Class Certification. Because their respective arguments overlap, Plaintiffs will consolidate their arguments to both briefs in this document.

which is the remaining cause of action, necessarily involves individualized evidence and so-called “mini trials” to prove the claims. Moreover, the Department argues that none of the three Named Plaintiffs have utilized the so-called “mandatory” dispute resolution procedures set forth in their Tariff.² As will be explained in this Brief, none of these arguments serve as a basis upon which class certification should be denied.

Each of the Named Plaintiffs has demonstrated they can act adequately and represent the class. They each have a basic understanding of the claims and have each experienced the harm which is alleged in the Complaint. All three of the Named Plaintiffs understands their obligations as class representatives to not only prosecute this case in their own interests, but also in the best interests of the class as a whole. All of them have already demonstrated, during two years of litigation, a willingness to prosecute the case vigorously with the assistance of their counsel. They have each participated in a deposition, responses to discovery, and an unsuccessful mediation. Each of them remains engaged in the progress of the case.

Additionally, this case is ideal for class treatment. The data necessary to determine whether Veolia and/or the Department fulfilled its obligations to read the classes’ water meters at least once every other month is contained in computerized records which can be easily analyzed. The estimation methodology utilized by Veolia to generate estimated bills is a mathematical formula applied to all rate payers. The consumption data for each individual rate payer is contained within the computerized records of Veolia and/or the Department.

It is a common tactic for defendants in potential class actions to bemoan the need for endless “mini-trials” and individualized proof. This case is no different. In most cases these

² The “Tariff” refers to the “Rules” document filed by the Department with the Indiana Utility Regulatory Commission on September 11, 2002 and which is attached to Veolia’s Brief as Exhibit “B.”

concerns are unjustified, as they are here. Plaintiffs' Petition for Class Certification should be granted and this case allowed to proceed pursuant to Indiana Trial Rule 23.

1. **The Named Plaintiffs Are Adequate Representatives of the Proposed Class.**

Both Veolia and the Department challenge the adequacy of all three class representatives pursuant to Trial Rule 23(A)(4). The adequacy requirement of Trial Rule 23(A)(4) has three components: 1) the 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 named plaintiff must be competent, experienced and qualified and generally be able to conduct the litigation to vigorously protect the rights of absent class members. *Rene v. Reed*, 726 N.E.2d 808,818 (Ind.Ct.App. 2000).

Defendants do not challenge whether proposed counsel for the class is adequate. Rather, the Defendants focus their challenge on the first two components.

In summary, the Defendants challenge all three named plaintiffs by arguing that they are not adequate representatives because they lack sufficient knowledge about their case making them wholly reliant on their counsel to direct the litigation. This argument cannot serve as a basis to deny class certification for several reasons. First, for the most part, Defendants' characterization of the named plaintiffs' deposition testimony is inaccurate and incomplete. Second, the named plaintiffs have demonstrated more than adequate mastery of the substance of their claims, and a willingness to pursue litigation vigorously, to enable them to serve as class representatives under Trial Rule 23(A)(4).

Each of the named Plaintiffs provided their deposition testimony in September, 2010. In different ways, each named Plaintiff understands the basis of their claim.

A. Jason Bond

Mr. Bond has attended one hearing in person in this case. Bond Depo., p. 6.³ He also attended the all day mediation in the Spring of 2010. *Id.* He meets with his counsel and the other named plaintiffs in person once every three to four months. *Id.* at 6-7. Mr. Bond testified that once he found out what was going on regarding overestimation and failure to check meters, and that it was happening to both him and many others, he wanted to be involved in the lawsuit to help out. *Id.* at 8-9. He understands that Veolia has contracted with the City to manage and run the water system. *Id.* at 11. Mr. Bond testified that he had a contract with Veolia. *Id.* at 14. He participated in this lawsuit because Veolia didn't live up to their responsibilities in terms of meter reading and overestimation. *Id.* at 15. Mr. Bond also understood that the estimation formula utilized by Veolia was not the one approved by the Indiana Utility Regulatory Commission. *Id.* at 32. Mr. Bond believes the formula used by Veolia to estimate bills is faulty because it leads to the overestimation of water bills. *Id.* at 36.

