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	)	CASE NO. 4:23CV0672
Plaintiffs,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
NORFOLK SOUTHERN CORP., <i>et al.</i> ,	)	
	)	
Defendants.	)	<b><u>ORDER</u></b>

**I.**

Pending is Plaintiffs’ Motion to Appoint Interim Class Counsel and a Plaintiffs’ Leadership Structure ([ECF No. 25](#) in Case No. 4:23CV0242 (*i.e.* the first-filed case)). The *Feezle* Leadership Group and Team Ohio seek appointment as interim class counsel to act on behalf of the putative class prior to class certification. The Cory Watson Attorneys contend the Court should not force non-class-seeking Plaintiffs to place their claims under the control of a class counsel organizational structure. After notice to the parties, the Court conducted a hearing on the motion *via* Zoomgov.com. The Court has been advised, having reviewed the record, the motion, supporting documentation (ECF Nos. [25-1](#), [25-2](#), [25-3](#), [25-4](#), [25-5](#), [25-6](#), and [25-7](#) in Case No. 4:23CV0242), and the applicable law. The Court has also considered the oral arguments of counsel offered during the hearing.

The appointment of interim class counsel is critically important in a case of this nature, as it is an ongoing event affecting potentially thousands of residents, property owners, and businesses in East Palestine, Ohio and the surrounding area, all of whom are members of the putative classes that have been proposed. For the reasons set forth below, the Court grants

Plaintiffs' Motion ([ECF No. 25](#) in Case No. 4:23CV0242; and appoints Interim Class Counsel as proposed by the *Feezle* Leadership Group and adopts the *Feezle* Leadership Group's proposed leadership structure with slight modification.<sup>1</sup>

At the outset, the Court notes that both the *Feezle* Leadership Group and Team Ohio have demonstrated the qualifications, experience, and commitment to adequately represent the putative class. While both sets of counsel raise compelling arguments, the Court finds that the *Feezle* Leadership Group will best serve the interests of the putative class.

[Fed. R. Civ. P. 23\(g\)\(3\)](#) gives a district court discretion to “designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.” *See also* [Smith v. FirstEnergy Corp., Nos. 2:20-cv-03755, 2:20-cv-03987, 2:20-cv-03954, 2021 WL 9032912 at \\*1 \(S.D. Ohio May 13, 2021\)](#). When there are a number of overlapping, duplicative or competing class actions filed, appointment of interim class counsel may be helpful to clarify “responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement.” [Manual for Complex Litigation \(“MCL”\) § 21.11 \(4th Edition, 2004\)](#).

[Rule 23\(g\)\(1\)\(A\)](#) specifically directs the Court to consider the following factors before appointing interim class counsel: “(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex

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<sup>1</sup> As suggested during the hearing, the Court adds Attorney Jeffrey S. Goldenberg to Plaintiffs’ Executive Committee and Attorney Ronald R. Parry to Plaintiffs’ Steering Committee. The Court also adds Attorney Nils P. Johnson, Jr. to be another Community Liaison Counsel.

litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.” [Rule 23\(g\)\(1\)](#) also lists other matters the Court may consider and actions the Court may take in appointing class counsel. [Fed. R. Civ. P. 23\(g\)\(1\)\(B\)-\(E\)](#). [Rule 23\(g\)\(4\)](#) requires class counsel to “fairly and adequately represent the interests of the class.” When “more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.” [Fed. R. Civ. P. 23\(g\)\(2\)](#).

The Court has conducted an independent review to ensure that counsel appointed to leading roles in the case at bar are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable. *See* [MCL § 10.22](#). In the case at bar, Attorneys Seth A. Katz, M. Elizabeth Graham, and Jayne Conroy have done significant work in identifying and investigating the potential claims in the February 3, 2023 Norfolk Southern train derailment in East Palestine, Ohio. These three lawyers and their respective law firms have extensive experience in the areas of class actions, complex litigation, toxic torts, railroad litigation, regulatory, and environmental litigation. The proposed team of attorneys is knowledgeable and experienced in the applicable law. Finally, the proposed Interim Class Counsel and their organizational structure are dedicated to committing substantial economic and legal resources to represent the putative class. The Court has no reason to believe that the *Feezle* Leadership Group, as supplemented herein, will be unable to commit the resources necessary to represent the class. Therefore, because the Court finds the *Feezle* Leadership Group clearly satisfies the requirements of [Rule 23\(g\)](#), it approves their proposed organizational structure consisting of Interim Class Counsel, Co-Lead Counsel, an Executive

