IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RICHARD JEFFRIES, and COLOURS BEAUTY SALON, LLC, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WEST VIRGINIA-AMERICAN WATER COMPANY,

Defendant.

Civil Action No. 17-C-765
Judge Carrie L. Webster

[PROPOSED] MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION AND PROCEDURAL HISTORY

Plaintiffs Richard Jeffries and Colours Beauty Salon, LLC, filed a class action complaint on June 2, 2017. WV American filed motions to refer the action to the Public Service Commission and to dismiss under W. Va. R. Civ. P. 12(b)(6) which the Court denied. WV American served an Answer on March 11, 2019.

After holding a scheduling conference, the Court entered a scheduling order on September 23, 2019, which set a trial date of September 21, 2020, and established deadlines for discovery, identification of expert witnesses on class certification and merits, the filing and briefing of Plaintiffs' motion for class certification and scheduled a hearing on the motion. The parties engaged in discovery and identified their respective class experts within the applicable deadlines. There are no motions pending other than Plaintiffs' Motion for Class Certification.

FINDINGS OF FACT

Because discovery on the merits of this action is not complete, the Court makes the following Findings of Fact based on the pleadings and additional materials – deposition excerpts

and documents – filed by the parties in support of their respective positions and solely for the purposes of evaluating this class certification motion.

1. Plaintiffs' claims arise from a catastrophic break in WV American's 36-inch prestressed concrete cylinder pipe ("PCCP") transmission main located in Dunbar, West Virginia discovered on June 23, 2015. Plaintiffs claim the main break caused outages and inadequate water pressure to approximately 25,000 WVAW customers. Initial repair attempts over the next several days were unsuccessful and water service was not restored until June 27, 2015. Plaintiffs claim that on June 29, 2015, another problem developed at the site of the initial break, which required an additional interruption in service to thousands of the same customers. Plaintiffs assert that full water service with adequate pressure was not restored to all customers until July 1, 2015.

2. As a result, based on WV American's own estimates at the time, Plaintiffs claim 25,000 customers experienced a complete interruption of service, others suffered a decrease in pressure, while others experienced a boil water advisory.

3. Plaintiffs also assert a claim that WV American breached its contractual obligation, under another of the PSC Water Rules incorporated in WV American's contracts, to at all times construct and maintain its entire plant and system in such condition that it will furnish safe, adequate and continuous service. Plaintiffs claim that WV American knew or should have known for many years prior to the June 2015 main break that its entire plant and system were not so constructed and maintained.

4. Plaintiffs claim a right of action for damages as the result of a violation by WV American of West Virginia Code § 24-3-1, which provides: "Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and

sufficient for the security and convenience of the public." Plaintiffs claim that WV American's facilities, as established and maintained, were not adequate or suitable. Plaintiffs further claim WV American's service - judged from industry standards - was not reasonable or sufficient, and its facilities were not adequate.

5. Finally, Plaintiffs assert a claim that WV American failed to exercise reasonable care through its faulty design and construction of the 36" concrete main and its joints; through its failure to address the transmission main's unacceptably high break rate; and through its indifference to 25,000 customers whom it left dependent on a single main with inadequate reinforcements, redundancy or storage reserves. Plaintiffs claim this conduct violated industry standards and Public Service Commission Water Rules and is therefore actionable.

6. Plaintiffs seek compensatory damages including but not limited to damages for annoyance and inconvenience, out-of-pocket expenses and lost profits, and seek punitive damages pursuant to their tort claims.

