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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DEERHURST CONDOMINIUM
OWNERS ASSOCIATION, INC.,
a Michigan non-profit
corporation and WOODVIEW
CONDOMINIUM ASSOCIATION,
a Michigan non-profit
corporation, individually
and as representatives of
a class of similarly-situated
persons and entities,
Plaintiffs,

vs. Case No. 15-006473-CZ

CITY OF WESTLAND,
a municipal corporation,
Defendant.

_____ /

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MOTION
BEFORE THE HONORABLE DAPHNE MEANS CURTIS
Detroit, Michigan - Thursday, October 6, 2016

1 APPEARANCES:

2

3

For the Plaintiff: GREGORY D. HANLEY (P51204)
Kickham Hanley, P.L.L.C.
32121 Woodward Avenue
Suite 300
Royal Oak, Michigan 48073
(248) 544-1500

4

5

6

7

For the Defendant: JAMES M. PELLAND (P51237)
Fausone Bohn, L.L.P.
41700 West Six Mile Road
Suite 101
Northville, Michigan 48168
(248) 380-0000

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INDEX

WITNESSES :

None

EXHIBITS :

None

1 Detroit, Michigan
2 Thursday, October 6, 2016
3 9:38 a.m.

4

5 THE COURT: File number 15-006473-CZ,
6 Deerhurst Condominium Association versus the City of
7 Westland.

8 MR. HANLEY: Good morning, your Honor. My
9 name is Greg Hanley and I represent plaintiffs and
10 the class members of this case.

11 MR. PELLAND: Good morning, your Honor,
12 James Pelland representing the City of Westland.

13 THE COURT: Okay. I've had an opportunity
14 to read the plaintiff's emergency motion for TRO and
15 preliminary injunction and City of Westland's
16 response. I'm ready.

17 MR. HANLEY: Okay, your Honor. This is a
18 class action that challenges the water and sewer
19 rates that have been imposed by the City of Westland
20 upon its citizens.

21 And I know we've been before your Honor on
22 the class certification issues, but we really haven't
23 addressed the merits in a sense and I don't want to
24 do that at length here, but I think understanding the
25 nature of our claims, I think feeds into why these

1 communications and this website communications are so
2 inappropriate. For many years Westland has been
3 including in its water and sewer rates about three
4 and a half million dollars that is paid by the water
5 sewer people when they pay their bills. That money
6 is then transferred to the general fund on an annual
7 basis. The City has attempted to justify those
8 transfers as being compensation to the general fund
9 for services provided, but once -- before we filed
10 the suit and it's been confirmed afterwards, that a
11 large portion of those expenses cannot be justified
12 as being related to any services provided to the
13 water and sewer fund, but instead are used to finance
14 the City's general fund obligation.

15 And, in fact, just one example of that,
16 your Honor, to make this more concrete, is every year
17 the City puts in its rates about \$1,400,000 for what
18 they say are health care expenses or health insurance
19 expenses for retired water and sewer employees.
20 Before we filed the suit, the City had never actually
21 calculated how much they pay for retired water and
22 sewer employees, but now they have and that amount is
23 approximately \$580,000.

24 So for all these years there's been five,
25 six, seven eight hundred thousand dollars that has

1 been imposed on the water and sewer customers that
2 has just been essentially stolen and given to the
3 general fund. And all of these things have been
4 confirmed through discovery, including the deposition
5 of their finance director. And I just want to read a
6 small snippet and I'll move on to the motion. With
7 respect to this retiree health care I ask a question.
8 So her data -- this is the person who calculated
9 this -- is showing that the cost in December of 2015
10 for that expense was \$587,000, correct? Answer:
11 Correct. Question: And your allegation for that
12 same period is \$1,375,000, correct? Answer:
13 Correct. Question: More than double what her data
14 shows? Answer: Correct. Question: And through
15 today you've not adjusted your cost allocations in
16 any way to reflect the data that Ms. Kolar has
17 compiled, correct? Answer: Correct. So --

18 THE COURT: And the person speaking was the
19 director of what?

20 MR. HANLEY: Finance director of the City
21 of Westland. Deposition that's attached as Exhibit D
22 to our motion. So -- and that's just one example of
23 the many ways that they're fancifully creating these
24 transfers. So why are we here today, your Honor?
25 Well, you'll recall that --

1 THE COURT: I know it has to do with the
2 notice to members of the class and your contention
3 that the City has inaccurately communicated with the
4 class. In other words, giving them inaccurate
5 information and basically telling them that it's
6 going to be a bad deal for them if they join the
7 class.

8 MR. HANLEY: Right, among other statements,
9 yes.

10 THE COURT: Okay.

11 MR. HANLEY: And the Court will recall that
12 after the Court certified the class, we had kind of a
13 protractive period of time where we were negotiating
14 the class notice and the form of that notice and we
15 agreed on the form of that notice and it was approved
16 by the Court and it contained neutral objective
17 information about the case.

