

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

<b>PATRICK JOSEPH TURNER, ET AL.</b>	*	<b>CIVIL ACTION</b>
<b>VERSUS</b>	*	<b>NO. 05-4206</b>
<b>MURPHY OIL USA, INC.</b>	*	<b>CONSOLIDATED CASE SECTION "L" (2)</b>

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**THIS DOCUMENT RELATES TO ALL CASES**

**ORDER AND REASONS**

Before the Court are Plaintiffs' and Defendant's proposed Notices to Class Members of the pending litigation. Because these proposed notices present several questions of law, the Court issues the following reasons as a predicate for the issuance of the Notice to Class Members.

**I. Factual and Procedural Background**

The factual background of this class action has been discussed in prior rulings of the Court and will not be discussed at length herein. Suffice it to say at this point that this class action arises from an incident in St. Bernard Parish following Hurricane Katrina. In early September 2005, Defendant Murphy Oil USA, Inc. ("Murphy Oil") reported to federal authorities that a 250,000-barrel above-ground storage tank at its Meraux, Louisiana refinery shifted off its foundation and released approximately 25,110 barrels of crude oil. It is alleged that some crude oil traveled into the neighborhoods surrounding the refinery.

After the individual cases were consolidated before this Court, Plaintiffs moved to have their claims certified as a class action under Rule 23 of the Federal Rules of Civil Procedure. After a two-day hearing in January 2006, the Court granted the Plaintiffs' motion and certified a

class. Defendant is now appealing that ruling under Rule 23(f) of the Federal Rules of Civil Procedure. The Court has denied Defendant's Motion to Stay Proceedings pending that appeal.

Immediately after class certification, Defendant Murphy Oil orally petitioned the Court to establish an opt-out procedure for class members and to provide the class with court-approved notice pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure. Defendant's request did not take the form of a formal motion. In a Minute Entry dated January 31, 2006, the Court required counsel for Plaintiffs and Defendant to draft a notice and to propose an opt-out procedure for class members. The Court has now received these drafts from both Plaintiffs and Defendant, and the drafts diverge in important respects. The parties disagree upon the content of the notice. Therefore, the Court shall construct the Notice to Class Members.

## **II. Legal Questions Surrounding Notice and Opt-Out**

There are two central legal questions that must be addressed before any notice is released. First, the parties disagree that class members should be provided the opportunity to opt-out of the litigation at this stage. Plaintiffs appear to suggest that, because an appeal is pending, and because the class definition is not final yet, class members should not be afforded an avenue to exclude themselves from the litigation. Defendant wants to include a method of opt-out at this stage.

Second, and relatedly, the parties appear to disagree regarding what type of notice is required at this stage. Rule 23 discusses two types of notice – a formal notice under Rule 23(c)(2) and an informal informational notice under Rule 23(d)(2). Rule 23(c)(2) requires that notice as prescribed by that section must be given to all class members of a Rule 23(b)(3) class; the class in this case is a Rule 23(b)(3) class. Rule 23(c)(2) notice is a component of a class member's right to due process. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). This

notice must comply with the detailed requirements of Rule 23(c)(2) and must be the “best notice practicable” for due process purposes. Fed. R. Civ. Proc. 23(c)(2); *Eisen*, 417 U.S. at 173. “Best notice practicable” generally means notice to each class member by mail, or “to all class members whose names and addresses may be ascertained through reasonable effort.” *Eisen*, 417 U.S. at 173.

On the other hand, Rule 23(d)(2) provides for a discretionary notice to class members by the Court to keep class members apprised of important developments in the litigation. This notice can contain whatever information the Court believes is important. This notice is not required to be the best notice practicable, but rather can be notice by publication. ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 8.15 (2005). Plaintiffs argue that they are not obligated at this stage to provide Rule 23(c)(2) notice because class certification is on appeal and because the class definition may change. Instead, Plaintiffs suggest that the looser Rule 23(d)(2) notice should be given. Defendant appears to disagree and suggests formal notice under Rule 23(c)(2).