STANDARD OF REVIEW

1. It is incumbent upon the Court to conduct a rigorous analysis to ensure that all of the prerequisites of class certification have been satisfied. *State of West Virginia ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 607 S.E.2d 772, 782 (2004), quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

2. Before the Court may certify a class action, it first must find that Plaintiffs have satisfied all of the provisions of WVRCP 23(a): numerosity, commonality, typicality and adequacy. Assuming these elements are met, WVRCP 23(c)(4) provides that when appropriate, "an action may be brought or maintained as a class action with respect to particular issues." As the Fourth Circuit acknowledges with respect to the analogous Federal Rule, Rule 23(c)(4)

"contemplates possible class adjudication of liability issues." *Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 428 (4th Cir. 2003). The Court enjoys "broad discretion to sever common issues for class adjudication through partial certification" in mass tort cases. *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 29 (E.D. N.Y. 2001). In fact, the "language and spirit" of the rules "encourage" the Court to do so to achieve "economies of time, effort, and expense, and promoting uniformity of decision as to persons similarly situated." *Id.*

3. Merits questions are to be considered by the Court only to the extent that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied. *State ex rel. West Virginia University Hospitals, Inc. v Gaujot*, 242 W. Va. 54, 829 S.E.2d 54, 63 (2019).

4. Our Supreme Court of Appeal has advised that in doubtful cases, questions as to whether a case should proceed as a class should be resolved in favor of allowing certification. *In re West Virginia Rezulin Litig.*, 214 W. Va. 52, 65, 585 S.E.2d 52, 65 (2003).

CONCLUSIONS OF LAW

1. The prerequisites of WVRCP 23(a) are met. First, the class is so numerous that joinder of all members is impracticable, and in fact Defendant does not contest numerosity. After an independent review of the record, including Plaintiffs' offer of the testimony of Mr. Gilbert, the Court finds that the Class will likely include approximately 120,000 customers and residents, including approximately 2,826 business establishments. Numerosity is satisfied if Plaintiffs demonstrate "some evidence of a reasonable numerical estimate of purported class members." *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112 (E.D. La. 2013) ("*Deepwater Horizon*"). Plaintiffs have met this standard.

2. There are a considerable number of common issues of both law and fact, such that the commonality element of WVRCP 23(a) is easily satisfied. Here, the foremost issue of fact

common to Plaintiffs and all Class members is the water main break itself. Moreover, issues of law common to Plaintiffs and all Class members include finding whether Defendant is liable for breach of contract for failing to maintain its facilities in such condition so as to provide an adequate and continuous water service. There is also a common issue among all members of the Class to determine whether Defendant violated its statutory duties to maintain adequate and suitable facilities. The claims of all Class members will resolve common issues of law as to whether Defendant failed to exercise reasonable care in the design, construction, maintenance and management of its water distribution system – an objective inquiry that, by its very nature, will involve the same proof for everyone.

3. The fact that there may have been individual members of the Class that suffered different consequences from having lost water are immaterial for purposes of commonality. Plaintiffs' theories of liability apply equally to all members of the Class, and damages suffered by individual class members as the result of Defendant's conduct will not defeat commonality. *Deepwater Horizon*, 295 F.R.D. at 136; *Leach v. E.I. du Pont de Nemours & Co.*, 2002 WL 1270121 at *11 (W. Va. Cir. Ct. Apr. 10, 2002) (where issues common to all class members are "core issues of liability," commonality exists even notwithstanding factual variations regarding individual class members). Commonality is easily met in this case.

4. Plaintiffs' claims are typical of the claims of the proposed Class. Their claims need only be typical, not identical. *Rezulin*, 214 W. Va. at 68, 585 S.E.2d at 68. Plaintiffs all either reside or own a business in the western portion of the Kanawha Valley District, and their claims have the same essential characteristics as the claims of all Class members. While potential differences exist between how Plaintiffs and members of the Class experienced a service interruption, the claims are all based on the same behavior by Defendant directed toward the Class

as a whole, and not toward individual members of the class. For whatever individual differences in damages may exist, the core focus of the case will remain on whether Defendant's actions toward the class members as a whole violated the law, and Plaintiffs and all members of the Class will be pursuing claims based on identical legal theories and the same key evidence. The low threshold of typicality is satisfied.

