

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KATHLEEN McHUGH and
DEANNA SCHNEIDER, individually
and on behalf of all persons
similarly situated,

Plaintiffs,

-v-

Case No. 11-cv-724-bbc

MADISON-KIPP CORPORATION,
CONTINENTAL CASUALTY
COMPANY, COLUMBIA CASUALTY
COMPANY, UNITED STATES FIRE
INSURANCE COMPANY and ABC
INSURANCE COMPANIES 1 – 50,

Defendants.

DECLARATION OF MICHAEL D. HAYES

Michael D. Hayes, having been duly sworn, on oath deposes and states as follows:

1. My name is Michael D. Hayes. I am an attorney licensed to practice in Illinois and in various federal courts. I am a shareholder in the Chicago law firm Varga Berger Ledsky Hayes & Casey. I am one of the attorneys who represent the Plaintiffs in the above captioned case, and have been admitted pro hac vice by this Court to act as their counsel in this matter. I also am one of the attorneys approved by the Court to serve as Class Counsel for the certified class in this matter.
2. I am submitting this Declaration in connection with Plaintiffs' Response Memorandum in Opposition to Madison-Kipp Corporation's Motion for Clarification (Doc. 74).
3. On April 17, 2012, the day after the Court granted Plaintiffs' motion for class certification and ordered the parties to consult with each other about a proposed class notice,

MKC's counsel John Scheller emailed Plaintiffs' counsel and requested that Plaintiffs provide MKC with a proposed draft of the class notice. A copy of this email is attached as Exhibit A to this Declaration. Mr. Scheller requested that Plaintiffs provide their draft notice to him by Friday, April 20, 2012, as "[t]his will provide us just over a week to try to reach agreement on the notice."

4. On April 19, 2012, a day earlier than requested by MKC and just three days after the Court's certification order was issued, I emailed a proposed draft of the class notice to Mr. Scheller. A copy of this email and the attached notice are attached as Exhibit B to this Declaration. In this communication, I requested that Mr. Scheller contact me with his comments no later than April 24, 2012.

5. After sending the draft class notice to Mr. Scheller, Plaintiffs' counsel did not receive any response concerning the notice from Mr. Scheller or any of the other attorneys who represent MKC. MKC's counsel did not communicate with Plaintiffs' counsel about the proposed notice, comment on Plaintiffs' draft, or propose MKC's own version. Instead of following the procedure specified by the Court concerning the class notice, MKC on April 24, 2012 filed its motion for clarification (Doc. 73) without ever responding to Plaintiffs about their proposed class notice.

6. On March 8, 2012, MKC's counsel notified Plaintiffs' counsel that MKC intended to seek certain discovery from putative class members in this case. On March 9, 2012 and March 12, 2012, Plaintiffs' counsel and MKC's counsel engaged in first email and then telephonic meet and confer communications to attempt to resolve the parties' differing positions concerning the appropriateness of the discovery MKC sought to initiate. During these communications, the only discovery MKC ever articulated wanting to obtain from class members were depositions and documents related to damages issues. Attached as Exhibit C to

this Declaration are the parties' email communications on this subject, in which MKC's counsel explains MKC's rationale for this proposed class member discovery, as follows: "To the extent that the complaint seeks damages, MKC needs to know the injury that is alleged." At no point during these meet and confer communications did MKC ever raise the topic of sampling of class member properties, and MKC has to date not issued any Rule 34 or Rule 45 request for property sampling directed to any class member (or to the name plaintiffs, either). MKC's statements in its clarification motion (Doc. 73) about needing access to class member properties to conduct sampling is the first time MKC has raised this topic as a potential discovery issue. As a result, the parties have not met and conferred and exchanged positions and authorities on this subject.

7. In connection with the Wisconsin Department of Natural Resources ("DNR") ongoing investigation of contamination issues at the MKC facility, MKC and DNR have already performed extensive amounts of environmental sampling in and around the certified Class Area. At present, all properties in the Class Area either have already been sampled or are slated in the future for sampling in connection with DNR's investigation. Attached as Exhibit D to this Declaration is a figure prepared by DNR in January, 2012 which graphically illustrates completed and planned sampling of Class Area properties.

