

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss

Superior Court Department

Janice Magliacane, individually and on behalf of others
similarly situated,

Plaintiff

v.

City of Gardner, Suez Water Environmental Services,
Inc. (formerly known as United Water Environmental
Services, Inc.), and AECOM Technical Services, Inc.
(formerly known as Earth Tech, Inc.),

Defendants

Civil Action No.

Jury Trial Demanded

RECEIVED

DEC 13 2017

**CLERK OF COURTS
WORCESTER COUNTY**

CLASS ACTION COMPLAINT

Based on the investigation of her Counsel, Plaintiff Janice Magliacane alleges for her Class Action Complaint as follows:

PRELIMINARY STATEMENT

1. Plaintiff Magliacane is a resident and homeowner in Gardner, Massachusetts, who brings this action on behalf of herself and all others similarly situated to obtain monetary and appropriate equitable relief for herself and members of the Class (defined below) who have had to replace heating coils, hot water heaters, furnaces and/or boilers due to coil corrosion.

2. Defendant City of Gardner (the "City" or "Gardner") is a City in the Commonwealth of Massachusetts. Since 1998, the City has sold, supplied and distributed water to the residents, property owners and businesses of Gardner through the City's private water system operators, which at relevant times were Earth Tech, Inc. (now known as Defendant AECOM

Technical Services, Inc.) (“Earth Tech”) and Suez Water Environmental Services, Inc. (formerly known as United Water Environmental Services, Inc.) (“Suez”).

3. In doing so, the City, Earth Tech and Suez assumed to duty to insure that the water that they sold, supplied and distributed was not unreasonably corrosive, and would not unreasonably damage the hot water heating systems of the residents, property owners and businesses of Gardner.

4. The City, Earth Tech and Suez have long known that the water they sold, supplied and distributed to Ms. Magliacane and to other residents, property owners and businesses in the City was corrosive, they failed to implement their own corrosion control plan, and they failed to take other actions which they knew would mitigate coil corrosion.

5. By the actions and inactions alleged herein, the City, Suez and Earth Tech caused physical property damage to the copper coils, water heaters and/or boilers of Ms. Magliacane and other residents, property owners and businesses of Gardner. Those actions (a) were negligent and grossly negligent, (b) created, permitted or maintained a nuisance, (c) breached express and implied warranties and/or (d) violated G.L. c. 93A

PARTIES

6. Plaintiff Janice Magliacane is an individual who resides in Gardner, Massachusetts.

7. Defendant City of Gardner (the “City” or “Gardner”) is a municipality in the Commonwealth of Massachusetts.

8. Defendant AECOM Technical Services, Inc. (formerly known as Earth Tech, Inc.) (“Earth Tech”) is a corporation with a principal place of business in Los Angeles, CA, which at relevant times had business operations in Gardner. Earth Tech is a former subsidiary of Tyco International, Ltd. (“Tyco”). In or about 2008, Tyco sold Earth Tech to AECOM Technology

Corp. (“AECOM”), and Earth Tech, Inc. was renamed AECOM Technical Services, Inc. Earth Tech was the contract operator of the Gardner water facilities from 1998 until 2008.

9. Defendant Suez Water Environmental Services, Inc. (formerly known as United Water Environmental Services, Inc.) (“Suez”) is a corporation with a principal place of business in Paramus, NJ, with business operations in Gardner, Massachusetts. In or about 2008, Suez acquired Earth Tech's water operation and maintenance contracts from AECOM. Suez has been the contract operator of the Gardner water facilities from 2008 to the present.

JURISDICTION

10. This Court has jurisdiction over this class action pursuant to G.L. c. 212, §3, because this is a civil action for money damages, and there is no reasonable likelihood that the single damage recovery for the plaintiff and the class will be equal to or less than \$25,000.

11. This Court has jurisdiction over the City pursuant to G.L. c. 258, §3 because the lawsuit is brought in Superior Court in Worcester County where the Plaintiff resides and the City is situated.

12. The exercise of personal jurisdiction over Defendants is proper pursuant to G. L. c. 223A, § 3 because, *inter alia*, Plaintiff's claims arise out of Defendants' conduct which took place in the Commonwealth of Massachusetts, and caused to property of Massachusetts residents located in Massachusetts, and all the members of the Class at relevant times were residents of Massachusetts. All Defendants have registered agents in the Commonwealth of Massachusetts.

FACTUAL ALLEGATIONS

13. The City and, at relevant times, Suez and Earth Tech are in business of selling, supplying and distributing water to the residents, property owners and businesses of the City of

Gardner. In connection with the sale and distribution of water, the City, Suez and Earth Tech are engaged in commercial activity for monetary gain and profit.

14. The City and, at relevant times, Suez and Earth Tech have sold, supplied and distributed water to the residents, property owners and businesses of the City of Gardner, and have operated two water treatment plants, the Crystal Lake Water Treatment Plant and the Snake Pond Water Treatment Plant.