18 And notably, the reason we went through the
19 process is it's required by the rules. 3.501 says,
20 as soon as practical the Court shall determine how,
21 when, by whom and to whom the notice shall be given.
22 The content of the notice and to whom the response of
23 the notice is to be sent, and that's what was done
24 here. And so after everybody here approved the form
25 of that notice, the City took it upon itself to

1 create this website that contains all sorts of
2 information that's clearly designed to coerce people
3 to not participate in the case. And how do we know
4 that? Leave aside what we call the inflammatory
5 comments about how this is lawyer driven and we're
6 the only ones that are going to benefit, which is by
7 the way, completely rebutted by our long record of
8 representing class members in these kind of cases.
9 But the primary problem with their website is, they
10 include an opt out form and they say, please send
11 this to opposing counsel.

12 They have another form that people can fill
13 out to send to the City with questions about the case
14 and they have a dedicated phone line. So this is an
15 extraordinary situation. We have a certified class
16 who's represented by two law firms that you have
17 certified. They are soliciting ex-parte
18 communications with our class members about the
19 subject matter of the lawsuit where that can't be
20 monitored by us.

21 We don't know what they're saying in these
22 phone calls. We don't know what they're saying in
23 response to the forms that are being submitted. And
24 your Honor, who is charged under the court rules with
25 us with making sure the class members get accurate,

1 objective, neutral information so that they can
2 decide whether they want to be part of this case, the
3 City is attempting to pervert that process and
4 influence people in a way that wasn't contemplated by
5 your notice and --

6 THE COURT: Let me ask a question briefly.
7 Doesn't the notice that was agreed upon give the
8 purported members of the class information that they
9 can opt out if they choose?

10 MR. HANLEY: Yes. Yes, it does.

11 THE COURT: Well, there's a better way I
12 could have said it, but essentially that's what I
13 wanted to know.

14 MR. HANLEY: Yes. Let's them know their
15 opt out rights. It doesn't encourage them. It
16 doesn't include hyperbole about the only people who
17 are going to benefit from this case are the lawyers
18 and that forecasting in all this doom and gloom for
19 the finances of the City if the case is successful.

20 You know, we've cited -- there's a large
21 body of federal law, your Honor, that we've cited in
22 our briefs that talk about how there's danger in
23 allowing these kind of communications. We cited the
24 Kleiner case, which is the principle case that
25 says --

1 THE COURT: Kleiner versus First National
2 Bank of Atlanta, an 11th Circuit case, 1985. I
3 highlighted it.

4 MR. HANLEY: Right. Unsupervised
5 unilateral communications with the plaintiff Class
6 sabotage the goal of informed consent by urging
7 exclusion on the basis of a one-sided presentation of
8 facts without opportunity for rebuttal. The damage
9 from the statements could well be irreparable.

10 It would be one thing if they had a neutral
11 content website that said there's this class action,
12 click here to see the notice, right. And by the way,
13 what was ordered by the Court and was negotiated as
14 part of this stipulated order was, Class members
15 would communicate with us, i.e., their counsel, not
16 with the City. So the mere fact that they're
17 initiating these procedures is really a violation of
18 the order because the order approves the notice which
19 says the communications are to be with us, right.
20 And that makes sense because they're our clients, not
21 their clients. Once we have a certified class,
22 they're our clients.

23 THE COURT: What do you say to the City's
24 argument that not all of the residents of the City of
25 Westland are necessarily members of the Class or

1 purported members or potential members of the Class?

2 MR. HANLEY: Well, here's what I would --
3 two things I would say to that.

4 THE COURT: And I do think that that's
5 essentially one of the arguments made.

6 MR. HANLEY: Right.

7 MR. PELLAND: Yes.

8 MR. HANLEY: There's 26,000 class members,
9 there's 80,000 residents. The problem is the 26,000
10 are the number of addresses that get bills. Those
11 addresses are occupied by probably more than one
12 person up to four people. So collectively the
13 argument that there's somehow sixty some thousand
14 people who aren't class members is really, really a
15 little bit disingenuous because when they say 26,000
16 class members, they say these are the addresses that
17 we sent the bills to.

18 But the more fundamental point is, why do
19 they -- what is the need to communicate with them?
20 They're not even class members. It's clear from the
21 website that these communications are not directed to
22 the general public. They're directed to people who
23 are impacted by these water and sewer rates that
24 we're challenging. And they're saying please send
25 them this form to opt out.

1 Why would a resident who's not in the Class
2 even care? I mean, it's disingenuous to suggest that
3 this is targeting somebody else. And by the way, the
4 fact that other people who aren't in the Class may
5 view it, doesn't mean that it's not wrongful as to
6 the Class members. I mean, the Class members,
7 they're -- the content of this notice was ordered by
8 the Court and it was never contemplated that they
9 would have some editorial website that has all this
10 doom and gloom, oh, we're going to have to raise
11 rates, it impacts the financial stability of the
12 water and sewer system and oh, by the way, you're not
13 going to get anything out of this and the lawyers are
14 going to get all the money. That's what it says and
15 that's an accurate characterization of what's on that
16 website.

