

January 11, 2018

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

*In re* Flint Water Cases Case No. 16-10444

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STATUS CONFERENCE

BEFORE THE HONORABLE JUDITH E. LEVY  
UNITED STATES DISTRICT JUDGE

JANUARY 11, 2018

APPEARANCES:

**FOR THE PLAINTIFFS:**

Esther Berezofsky  
Berezofsky Law Group, LLC  
210 Lake Drive East, Suite 101  
Cherry Hill, NJ 08002

Teresa Ann Caine Bingman  
Law Offices of Teresa A. Bingman  
1425 Ambassador Drive  
Okemos, MI 48864

Jayson E. Blake  
McAlpine PC  
3201 University Drive, Suite 100  
Auburn Hills, MI 48326

**To Obtain a Certified Transcript:**

Jeseca C. Eddington, RDR, RMR, CRR, FCRR  
Federal Official Court Reporter  
United States District Court  
200 East Liberty Street - Ann Arbor,  
Michigan 48104

January 11, 2018

2

1 Peretz Bronstein  
Bronstein, Gewirtz & Grossman, LLC  
2 60 East 42nd Street, Suite 4600  
New York, NY 10165  
3  
4 Mark Cuker  
Cuker Law Firm, LLC  
2005 Market Street, Suite 1120  
5 Philadelphia, PA 19103  
6  
7 Shayla A. Fletcher  
The Fletcher Law Firm, PLLC  
1637 South Huron  
8 Ypsilanti, MI 48197  
9  
10 William Goodman  
Goodman and Hurwitz, P.C.  
1394 East Jefferson Avenue  
10 Detroit, MI 48207  
11  
12 Deborah LaBelle  
221 N. Main Street, Suite 300  
Ann Arbor, MI 48104  
13  
14 Theodore J. Leopold  
Cohen Milstein Sellers & Toll, PLLC  
2915 PGA Boulevard, Suite 200  
15 Palm Beach Gardens, FL 33410  
16  
17 Stephen Morrissey  
Susman Godfrey L.L.P.  
1201 Third Avenue, Suite 3800  
17 Seattle, WA 98101  
18  
19 Paul F. Novak  
Weitz & Luxenberg, P.C.  
Chrysler House  
719 Griswold Street, Suite 620  
20 Detroit, MI 48226  
21  
22 Michael L. Pitt  
Pitt, McGehee, Palmer & Rivers, PC  
117 West Fourth Street, Suite 200  
23 Royal Oak, MI 48067-3804  
24  
25 Solomon M. Radner  
EXCOLO LAW, PLLC  
26700 Lahser Road, Suite 401  
Southfield, MI 48033

January 11, 2018

3

1 Herbert A. Sanders  
2 The Sanders Law Firm PC  
3 615 Griswold Street, Suite 913  
4 Detroit, MI 48226

5 Hunter Shkolnik  
6 Napoli Shkolnik Law PLLC  
7 1301 Avenue of the Americas, 10th Floor  
8 New York, NY 10019

9 Gregory Stamatopoulos  
10 Weitz & Luxenberg, P.C.  
11 719 Griswold, Suite 620  
12 Detroit, MI 48226

13 Corey M. Stern  
14 Levy Konigsberg, LLP  
15 800 Third Avenue, Suite 11th Floor  
16 New York, NY 10022

17 Nick Szokoly  
18 Murphy, Falcon & Murphy  
19 1 South Street, Suite 2300  
20 Baltimore, MD 21202

21 Mark Wilder  
22 Lillian F. Diallo Law Offices  
23 500 Griswold Street, Suite 2340  
24 Detroit, MI 48226

25 Shawntane Williams  
Williams & Associates Law Firm PLLC  
28211 Southfield Road, Suite 353  
Lathrup Village, MI 48076-7047

**FOR THE DEFENDANTS:**

21 Charles E. Barbieri  
22 Foster, Swift, Collins & Smith, PC  
23 313 South Washington Square  
24 Lansing, MI 48933-2193

25 Frederick A. Berg  
Butzel Long  
150 West Jefferson, Suite 100  
Detroit, MI 48226

January 11, 2018

4

1 Margaret A. Bettenhausen  
Michigan Department of Attorney General  
2 P.O. Box 30755  
Lansing, MI 48909

3  
4 Michael S. Cafferty  
Michael S. Cafferty & Associates  
333 West Fort Street, Suite 1400  
5 Detroit, MI 48226

6  
7 James M. Campbell  
Campbell, Campbell, Edwards & Conroy  
One Constitution Plaza, Suite 300  
8 Boston, MA 02129-2025

9  
10 Mary Chartier-Mittendorf  
1905 Abbot Road, Suite 1  
East Lansing, MI 48823

11  
12 Richard F. Cummins  
Simen, Figura and Parker  
5206 Gateway Centre, Suite 200  
Flint, MI 48507

13  
14 Joseph F. Galvin  
Genesee County Drain Commissioners  
Office  
4610 Beecher Road  
15 Flint, MI 48532

16  
17 Philip A. Grashoff, Jr.  
Kotz Sangster Wysocki P.C.  
36700 Woodward Avenue, Suite 202  
18 Bloomfield Hills, MI 48304

19  
20 Kristen E. Guinn  
Smith Haughey Rice & Roegge  
100 Monroe Center, NW  
Grand Rapids, MI 49503

21  
22 William Young Kim  
City of Flint Law Department  
1101 South Saginaw Street, Third Floor  
23 Flint, MI 48502

24  
25 Sheldon H. Klein  
Butzel Long  
41000 Woodward Avenue  
Stoneridge West  
Bloomfield Hills, MI 48304

January 11, 2018

5

1 Richard Kuhl  
Michigan Department of Attorney General  
2 P.O. Box 30755  
Lansing, MI 48909

3  
4 Zachary Larsen  
Michigan Department of Attorney General  
P.O. Box 30755  
5 Lansing, MI 48909

6  
7 J. Brian MacDonald  
Cline, Cline  
1000 Mott Foundation Building  
503 S. Saginaw Street  
8 Flint, MI 48502

9  
10 Wayne B. Mason  
Drinker, Biddle & Reath  
1717 Main Street, Suite 5400  
Dallas, TX 75201

11  
12 Todd R. Mendel  
Barris, Sott, Denn & Driker, PLLC  
333 W. Fort Street, Suite 1200  
13 Detroit, MI 48226-3281

14  
15 Brett T. Meyer  
O'Neill, Wallace & Doyle, P.C.  
Four Flags Office Center  
300 Saint Andrews Road, Suite 302  
16 P.O. Box 1966  
Saginaw, MI 48605

17  
18 David W. Meyers  
5520 Main Street  
Lexington, MI 48450

19  
20 Thaddeus E. Morgan  
Fraser, Trebilcock  
124 West Allegan Street, Suite 1000  
21 Lansing, MI 48933

22  
23 William H. Murphy, III  
Murphy, Falcon & Murphy  
One South Street, 23rd Floor  
24 Baltimore, MD 21202

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23  
24  
25

Alexander S. Rusek  
White Law PLLC  
2400 Science Parkway, Suite 201  
Okemos, MI 48864

Craig S. Thompson  
Sullivan, Ward, Asher & Patton  
25800 Northwestern Highway, Suite 1000  
Southfield, MI 48075-1000

Kenneth Wilson  
Perkins Law Group  
615 Griswold, Suite 400  
Detroit, MI 48226

Matthew Wise  
Foley & Mansfield, PLLP  
130 East Nine Mile Road  
Ferndale, MI 48220

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PROCEEDINGS

THE CLERK: The matter before the Court is In Re Flint Water Cases.

THE COURT: Well, please be seated. And we will now go through the drill of having appearances for the record. And let me say a couple of things about that.

Jeseca Eddington is, I believe, the best court reporter in the United States. Not just this side of the Mississippi, not just the upper midwest, but the United States of America. But she can only do her job if she has everybody checked in. And if those who are not sitting at counsel table identify yourself by your name and your client when you speak, because it's just impossible for her to memorize where everybody is. So I'll ask you to conform to that request.

The other thing is are there any recording devices in the courtroom that are operative this morning? Any cellphones that are recording this? Any other media recording going on?

WOMAN IN COURTROOM: No.

THE COURT: No? Okay.

WOMAN IN COURTROOM: Not anymore.

THE COURT: Good. Because that's prohibited. So that will not take place. Jeseca will be the only record that is taken here, and there are good reasons for that. So thank you, very much, for taking care of that.

So why don't we begin with appearances for the record

1 starting in the jury box.

2 MR. BRONSTEIN: Peretz Bronstein for class  
3 plaintiffs.

4 THE COURT: Welcome back.

5 MR. WASHINGTON: Val Washington for Mr. Lee, the  
6 Anderson group, and local counsel for the Gulla group.

7 MS. BEREZOFSKY: Esther Berezofsky class plaintiffs  
8 on Waid and the Gulla plaintiffs and Lowery.

9 MR. STAMATOPOULOS: Gregory Stamatopoulos on behalf  
10 of class plaintiffs.

11 MR. GOODMAN: William Goodman on behalf of class  
12 plaintiffs and also on behalf of the plaintiffs in the Marble  
13 case. And it's not clear to me whether this status conference  
14 involves Marble or whether that will come subsequently after  
15 this.

16 THE COURT: Who are the Marble plaintiffs?

17 MR. GOODMAN: They're a separate individual case,  
18 your Honor.

19 THE COURT: Well, if they're part -- but they're part  
20 of this process or not?

21 MR. GOODMAN: It's unclear. I think that the status  
22 of the Marble case is unclear, whether they are a part of the  
23 process or whether they are separate. And I think all counsel  
24 on that case are somewhat confused as to that point.

25 THE COURT: Let me ask Mr. Stern and Mr. Shkolnik who

1 I have appointed as liaison counsel to all of the individual  
2 cases. What is your position, Mr. Stern, on that?

3 MR. STERN: We had discussed it with Mr. Goodman as  
4 well as with Ms. Bettenhausen and I thought we were in  
5 agreement that it would be subject to the larger group. I was  
6 on an e-mail exchange in the last five or six days --

7 FEMALE ATTORNEY: We can't hear you.

8 MALE ATTORNEY: Could Mr. Stern please speak --

9 MR. STERN: I'm sorry. Corey Stern. I thought that  
10 there was an agreement. I received an e-mail from Ms.  
11 Bettenhausen on behalf of the defendants in the Marble case  
12 that there was an agreement that that case would be subject to  
13 the larger case.

14 I'm not married to that idea, if there's some reason  
15 not to be. But that was my impression. We were happy with  
16 that. Thought it was appropriate, the defendants and  
17 plaintiff in that case. Something may have changed. But  
18 walking in here today, I didn't know it was an issue.

19 THE COURT: Okay. We'll take a look at it. Thank  
20 you, Mr. Goodman, for letting me know about that.

21 MR. GOODMAN: Thank you, your Honor. Surely.

22 MS. BINGMAN: Teresa Bingman on behalf of class  
23 plaintiffs and Marble.

24 THE COURT: Okay. Thank you.

25 MR. BLAKE: Good morning, your Honor. Jayson Blake,

1 McAlpine Law Firm, liaison counsel to the state court class  
2 plaintiffs.

3 THE COURT: Okay.

4 MR. MORRISSEY: Good morning, your Honor. Stephen  
5 Morrissey on behalf of class plaintiffs.

6 THE COURT: Thank you.

7 MR. NOVAK: Good morning. Paul Novak on behalf of  
8 class plaintiffs.

9 THE COURT: Thank you, so much.

10 MR. STERN: Again, Corey stern co-liaison counsel for  
11 the individual plaintiffs.

12 MR. SHKOLNIK: Good morning, again, your Honor.  
13 Hunter Shkolnik, co-liaison on behalf of the individual  
14 plaintiffs.

15 MR. PITT: Good morning. Michael Pitt, co-interim  
16 lead counsel on the class.

17 MR. LEOPOLD: Good morning. Ted Leopold, co-lead  
18 counsel on behalf of the class.

19 THE COURT: Thank you.

20 MS. BETTENHAUSEN: Margaret Bettenhausen on behalf of  
21 state defendants. Just quickly on the Marble complaint.

22 THE COURT: Yes.

23 MR. CHAPMAN: What Mr. Stern said was my  
24 understanding as well. I did have conversations with him and  
25 with Mr. Goodman, and I thought we were all in agreement.

1 Your order approving the master complaint process was entered  
2 in Marble, just so you know.

3 THE COURT: Yeah.

4 MS. BETTENHAUSEN: So I thought we had agreement on  
5 that, but we can certainly address it if we need to.

6 THE COURT: So if I understand Marble, it's a  
7 legionella case that also has as a defendant McLaren Hospital?

8 MS. BETTENHAUSEN: Correct, your Honor.

9 THE COURT: Is that how it differs from -- there's a  
10 different defendant. Some of the same defendants, but also  
11 McLaren.

12 MR. GOODMAN: That's correct.

13 MADAM COURT REPORTER: You have to say your name.

14 MR. GOODMAN: William Goodman. I apologize. That's  
15 correct. And that's why I think that there are reasons why it  
16 should be treated separately. Because of McLaren being a  
17 separate and nonuniversal defendant in the case.

18 THE COURT: And is counsel for McLaren here today?

19 MR. MACDONALD: Yes, your Honor. Brian MacDonald on  
20 behalf of McLaren Healthcare Corporation. And we would also  
21 be opposed to the inclusion in the general case because this  
22 is legionella. This is the only action in which we are  
23 defending.

24 THE COURT: I'll take a look at it. We won't hold up  
25 this status conference to make a decision and hear argument on

1 that today because I'm not prepared for it. I've looked at  
2 the case. I'm aware of the fact that McLaren is in it. But  
3 let's keep going. Mr. Stern.

4 MR. STERN: Just so your Honor knows, it's not going  
5 to be the only case. We have a death case that involved  
6 McLaren as well that has similar facts. But we were waiting  
7 for the decedent's estate, for his children to testify at  
8 criminal proceedings, which just occurred this past week. And  
9 we didn't want to hurt the criminal proceeding or interfere,  
10 so we've been waiting to file.

11 I assume that there may be others in that position.  
12 So when your Honor is taking a look at it, it may be important  
13 to note that there will be other cases against McLaren by some  
14 of the same lawyers here that also involve some of the  
15 defendants here.

16 MR. SHKOLNIK: Your Honor, if I can be heard on this.  
17 Is it possible for us to put this issue on the next status  
18 conference?

19 THE COURT: Let's put this issue on --

20 MR. SHKOLNIK: And if it needs to be briefed, we can  
21 probably do it so you have a record in front of you.

22 THE COURT: Yes. Thank you, Mr. Shkolnik. We'll  
23 certainly put it on the agenda for the next status conference.  
24 And I'll decide between now and then whether to order briefing  
25 prior to that. Because if there is some issue that should be

1 briefed, that would be helpful to have before we have further  
2 discussion.

3 But what we may end up doing at the next conference  
4 is just setting a briefing schedule for it if there are cases  
5 yet to be filed. But I'll start to take a look at it in a  
6 little more detail between now and then. Where are we? Mr.  
7 Kim.

8 MR. KIM: Thank you, your Honor. William Kim  
9 appearing for the City of Flint. And Dayne Walling.

10 THE COURT: Okay. Thank you.

11 MR. KLEIN: Good morning. Sheldon Klein also for the  
12 City of Flint.

13 MR. RUSEK: Good morning, your Honor. Alexander  
14 Rusek on behalf of defendant Howard Croft.

15 MR. BERG: Good morning, your Honor. Frederick Berg  
16 on behalf of defendant City of Flint.

17 THE COURT: Thank you.

18 MR. WILLIAMS: Good morning, your Honor. Michael  
19 Williams on behalf of Veolia North America defendants.

20 MR. CAMPBELL: Good morning, again, your Honor.  
21 James Campbell. I also represent the three Veolia North  
22 America plaintiffs. Thank you.

23 MR. MASON: Good morning. Wayne Mason. I represent  
24 Lockwood, Andrews, Newman, also known as LAN defendants as  
25 well as LAD, Leo A. Daly.

1 THE COURT: Thank you.

2 MR. WILDER: Marvin Wilder appearing for Lillian  
3 Diallo representing Gist, Kirkland and Savage plaintiffs.

4 THE COURT: Thank you.

5 MR. GALVIN: Good morning, your Honor. Joseph Galvin  
6 on behalf of Drain Commissioner Jeff Wright.

7 THE COURT: Excellent. Thank you.

8 MS. LABELLE: Deborah LaBelle on behalf of the class  
9 plaintiffs and the Mays.

10 THE COURT: Thank you, very much.

11 MS. WEINER: Jessica Weiner on behalf of the class  
12 plaintiffs.

13 MR. MURPHY: Your Honor, William H. Murphy the Third  
14 on behalf of the Boler class.

15 THE COURT: All right. Thank you.

16 MR. SZOKOLY: Good morning, your Honor, Nick Szokoly  
17 also on behalf of the Boler class. Thank you.

18 MR. THOMPSON: Good morning, your Honor. Craig  
19 Thompson appearing on behalf of defendant Rowe Professional  
20 Services Company.

21 THE COURT: Thank you.

22 MR. BARBIERI: Charles Barbieri appearing on behalf  
23 of MDEQ defendants, Michael Prysby, Adam Rosenthal, and  
24 Patrick Cook.

25 MR. MENDEL: Todd Mendel on behalf of Governor

1 Snyder.

2 THE COURT: Thank you, very much.

3 MR. KUHL: Richard Kuhl on behalf of the State  
4 defendants.

5 MR. LARSEN: Zack Larsen also on behalf of State  
6 defendants.

7 MR. GRASHOFF: Philip Grashoff on behalf of Stephen  
8 Busch, one of the MDEQ defendants. And if I may, your Honor,  
9 I would like to just join in and say that as far as my client  
10 is concerned -- and I think I can speak on behalf of the other  
11 MDEQ defendants, we're in agreement with Mr. Goodman with  
12 respect to how to treat the Marble case.