8. I make the attestations in this Declaration under penalty of perjury under the laws of the United States.

Dated: May 1, 2012

/s/ Michael D. Hayes
Michael D. Hayes

CERTIFICATE OF SERVICE

Michael D. Hayes, an attorney, hereby certifies that a true and correct copy of the foregoing **Declaration of Michael D. Hayes** was on May 1, 2012 electronically served on all counsel of record as a result of the CM/ECF filing of this document.

s/ Michael D. Hayes

EXHIBIT A

Michael Hayes

From: Scheller, John C (22276) [JCScheller@michaelbest.com]
Sent: Tuesday, April 17, 2012 1:37 PM
To: 'Shawn M. Collins'; Jacques Condon; Ross, Rebecca L.; White, Chris; ddillon@brennansteil.com; Edward J. Manzke; jbk@mtfn.com; Busch, John A (14977); Seese, Lee M (46759); Michael Hayes; mjc@mtfn.com; Norman B. Berger; rlewandowski@whdlaw.com
Subject: McHugh, et al v. Madison-Kipp: Notice to Class

Shawn and Norm,

Pursuant to the Court's April 16th Opinion and Order, a joint proposed notice is due to the Court on April 30. In the event the parties cannot agree on the notice, then April 30 also is the deadline for submission of positions / disagreements to the Court.

Accordingly, please provide Plaintiffs' proposed notice to us no later than this Friday, April 20. This will provide us just over a week to try to reach agreement on the notice.

If you have any questions, please let me know.

John

Unless otherwise expressly indicated, if this email, or any attachment hereto, contains advice concerning any federal tax issue or submission, please be advised that the advice was not intended or written to be used, and that it cannot be used, for the purpose of avoiding federal tax penalties.

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EXHIBIT B

Michael Hayes

From: Michael Hayes
Sent: Thursday, April 19, 2012 11:23 AM
To: Scheller, John C (22276)
Cc: 'Shawn M. Collins'; Jacques Condon; Ross, Rebecca L.; White, Chris; ddillon@brennansteil.com; Edward J. Manzke; jbk@mtfn.com; Busch, John A (14977); Seese, Lee M (46759); mjc@mtfn.com; Norman B. Berger; rlewandowski@whdlaw.com; Wiley, Fran M (27551); Ziemba, Leah H (24420); Bianchi, Jr. Albert (24425); Scott Wagner; Jennifer Mueller; Linda Ewert
Subject: McHugh v. Madison-Kipp: Class Notice
Attachments: MKC case Class Notice 4-19-12.DOC

Mr. Scheller:

Attached please find Plaintiffs' proposed draft of the Class Notice. Please get back to me with your comments on this document no later than the close of business next Tuesday, April 24.

I have tried to copy everyone on this who is supposed to receive these communications. If I inadvertently have missed someone, please forward this to them.

Regards,

Mike Hayes

MICHAEL D. HAYES
VARGA BERGER LEDSKY HAYES & CASEY
A Professional Corporation
125 South Wacker Drive
Suite 2150
Chicago, Illinois 60606-4473
(312) 341-9830 (Telephone)
(312) 419-0225 (Facsimile)
Firm Website: www.vblhc.com

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KATHLEEN McHUGH and
DEANNA SCHNEIDER,
Individually and on behalf of
all persons similarly situated,

Plaintiffs,

-v-

Case No. 11-cv-724-bbc

MADISON-KIPP CORPORATION,
CONTINENTAL CASUALTY
COMPANY, COLUMBIA CASUALTY
COMPANY, UNITED STATES FIRE
INSURANCE COMPANY and ABC
INSURANCE COMPANIES 1 – 50,

Defendants.

NOTICE OF CLASS ACTION LAWSUIT

**TO: ALL OWNERS AND/OR RESIDENTS OF THE RESIDENTIAL PROPERTIES
LOCATED ON SOUTH MARQUETTE STREET (EVEN NUMBERED
PROPERTY ADDRESSES RANGING FROM 102 THROUGH 230 SOUTH
MARQUETTE STREET) AND WAUBESA STREET (PROPERTY ADDRESSES
RANGING FROM 233 THROUGH 269 WAUBESA STREET) IN MADISON,
WISCONSIN**

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, you are hereby notified as follows:

CASE DESCRIPTION

The above-captioned class action lawsuit is pending in this court. It was brought representatively on behalf of a class (the "Class") consisting of all owners and/or residents of the 34 residential properties located on South Marquette Street (even numbered property addresses ranging from 102 through 230 South Marquette Street) and Waubesa Street (property addresses ranging from 233 through 269 Waubesa Street) in Madison, Wisconsin. A list identifying each specific property in the this area (the "Class Area") is attached hereto as Exhibit 1.