17 So, yeah, there may be people who are
18 residents of the City who aren't in the Class, but
19 that doesn't -- that doesn't justify the statements
20 on the website. The statements on the website are
21 meant to inflame the class members, not to inflame
22 some general resident who never pays a bill.

23 So we think at a minimum portions of the
24 site that contain editorial comments that go beyond
25 the notice should not be allowed to be up there. And

1 any sort of form or hotline or things that allow
2 unfettered ex-parte communications with class members
3 ought to be prohibited, your Honor.

4 THE COURT: Okay. Response.

5 MR. PELLAND: Thank you, your Honor. I
6 didn't know we were going to get into this, but
7 because they went into a summary of the case and
8 their, you know, allegation on what -- why they think
9 they're going to prevail in this case, I feel it
10 important that this Court really understand what's
11 going on in this case.

12 THE COURT: I don't -- I didn't hear that
13 they thought they were going to prevail.

14 MR. PELLAND: Well --

15 THE COURT: I thought I was given
16 background information regarding the alleged three
17 and a half million dollars going to the general fund
18 and the City's allegation that one and a half million
19 was targeted for retired water and sewerage employees
20 and that the number is more like 580,000 --

21 MR. PELLAND: Right.

22 THE COURT: So I don't -- we're not --

23 MR. PELLAND: Okay. I apologize if I
24 misspoke then.

25 THE COURT: Okay.

1 MR. PELLAND: What I meant to say is that
2 there's a little bit of the substance of the
3 allegations were portrayed and I want to just clarify
4 that --

5 THE COURT: Okay.

6 MR. PELLAND: -- the Court should
7 understand that this case is about the rates that are
8 being charged to water and sewer customers. The rate
9 structure and how the rates are calculated are not
10 based on just one retiree health care benefit.

11 This is a \$33 million plus enterprise that
12 runs the water and sewer department over the course
13 of one year. There's many, many different
14 components, cost and revenue that are factored into
15 this structure. And the way rates go, and everyone
16 does rates the same, they're based on budgeted
17 numbers of projections of what will happen in the
18 future. They're not based on data that every month
19 we look at exact data and say, okay, this is exactly
20 what it was. Let's recalculate our rates. This is
21 how we charge. So it's a budgeted number going out.

22 By doing that, there's certain allegations,
23 assumptions and numbers that have to be put into that
24 to calculate these rates, so I want the Court to --
25 without going into that in more detail just

1 understand that you can pull up one, you know,
2 component of it and say, oh, look at this. This is
3 completely wrong, but there's other components that
4 could be wrong going the other way. Maybe they were
5 undercharged or the expense wasn't there or maybe
6 there wasn't an expense that the City could have
7 charged that they didn't charge. The fact of the
8 matter is you have to look at it as when those all
9 balance out, what were the rates that were being
10 charged to the Class members.

11 Because at the end of the day, it's only if
12 the rates were wrong, if the rates were only too high
13 that the Class members were damaged and prevailed.
14 This -- how they calculated the numbers, was it too
15 high here, too low there, didn't do it here,
16 shouldn't have done it there kind of thing, if it
17 comes out rates are right, rates are right. There's
18 no damage then to the Class members under this case.
19 And I just want the Court to understand that. Now --

20 THE COURT: And I should tell both of you,
21 I don't know ultimately how this is all going to pan
22 out, if you will.

23 MR. PELLAND: I understand.

24 THE COURT: The issue before me today
25 basically is whether or not the City has the right to

1 general. I agree with that.

2 MR. PELLAND: In general. Now we have to
3 understand that we have class -- we have basically
4 different pools of people that are out there. We
5 have Class members, no doubt about it, and we'll get
6 into that because that's very important that there's
7 class members. There's residents. There's residents
8 that are also Class members. And there's Class
9 members that are no longer residents. So we got
10 different pools of people who have different
11 potential interest in this case.

12 Residents have a substantial interest in
13 this case, whether they're just residents or whether
14 residents and their Class members. And the reason is
15 because if you look at the statements that were put
16 on the frequently asked questions, that it will cause
17 a potential -- may cause a financial impact on the
18 City, I think there can be doubt that there can be a
19 financial impact.

20 THE COURT: May I interrupt a minute.

21 MR. PELLAND: Yes.

22 THE COURT: We had more than one discussion
23 I think on and off the record, and I'm referring to
24 the two of you and to the Court, regarding the notice
25 of -- the Class notice --

1 MR. PELLAND: Um-hum.

2 THE COURT: -- and what it should and
3 should not contain. And why do you believe that the
4 website put up by the City was necessary given the
5 agreement reached regarding the Class notice?

6 MR. PELLAND: Be -- I'm sorry. Are you
7 finished?

8 THE COURT: No. No.

9 MR. PELLAND: I didn't want to cut you off.

10 THE COURT: No. I'm okay. I finished my
11 question.

12 MR. PELLAND: Okay. Thank you, your Honor.
13 Because there's no prohibition for the City to
14 respond to its position on what --

15 THE COURT: That's a negative response.
16 I'm asking you why -- or that's a response that
17 doesn't directly address my question.