13 We believe it should be segregated from the overall  
14 cases before you. We've not had a conversation with the state  
15 on this. So I'm a little bit surprised that they agreed to  
16 it. But we're on the record to be opposed to a joinder in  
17 these master form complaints.

18 THE COURT: Okay. Thank you.

19 MR. MORGAN: Thaddeus Morgan on behalf of Liane  
20 Shekter Smith.

21 MR. PATTWELL: Good morning, your Honor. Michael  
22 Pattwell on behalf of Dan Wyant and Brad Wurfel.

23 MR. MEYERS: Good morning. David Meyers on behalf of  
24 Daugherty Johnson.

25 MR. RADNER: Good morning, your Honor. Solomon

1 Radner on behalf of Washington plaintiffs.

2 MR. CUKER: Good morning, your Honor. Mark Cuker,  
3 co-counsel in the Gulla and Lowery cases.

4 MR. CAFFERTY: Good morning, your Honor. Michael  
5 Cafferty on behalf of Nancy Peeler.

6 MR. MACDONALD: Again, your Honor. Brian MacDonald  
7 on behalf of McLaren Healthcare Corporation.

8 THE COURT: Thank you.

9 MS. CHARTIER: Good morning. Mary Chartier on behalf  
10 of Robert Scott.

11 MR. MEYER: Good morning, your Honor. Brett Meyer on  
12 behalf of Michael Glasgow.

13 MS. FLETCHER: Good morning, your Honor. Shayla  
14 Fletcher on behalf of Alexander plaintiffs.

15 MS. WILLIAMS: Good morning, your Honor. Shawntane  
16 Williams on behalf of Alexander plaintiff.

17 MR. SANDERS: Good morning, your Honor. Herb Sanders  
18 on behalf of the Alexander plaintiffs.

19 THE COURT: Mr. Sanders.

20 MS. GUINN: Good morning, your Honor. Kristen Guinn  
21 on behalf of defendant Miller.

22 MR. WISE: Good morning, your Honor. Matt Wise on  
23 behalf of Jeff Wright.

24 MR. WILSON: Good morning, your Honor. Ken Wilson  
25 appearing on behalf of Darnell Earley.

1 MR. CUMMINS: Your Honor, Richard Cummins on behalf  
2 of Edward Kurtz.

3 THE COURT: All right. Thank you, very much. That  
4 took approximately 20 minutes. I appreciate your patience.  
5 And just a repeat reminder to please identify yourself if  
6 you're not sitting at one of the two counsel tables.

7 So I issued on December 27th an agenda for this  
8 meeting. I had received, as we had agreed upon, proposals  
9 from the parties for issues to discuss. We now have a  
10 six-page agenda that we will attempt to work through in an  
11 efficient manner.

12 Before doing that, I'd like to inform you of one  
13 efficiency that I'm going to try to put in place, which is to  
14 request that all counsel file a special appearance in the case  
15 16-10444. And I'll include that in an order following this  
16 case that will be entered in each of the cases.

17 Once you've filed a special appearance -- and we'll  
18 have directions on how to accomplish that -- from hereon out,  
19 if they are non-dispositive or nonlegal related orders that  
20 are administrative, that are announcing an agenda, that are  
21 announcing a process, I'll file it only in that particular  
22 case so that everybody who is on all of these cases does not  
23 have your inbox jammed so that you can't function. And also  
24 so that my phenomenal case manager, Shawna Burns, is not  
25 spending all of her time entering orders on all of these

1 cases.

2 And in addition, we are setting up a public website  
3 on the Eastern District of Michigan's District Court website  
4 where we'll also post those so that people who are a part of  
5 the media, people who are parties to the case, who are  
6 interested in what's going on can have access to all of the  
7 orders without paying PACER or paying a lawyer -- there we go.  
8 We've got somebody who's looking forward to that -- to get  
9 access to them.

10 And that will be a safeguard also. Any one here is  
11 welcome to look at that portion of the website. Right now  
12 what it says is Flint Water cases and it only has Judge  
13 Lawson's Concerned Pastors and possibly the DEQ case. So  
14 we'll fix it up so that it's evident that there will be a  
15 separate tab for our cases.

16 The second thing I wanted to announce before we get  
17 into the substance of the conference today is that the next  
18 status conference in this case will take place on Tuesday,  
19 February 20th here in this courtroom. And I will set up a  
20 timeframe for proposed agenda items to be submitted and for me  
21 to issue an agenda for that conference.

22 And the next thing I'd like to indicate is at 10  
23 o'clock prior to our beginning this conference at 11 o'clock,  
24 I met with interim co-lead counsel for the class cases,  
25 liaison counsel for the individual cases, and the

1 administrative executive committee for the defendants in  
2 chambers. This is now the third such meeting that I think  
3 everyone should be aware of.

4 And the purpose of that meeting was to discuss the  
5 appointment in just a little bit more detail of the  
6 facilitated mediation team, and we'll get to that further down  
7 on the agenda. And the next status conference will include a  
8 similar 10:00 AM in chambers meeting for that same set of  
9 lawyers.

10 So having reviewed that, what I'd like to do is begin  
11 with the discussion of the master in short form individual  
12 complaints. And following our last conference we had -- I'm  
13 going to get my binder on that subject out. We set a schedule  
14 for the filing of these documents and that schedule was met by  
15 the parties. There was briefing that followed where various  
16 of the defendants had certain challenges to the short-form  
17 complaint and how it will work.

18 What I've indicated in this order is what I believe  
19 would be an efficient approach to it. But I did identify  
20 based on the submissions from the defendants as well as my own  
21 review some concerns that I wanted to address in the  
22 short-form complaint.

23 And so you can see on page 2 of this agenda that the  
24 short-form complaint was filed on December 22nd, 2017. Now,  
25 we had some concerns about what that meant. And all it means,

1 as I understand it, is that a framework for proceeding from  
2 here now exists in the individual cases involving the Flint  
3 Water situation that we're all here for.

4 And that short-form complaint by itself has no legal  
5 impact on any of the defendants because it doesn't yet have a  
6 plaintiff attached to it and it has not been filed with a  
7 plaintiff with a lawyer and served on the defendants. It's  
8 simply the route to get to that point.

9 So the first issue that I'd like to address is  
10 setting a timeframe for beginning to use the short-form  
11 complaint. Mr. Shkolnik. And if you will address items 1  
12 through 4 from your perspective.

13 MR. SHKOLNIK: Yes, your Honor.

14 THE COURT: Which is the timing for amending the  
15 pending nonclass cases, timing for responsive pleadings,  
16 whether to identify certain cases as bellwether cases that  
17 should receive the focus of the Court. And the manner in  
18 which the newly filed or removed nonclass action Flint Water  
19 cases should be addressed.

20 But I have an addition, a late addition that's not on  
21 the agenda. Which is as I read the short-form complaint, I  
22 think it's a very helpful tool. But I don't entirely  
23 understand if there are going to be multiple plaintiffs in one  
24 case, there's no way in which a plaintiff can assert certain  
25 counts and not other counts. How would a defendant know -- if

1 you list the plaintiffs on page 3 on the question 3  
2 plaintiffs.

3 MR. SHKOLNIK: Yes.

4 THE COURT: And then you get to claims and counts on  
5 page 4 and injuries, for instance injuries, you might have  
6 somebody who has legionella and not lead poisoning. You might  
7 have someone who has both. You might have someone who has  
8 other. But there's no way to connect one plaintiff to one set  
9 of injuries, a different set of plaintiffs to a different set  
10 of injuries.

11 MR. SHKOLNIK: Your Honor, let me address that  
12 question first.

13 THE COURT: Let's start with that.

14 MR. SHKOLNIK: Then we can go back the other issues.  
15 With respect to -- we like to refer to this as the bundling.  
16 A bundling is part of that purpose of this is so that similar  
17 situated plaintiffs are combined into the one pleading. So  
18 the suggestion would be plaintiffs who all have lead poisoning  
19 -- if someone has legionella, you wouldn't put that plaintiff  
20 with the other ones that are similarly situated.

21 So if there are -- there's one plaintiff or 20  
22 plaintiffs, those would all have the same allegations. You  
23 would only include them if you were all making the same claims  
24 for causes of action. And the same general injury claims in  
25 your case.

1 THE COURT: So you wouldn't have a mother, a  
2 daughter, and a property claim regarding their home in one  
3 case.

4 MR. SHKOLNIK: If that was the case, that would be a  
5 complaint where every one of those plaintiffs make that claim.  
6 If it's a family claim.

7 THE COURT: Okay.

8 MR. SHKOLNIK: As opposed to you have a family in one  
9 house that didn't have a property damage claim and a family in  
10 a separate house that has a property claim. You would have a  
11 hard time delineating those damages. You would want to bundle  
12 the plaintiffs that are making the same claims in their home  
13 for the purposes of expediency and efficiency.

14 And there is going to be a plaintiff's fact sheet  
15 where each individual person specifically identifies what they  
16 are alleging in that household. So the complaint is a general  
17 statement of the damages.

18 THE COURT: Okay.

19 MR. SHKOLNIK: And then the PFS is coming. I forgot  
20 what we were doing in Genesee County. But it will be similar  
21 where you will be doing -- it will be triggering a PFS very  
22 quickly after the complaint is filed.

23 THE COURT: Okay. So as long as you're satisfied  
24 that the defendants are -- that you can notify the court and  
25 the defendants of each plaintiff's cause of action and injury

1 because of the way you're going to handle this.

2 MR. SHKOLNIK: Yes.

3 THE COURT: Then I am prepared to proceed to the  
4 other points that you're going to address.

5 MR. SHKOLNIK: Now, I think the most important point  
6 is what the Court mentioned earlier is that this is a  
7 nonoperative complaint at this point in time. And in most of  
8 these cases what we're dealing with is as a master complaint  
9 and a checkoff until a party adopts it, it does not trigger  
10 anything on either side.

11 What we're suggesting with respect to timing of  
12 amendment as well as adopting. Since there can be a large  
13 number of people that have to do this in the first round, we  
14 would suggest that the plaintiffs be given 60 days to adopt  
15 the master complaint as an amended complaint in their causes  
16 of action.

17 It's not suggesting that a party such as -- I know  
18 for a fact that Mr. Stern and myself, the day the Court enters  
19 the order, we'll adopt it so it will trigger the effectiveness  
20 of the master complaint. We've even told the defendants that,  
21 that we intend to do it immediately to allow the other  
22 plaintiffs that may have a lot more cases and they're not on  
23 top of it as quickly as we are to give them the 60 days to  
24 adopt an amendment to their complaint under the master  
25 complaint is what we think would be fair for the various

1 attorneys out there.

2 THE COURT: Okay.

3 MR. SHKOLNIK: As to responsive pleadings and  
4 dispositive motions, what's interesting about this --

5 THE COURT: Mr. Shkolnik.

6 MR. SHKOLNIK: Yes.

7 THE COURT: But then -- if the Court were to enter an  
8 order saying 60 days from today that by the close of business  
9 today I am approving the short form and the master -- proposed  
10 master short-form complaint, and that order would then be  
11 entered in all pending individual actions ordering that  
12 counsel amend their complaint to conform to that?

13 MR. SHKOLNIK: Yes, your Honor.

14 THE COURT: And then the next point would be what is  
15 the triggering for the defendants in terms of responsive  
16 pleadings. I would submit that 60 days is ample time to put  
17 in the motion to dismiss, which is what we anticipate's going  
18 to happen.

19 From the adoption from the first checkoff complaint,  
20 the first adoption of the master complaint. This way, let's  
21 go into this hypothetical that Mr. Stern and I tomorrow file  
22 our adoption in our various cases, that the triggering date  
23 for responsive pleadings would be 60 days from the first  
24 adoption. So we will know that at the latest, since the  
25 holiday is Monday, let's assume we adopt on Tuesday.

1           The triggering date would be 60 days from the day  
2 after Martin Luther King Day. And they would have the  
3 opportunity to either answer or move against the complaint,  
4 which is alleging much of the same causes of action as we have  
5 in the class complaints. Same causes of action that have been  
6 briefed.

7           THE COURT: I'll hear from you, Mr. Mason. Let me  
8 just let him -- oh, would you like to speak now?

9           MR. MASON: No, whenever you like.

10          THE COURT: Okay. Let me just hear the end of this.  
11 But Mr. Shkolnik, 60 days from your adoption for your cases  
12 because you're ready to go. Somebody's back in New York or  
13 wherever ready to hit send. But there are other people who  
14 will adopt it in 59 days. And you're suggesting then one day.

15          MR. SHKOLNIK: Your Honor, what I'm suggesting is  
16 that once they move against the general causes of action,  
17 these causes of actions, the vast majority of issues are going  
18 to be teed up. The whole purpose of the master complaint is  
19 so that you will address one comprehensive briefing done by  
20 the leadership on that complaint.

21           I'm not suggesting that the defendants may not want  
22 to have a suspension of additional -- so they don't have to  
23 keep filing the same motion over and over again, that the  
24 Court could then take into consideration there is a briefing  
25 schedule on the master complaint and that the answer or moving

1 against those additional filed complaints can be deferred  
2 until the Court reaches its determination on the master  
3 briefing.

4 THE COURT: Okay.

5 MR. SHKOLNIK: So this way there is not a repetitive  
6 amount of work for the defendants. They brief it once. And I  
7 think between Mr. Stern and I, we're going to be probably  
8 adopting everything that we've alleged in that master  
9 complaint and the briefing will be comprehensive for all those  
10 issues.

11 Then maybe down the road after the Court decides  
12 those general issues, there may be an individual plaintiff  
13 that has unique issues that the defendants want to move  
14 against in those separate cases. But you've already decided  
15 the master, much like you did with the class complaint. The  
16 general issues will be dealt with.

17 THE COURT: And this is bringing me right back to  
18 where we started with the Marble case. Do you have McLaren as  
19 a defendant?

20 MR. SHKOLNIK: I don't know if --

21 THE COURT: I don't think you do.

22 MR. SHKOLNIK: No. So we --

23 THE COURT: Okay. I'll just take that into  
24 consideration.

25 MR. SHKOLNIK: We'd be happy to add them. We're all

1 encompassing.

2 THE COURT: Does item 3 -- sort of addresses some of  
3 my concern -- is whether you believe there are certain  
4 individual cases that should be bellwether cases so that the  
5 defendants are not spending all their time cutting and pasting  
6 and modifying their motion for all of the cases. How many  
7 cases do you estimate you'll be filing?

8 MR. SHKOLNIK: We'll be filing fairly quickly  
9 hundreds of cases in this court. And I believe Mr. Stern  
10 already has hundreds already that we'll be amending.

11 THE COURT: Okay.

12 MR. SHKOLNIK: So we'll be amending whatever we have  
13 here. And I think that's in the dozens. But there will be a  
14 lot of operative complaints within the week's time of your  
15 order. And we could pick a case, the lowest number could  
16 potentially be the one that the Court designates as the one  
17 where the motions are brought, which is one way I think we  
18 could handle that issue.

19 But I think the key for the master complaint is that,  
20 your Honor, you only have to do this once on the major issues.  
21 And we'd tee that up as soon as possible since most of that  
22 briefing has been done in the class. And you're already  
23 working on that endeavor.

24 THE COURT: Okay. I know we have other plaintiffs'  
25 counsel who may want their case up at the top of the list.

1 And so I'll -- I appreciate your suggestion.

2 MR. SHKOLNIK: I'm not suggesting that other  
3 plaintiffs may not --

4 THE COURT: Yeah.

5 MR. SHKOLNIK: -- be involved in this process as  
6 well.

7 THE COURT: Right.

8 MR. SHKOLNIK: The idea is not who is the first  
9 plaintiff. Because bellwether is something we may want to sit  
10 and talk about as to what is truly a bellwether and how we're  
11 going to do that and how quickly we can do it. We think it  
12 should be a process started right away.

13 But for the purpose of the motion, we just think  
14 whatever is the first adopted master complaint should trigger  
15 the first motion and then the remainders wait until the Court  
16 has made some decisions.

17 THE COURT: Okay. And in the agenda I indicated  
18 bellwether cases. So it's not that there will be -- I mean,  
19 there may need to be a legionella case.

20 MR. SHKOLNIK: Yes.

21 THE COURT: There may need to be a lead case, a  
22 property damage case, things of that nature.

23 MR. SHKOLNIK: Yes.

24 THE COURT: Okay. So that may be something that's  
25 worth having further briefing on. But let's move to the next

1 point.

2 MR. SHKOLNIK: Yes, your Honor. I think we're on  
3 number 4.

4 THE COURT: 4.

5 MR. SHKOLNIK: As to the newly filed or removed  
6 cases, the way I have seen this done in the past is that there  
7 is a CMO or an order entered by the Court, which is your  
8 adoption of the short-form complaint.

9 And contained within that order is you have 60 days  
10 for the first -- this first tranche of cases that are already  
11 on file. And that for any newly filed case that a copy of the  
12 CMO will automatically report out to the ECF to the plaintiff  
13 that they have 30 days to adopt the amended complaint. So  
14 there's an automatic triggering of the adoption going forward.

15 THE COURT: I see.

16 MR. SHKOLNIK: So we don't have the cases just  
17 sitting there. And I don't know the mechanisms of the Court's  
18 and the clerk's office, but I know in most MDL's where this is  
19 utilized, there's somehow that when the new ECF filing is  
20 established for an assigned case in the MDL or the mas case,  
21 there is a triggering of the initial order for that case.

22 And then as liaison counsel, we will also -- and I'm  
23 sure the defendants will more than likely want those new  
24 plaintiffs to know about this, that we will then also notify  
25 the new parties as we find out that there is this standing

1 order and you must comply with it.

2 THE COURT: Okay. Thank you.

3 MR. SHKOLNIK: I think those are the four points.

4 THE COURT: Those are the four points.

5 MR. SHKOLNIK: Thank you.

6 THE COURT: And in terms of a response from the  
7 defendants, Mr. Mason is already standing up.

8 MR. SHKOLNIK: Biting at the bit.

9 THE COURT: Yes.

10 MR. MASON: Thank you, your Honor. Wayne Mason for  
11 LAN LAD defendants. You started at number five, so I'll go  
12 right to number five.

