

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

JAY BURDICK, CONNIE PLOUFFE,
EMILY MARPE,
as parent and natural guardian of E.Y., an infant,
and, G.Y., an infant, JACQUELINE MONETTE, WILLIAM
SHARPE, EDWARD PERROTTI-SOUSIS,
MARK DENUÉ and MEGAN DUNN,
individually, and on behalf of all similarly situated

Plaintiffs,

v.

TONOGA INC., (d/b/a TACONIC),

Defendant.

**NOTICE
APPROVAL AND
SETTLEMENT
SCHEDULING
ORDER**

**Index No.: EF2016-
253835**

Plaintiffs Jay Burdick, Connie Plouffe, Emily Marpe, as parent and natural guardian of E.Y., an infant, and G.Y., an infant, Jacqueline Monette, William Sharpe, Edward Perrotti-Sousis, Mark Denué, and Megan Dunn, on behalf of themselves and the Settlement Class Members, and Defendant Tonoga, Inc. (d/b/a Taconic), by their respective counsel, have submitted a Settlement Agreement to this Court, and Plaintiffs have moved under CPLR 907 and 908 for an Order (1) approving the Notice Program; (2) appointing KCC as the General Administrator of the Settlement and directing it to commence the Notice Program; (3) holding that the classes defined in the Third Amended Consolidated Complaint and the Settlement Agreement meet the requirements of CPLR Article 9; (4) providing authority pursuant to CPLR 1201 for parents and guardians of all named Minor Plaintiffs and absent Minor Settlement Class Members, and for legal representatives of absent incompetent Settlement Class Members, to sign Claim Forms and releases on behalf of the Settlement Class Members they represent; (5) setting deadlines and ordering procedures for Settlement Class Members to opt out of the Settlement or object to the Settlement; and (6) setting

a date by which the Court will consider final approval of the Settlement and any application for attorneys' fees, expenses, and Class Representative Service Awards. The Court has considered the Settlement Agreement, the exhibits to the Settlement Agreement, the proposed Notice Program, the record of proceedings, and all papers and arguments submitted in support, and now finds that the motion should, and hereby is, **GRANTED**.

ACCORDINGLY, THE COURT FINDS AND ORDERS:

1. This Court has jurisdiction over the subject matter of this lawsuit and jurisdiction over Plaintiffs and Defendant for purposes of this Settlement.
2. Capitalized terms not otherwise defined in this Order have the definitions set forth in the Settlement Agreement.

~~SUMMARY OF THE LITIGATION AND SETTLEMENT~~

3. On July 26, 2016, Plaintiffs Burdick and Marpe, individually and as parent and natural guardian of E.B., an infant, and G.Y., an infant, commenced this action by filing a proposed class action complaint alleging tort theories of negligence, trespass, nuisance, and strict liability based on the presence of perfluorooctanoic acid (PFOA) in the Town Public Water System, in private wells, on or at their properties, and/or in their blood.

4. On September 22, 2016, Plaintiffs Connie and Edward Plouffe, and Frank and Suzanne Seymour filed a second proposed class action complaint asserting similar claims.

5. Defendant moved to dismiss both complaints pursuant to CPLR 3211(a)(7) on November 15, 2016, and Plaintiffs moved to consolidate the cases on December 20, 2016.

6. In each case, the Court denied Defendant's motion to dismiss Plaintiffs' negligence, trespass, and strict liability claims, and also denied Defendant's motion to dismiss nuisance claims alleged on behalf of Plaintiffs with privately owned wells. The Court granted Defendant's motion

to dismiss nuisance claims alleged on behalf of Plaintiffs who obtained their drinking water from the Town Public Water System. The Court further ordered the two cases to be consolidated into the present action.