15. The residents, property owners and businesses of the City of Gardner pay for the water based on usage as determined by water meters installed at their properties.

16. In 1998, the City entered into a contract with Earth Tech for the operation and maintenance of the City's water supply system which distributes water to residents, property owners and businesses in the City of Gardner. That contractual agreement privatized the City's water operations (the "Contract"). In or about 2008, Earth Tech's responsibilities and obligations under the contract with Gardner were assumed by Suez, and Suez is not the contract operator of the Gardner water facilities.

17. Under the Contract between the City and Earth Tech, which was later assumed by Suez, Earth Tech and Suez had the responsibility for ensuring that the City's water systems are operated and maintained consistent with Good Industry Practices, i.e., "those methods, techniques, standards and practices which at the time they are employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good and prudent practices in the construction, operation or maintenance, as the case may be, for the municipal water and/or wastewater industry, as the case may be, in the northeast region of the United States and are consistent with the same degree of skill and care ordinarily exercised by members of the respective trade or profession." Contract, pp. 2, 7, 10 and Ex. 12.

18. Under the Contract between the City and Earth Tech, which was later assumed by Suez, Earth Tech and Suez “guarantee[d]” that the services it will perform under the contract will conform with “Good Industry Practices” and agreed to “use use all reasonable means and methods to insure the safety, integrity and quality of the City’s water.” Contract, p. 8, 10.

19. Under the Contract between the City and Earth Tech, which was later assumed by Suez, Earth Tech and Suez further agreed that the work it performed shall “shall conform to the highest professional standard of care and practice customarily expected of those engaged in performing comparable work, the personnel furnishing said services shall be qualified and competent to perform adequately the services assigned to them and the recommendations, guidance and performance of such personnel shall reflect such standards of professional knowledge and judgment.” Contract, p. 43.

20. Under the contract between the City and Earth Tech, which was later assumed by Suez, Earth Tech and Suez, agreed to “indemnify[y] and shall at all times save and hold harmless the City of Gardner, and its officers, attorneys, employees, and agents, from and against any and all claims (including workers' compensation and wage claims) demands, suits, actions, liabilities, damages, penalties, judgments, and costs and expenses, including without limitation the costs and expenses of litigation, of or by anyone that in any way is caused by, arises out of, or is occasioned by and to the extent of the willful misconduct or negligent performance, activities, operations, or omissions of Earth Tech, or any of its consultants, contractors, or the agents or employees thereof, regardless of whether or not they are caused in part by a party indemnified hereunder.” Contract, p. 40.

21. Under the contract between the City and Earth Tech, which was later assumed by Suez, the residents, property owners and businesses of the City of Gardner were “customers” of

Earth Tech and Suez, and Earth Tech and Suez were required to respond to complaints by water customers and to set up a toll free number which they staffed, where customers could report water problems. Contract, Ex. 12.

22. Suez and Earth Tech considered the residents, property owners and businesses of the City of Gardner to be its customers and sent annual water quality reports to every City home and business, in which they acknowledged their responsibilities to ensure that the water they sell, supply and distribute was safe and of high quality.

23. The City, Earth Tech and Suez have known for years that the water that they sell, supply and distribute to the residents, property owners and businesses of the City of Gardner is corrosive and has damaged the heating coils, water heaters, furnaces and boilers of Gardner residents, property owners and businesses.

24. This problem could have been avoided (or at a minimum significantly mitigated) if the City, Earth Tech and Suez had not been negligent and grossly negligent, and had implemented the protocols that had been approved to add orthophosphate to its water treatments system to inhibit corrosion of the distribution system piping and plumbing.

25. In a June 1994 report, City consultants Tighe & Bond, stated that “the corrosive nature of the source water was causing leaching of lead and copper from building plumbing.” Tighe & Bond concluded in its corrosion control study concluded that “increasing the pH of the water entering the distribution system would reduce lead and copper solubility” and recommended that the City’s water treatment facility at Crystal Lake, “add a non-zinc based orthophosphate to serve as a film former within the distribution system and inhibit corrosion of the distribution system piping and plumbing.”

26. In a January 1998 letter Tighe & Bond also recommended that the City's water treatment facility at Snake Pond, employ "corrosion control using caustic soda and poly/orthophosphate blend."

27. When the City constructed water treatment plants at Crystal Lake and Snake Pond, the City and Earth Tech incorporated the addition of orthophosphate into the design of the facilities as a corrosion inhibitor.

28. The City and Earth Tech sought approval from the Massachusetts Department of Environmental Protection ("MADEP") to add orthophosphate as a corrosion inhibitor as reflected in correspondence with the MADEP.