This case differs from a securities fraud or antitrust class action, where most class members are unaware of the litigation and their status prior to their receipt of court-approved notice under Rule 23(c)(2). This litigation has been well-publicized, and the Plaintiffs’ alleged damages are acute. Thus, the Court’s concern with notice is not to inform class members about the *existence* of the litigation, but rather to inform them about the *nature* of the litigation, that is, its scope and its potential consequences for class members.

The Court can find no legal justification to deny class members the right to exclude themselves from this litigation at this stage, provided they are thoroughly informed of their options and the consequences of their action. It is true that, in the typical Rule 23(b)(3) class

action, class members are given a method and a deadline to opt-out somewhat later in the litigation. In general, the district court has discretion regarding the timing of Rule 23(c)(2) notice and opt-out. The notice is meant to ensure that the class members receive notice prior to settlement or adjudication on the merits; thus, notice can occur at any point prior to a trial, dispositive motion, or settlement. *See Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) (citing cases nationwide and describing the phenomenon of “one-way intervention” that opt-out is intended to avoid).

In this case, an active settlement program is underway, and the Court is mindful that most class members who would choose exclusion at this stage would do so in order to participate in Murphy’s settlement program. Class members who wish to participate in the Murphy settlement program should be notified of the consequences of such participation. Class members undeniably have the right to opt-out of this litigation: this is an individual decision for the class member “that must be made on his own after notice of his options.” *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 412 (2d Cir. 1975) *superseded on other grounds as stated in Menowitz v. Brown*, 991 F.2d 36, 41 (2d Cir. 1993).

Part of the Court’s role in class action litigation is to protect the class and to provide neutral information to class members such that their decisions to opt-out of the class are fully informed, and are not based upon any economic coercion. *See, e.g., Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) (rejecting a defendant’s campaign to solicit exclusions of class members from the litigation). Complicating the issue is Defendant’s Rule 23(f) appeal, which could alter the Court’s class definition in this case. However, the Court believes the status of the appeal is not a cause for concern regarding notice. Rule 23(f) appeals are discretionary, and, as the Seventh Circuit has stated, they “should not unduly retard the pace

of litigation.” *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). The Court has not granted a stay of proceedings pending the appeal. As of this date, the Fifth Circuit has not granted a stay either. While the class definition could change after an appeal, the Court stated in its Order and Reasons granting class certification that the class definition could change pending further testing as well. In the event of a change in class definition, the Court will re-notify class members of the nature of the class action. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.311 (2004) (suggesting re-notice to the class upon amendment of the class definition).

However, after reviewing the relevant authorities on these issues, the Court believes that class members must be afforded sufficient notice of the status and nature of this litigation and the opportunity to opt-out of the class action at this point. Because the Court finds that class members should be allowed to opt-out at this stage, the Court believes that the required notice under Rule 23(c)(2) is appropriate at this time. Rule 23(c)(2) notice is a component of a class member’s right to due process under the Fourteenth Amendment. *Eisen*, 417 U.S. at 173. As such, the class member should not exclude himself or herself without receiving the neutral information given by the Court in a Rule 23(c)(2) notice.

The Court acknowledges that Rule 23(c)(2) notice may be burdensome upon the Plaintiffs at this stage, particularly if the class definition is amended and further notices are required. However, the potential prejudice to class members who would exclude themselves without receiving the proper notice and understanding the consequences of their actions is too great to delay Rule 23(c)(2) notice. Therefore, the Court attaches to this Order and Reasons the Notice to Class Members that has been approved by the Court. This Notice shall be distributed by Plaintiffs in accordance with the requirements of Rule 23(b)(3).

## **II. Conclusion**

Accordingly, IT IS ORDERED that the attached Rule 23(c)(2) notice is hereby APPROVED for distribution to class members. Class members shall be afforded the opportunity to opt out of this litigation.