7. On May 3, 2017, Plaintiffs filed their First Amended Consolidated Complaint. On August 30, 2017, Plaintiffs moved for leave to file a Second Amended Consolidated Complaint, which sought to dismiss Plaintiffs Suzanne Seymour and Emily Marpe in her individual capacity, and to join Plaintiffs Jacqueline Monette, William Sharpe, Edward Perrotti-Sousis, Mark Denué, and Megan Dunn as additional representative plaintiffs. Defendant did not oppose Plaintiffs' motion for leave to amend. The Court granted the motion on September 20, 2017.

8. The Parties thereafter engaged in significant discovery efforts, including the exchange of several sets of written discovery served by and on each party, voluminous document productions, depositions of each Plaintiff as well as twelve depositions of Defendant's current or former employees, several spanning more than one day, third-party discovery of the New York State Department of Environmental Conservation, and motion practice regarding Defendant's privilege log.

9. On February 6, 2018, Plaintiffs moved to certify four classes pursuant to CPLR 902: a class of property owners who obtained drinking water from the Town Public Water System and sought diminution in property value; a class of property owners who obtained drinking water from privately owned wells contaminated with PFOA and sought diminution in property value; a class of owners or renters residing in homes with privately owned wells contaminated with PFOA and sought nuisance damages; and a class of individuals exposed to PFOA from a contaminated source in Petersburg who subsequently obtained blood tests demonstrating that PFOA was present in their blood serum at or above the background level of 1.86 ug/L (parts per billion), and

who sought consequential medical monitoring damages. Following submission of extensive briefing and expert affidavits, the Court certified each of the four proposed classes, appointed Plaintiffs as class representatives, and appointed Class Counsel to represent the certified classes.

10. On August 6, 2018, Defendant noticed an appeal of the Court's class certification decision and order. Defendant also moved for a stay of proceedings before this Court pending disposition of its appeal—a motion that was denied.

11. On October 9, 2018, Plaintiffs moved the Court to approve a proposed notice plan pursuant to CPLR 904. After the motion was fully briefed, the Court approved Plaintiffs' proposed plan, which included direct mail notice to all households within the Petersburg zip code, as well as any properties with contaminated private wells within a seven-mile radius of the Taconic facility; information posted to the Petersburg Water Facebook page, which was administered by Plaintiff Emily Marpe; publication notice in local print media; and posted notice on a website administered by Plaintiffs' counsel.

12. On January 17, 2019, Plaintiffs filed a Note of Issue and Certificate of Readiness for Trial, demanding a jury trial on all issues.

13. On March 1, 2019, Defendant filed a motion for summary judgment, as well as separate motions to exclude the testimony of Plaintiffs' expert witnesses: (1) Dr. David Savitz, (2) Plaintiffs' Medical Monitoring Experts – Drs. Alan Ducatman, Donald R. Brandt, and Sloane Shepard, (3) Drs. Hyeong-Moo Shin and Donald Siegel, (4) Dr. Nicholas Cheremisinoff, and (5) Dr. Jeffrey E. Zabel. The Parties fully briefed each of these motions, which included submission of substantial record evidence. On November 15, 2019, the Court issued orders denying each motion to exclude expert testimony.

14. The Appellate Division, Third Department, heard oral argument on Defendant's

appeal of the class certification decision and order in September 2019. On November 21, 2019, the Appellate Division affirmed the decision and order in all respects. On December 27, 2019, Defendant moved for leave to appeal to the Court of Appeals. This motion was denied by the Appellate Division.

15. On December 30, 2019, Defendant filed a notice of appeal of the decision and orders denying its motions to exclude the testimony of Plaintiffs' expert witnesses.

16. On January 24, 2020, this Court issued an order granting in part and denying in part Defendant's motion for summary judgment. In particular, the Court granted Defendant's motion for summary judgment on Plaintiffs' claim for strict liability. The Court denied Defendant's motion for summary judgment in all other respects.

~~17. On February 20, 2020, in response to a request from Plaintiffs, the Court indicated~~ that it would not set a trial date until all appellate issues were resolved.

18. On March 6, 2020, Defendant filed a notice of appeal of the decision and order granting in part and denying in part its motion for summary judgment.