13 THE COURT: Okay.

14 MR. MASON: If you like.

15 THE COURT: Sure.

16 MR. MASON: I think we agree in terms of the  
17 plaintiffs adopting the particular paragraphs and the like and  
18 the clarity with respect to those pleadings. Then the  
19 defendants can move and have some clarity on what they're  
20 moving on when those individual complaints are live, if you  
21 will.

22 With respect to the timing of these things, that's  
23 one of the concerns that I have is if I understand Mr.  
24 Shkolnik, he was talking about triggering it from when they  
25 file and adopt, have a group adopted. Part of the reason for

1 the management of complex litigation is to avoid numerous  
2 deadlines and triggers.

3 And so I would propose that there be -- if it's 60  
4 days or whatever the Court decides -- that all counsel are  
5 required to plead by that date. And that that would be the  
6 trigger date. And then from that date, then dispositive  
7 motions and the like would be ordered another date by this  
8 Court.

9 I don't think we need to -- we've been talking about  
10 deadlines and things. This is important. I think if we can  
11 agree conceptually, the parties can get together quickly and  
12 propose to the Court a joint schedule for the actual dates  
13 that we talk about.

14 But I think that's important. We don't want to have  
15 a situation where we're all trying to keep track of what the  
16 trigger dates are on numerous cases. Mr. Shkolnik said  
17 they're going to file a bunch more. And we should work off  
18 some continuity there I think is really important.

19 THE COURT: And you're suggesting that for all  
20 counsel on currently pending, currently filed cases. There  
21 will be new cases as long as the statute of limitations have  
22 not run, I anticipate new cases with new lawyers coming in  
23 constantly.

24 MR. MASON: Right. And Mr. Shkolnik was recommending  
25 in his experience in some MDL's how to handle that. I've had

1 some experience in others. That's why I suggest we meet and  
2 confer and provide a solution to those issues. Number one,  
3 the cases that are already pending as well as those that would  
4 be filed thereafter.

5 THE COURT: Mr. Shkolnik, do you have any objection  
6 to that?

7 MR. SHKOLNIK: I never have an objection to meeting  
8 and conferring. Your Honor, I just think by putting out a  
9 triggering date of 60 days before the first, and then trigger  
10 another 60 days for responses, we're talking a half a year at  
11 that point.

12 THE COURT: Yeah. I think the 60 days for that is  
13 too long. I would look at something like 30 days for  
14 currently pending cases to be amended to conform to the short  
15 form. And then at the conclusion of that period, a shorter  
16 period such as 30 days exists for a response. Because you  
17 already -- you can start writing your motion. You've already  
18 written your motion to dismiss.

19 MR. MASON: Absolutely. And we're happy -- with the  
20 Court's guidance that you provided, we can meet and confer and  
21 agree on that.

22 THE COURT: Okay. And during your meet and confer,  
23 you could have a running tape of I'm suggesting 30 days for  
24 the currently pending cases. Everyone's here or somebody who  
25 knows the people who need to do it are here today. And the

1       dispositive motion or answer 30 days later to answer is what  
2       I'm thinking. But if there's reason to do it differently  
3       you'll let me know.

4               MR. MASON: I do want to address under number one  
5       though the reference to amendment.

6               THE COURT: Yeah.

7               MR. MASON: I do think we need some certainty. I  
8       think Mr. Grashoff mentioned this before at a prior hearing,  
9       or Mr. Klein. But the reality is once -- this has been  
10      flushed out for a long time. And so once the pleadings are  
11      provided, to me there should be a motion for leave of court to  
12      amend thereafter so that we have some certainty and we don't  
13      have all these amendments all the time.

14              I'm certainly not trying to preclude anyone that has  
15      a legitimate cause of action or something comes up where they  
16      now have a claim. But it should not be just a --

17              THE COURT: A free pass.

18              MR. MASON: An amending free pass all the time.  
19      Otherwise it doesn't mean anything to create some certainty.

20              THE COURT: I think that's a point well made. And it  
21      has been received. And it makes sense to me that there should  
22      be a motion for leave. And we all know what the law is under  
23      that. And so it's an established body of law that can be  
24      applied. So I think that's reasonable and can include that in  
25      the order adopting the short form complaint.

1 MR. MASON: With respect to number 3, your Honor --

2 MR. SHKOLNIK: Your Honor, if I could just --

3 THE COURT: Yeah.

4 MR. SHKOLNIK: I don't mean to interrupt. Since  
5 we're doing it. Just so it's clear that the motion to amend  
6 would be not for the purpose of adopting the --

7 THE COURT: Short form.

8 MR. SHKOLNIK: -- short form. It was if you want to  
9 go do it again down the road.

10 THE COURT: Yes. Exactly.

11 MR. SHKOLNIK: Thank you. I just wanted to get that  
12 clarification. Thank you.

13 MR. MASON: With respect to number 3, your Honor, I  
14 think we -- I'm a little confused as to the intent of the  
15 Court's comment here with respect to bellwether cases. I  
16 mean, when I refer to bellwether cases normally in the context  
17 it's identifying cases for trial to be identified.

18 If it's in another context, when the Court uses the  
19 term adjudication and there was some discussion with Mr.  
20 Shkolnik about motion practice, I view that typically as  
21 something different with respect to lead cases for dispositive  
22 motions or the like or identifying how we will move so that we  
23 don't have multiple motions then the Court has to review this  
24 all the time.

25 I think that is a prudent thing to do as we discussed

1 the big picture of sequencing here of getting dispositive  
2 motions addressed, getting the Fifth Amendment, sovereign  
3 immunity, all of those issues. But as it relates to  
4 bellwether trials, I would suggest to the Court that that is  
5 way premature.

6 THE COURT: I agree. And I couldn't think of a  
7 better word. And I understand why you're saying what you're  
8 saying. But what I was trying to do is signal to all of you  
9 to think about how to make this an efficient process for you  
10 and for me. And for the -- all the parties that are involved.

11 So I think we've got that already in items one as  
12 we've addressed one and two.

13 MR. MASON: Is there anything else on those that I  
14 haven't addressed? I tried to address them all, I think.

15 THE COURT: I think that's it. Just if you wish to  
16 address the issue on item 4 of if a new case is filed, we  
17 would have a notice that gives them 30 days to adopt.

18 MR. MASON: Right. I agree where Mr. Shkolnik. An  
19 order or a CMO or something to that effect that gives clear  
20 direction to new counsel with respect to that. Otherwise I  
21 think we will address it in this meet and confer and  
22 ultimately the Court's order.

23 THE COURT: Okay. Now, on the meet and confer, we've  
24 got Mr. Campbell wants to say something. But before he says  
25 that, I'd like to set a date by which you'll submit that

1 proposed order.

2 MR. SHKOLNIK: Can we have a week from -- is today  
3 Thursday or Friday? A week from tomorrow, your Honor?

4 THE COURT: Yes.

5 MR. SHKOLNIK: Thank you.

6 MR. MASON: That would be fine.

7 THE COURT: That's the 19th.

8 MR. SHKOLNIK: Thank you.

9 THE COURT: And what I would like is for you to have  
10 your meet and confer. I don't need to know anything about it  
11 other than if it results in a proposed order. Then you will  
12 submit the proposed order by January 19th.

13 MR. MASON: Thank you.

14 THE COURT: Okay.

15 MR. SHKOLNIK: And your Honor, if there's -- if we  
16 come up with --

17 THE COURT: If you're unsuccessful --

18 MR. SHKOLNIK: Just put a line what we propose and a  
19 line what they proposed with no arguments?

20 THE COURT: Yeah.

21 MR. SHKOLNIK: Thank you, your Honor.

22 THE COURT: I think I'll be able to tell. Mr.  
23 Campbell.

24 MR. CAMPBELL: Thank you, your Honor. Good morning  
25 again. James Campbell. I represent the three Veolia North

1 America companies. In terms of adding something new to the  
2 discussion, your Honor. I agree with generally with what has  
3 been said and in particular the meet and confer so that we are  
4 all clear about when the currently pending cases will adopt,  
5 when we'll need to move to dismiss. And I'm particularly -- I  
6 was glad to hear your definition of bellwether.

7 THE COURT: Good.

8 MR. CAMPBELL: That's actually how I interpreted it  
9 so that we can just do a master set of pleadings and then the  
10 follow cases can adopt obviously with a chance to -- for their  
11 individual plaintiffs' challenge as they see fit.

12 The one thing that I would like to add to the  
13 discussion, your Honor, and it was in our brief that was filed  
14 on the 22nd, right after the short-form complaint was filed.

15 THE COURT: Okay.

16 MR. CAMPBELL: So your Honor, in our view, the  
17 short-form complaint is not adequate with respect to three  
18 pleading items. And we're talking about the pleadings stage  
19 here of the short-form complaint. We also added a fourth  
20 point which has already been addressed. And that is the way  
21 by which amendments to this complaint, whatever it may be when  
22 you would actually adopt it, how that's done.

23 THE COURT: But you're saying that it's not adequate,  
24 that it would not survive a 12(b)(6) motion?

25 MR. CAMPBELL: That's our view, Judge, yes.

1 THE COURT: But then that's where you will file your  
2 12(b)(6). I read your brief, of course. I just want everyone  
3 to know I do my best to read every piece of paper filed. But  
4 I understood what you to be doing is sort of preemptively  
5 arguing your case. Tell me how you're not doing that?

6 MR. CAMPBELL: Should I say that, Judge?

7 THE COURT: Why not --

8 MR. CAMPBELL: Why not, okay.

9 THE COURT: Why not file that as a motion to dismiss?

10 MR. CAMPBELL: I think what we're doing -- I think  
11 you're absolutely right, your Honor. But in this process  
12 where we're all trying to move it forward so that we're not  
13 repeating the same things over and over again. If you look at  
14 the short-form complaint --

15 THE COURT: I am.

16 MR. CAMPBELL: There is really no allegations as to  
17 the individual plaintiffs about causation really in any  
18 meaningful way that would meet, in our judgment, relay the  
19 Iqbal standard. And then further, the issue of multiple  
20 plaintiffs has already been addressed. But when we left last  
21 time there was this issue of filing, you know, a complaint  
22 with large numbers of plaintiffs.

23 And this complaint doesn't really do that.

24 THE COURT: But what this complaint does, Mr.  
25 Campbell, is it follows upon the master individual complaint.

1 And I'm looking at paragraph 437, for example.

2 MR. CAMPBELL: I'm not looking at that.

3 THE COURT: At critical times during gestation in her  
4 developmental years, the minor plaintiff has been exposed to  
5 damaging levels of lead and other toxic substances. And then  
6 it goes on to say that the clear connection in all of this is  
7 that as a direct and proximate result of the above individual  
8 defendant's conduct and/or failure to act, plaintiffs have  
9 suffered past, present, and future.

10 So I think the master complaint is where that story  
11 is told through the eyes of the plaintiffs. And then the  
12 short form just tells us which of those paragraphs are truly  
13 operative for need to be referenced in an individual case.

14 MR. CAMPBELL: I understand what you're saying, your  
15 Honor. But still in all, if any -- in any given individual  
16 case, that combination of the master complaint and the  
17 short-form complaint, at least in our view on Rule 8 standards  
18 and Iqbal standards.

19 THE COURT: Yeah.

20 MR. CAMPBELL: That does not say when the individual  
21 plaintiff was exposed, whether they drank the water, whether  
22 they stopped drinking the water. Well, you know, things that  
23 relate to the individual plaintiff and the like, so.

24 THE COURT: I see -- I mean, what I've got in here is  
25 paragraph 6 or portion 3 says Flint Water exposure in the

1 short form.

2 MR. CAMPBELL: Yes, your Honor.

3 THE COURT: And it says that the individual lived in  
4 Flint from approximately blank date until blank. And the  
5 period of so on. And so you're suggesting that it needs to  
6 say and drank the water while living there?

7 MR. CAMPBELL: Yes. Because there's information that  
8 is available publically about certain plaintiffs not doing  
9 that or stopping and the like or moving from Flint. I just  
10 believe, your Honor, that on a pleading level that the  
11 combination of the two for an individual plaintiff doesn't  
12 sufficiently plead the case.

13 THE COURT: Well, if they moved away, then that will  
14 be the ending date for when they lived there. So you'll know  
15 when they were there. And also we should note that I have  
16 approved the fact sheet that will provide excruciating detail  
17 on each of the plaintiffs and their potential or actual  
18 exposure.

19 And I know that that fact sheet is not in the long or  
20 short-form complaint. But I appreciate your arguments and I  
21 think that they would be well placed or they would be  
22 appropriate to be filed as your motion to dismiss.

23 MR. CAMPBELL: Thank you, Judge. I would just  
24 respond to that fact sheet issue.

25 THE COURT: Okay. Go right ahead.

1 MR. CAMPBELL: That would be a cannon I believe the  
2 plaintiffs actually presented as it's in the nature of an  
3 interrogatory or a document. That's discovery.

4 THE COURT: I understand that's discovery. But what  
5 I'm understanding is what I have done in looking at the long  
6 form -- the master individual in the short form is checked it  
7 against your brief to see whether there is a story that  
8 includes causation that's told here.

9 And just as a -- without the benefit of full briefing  
10 on a motion to dismiss, there appear to be paragraphs that  
11 indicate people drank water that had toxins in it and injuries  
12 resulted. And I think at a really basic level that's what  
13 causation looks like in a lawsuit.

14 MR. CAMPBELL: And your Honor, I saw you looking at  
15 the clock. Just if I could finish --

16 THE COURT: Take your time. I've got time.

17 MR. CAMPBELL: That on the fraud allegations in the  
18 complaint, separate and distinct from overall causation.

19 THE COURT: Okay.

20 MR. CAMPBELL: There's a complaint and the short form  
21 read together, a master complaint, they don't rise to the  
22 level of pleading the causation aspect of fraud --

23 THE COURT: Oh.

24 MR. CAMPBELL: -- with particularity, so.

25 THE COURT: I see. And that's again, that's a

1 12(b)(6). You might be right. I don't know sitting here.  
2 But I think that that's a 12(b)(6) motion and I see those in  
3 every civil fraud case. And I probably grant them in 95  
4 percent of them because there isn't a fraud in those cases. I  
5 don't know about here. I have no idea because I don't have  
6 the benefit of a responsive pleading, briefing.

7 MR. CAMPBELL: As to the other issues specifically in  
8 your agenda, if there was anything you'd like to have me  
9 comment on.

10 THE COURT: At this point I think you've covered  
11 everything.

12 MR. CAMPBELL: Thank you, Judge.

13 THE COURT: Thank you. Mr. Klein.

14 MR. KLEIN: I can't see the clock well enough to see  
15 whether it's to say good morning or good afternoon, your  
16 Honor.

17 THE COURT: Okay.

18 MR. KLEIN: Sheldon Klein for the City of Flint.  
19 I'll try not to repeat. I think items 1 and 2 have been  
20 basically do a meet and confer and see if we can solve them,  
21 so that's fine. And number 4, I agree with the notion of a  
22 standard order for newly filed cases. So I have nothing to do  
23 there.

24 The bellwether cases is a source both of confusion  
25 and concern for me.

1 THE COURT: Okay.

2 MR. KLEIN: I mean, at this point we're not going to  
3 work out all of the issues. But I just want to highlight a  
4 few points of concern. One, it is impossible to even start  
5 thinking about selection of bellwether cases until we have the  
6 short-form complaints and --

7 THE COURT: Well, let's do this. Let's go back in  
8 time and take the word bellwether out.

9 MR. KLEIN: Okay. Then --

10 THE COURT: Because my intention wasn't to say we're  
11 going to have a trial in two months on four or five of these  
12 cases and impanel a jury. That's not what I was talking  
13 about.

14 What I was talking about is how items 1, 2, and 4 are  
15 going to be accomplished so that this is an efficient process  
16 for everybody. And so that's really all I was talking about  
17 here.

18 MR. KLEIN: And I actually don't object to the word  
19 bellwether.

20 MR. SHKOLNIK: We'll stipulate, your Honor.

21 MR. STERN: And we can be ready in four or five  
22 months.

23 THE COURT: Trial starts -- we've got a jury here,  
24 I'm sure.

25 MR. KLEIN: The concept, as I understand it. Of what

1 a bellwether case is and, among other things, I looked it up  
2 in the dictionary and learned for the first time it has to do  
3 with goats and not climate. Clearly we can't do discovery in  
4 2000 individual cases or at least I hope we're not going to do  
5 right out of the bat start doing discovery in every case.

6 So we certainly concur -- I don't know if we concur.  
7 But we would urge that there be some process for identifying  
8 some manageable number of cases to commence discovery.

9 THE COURT: Exactly. That's what I was trying to  
10 accomplish.

11 MR. KLEIN: We can't begin -- I just want to make two  
12 points clear. One, we couldn't begin to rationally deal with  
13 that until we have short-form complaints and fact sheets.  
14 Because at this point we have nothing but captions for all  
15 practical purposes.

16 THE COURT: Well, you have actual lawsuits that are  
17 now going to conform to this. So you could -- you have a way  
18 to know what these claims look like and who the plaintiffs are  
19 so far.

20 MR. KLEIN: Well, for example, we will at least until  
21 the plaintiffs' fact sheets, we will have no idea whether a  
22 plaintiff has blood tests or water tests. Otherwise you're  
23 throwing darts at a list of case as far as what's an  
24 appropriate representative sample of cases. And I do think  
25 ultimately to be useful it's more than one lead case and one

1 legionella case, etcetera.

2 And for it to work, you know, from my reading there  
3 appears to be a number of different methodologies for deciding  
4 upon which should be, let's say, lead cases instead of  
5 bellwether cases. It doesn't matter. It requires information  
6 to identify what is a useful sampling of cases. And at this  
7 point we really don't have that information. We have nothing  
8 but generic allegations.