18 MR. PELLAND: Okay. Your Honor --

19 THE COURT: What I'm asking is, why does
20 the City need or did the City feel the need to put up
21 a website regarding this Class action when there was
22 an agreement as to what the Class notice would be,
23 what language would be contained in the Class notice,
24 why did the City put up a website?

25 MR. PELLAND: Because I believe that there

1 was additional information that people would have a
2 question about and this was their form of answering
3 it. Rather than trying to field questions from
4 everyone, they believed this was the best way for
5 residents or people who heard of the lawsuit or the
6 Class action lawsuit to be able to come and get
7 information -- additional unanswered information that
8 the Class notice wouldn't have been required to have.
9 For instance, we have --

10 THE COURT: Couldn't --

11 MR. PELLAND: I'm sorry.

12 THE COURT: -- that have been negotiated?
13 Couldn't that have been part of the agreement in
14 terms of, these are frequently asked questions or
15 these are the questions we think might be frequently
16 asked and these are the answers to those questions as
17 part of the class notice or some addendum or whatever
18 to the Class notice.

19 MR. PELLAND: Your Honor, I can't say that
20 it couldn't have been. The question is, is whether
21 it was required to and I don't believe it was
22 required to be part of that notice.

23 I think the information that's on here is,
24 you know, it's information that it says we compare
25 our rates to other cities. That's really not

1 rated -- that's really not related to this lawsuit,
2 but we thought it was something that the residents
3 would want to know. We also wanted to state that
4 this didn't have anything to do with the prior
5 flooding case. This didn't have to do with any lead
6 in the pipes type thing. So there's information that
7 was also contained in here and much of it -- counsel
8 only points to two paragraphs, much of it that has to
9 do with not only the lawsuit questions that would be
10 raised by the lawsuit, but more confusion of what the
11 lawsuit is about.

12 THE COURT: Why did the City feel it
13 necessary to basically, maybe instill a little anger,
14 I don't know about anger, but cause people perhaps to
15 be upset if they believe that the attorneys for the
16 Class are going to reap the benefit and pretty
17 much -- the language I just used is milder than the
18 language that the City used on its website, basically
19 said that, you know, it won't be the Class that will
20 be the main beneficiaries, it will be the attorneys
21 for the Class.

22 Why did the City feel the need to tell
23 Class members and or others that, hey, you know, this
24 might have some negative impact on the City's
25 finances and on your rates. I don't know if you

1 indicated your rates but something to that effect.
2 Why did you feel that was necessary to include those
3 two things?

4 MR. PELLAND: Because that's actually one
5 of the critical and important things that residents
6 are concerned about for the most part, your Honor.
7 As taxes, the financial stability of the City is of
8 critical concern to everyone. And to say that a
9 \$20 million judgement against the City is not, you
10 know, going to potentially cause financial
11 instability in the City. One, that's completely
12 true. And, two, that's something that most people
13 that would be looking to see how this impacts them as
14 residents and or any -- in any other capacity as
15 owners of property in the City.

16 How does it impact them? Because if
17 there's a huge judgement, but where does that
18 judgement get paid from. There's a water fund.
19 There's some in there, but if that's depleted, that
20 causes financial instability in our water fund which
21 not only is impacted by, oh, this is money that we
22 need to run this. We have bonds outstanding. We
23 have a Revenue Bond Act that we have to abide by that
24 actually requires a certain amount of money to be in
25 that bond fund. So --

1 THE COURT: Okay. Okay. That answers one
2 part of the question.

3 MR. PELLAND: Okay.

4 THE COURT: The other is, why did the City
5 feel the need to say, hey, you know, it's the
6 attorneys who are going to reap the financial benefit
7 more so than any class members?

8 MR. PELLAND: Your Honor, it's difficult
9 for me to answer that question because I was not the
10 one who made the decision to put that in, but I will
11 answer it --

12 THE COURT: Okay. But you ought to be able
13 since you're representing the City of Westland, to
14 respond to that --

15 MR. PELLAND: I will respond.

16 THE COURT: -- because you're here today.

17 MR. PELLAND: I will respond. And my
18 response is a little bit different than the question
19 you asked. Is why did they feel it necessary --

20 THE COURT: I don't want another question
21 answered.

22 MR. PELLAND: I have to -- it's not.

23 THE COURT: Excuse me. Excuse me. I
24 almost feel like I'm a moderator.

25 MR. PELLAND: No. No. I apologize, your

1 Honor. I don't mean to interrupt you.

2 THE COURT: I simply wanted to know why the
3 City inserted language on its website to the affect
4 that it was the attorneys for the Class who would
5 reap the principle financial benefit and not the
6 members of the Class.