Committee (which includes Plaintiffs' Liaison Counsel), Plaintiffs' Steering Committee (which includes Plaintiffs' Co-Liaison Counsel, Community Liaison Counsel, and several Subcommittees such as Discovery, Law and Briefing, Science, and Experts. See [MCL § 10.221](#).<sup>2</sup>

A. The Court finds that Burg Simpson Eldredge Hersh & Jardine, P.C., Grant & Eisenhofer P.A., and Simmons Hanly Conroy LLC meet the standards set forth in [Fed. R. Civ. P. 23\(g\)\(1\) and \(4\)](#) to serve as Interim Class Counsel. Pursuant to [Rule 23\(g\)\(3\)](#), the Court appoints the following attorneys as Interim Class Counsel:

Seth A. Katz of Burg Simpson Eldredge Hersh & Jardine, P.C.

M. Elizabeth Graham of Grant & Eisenhofer P.A.

Jayne Conroy of Simmons Hanly Conroy LLC

B. The Court finds that Burg Simpson Eldredge Hersh & Jardine, P.C., Grant & Eisenhofer P.A., Simmons Hanly Conroy LLC, and Morgan & Morgan, P.A. are competent to serve as Co-Lead Counsel to manage the putative class actions and the individual actions.

Pursuant to the Court's inherent authority, the Court appoints the following attorneys as Co-Lead Counsel:

Seth A. Katz of Burg Simpson Eldredge Hersh & Jardine, P.C.

M. Elizabeth Graham of Grant & Eisenhofer P.A.

Jayne Conroy of Simmons Hanly Conroy LLC

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<sup>2</sup> Committees of counsel can sometimes lead to substantially increased costs. Therefore, Interim Class Counsel should try to avoid unnecessary duplication of efforts and control fees and expenses.

T. Michael Morgan of Morgan & Morgan, P.A.<sup>3</sup>

C. The Court finds that the following attorneys and their firms meet the standards set forth in [Fed. R. Civ. P. 23\(g\)\(1\) and \(4\)](#) to serve in the following capacities in the organizational structure of the *Feezle* Leadership Group:

1. [Pursuant to Rule 23\(g\)\(3\)](#), the Court appoints the following attorneys to Plaintiffs'

Executive Committee:

Mark P. Chalos of Lief Cabraser Heimann & Bernstein, LLP

Vincent L. Greene IV of Motley Rice LLC

Christopher A. Seeger of Seeger Weiss LLP

Mikal C. Watts of Watts Guerra LLP

Charles E. Schaffer of Levin Sedran & Berman LLP

James J. Bilsborrow of Weitz & Luxenberg, PC

Michelle L. Kranz of Zoll & Kranz, LLC (Plaintiffs' Liaison Counsel)

Jeffrey S. Goldenberg of Goldenberg Schneider, LPA

2. [Pursuant to Rule 23\(g\)\(3\)](#), the Court appoints the following attorneys to Plaintiffs'

Steering Committee:

Daniel R. Karon of Karon LLC

Roger C. Denton of Wright & Shulte, LLC

Neal E. Shapero of Shapero Roloff Co., LPA

Brian P. Kopp of Betras Kopp & Markota

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<sup>3</sup> Attorney Morgan will represent individuals and entities who have elected to file cases outside the class action, but are not opposed to the class structure.

Alyson Steele Beridon of Herzfeld Suetholz Gastel Leniski and Wall PLLC

Margaret M. Murray of Murray & Murray Co., L.P.A.