29. The MADEP approved the addition of orthophosphate as a corrosion inhibitor for both the Crystal Lake and the Snake Pond water treatment facilities in 1998 and 1999:

- a. In a March 1998 letter from the MADEP to the City, the MADEP approved the City's request for the construction of the Crystal Lake Water Filtration Facility, which included post treatment of finished water that incorporated "corrosion control with orthophosphoric acid";
- b. In a January 1999 letter from the MADEP to the City, the MADEP approved the City's request for the construction of the Snake Pond Well Treatment Facility in which the MA DEP noted that "Corrosion control is proposed to include treatment of this groundwater source with the addition of sodium hydroxide for pH adjustment and phosphate addition as a corrosion inhibitor"; and

30. In an August 2002 letter from Earth Tech to the MADEP, Earth Tech advised the MADEP that "we do not believe our corrosion control program has been optimized" and that

after stabilizing the pH levels leaving the Gardner Treatment facilities, Earth Tech would **“further optimize lead and copper control with orthophosphate treatment.”**

31. Despite the City’s and Earth Tech’s decision to add orthophosphate as a corrosion inhibitor, and the approval by the MADEP to add orthophosphate for corrosion control, the City, Earth Tech, and later Suez failed to add orthophosphate to inhibit corrosion through neglect.

32. Commencing in the early to mid 2000s, copper heating coils in hot water heating systems of Gardner residents, property owners and business began to fail prematurely, with many residents experiencing multiple failures.

33. By 2009 or 2010, the City had received numerous complaints about copper water heater coil failures and the City commenced an investigation.

34. In 2011, the City Engineer contacted Darren Lytle, the acting chief of the Treatment Technology Evaluation Branch of the United States Environmental Protection Agency (“EPA”), to test a copper water-heater coil as well as hot and cold distribution, raw surface and well, and boiler water samples. Dr. Lytle, an EPA expert on corrosion, could not find any problems with the coil itself. He informed the City however, that the water’s **“alkalinity is very low and that is never good for pitting corrosion. I would consider increasing it a bit...”** On information and belief, the City shared the results of the EPA testing with Suez. The City and Suez did not act on this recommendation to increase the alkalinity of the water.

35. By 2012, the City had received reports of more than 400 coil failures from more than 250 City residents, with many residents experienced multiple coil failures.

36. In 2012, the City and Suez retained Microvision Laboratories (“Microvision”) to examine water coil samples that were submitted for corrosion and failure analysis. Microvision ruled out coil quality/imperfections as the culprit. Microvision also noted that in addition to the coil

failures, boilers showed signs of deterioration as well. Microvision suspected that the switch from chlorine to chloramine to disinfect the water may have contributed to the coil corrosion.

37. Microvision also had a proposed solution to mitigate the corrosion problem. It recommended in its June 15, 2012 report that:

Additional steps might be taken in order to minimize the risk of aggressive corrosion. Depending on the application environment, the addition of a phosphate corrosion inhibitor might increase the longevity of the piping. Since copper is generally self oxidizing, it is often not directly attacked, but in this case, it does appear that the oxide layer is being removed. **Additional phosphate based protective material layers may inhibit this process further, adding longevity to the system.**

38. In a June 26, 2012 memorandum summarizing the Microvision report's findings, the City Engineer wrote that while no single factor was obvious, the report

- takes coil quality/imperfections off the table;
- shows that in addition to the copper coils, boilers are showing signs of deterioration as well;
- shows no signs of bacterial corrosion of the copper or nitrification; and
- suspects chloramines and fluoride as the culprits

39. Based on the Microvision report, the City Engineer recommended that moving forward the City and Suez should consider "corrosion inhibitors" and increasing "alkalinity." In a July 31, 2012 memo, the City Engineer, wrote:

After a careful review of the report prepared by Microvision Laboratories concerning the failure of copper heating coils in Gardner, I believe we need to direct United Water to adjust the water chemistry of finished water leaving Crystal Lake. As anticipated, the report does not adequately identify any single cause or source of the failure of the copper heating coils; however, it suggests that fluoride and chloramination could be unwitting contributors.... **Original studies in advance of the current water treatment facility construction called for the addition soda ash for alkalinity control and**

non zinc orthophosphate for corrosion control. At some point the orthophosphate addition was dropped and is not used today.

... I believe it is incumbent upon us as the supplier to improve water chemistry to make the water more protective of the copper pipe within the boiler heating environment. This may be accomplished by adding phosphate corrosion inhibitors or increasing alkalinity and pH. I suggest that United Water be instructed to consult with their water chemistry experts and recommend to the City adjustments to water chemistry that will enhance the protection of copper.

40. Despite these recommendations, the City and Suez did not take steps to improve the water chemistry to make the water more protective of the copper pipe within the boiler heating environment by adding phosphate corrosion inhibitors or increasing alkalinity and pH out of neglect. In fact, the City Engineer noted in an internal memo written in 2015, the City and Suez “have not looked at our corrosion control strategy” in years.

41. The City and Suez also knew that the switch from chlorine treatment to chloramines treatment could result in corrosion and leaks. In a 2005 study in the City’s possession, the authors indicated that “a switch to chloramines may increase ... pinhole leaks.” According to this study, “within 18 months after switching to chloramine from chlorine, one utility detected marked increases in pinhole leaks and brass failures.”