9 THE COURT: Okay. Then I think in light of what  
10 you're saying and Mr. Mason and I think Mr. Campbell, it's  
11 worth holding item 3 off for the February conference. Let's  
12 just get a stipulated order. And if it's not stipulated, then  
13 an order that provides the timeframe for filing these  
14 short-form complaints. And then we can identify -- we can  
15 sort out whether to identify a handful that will receive the  
16 Court's attention first.

17 MR. KLEIN: And just one final point, just jumping  
18 back to the beginning, I assume if the Court does seek  
19 briefing on the Marble case, any of the defendants there will  
20 be free to submit briefs?

21 THE COURT: Yes.

22 MR. KLEIN: Thank you, your Honor.

23 THE COURT: Do you want to say right now do you think  
24 we should set a briefing schedule prior to the February 20th  
25 status conference on whether Marble should be -- Marble and

1 any subsequent McLaren defendant cases should be consolidated?

2 MR. KLEIN: It seems to me that it's complicated  
3 enough that it warrants briefing.

4 THE COURT: Okay. Mr. Grashoff?

5 MR. GRASHOFF: May I approach? Or do I stand here?

6 THE COURT: You can yell. But identify yourself.

7 MR. GRASHOFF: Philip Grashoff on behalf of Stephen  
8 Busch and the MDEQ defendants on the process that we're  
9 entering into. May I speak from here?

10 THE COURT: Yes.

11 MR. GRASHOFF: Our position is that we agree that  
12 this meet and confer makes a lot of sense. We agree that the  
13 bellwether concept is premature. We disagree, respectfully  
14 disagree with the Court's view of how easy this process is  
15 going to be.

16 THE COURT: Oh, be there no mistake. Nothing about  
17 this is easy.

18 MR. GRASHOFF: This is the most terrifying concept  
19 I've ever heard of. 30 days for the plaintiffs to file their  
20 cases and 30 days to response or otherwise plead. This is  
21 going to be an avalanche of cases that are --

22 THE COURT: No. This is not all the new -- this is  
23 30 days to amend pending cases that already exist.

24 MR. GRASHOFF: That's what I'm talking about. We  
25 have motions to dismiss in multiple pending plaintiffs' cases.

1 We're going to have to receive the short-form complaints. And  
2 they can't be segregated from the long form general complaint  
3 because we're going to have to review both with respect to  
4 each of the plaintiffs that are bringing the case to find out  
5 where this fits and what defenses or what our response is  
6 going to be.

7 We -- I was going to ask for 60 days for the  
8 plaintiffs to file whatever they want to on the short-form  
9 complaints knowing that not all are going to come in at the  
10 same time. That's the cutoff date. That's the date that  
11 would trigger a time for us to respond or otherwise plead.

12 And we think a fair time is 90 days after that time  
13 to respond or otherwise plead or make a decision that we want  
14 to incorporate if we can. And that's going to require a  
15 separate analysis, if we can incorporate our earlier motion  
16 12(b)(6) motion -- 12(b)(5) motion to dismiss. This is going  
17 to be a huge monumental task every time a case is filed.

18 THE COURT: I understand. Thank you.

19 MR. PATTWELL: Your Honor, Michael Pattwell on behalf  
20 of Dan Wyant and Brad Wurfel. I'm under the impression that  
21 there are at least or in the range of approximately 38  
22 individual cases that would be -- where there will be a  
23 short-form complaint filed. So I would echo my co-counsel's  
24 concern that being able to file 38 motions to dismiss in 30  
25 days even for a large law firm let alone for the individual

1 smaller firm, that that might be an unreasonable burden.

2 THE COURT: Thank you.

3 MR. STERN: Your Honor, I just feel like that on some  
4 level -- and it's nobody's fault -- that we're like two ships  
5 in the night what we're talking about here. The reality is if  
6 there's a master complaint, that we believe when it's adopted  
7 by 50,000 people still contain the same claims.

8 Now understanding that each of those individuals has  
9 separate issues. I lived here. I moved from here. I didn't  
10 live here. I traveled through Flint once. I don't have lead  
11 poisoning. I have cancer. I have legionella. I believe that  
12 my asthma was caused by the water. Understand all of that.

13 But the reality is is that moving against the master  
14 complaint and moving against all of the individuals who adopt  
15 the master can be done in one pleading. The whole point of  
16 filing this master complaint and then having folks adopt it is  
17 to try to streamline it to avoid the very things that Mr.  
18 Grashoff and Mr. Pattwell just described.

19 Now there may be discrepancies. There may be issues  
20 where for one individual plaintiff it requires something else.  
21 But it's very possible in the course of our meet and confer or  
22 in our conversations that those individual issues can be  
23 either incorporated in one pleading or moved to the back  
24 burner while the Court actually adjudicates the substantive  
25 legal issues that are raised in the master.

1           So I don't think that there's -- that the level of  
2 pleadings that are being described by the defendants is what  
3 will be required of them as accurate. Furthermore, I think  
4 that most of this stuff has already been briefed. And this  
5 master complaint was filed months ago.

6           In fairness, I know everyone's busy, but there's no  
7 surprise in what's going to be filed in an individually  
8 adopted short-form complaint. There's nothing new. And if  
9 something new is adopted, it will be in a one off situation by  
10 someone who has not yet filed. Because every one that's filed  
11 a complaint before your Honor has had his or her claims  
12 included in the master.

13           There is literally nothing in the master complaint  
14 that hasn't already been filed by somebody. And there's  
15 nothing left out of it.

16           THE COURT: Okay. Mr. Sanders.

17           MR. SANDERS: I would like to point --

18           MADAM COURT REPORTER: State your name.

19           THE COURT: Oh.

20           MR. SANDERS: Herb Sanders. I'd like a point of  
21 clarification, if I may. Your Honor, you raised at the  
22 beginning of the discussion identifying damages as it relates  
23 to particular claims. Am I to understand that, for example,  
24 property damage, that plaintiffs who have property damages are  
25 in one complaint. And if you don't, they're in another.

1           And the reason why I raise that issue, hypothetically  
2 speaking I filed on behalf of 30 people in one complaint. I'm  
3 now being told I have to amend that complaint. If some of my  
4 people, for example, have property damage and some don't, do I  
5 now have to file a new lawsuit on behalf of some of those  
6 folks? Do they remain under the same case number?

7           THE COURT: Mr. Sanders, here's -- that was my  
8 question exactly. But what I'm going to suggest you do is  
9 communicate with Mr. Stern who's got duties assigned by the  
10 Court as liaison counsel to all individual cases and work that  
11 out with him, because that was my concern as well.

12           And what I don't want to see is you end up with 30  
13 individual cases with a filing fee of \$450 per case. I don't  
14 have any interest in that. The Court's going to have to make  
15 money some other way. And so that has to be resolved. But  
16 I'm going to leave it to you and Mr. Stern to sort that out.

17           MR. SANDERS: Okay.

18           MR. STERN: And Mr. Shkolnik.

19           THE COURT: And Mr. Shkolnik, yes.

20           MR. PITT: I'll let Mr. Stern do it.

21           THE COURT: Yes. But in response I think Mr.  
22 Pattwell, yeah. Please say your name.

23           MR. PATTWELL: Certainly. Michael Pattwell on behalf  
24 of Dan Wyant and Brad Wurfel. I think Mr. Stern makes some  
25 very valid points. I'd like to make one point that's in line

1 with Mr. Campbell's concerns as they've briefed with regard to  
2 Iqbal standard and level of particularity for these claims.

3 In that regard, the short-form complaints should be  
4 different as I think Mr. Campbell did argue. And I would  
5 bring to the Court's attention that, you know, we fully intend  
6 to brief those issues on a motion to dismiss basis. And just  
7 yesterday or the day before in a very similar lead lawsuit  
8 against Governor Chris Christie in New Jersey federal court on  
9 the Iqbal basis and on qualified immunity dismissed what we  
10 would perceive to be a similarly insufficient plead complaint.

11 So those issues will involve a lot of work is all I'm  
12 saying.

13 THE COURT: Okay. Thank you. And what I'd like to  
14 point out is I'm looking at the master complaint in the --  
15 master long-form complaint for the individual plaintiffs. And  
16 it is alleged that this situation that has given rise to this  
17 litigation began at least somewhere around April of 2014.

18 We are very close to four years after this situation  
19 began. And it will require a great deal of work on all of  
20 your parts to bring this case along, these cases along. It  
21 will require some work from myself and my staff.

22 But that -- something happened that got us here. And  
23 we are going to have to turn our attention to focusing on it  
24 as best we can within our professional responsibilities. And  
25 I know you all have a duty to tell me that you can't meet

1 those responsibilities if I enter an order that makes it  
2 impossible for you to live up to the code of conduct for  
3 lawyers.

4 But I keep in mind the beginning of this situation  
5 and how we're going to move this forward in everything that I  
6 do, in how I assign my time between cases that take place this  
7 afternoon, yesterday, the day before, and what I do on this  
8 case. So I just know that we're all under a great deal of  
9 pressure. Time is limited.

10 But there are people seeking a resolution on both  
11 sides. Defendants whose lives need to move on. Plaintiffs  
12 who are seeking a remedy. So I keep that in mind and we'll  
13 find a way to go forward that's fair to everybody Mr. Came.

14 MR. KIM: Your Honor, I think Mr. Stern is  
15 envisioning a process where we would be able to file a single  
16 complaint to dismiss against the master complaint even after  
17 all the short forms are filed. And I don't disagree that he  
18 -- I don't think that he's necessarily wrong to think that.  
19 But it's entirely hypothetical at this point until we see  
20 exactly how the short forms are filed and how they're adopted.

21 And my colleagues on the defense side are correct  
22 that a lot of time our analysis, because we are raising  
23 governmental immunity issues and qualified immunity issues, we  
24 need to be able to respond on an individual basis based on the  
25 short-form complaints and sometimes by each specific

1 plaintiff.

2 It's just -- so it's difficult for -- you know,  
3 essentially we're talking about an ideal kind of situation  
4 versus what may hypothetically be possible. And you know for  
5 us to be able to say that we can do -- respond within 30 days  
6 of all the short forms being filed, I can't see that being  
7 realistic.

8 THE COURT: And that's where the meet and confer,  
9 you'll sort it out. If you can agree, you'll submit one  
10 proposed order. If you can't, it will be color coded in some  
11 manner so I can tell who's making what recommendations. And  
12 I'll make a decision, so. But thank you for educating me on  
13 what I'm likely to see.

14 MR. GRASHOFF: Your Honor, Phil Grashoff. Again, if  
15 I may just for a moment. We're not going to be filing motions  
16 to dismiss the master form complaint.

17 THE COURT: Excuse me?

18 MR. GRASHOFF: We're not going to be filing motions  
19 on the master form complaint.

20 THE COURT: No.

21 MR. GRASHOFF: Because it's a nonentity. We're going  
22 to be filing motions on the 400 cases or a thousand cases that  
23 are coming in on the individual form complaint. And that's  
24 where I start to get heartburn. And for the Court to look  
25 back, I respectfully suggest, to look back four years into

1 2014, it's not the right trigger date for this. It's when  
2 they filed the suits in 2016.

3 THE COURT: It is, absolutely. But I'm simply coming  
4 up with a story that is true to me that I am conveying to you  
5 that something happened that triggered all of you being here.

6 MR. GRASHOFF: It did.

7 THE COURT: And that something is going to sooner or  
8 later trigger a judgment one way or another or many judgments.  
9 And we're going to try to keep that timeframe as reasonable as  
10 possible. So you may be seated. But thank you, very much.

11 MR. GRASHOFF: Thank you.

12 THE COURT: So let's go on to the next issue, which  
13 is the consolidation of Mays vs Snyder and Boler v Earley.  
14 There was some briefing on the impact of that. I have read  
15 and re-read those cases. And it is -- I am absolutely bound  
16 by the law that the Sixth Circuit has set forth in those  
17 cases. And I have no problem with that.

18 In the Boler case, we have the Safe Drinking Water  
19 Act immunity issue. And on page 27 of the Slip opinion, we  
20 have I think what's operative here which is that the court  
21 determined that Eleventh Amendment sovereign immunity applies  
22 to the State of Michigan in both Mays and Boler as well as to  
23 the Boler plaintiffs' claims against MDEQ, MDHHS, and Governor  
24 Snyder.

25 So we have that. That's clear. But what needs to be

1 done now is that these will be consolidated in the  
2 consolidated class action. But what we have is a new master  
3 complaint that has different allegations against the State of  
4 Michigan, Governor Snyder, Nick Lyon, and so on. And so I  
5 will absolutely observe and follow the law as the Sixth  
6 Circuit has set forth in Boler. But I will do so in light of  
7 the newly pled complaint. Mr. Pitt.

8 MR. PITT: Yes, your Honor.

9 THE COURT: So I guess what I'm trying to say is  
10 there will not -- as soon as those cases are consolidated, it  
11 will not result in the automatic dismissal of the State of  
12 Michigan, Governor Snyder and so on because I will have to  
13 consider the impact of those cases in light of the new  
14 allegations.

15 MR. PITT: Correct. And on behalf of -- Michael Pitt  
16 on behalf of the class. We have looked at this issue from  
17 several different perspectives. And it's our recommendation  
18 to the Court that under Rule 42 the Court, of course, has  
19 broad discretion to consolidate for all purposes or limited  
20 purposes.

21 And it's our recommendation that the Court consider a  
22 consolidation of Boler and Mays for a limited purpose. And  
23 that limited purpose would be to consolidate the cases for  
24 purposes of the mediation that's going to be taking place  
25 hopefully within the next 60 or 90 days.

1                   And the reason we say that is as the Court knows,  
2 there are pending petitions for certiorari in the United  
3 States Supreme Court.

4                   THE COURT: There are two now; is that correct?

5                   MR. PITT: There are two.

6                   MR. KLEIN: I believe there are three, your Honor.

7                   MR. PITT: Three now. Perhaps there's three.

8                   THE COURT: I don't automatically seem to -- you gave  
9 me briefing --

10                  MR. PITT: On the Wright --

11                  THE COURT: On the Wright motion.

12                  MR. PITT: -- cert.

13                  THE COURT: Can somebody send me the cert briefing?  
14 I don't care who does it. Can you send it to me? I just like  
15 to keep up. I can go on SCOTUSblog or something and find it.

16                  MR. LEOPOLD: Your Honor, we can do that.

17                  THE COURT: Thank you, Mr. Leopold. I am just trying  
18 to use my time not Googling peoples' blogs.

19                  MR. PITT: The other concern that we have -- and of  
20 course --

21                  THE COURT: Oh, wait. You want them consolidated for  
22 a limited purpose. You didn't say what the limited purpose  
23 was.

24                  MR. PITT: For to be under the Court's umbrella for  
25 mediation purposes.

1 THE COURT: Oh, I see. But why -- in light of the  
2 earlier court order consolidating all of the pending class  
3 action under you and Mr. Leopold's leadership, why would these  
4 two cases not qualify for that?

5 MR. PITT: Well, because of the unique posture  
6 they're in. Those are the two that are heading to the Supreme  
7 Court.

8 THE COURT: But I haven't issue -- I have not issued  
9 a stay pending --

10 MR. PITT: And we're not --

11 THE COURT: I don't think --

12 MR. PITT: We're not asking for a stay.

13 THE COURT: -- stay is not warranted, but.

14 MR. PITT: But I think in order to keep those cases  
15 separate for purposes of this appellate process that's taking  
16 place, it makes some sense to keep them separate for that  
17 purpose and consolidated for the limited purpose of bringing  
18 them under the Court's umbrella for the mediation process  
19 that's about to take place.

20 Another concern that we have, your Honor --

21 THE COURT: But let me stop you there. There's  
22 nothing that -- if I'm not facing a motion for a stay pending  
23 a cert decision at the Supreme Court and there are factors to  
24 be applied. And at least based on the one brief that I've  
25 read, I would not stay the cases.

1           So assuming we're not staying any of the cases -- and  
2 I haven't read the other briefs, so maybe we would. But let's  
3 assume we're not. Why would we -- the appellate process has  
4 no impact on my work until -- unless and until they issue a  
5 decision.

6           MR. PITT: Correct.

7           THE COURT: So why should we keep them separate?

8           MR. PITT: The other reason was the fact that in the  
9 Boler case they have alleged accounts that are not currently  
10 in the master class action complaint. And if they're  
11 consolidated, class counsel is concerned that we would have to  
12 file yet another amendment to the class complaint, which would  
13 have the affect of setting back the schedule which the Court  
14 has already placed on the motions to dismiss and the  
15 plaintiffs' duty to respond within a certain period of time.

16           THE COURT: Generally speaking, what are the counts  
17 Boler has alleged that are not in the master?

18           MR. PITT: For the most part, they're contractual  
19 claims.

20           THE COURT: Oh.

21           MR. PITT: And the Court dealt with those somewhat in  
22 the Guertin case. There are a number of constitutional claims  
23 and allegations they make. But they're tied to the impairment  
24 of contract provision of the United States Constitution as  
25 opposed to bodily integrity and/or a state created danger.

1 THE COURT: But did the Sixth Circuit rule on that?

2 MR. PITT: No, not at all.

3 THE COURT: So those would --

4 MR. PITT: So we don't want to be in the position  
5 where we're going to feel obligated to amend the master  
6 complaint to include the Boler contractual claims. It will  
7 set back the time table the Court has already scheduled. And  
8 briefs have been submitted. And we're filing -- preparing to  
9 file our response briefs. We think it's important that we  
10 keep that schedule current and not set it back.

11 And also we have some doubt as to the validity of  
12 those claims in light of the Court's ruling in Guertin. So we  
13 don't want to be in a situation where we have to delay all  
14 these proceedings to include in the master complaint new  
15 allegations.