B. David Lear

Mr. Lear received a string of water bills in the January, 2008 timeframe that generally ranged from \$200 to \$300 which he found outrageous. Lear Depo., p. 8. He called the water company and was told that it was due to an estimated bill, and not to pay it and that they would send someone out to read the meter. *Id.* at 9. He understands that Veolia has been hired to operate the water utility, which utility is owned by the Department. *Id.* at 11. He believes that Veolia should have read the meters every other month, as it is required to. *Id.* at 13-14. He believes he was harmed because of high estimates that did not reflect his actual consumption. *Id.*

³ Each of the three depositions of the Named Plaintiffs are attached to the Department's Brief in Opposition as Exhibits "C", "D", and "E." Rather than burden the Court with duplicates, the Plaintiffs will simply rely on those copies.

at 20. He also believes that the estimation methodology used by Veolia is flawed. *Id.* at 30. He does not believe that the current estimation methodology accounts for seasonal variations. *Id.* at 31.

C. **Leslie Bridges**

Ms. Bridges testified that she understood Veolia to be the company that manages the water company. Bridges Depo., p. 12. She described her relationship with Veolia as being a customer. *Id.* at 14. She is “not sure” whether she has a contract with Veolia, because she has never been provided with one. *Id.* at 15. She testified that she sued Veolia because of their estimates of her water usage, and also because they mismanaged the readings of her water meter. *Id.* at 15. She understands that Veolia is required to read her water meter once every other month by the Indiana Utility Regulatory Commission. *Id.* at 16.

2. **Trial Rule 23(A)(4) Does Not Require that Plaintiffs Possess Perfect or Complete Information About the Case**

Veolia and the Department seemingly demand that each of the named Plaintiffs should grasp and understand each and every nuance regarding the legal and factual basis of their claims. Perfect knowledge of the case is not, however, needed to fulfill the requirements of Trial Rule 23(A)(4). The Supreme Court has held that a class representative’s lack of knowledge about his case does not make him an inadequate representative. *Surowitz v. Hilton Hotels, Corp.*, 383 U.S. 363 (1966). In *Chakejian v. Equifax Information Services, Inc.*, 256 F.R.D 492 (E.D. Penn. 2009) the defendant challenged the adequacy of plaintiff to serve as class representative in a Fair Credit Reporting Act class action. *Id.* at 499. Equifax cited the plaintiff’s deposition wherein the plaintiff admitted he had never read the amended complaint, and could not identify the law or the part of the FCRA that he claims Equifax violated. *Id.* He also testified that he did not wholly

understand his obligations as class representative. Nevertheless, the District Court found that the plaintiff's lack of knowledge was not a bar to class certification. The District Court noted that the Plaintiff submitted to a five hour deposition, and that he understood his obligation to look out for the best interests of the class as a whole. *Id.* His confusion about some aspects of the case does not create a conflict to render him inadequate under Rule 23(A)(4). See also, *Lerner v. Haimsohn*, 126 F.R.D. 64,67 (D.Colo. 1989) (Generally, as long as the Plaintiffs as class representatives know something about the case even though they are not knowledgeable of the complaint's specific allegations the class should be certified.); *Lewis v. National Football League*, 146 F.R.D. 5, 10 (D.D.C. 1992) (Rule 23(A)(4) does not require that the class representative have extensive knowledge of their case. Evidence in the record indicate that the named plaintiffs are not only willing to participate, but already have.); *Lewis v. Curtis*, 671 F.2d 779, 789 (3rd Cir. 1982)(finding adequacy requirement even though the named plaintiff displayed a complete ignorance of the facts concerning the transaction that he was challenging).

Fortunately, this case is not burdened with Named Plaintiffs who are completely ignorant of the facts of their case, or even remotely so. To the contrary, each of the Plaintiffs in this case displays at least a basic understanding of their claims. Each Plaintiff experienced abnormally high estimated water bills, and meter reads which were not at least every other month. Each understood that Veolia was the entity charged with managing the water utility. Each felt that they had been harmed due to these high, estimated water bills because they paid substantially more than their actual usage justified. Moreover, all three Plaintiffs have demonstrated not only a willingness, but have actually participated in the prosecution of this case over the past two years. Each one submitted to a deposition, and provided responses to discovery. Each Plaintiff participated in an all-day mediation in April of this year. Each one has expressed a willingness to

look out for the best interest of the class as a whole. See, Exhibit “F”, Petition for Class Certification, Affidavits of Named Plaintiffs.