In their First Amended Class Action Complaint in this case, plaintiffs Kathleen McHugh and Deanna Schneider allege that their properties and the other properties in the Class Area have

been impacted by toxic vapors released from the manufacturing facility operated by defendant Madison-Kipp Corporation (“MKC”). In this case, plaintiffs are seeking injunctive relief under federal and state law to require MKC to fully investigate and remediate the alleged contamination on MKC’s property and in the Class Area. Plaintiffs are also seeking to recover compensatory damages (including for lost property values, loss of the reasonable use and enjoyment of their properties, and aggravation and annoyance) and punitive damages from MKC. MKC has filed an Answer to Plaintiffs’ First Amended Class Action Complaint in which it denies that Plaintiffs are entitled to the relief they are seeking in this lawsuit and interposes various legal defenses. The Court has not yet made any determinations about the merits of Plaintiffs’ claims or MKC’s defenses.

THE CLASS CERTIFICATION DECISION

On April 16, 2012, the court entered an order certifying this lawsuit as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The court certified the Class defined above (consisting of the owners and/or residents of the 34 properties listed on Exhibit 1 to this Notice). Kathleen McHugh and Deanna Schneider have been approved by the court to serve as class representatives. The court has approved Shawn M. Collins and Edward J. Manzke (of The Collins Law Firm, P.C.) and Norman B. Berger and Michael D. Hayes (of Varga Berger Ledsky Hayes & Casey) to serve as attorneys for the Class (“Class Counsel”).

The court has determined that this case will proceed in two phases. In the first phase, the issues of (1) whether MKC is liable for the alleged contamination, (2) the geographical scope of the alleged contamination, and (3) classwide injunctive relief will be decided on behalf of all members of the Class. If plaintiffs are successful in the first classwide phase proceeding, then there would be a second phase of the case where the issues of monetary damages and individual requests for injunctive relief would be determined on an individual basis for each Class Member.

It is important to note that this case only seeks to determine claims for property damages and injunctive (environmental investigation and remediation) relief. Personal injury claims (i.e., bodily injury, sickness or disease related to exposure to the alleged contamination) are not being determined in this case; therefore any member of the Class who believes he/she has such personal injury claims to assert would need to file his/her own individual lawsuit concerning such matters.

This Notice is given to you because you may be a member of the Class whose rights would be affected by this lawsuit. This Notice should not be understood as an expression of any opinion by the court concerning the merits of this action. This Notice is intended to advise you of the pendency of this class action lawsuit and of your rights with respect thereto.

YOUR TWO OPTIONS:
(1) REMAIN IN THE CLASS OR (2) OPT OUT OF THE CLASS

A. REMAINING IN THE CLASS

You have the right to remain in and be a part of the Class. If you own or reside in residential property in the Class Area, you will be automatically included in the Class, unless you request to be excluded from the Class in the manner below set forth. If you remain a member of the Class you will be bound by any judgment, whether favorable or unfavorable, entered in the case. If plaintiffs prevail in this case and there is a monetary recovery (either through a class-wide settlement or at the damages phase of the case), you may be entitled to share in that recovery, less any costs, expenses and attorneys' fees that the court may allow. If MKC prevails in this case and there is no monetary recovery, individual class members will not be required to pay any court costs to MKC. **If you wish to be included in the Class, you need not take any action at this time.**

All members of the Class will be automatically represented by Class Counsel. You will not have to pay anything to have Class Counsel represent you. Class Counsel only receives compensation for their services and reimbursement of their expenses, subject to court approval, if they achieve a recovery for members of the Class or if the court orders MKC to pay for Class Counsel's legal fees and expenses. You may, if you wish, elect to remain in the Class but not be represented by Class Counsel. If you wish to remain in the Class but not be represented by Class Counsel, you must either file your own appearance or hire your own lawyer to appear for you, at your own expense.