19. During the summer and fall of 2020, the Parties briefed the pending appeals. The Appellate Division consolidated the appeals for oral argument, which was held on January 12, 2021. On February 25, 2021, the Appellate Division dismissed Defendant's appeals of the orders denying its motions to exclude the testimony of Plaintiffs' expert witnesses. In a separate order issued the same date, the Appellate Division affirmed the decision and order on summary judgment. Defendant's subsequent motions to appeal to the Court of Appeals were denied.

20. On May 3, 2021, following a conference with the Parties, the Court entered a pretrial scheduling order that, *inter alia*, set a trial date of May 5, 2022.

21. On August 4, 2021, the Parties engaged in a full-day mediation at arms length

before Professor Eric Green of Resolutions, LLC. At the end of this mediation session, Plaintiffs and Defendant reached an agreement in principle. They then negotiated the detailed written Settlement Agreement and exhibits that are now before the Court.

22. The Settlement provides, among other things, that as consideration for the release from Settlement Class Members, Defendant will pay \$23,464,362 in cash into a Settlement Fund (the Total Settlement Payment). Of this amount, \$4,410,000 will be allocated to members of the Property Settlement Classes; \$4,031,250 will be allocated to members of the Private Well Nuisance Class; and \$8,550,000 will be allocated to fund an estimated fifteen-year medical monitoring program to benefits members of the Medical Monitoring Settlement Class.

23. In its July 3, 2018 decision and order granting Plaintiffs' motion for class certification, the Court ruled that the Town Water Property Damage Class, Private Well Property Damage Class, Private Well Nuisance Class, and PFOA Invasion Injury Class met the requirements of CPLR 901 for certification, and none of the discretionary factors set forth in CPLR 902 precluded certification. Since the Court's certification order, Plaintiffs filed, with Defendant's consent, a Third Amended Consolidated Complaint that alters three of the class definitions from those previously certified. The Court finds that none of the amendments materially affects its previous analysis of the CPLR Article 9 requirements and considerations.

24. The Town Water Property Damage Class definition has not changed. The Private Well Nuisance Class definition has been revised to require that an affected property is located in the Town of Petersburg and within a seven mile radius of Defendant's facility. Previously, the class definition required that an affected property was located within a seven mile radius, but it did not require a property to be located in the Town of Petersburg. The Private Well Nuisance Class definition has also been revised to insert "at the time the contamination was discovered" after "at

or around February 20, 2016” for clarification that the important date was when the contamination was discovered and to remove any ambiguity in the claims process. The Court finds that these revisions make the class more cohesive but otherwise does not materially alter its prior analysis of the propriety of class certification under CPLR Article 9. A similar revision—requiring affected properties to be located within the Town of Petersburg and clarifying that the date of ownership required is when the contamination was discovered—was made to the Private Well Property Damage Class and Medical Monitoring Settlement Class (also referred to as the PFOA Invasion Injury Class) definitions and these revisions do not materially alter the Court’s class certification analysis with regard to these classes.

25. The Private Well Property Damage Class definition, as set forth in the Agreement, ~~requires that a class member owned the affected property on or before February 20, 2016. The~~ class previously certified by the Court required that a class member owned *and occupied* the affected property on or before February 20, 2016. This revision, which Plaintiffs explain is a clarification of the Parties’ intent, potentially expands the class definition somewhat, though the Court finds that any such expansion does not materially alter its prior class certification analysis.