16 We don't have that issue with the Mays complaint  
17 because the Mays complaint tracks pretty closely our master  
18 complaint that's been filed as part of the class. But I think  
19 because Mays and Boler are joined together for appellate  
20 purposes, there's no reason that they shouldn't be treated the  
21 same.

22 THE COURT: Who was the lead plaintiffs' counsel?

23 MR. SZOKOLY: Nick Szokoly.

24 MR. PITT: He's here.

25 MR. SZOKOLY: I jumped out like there was --

1 MADAM COURT REPORTER: Can you say your name again?

2 I didn't hear it.

3 MR. SZOKOLY: Nick Szokoly.

4 MR. LEOPOLD: And your Honor, just one issue to sort  
5 of piggyback on Mr. Pitt is I think in addition to the  
6 mediation issues for limited consolidation would be for  
7 discovery purposes as well. That would be an important issue.  
8 It makes sense to dovetail both of those in.

9 THE COURT: Okay. Thank you, Mr. Pitt. Mr. Szokoly,  
10 do you wish to speak on that subject?

11 MR. SZOKOLY: I do, your Honor. May I approach?

12 THE COURT: Please.

13 MR. SZOKOLY: Thank you. Good afternoon. First of  
14 all, Nick Szokoly on behalf of the Boler plaintiffs. To  
15 answer some of the questions that your Honor has asked -- can  
16 I back up for a little bit?

17 THE COURT: Sure.

18 MR. SZOKOLY: So we filed our complaint in January of  
19 2016. We were either the first or the second non SDWA  
20 complaint filed. After that, we filed for preliminary  
21 injunction, which is docket 17, less than a month later  
22 February 24th of 2016.

23 The preliminary injunction dealt with the fact that  
24 despite the City being under a do not drink order, the City of  
25 Flint continued to collect and foreclose and issue liens on

1 residents' houses if they didn't pay their water bill.

2 THE COURT: I see.

3 MR. SZOKOLY: So we briefed that before Judge  
4 O'Meara. We were actually -- I think we were in this  
5 courtroom on the 23rd when Judge O'Meara asked for a second  
6 round of briefing on whether or not he had jurisdiction.

7 Now importantly during that discussion at the bench  
8 we shared the fact that we had done extensive negotiations  
9 with the City and the City had reached an agreement in theory  
10 to cease all forecloses and liens. So those issues get  
11 briefed and then we learn on the 16th of -- or 23rd of March  
12 sitting at the Holiday Inn in Flint getting ready to go over  
13 to the court for a status conference that the status  
14 conference was cancelled and that our case had been dismissed  
15 for want of jurisdiction.

16 THE COURT: Okay.

17 MR. SZOKOLY: Importantly, Judge O'Meara never  
18 reached the issue of the preliminary injunction. It's  
19 briefed. It's ripe. It's sitting in the file. We're all  
20 ready to continue moving along on that motion. Secondly, we  
21 go up on appeal and we argue what you've already seen. And I  
22 don't know -- you probably have no spare time left anymore.

23 THE COURT: I read the briefs on Boler.

24 MR. SZOKOLY: Okay. We split the oral argument  
25 between Mays and Boler. It was an absolute pleasure working

1 with Sam Bagenstos. We worked collaboratively --

2 MADAM COURT REPORTER: Counsel, slow down.

3 MR. SZOKOLY: Sure.

4 MADAM COURT REPORTER: It was an absolute pleasure  
5 working with ...

6 MR. SZOKOLY: And working collaboratively. Is it  
7 that fast?

8 THE COURT: Yes.

9 MADAM COURT REPORTER: Yes.

10 MR. SZOKOLY: I'm trying to get ahead of the gun  
11 here. So we argued the motion or argued the appeal before the  
12 Court. Mr. Bagenstos took half. I took half.

13 THE COURT: You have not slowed down.

14 MR. SZOKOLY: Sorry. It felt slower. It felt  
15 slower. So I argued the part specifically about the  
16 impairment of the article one section 10 contract right. I  
17 submit to you if you had trouble getting to sleep tonight and  
18 wanted to listen to the oral argument.

19 THE COURT: I did.

20 MR. SZOKOLY: The first half of the oral argument is  
21 the article 1 section 10 contract right. Judge Stranch had a  
22 lot of questions about it. We went back and forth. And it  
23 appears in the brief multiple times. During that exact period  
24 in time, your Honor had just ruled on -- the argument was the  
25 15th. You had ruled 10 days prior in the Guertin case in the

1 contract rights.

2 Mr. Bagenstos provided a copy of the Guertin opinion  
3 to the panel. These issues were all in play. Everybody knew  
4 they existed. So we get a ruling on the 28th of July from the  
5 Court of Appeals. On the 27th, your Honor issued an order  
6 appointing interim co-lead counsel regarding a hearing that  
7 was had on the 26th. Obviously at that time we weren't --

8 THE COURT: You weren't here yet.

9 MR. SZOKOLY: We weren't here. We were here first,  
10 but had to go back up. And then on the 29th of September we  
11 finally get the mandate from the Fourth Circuit --

12 THE COURT: Sixth.

13 MR. SZOKOLY: Sixth Circuit. I'm a member there,  
14 too. And as your Honor, I'm sure, is well aware, under FRCP  
15 41, the mandate is effective when it's issued.

16 THE COURT: Right.

17 MR. SZOKOLY: We still have never, despite Rule 12A,  
18 still have never gotten an answer or responsive pleading from  
19 the City. The City defendants are the only defendants left in  
20 our case.

21 THE COURT: Okay.

22 MR. SZOKOLY: Thank you, your Honor.

23 THE COURT: Thank you.

24 MR. SZOKOLY: And moving forward though, when we  
25 brought this case, we included those claims because they are

1 valid claims. They are legally legitimate claims. That being  
2 said, we have met multiple times with many members of the  
3 committee. We met with Mr. Levin, we met with Mr. Pitt, and  
4 we've gotten exactly what you heard today, which is some  
5 reticence and questioning of whether or not these are really  
6 valid claims or not.

7 As your Honor is well aware, when you look at  
8 something like the manual for complex litigation, the current  
9 version, in 222 and 224 where there is a legitimate concern  
10 about the interests or conflicting or competing interest of  
11 co-lead counsel, the Court has to take steps to address that.

12 And to suggest that you will consolidate our case  
13 with the consolidated class action but that even though we  
14 don't think they're real claims, we'll keep them over here in  
15 the bucket gives even more concerns that I had before I walked  
16 in here. That's not exactly what I thought Mr. Pitt was going  
17 to say, but he's conceded effectively the point that the  
18 committee and co-lead counsel have no interest in prosecuting  
19 these claims.

20 THE COURT: I didn't hear that they have no interest.  
21 I heard that there would be further delay in the process. It  
22 would require amending the master complaint and so on. But  
23 I'm hearing what you're saying.

24 MR. SZOKOLY: Sure. Now one of the things that your  
25 Honor had asked about in the agenda was our view on

1 consolidation and the effect of consolidation. And as your  
2 Honor, I think, would agree, the effect of consolidating Boler  
3 with the master is a sua sponte dismissal of the contract  
4 claims and the impairment of contract claims even though  
5 there's been no briefing and the City hasn't even filed an  
6 answer.

7 You'd have to prune them off. They disappear.  
8 They're not in the master complaint.

9 THE COURT: Okay. Okay.

10 MR. SZOKOLY: So your Honor, lastly, too, when you  
11 talk about efficiency -- and the idea is not to promote  
12 efficiency over the rights of due process. But if you proceed  
13 to consolidate these cases with the master and the Supreme  
14 Court grants certiorari, we can throw efficiency out the  
15 window. The whole thing grinds to a halt.

16 That's why they're trying to segregate these two  
17 cases into a little side bucket. The fact is if they get  
18 consolidated with the master case and the Supreme Court grants  
19 certiorari, all of this grinds to a halt. And that --

20 THE COURT: Okay. Here's what I'm going to do.

21 MR. SZOKOLY: Yes, your Honor.

22 THE COURT: I was not focused on the contract claim  
23 in Boler because I was just reading Boler in a Sixth Circuit  
24 -- I mean, I read your briefs and so on. But the Sixth  
25 Circuit -- I thought what we were going to discuss today was

1 the impact of the Sixth Circuit's decision on the other cases  
2 and not on this issue.

3 So what I'm going to do is take into consider  
4 everything you've said, Mr. Szokoly, and what Mr. Pitt said.  
5 Mr. Klein wants to say something.

6 MR. KLEIN: I will be brief.

7 THE COURT: And so Mr. Klein, go ahead. Just project  
8 from there, please.

9 MR. KLEIN: Can you hear me okay?

10 THE COURT: I can hear you.

11 MR. KLEIN: We are concerned that -- we oppose the  
12 cases not being consolidated for a couple of reasons. One,  
13 because now we're talking multiple tracks of briefing,  
14 etcetera. Two, because we have two conflicting class  
15 definitions which can lead to confusion or worse down the  
16 road. We think it's important that there be a class that  
17 we're shooting at.

18 And then finally, just as a factual matter, there has  
19 not been a single foreclosure or a single water shutoff in the  
20 now going on two years. I guess that's right, about two  
21 years, since the Boler case was filed.

22 THE COURT: Okay.

23 MR. SZOKOLY: Your Honor, if I could just to wrap up?

24 THE COURT: Maybe what I'll do is order briefing on  
25 this.

1 MR. SZOKOLY: Your Honor, that's fine. I know you  
2 have not a shortage of paper in this case. I could offer a  
3 suggestion to the Court.

4 THE COURT: Please.

5 MR. SZOKOLY: A little bit of pragmatism if you think  
6 it would help. We would not object to consolidation for the  
7 purposes of mediation. Although I think it is a bad idea for  
8 the efficiency purposes if certiorari gets granted. Provided  
9 that we, on behalf of the Boler plaintiffs, participate.

10 Obviously in this case, interim was selected and  
11 leadership committee was selected. The Court had no  
12 jurisdiction over us. We could do not but watch.

13 THE COURT: Okay. Well, thank you. And so what I'll  
14 do is determine -- I'll give it some thought after this  
15 hearing and I will determine whether briefing is needed,  
16 further briefing. I know there's been some briefing already  
17 for the defendants. Ms. Bettenhausen?

18 MS. BETTENHAUSEN: Since there may or may not be  
19 briefing, I just want --

20 THE COURT: State your name.

21 MS. BETTENHAUSEN: Yeah. Margaret Bettenhausen for  
22 State defendants. I think we tried to address what the impact  
23 of the court's ruling would be.

24 THE COURT: Yeah.

25 MS. BETTENHAUSEN: I mean, the State of Michigan was

1 dismissed in both cases based on Eleventh Amendment. So  
2 really our position would be that it doesn't really matter how  
3 you plead it, whether it's monetary relief or injunctive  
4 relief you're pleading, we believe that consolidation should  
5 cult in the complete dismissal of the State of Michigan.

6 THE COURT: I understand that.

7 MS. BETTENHAUSEN: The Boler and Mays decision did  
8 not address the individual capacity claims against Snyder,  
9 Dillon, and Lyon, which are the State defendants in this. So  
10 it doesn't have any impact on that.

11 And then with regard -- as the Court said at the  
12 beginning of this discussion, with regard to the official  
13 capacity claim against the governor, well at some point the  
14 plaintiffs have to plead an ongoing violation of federal law.  
15 And that would be what the Court would need to do to determine  
16 if that's actually been done.

17 So really I think that's what the impact would be.  
18 The problem we would see with allowing some sort of amended  
19 master complaint -- excuse me, master class action complaint  
20 to bring in these old claims that were perhaps in the form of  
21 Mays and Boler, well that's -- we don't want any old claims  
22 revived. Our clients were completely dismissed in the Boler  
23 complaint to allow that to -- you know, the complaint to be  
24 amended now and revive those claims seems completely wrong.

25 THE COURT: Okay.

1 MS. BETTENHAUSEN: So I think that's --

2 THE COURT: All right.

3 MR. LEOPOLD: Your Honor, just quickly I think to  
4 bring this to resolution.

5 THE COURT: Yes. Let's do that.

6 MR. LEOPOLD: Class aspect is coming at it from a  
7 procedural perspective and how that be handled in light of  
8 really the elephant in the room on the cert, not knowing  
9 what's going to happen on the cert.

10 THE COURT: Yes.

11 MR. LEOPOLD: We haven't even briefed those issues  
12 yet on the cert. So it's going to be a while before the  
13 Supreme Court, I'm sure, addresses that. And so it's a  
14 procedural issue not having standing to appear at a mediation.

15 The issue is not knowing what the Supreme Court is  
16 going to do. To consolidate the entire case with the  
17 prospects that if it's consolidated, the Supreme Court  
18 accepts, then we may have a potential problem of a stay.  
19 That's our concern.

20 That's why we're saying for limited purposes until at  
21 least the U.S. Supreme Court issues a ruling on cert, to  
22 consolidate for the basis of just discovery and mediation. I  
23 think that sort of cures this issue of the case being able to  
24 move forward, just not on the claims that are in the pleading.

25 THE COURT: Okay.

1 MR. LEOPOLD: Thank you.

2 THE COURT: All right. Well, thank you. He.

3 MR. SZOKOLY: Your Honor, if I could? Do you  
4 anticipate you'll give us some guidance before the next agenda  
5 if you want us to brief the issue with regard to --

6 THE COURT: Yes. I'll issue an order. What I've  
7 been doing for each of these is in the next day or two I will  
8 draft an order setting forth everything that's been orally  
9 ordered here. You may be seated.

10 MR. SZOKOLY: Thank you, your Honor. I promise to  
11 drink less coffee next time. It was a long flight.

12 THE COURT: Okay. That's all right. The next issue  
13 is the removal based on federal officer jurisdiction. And we  
14 have the Waid case 16-13519. And unless anyone wishes to make  
15 any further argument on that, I am prepared to grant  
16 plaintiffs' motion to remand. Mr. Barbieri.

17 MR. BARBIERI: If I may, your Honor?

18 THE COURT: You may.

19 MR. BARBIERI: Thank you. Again, for the record, I'm  
20 Charles Barbieri and I represent three of the MDEQ defendants.  
21 I'm arguing in response to the motion for remand on behalf of  
22 all the MDEQ defendants.

23 THE COURT: Okay.

24 MR. BARBIERI: And I don't want to repeat what has  
25 already been briefed.

1 THE COURT: Thank you.

2 MR. BARBIERI: We obviously moved in part -- or not  
3 moved in part. But presented our notice in part on the basis  
4 that there was federal officer removal grounds.

5 THE COURT: We know the Sixth Circuit has made a  
6 decision on that.

7 MR. BARBIERI: Mr. Goodman and I experienced that.

8 THE COURT: Okay.

9 MR. BARBIERI: In any event, your Honor, there is an  
10 alternative grounds that I do not want to have the Court lose  
11 sight of. In counts 3 and 4 of the Waid complaint.

12 THE COURT: Yes.

13 MR. BARBIERI: This is not a class action complaint.  
14 This is an individual complaint.

15 THE COURT: I understand.

16 MR. BARBIERI: There are allegations of violations of  
17 the federal Safe Drinking Water Act. And as part of the  
18 response to the motion for remand, we pointed out to your  
19 Honor that in fact that provides for federal question  
20 jurisdiction in this matter.

21 Now, I realize the briefing submitted by the  
22 plaintiffs after our response presented a case called Yellow  
23 Freight. I submit to your Honor that the Yellow Freight case  
24 is not controlling in terms of dictating the Court's decision.

25 I would like the Court to consider the cases of

1 Dorsey v City of Detroit, 858 F.2d 338, 341, a Sixth Circuit  
2 1988 case. And that's a 1983 action. Warren v United States,  
3 which is found at 932 F.2d 582, Sixth Circuit 1991, a Food  
4 Stamp Act case. And then the Ullmo, U-L-L-M-O, v Gilmour,  
5 G-I-L-M-O-U-R, Academy, 273 F.3d 671, a Sixth Circuit 2001  
6 decision under the Individuals With Disabilities Education  
7 Act.

8 And all three of those decisions found that the  
9 weight of authority holds that even if this Court were to  
10 acknowledge that some sort of grant or concurrent jurisdiction  
11 exists, it does not prohibit removal. And we submit, your  
12 Honor, on the basis of those that the Yellow Freight decision  
13 is not dispositive of whether this Court should continue to  
14 maintain the federal question jurisdiction based on counts 3  
15 and 4.

16 THE COURT: Counts 3 and 4, okay. Thank you. So  
17 what I'll do, I have the briefing. I will take into  
18 consideration Yellow Freight and Dorsey and Ullmo and the  
19 other cases Mr. Barbieri just mentioned, take a second look at  
20 it, and issue a written decision.

21 Based on the briefing alone, I was convinced that the  
22 case should be remanded. But I'll certainly add those cases  
23 to my consideration and make sure. And I have more times than  
24 I care to reveal sat here and said I'm going to do one thing,  
25 take a look, and I do another thing. So I'll let you --

1 you'll find out -- I will review those cases.

2 MR. BARBIERI: Thank you, your Honor.

3 THE COURT: Yeah. Thank you. The insurance  
4 disclosures, interim co-lead counsel and individual liaison  
5 counsel informed me that certain insurance disclosures from  
6 MDEQ defendants may be sufficient. Has that been resolved?

7 MR. LEOPOLD: No, Your Honor. I just need to raise  
8 it with the Court. And it perhaps has been resolved, but I  
9 would just like to get some clarification perhaps from the  
10 Court and/or from those defendants.

11 As your Honor may recall last time at the hearing --  
12 and I'm citing to the transcript at page 46 as well as your  
13 Honor's order. Your Honor stated to the defendants based upon  
14 my raising of the issue -- and I'm quoting at line 5. So what  
15 we'll do is set a deadline for the MDEQ defendants to  
16 diligently review their records to find out if they have  
17 insurance and to disclose that to the plaintiffs.