New Orleans, Louisiana, this \_\_\_\_ day of February, 2006.

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UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

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**LEGAL NOTICE OF CLASS CERTIFICATION**

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**TO: ALL PEOPLE RESIDING OR OWNING PROPERTY NEAR THE MURPHY OIL USA REFINERY. PLEASE READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR LEGAL RIGHTS.**

**1. Description of the Case.**

On September 3, 2005, Murphy Oil USA, Inc. notified the federal government that approximately 25,110 barrels of crude oil escaped from a 250,000-barrel above-ground storage tank at Murphy Oil's refinery in St. Bernard Parish, Louisiana. Some of this oil traveled into the neighborhoods surrounding the refinery.

As a result, twenty-seven consolidated class actions were filed on behalf of several thousand people claiming damages in connection with the oil spill. Plaintiffs are homeowners and business owners in St. Bernard Parish who claim they have suffered damage as a result of the spill.

Murphy's position is that the leak was not its fault, but rather was due to the effects of Hurricane Katrina and/or the fault of the Army Corps of Engineers, the agency responsible for the Mississippi River Gulf Outlet and the levees protecting the community.

On January 30, 2006, the Court certified these cases as a class action and granted the Plaintiffs' Motion for Class Certification for all persons living within the area described in the class definition (see Section 2 below). The following five individuals were named as class representatives: Phyllis N. Michon, Cherie Scott Perez, Fernand Marsolan, Jr., Robin Diaz Clark, and James Shoemaker. The Court also approved the following attorneys as class counsel: Sidney Torres, Richard Arsenault, Daniel Becnel, Val Exnicios, Michael Stag, Mickey Landry, Scott Bickford, Hugh Lambert, Joseph Bruno, Madro Bandaries, William Bradley, Ronnie Penton, Robert Becnel, Walter Leger, Donni Young, Darleen Jacobs, E. Carroll Rogers, Salvador Gutierrez, Michael Hingle, Walter Dumas, Anthony Irpino, and Gerald Meunier.

The Court certified the following claims for class-wide treatment:

- Negligence (Louisiana Civil Code article 2315)
- Liability of Landowner for activity that deprives his neighbor of enjoyment or causes damage (Civil Code articles 667 and 2315)
- Strict Liability (Civil Code articles 2317 and 2322)
- Nuisance (Civil Code articles 667-669)
- Trespass (Civil Code articles 3421 and 3425)
- Groundwater Contamination (Louisiana Revised Statutes 30:2015.1)

Under these claims, the Plaintiffs have asked for damages and attorneys' fees for the following injuries: contamination of property, cost of homogeneous restoration, loss of use of property, increased living expenses, extended displacement costs, diminution of property value, ecological damages, loss of income, lost profits, lost business opportunity, inconvenience, mental anguish, emotional distress, bodily harm, past and future medical expenses, injunctive relief, and damages or payments for remediation of groundwater.

After hearing the evidence, the Court found that the twenty-seven cases filed were appropriate for treatment as a class action. A "class action" is a suit in which certain named individuals, the class representatives, sue on behalf of the unnamed members of the class. All



individuals who choose to remain in the class are bound by any judgment rendered in the class action, and this judgment could be favorable or unfavorable to the class member.

The Court certified these cases as a class action because 1) the plaintiffs were so numerous that trials of individual cases would be impractical, 2) there are questions of law and fact common to the class members, 3) the claims of the class representatives are typical of the claims of other plaintiffs, 4) the class representatives will fairly and adequately protect the interests of the class, 5) the issues common to all class members predominate over issues that affect only individual plaintiffs, and 6) the class action format is superior to other available methods of judicial resolution of this dispute.

A full copy of the Court's decision granting class certification may be viewed at [www.laed.uscourts.gov](http://www.laed.uscourts.gov). (Please follow the "Murphy Oil" link on the left side of the front page to navigate to the Court's opinion.) Murphy is appealing this decision to the Fifth Circuit Court of Appeals. The class action is proceeding to trial while the appeal of certification is pending. The Court has set a date of August 14, 2006 for the first phase of the trial in this case. This phase will determine Murphy Oil's liability, if any, for the spill at issue.