7 MR. PELLAND: Okay. Just to clarify, that
8 statement actually says that the current residents
9 will not benefit from the lawsuit. It doesn't say
10 the Class members won't benefit from the lawsuit,
11 your Honor. So I want to just clarify that point
12 because I think that's important when you're looking
13 at this and we can look at the actual language. Yes,
14 that's what I'm flipping to right now. If you
15 look --

16 THE COURT: Here it is. The City believes
17 there is no factual or legal merit to the claim.
18 Ultimately, there's no net benefit to the current
19 residents of the City if the Class members prevail.
20 This suit is designed to benefit the opposing legal
21 counsel who was set to received one third of any
22 refund or payment the City is required to make to the
23 Class members. Any amount paid for the Class
24 member's legal fees would ultimately be an expense
25 incurred by the City's residents.

1 So I said it in much shorter form, but what
2 I said pretty much sums up what the City indicated in
3 its website or on its website.

4 MR. PELLAND: You're correct. The only
5 point that I wanted to point out is when it said
6 there's no net benefit to the current residents of
7 the City. It doesn't say there's no benefit to the
8 Class members, your Honor. And as we talked about,
9 there's a difference between that.

10 THE COURT: I don't know if there's a
11 material difference because some of the Class members
12 may no longer be residents. Some of the members are
13 residents.

14 So there's no way of getting around it
15 that, you know, we're mincing -- we're using
16 semantics in a way when we say the residents versus
17 the class members, because some of those residents,
18 many of those residents, a lot of those residents
19 are, in fact, or would be class members.

20 MR. PELLAND: Your Honor, I don't disagree
21 with what you're saying. My point is that there
22 clearly is current residents that aren't Class
23 members.

24 And you're correct that there are Class
25 members that are no longer residents. That's why

1 that doesn't say that Class members may not benefit
2 from it. Now, back to your -- have I -- back to your
3 original question was why did the City feel it
4 important to put on there about the attorney fees and
5 who would ultimately be responsible for them? The
6 question really is, is if you look at the cases that
7 are cited to and that would support some type of
8 limitation on communications that a party may have
9 with other potential parties in a case, because
10 that's what we're talking about. These are party
11 communications amongst each other, is it untrue, is
12 it misleading or is it coercive?

13 And the position would be is that this is a
14 statement, that if there is a judgment and the
15 attorneys are able to -- are paid out of it, that
16 money has to come from somewhere. It's coming from
17 the City. The City does not just make money and have
18 money. If it has to pay a \$20 million judgment that
19 has some of the attorney fees incorporated into it,
20 defense counsel fees, plaintiff's counsel fees
21 ultimately the residents, the proper owners, the tax
22 payers, potentially the rate payers have to pay that
23 amount.

24 This -- and if they do, the money they
25 receive is kind of being diverted back into the

1 system because they -- some of them, maybe not all of
2 them, have to pay it back into the City. Now,
3 that -- it may not be an argument or a position that
4 plaintiff's counsel is happy with, but from the
5 City's perspective, it's a true statement of that
6 that in fact packs the financial condition of the
7 City and who ultimately would be responsible for the
8 fees.

9 THE COURT: Let's assume for the moment
10 that that is a true statement, not every true
11 statement is a proper statement, an appropriate
12 statement that should be made and perhaps
13 particularly in the context of a class action.

14 Is there anything else you want to say in
15 response to the --

16 MR. PELLAND: I do, your Honor. I just
17 want to --

18 THE COURT: -- plaintiff's motion.

19 MR. PELLAND: The Kleiner case which you've
20 looked at and the other cases cited by the plaintiff,
21 I want to make sure that you understand that we
22 looked at these cases and we searched for other cases
23 and we did not find a case where a passive website
24 where people actually have to actively seek it out,
25 click on several different links to get to it to read

1 these questions.

2 THE COURT: That's pretty easy these days.
3 I mean, you know seven or eight year olds can -- are
4 pretty tech savvy these days, so I don't think that
5 would be too difficult.

6 MR. PELLAND: I'm not saying it's
7 difficult. I'm saying it's the activity on the part
8 of the Class members or the residents who are doing
9 it. The City has not sent out of letters. Has not
10 made phone calls. Has not done an e-mail. And in
11 the Kleiner case, that's what the issue was.

12 They actually had this whole scheme where
13 they took the list of these Class members. They
14 talked to the people and the defendants and they were
15 actually making specific phone calls to Class
16 members. They were reaching out to the Class members
17 trying to convince them to opt out and --

18 THE COURT: And you know what I thought
19 about last night?

20 MR. PELLAND: Yes, your Honor.

21 THE COURT: The Kleiner case came out in
22 1985 --

23 MR. PELLAND: Um-hum.

24 THE COURT: -- this is 2016. So that case
25 came out about 29 years ago, not at a time when the

1 internet, any -- let me put it this way, before the
2 age of electronic communications became what it is
3 today. So you're looking at it in a context of
4 written information given to purported Class members
5 in Kleiner. I don't know that it makes a material
6 difference that in the Kleiner case there were
7 written communications rather than a website.