B. OPTING OUT OF THE CLASS

You have the right to opt out, or exclude yourself, from the Class. If you opt out of the Class, you will not be bound by the result in this case, whether favorable or unfavorable to the Class. However, if you opt out of the Class you will not share in any monetary, injunctive relief, or other recovery that may be achieved for the Class in this case. If you opt out of the Class, you would be free (at your own expense) to bring your own individual action against MKC concerning the issues being addressed in this class action case. **If you wish to opt out of the Class, you must send a first class mail letter setting forth your name, present address, and a statement that you wish to opt out of the Class, postmarked on or before [INSERT DATE 30 DAYS FOLLOWING MAILING DATE OF THE NOTICE], 2012 to Class Counsel at the following address:**

Shawn M. Collins
The Collins Law Firm, P.C.
1770 North Park Street
Suite 200
Naperville, Illinois 60563

If you do not send an opt out letter, or if your opt out letter is postmarked after **[FILL IN ABOVE DEADLINE DATE]**, 2012, you will automatically remain in and be included in the Class.

FURTHER INFORMATION

Plaintiffs' First Amended Class Action Complaint, MKC's Answer, the court's class certification ruling and all other papers filed in this action are publicly available for inspection at no cost at the office of the Clerk of the Court, U.S. District Court, 120 N. Henry Street, Room 320, Madison, Wisconsin 53703, and are available there for copying at your own expense.

If you have any questions about this Notice or about this case generally, you may write to Class Counsel Shawn Collins at the address listed above, or call Class Counsel at (630) 527-1595 (Extension 221).

PLEASE DO NOT CALL OR WRITE THE COURT OR THE CLERK OF THE COURT. THE COURT AND THE CLERK CANNOT ANSWER QUESTIONS CONCERNING THE LAWSUIT.

Dated: _____, 2012

**By Order of the United States District
Court for the Western District of Wisconsin**

EXHIBIT C

Michael Hayes

From: Ziemba, Leah H (24420) [lhziemba@michaelbest.com]
Sent: Friday, March 09, 2012 4:18 PM
To: Michael Hayes
Cc: Norman B. Berger; Ed Manzke; Shawn Collins; Crass, David A (22267); Busch, John A (14977); Bianchi, Jr. Albert (24425)
Subject: RE: MKC case -- discovery directed to non-plaintiffs [IWOV-MBF.FID7719247]

Mike,

We would not be opposed to a telephonic meet and confer regarding the discovery issues raised in your previous email. Our position is that the current scheduling order remains in place, including the April 27, 2012, expert disclosure deadline and July 6, 2012, dispositive motion deadline. In an effort to undertake discovery in a manner that will allow us to comply with the currently scheduled deadlines, we will need to move forward on obtaining relevant discovery from all necessary sources.

Regards,

Leah

From: Michael Hayes [mailto:MHayes@vblhc.com]
Sent: Friday, March 09, 2012 2:42 PM
To: Ziemba, Leah H (24420)
Cc: Norman B. Berger; Ed Manzke; Shawn Collins; Crass, David A (22267); Busch, John A (14977)
Subject: RE: MKC case -- discovery directed to non-plaintiffs [IWOV-MBF.FID7719247]

Leah:

We respectfully disagree, for several reasons, with the position you articulate below concerning the appropriateness and need at this juncture for damages discovery directed to non-plaintiff putative class members. First, a class hasn't even been certified yet and your client has vigorously opposed certification. We believe that discovery directed to persons whose legal rights haven't even yet been determined to be at issue in this case is premature, wasteful and excessive. Second, the rationale you offer for this discovery – the need to ascertain damages information – and the specific types of information MKC intends to seek are plainly outside the scope of the class certification being sought in Plaintiffs' pending certification motion. As you will recall, Plaintiffs have expressly sought certification under the 7th Circuit's Mejdrech decision and its progeny, which provides for bifurcation of all damages issues until after a class-wide determination of the following issues: "[W]hether there was unlawful contamination and what the geographical scope of contamination was." (319 F. 3d 910, 912 (7th Cir. 2003)) Even if Plaintiffs' motion for class certification is granted, the initial class-wide phase of the case will not implicate the damages subjects on which MKC is now proposing to initiate discovery. If the case is certified as a class action, and if the case proceeds beyond the class-wide determination of the Mejdrech issues, MKC obviously will have an ability at that later time in the second phase of the case to obtain damages-related discovery from the name-plaintiffs and class members. Third, serving pre-certification discovery on putative class members additionally runs afoul of various Rule 23 legal principles (See generally, Newberg on Class Actions, Secs. 16:4 and 16:5) presumptively limiting defendant's discovery in class actions to the named plaintiffs/class representatives and protecting putative class members against pre and post-certification discovery. These authorities note that discovery directed to class members often can be viewed as harassing, as it may dissuade class members from participation in the class. Plaintiffs believe that this concern is implicated here, given MKC's intention to serve detailed discovery requests on every member of the putative class prior to class certification and prior to receiving the opt out election they will have should a class be certified.