Joyce Chambers Reichard of Kelley Ferraro, LLC

Gary A. Corroto of Plakas Mannos

Ashlie Case Sletvold of Peiffer Wolf Carr Kane Conway & Wise, LLP (Plaintiffs' Co-Liaison Counsel)

Wesley D. Merillat of The Charles E. Boyk Law Offices, LLC

Kelly K. Iverson of Lynch Carpenter, LLP

Douglas J. Olcott of Edgar Snyder & Associates, LLC

Daniel Aaron Rihn of Robert Pierce & Associates

Dena R. Young of Berger Montague PC

Stephen R. Basser of Barrack Rodos & Bacine

Gary M. Klinger of Milberg Coleman Bryson Phillips Grossman, PLLC

Andrew D. Schlichter of Schlichter Bogard & Denton, LLP

Daniel Thornburgh of Aylstock, Witkin, Kreis & Overholtz, PLLC

Ronald R. Parry of Strauss Troy Co., LPA

3. Pursuant to [Rule 23\(g\)\(3\)](#), the Court appoints the following attorneys as Community

Liaison Counsel:

Nicholas T. Amato of Amato Law Office, LPA

Nils P. Johnson, Jr. of Johnson & Johnson Law Office<sup>4</sup>

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<sup>4</sup> Attorney Johnson is not currently receiving Notices of Electronic Filing (“NEFs”) from the Court. In order to effectively use the electronic filing system and retrieve documents from the electronic filing system, users must have a PACER (Public

(continued...)

4. Pursuant to [Rule 23\(g\)\(3\)](#), the Court appoints the following attorneys to Plaintiffs' current Subcommittees focused on specific aspects of this litigation to work on tasks assigned to them by Co-Lead Counsel:

Gregory R. Farkas of Frantz Ward

Grant W. MacKay of Law Office of Grant W. MacKay LLC

Zachary J. Murry of Barkan & Robon, Ltd.

Michael J. O'Shea of Lipson O'Shea Legal Group

Patrick J. Perotti of Dworken & Bernstein, Co., L.P.A.

Thomas W. Pirtle of Laminack Pirtle & Martines, LLP

J. Scott Bertram of Bertram & Graf, L.L.C.<sup>5</sup>

D. Co-Lead Counsel, in consultation with the Members of the Executive Committee, shall have the following responsibilities on behalf of all Plaintiffs in this action and any additional related actions that are consolidated with this action (collectively, "the Action"):

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<sup>4</sup>(...continued)

Access to Court Electronic Records) account. NextGen CM/ECF registration for e-filing and notification is required in the Northern District of Ohio unless otherwise ordered by the Court. Register online at <https://www.pacer.gov/>; and the registration form can be completed at: <https://pacer.psc.uscourts.gov/pscof/registration.jsf>. Attorney Johnson is, hereby, ordered to act, forthwith, to cure this deficiency.

NextGen CM/ECF Registration for the Northern District of Ohio is located on the Court's web site at: <https://www.ohnd.uscourts.gov/electronic-filing-registration>.

Once registration is completed and approved by the Court, the party will be notified via email that filing privileges have been granted. The user's login and password required to submit documents to the electronic filing system serve as the user's signature on all electronic documents filed with the Court.

<sup>5</sup> The Court will look with favor on Co-Lead Counsel invoking [Local Rule 83.6](#), to allow qualified law students from regional law schools (*e.g.*, Akron, Cleveland State, Case Western Reserve, Capital, and/or Ohio State) to participate in court-approved facets of this litigation.

1. To determine and to present in motions, briefs, oral argument (subject to permission of the Court) or such other fashion as may be appropriate, either personally or by designee, to the Court and opposing party, the position of all Plaintiffs as to all matters arising during all pretrial and trial proceedings in the Action;
2. To designate attorneys to appear and present oral argument (subject to permission of the Court) at status, pretrial and other conferences and hearings in the Action;
3. To conduct or coordinate discovery on behalf of Plaintiffs consistent with the Local and Federal Civil Rules, including the preparation of interrogatories, requests for production of documents, requests for admission, and the examination of witnesses in depositions in the Action;
4. To designate an attorney to enter into stipulations with Defendants' counsel in connection with the Action;
5. To direct, supervise, and monitor the activities of Plaintiffs' counsel and to implement procedures to ensure that schedules are met and unnecessary expenditures of time and funds by counsel are avoided in the Action;
6. To conduct all pretrial, trial, and post-trial proceedings on behalf of all Plaintiffs in the Action, including appointing trial counsel;
7. To employ and consult with experts;
8. To call meetings of the Executive Committee and other attorneys involved in this litigation when appropriate;

