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June 12, 2002

VIA MESSENGER

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

Re: Schwinger et al. v. Verizon, Inc. et al., Case No. 02 CV 2017

Dear Judge Wexler:

In compliance with Your Honor's Rule 2(B), this letter sets forth the bases for a Fed. R. Civ. P. 12(b) motion that we propose to file on behalf of Verizon Communications Inc., GTE Corporation, GTE Operations Support Incorporated, and others referred to in ¶8(w) of the complaint as the "Verizon Defendants." We filed a similar letter on May 6, 2002 in Stevens v. Verizon Communications Inc., et al., Case No. 02 CV 2543.

Plaintiffs allege that, beginning in 1952, predecessors of the Verizon Defendants operated a "nuclear processing facility" in Hicksville, New York. Plaintiffs claim that "nuclear waste" from the manufacturing process "was discharged into the drinking water and air of the adjoining residential neighborhood" where plaintiffs lived, ¶ 12, and that these "releases" allegedly "resulted in the exposure of persons living in the area to toxic and radioactive materials," ¶ 15. The 44 named plaintiffs claim exposure to the "releases" at different times since 1959. ¶¶ 7(a)-(ee). Thirty-one plaintiffs claim to have sustained 22 different types of cancer and other medical conditions. Some plaintiffs seek recovery for alleged physical injuries to their decedents, who died as many as 20 years ago. Others seek recovery for loss of consortium and future medical monitoring, and one plaintiff alleges only property damage. ¶ 73(e).

Count One of the eight-count complaint asserts a Public Liability Action ("PLA") under the Price-Anderson Act against only the Verizon Defendants. The remaining seven counts assert claims against all defendants under New York law for negligence, negligence per se, strict liability, misrepresentation and concealment, civil conspiracy, wrongful death and survival, and property damage. ¶¶ 21-72. Plaintiffs seek to recover $1.61 billion in damages for the eight counts, as well as "general damages, special damages," and "punitive and exemplary damages," ¶ 77, allegedly to compensate plaintiffs for physical and emotional harm, medical expenses, medical detection and surveillance services, loss of wages, domestic help, loss of consortium, and to punish defendants. ¶¶ 73-74. At this juncture, we anticipate moving to dismiss the Complaint in its entirety on two principal grounds. First, Count One of the Complaint fails to state a claim

C-9

under the Price-Anderson Act. Second, Counts Two through Eight, which purport to state claims under various New York state law causes of action, are both pre-empted by the Price-Anderson Act as to the Verizon Defendants and contain numerous deficiencies independently requiring their dismissal.

Price-Anderson Claims. Over the past 50 years, the federal government has regulated the processing of nuclear materials through a comprehensive scheme that has 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 (3d Cir. 1991). The resulting 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). Plaintiffs acknowledge that their claims "are statutorily deemed to arise under the federal Price-Anderson Act." ¶ 27. Plaintiffs' claims are therefore "compensable under the . . . Act or [they are] not compensable at all." *TMI II*, 940 F.2d at 854.

Federal law exclusively 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. 1994). Thus, plaintiffs cannot state a PLA claim unless they allege that defendants engaged in activities that resulted in releases of radiation that exceeded the applicable federal standards. *See, e g , In re TMI*, 67 F.3d at 1108 n.10. Because plaintiffs do not and cannot allege such a violation, plaintiffs' claims must be dismissed. In addition, all claims for personal exposure to radioactive materials advanced by plaintiffs who have not sustained physical injuries (including claims for loss of services and consortium of others and requests for future medical monitoring) are precluded by the Price-Anderson Act's explicit limitation of cognizable claims to those for past or present "bodily injury, sickness, disease or death." 42 U.S.C. § 2014(q). Nor does the Price-Anderson Act permit recovery for "property damage" based on "proximity" to nuclear materials or "potential" contamination by nuclear materials, as alleged by plaintiffs in ¶ 71.

