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May 6, 2002

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Via Messenger

The Honorable Leonard D. Wexler
United States District Court
944 Federal Plaza
Central Islip, New York 11722

Re: *Gilbert Stevens v. Verizon Communications Inc. et al*,
Case No. 02 CV 2543.

Dear Judge Wexler:

In compliance with Your Honor's Rule 2(B), we submit this letter to set forth the bases for a motion that we propose to file pursuant to Fed. R. Civ. P. 12 on behalf of defendants Verizon Communications Inc. and GTE Corporation.

Plaintiffs allege that, between 1952 and 1967, predecessors of the defendants operated a "plant" on Cantiague Rock Road in Hicksville, New York. Plaintiffs claim that "chemicals and other toxins, including uranium, were released into the soil, water, air and other areas in and around the . . . plant." Complaint, ¶¶ 10 - 12. As a consequence, "persons living in the vicinity of the . . . plant . . . were [allegedly] subjected to various illnesses and diseases . . ." *Id.*, ¶ 16. Plaintiffs purport to assert three "causes of action," but these are actually claims for relief which are premised on alleged violations of unspecified federal and New York laws and the claimed existence of a "public nuisance" and "dangerous and hazardous conditions." *Id.*, ¶ 30. First, plaintiffs seek damages for all "persons who have suffered physical harm." *Id.*, ¶ 32. Second, plaintiffs seek damages for those residents "who have suffered property damage and whose property value has been impaired . . ." *Id.*, ¶ 35. Third, plaintiffs seek to establish a fund to "determine what adverse effects [defendants'] toxic wastes have had upon residents . . . and to take the appropriate medical action to limit the harm." *Id.*, ¶ 38.

Plaintiffs purport to assert these claims on behalf of a class comprising "all persons who resided in the area . . . who suffered physical harm and/or property damage due to the defendants' dangerous and hazardous conditions of the air, water and soil . . ." *Id.*, ¶ 24. Yet only one of the named plaintiffs alleges physical harm (which was diagnosed in 1987). *Id.*, ¶ 17. The remaining four admit to not having contracted any "specific diseases or illnesses" that are

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attributable to "defendants' conduct." *Id.*, ¶ 18. None of the named plaintiffs claims to have suffered property damage.

We anticipate moving to dismiss the Complaint in its entirety on two principal grounds at this juncture. First, the Complaint fails to state a claim for "radiological contamination." *Id.*, ¶ 15. Over the past 50 years, the federal government has regulated the processing of nuclear materials through a scheme so comprehensive as to have preempted states from regulating nuclear safety. See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 208 (1983). In particular, the Price-Anderson Act was intended to "supplant all possible state causes of action" by "creat[ing] a federal cause of action . . . and channel[ing] all legal liability . . . through that cause of action." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 856 - 57 (3^d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992). The resulting "public liability action" (PLA) is "sweeping" in scope and encompasses any legal liability from "nuclear incidents" (i.e., "any occurrence causing personal or property damage arising out of the toxic, radioactive . . . or other hazardous properties of atomic or byproduct materials"). *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998). At bottom, then, plaintiffs' claims for "radiological contamination" are "compensable under the . . . Act or [they are] not compensable at all." *TMI II*, 940 F.2d at 854.

As a threshold matter, it is exclusively federal law that sets radiation dose standards for permissible releases from nuclear facilities, with the published dose limits in place at the time of the alleged release establishing the controlling standard of care. See, e.g., *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir.), *cert. denied*, 512 U.S. 1222 (1994). Thus, plaintiffs cannot state a "public liability action" unless they are able to allege that defendants engaged in activities that resulted in releases of radiation that exceeded the standards published in the pertinent federal regulations. See, e.g., *In re TMI*, 67 F.3d 1103, 1108 n.10, 1119, (3^d Cir. 1995). Because plaintiffs do not and cannot allege such a violation, plaintiffs' claims for "radiological contamination" must be dismissed. In addition, the claims for medical monitoring being advanced by those plaintiffs who have not suffered any physical injuries are precluded by the Price-Anderson Act's explicit limitation of cognizable claims to those for actual "bodily injury, sickness, disease or death." 42 U.S.C. § 2014(q).

Second, if plaintiffs are trying to assert causes of action that may not be preempted by the Price-Anderson Act because they arise from something other than a "nuclear incident," plaintiffs have utterly failed to do so. To begin with, plaintiffs never identify just which "laws" of New York or the United States were supposedly violated by "defendants' conduct . . ." Complaint, ¶ 30. Similarly, plaintiffs make no attempt to allege the numerous elements that are essential to state cognizable claims for a "public nuisance" or the creation of "dangerous and hazardous conditions" (*id.*), let alone any facts sufficient to make out these essential elements. As a consequence, the Complaint must be dismissed. See *Husowitz v. American Postal Workers Union*, 190 F.R.D. 53, 58 (E.D.N.Y. 1999) (dismissing complaint in part because Fed. R. Civ. P.

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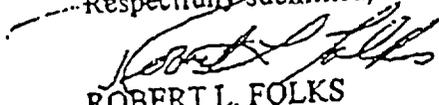
8 requires allegations sufficient to "ensure that courts and adverse parties can understand a claim and frame a response to it").

In addition, we anticipate moving to strike plaintiffs' class action allegations forthwith on at least two grounds. First, because the proposed class would comprise those residents "in the area of the defendants' plant . . . who suffered physical harm and/or property damage due to the defendants' dangerous and hazardous conditions" (Complaint, ¶ 24), this Court would not be able to ascertain the membership of the class without first conducting innumerable mini-trials to determine whether a particular resident qualified. This alone means that the class proposed by plaintiffs would not be "presently ascertainable." MANUAL FOR COMPLEX LITIGATION § 30.14 (3d ed. 1995); see, e.g., *Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1473 (N.D. Ala. 1996) (dismissing class action because definition was too indefinite); *Newton v. Southern Wood Piedmont Co.*, 163 F.R.D. 625 (S.D. Ga. 1995) (rejecting proposed definition of class as "fundamentally defective" and "uncertifiable as a matter of law" because individual exposure diagnoses would be required to determine class membership). Second, cases like this cannot be certified as class actions because critical issues such as exposures, doses, medical causation and compliance with statutes of limitation will turn on individualized evidence particular to each would-be class member and are therefore incapable of being proved on a common, class-wide basis. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Barnes v. American Tobacco Co.*, 161 F.3d 127, 144 - 46 (3^d Cir. 1998); *O'Connor v. Boeing North American, Inc.*, 197 F.R.D. 404, 414 (C.D. Cal. 2000).

Finally, because of the unique circumstances of this case, we intend to ask the Court to stay discovery pending a ruling on our anticipated motion to dismiss. Because proceeding otherwise would entail extensive and expensive discovery of documents and other evidence generated many years ago, we ask that Your Honor first allow the parties to address the threshold issue of whether plaintiffs will be able to pursue Public Liability Actions under the Price-Anderson Act.

We thank the Court for its consideration and stand ready to address all of these issues at Your Honor's earliest convenience.

Respectfully submitted,


ROBERT L. FOLKS

RLF/cil

cc: Counsel of Record

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