For the above reasons, we respectfully request that MKC reconsider its position on this issue.

5/1/2012

At this point, we request that the parties engage in a formal meet and confer to explore whether we can resolve our differences on this issue. Please check with your colleagues and let us know a convenient time for early next week for a telephone conference on this subject. In the interim, we strongly urge you not to serve any discovery on any putative class members until we have had an opportunity to work this out ourselves or have Magistrate Judge Crocker decide the issue. We are committed to moving quickly on this issue with you and, if necessary, the court.

Regards,

Mike Hayes

From: Ziemba, Leah H (24420) [mailto:lhziemba@michaelbest.com]
Sent: Friday, March 09, 2012 12:32 PM
To: Michael Hayes
Cc: Norman B. Berger; Ed Manzke; Shawn Collins; Crass, David A (22267); Busch, John A (14977)
Subject: RE: MKC case -- discovery directed to non-plaintiffs [IWOV-MBF.FID7719247]

Mike:

Thank you for your email. Given the scheduling order in this matter, MKC must move forward with discovery. To the extent that the complaint seeks damages, MKC needs to know the injury that is alleged. Therefore, we would seek discovery on issues related to the requested relief - including issues related to the harm/injury alleged, attempts to sell or refinance homes in the area, amount claimed in diminution in value, the loss of enjoyment alleged, etc.

Please advise who you represent and whether you will accept third-party subpoenas for those parties whom you represent. Additionally, we plan to obtain discovery from all 34 property owners regarding these same issues. We are willing to work with you to determine the best and most efficient method to obtain that information.

Regards,

Leah

From: Michael Hayes [mailto:MHayes@vblhc.com]
Sent: Friday, March 09, 2012 9:41 AM
To: Ziemba, Leah H (24420); Busch, John A (14977); Crass, David A (22267)
Cc: Norman B. Berger; Ed Manzke; Shawn Collins
Subject: MKC case -- discovery directed to non-plaintiffs

Leah:

Further to our telephone call this morning, I have conferred with my colleagues concerning your statement that MKC is planning to issue discovery to non-plaintiff owners and residents of class area properties. Given that 1) a class has not yet been certified in this case, 2) the Mejdrech scope of issues on which plaintiffs have requested certification, and 3) the legal restrictions on contacting or issuing discovery to class members either before or after certification, my colleagues and I have concerns about the discovery or other types of contact MKC may be contemplating here. That said, we don't know what types of information MKC is seeking from non-plaintiff class members, and of course don't want to burden the court with a dispute on an issue that, if discussed, we might be able to resolve by agreement. We therefore request that you explain what topics of discovery or other information MKC is intending to seek from non-plaintiff putative class members at this time, so that we can either reach an agreement or promptly take the issue to the Magistrate Judge for resolution. Until we have had an opportunity to explore these issues with you further, please be advised that it is plaintiffs' position that it would be improper for MKC to informally communicate with non-plaintiff class members on case-related issues or to issue subpoenas for discovery to these non-parties.

We look forward to hearing from you on this issue.

5/1/2012

Regards,

Mike Hayes

MICHAEL D. HAYES
VARGA BERGER LEDSKY HAYES & CASEY
A Professional Corporation
125 South Wacker Drive
Suite 2150
Chicago, Illinois 60606-4473
(312) 341-9830 (Telephone)
(312) 419-0225 (Facsimile)
Firm Website: www.vblhc.com

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EXHIBIT D