9. To conduct settlement discussions in the Action with Defendants' counsel on behalf of Plaintiffs and the proposed Class and to enter into a settlement with Defendants, subject to Court approval;

10. To ensure that all Plaintiffs and all Plaintiffs' counsel are kept informed of the progress of the Action as necessary;

11. To be responsible for forwarding, as necessary, to all Plaintiffs' counsel all Orders, discovery, filings, and other documents served on Interim Class Counsel in the Action;

12. To make all work assignments to Plaintiffs' counsel in the Action and to do so in such a manner as to promote the orderly and efficient prosecution of the Action and to avoid unnecessary duplication and unproductive efforts;

13. To ensure that work assignments to all Plaintiffs' counsel in the Action are made in the best interests of Plaintiffs and the proposed Class and are made on the basis of the qualifications and expertise of the persons assigned particular tasks or responsibilities, counsel's knowledge of the law, facts and issues, efficiency, and cost-effectiveness;

14. To assess Plaintiffs' counsels' common litigation costs in the Action and to collect all assessments on a regular basis;

15. To collect time, lodestar, and expense reports from all Plaintiffs' counsel in the Action, including paralegals and any other staff members whose time is expected to be included in any fee petition in the Action;

16. To coordinate and communicate with Defendants's counsel in the Action, including the scheduling of depositions;

17. To coordinate and communicate with Plaintiffs' counsel in any other actions involving the February 3, 2023 Norfolk Southern train derailment in East Palestine, Ohio at issue in this Action, if any, when those other actions are not formally related to this Action; and

18. To otherwise coordinate the work of all Plaintiffs' counsel in the Action and to perform such other duties as necessary or as authorized by further Order of the Court.

E. Co-Lead Counsel shall serve as the principal point of contact for the Court with Plaintiffs' counsel in the Action and, in that role, shall have the following responsibilities:

1. Receive Orders, notices, and telephone calls from the Court on behalf of all Plaintiffs' counsel in the Action;

2. Attend all in-person and telephonic/Zoomgov.com hearings and conferences before the Court in the Action;

3. Coordinate the filing and service of all pleadings and other documents that are filed by Plaintiffs' counsel in the Action;

4. Sign any consolidated complaint, motions, briefs, discovery requests, objections and responses, and subpoenas or notices on behalf of all Plaintiffs in the Action; and

5. Ensure that all actions by Plaintiffs' counsel in the Action are in conformance with the applicable Local Civil Rules of the Court.

E. Defendants' counsel may rely upon all agreements made with and representations made by Co-Lead Counsel in connection with the prosecution of the Action.

## **II.**

The Court has also considered the parties' Joint Status Report ([ECF No. 26](#) in Case No. 4:23CV0242).

Counsel for Plaintiffs in all but one of the 22 filed cases identified in Paragraph A of the parties' Joint Status Report have agreed to consolidation of all cases for pretrial purposes.<sup>6</sup> Defendants' Counsel also agrees that consolidation for pretrial purposes of all cases in Paragraph A is appropriate.

1. Case Nos. in 4:23-cv-00242, 4:23-cv-00250, 4:23-cv-00257, 4:23-cv-00268, 4:23-cv-00292, 4:23-cv-00298, 4:23-cv-00303, 4:23-cv-00308, 4:23-cv-00315, 4:23-cv-00324, 4:23-cv-00344, 4:23-cv-00345, 4:23-cv-00350, 4:23-cv-00363, 4:23-cv-00380, 4:23-cv-00415, 4:23-cv-00429, 4:23-cv-00440, 4:23-cv-00479, 4:23-cv-00495, 4:23-cv-00509, 4:23-cv-00510, 4:23-cv-00529, 4:23-cv-00586, 4:23-cv-00600, 4:23-cv-00601, 4:23-cv-00602, 4:23-cv-00603, 4:23-cv-00604, 4:23-cv-00634, and 4:23-cv-00672 are hereby consolidated pursuant to [Fed. R. Civ. P. 42](#). On or before May 4, 2023, Co-Lead Counsel shall serve and file a Master Consolidated Class Action Complaint in Case No. 4:23-cv-00242 (*i.e.* the first-filed case) joining the claims from the consolidated cases (including cases filed by individual plaintiffs that are not putative class actions) that reflects their joint representation of Plaintiffs. Therefore, Defendants need not respond to the Complaint ([ECF No.1](#)) in Case No. 4:23-cv-00242.