5. Defendant does not contest the adequacy requirement of WVRCP 23(a). On the Court's independent review of the record, Plaintiffs, who detailed by their testimony the hardships imposed by the loss of water, including the incurrence of out-of-pocket costs, have shown that there is no conflict between their claims and those of Class members. Further, they have shown that they have retained highly skilled counsel and together will vigorously prosecute the matter. The adequacy requirement is satisfied.

6. Certification of a fault-based issues class under WVRCP 23(c)(4) is appropriate and within the Court's discretion. The issue of fault or liability is a common issue capable of generating class-wide answers. Numerous courts have found that use of a Rule 23(c)(4) issues class to resolve the liability issue on behalf of all claimants through common proof will materially advance disposition of the litigation. *Good v. American Water Works Company, Inc.*, 310 F.R.D. 274, 295 (S.D. W. Va. 2015); *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) ("single hearing" on liability issues "decided first" through Rule 23(c)(4) issues class certification avoids need for litigating class-wide issues of liability "in more than a thousand separate lawsuits"); *Gunnells*, 348 F.3d at 428 (class adjudication of liability issues an appropriate use of Rule 23(c)(4)).

7. Certification of an issues class affords the Court the flexibility to best manage this action through the remaining stages of litigation including trial on the merits. The Court also finds

that traditional WVRCP 23(b)(3) requirements are met. First, the fault or liability issue predominates over issues affecting only individual members, and resolution of the liability issue "will resolve an issue that is central to the validity of each one of the claims in one stroke." Syl. pt. 3, *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, 829 S.E.2d 54 (2019) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). The fault or liability determination will rely upon common class-wide evidence related to WV American's conduct prior to the June 2015 main break, and what it did or failed to do to maintain an adequate water system that complied with its contractual and statutory duties.

8. Moreover, a class action is also clearly superior to other methods of adjudication, especially in view of the likely complexity involved in proving the central issue of liability. *Good*, 310 F.R.D. at 297 (certifying WVRCP 23(c)(4) issues class, and holding that "absence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights under the circumstances here presented"). The claims here are small value claims, which present the most compelling rationale for use of the class device. A class action "significantly reduces the overall cost of complex litigation, allowing plaintiffs' attorneys to pool their resources and requiring defendants to litigate all potential claims at one, thereby leveling the playing field between the two sides." *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 240 (S.D. W. Va. 2005).

9. In reaching this decision, the Court has considered WV American's argument that liability issues require assessment of individual impacts, allegedly making individual issues predominate the case and rendering a class action unmanageable. The Court concludes, however, that here, the relevant liability evidence does not depend on a showing of damages on an individual basis or what happened in the event to individual customers. Plaintiffs' claim that whether a breach of contract and the common-law and statutory duties occurred is entirely independent of any

damages that flowed from that conduct, and Plaintiffs' proofs such as WV American's awareness of a problem in the past with the water main in question, will not delve unnecessarily into individual inquiries relevant to particular customers. The "balancing test of common ~~of common~~ and individual issues is qualitative, not quantitative. Common liability issues may still predominate even when individualized inquiry is required in other areas. At bottom, the inquiry requires a district court to balance common questions among class members with any dissimilarities between class members." *Good*, 310 F.R.D. at 296, citing *Gunnells*, 348 F.3d at 429. The Court sees no danger of liability proofs becoming dependent on individual circumstances, and thus certification of an issues class dealing with the fault or liability issue will effectively streamline the litigation.

10. Finally, the Court finds that the Class is sufficiently ascertainable for purposes of certification. Plaintiffs have requested that the Court certify a Class of WVAW customers objectively defined as located within the geographical boundaries of the WVAW service area served by the 36-inch water main that broke. *See* Plaintiffs' Reply Memorandum in Support of Motion for Class Certification, at p. 16. Plaintiffs' expert, Mr. Lorenz, was able to objectively demonstrate a water service disruption boundary map. This objectively based evidence will assist the Court, and the precise identity of each class member need not be specifically identified at this early stage. Moreover, WV American can identify the addresses of its own customers within objective boundaries so that notice can readily be provided to the Class.