18 Now, as it relates to the private engineering  
19 defendants, there has certainly been a compliance and good  
20 faith. And in fact, Mr. Campbell has recently responded  
21 further as to those issues. But some of the defendants, Mr.  
22 Pattwell and I believe Mr. Grashoff, the way that it is worded  
23 in all candor, it leaves me somewhat concerned. And I just  
24 need clarification if there has been, quote, the diligent  
25 effort to review whether there are policies. And I'm quoting

1 the language is identical.

2 So I'm assuming they met and conferred about how to  
3 respond to it. But they state in response the Court's  
4 inquiry, quote, in accordance with the Court's orders  
5 regarding issues discussed at the November 15, 2017 status  
6 conference, and based upon information reasonably available,  
7 MDEQ defendants Stephen Busch has no insurance agreement that  
8 may be liable to satisfy all or part of a possible judgment.

9 Now, I don't want to get into a game of semantics.  
10 The issue is based upon a good faith diligent search, not  
11 necessarily what's reasonable available, but a search, is  
12 there policies of coverage that potentially may be available?  
13 And if so, they need to be produced.

14 And in all candor and I've communicated with them  
15 that the way it is phrased, it just leaves the door open. And  
16 I just need confirmation whether or not there are policies in  
17 existence that would cover these claims. And that's  
18 respectfully either a yes or a no. You know, based upon a  
19 really, you know, diligent -- and I think there was a reason  
20 why the Court used that word. Diligent search.

21 THE COURT: Mr. Grashoff, please state your name.

22 MR. GRASHOFF: Phil Grashoff on behalf of all the  
23 MDEQ defendants because we all responded the same way.

24 THE COURT: I just heard that. So let me ask you,  
25 are there insurance policies in existence for any of your

1 clients that would potentially cover these claims?

2 MR. GRASHOFF: My information is that there are not  
3 those kinds of policies available.

4 THE COURT: And have they undertaken a diligent  
5 search?

6 MR. GRASHOFF: Yes.

7 THE COURT: And can you clarify your written response  
8 to say my clients certify that they have undertaken a diligent  
9 search and there are no insurance policies that would cover  
10 these claims, if that's, in deed, true?

11 MR. GRASHOFF: Your Honor, all of our clients were  
12 required to file a certificate with the State of Michigan in  
13 order for them to obtain representation by the State of  
14 Michigan in defense of these actions that they do not have  
15 insurance.

16 THE COURT: Okay. Have you seen that certificate,  
17 Mr. Leopold?

18 MR. LEOPOLD: No. And if they could provide those  
19 certificates certified that would be fine.

20 THE COURT: That's very helpful, Mr. Grashoff to know  
21 about. So if you could provide that to plaintiffs' co-lead  
22 council and liaison counsel, that will satisfy my order. Mr.  
23 Pattwell?

24 MR. PATTWELL: Yeah. One point of clarification.  
25 Mike Pattwell on behalf of Dan Wyant and Brad Wurfel. I'm

1 aware of no such certification that we were required to file  
2 with the State. However, I can represent to the Court and  
3 everyone in the room that my clients have a home insurance  
4 policy and an auto policy. They do not have any other  
5 policies. This information was conveyed.

6 What Mr. Leopold asked for in writing was he wanted  
7 to see copies of those home insurance and auto policies for  
8 himself to determine whether or not there was coverage.  
9 That's absolutely, you know, not what the rule requires.  
10 There are dozens of cases holding to a contrary. And that's  
11 not what he's asked for today. So I think that --

12 THE COURT: Excuse me for interrupting you. But can  
13 you represent that the home insurance policy has no umbrella  
14 policy that would cover something beyond an incident inside  
15 the home?

16 MR. PATTWELL: Yes. That's what I've just  
17 represented. And we even went a further step to go over those  
18 policies in detail. And there is absolutely no way that they  
19 do provide coverage.

20 THE COURT: Okay. Does that satisfy you, Mr.  
21 Leopold?

22 MR. LEOPOLD: Yes, your Honor. I think that in all  
23 candor the Court asked if there are certain cases according to  
24 Mr. Grashoff which now apparently is not perhaps accurate, I  
25 don't know, but I think just if those defendants can sign a

1 certification that they diligently searched and there are no  
2 applicable insurance policies, I think that cures the issue  
3 and it closes the door so that there is no ambiguity in any  
4 way, shape or form.

5 THE COURT: Mr. Kuhl.

6 MR. KUHL: Yes, your Honor. Richard Kuhl for the  
7 State defendants. I believe that the communications that Mr.  
8 Grashoff is referring to are privileged communications between  
9 the State department and their individual employees. So I  
10 just wanted to alert counsel to the fact that there may be  
11 parts of those that we consider to be privileged. We will,  
12 however, agree to do whatever is necessary to make sure those  
13 certifications are compliant.

14 THE COURT: Okay. Then what I'll do is consider  
15 including in the order that follows this conference a request  
16 for a separate certification that there's been a diligent  
17 search and there either is or is not an insurance. Mr.  
18 Grashoff.

19 MR. GRASHOFF: Your Honor --

20 MADAM COURT REPORTER: State your name.

21 THE COURT: State your name.

22 MR. GRASHOFF: Phil Grashoff on behalf of Stephen  
23 Busch. Will the Court accept a certification by counsel?  
24 Because if part of this is subject to a privilege as Mr. Kuhl  
25 said, we'll have to deal with the state. But we can settle

1 this --

2 THE COURT: No. The only thing that I understood Mr.  
3 Kuhl to say is subject to the privilege is that exact  
4 certification to the State or to the lawyers to get their  
5 representation --

6 MR. GRASHOFF: That's what I'm talking about.

7 THE COURT: Right. So I don't want that. If that's  
8 --

9 MR. GRASHOFF: Then we can't provide it if it's  
10 subject to --

11 THE COURT: You can't provide that document. But you  
12 can do a separate search that I order you to do.

13 MR. GRASHOFF: We have already done that. We've  
14 looked at the home owners policy. We've looked at the auto  
15 policy. We looked at the life policy. None of those policies  
16 contain any coverage for these kinds of matters.

17 THE COURT: Okay. Then that may be adequate. You're  
18 on the record as an officer of the Court. I'll determine a  
19 little later today if that's --

20 MR. GRASHOFF: That's where I was going with Mr.  
21 Pattwell.

22 THE COURT: Okay. Thank you. Let's move on to  
23 failure to serve in the two cases that are identified. I now  
24 have a request for new summonses.

25 MR. SHKOLNIK: Yes, your Honor. As to one of the

1 defendants, Veolia, we have waivers that are on file.

2 THE COURT: Okay.

3 MR. SHKOLNIK: As to the MDEQ defendants, we're  
4 asking for reissue of the summons. Apparently there was a  
5 failure in getting the summons served in a timely fashion. So  
6 we need to reissue it.

7 THE COURT: And I think the rule requires that there  
8 be a reason. And is the reason that there was an  
9 unanticipated failure?

10 MR. SHKOLNIK: There was an unanticipated failure.  
11 I'm being very candid, your Honor. Yes.

12 THE COURT: Okay. All right. Because I will note  
13 that this was on the agenda in at least one or two others.

14 MR. SHKOLNIK: The last conference we talked about.

15 THE COURT: The last conference, okay.

16 MR. SHKOLNIK: We did a diligent search and we  
17 finally realized that was the problem.

18 THE COURT: That's what happened, okay. Mr.  
19 Grashoff?

20 MR. GRASHOFF: Your Honor, we were going to back away  
21 from the issue in light of the filings on the 8th of January  
22 with the Court -- anticipating where the Court was probably  
23 going to go on this issue. So we're fine.

24 THE COURT: Okay.

25 MR. SHKOLNIK: Thank you.

1 THE COURT: Then that's granted or taken care of.  
2 The next issue is the issue of facilitative mediation. The  
3 Court issued an order earlier this week I believe on Tuesday  
4 morning indicating -- I don't really care for talking about my  
5 point in the third person.

6 Indicating that I would be -- had interviewed and  
7 worked with and intend to appoint Senator Levin and former  
8 chief judge pro tem of the Wayne Circuit Court, Pamela  
9 Harwood, as facilitative mediators in this case pursuant to  
10 Eastern District of Michigan local Rule 16.4.

11 I provided the parties until 10:00 AM this morning to  
12 file any objections to those two individuals working on this  
13 case in that capacity and I did not receive any new  
14 objections.

15 I had previously had discussions with the executive  
16 team for administrative purposes and the plaintiffs group.  
17 And I believe that any objections that were raised -- they  
18 were not formal objections. Maybe they were formal  
19 objections. But that the issues that were raised with respect  
20 to Senator Levin can be adequately, professionally, and  
21 properly addressed by the law firm where he is currently  
22 working, Honigman. And I have spoken to him about that and he  
23 has made a commitment to the process and is very excited about  
24 learning about this case and getting involved with it.

25 So having taken into consideration the concerns,

1 objections that I think were well placed and caused me to do  
2 some research and conduct some conversations, I will be  
3 appointing Senator Levin and Judge Harwood to be facilitative  
4 mediators in the case. And I will be issuing probably by the  
5 end of the day on Tuesday an order that outlines their duties  
6 and the process they'll undertake to begin work on this case.

7 I will retain all pretrial matters, all substantive  
8 legal matters. They will be serving exclusively as  
9 facilitative mediators. And I will work out in that order  
10 some manner in which I will have limited communication with  
11 them to ensure that the process is going forward but not to  
12 have myself involved in their work or to hear from them about  
13 any confidential materials that are discussed.

14 So all of that will be set forth in an order. Is  
15 there anyone here that has filed something that I was unaware  
16 of and wishes to address it? Okay.

17 I come into each one of these meetings with -- ready  
18 to go and certain that we're going to get through everything.  
19 And I'm trying not to wear out. Okay.

20 Now we're on the motion to stay discovery based on  
21 Fifth Amendment and sovereign immunity. Who -- that is the --  
22 who would like to argue that for the State and for the  
23 individuals? And before you, Ms. Bettenhausen -- let me say  
24 this, which is that there is the current document request  
25 only. And that's all we're talking about right now.

1 But as I understand the law on sovereign immunity,  
2 the State and it's various defendants departments have  
3 asserted sovereign immunity. And they have preserved that in  
4 this case I think very capably and very well.

5 And that said, I believe I'm understanding from the  
6 briefing that was submitted that the State has already  
7 complied with this document request through the state court  
8 litigation. And there would be nothing further for you to  
9 produce other than a certification that you've produced it.  
10 Is that right?

11 MS. BETTENHAUSEN: I think that's correct. I think  
12 that we've agreed with the plaintiffs that we don't need to  
13 reproduce it in this case. So I mean, I guess I just wanted  
14 to say we're a little confused what we were talking about.

15 THE COURT: Yeah.

16 MS. BETTENHAUSEN: You just clarified that now we're  
17 talking about just that document --

18 THE COURT: Just that document request.

19 MS. BETTENHAUSEN: -- production. They issued a  
20 nonparty subpoena to us in state court. And we responded to  
21 it, produced documents. They agree they don't need to be  
22 reproduced here. So I think with regard to at least that one  
23 --

24 THE COURT: Perfect.

25 MS. BETTENHAUSEN: -- issue what I thought was to

1 agenda was the larger issue of originally the Court had  
2 ordered us to do some briefing --

3 THE COURT: I did.

4 MS. BETTENHAUSEN: -- on preliminary discovery, which  
5 I think goes beyond just that -- I think actually the order  
6 was entered before we received that first document request.  
7 So I don't know if you want us to stick to just the document  
8 request now or move on and just -- we haven't actually moved  
9 for a stay either.

10 THE COURT: Yeah.

11 MS. BETTENHAUSEN: I wanted to clarify. We haven't  
12 moved for a stay of discovery. But we do think there are  
13 reasons based on sovereign immunity and Fifth Amendment to  
14 either limit or move forward. Depending on what we're talking  
15 about. We're just talking about, you know, the document  
16 production that's already occurred, we don't have a Fifth  
17 Amendment concern with that because otherwise we wouldn't have  
18 produced all those documents.

19 THE COURT: Right.

20 MS. BETTENHAUSEN: So I think that's pretty clear.  
21 But you know if we're going to start -- it's kind of hard to  
22 talk in the hypothetical. We're talking about depositions,  
23 written interrogatories.

24 THE COURT: Yeah.

25 MS. BETTENHAUSEN: Request for admissions, then yeah

1 , I think those kind of trigger some of the other concerns.

2 And I think this is all well laid out in our briefs.

3 THE COURT: It is.

4 MS. BETTENHAUSEN: But if we want to limit today to  
5 just the document production, I think state defendants and  
6 plaintiffs have worked out a fix.

7 THE COURT: Okay. Mr. Leopold?

8 MR. LEOPOLD: And counsel's correct. I mean, on that  
9 issue, we sort of worked around the problem, if you will, and  
10 we are good to go on that issue. I think the broader issue  
11 and what we're prepared to address today if the Court wants to  
12 hear issues and argument about that -- and what our briefing  
13 sort of dealt with was the issue of sort of moving forward on  
14 beginning some semblance of initial discovery from the various  
15 parties in the government, if you will.

16 THE COURT: The tension that exists is we do not have  
17 the motions to dismiss or answers filed. We have just  
18 extended that timeframe out at least somewhat. There is a  
19 document preservation order so that these documents should not  
20 be destroyed by anyone anywhere.

21 And so I guess I'll turn back to you, Mr. Leopold.  
22 Is there a second round of preliminary discovery that's  
23 limited in scope that the plaintiffs have contemplated?

24 MR. LEOPOLD: Not at this time, your Honor. I think  
25 -- and I take where the Court is coming from very well that at

1 least from the state entities, this first round has been very  
2 helpful. And we're up and doing our work in that regard.

3 Where it really comes into play, however, is the  
4 issue as it relates to the, one, private defendants because  
5 the private defendants' position thus far has been until there  
6 is discovery being allowed to proceed forward, we are  
7 objecting to any discovery as to us, which is a different  
8 animal, if you will.

9 THE COURT: Yeah. And that is absolutely not an  
10 Eleventh Amendment or a Fifth Amendment. And I'm not inclined  
11 to stay portions of -- and I'm not saying for Mr. Campbell and  
12 for the other -- Mr. Mason and the other lawyers here on  
13 behalf of the private defendants. We're not going to have a  
14 trial of just your people. And they're not going to be left  
15 with a verdict of a jury who wants to hold someone  
16 accountable.

17 But we are going to get the process underway to the  
18 extent that it can be efficiently and fairly done with regard  
19 to some initial discovery, so.

20 MR. LEOPOLD: And that's all that we at this point I  
21 think are seeking, number one. And number two, as relates to  
22 some of the issues of third party preservation and production.  
23 And Mr. Novak was going to argue some of these. I don't know  
24 if he wants to add anything to what's been addressed.

25 MR. NOVAK: I think that the --

1 MADAM COURT REPORTER: State your name.

2 MR. NOVAK: Paul Novak on behalf of the plaintiffs.  
3 Just briefly. I think the characterization of the State's  
4 production as far has been adequate. There are outstanding  
5 request for production of similar documents that the City of  
6 Flint has not produced.

7 THE COURT: Okay. Let's stop there. The City of  
8 Flint does not have Eleventh Amendment -- I've got to look at  
9 Mr. Berg or Mr. Klein. Does not have Eleventh Amendment  
10 immunity. They are not -- they do not have Fifth Amendment  
11 immunity. So tell me about the City of Flint responding.

12 MR. BERG: Yes, your Honor. Rick Berg here on behalf  
13 of the City of Flint. I am fully apprised of the Court's  
14 purview with respect to that issue.

15 THE COURT: Okay.

16 MR. BERG: The Court made itself clear in the Guertin  
17 opinion. We respectfully disagree.

18 THE COURT: Okay.

19 MR. BERG: We have included the Eleventh Amendment  
20 argument in our motion to dismiss now pending that was filed  
21 against the consolidated class action complaint. The  
22 consolidated class action complaint motions were filed at the  
23 beginning of December. And so that issue is, again, before  
24 the Court. And so at least insofar as the Court is  
25 sympathetic to the idea that preliminary discovery ordinarily

1 does not begin --

2 THE COURT: Right.

3 MR. BERG: -- during the period of time before an  
4 answer is filed. We offer that the Court should treat the  
5 discovery to us in the same manner.

6 I understand that the Court may be forecasting what  
7 it believes its opinion would be. However, the issue that the  
8 Court decided in Guertin is in front of the Sixth Circuit  
9 Court of Appeals. And to the extent that the same result  
10 obtains here, we have another collateral order doctrine appeal  
11 available to us.

12 And we believe that the argument is, while novel,  
13 strong.

14 THE COURT: You think it's strong?

15 MR. BERG: We believe it's strong insofar as the City  
16 of Flint was commandeered by the State and taken over in a  
17 manner unprecedented in our jurisprudence. And that in spite  
18 of the Court's opinion with respect to that issue in the  
19 Guertin opinion, no Court has thoroughly evaluated the issue.  
20 We also have the issue before the Michigan Court of Appeals  
21 and the Michigan Supreme Court in different cases.

22 THE COURT: Yeah.

23 MR. BERG: Until that issue is addressed, we feel  
24 compelled to take the position that we have the same level of  
25 immunity that the State does and should be afforded the same

1 treatment that the State defendants are treated in regard to  
2 the Court's order on that subject.

3 THE COURT: Okay. I appreciate your argument. I had  
4 an opportunity to consider this issue in a voting case that  
5 was brought forward by Mr. Robert Davis I believe regarding  
6 Highland Park when it had an emergency manager or possibly  
7 Detroit. And so the issues are familiar to me.

8 And in Mr. Davis' case he wanted to recall many of  
9 your clients. And he -- and the State and various election  
10 canvassing officials. So I was faced with this issue then and  
11 in that case determined that emergency manager -- that the  
12 emergency manager was not a state official.

13 But certainly this is a different case. I will read  
14 the briefs carefully and make a separate decision. The fact  
15 is right now there is one limited request. And from  
16 everything that I've read thus far and decided thus far in the  
17 Guertin case, I think that the City of Flint and its emergency  
18 managers are not state -- the State of Michigan.