8 MR. PELLAND: I don't --

9 THE COURT: So I don't get your point.

10 MR. PELLAND: Okay. Let me clarify then.
11 In the Kleiner case it wasn't written communications.
12 It was the phone calls being made to the Class
13 members. And to address your point earlier about the
14 website --

15 THE COURT: Not just phone calls, but go
16 ahead.

17 MR. PELLAND: To address your point, back
18 in the '80s, there were telephones. How would
19 this --

20 THE COURT: Oh, I know that.

21 MR. PELLAND: How would this be --

22 THE COURT: Thanks for telling me that.

23 MR. PELLAND: How would this be any
24 different than someone calling the City and saying --
25 that's my point. It's the activity on the side of

1 the Class member coming to the City, not the City's
2 activity of going to the Class member which is what's
3 shown in all of these cases. There's activity --

4 THE COURT: If you put up a website and say
5 you're a resident of the City of Westland and perhaps
6 you're a Class member as well --

7 MR. PELLAND: Um-hum.

8 THE COURT: -- why wouldn't one or couldn't
9 one simply, say, hum, let me see if there's some more
10 information about this, and click on the City of
11 Westland's website? So I -- I know the answer in my
12 mind, so that was really rhetorical, so never mind.
13 Go ahead.

14 MR. PELLAND: I'm not --

15 THE COURT: Oh, you're not done?

16 MR. PELLAND: No. My point wasn't that you
17 can't get to the information. My point is it was not
18 an active scheme like was done in the other cases
19 that were relied on by them. Now, the question is
20 then, well --

21 THE COURT: So -- -

22 MR. PELLAND: -- so the Class member --

23 THE COURT: -- putting up a website is
24 passive? Putting a website is passive?

25 MR. PELLAND: I would say --

1 THE COURT: It's not actively trying to
2 give certain information to purported Class members
3 and others? I think -- I keep saying purported. I
4 guess I mean putative.

5 MR. PELLAND: Putative.

6 THE COURT: Okay.

7 MR. PELLAND: It's not that it's not trying
8 to provide the information to them, it's making
9 available the information to them. It's not actively
10 going to their face. It's not sending them a letter
11 that says read this. It's not making a phone call
12 saying, listen, you got to do this because this, this
13 and this.

14 It is, if you are seeking information, you
15 can come to the website. And I think one of the
16 cases they relied on, that was where BP was going to
17 the Class members trying to settle with them and they
18 said, the Class members have a right to say, no, I
19 don't want to deal with you and I don't have to do
20 it. There's no difference here where the class
21 members don't have to go on to that link if they
22 don't want don't to, so they have to make the
23 affirmative act to get the information. It's not
24 being thrust upon them by the City. It's made
25 available by the City --

1 THE COURT: You mean foisted.

2 MR. PELLAND: Foisted upon them.

3 THE COURT: F-O-I-S-T-E-D. Go ahead. I'm
4 sorry. Are you done?

5 MR. PELLAND: It's -- I just --

6 THE COURT: I'm not telling you to stop. I
7 just want to make sure you're finished.

8 MR. PELLAND: I understand, I just want to
9 make one other point.

10 THE COURT: Go ahead.

11 MR. PELLAND: That believe it or not in
12 this case, the City is actually a Class member and so
13 is the Mayor potentially so is all the counsel
14 members.

15 If you put a prohibition on any
16 communication, with the defendant with any potential
17 putative Class members, you're effectively telling
18 the City they can't talk to their residents about it
19 who are not Class members. They can't talk to the
20 City council about it. They can't -- the Mayor can't
21 talk about it amongst themselves. You basically
22 completely tied the hands of the City to even
23 communicate with the people in charge on this case.

24 And not only that, if you prohibit us from
25 talking to class members, we don't know who the class

1 members are. They've never been identified
2 necessarily by -- because there could be five people
3 in a household. One of them is a Class member, four
4 of them may not be Class members. We don't know what
5 the prohibition even applies to anymore.

6 THE COURT: Okay.

7 MR. PELLAND: Thank you, your Honor.

8 THE COURT: We need to take a very short
9 break. My reporter's office is right across the
10 hall. She needs to retrieve something.

11 (Recess taken at 10:13 a.m.)

12 (Back on the record at 10:15 a.m.)

13 THE COURT: I think you've finished your
14 argument on behalf of the City of Westland?

15 MR. PELLAND: Yes, your Honor.

16 THE COURT: Okay.

17 MR. HANLEY: I just have a very brief
18 rebuttal, your Honor. This is not passive. This is
19 an active campaign to route people to this website.
20 On September 29th, the Mayor of Westland William Wild
21 gave a --

22 THE COURT: Spell the last name.

23 MR. HANLEY: Wild, W-I-L-D. Gave an
24 interview to the local paper in which he said, in
25 effect, people are suing themselves. We think it's a

1 frivolous lawsuit. We're going to fight it, Wild
2 said. We will have a response on the City's website.
3 So he's telling the reporter we're putting up this
4 website, knowing that this is going out to the
5 public, the very public that is part of this Class.
6 Then at the counsel meeting on Tuesday --

7 THE COURT: You're about to play a video?

8 MR. HANLEY: It's very short, your Honor.

9 THE COURT: Okay. The record should
10 reflect I'm looking at a laptop -- a video on a
11 laptop. I can't hear it. Is it possible for the
12 volume to be turned up? And who is the person
13 pictured on the video? Can you just come right up to
14 me and we can summarize.