Moreover, because a PLA is the sole cause of action authorized by Congress for claims based on exposure to radioactive materials, plaintiffs cannot maintain claims under state laws that set standards of care different from the controlling standard of care established by federal regulatory dose limits. Yet Counts Two through Eight seek to impose liability based on state law standards of care that are "inconsistent with" the federally mandated standard of care. 42 U.S.C. § 2014(hh). Those state law causes of action are therefore preempted as to the Verizon Defendants, and Counts Two through Eight should be dismissed. *See, e.g , Nieman v. NLO, Inc* , 108 F.3d 1546, 1553 (6th Cir. 1997) (holding that Price-Anderson Act preempts state law claims, which cannot stand as separate causes of action), *McLandrich v. Southern California Edison Co.*, 942 F. Supp. 457, 465 & n.7 (S.D. Cal. 1996) ("applying the 'ultrahazardous activities' doctrine here would be clearly inconsistent with the Price-Anderson Act, as it would make nuclear power plant licensees strictly liable without the 'safe haven' provided by the dose limits regulations")

State Law Claims. Plaintiffs' state law claims are subject to dismissal for a variety of other reasons For example, plaintiffs' gross negligence and recklessness claims (Count Two) must be dismissed for failure to plead with particularity a knowing disregard of risk, as required by both New York law and Fed R. Civ. P. 9(b) Plaintiffs have pled nothing that "smacks of intentional wrongdoing." *Hartford Ins Co v. Holmes Protection Group*, 673 N.Y.S.2d 132, 133 (1st Dep't 1998). In Count Three, plaintiffs fail to state a claim for negligence per se because they do not allege how any particular statute creates a certain standard of care or how such a standard was purportedly violated. *See Dance v. Town of Southampton*, 47 N.Y.S.2d 203, 208 (2nd Dep't 1983). Count Five fails to state a claim for intentional misrepresentation or concealment because it does not state with particularity any facts alleging specific intent to mislead, as required by Fed. R. Civ. P. 9(b) and New York law. *See, e.g*, *Rudolph v. Turecek*, 658 N.Y.S.2d 769, 771 (3rd Dep't 1997). Count Six, "Civil Conspiracy," fails to state a claim as well. Under New York law, "civil conspiracy" is not an independent tort, but serves only to connect the actions of several defendants that have committed an intentional tort. *See Alexander& Alexander v. Fritzen*, 68 N.Y.2d 968, 969 (1986). Again, plaintiffs' claims for intentional misrepresentation and concealment have not been pled with sufficient particularity to survive a motion to dismiss. Similarly, Count Eight, "Property Damage," fails to state any actionable claim under New York law: there is no independent cause of action for property damage, which is merely a form of damages

Ten of the eleven wrongful death claims in Count Seven are plainly barred by New York's two-year statute of limitations because the deaths allegedly occurred more than two years before the complaint was filed. *See* N.Y. Est Powers & Trusts Law § 5-4.1(1). More generally, all of the purported New York state law claims brought by any of the plaintiffs are barred to the extent they are based on alleged symptoms that first appeared more than three years before the complaint was filed. N.Y. C.P.L.R. §214-c(2), *In re Matter of New York County DES Litigation*, 89 N.Y.2d 506, 511-14 (1997). Plaintiffs pointedly fail to allege any dates upon which any symptoms purportedly first appeared. Plaintiffs should be required, up front, to disclose their position on this critical, and potentially case-dispositive, issue.

Plaintiffs' request on behalf of unspecified "individuals" for future "medical monitoring" damages should be stricken as a matter of law because (1) it fails to allege that such relief is necessary to a "reasonable degree of medical certainty" as required by New York law, *Askey v. Occidental Chemical Corp.*, 477 N.Y.S.2d (4th Dep't 1984), and (2) the complaint "fails to specifically allege actual exposure to [hazardous substances], at toxic levels " *Jones v Utilities Painting Co* , 603 N.Y.S.2d 546 (2nd Dep't 1993). Finally, Count Eight, "Property Damage," alleges that it is brought on behalf of "Plaintiffs OMOS MAIERS and others," ¶ 71, but no allegations sufficient to sustain class claims have been pled, and in any event, no class would be permissible. *See* May 6, 2002 Letter, Stevens v. Verizon Communications Inc., et al., Case No. 02 CV 2543, p. 3.

We thank the Court for its consideration and are prepared to address these issues at the Court's convenience.

Respectfully submitted,

Robert L. Folks

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cc: Counsel of Record