## **2. The Class Definition**

The Court has certified, at this time, the following class:

All persons and/or entities who/which have sustained injuries, loss, and/or damages as a result of the September 2005 spill of crude oil and any other related substances from a storage tank located on Defendant Murphy Oil USA, Inc.'s property in Meraux, Louisiana, and who/which on August 29, 2005, were residents of, or owned properties or businesses in, the following area: Beginning north, from the 40 Arpent Canal with its intersection in the west at Paris Road in Chalmette, Louisiana, and traveling along Paris Road in a southerly direction to its intersection with St. Bernard Highway, then heading east from this intersection along St. Bernard Highway to Jacob Drive, then heading north along Jacob Drive to the

intersection with East Judge Perez Drive, then heading east along East Judge Perez Drive to its intersection with Mary Ann Drive, then heading north along Mary Ann Drive to the 40 Arpent Canal.

A map setting forth the boundaries of the class is attached to this notice. A color version of the map may be viewed at [www.laed.uscourts.gov](http://www.laed.uscourts.gov) (follow the “Murphy Oil” link). If you fall within this class definition, you will be legally bound by all determinations made by the Court concerning the class unless you opt-out in the manner described below.

The Court chose a class area that is larger than Murphy Oil’s “settlement zone” and smaller than the area proposed by the Plaintiffs. The Court designated this area based upon the evidence produced at the January 12, 2006 class certification hearing. The Court reached its decision after considering the opinions of experts hired by the Plaintiffs and by Murphy Oil, reports by the Environmental Protection Agency (EPA) and other state and federal agencies that have examined the area, as well as other evidence admitted at the class certification hearing.

### **3. Opting-Out of the Class Action**

If you want to participate in the class action and you are within the class area as defined in this notice, you do not need to take any action at this time. If you are a member of the class, Murphy Oil is legally prohibited from dealing with you individually or directly concerning your claim.

On the other hand, if you do not want to participate in the class action, you must opt out of the class action. If you opt out of the class action, you are responsible for either settling your claim with Murphy or bringing your own lawsuit against Murphy in connection with the September 2005 spill. If you opt out, you will not be able to share in monetary damages, if any, that the Plaintiffs may obtain in this litigation. You may wish to consult with an attorney before you make a decision to opt out or to remain in this litigation.

In order to opt-out, you must email, fax, or write a letter to both Sidney Torres, Liaison Counsel for Plaintiffs, and Kerry Miller, Liaison Counsel for Murphy. Mr. Torres' contact information is as follows:

Sidney Torres  
Liaison Counsel for Plaintiffs  
1290 7th Street  
Slidell, Louisiana 70458  
Fax: (985) 661-8914  
Email: [storres@torres-law.com](mailto:storres@torres-law.com)

Mr. Miller's contact information is as follows:

Kerry Miller  
Liaison Counsel for Murphy Oil  
1100 Poydras Street, Suite 3600  
New Orleans, Louisiana 70163  
Fax: (504) 599-8145  
E-mail: [kmiller@fpkc.com](mailto:kmiller@fpkc.com)

**\* \* \* IF YOU CHOOSE TO OPT-OUT, YOU MUST DO SO BEFORE JUNE 1, 2006. \* \* \***

#### **4. Questions Concerning Your Legal Rights**

If you have questions concerning your legal rights as a member of the class action, more information about the case is available on the Court's Web site, [www.laed.uscourts.gov](http://www.laed.uscourts.gov) (follow the "Murphy Oil" link). You may also contact your own lawyer or any of the lawyers listed above as class counsel.

The above notice is approved for publication this 3rd day of February, 2006.

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Eldon E. Fallon  
UNITED STATES DISTRICT JUDGE