15 MR. HANLEY: All right.

16 (Video being played at 10:16 a.m.)

17 (Video concluded at 10:17 a.m.)

18 THE COURT: Okay. What I just heard the
19 Mayor say is that the City of Westland was
20 encouraging people, residents of the City of Westland
21 to go to the website or call the Mayor's office for
22 information or go to a particular e-mail address for
23 additional information. Okay.

24 MR. HANLEY: One other thing I would like
25 to say. The notion that there's going to be this

1 catastrophic liability and everybody is going to be
2 harmed by it, well, if the Mayor thinks it's
3 frivolous, then that possibility is not going to come
4 to pass. If it does come to pass, it means that we
5 will have proven to the Court or the fact finder's
6 satisfaction that they have engaged in pervasive
7 massive wrong doing over a long period of time and I
8 don't understand why that would be somehow something
9 that was appropriate.

10 But this final thing. Rule 3.501 has
11 specific requirements for the content of the notice.
12 And one of the things that has to be in the notice is
13 a description of possible financial consequences for
14 the Class, okay. That's not just gratuitous, it's
15 required, and we negotiated that notice.

16 There was none of this stuff in there about
17 catastrophic judgment or if the case wins or the
18 lawyers are going to get paid and not you. The
19 description of the possible financial consequences
20 for the Class is in the notice. They are
21 supplementing it with misleading and inappropriate
22 information designed to coerce people to not
23 participate in the Class and we think that that is
24 completely improper, your Honor.

25 THE COURT: All right. I'm ready to rule.

1 MR. PELLAND: Judge, just very, very, very
2 briefly. I swear.

3 THE COURT: Okay. At some point we're
4 going to have to --

5 MR. PELLAND: This is going to be -- just
6 this very last point.

7 THE COURT: Okay.

8 MR. PELLAND: The financial consequences to
9 the Class members is different than financial
10 consequence to current residents of the case
11 because -- and I just want to make that point on the
12 record. Thank you.

13 THE COURT: Okay. I understand your point
14 but I also understand what both of you indicated in
15 your respective arguments, that there are residents
16 who are Class members. There are residents who are
17 not Class members. There are people who are no
18 longer residents who are Class members. So I don't
19 know that what you just indicated is of any import.

20 It was not easy for the plaintiff Class and
21 the City of Westland to come to an agreement as to
22 the language, the actual notice to the Class that
23 there is a Class action and what their rights were,
24 Class members, and what they could do and could -- in
25 other words, they could opt out or join the Class and

1 so forth. The word easy is not really what I wanted
2 to say. There was a fairly vigorous intense back and
3 forth between the plaintiff or the Class and the City
4 of Westland as to what the notice would contain and
5 if I'm wrong, please correct me because I remember
6 having discussions, more than one discussion
7 regarding not only whether or not the Class would be
8 certified, but what the notice -- the Class notice
9 would contain. And I was never advised that the City
10 intended to put up a website, to basically scare or
11 attempt to scare people who might be members of the
12 Class into not joining the class.

13 If I'm told that -- I'm told on some
14 official website, the City of Westland's website that
15 there may be some financial consequences and not
16 only -- not only will there be financial
17 consequences, but in connection with that it's going
18 to be the lawyers who make the money or make more
19 money than the Class members. The financial
20 consequences, I don't know what the language -- I
21 have the actual notice highlighted, I think, but
22 the -- consistent with 3 .501, was already
23 information in the Class notice as to what the
24 possible financial consequences would be, do you
25 agree?

1 MR. PELLAND: To the Class members.
2 Financial consequences to the Class members, not to
3 the property owners of the City, the people that pay
4 taxes in the City of Westland --

5 THE COURT: We're not going to go through
6 that route again, because you can't tell me right now
7 who all the Class members are, nor can, I don't
8 think, the plaintiff. So when you're telling me that
9 there's a difference between the Class members and
10 the residents, I understand what you're saying, but
11 we haven't even identified, or I don't think you've
12 actually identified who are Class members only, who
13 are residents only, who might be both Class members
14 and residents.

15 So you will -- the defendant City of
16 Westland, delete the language from your website
17 regarding the financial -- what the City believes the
18 financial consequences will be of this litigation.
19 You will also delete the information from the Website
20 regarding the financial benefit to the attorneys
21 representing the Class. I think there was one more
22 note I had.

23 You may not have the City -- the -- yeah,
24 the City of Westland answer questions about the Class
25 action because only the persons who call the City and

1 City employees who answer the phone will know what
2 the discussions were and whether it violates my
3 ruling today or is inaccurate or is totally truthful
4 and above board. We just could not and would not
5 know. So I think I covered all the basis. You can
6 have a website, but you can simply indicate there is
7 a Class action. You can -- and refer to the
8 notice -- I don't know if you actually have a -- the
9 actual wording of the Class notice on the website.
10 Do you?