2. The record, including the docket sheet for Case No. 4:23-cv-00242 shall be changed to reflect that “*In re: East Palestine Train Derailment*” is the name of this litigation, in lieu of “*Feezle et al v. Norfolk Southern Railway Co. et al.*”

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<sup>6</sup> Counsel for Plaintiffs in *CeramFab, Inc. et al. v. Norfolk Southern Corporation et al.* No. 4:23-cv-00509 (N.D. Ohio filed March 13, 2023) have not agreed that consolidation is appropriate and did not consent to being part of a Master Consolidated Class Action Complaint. Despite that original mindset, upon the issuance of this Order, the Court encourages the plaintiffs and their counsel in that case to consider the benefits of consolidation.

3. Further proceedings in the following cases are stayed: Case Nos. 4:23-cv-00250, 4:23-cv-00257, 4:23-cv-00268, 4:23-cv-00292, 4:23-cv-00298, 4:23-cv-00303, 4:23-cv-00308, 4:23-cv-00315, 4:23-cv-00324, 4:23-cv-00344, 4:23-cv-00345, 4:23-cv-00350, 4:23-cv-00363, 4:23-cv-00380, 4:23-cv-00415, 4:23-cv-00429, 4:23-cv-00440, 4:23-cv-00479, 4:23-cv-00495, 4:23-cv-00509, 4:23-cv-00510, 4:23-cv-00529, 4:23-cv-00586, 4:23-cv-00600, 4:23-cv-00601, 4:23-cv-00602, 4:23-cv-00603, 4:23-cv-00604, 4:23-cv-00634, and 4:23-cv-00672.<sup>7</sup>

4. Defendants shall have until 30 days after service of the Master Consolidated Class Action Complaint to answer, plead or otherwise move in response to the affirmative pleading.

5. If Defendants serve and file a motion in response to the Master Consolidated Class Action Complaint, Plaintiffs must serve and file a memorandum in opposition within 30 days after service of the motion.

Defendants may serve and file a reply memorandum in support of any motion filed in response to the Master Consolidated Class Action Complaint within 14 days after service of the memorandum in opposition.

6. The [Fed. R. Civ. P. 26\(f\)](#) conference shall be completed on or before May 18, 2023. The participation of parties represented by counsel is left to the discretion of their counsel. The Court does not require the personal participation of the parties at this conference. A party may not seek formal discovery from any source before the parties have met and conferred at the [Rule 26\(f\)](#) conference. [Fed. R. Civ. P. 26\(d\)\(1\)](#).

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<sup>7</sup> It is the intention of the undersigned to administratively close these cases upon the filing of the Master Consolidated Class Action Complaint in Case No. 4:23-cv-00242.

As part of their pre-Case Management Conference planning conference, counsel must determine whether there will be discovery of electronically stored information (“ESI”) [E-discovery]. If counsel anticipates E-discovery, they must decide on a method for conducting such discovery or agree to abide by the default standard set forth in [Appendix K to the Local Civil Rules](#).

The parties (through counsel or personally, if unrepresented) shall file a report on their discussion, including a proposed discovery plan, in a form substantially similar to Attachment No. 1, signed by all counsel and/or unrepresented parties and submit this report to the Court no later than five days after the [Rule 26\(f\)](#) conference. *See* Attachment No. 2 for an example of an agreement regarding the handling of disclosed privileged material.

IT IS SO ORDERED.

April 5, 2023  
Date

/s/ Benita Y. Pearson  
Benita Y. Pearson  
United States District Judge