19 And so I will order that the current outstanding  
20 document request be complied with by the City of Flint and its  
21 emergency managers.

22 MR. BERG: May I make one more point before the Court  
23 certifies that last statement?

24 THE COURT: Please.

25 MR. BERG: And that being that under MCL 767A.8, in

1 the context of a state Attorney General's investigation  
2 seeking documents in connection with a criminal proceeding.

3 THE COURT: Yeah.

4 MR. BERG: They are deemed confidential. And for us  
5 to honor the request which, as I recall, was specifically  
6 geared toward please give us the documents that you gave --

7 THE COURT: Yes.

8 MR. BERG: -- of the investigating agencies. That's  
9 what I recall the requests to be. I believe that we will be  
10 trampling on that statute.

11 THE COURT: Okay.

12 MR. BERG: And would run into problems with Mr. Flood  
13 and Mr. Schuette. And so in response to that -- to fast  
14 forward a moment.

15 THE COURT: Yeah.

16 MR. BERG: It seems to me that to respond to the  
17 Court's order, we would seek their interest in intervening in  
18 that issue or at least need their waiver. They would have to  
19 become involved in that decision before we could honor the  
20 Court's order.

21 THE COURT: Could you do this, Mr. Berg? Because I  
22 think you raise an important point. There were about five  
23 bodies of documents -- that's a way to say it -- in  
24 plaintiffs' request. Could you submit to me briefing about  
25 which ones with the court order -- and so you're not waiving

1 if you believe that the City of Flint at that time was the  
2 State of Michigan and have an argument in that regard.

3           Knowing that there's a court order ordering you to do  
4 this, I think that protects your sovereign immunity argument  
5 because I'm ordering you to do it despite your valid -- or  
6 your claim yet to be determined that you're a sovereign state.

7           There must be some of those documents that you could  
8 produce without violating 767A.8.

9           MR. BERG: Perhaps.

10           THE COURT: Because some of it was just documents  
11 given to the Michigan Department of Civil Rights. Documents  
12 -- yes, Mr. Novak.

13           MR. Novak: I'd like to address that point. The  
14 issue of production of documents that have been produced in a  
15 grand jury investigation comes up all the time in antitrust  
16 criminal cases where there are parallel civil antitrust cases.

17           THE COURT: Okay.

18           MR. NOVAK: It came up I'm positive in the auto parts  
19 cases that Judge Battani has been ruled on. And if the  
20 position is being advocated by some of the defendants today  
21 had been accepted by Judge Battani, she'd still be doing front  
22 end motion to dismiss briefing rather than having resolved  
23 several hundred million dollars of settlements over the last  
24 five years.

25           Back when -- and consequently the reason that we were

1 careful to tailor the requests that we did -- and I'd like to  
2 confirm to the extent that there's any ambiguity about the  
3 request, we are not requesting any producing party to produce  
4 to us documents that they have received as part of a grand  
5 jury or criminal proceeding.

6 THE COURT: Just documents they have produced.

7 MR. NOVAK: Just documents they have produced. I'll  
8 give you an example. The State of Michigan --

9 THE COURT: Well, I understood that. Okay. Go  
10 ahead.

11 MR. NOVAK: The State of Michigan produced to us the  
12 resumé of one of the individual defendants that was in their  
13 possession that they have already produced to Special  
14 Prosecutor Flood. Now, if that individual wanted to go out  
15 and seek new employment, there is nothing that prevents them  
16 from producing their resumé to a potential future employer  
17 because that document has also been produced in the criminal  
18 grand jury investigation.

19 THE COURT: Right.

20 MR. NOVAK: If the document was something that was  
21 within their possession prior to the grand jury investigation  
22 and they are the ones that produced it to the grand jury  
23 investigation, then there is nothing that prohibits them from  
24 producing it to us.

25 THE COURT: I don't think that's what Mr. Berg is

1 arguing. Is that what you're saying?

2 MR. BERG: What I'm arguing, your Honor, is that  
3 under the language of the statute, the statute itself by its  
4 terms suggests that exactly what Mr. Novak says is permitted  
5 is not permitted. There's no subject to the sentence here.  
6 It says these things shall not be divulged. If they've been  
7 produced to the prosecutor, they shall not be divulged.

8 THE COURT: But if my resumé was produced to the  
9 prosecutor and I want to get a job, I can't use my resumé?

10 MR. BERG: I appreciate the practical argument that  
11 he's made. But what the Court has asked us to do I believe is  
12 brief what it is that we can and cannot do.

13 THE COURT: Right. Yeah.

14 MR. BERG: It's the language here that says shall not  
15 be available for public inspection or copy or divulged to any  
16 person.

17 THE COURT: Slow down.

18 MR. BERG: SO that's what it says. Documents  
19 obtained by the prosecuting attorney shall not be divulged to  
20 any person.

21 THE COURT: Okay. Mr. Novak -- and then we're going  
22 to need to take a short break after Mr. Novak. I see Mr.  
23 Pattwell and Mr. Klein.

24 MR. NOVAK: The language that he cited, documents  
25 obtained by the prosecutor, is accurate as to the restriction.

1 I can't go to Special Prosecutor Todd flood and say produce to  
2 me what has been obtained by you. I can, however -- and we  
3 structured it this way. I used to be an assistant attorney  
4 general making precisely these types of document requests in a  
5 variety of antitrust cases around the country where there were  
6 parallel criminal proceedings.

7 And the reason that we restricted it in the manner  
8 that we did -- and by the way, under the interpretation that  
9 Mr. Berg is suggesting, the state itself, when it produced  
10 these documents to us in the state court action, is violating  
11 if one wants to interpret the statute in a manner that Mr.  
12 Berg is interpreting it, has violated the statute.

13 So the Attorney General's Office does not interpret  
14 the statute that way. There is federal law that we have cited  
15 to the Court on the analogous federal issue in federal grand  
16 jury investigations. It's never been interpreted that manner  
17 in those federal cases.

18 And that's why we narrowly contoured the request for  
19 production in the manner that we did. The interpretation that  
20 Mr. Berg is suggesting I think is contrary to what's been done  
21 in a whole host of cases.

22 THE COURT: Okay. All right. And Mr. Novak, even  
23 though I said I read everything -- and I have -- what you're  
24 suggesting and what Mr. Berg are suggesting is you fully  
25 briefed this already?

1 MR. NOVAK: I have not briefed the specific statute  
2 that he referenced.

3 THE COURT: Okay.

4 MR. NOVAK: I did brief the issue under federal rule  
5 6C and the corresponding criminal case. And there are tons of  
6 criminal cases under federal criminal law where this issue has  
7 been addressed.

8 THE COURT: Because I'm just reading it now for the  
9 first time for myself. And it says that these documents shall  
10 not be available for public inspection or copying or divulged  
11 to anyone except as otherwise provided and are not subject to  
12 FOIA, which makes it sound to me that the prosecuting attorney  
13 who obtains this is the person who's a governmental entity who  
14 could be subject to FOIA.

15 So I'm just reading it for the first time and I'm  
16 thinking that it may not pose an obstacle to us. But I  
17 certainly don't want to subject anyone to criminal  
18 prosecution. So I will take a closer look at that.

19 But what I would appreciate is looking at that list  
20 of five groups of documents. And not all of them fall under  
21 this even arguably.

22 MR. BERG: I believe that's correct, your Honor. I  
23 won't rehash the Eleventh Amendment argument and the rights of  
24 governmental entities with immunities to be free from the  
25 burdens of discovery, not just trial. We are in that position

1 as well.

2 THE COURT: Yes. And there's a case -- one of my  
3 cases is on appeal at the Sixth Circuit on the issue of  
4 qualified immunity and we'll learn from them. They may find  
5 that the qualified immunity applies. And that will put us in  
6 a very different position.

7 So but this is a very finite document request that  
8 could potentially facilitate getting work done simultaneously  
9 as the briefing gets taken care of. And so that's why I'm  
10 interested in it.

11 And but no matter what, we must give my court  
12 reporter a break. So what we'll do is take a 10-minute break  
13 until 1:30. And then I should warn everybody that I have a  
14 2:30 criminal case that's set for an argument here in this  
15 courtroom. And I'd like to try to keep that schedule. Or as  
16 close as possible.

17 THE CLERK: All rise. Court is in recess.

18 (Brief Recess)

19 THE CLERK: All rise. Court is back in session.

20 THE COURT: Okay. Please be seated. Mr. Berg, what  
21 I'm going to do at this point is having considered your  
22 argument, having looked at the statute, and during the break  
23 one case, I am going to order that your client respond to the  
24 document request. But I will permit you -- what I was trying  
25 to get at is are there other arguments -- is it just that line

1 that the documents produced to the state attorney general or  
2 special prosecutor?

3 MR. BERG: It is slightly more broad, your Honor, in  
4 this respect. The law in that particular statute and the law  
5 as it may exist under federal law -- and it has not been  
6 briefed. I admit. But I assume that there are similar  
7 confidentiality concerns with the U.S. Attorney's Office and  
8 of course the U.S. Attorney's Office is doing its own  
9 investigation in this case.

10 THE COURT: Right. But no one's subpoenaing their  
11 records.

12 MR. BERG: No. However, the laws --

13 THE COURT: I mean, the records produced to them.  
14 But if you play this out, if I'm an employer and I'm  
15 potentially subject to criminal investigation, you ask for my  
16 payroll record so you can see if I'm engaging -- if I'm  
17 engaging in a crime. I'm still allowed to pay my employees  
18 and use my payroll records and give them out to people. This  
19 can't possibly mean what you're saying it means.

20 MR. BERG: I think I can address the Court's point  
21 and I will credit Mr. Pattwell who discussed this with me  
22 during the break.

23 THE COURT: Okay.

24 MR. BERG: The idea is that by revealing what it is  
25 that has been produced, you are essentially giving testimony

1 or evidence to the fact that -- of what the prosecutors have  
2 asked for.

3 THE COURT: Well, yes. But you're not -- you don't  
4 have -- the City of Flint doesn't have Fifth Amendment  
5 immunity, so.

6 MR. BERG: No, no. I understand. But it does tread  
7 on the policy concerns out of which the laws protecting those  
8 documents arise. You're right. Perhaps a different pair of  
9 shoes should be at the podium today saying please don't let  
10 them do that, your Honor, because it impedes my criminal  
11 prosecution.

12 THE COURT: I see.

13 MR. BERG: However, that policy is nonetheless there  
14 implicit in the statute. And that is that the prosecutor  
15 should not have to worry about what the world gets to see  
16 about what they've asked for. And by producing what we have  
17 produced, it reveals what they asked for.

18 THE COURT: Okay.

19 MR. BERG: And so there is a policy concern there  
20 that the governmental prosecuting agencies should have the  
21 opportunity anyway to speak on. And I also spoke to Mr. Klein  
22 who was involved intimately and is still in the automotive  
23 cases before Judge Battani and the rendition of how that works  
24 by Mr. Novak is not consistent with his understanding and  
25 recollection.

1           There were detailed frequent decisions, surgical  
2 decisions as to what would be produced to when on a case by  
3 case basis with the U.S. Attorney's Office involved in the  
4 decisionmaking process. It was not carte blanche don't worry  
5 about it. It simply was not.

6           If the Court would like to hear greater detail, Mr.  
7 Klein would be happy to do it. But that is the sum and  
8 substance of it.

9           THE COURT: Okay. I appreciate that. And thank you,  
10 Mr. Pattwell, for that contribution as well. Why don't we do  
11 this, which is have the City of Flint submit an additional  
12 brief we'll say within 10 days on your objection. I take it  
13 it's just the documents that you were produced to the U.S.  
14 Attorney's Office and the documents produced in the special  
15 prosecutor.

16           You've got the Eleventh Amendment issues for all of  
17 the documents and things like that. But I'm not -- I don't  
18 find that compelling at this time. But let me look at the  
19 calendar. So we could say by Monday the 22nd a brief would be  
20 filed regarding the application of 767A.8.

21           MR. BERG: And I suppose such other laws as might be  
22 relevant.

23           THE COURT: Yeah.

24           MR. BERG: To the request.

25           THE COURT: Yeah. And then we need to be able to

1 have a response. And we could have the response by February  
2 5th. Mr. Novak?

3 MR. NOVAK: I was simply going to make the  
4 observation that there are instances in cases with which we've  
5 been involved where either the U.S. attorney or a prosecutor  
6 will object to a production being made of documents that have  
7 been requested. They have not done so here.

8 And that's what makes it troubling to have defendants  
9 say, oh, I can't possibly produce these documents because they  
10 would interfere with criminal investigation when the  
11 prosecutors have not made that argument, so, themselves.

12 THE COURT: Okay.

13 MR. NOVAK: There are instances where they elect to  
14 do so and they will sometimes seek to stay the production of  
15 the documents. And they haven't done so.

16 THE COURT: Okay.

17 MR. BERG: I don't know that we can be certain or  
18 aware of the status of this particular issue at this time.

19 THE COURT: Yeah. I guess I would leave that to you  
20 to notify them.

21 MR. BERG: We will do so.

22 THE COURT: I know you get motions to quash. If the  
23 request went to the U.S. Attorney's Office or if it went to  
24 the special prosecutor, they'd automatically be right here.  
25 They'd know about it. So I will trust that those who believe

1 those prosecuting entities might have an objection will let  
2 them know.

3 MR. NOVAK: I should state that orally we have  
4 notified at least Special Prosecutor Flood that had we have  
5 requested each of the different defendants in this action to  
6 produce the documents that they produced.

7 THE COURT: Okay. All right. Good. Now, as I  
8 understand it, the individuals who had Fifth Amendment  
9 concerns, those documents have actually been produced through  
10 the State of Michigan. And it's -- well, I guess I'll look to  
11 the -- maybe Mr. Novak.

12 MR. BERG: Thank you, your Honor.

13 THE COURT: Thank you, Mr. Berg. So you no longer  
14 need -- we don't have to address their Fifth Amendment  
15 concerns insofar as the State of Michigan can tell us -- and  
16 maybe we need a certification -- that they have actually  
17 produced what would be responsive.

18 MR. NOVAK: One of the problems that we are operating  
19 under is that even though we submitted these document requests  
20 in August, we haven't had a response to that document  
21 production request from any of the individual defendants.  
22 Instead they've raised in the October status conference kind  
23 of generic Fifth Amendment concerns. And then have raised  
24 subsequent concerns.

25 For instance today was the first time we heard the

1 criminal prosecutorial statute being referenced. So I can't  
2 tell you today whether any of the individual defendants have  
3 responsive documents in their possession that they, as  
4 individuals, produced to the prosecutors or not. If they did,  
5 they, I believe, would have an obligation to produce them in a  
6 response to request for production.

7 If they don't because their e-mail and other  
8 documents were residing on the State's or the City of Flint's  
9 ESR architectural servers, then it would be those entities  
10 that would produce the documents, not the individuals.

11 In one instance if they have individually produced  
12 documents to the prosecutor, we will expect those to be  
13 produced in response to our request for production. If they  
14 haven't because everything was in the other systems, then it  
15 would be a simple no responsive documents exist and that would  
16 be a sufficient answer to our request for production.

17 THE COURT: Okay. Well, let's start with Ms.  
18 Bettenhausen.

19 MS. BETTENHAUSEN: I think in the agenda or in a  
20 previous order actually on some briefing on this, you're  
21 asking whether a subpoena or something to DEQ or DHHS would be  
22 able to get documents responsive. And what we agreed and  
23 explained to the plaintiffs and can represent is that what  
24 this nonparty subpoena that they sent us in the state court  
25 would have included all those same documents.

1 THE COURT: Right.

2 MS. BETTENHAUSEN: Because these documents we have  
3 been collecting have been -- I mean, it depends on what we  
4 were asked for from all those different entities. But they  
5 are from different state agencies. So that would have been  
6 included in our production.

7 As far as whether a certain individual has produced  
8 some sort of separate document, that's not how we understood  
9 what you were talking about.

10 THE COURT: Yeah. No, it wasn't what I was talking  
11 about then.

12 MS. BETTENHAUSEN: Okay.

13 THE COURT: It's just that when the briefing came  
14 back and I have plaintiffs' corrected supplemental brief  
15 regarding the first request for production where I thought I  
16 understood that your production may have encompassed  
17 production by individuals. But plaintiffs may still be  
18 seeking a certification to that effect one way or another.  
19 Yeah, this is Mr. Novak.

20 MR. NOVAK: Yeah, the certification that we may  
21 request from the State at some point after the immunity issues  
22 and all of those things have been wrestled with.

23 We're fine with the State's production. We basically  
24 discussed it with them. We got a workaround from the subpoena  
25 in state court. And we're fine with what the State has

1 produced in response to our request for production.

2 The only caveat being that at some point in the  
3 future when all the immunity issues get resolved, we may want  
4 a certification from them in this courtroom saying --  
5 certifying that the production is complete.

6 THE COURT: Okay.

7 MR. NOVAK: But we can deal with that down the road  
8 after the immunity issues.

9 Separate and aside from that though, the individual  
10 DEQ defendants, to the extent that they have as individuals  
11 produced their own documents to one of those five governmental  
12 investigative groups, we still want production of those  
13 materials.

14 It may be that no such responsive materials exist and  
15 that the defendants or those individual defendants have been  
16 asserted Fifth Amendment protections over documents for the  
17 last three months that don't exist, which I don't consider a  
18 productive exercise of anyone's time. But it's up to them to  
19 answer that.

20 THE COURT: Okay. Well, let's see who -- Mr.  
21 Barbieri.

22 MR. BARBIERI: Thank you, your Honor. Chuck Barbieri  
23 again on behalf of the MDEQ defendants. We filed several  
24 briefs as the Court is aware.

25 THE COURT: Yes.

1 MR. BARBIERI: In response to the argument presented  
2 by Mr. Novak this afternoon, my concern is that any production  
3 would be infringing upon the Fifth Amendment right against  
4 self-incrimination. And the reason I state that is even the  
5 act of producing can be testimonial.