11. The Court finds compelling the fact that single-event mass accident cases such as this one are considered to be well-suited to class action treatment. In *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003), Judge Posner, writing for the panel, held that the district judge's decision to certify a class for determination of the common issues of "whether or not and

to what extent [the defendant] caused contamination of the area in question," 319 F.3d at 911, was so sound that he concluded, "[w]e can see, in short, no objection to the certification other than one based on a general distaste for the class-action device." *Id.* at 912. This is the general consensus, and it has been repeated across the United States for at least three decades. *See, e.g., Crutchfield v. Sewerage and Water Board of New Orleans* case 829 F.3d 370, 378 (2016) (noting that the mass tort cases in which class certification has been found to be appropriate are cases that "involved single episodes of tortious conduct usually committed by a single defendant"); *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992) (approving district court's decision to certify a class arising out of an explosion at an oil refinery for resolution of liability and punitive damages issues); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("[W]here the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy."); *Deepwater Horizon*, 295 F.R.D. at 141 (certifying class arising out of oil spill on grounds that "[p]redominance is more easily satisfied in a single-event, single-location mass tort actions such as this because the defendant allegedly caused all of the plaintiffs' harms through a course of conduct common to all class members."); *In re MTBE Products Liability Litigation*, 241 F.R.D. 435, 442 (S.D.N.Y. 2007) ("[C]ourts have repeatedly recognized that such single-incident mass accidents are suitable for class-wide adjudication.").

12. Although the Court concludes that Plaintiffs motion for certification under Rule 23(c)(4) should be granted as to the issues of fault described above, there is one more issue to consider. Plaintiffs proposed that the factfinder in the common-issues trial should also be given the opportunity, depending on the evidence, to award a punitive damages multiplier that would apply to any future awards of individual compensatory damages in subsequent proceedings.

However, the Court concludes that decisions impacting the amount of any potential punitive damages award, including a multiplier, should not be made without full consideration of the extent of harm caused and other aspects of compensatory damages. *Good v. Am. Water Works Co., Inc.*, 310 F.R.D. 274, 294 (S.D.W. Va. 2015) ("The court accordingly declines the plaintiffs' request to include the punitive damages issue as a component of class certification."). Therefore, the Court declines to include a punitive damages multiplier among the issues for class-wide resolution in the instant Rule 23(c)(4) certification.

13. Therefore, for the reasons expressed in this Memorandum Opinion and Order, Plaintiffs' Motion is **GRANTED in PART and DENIED in PART.**

14. The Class is defined as all WVAW customers, residents and businesses located within the boundaries of the service area served by the 36-inch water main that broke, but excluding the following:

a. West Virginia American Water Company and its officers, directors, and employees and any affiliates of West Virginia American Water Company, and their officers, directors, and employees;

b. Judicial officers and their immediate family members and associated court staff assigned to this case;

c. Class Counsel and attorneys who have made an appearance for the Defendants in this case; and

d. Persons or entities who exclude themselves from the Certified Class (Opt Outs).

15. This action shall be certified and maintained as a class action with respect to particular issues pursuant to West Virginia Rule of Civil Procedure 23(c)(4), with respect to the overarching common issues of whether Defendant is liable for breach of contract and negligence, and for actionable violation of its statutory duties under the West Virginia Code.

16. The Court appoints Richard Jeffries and Colours Hair Salon, LLC to serve as representatives of the Class. Stuart Calwell and the law firm of Calwell Luce diTrapano PLLC, and Van Bunch and the law firm of Bonnett Fairbourn Friedman & Balint, P.C., are appointed as Lead Counsel for the Class. The court notes and preserves defendants objections and exceptions to the courts ruling. cw

Dated: 2-14, **2020**

Honorable Carrie L. Webster

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I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20
DAY OF 2020
CLERK
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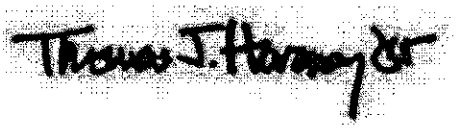

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