42. As additional complaints continued to mount, in 2015 the City and Suez retained yet another consultant, Corrosion Testing Laboratories (“CTL”), to conduct further testing on the leaking copper coil failures.

43. CTL concluded in a September 8, 2015 report that “leaks in the provided coils were caused by localized pinholes that formed at the inside surface of the coil (exposed to potable drinking water)” and that “the attack that created the pinholes was likely caused by the water quality issues related to soft water low alkalinity, and/or low dissolved inorganic carbon.” CTL further

stated that Suez's use of chloramine treatment has been "associated with changing the alkalinity and dissolved inorganic carbonate levels in water."

44. In September 2015 the City directed Suez to perform a Desk Top Corrosion Study to review its strategy for corrosion control, which the City and Suez had not reviewed in years.

45. The City has long understood that Gardner and its water system operators have the responsibility to correct the coil corrosion problem, but did not do so:

- a. In a July 2012 memorandum the City Engineer wrote: **"I believe it is incumbent upon us as the supplier to improve water chemistry to make the water more protective of the copper pipe within the boiler heating environment."**
- b. In a February 2015 memorandum from the City Engineer to a City Councilor, the City Engineer admitted **"we have a problem that needs to be solved."** The City Engineer further stated that the City must **"fix the problem,"** and that **"the fix will no doubt be to add chemicals to the water to coat the pipes to add more protection against wear or corrosion."**
- c. In a September 2015 memorandum from the City Engineer to Suez, which was copied to the Mayor, the City Engineer acknowledged that the City and Suez had responsibility for **"protection of piping materials from metal deterioration."**

46. It was not until June 2016 that the City and Suez sought MADEP approval (for the second time) to add orthophosphate at both the Crystal Lake and Snake Pond Water Treatment Facilities as a corrosion control inhibitor. Indeed, as noted in the proposal, in the late 1990s, both facilities had been previously permitted for phosphate addition by the MADEP. However, the City, Earth Tech and Suez never implemented the approved program out of neglect.

47. On November 4, 2016, representatives of the MADEP, the City and Suez met to discuss the coil corrosion issues and on January 18, 2017, the City and Suez submitted a final plan “to proceed with the addition of orthophosphate at the Crystal Lake and Snake Pond Water Treatment Facilities in the City of Gardner's Water Sytstem [sic].”

48. The City’s and Suez’s request to add orthophosphate as a corrosion inhibitor was approved by the MADEP on August 8, 2017.

49. On August 30, 2017, the City announced that it would add orthophosphates to the City’s water supply, which the City Engineer stated “will make the situation go away,” and that the use of orthophosphate was safe and is the standard for dealing with copper corrosion. This is the course of action that the City, Suez and Earth Tech had long intended to implement but failed to do so out of neglect.

50. By reason of the foregoing actions and inactions:

- a. the City was negligent, grossly negligent and created, permitted or maintained a nuisance;
- b. Suez was negligent, grossly negligent, created, permitted or maintained a nuisance, breached express and implied warranties in connection with the sale, supply and distribution of water, and engaged in unfair and deceptive acts and practices in violation of G.L. c. 93A; and
- c. Earth Tech was negligent, grossly negligent, created, permitted or maintained a nuisance, and engaged in unfair and deceptive acts and practices in violation of G.L. c. 93A.

51. On information and belief, the City and Suez still have not added orthophosphates to the City's water supply, even though the MADEP approved their request in August 2017; thus, their negligence, gross negligence, nuisance, and statutory violations are continuing.

52. The City's, Earth Tech's and Suez's negligence, gross negligence, nuisance, breach of warranties and/or unfair and deceptive acts and practices have caused substantial damage to Ms. Magliacane and hundreds of the other residents, property owners and business of the City who have had damage to their property and have had to replace their heating coils, hot water heaters and/or boilers.

53. Ms. Magliacane has had three copper heating coils fail. Ms. Magliacane replaced two copper heating coils. After a third copper coil failed, Ms. Magliacane installed a hot water heater to replace her tankless hot water system in order to avoid additional costs of further copper coil replacements.

54. On October 12, 2017, Plaintiff sent a demand letter to the City, Suez and Earth Tech, individually and on behalf of a class of "Gardner residents, property owners and businesses who have had to replace/purchase heating coils, boilers and/or hot water heaters since 2000 due to coil corrosion." Earth Tech has never responded to the demand letter. The City responded to the demand by letter dated December 4, 2017, in which it denied all responsibility and liability. Suez belatedly responded to the demand by letter dated December 8, 2017, in which it adopted the positions of the City in its letter dated December 4, 2017, and made no offer of relief.

55. Plaintiff's presentment of her claim to the City met the requirements G.L. c. 258, §4, and her claims are not exempt under G.L. c. 258, §10. Plaintiff's presentment was made in writing to the Mayor of the City within two years after the date upon which her causes of action arose, and the City finally denied her claim by letter dated December 4, 2017, sent by certified mail.