11 MR. PELLAND: No, we don't.

12 THE COURT: Okay. That would be the most
13 effective way of giving information to the Class
14 members and or the residents. Click here for the
15 Class notice.

16 MR. PELLAND: Is that being ordered, your
17 Honor or is --

18 THE COURT: Yes, it is. It's being
19 ordered.

20 MR. PELLAND: Okay.

21 THE COURT: That's my ruling. Thank you.

22 MR. PELLAND: Your Honor, can I just -- I
23 just need to clarify something. You said the City
24 cannot answer questions about this lawsuit. Is it a
25 blanket gag order that they cannot talk to anyone

1 about this or is it direct --

2 THE COURT: They can tell --

3 MR. PELLAND: Or they can only talk to
4 Class members, because it is distinguished.

5 THE COURT: This is probably going to be at
6 least the fifth time that I said it. Since no one's
7 really clear about who the Class members actually --
8 what the Class will actually consist of, you know,
9 because we keep talking about the residents who may
10 be Class members, clearly people who are Class
11 members who receive water bills and so forth, so
12 that's a distinction without a true difference.

13 And how is the City going to ascertain
14 that? Oh, are you receiving water bills? Are you
15 going to determine or someone on the City's behalf,
16 try to determine whether the caller is or is not a
17 member of the Class? That in itself creates some
18 difficulty. So my ruling is what I've just
19 indicated.

20 MR. HANLEY: Thank you, your Honor.

21 THE COURT: Thank you.

22 MR. PELLAND: Your Honor, I'm sorry. And
23 I'm not trying to belabor this point. I need to have
24 clarification because as I talked about it, is there
25 a complete -- and I understand what you're saying.

1 Based on what you're saying, it's my understanding
2 the City cannot talk about the lawsuit at all to
3 anyone because we don't know --

4 THE COURT: The City can direct any callers
5 to the Class notice, and the City can actually post a
6 copy of the class notice on its website and that's
7 it, because otherwise, if any other information, any
8 other discussion is had via phone call, no one but
9 the City employee and the person to whom the City
10 employees speaks will know the nature and extent of
11 the conversation.

12 MR. PELLAND: Your Honor, I'm clear on the
13 phone calls. My question is more there's other
14 scenarios. What if there's a comment requested of
15 the City on the status of the lawsuit or a question
16 from the newspaper about the status of the lawsuit or
17 their position on the lawsuit? That's one scenario.

18 There's also a scenario our council members
19 and potentially our Mayor, I'd have to clarify this,
20 are Class members. They live in the City and they
21 actually -- they pay water bills. Is there a
22 prohibition against me now or anyone talking to
23 counsel or the Mayor about this case? I mean, I need
24 to understand this, your Honor, because I don't want
25 to be in violation of an order. And I'm not trying

1 to be cute with it, but that's a very real concern if
2 there's a blanket prohibition by the City to discuss
3 the lawsuit.

4 THE COURT: Tell me what you propose the
5 City ought to be -- and or its officials, the Mayor,
6 the council people and so forth, ought to be able to
7 say to Westland residents? Let's just put it that
8 way.

9 MR. PELLAND: Your Honor, I would say that
10 you've decided at least with regard to what the
11 website can't contain. The financial -- so if
12 there's a prohibition on stating those to the press,
13 but we could say this lawsuit doesn't have to do with
14 lead pipes, because you're allowing -- from what I
15 understand in your ruling, you're allowing other
16 parts of that frequently asked questions to remain as
17 long as they don't have a statement regarding the
18 financial impact the lawsuit may have on the City or
19 the financial benefit that the -- any attorneys in
20 the case may receive.

21 So I'm just trying to accommodate -- I
22 understand if you're ruling that we have to take down
23 our call-in line or if we have to take down -- if
24 they call into the City and say, we have a question
25 about the lawsuit, that we have to say we can't

1 discuss the lawsuit with you. You need to be
2 directed to Kickham Hanley's website or the notice.
3 That's all we can do. But there's other scenarios
4 besides that -- and I also understand it would apply
5 to e-mail. If an e-mail came in that they were
6 asking a question, we have to respond back, please
7 see this. I understand that part of it. I don't
8 understand and I'm unclear on what the restraints
9 would be on the City from talking to other people.

10 And with regard to counsel and the Mayor, I
11 would propose it has to be unlimited. We would have
12 to be unlimited in the ability to talk to them about
13 any and all aspects of the lawsuit.

14 MR. HANLEY: We would stipulate to that,
15 your Honor. The notion that they're Class members
16 and therefore he can't talk to them. It's --
17 candidly, it's silly. Of course --

18 MR. PELLAND: It is not silly when you have
19 an order that says I can't do it.

20 MR. HANLEY: They're --

21 THE COURT: Excuse me. I haven't imposed
22 an order or said that there will be an order,
23 basically a gag order on the City council and the
24 Mayor.

25 MR. PELLAND: I understand that. That's