Most often a Court is left with only a promise that the class representative will vigorously litigate the proposed class action in the future. Here, the Court has something much more: over two years of *actual* participation by each of the Named Plaintiffs that is more than sufficient to demonstrate their commitment to see this case through for the class as a whole.

3. **The Plaintiffs Are Not Subject to a Mandatory Dispute Resolution Process.**

The Department argues that because none of the Plaintiffs exhausted the so-called “mandatory” dispute resolution process in the Tariff, they are not adequate representatives of the class. This argument fails for several reasons. First, the Department made the identical argument in its Motion to Dismiss Second Amended Complaint filed on April 1, 2009. Department’s Brief in Support of Motion to Dismiss, p. 12. The Court rejected this argument in its Order dated May 17, 2010. Second, the dispute resolution language contained in the Tariff is not mandatory at all.

In its Brief in Support of Motion to Dismiss filed on April 1, 2009, the Department argued:

... Plaintiffs’ Complaint alleges breach of contract, nothing more. But even this claim fails because the Plaintiffs flatly ignored the Tariff’s mandatory dispute resolution procedure, and thus failed to satisfy a condition precedent to bringing this action. (Brief, p.12).

The remaining claim against Veolia and the Department is described in Count I of the Second Amended Complaint; for Breach of Contract. The Court’s Order of May 17, 2010 specifically denied the Department’s Motion to Dismiss Count I of the Second Amended Complaint. The Department has not come forward with any new facts, or new law, which could change the

Court's previous decision that there is no mandatory alternative dispute resolution process contained in the Tariff. For this reason alone, the Department's argument cannot serve as a basis to deny class certification.

Second, the Department wrongly characterizes the optional consumer complaint process contained in the Tariff as a mandatory arbitration or dispute resolution clause. The complaint procedure contained in the Tariff is not a condition precedent to bringing the present action. A party seeking relief in favor of an alternative dispute resolution mechanism must satisfy a two-prong test: (1) a party must demonstrate the existence of an enforceable agreement to alternatively resolve the dispute, and (2) a party must prove that the disputed matter is the type of claim that the parties agreed to resolve alternatively. *TWH, Inc. v. Benford*, 2008 WL 5404215 (Ind. Ct. App. 2008). "To be enforceable, an agreement to [alternatively resolve a matter] must . . . evidence an intention to resolve some controversy through [alternative means]." *Novotny v. Renewal by Anderson Corp.*, 861 N.E.2d 15 (Ind. Ct. App. 2007). The purpose of arbitration, and any alternate dispute resolution mechanism, is to afford parties the opportunity to reach a final disposition of differences in an easier, more expeditious manner than by litigation. *North Miami Education Assn. v. North Miami Comm. Schls.*, 736 N.E.2d 749 (Ind. Ct. App. 2000), decision clarified on rehearing, 746 N.E.2d 380 (Ind. Ct. App. 2001); *Shahan v. Brinegar*, 181 Ind.App. 39, 390 N.E.2d 1036 (1st Dist. 1979).

The validity of an alternate dispute resolution mechanism is based on mutuality of obligation. *Scaffidi v. Fiserv, Inc.*, 218 Fed. Appx. 519 (7th Cir. 2007)(an agreement to arbitrate an employment dispute was found valid on contract law because the employer was equally bound to arbitrate any of its claims that were covered by the agreement); *Perry Fashions, Ltd. v. Ultracashmere House, Ltd.*, 462 N.E.2d 252 (Ind. Ct. App. 4th Dist. 1984)(New York law

requires arbitration agreements to be mutually binding to be enforceable); *Covenant Health Rehab of Picyune, LP v. Brown*, 949 S.2d 732 (Miss. 2007)(a grievance resolution process in an agreement for admission to nursing home providing that an event of claim, dispute or controversy other than one regarding payment for services rendered or refunds due, parties would participate in a grievance resolution process was found unconscionable as to the resident because the nursing home was allowed to bring a suit in court on issues of payment while the resident was prohibited from bringing suit in court on any grounds).