FRAUDULENT CONCEALMENT

56. The City and its water system operators have continually denied that any of their actions or inactions contributed the coil corrosion and until September, 2015, denied that the coil corrosion was caused by the City's water or related to the chemistry of the City's water.

57. Prior to September 2015, the City publicly blamed the copper coil corrosion on the manufacturers of the coils and the materials used in manufacturing the coils, even though it knew that in 2011 the EPA did not find anything wrong with the coils, that in 2012 Microvision had ruled out the coils as the cause, and that residents of neighboring towns which used the same copper heating coils did not experience the copper heating coils failures.

58. At a May 17, 2013 meeting of the Public Service Committee of the City Council, in response to questioning about coil corrosion, the City Engineer stated "we have the water tested and it is not showing anything." That statement was not true since by March 2013 (a) the EPA had reported that alkalinity of the water was "very low" and should be increased and (b) Microvision advised the City and Suez that it suspected that the chloramine used to disinfect the water may have contributed to the coil corrosion.

59. The City and its water system operators, Suez and Earth Tech, never disclosed that since the late 1990s its consultants had recommended the addition of orthophosphate to mitigate corrosion and that the City never implemented that recommendation even though they sought and received MADEP approval to do so. The City and Suez never disclosed that in 2012, Microvision had recommended the addition of orthophosphate to mitigate coil corrosion.

60. In September 2015, the City issued a press release concerning the CTL study which acknowledged that "the soft water (low alkalinity) and a low level of Dissolved Inorganic Carbons" contributed to the copper coil failures. Notwithstanding CTL's conclusion that Earth Tech's and

Suez's use of chloramine treatments were associated with the low alkalinity and low dissolved inorganic carbon levels which contributed to the corrosive water conditions, in the press release the City stated "the failure of some copper coils has been potentially determined to be due to the natural state of the water itself and not due to any additives." This statement was false in light of CTL's conclusion that chloramine treatment was associated with the low alkalinity and low dissolved inorganic carbon levels which contributed to the corrosive water conditions.

61. Following the issuance of the September 2015 press release, the City's Mayor denied that the City had any culpability for the coil corrosion because the CTL report attributed the issue to the natural state of the surface water.

62. According to the minutes of the meeting of the Public Service Committee of the Council on March 3, 2016, the City continued publicly to deny that any responsibility for the coil corrosion, with the City Engineer stating: "we are not doing anything wrong." At the same meeting, the City Engineer further reported that the Massachusetts Interlocal Insurance Association ("MIAA") (the City's insurance carrier) reviewed and denied any claims associated with the coil corrosion "because City has soft water, which is a natural occurrence."

63. The City's misstatements and denials were made with the intent to deceive the residents, property owners and businesses in Gardner in order to conceal the City's negligence and the negligence of its water systems operators, Earth Tech and Suez. The City misstatements and denials were made with the intent to deceive the residents, property owners and businesses in Gardner in order to conceal the existence a cause of action against the City, Earth Tech and Suez in order to avoid litigation.

64. In light of the City's fraudulent concealment, pursuant to G.L. c. 260, §12, the period prior to the actual discovery of the causes of action set forth herein shall be excluded in determining the time limit for the commencement of the action.

CLASS ACTION ALLEGATIONS

65. Plaintiff re-alleges and incorporates the allegations contained in the paragraphs above.

66. Plaintiff brings this action pursuant to Massachusetts Rule of Civil Procedure 23 and Chapter 93A, Section 9(2) on behalf of herself and a Class consisting of: "Gardner residents, property owners and businesses who have replaced or will have to replace heating coils, boilers and/or hot water heaters due to coil corrosion."

67. Plaintiff reserves the right to amend the definition of the Class.

68. This action is properly maintainable as a class action.

69. The members of the Class are thus so numerous that joinder of all members is impractical. On information and belief, there are hundreds of members of the Class.

70. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

- a. Whether Defendants were negligent, grossly negligent and/or created, permitted or maintained a nuisance by reason of the conduct alleged herein;
- b. Whether Defendants had knowledge of methods and processes that would reduce or mitigate the corrosive properties of the water they supplied to Plaintiff and the Class but failed to employ such methods and processes;

- c. Whether the corrosive properties of the water supplied by Defendants to Plaintiff and the Class caused copper coils to leak and fail;
- d. Whether Suez breached implied and express warranties when it supplied corrosive water to Plaintiff and the Class; and
- e. Whether Suez and Earth Tech engaged in unfair and deceptive acts and practices by reason of the conduct alleged herein, and whether they did so knowingly and willfully.

71. Plaintiff is a member of the Class and her claims are typical of the claims of the members of the Class because, like Plaintiff, each member purchased water which was distributed from the City water plants, at relevant times, by Earth Tech and Suez.