26. Finally, the Medical Monitoring Settlement Class, as set forth in the Settlement Agreement and in the Third Amended Consolidated Complaint, now also encompasses children who were exposed to PFOA in utero, including the recently-joined infant Plaintiff E.Y., who was born in 2018 with a PFOA blood serum above 1.86 ug/L at birth. The Court finds that this expansion of the class does not materially alter its previous class certification analysis. Indeed, all class members, including those exposed in utero, must present proof of exposure at a level above background levels, meaning that each class member can satisfy the requirement set forth in *Abusio v. Consolidated Edison Co. of New York*, 656 N.Y.S.2d 371, 372 (2d Dep’t 1997), to demonstrate

a “rational basis” for fear of contracting a disease. As the Court explained in its class certification decision and order, “rational basis” has been construed to mean, *inter alia*, the clinically demonstrable presence of a toxin in a plaintiff’s body. The requirement that each class member, including children exposed in utero, provide proof of a blood test thus ensures that all class members share a rational basis for fear of contracting a disease.

27. The Court further finds that CPLR 907 expressly permits it to alter or amend its prior orders, including its order certifying the four classes. Accordingly, the Court finds that the following classes meet the requirements for class certification set forth in CPLR 901 and satisfy the discretionary considerations enumerated in CPLR 902:

Town Water Property Damage Class:

All Persons who are or were owners of real property and who obtain or obtained ~~their drinking water from the Town Public Water System and who purchased their~~ property on or before February 20, 2016; provided, however, that the Town Water Property Damage Class shall not include Excluded Persons or Russell Properties.

Private Well Property Damage Class:

All Persons who are or were owners of real property located in the Town of Petersburg within a seven (7) mile radius of Defendant’s Facility and who: (i) obtain or obtained their drinking water from a privately owned well contaminated with PFOA; and (ii) owned that property at or around February 20, 2016 when the contamination was discovered; provided, however, that the Private Well Property Damage Class shall not include Excluded Persons or the Russell Properties.

Private Well Nuisance Class:

All Persons who are or were owners or renters of real property located in the Town of Petersburg within a seven (7) mile radius of the Defendant’s Facility and who: (i) obtain or obtained their drinking water from a privately owned well contaminated with PFOA; and (ii) occupied that property at or around February 20, 2016 when the contamination was discovered, provided, however, that the Private Well Nuisance Class shall not include Excluded Persons.

Medical Monitoring Settlement Class or PFOA Invasion Injury Class:

All individuals who have: (a) ingested water at a property that was supplied by the Town Public Water System or from a private well in the Town of Petersburg in which PFOA has been detected; and (b) underwent blood serum tests that detected a PFOA level in their blood above 1.86 ug/L; or any natural child (i) who was born to a female who meets and/or met the above criteria at the time of the child’s birth;

and (ii) whose blood serum was tested after birth and detected a PFOA level above 1.86 ug/L; provided, however, that the Medical Monitoring Settlement Class shall not include Excluded Persons.

28. The Court finds that the definition of “Excluded Persons” in the Settlement is reasonable and meets the general requirements under CPLR Article 9.

29. In addition, the Court finds that the class representative Plaintiffs appointed in its July 3, 2018 decision and order should remain appointed as class representative Plaintiffs, with the exception of Plaintiffs Edward Plouffe and Frank Seymour, both of whom passed away during the course of this litigation.

30. The Court further finds that Class Counsel, who have diligently and skillfully litigated this Action for over five years, shall be appointed to represent the Settlement Classes and ~~shall serve as Class Counsel to Settlement Class Members. In particular, the Court appoints~~ Stephen G. Schwarz and Hadley Matarazzo of Faraci Lange LLP and James J. Bilsborrow of Seeger Weiss LLP as Class Counsel to the Settlement Classes. Class Counsel are authorized to act on behalf of the Settlement Classes with respect to all acts required by, or which may be given pursuant to, the Settlement or such other acts that are reasonably necessary to consummate the proposed Settlement set forth in the Settlement Agreement.

THE NOTICE PROGRAM COMPORTS WITH THE REQUIREMENTS OF THE CPLR

31. CPLR 908 states that a “class action shall not be . . . compromised without approval of the Court. Notice of the proposed . . . compromise shall be given to all members of the class in such manner as the court directs.”