The complaint procedure described in the Tariff is not a valid mandatory dispute resolution procedure in that it contains no mutuality of obligation. There is no language which requires the Department to submit its complaints against customers to this process. The language at issue relating to the complaint procedure reads as follows:

(A) Complaint. A customer *may* complain to the Department at any time about any bill which is not then delinquent, a security deposit, a disconnection notice, or any other matter relating to the Department's service and may also request a conference about such matters. The complaints may be made in person, in writing, or by completing a form available from either the Commission or from the Department at its business office. A complaint shall be considered filed upon receipt by the Department, except mailed complaints shall be considered filed as of the postmark date. In making a complaint or requesting a conference (hereinafter "complaint"), the customer shall state his name, service address and the general nature of his complaint.

(B) Investigation of Complaint and Notification of Proposed Disposition. Upon receiving each such complaint, the Department will investigation the matter, confer with the customer when requested and notify him, in writing, of its proposed disposition of the matter. Such written notification will advise the customer that he may, within seven days following the date on which such notification is mailed, request a review of the Department's proposed disposition by the Commission. If the customer requests a special meter reading, the first reading of the customer's meter by the Department during its investigation shall not be subject to the charge for a special meter reading prescribed in the Department's rate schedules. Subsequent readings, however, if requested by the customer, will be subject to the charge. (Emphasis Added)

The dispute resolution procedure is optional because it says: “a customer *may* complain to the Department at any time about any bill which is not then delinquent. . .” In *Showboat Marina v. Tonn & Blank Construction*, 790 N.E.2d 595 (Ind.Ct.App. 2003) the Court of Appeals considered similar language in the context of an arbitration clause. Interpretation of agreements to submit disputes to mandatory dispute resolution procedures are governed by ordinary contract principles. *Id.* at 597-598. The Court of Appeals refused to enforce the arbitration clause in that case because it found that the agreement expressly stated that either side “may” institute arbitration. *Id.* at 598. Likewise, the Department’s so-called mandatory dispute resolution clause does not expressly require adherence to its procedures as a condition precedent to filing a lawsuit, but rather states that customers “may” do so. There is simply no requirement that any customer follow this procedure before resort to the courts.

Many of the cases cited by the Department that the language above requires, as a condition precedent to a lawsuit, compliance with a dispute resolution procedure, involve arbitration clauses. Arbitration, by its nature, involves an adjudication which results in a decision, usually by a neutral third person. Rules for Alt. Dispute Resolution, Rule 1.3(B). The dispute resolution process incorporated in the Department’s Tariff does not even pretend to conform to what is commonly known as arbitration. There is no “decision”, only a “proposal” that may or may not result in a resolution. There is no “neutral” to render a decision after an adjudication, only a process by which the Department reviews the complaint. Indeed, conformity with the Department’s informal dispute resolution would not guarantee any particular result, outcome or decision. The recognized value of mandatory dispute resolution is expeditious resolution without resort to the courts; in a word, finality. No such finality would accrue from the Department’s dispute resolution process.

4. **Proving the Claims of the Frequency Class will not Require Individualized Proof.**

The Defendants assert that proof of the Plaintiffs' claims under the Frequency Class are not subject to common evidence but instead require individual proof therefore defeating the typicality requirement under Trial Rule 23(A)(3). Predictably, the Defendants anticipate tens of thousands of discrete mini-trials in order to determine if the entered skip code is valid or not. The doom and gloom scenario painted by the Defendants has no basis in the facts of this case. The claims of the Frequency Class are subject to common proof through the use of Defendants' computerized records.

The proposed class definition of the Frequency Class is:

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.

As Veolia describes in its Brief in Opposition, a skip code is entered into Veolia's computer database when their meter reader does not perform a scheduled meter read. Brief in Opposition, p. 5. The recorded skip code will identify the reason the meter was not read as scheduled. *Id.* When a customer's consumption is not read, the customer's consumption is estimated for the month. *Id.* So, for example, the if a customer's meter was inaccessible for a particular reason, say due to a locked gate, snow or a vicious dog, a specific skip code will be recorded and stored on Veolia's system memorializing the reason the customer's scheduled actual meter read was not performed.