72. Plaintiff will fairly and adequately protect the interests of the members of the Class and have retained counsel who have extensive experience prosecuting consumer class actions and who, with Plaintiff, are fully capable of, and intent upon, vigorously pursuing this action. Plaintiff does not have any interest adverse to the Class.

73. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Furthermore, the damage that has been suffered by any individual Class member is likely not substantial enough to support the expense and burden of individual litigation. Accordingly it would be impracticable for all members of the Class to redress the wrongs done to them individually. There will be no difficulty in the management of this action as a class action.

74. The prosecution of separate actions against Defendants would create a risk of inconsistent or varying adjudications with respect to the individual Class members which could establish incompatible standards of conduct for Defendants. In addition, adjudications with respect

to individual members of the Class could, as a practical matter, be dispositive of the interests of the other members of the Class not parties to such adjudications, or could substantially impede or impair their ability to protect their interests.

75. The members of the Class are identifiable through Defendants' records, and the records of plumbing supply companies, which have replaced the corroded coils of the members of the Class.

76. Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

Count I
Negligence and Gross Negligence
(Against City of Gardner)

77. Plaintiff re-alleges and incorporates the foregoing paragraphs as if fully set forth herein.

78. Gardner owed a duty of care to Plaintiff and the members of the Class, which it breached by the conduct alleged herein.

79. Gardner sold, supplied and distributed water to residents, property owners and business owners in the City, including Plaintiff and members of the Class, and assumed the duty to Plaintiff and the members of the Class to act with reasonable and ordinary care.

80. Gardner breached that duty to Plaintiff and the members of the Class and was negligent when it failed to take reasonable and appropriate action to provide water that would not damage the coils of the Plaintiff and the members of the Class. Specifically, Gardner breached its duty by unreasonably:

- a. failing to implement its plan to add orthophosphate inhibitors to the water supply to reduce corrosion which had been approved by the MADEP in the late 1990s;
- b. failing to take corrective action after the EPA recommended an increase to the alkalinity of the City's water;
- c. failing to take corrective action after Microvision recommended the addition of a phosphate corrosion inhibitor to increase the longevity of the piping;
- d. failing to take corrective action after CTL reported that the pinhole leaks in the heating coils were likely caused by the water quality issues related to soft water low alkalinity, and/or low dissolved inorganic carbon which has been associated with the use of chloramine treatments;
- e. Switching from a chlorine treatment to a chloramine treatment of the water, which caused the alkalinity levels to drop, without considering or implementing counter-measures to prevent the corrosive effects of the water;
- f. failing to take appropriate steps to remediate known issues concerning the alkalinity and chemistry of Gardner's water;
- g. failing to remediate the issues in the water it sold, supplied and distributed that it knew was causing corrosion in its customers' heating coils and for which it had an obligation to fix; and
- h. failing to properly supervise its water system operators, Suez and Earth Tech.

81. Gardner's conduct was also grossly negligent and showed indifference to its legal duty and showed utter forgetfulness of legal obligations so far as other persons may be affected. In

the face of a known risk, Gardner persisted in engaging in actions and inactions involving a high degree of probability that harm would result.

82. In engaging in the conduct alleged herein, the City and its employees and agents were not engaged in a discretionary function because the actions and inactions complained of did not involve a planning decision or judgment. Rather, the conduct complained of involved the failure of the City and its employees and agents to carry out previously established plans to add orthophosphate as a corrosion inhibitor in accordance with their delegated authority and to follow the recommendations of its hired experts out of neglect.

83. Gardner's negligence and gross negligence continued at least until August 30, 2017, and on information and belief, continues to this day.

84. Plaintiff and the members of the Class did not know that the negligence and gross negligence of the City, and could not have reasonably have known that the negligence and gross negligence of the City, caused them harm more than three years prior to the commencement of this action or more than two years prior to the presentment of the claim under G.L. c. §258, §4.

85. As a direct and proximate cause of Gardner's breach of duty, negligence and gross negligence, Plaintiff and the members of the Class have suffered ascertainable losses and property damage.

86. Gardner is liable to Plaintiff and members of the Class for all damages caused by its negligence and gross negligence.

Count II
Negligence and Gross Negligence
(Against Suez and Earth Tech)

87. Plaintiff re-alleges and incorporates the foregoing paragraphs as if fully set forth herein.

88. Suez and Earth Tech owed a duty of care to the Plaintiff and the members of the class, which it breached by the conduct alleged herein.

89. Suez and Earth Tech were in the business of supplying water to the residents of the City, property owners and business owners in the City, including the Plaintiff members of the Class, as its customers.

90. Suez and Earth Tech supplied water to residents of the City, property owners and business owners in the City, including the Plaintiff and the members of the Class, and assumed the duty to the Plaintiff and the members of the Class to act with reasonable and ordinary care.