32. CPLR 908 provides Supreme Court with discretion to evaluate a proposed notice to compromise a class action proceeding. *See In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 160 (1st Dep’t 1990). Notice, at a minimum, must “inform[] all class members of the pending

class action, the composition of the class, the issues between the parties, the terms of the proposed settlement, how a class member may object, the time period within which such objection, if any, must be made, and the date on which the trial court will hold a hearing, at which same will consider the fairness of the proposed settlement.” *Id.*

33. The Settlement provides for Notice to be mailed directly to all owners of real properties that obtain drinking water from the Town Public Water System and to properties in the Town of Petersburgh that obtain drinking water from private wells contaminated with PFOA. With regard to the latter category, the Settlement provides that the General Administrator shall be provided with private well testing data obtained by the NYSDEC from well testing it performed on private wells throughout the Town since February 2016.

~~34. In addition to direct mail efforts, the Notice Program consists of a digital media plan that will target adults in New York State, the Albany-Troy-Schenectady region, and the Town of Petersburgh using various websites, social media, and Facebook. An affidavit submitted by the General Administrator asserts that this plan will result in 53.3 million impressions.~~

35. The Notice Program will also include newspaper advertisements in the Albany Times Union and Eastwick Press, as well as a national press release.

36. The General Administrator will also establish a Settlement Website containing the pertinent Settlement documents, as well as the opt out and objection dates, and the date of a Final Fairness Hearing.

37. Consistent with New York law, the Notice informs all class members of the pending class action, the composition of the classes, the issues between the parties, the terms of the proposed Settlement, how a class member may object, the time period within which such objection, if any, must be made, and the date on which the Court will hold a hearing to consider the fairness

of the proposed Settlement. *In re Colt Indus. Shareholder Litig.*, 155 A.D.2d at 160.

38. The Court finds that the Notice Program, including the Notice Form and the particulars of the Notice Program described in the Affidavit of Carla A. Peake in Support of Settlement Notice Program, satisfy CPLR 908. The Court appoints KCC as General Administrator, approves the Notice Program, and directs that the Notice Program be implemented as set forth in the Settlement.

39. All fees, costs, and expenses incurred in implementing the Notice Program shall be paid from the Preliminary Settlement Fund as set forth in the Settlement.

SETTLEMENT OF CLAIM OF INFANT, INCOMPETENT, AND DECEASED CLASS MEMBERS

40. Plaintiff Emily Marpe is acting in this Action in her capacity as parent and natural guardian G.Y and E.Y, both of whom are minors. Plaintiff Marpe will apply to the Court for approval of the Settlement on behalf of the Minor class representatives and all absent Minor Settlement Class Members. This Order provides authority pursuant to CPLR 1201 for parents and guardians of all named Minor absent Settlement Class Members, and for legal representatives of absent incompetent Settlement Class Members, to sign Claim Forms and releases on behalf of the Settlement Class Members they represent. An Order from this Court finally approving the Settlement shall effectuate a settlement under CPLR 1207 for all named Minor Plaintiffs, absent Minor Settlement Class Members, and absent incompetent Settlement Class Members.

41. The legal representatives of deceased absent Settlement Class Members shall have authority to sign Claim Forms and releases on behalf of the absent Settlement Class Members they represent. Where a legal representative of a deceased absent Settlement Class Member submits a Claim Form on that Settlement Class Member's behalf, that legal representative shall attest to their authority to act for the deceased absent Settlement Class Member.

PROCEDURES FOR REQUESTING EXCLUSION FROM OR OBJECTING TO THE SETTLEMENT

42. A Settlement Class Member may request exclusion from the Settlement at any time prior to the Opt Out Deadline, provided an opt-out notice is sent to the General Administrator in accordance with the procedures set forth in the Settlement Agreement. Any Settlement Class Member who elects to opt out of the Settlement shall not be entitled to receive any benefits conferred by the Settlement but also shall not be bound by the terms of the Settlement. Conversely, any Settlement Class Member who does not timely and validly request to opt out shall be bound by the terms of the Settlement, including the Release, regardless of whether such person chooses to file a Claim Form to participate in the Settlement. If a real property that is encompassed by one of the Property Settlement Classes has more than one legal owner and one of those owners excludes themselves from the relevant Settlement Class, then all owners of that real property shall be deemed to have opted out of the Settlement, and no owner of the real property shall be entitled to a payment under the Settlement.