As was explained in Plaintiffs' Brief in Support of Class Certification, there were a number of occasions during the period January 1, 2007 through December 31, 2008 during which Veolia simply did not perform meter reading activities for customers who were due a scheduled read. Under the proposed class definition the question then becomes whether those missed reads were accompanied by a valid skip code. Under the Tariff, Veolia may estimate a bill for which it is otherwise required to determine actual consumption in the case of "inclement weather, labor disputes, inaccessibility of a customer's meter or remote counter where the Department has reasonably attempted to read it, and failure of the meter or remote counter to register". Tariff, p. 11. The purpose of the "valid skip code" language of the class definition is *not* to scrutinize and/or test the validity of each skip code entered during this time period. Rather, it is to screen out missed reads which were accompanied with a skip code the validity of which Plaintiffs will unlikely challenge on an individual basis. There is little doubt that Veolia missed large numbers of actual reads during this time period and that these missed reads were not accompanied by valid skip codes because the missed reads were caused by decisions made by Veolia unrelated to the reasons reflected by Veolia's skip codes. All of these determinations can be made from the data in Veolia's system.

Moreover, individualize proof will not be required to prove these claims. All of the records related to scheduled reading cycles, entered skip codes, and estimates are contained within the database maintained by Veolia on a system wide basis. Veolia will not be required to examine each individual circumstance to determine whether the entered skip code is valid or not.⁴ Rather, the data can be analyzed in bulk, since it will be fairly simple to determine the large

⁴ Incredibly, Veolia suggests it will have to conduct thousands of mini-trials to determine the validity of its own data.

numbers of customers whose meter was not read for reasons other than a valid skip code. So, for example, if a large number of customers have, on a given day, a skip code entered for “inclement weather”, that is easily determined on a class wide basis by comparing historical weather data to Veolia’s inclement weather policy to determine whether it is valid or not.

5. Proof of the Claims of the Estimating Class does not require Individualized Proof.

The basic allegation of the Estimating Class is that Veolia did not utilize the Tariffed estimation methodology but a different one which tended to estimate consumption higher than otherwise would be the case. By example, if a customer’s consumption was estimated in a given month as 5 units using the formula provided in the Tariff, and the actual methodology used by Veolia instead resulted in a consumption value of 8, then for that month the customer would have overpaid by the price of 3 consumption units. Veolia claims that individualized proof will be required to show whether a particular customer was harmed by the application of the incorrect formula.

The problem with Veolia’s argument is that it totally ignores the efficiencies available through the analysis of all customer data in their database. While it is certainly possible that a customer might have actually benefited in a given month by the application of the incorrect formula, this is something that is easily and swiftly determine from the data in Veolia’s possession. Veolia retains monthly consumption data for each customer in their system. This data can easily be applied to different formulas to determine whether a customer was harmed or benefited from the application of the wrong formula in a given period.

Veolia also claims that the estimation class suffers from a “complete absence of evidence” of how a proper seasonal average could be determined or applied. This claim is

striking in that Veolia itself apparently has had no difficulty doing so. In its internal documents, Veolia described to its customers that it was “reviewing the method with the IURC to determine if there is a better way to estimate bills, for example, comparing customer’s seasonal usage (i.e. winter to winter) to prepare estimates rather than averaging the whole year.” Brief in Support of Class Certification, Exhibit “D.” Plaintiffs also believe that the evidence will show that Veolia made substantial progress in developing a seasonal average internally that could have easily been utilized in estimating customer water consumption in a fair way. Regardless, Veolia’s claim that there is no “seasonal average” with which to determine whether and how much customers have been damaged, is of no moment. These are facts which go to the substance of the claims and not the class certification.

II. CONCLUSION

For all the foregoing reasons, the Named Plaintiffs request that the Court grant class certification pursuant to Indiana Trial Rule 23; and for all other appropriate relief.

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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 3rd day of December, 2010:

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