91. Suez and Earth Tech breached that duty to Plaintiff and the members of the Class and were negligent when they failed to take steps to conduct their water supplying businesses reasonably. Specifically, Suez and/or Earth Tech breached their duty by unreasonably:

- a. failing to implement the plan to add orthophosphate inhibitors to the water supply to reduce corrosion which had been approved by the MADEP in the late 1990s;
- b. failing to take corrective action after the EPA recommended an increase to the alkalinity of the City's water;
- c. failing to take corrective action after Microvision recommended the addition of a phosphate corrosion inhibitor to increase the longevity of the piping;
- d. failing to take corrective action after CTL reported that the pinhole leaks in the heating coils were likely caused by the water quality issues related to soft water low

alkalinity, and/or low dissolved inorganic carbon which has been associated with the use of chloramine treatments;

- e. Switching from a chlorine treatment to a chloramine treatment of the water, which caused the alkalinity levels to drop, without considering or implementing counter-measures to prevent the corrosive effects of the water;
- f. failing to take appropriate steps to remediate known issues concerning the alkalinity and chemistry of Gardner's water; and
- g. failing to remediate the issues in the water it sold, supplied and distributed that it knew was causing corrosion in its customers' heating coils and for which it had an obligation to fix.

92. Suez's and Earth Tech's conduct was also grossly negligent and showed indifference to its legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. In the face of a known risk, Suez and Earth Tech persisted in engaging in conduct involving a high degree of probability that harm would result.

93. Suez's negligence and gross negligence continued at least until August 30, 2017, and on information and belief continues to this day.

94. Plaintiff and the members of the Class did not know that the negligence and gross negligence of Suez and Earth Tech, and could not have reasonably have known that the negligence and gross negligence of Suez and Earth Tech, caused them harm more than three years prior to the commencement of this action.

95. As a direct and proximate cause of Suez and Earth Tech's breach of duty, negligence and gross negligence, Plaintiff and other members of the Class have suffered ascertainable losses and property damage.

96. Suez and Earth Tech are liable to Plaintiff and members of the Class for all damages caused by their negligence and gross negligence.

Count III
Nuisance
(Against the City of Gardner)

97. Plaintiff re-alleges and incorporates the forgoing paragraphs as if fully set forth herein.

98. Gardner created, permitted, or maintained an unreasonable condition or activity at the water treatment facilities owned by the City which caused damage to and a substantial and unreasonable interference with the use and enjoyment of the properties of the Plaintiff and the members of the Class.

99. As a direct and proximate cause of the nuisance created, permitted, or maintained by Gardner, Plaintiff and other members of the Class have suffered ascertainable losses and property damage.

100. The nuisance created, permitted or maintained by Gardner continued at least until August 30, 2017, and on information and belief continues to this day.

101. Gardner is liable to Plaintiff and members of the Class for all damages caused by the nuisance created, permitted, or maintained by the City of Gardner.

Count IV
Nuisance
(Against Suez and Earth Tech)

102. Plaintiff re-alleges and incorporates the forgoing paragraphs as if fully set forth herein.

103. Earth Tech and Suez created, permitted, or maintained an unreasonable condition or activity at water facilities operated by Earth Tech Suez for the City which caused damage to and a

substantial and unreasonable interference with the use and enjoyment of the properties of the Plaintiff and the members of the Class.

104. As a direct and proximate cause of the nuisance created, permitted, or maintained by Earth Tech and Suez, Plaintiff and other members of the Class have suffered ascertainable losses and property damage.

105. The nuisance created, permitted or maintained by Earth Tech and Suez continued at least until August 30, 2017, and on information and belief continues to this day.

106. Earth Tech and Suez are liable to Plaintiff and members of the Class for all damages caused by the nuisance which they created, permitted, or maintained.

Count V
Breach of Implied Warranty of Merchantability
(Against Suez)

107. Plaintiff re-alleges and incorporates the foregoing paragraphs as if fully set forth herein.

108. Suez regularly supplies and distributes water, through a contract with Gardner, to consumers, and thus is a merchant with respect to water.

109. Suez supplied and distributed water with low alkalinity levels and corrosive properties to the Plaintiff and the members of the Class.

110. It was reasonably foreseeable to Suez that Plaintiff and the members of the Class, would seek to use the water in hot water heating systems with copper coils.

111. The water provided by Suez, containing low alkalinity levels and corrosive properties, was defective compared to the water promised by Suez.

112. Suez had knowledge of methods and processes that reduce or mitigate the corrosive properties of the water, which it did not employ.

113. Suez's breach of warranty continued at least until August 30, 2017, and on information and belief continues to this day.

114. Plaintiff and the members of the Class were injured by Suez's breach of warranty within three years of filing suit.

115. By delivering defective water that contained low alkalinity levels and corrosive properties, Suez caused substantial injury to the property of Plaintiff and the members of the Class.

116. Suez is liable to Plaintiff and members of the Class for all damages caused by Suez's breach of the implied warranty of merchantability.