43. Objections to the Settlement, to the application of attorneys' fees and costs, and/or to the Service Award must be served on the Parties in accordance with the Settlement. Class Counsel and/or Defendant may conduct limited discovery on any objector or objector's counsel consistent with New York law.

44. Except for Settlement Class Members who have timely asserted an objection to the Settlement, all Settlement Class Members shall be deemed to have waived all objections and opposition to the fairness, reasonableness, and adequacy of the Settlement.

MOTIONS FOR FINAL APPROVAL, FEES, EXPENSES, AND SERVICE AWARDS

45. Plaintiffs shall file their Motion for Final Approval of the Settlement, application for attorneys' fees and costs, for a Service Award to the Plaintiffs, and for all Settlement

Administration Costs, no later than 150 days after this Order is entered. At the Final Approval Hearing, the Court will hear argument on Plaintiffs' Motion for Final Approval of the Settlement, and on Class Counsel's application for attorneys' fees and expenses, for the Service Award for the Plaintiffs, and for all Settlement Administration Costs.

FINAL APPROVAL HEARING

46. The Court will hold a Final Approval Hearing on March 21, 2022 at 10:00a.m., at the Rensselaer County Courthouse, 80 Second Street, Troy, New York 12180, or by videoconference or teleconference if determined by separate order, to assist the Court in determining whether to grant Final Approval to the Settlement, enter the Final Approval Order and Judgment, and grant any motions for fees, expenses, and the Service Award.

~~OTHER PROVISIONS~~

47. Class Counsel and Defendant's counsel are authorized to take, without further approval of the Court, all necessary and appropriate steps to implement the Settlement according to its terms, including implementing the Notice Program.

48. Pending determination whether the Settlement Agreement should be granted Final Approval, further proceedings against Defendant are stayed in this Action, other than proceedings necessary to carry out or enforce the terms of the Settlement.

49. Without further orders of the Court, the Parties may agree to make non-material modifications to the Settlement Agreement (including the exhibits thereto) in implementing the Settlement that are not inconsistent with this Order, including making minor changes to the Settlement Agreement, to the form or content of the Notice Form, or to any other exhibits that the Parties jointly agree in writing are reasonable or necessary.

50. The Court shall retain jurisdiction over the Settlement Agreement and shall

consider all further matters arising out of or connected with the Settlement.

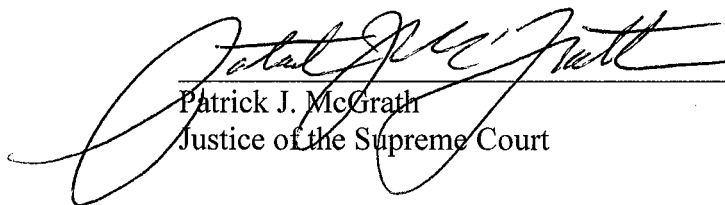
SCHEDULE OF DEADLINES

51. The Court sets the following deadlines:

Event	Date
Deadline for Defendant to pay \$200,000 Preliminary Settlement Fund Payment in cash to the Escrow Account	November 4, 2021
Deadline for General Administrator to commence Notice Program	November 15, 2021
Commencement of the Enrollment Period	November 15, 2021
Opt Out Deadline	February 28, 2022
Objection Deadline	February 28, 2022
Deadline for filing a Motion for Final Approval and any petition for an award of attorneys' fees, costs, and Service Award	March 4, 2022
Final Approval Hearing	March 21, 2022 at 10:00a.m.

SO ORDERED.

Date October 15, 2021
Troy, New York



Patrick J. McGrath
Justice of the Supreme Court