Count VI
Breach of Express Warranty
(Against Suez)

117. Plaintiff re-alleges and incorporates the foregoing paragraphs as if fully set forth herein.

118. Suez expressly warranted and "guarantee[d]" that it would use "Good Industry Practices" and "use all reasonable means and methods to insure the safety, integrity and quality of the City's water" in the contract with Gardner.

119. Suez provided water with corrosive properties to Plaintiff and members of the Class that lacked the promised "quality" promised in the contract with Gardner.

120. By delivering water with low alkalinity levels and corrosive properties, Suez has breached its express warranty to Gardner and by extension Gardner's residents, including Plaintiff and members of the Class.

121. Suez's breach of warranty continued at least until August 30, 2017, and on information and belief, continues to this day.

122. Plaintiff and the members of the Class were injured by Suez's breach of express warranty within four years of filing suit.

123. Suez is liable to Plaintiff and members of the Class for all damages caused by Suez's breach of express warranty.

Count VII
Violation of G.L. c. 93A
(Against Suez and Earth Tech)

124. Plaintiff re-alleges and incorporates the foregoing paragraphs as if fully set forth herein.

125. At all relevant times, Suez and Earth Tech were engaged in trade or commerce within the Commonwealth of Massachusetts, including the trade or commerce of selling water to residents of the City and distributing water to residents of the City through their contract with Gardner, for monetary gain and profit.

126. Suez and Earth Tech engaged in unfair and deceptive acts by reason of the conduct alleged herein. Specifically, Suez and Earth Tech have engaged in unfair or deceptive acts or practices in the conduct of trade or commerce in violation of G. L. c. 93A, §2 when they:

- a. sold and distributed water which they knew was corrosive to Plaintiff and the members of the Class;
- b. failed to take steps to remediate known issues concerning the alkalinity levels, chemistry and corrosive properties of the water they sold and distributed;
- c. ignored and failed to implement recommendations of experts to address the corrosive properties of the water; and

d. switched from a chlorine treatment to a chloramine treatment of the water, which caused the alkalinity levels to drop, without taking the necessary counter-measures to prevent the corrosive effects of the water.

127. By reason of the foregoing, Suez and Earth Tech have engaged in unfair or deceptive acts or practices in the conduct of trade or commerce in violation of G.L. c. 93A, §2.

128. Plaintiff and the members of the Class did not know and could not have reasonably have known that the unfair and deceptive acts or practices of Suez and Earth Tech caused them harm more than four years prior to the commencement of this action.

129. The violations of G.L. c. 93A §2(a) by Suez and Earth Tech, as described herein, were done willfully and knowingly.

130. As a direct and proximate cause of Suez and Earth Tech's unfair and deceptive acts and practices, Plaintiff and the members of the Class were harmed and their property has been damaged.

131. On October 12, 2017, Plaintiff sent Suez and Earth Tech written demands for relief pursuant to Chapter 93A, Section 9, identifying the claimant and reasonably describing the unfair acts or practices relied upon and the injuries suffered. Earth Tech did not respond to Plaintiff's demand. Suez belated responded to Plaintiff's demand on December 8, 2017, and did not make a reasonable offer of relief.

132. As a result of Suez's and Earth Tech's violations of G.L. c. 93A, Sec 2(a) Suez and Earth Tech are liable to Plaintiff and the Class for up to three times the damages that Plaintiff and the members of the Class incurred, together with all related court costs, attorneys' fees, and interest.

PRAYERS FOR RELIEF

Plaintiff, on behalf of herself and the Class, prays for:

- a. an order certifying the Class under G.L. c. 93A and Mass. R. Civ. P. 23;
- b. an award of damages against the City, Suez and Earth Tech in the amount to be proven at trial;
- c. an award of triple damages against Suez and Earth Tech under G.L. c. 93A due to their willful and knowing violation of G.L. c. 93A, Sec. 2(a) and their failure to make a reasonable offer of settlement in response to Plaintiff's G.L. c. 93A demand letter;
- d. an award of attorneys' fees and expenses against Suez and Earth Tech under G.L. c. 93A;
- e. an order directing the City and Suez to forthwith take remedial and corrective action, including those steps approved by the MADEP on August 8, 2017; and
- f. such other relief as the Court deems just and proper.

JURY DEMAND

Plaintiff, on behalf of herself and the Class, demands a trial by jury on all claims so triable.

Dated: December 12, 2017

By her attorneys,



Edward F. Haber (BBO #215620)
Michelle H. Blauner (BBO #549049)
Adam Stewart (BBO # 661090)
Jonathan Dinerstein (BBO #696004)
SHAPIRO HABER & URMY LLP
2 Seaport Lane
Boston, MA 02210
Tel: (617) 439-3939
ehaber@shulaw.com
mblauner@shulaw.com
jdinerstein@shulaw.com

Patrick Bunnell (BBO # 562321)
Dombrowski, Aveni & Bunnell, PC
6 Grove Avenue
Leominster, MA 01453
Tel: (978) 840-0001
Patrickbunnell@gmail.com

Attorneys for Plaintiff and the
Putative Class