6 And we cited to your Honor some cases that talk about  
7 if you're acknowledging the existence of documents, the  
8 possession of those documents, and the authentication of those  
9 documents, you are doing something that's adverse to your  
10 interests and would be infringing upon your rights against  
11 self-incrimination.

12 Now, quite frankly, I think probably any of the  
13 records that exist regarding my client probably are in the  
14 state domain. That would be my guess. But I have not asked  
15 and I do not know for a fact whether my clients have ever  
16 produced anything for any other investigations.

17 And the reason I don't know, I haven't been retained  
18 to represent those clients in those other situations. So I  
19 don't know whether they have produced anything, your Honor.  
20 Because I am not privy and involved. And my concern is they'd  
21 probably tell me that's none of your business, Mr. Barbieri,  
22 because I'm working with counsel in a different circumstance.  
23 And quite frankly, I don't think I should be put at that peril  
24 or my client should be put at that peril in trying to produce  
25 things --

1 THE COURT: But let's go back to the step to whether  
2 the act of production is testimonial.

3 MR. BARBIERI: Yes. It is now. It is now. If  
4 you're asking me to do it, it is now.

5 THE COURT: Well, I think that there's a bit more of  
6 a subtle gloss that the courts have put on it. Whether an act  
7 of production is testimonial is evaluated on a spectrum from  
8 testimony to surrender. And non testimonial is those -- could  
9 be the production of documents whose existence the requesting  
10 party knew to be a foregone conclusion.

11 Now this seems like it could be a foregone  
12 conclusion. We sort of know -- it seems like we know  
13 generally what these documents are.

14 MR. BARBIERI: Your Honor, when my clients were asked  
15 to leave the MDEQ, they were to leave everything they had,  
16 which I understand to be true. And I don't know what happened  
17 to those after that point in time except to the extent that we  
18 now find them in FMLA databases.

19 THE COURT: Yeah.

20 MR. BARBIERI: Or it's been produced in this separate  
21 domain that Ms. Bettenhausen has talked about. But beyond  
22 that, your Honor, I don't know.

23 THE COURT: So we've got two issues. Number one,  
24 there could be absolutely nothing. And so we need to -- if  
25 that's the case, that resolves this. But this Hubbell case,

1 United States v Hubbell, 530 U.S. Supreme Court from 2000 says  
2 that a document production is testimonial when the producing  
3 party must, quote, make extensive use of the contents of his  
4 own mind in identifying the documents responsive to the  
5 request. And it sounds like there won't be any extensive use  
6 of anyone's mind to do this.

7 MR. BARBIERI: You make light of that, your Honor.  
8 But I think with a Fifth Amendment right we shouldn't make  
9 light of --

10 THE COURT: Well, we have a lot more to go on the  
11 Fifth Amendment if we're going to get deeply into it.

12 MR. BARBIERI: I think Mr. Novak is simply on a  
13 fishing expedition. He got the documents from the state  
14 domain. And to persist in this effort, presenting my client  
15 in a conflict that doesn't need to be presented.

16 THE COURT: Then let's do this. Because he doesn't  
17 know what he doesn't know. That's what he's telling me. Is I  
18 don't know if these individuals produced things separate from  
19 the State production. So can we just take an incremental step  
20 of finding out do such documents exist? Now that has to be  
21 something your clients will tell you.

22 MR. BARBIERI: I would assume. And as long as I  
23 don't view it as being an infringement on their right against  
24 self-incrimination, we'll respond to that, your Honor.

25 THE COURT: Okay. Let's do that. And so how much

1 time do you need to ask them if they produced anything -- once  
2 they were escorted out of the office, whatever, did they  
3 produce anything separate to these investigative bodies.

4 MR. BARBIERI: I would ask for a couple of weeks,  
5 your Honor.

6 THE COURT: How many clients do you have?

7 MR. BARBIERI: I have three clients, your Honor. And  
8 I will be gone for a few days.

9 THE COURT: Okay. Let me look at the calendar. Can  
10 you do it by Monday the 22nd?

11 MR. BARBIERI: Could we have until the end of that  
12 week, your Honor?

13 THE COURT: The 26th.

14 MR. BARBIERI: Yes.

15 THE COURT: Okay. Mr. Novak.

16 MR. NOVAK: Just to address the testimonial point.

17 THE COURT: Yeah.

18 MR. NOVAK: To the extent that there was any  
19 testimonial self-incrimination, that was waived when those  
20 documents were produced by that individual --

21 THE COURT: Right.

22 MR. NOVAK: -- to the prosecuting attorney that  
23 requested them. And why Fifth Amendment self-incrimination  
24 rights are being asserted here for documents that they have  
25 already produced to the extent that they exist in criminal

1 prosecutorial investigations is beyond me.

2 THE COURT: Well, perhaps the State special  
3 prosecutor was more expansive than the U.S. Attorney's Office  
4 and then once these documents -- I don't know. But we don't  
5 have to get into it yet. I'm learning in this job that if I  
6 can do something based on a narrow avenue, I'm going to do  
7 that.

8 MR. NOVAK: I'm fine with simply making a  
9 determination as to whether the documents exist.

10 THE COURT: Let's just find out if any other  
11 documents -- also by -- did we say the 26th? So what you'll  
12 let me know by the 26th -- and that goes to everybody who is  
13 here asserting on behalf of individual clients the Fifth  
14 Amendment in response to this request.

15 That by the 26th you'll let me know if any documents  
16 exist that were produced that are not already -- that were not  
17 produced by the State of Michigan or the Michigan Department  
18 of Environmental Quality. And you -- so you'll let me know if  
19 there were any that were not produced to them by them. And  
20 then you'll certify that. If there were none, you'll certify  
21 it and submit it to the plaintiffs' counsel.

22 MR. BARBIERI: Unless there's some other issue I  
23 don't see, I plan on doing that, your Honor.

24 THE COURT: Okay.

25 MR. NOVAK: If I could -- because I think the way you

1 phrased it actually bordered more on the testimonial argument  
2 that --

3 THE COURT: Okay. Phrase it another way for me.

4 MR. NOVAK: Documents that they individually  
5 produced.

6 THE COURT: Yes.

7 MR. NOVAK: To any of the five --

8 MADAM COURT REPORTER: I can't hear that.

9 MR. BARBIERI: That is the way I was interpreting  
10 your comment.

11 THE COURT: Okay. Pattwell.

12 MR. PATTWELL: Mike Pattwell on behalf of Dan Wyant  
13 and Brad Wurfel. Your Honor, as we've stated in our briefing  
14 before, neither one of my clients presently intends to assert  
15 the Fifth. So the way that you phrase that wouldn't, you  
16 know, necessarily -- but you know, I do believe that --

17 THE COURT: We'll just phrase it all individual -- so  
18 are they -- do you know if they have responsive documents?

19 MR. PATTWELL: Yes.

20 THE COURT: That are separate from what was produced  
21 by the State?

22 MR. PATTWELL: Well, that I don't know. The State --  
23 I don't know exactly what the State produced. Obviously both  
24 of Mr. Wurfel and Mr. Wyant were state employees. And  
25 presumably all of their documents would have been, you know,

1 within the confines of what the State produced. But I've got  
2 no way to go through hundreds and hundreds of thousands of  
3 documents to determine that.

4 THE COURT: Okay.

5 MR. PATTWELL: But what I do know and I can represent  
6 is I do believe that upon an order of confidentiality to  
7 United States Congress, one of my clients did produce  
8 documents that were in his possession and control. And now in  
9 addition to the qualified immunity and sovereign immunity,  
10 which if I were to restate our argument which I believe the  
11 Court's well aware, I'd sound like a broken record.

12 Outside of that issue, there was the initial briefing  
13 request which was simply whether or not we thought that -- and  
14 this is what I think drove this entire discussion. Whether or  
15 not by complying with the request at this stage we will be  
16 waiving our immunity.

17 THE COURT: Right.

18 MR. PATTWELL: I think the caselaw on that point is  
19 pretty clear. We've evidenced no intent to waive our  
20 sovereign immunity or qualified immunity.

21 THE COURT: Right.

22 MR. PATTWELL: We simply request that if the Court is  
23 going to disregard our argument with respect to determining  
24 immunity before entering into discovery on this small issue,  
25 that the Court would simply state that there is no waiver by

1 complying with the Court order.

2 THE COURT: Absolutely.

3 MR. PATTWELL: And then the secondary issue, which I  
4 don't believe we necessarily have a dog in the fight is simply  
5 whether when the United States Congress tells you do not  
6 disclose to third parties the documents that you're producing  
7 to us and then a federal judge is telling us you must disclose  
8 those to plaintiff, who do we follow?

9 Same with respect to Todd Flood. We've not reached  
10 out to Congress. We've not reached out to Todd Flood's  
11 office. But maybe that's the simple answer, is that we reach  
12 out to both of those entities and say do we have permission to  
13 turn these documents over pursuant to court order?

14 THE COURT: Pursuant to court order.

15 MR. PATTWELL: And I would suspect that the answer is  
16 yes but we haven't done that yet.

17 THE COURT: Okay. Let's find out.

18 MR. NOVAK: I'd simply note that I don't believe our  
19 document request requested any documents individuals may have  
20 produced to Congress.

21 THE COURT: Oh, no it didn't have Congress. That's  
22 right.

23 MR. NOVAK: It gives me an idea for the next request.  
24 But as -- well, that's it for now.

25 THE COURT: All right. Thank you.

1 MR. GRASHOFF: Your Honor?

2 THE COURT: Yes.

3 MR. GRASHOFF: A lot --

4 THE COURT: Mr. Grashoff, you'll need to state your  
5 name.

6 MR. GRASHOFF: Phil Grashoff again. Can we have a  
7 clarification of exactly what you are ordering us to do? I  
8 have heard two or three different iterations.

9 THE COURT: Well, the clarification will come when I  
10 sit down and thoughtfully put it together.

11 MR. GRASHOFF: Fine.

12 THE COURT: But generally speaking, there will be an  
13 order for the individual defendants to inform the Court as to  
14 whether they produced documents themselves separately from the  
15 State of Michigan to either of the investigative bodies  
16 currently at issue in the first request for production. And  
17 if they can say here and now that they did not, then they  
18 would be ordered to certify that.

19 MR. GRASHOFF: Thank you.

20 THE COURT: Okay. You're still standing up.

21 MR. NOVAK: There are still discovery -- the same  
22 discovery request that has been made to the engineering  
23 defendants --

24 THE COURT: Oh. Well, they --

25 MR. NOVAK: For documents they have produced to the

1 | investigative entities.

2 | MR. CAMPBELL: May I, Judge?

3 | THE COURT: Yes. And Mr. Campbell, does this go to  
4 | your requests to stay and things of --

5 | MR. CAMPBELL: I don't believe we made a request to  
6 | stay, your Honor.

7 | THE COURT: Okay.

8 | MR. CAMPBELL: I hope not.

9 | THE COURT: No. But I think there was -- okay. Go  
10 | ahead.

11 | MR. CAMPBELL: It's James Campbell. And I represent  
12 | the three Veolia North America entities. Your Honor, with  
13 | respect to the document requests that were served to my client  
14 | or clients, I think we need and I would request your Honor to  
15 | go back to when that was done. It was done at a time when we  
16 | were addressing collectively whether or not we were going to  
17 | engage in some form of preliminary discovery.

18 | THE COURT: Right.

19 | MR. CAMPBELL: And you may recall that many of the  
20 | defendants, my clients as well, objected to the service of  
21 | these document requests because we felt that it was kind of  
22 | jumping the gun.

23 | THE COURT: Yeah.

24 | MR. CAMPBELL: And getting ahead of the process. So  
25 | that's the context that we're dealing with these requests in.

1 And now it seems like it's morphed to, well, everyone knew  
2 they were coming and the like.

3 THE COURT: Well I can't recall. I don't have the  
4 transcripts and so on. But I do recall the serious objections  
5 to the plaintiffs having sent this out without authority from  
6 the Court to do so at that posture.

7 MR. CAMPBELL: That's where I'm starting from, your  
8 Honor.

9 THE COURT: Okay.

10 MR. CAMPBELL: And what we did was we responded to  
11 the document request and we objected to them. And we stated  
12 our objections as we would if this was an ordinary civil case.

13 THE COURT: Yeah.

14 MR. CAMPBELL: So we have not heard anything from the  
15 plaintiffs in terms of a meet and confer on that. But what I  
16 would say to this is --

17 THE COURT: Well, I think we've met.

18 MR. CAMPBELL: We have, Judge.

19 THE COURT: Yeah. And I think what happened when you  
20 raised those objections, I thought that was helpful to my  
21 understanding of where things were. But then we went beyond  
22 that and I said sitting here that it is time to do this  
23 limited discovery. That I guess I didn't clearly rule on  
24 that. But I -- we've now moved past that.

25 MR. CAMPBELL: I'm getting that sense, Judge. But

1 honestly I don't remember you saying that. I don't recall  
2 that coming from your Honor. But the way that we were  
3 presenting this, Judge, is -- and I stand corrected obviously  
4 if it's in the transcript.

5 But looking at this agenda the way it was drafted  
6 with Fifth Amendment issues and the like and immunity issues,  
7 I did not understand this particular agenda item to address  
8 this. But in any case, we did make a filing on it. And what  
9 our proposal is not -- this is what we've been trying to avoid  
10 from the outset at least from our prospect that these requests  
11 were filed. And now we have this one limited area where the  
12 discovery process is now burdened on the defendants. My  
13 client included.

14 I suggest, your Honor, that if we're going to go down  
15 this road, that your Honor consider a more fulsome or both  
16 sided, plaintiffs included, move it along strategy. We have  
17 fact sheets. We've proposed right from the get-go when your  
18 Honor asked for a discovery plan exchange of FOIA requests as  
19 documents that support claims and defenses in the nature of  
20 Rule 26 automatic disclosure and then finally the use of non  
21 documents only third party subpoenas.

22 THE COURT: Right.

23 MR. CAMPBELL: So that we can move the process  
24 forward. If those three things were to go forth along with  
25 these document requests, we certainly would be moving it

1 forward. But if your Honor backs out of where these requests  
2 came from, it's all one sided. And it's not fair under the  
3 circumstances.

4 THE COURT: Well, we have approved a fact sheet. We  
5 don't have a timeframe or anything of that nature yet. So  
6 what I hear you saying is that if there's going to be  
7 preliminary discovery, then let there be preliminary limited  
8 discovery and we'll define what it is. Is that what you're  
9 saying?

10 MR. CAMPBELL: Correct. Yes, your Honor.

11 THE COURT: And it will go to both sides.

12 MR. CAMPBELL: Yes.

13 THE COURT: And a February 20th status conference.  
14 And if you would like to brief what the discovery is that  
15 you're seeking, then I would be very happy to address it at  
16 that conference.

17 MR. CAMPBELL: Thank you, your Honor. I didn't  
18 mention it to you this morning.

19 THE COURT: That's okay.

20 MR. CAMPBELL: But I may be in trial in Philadelphia.  
21 Your condolences are accepted.

22 THE COURT: I am sorry. We had a trial here this  
23 week. And it started and it finished in one week -- I mean,  
24 in two days. And it felt so productive to start something and  
25 to finish something. And the jury had a good time. It all

1 went really well, so.

2 MR. CAMPBELL: So that's how I request your Honor  
3 address this issue, at least with respect to our client that  
4 it might be taken out of the context in which it was done and  
5 give -- it's a mutual issue.

6 THE COURT: Okay. Absolutely. And you have, I'm  
7 sure, other folks at your firm who will be here when you're in  
8 that trial.

9 MR. CAMPBELL: They will.

10 THE COURT: Okay. So why don't we have that issue on  
11 the agenda for the next conference. And when I set the  
12 schedule for submitting agenda items -- do you want briefing  
13 on what it is you're seeking and do the plaintiffs want to  
14 respond or --

15 MR. CAMPBELL: I think actually, your Honor, it's  
16 been in our -- the discovery plan that you suggested and in  
17 the brief regarding Fifth Amendment and immunity issues that  
18 we filed, we reiterated the same approach again.

19 THE COURT: Yeah.

20 MR. CAMPBELL: And we actually submitted to your  
21 Honor with that brief and proposed order.

22 THE COURT: So I know what it is. The plaintiffs  
23 know what it is.

24 MR. CAMPBELL: Yes.

25 THE COURT: And so we can put it on the agenda. Do

1 the -- Mr. Novak, do you feel like you've responded adequately  
2 to it?

3 MR. NOVAK: The only thing that I'm not understanding  
4 is IS there an obligation at this point or what is the status  
5 of our outstanding request?

6 THE COURT: You don't -- have you served this  
7 discovery?

8 MR. CAMPBELL: We have not served this discovery.

9 THE COURT: Right.

10 MR. CAMPBELL: Respecting your Honor --

11 THE COURT: Yes.

12 MR. CAMPBELL: Our view of what your Honor was  
13 saying.

14 THE COURT: Yes.

15 MR. CAMPBELL: That we're holding.

16 THE COURT: Yes.

17 MR. CAMPBELL: But what we did do in terms of  
18 responding and serving is the objection to those document  
19 requests.

20 THE COURT: Okay. All right. So no, there's no --  
21 the clock isn't ticking on a response until we decide the  
22 scope of it.

23 MR. SHKOLNIK: Your Honor, on behalf of the  
24 individual plaintiffs if I can just be heard on one issue. In  
25 order not to be redundant and cause additional briefing, the

1 individual plaintiffs did not serve a mirror set of discovery  
2 demands. And all the references are, quote, the class action  
3 evidence and the class action discovery.

4 We try not to duplicate efforts here. We just want  
5 the record, if it's okay with the Court, that whatever this  
6 involves deals across the board, class and individuals, so  
7 that we don't have to engage in another round of discovery  
8 demands. We were simply going to copy what was done. But it  
9 seems more of a waste of work.

10 THE COURT: I feel as if we discussed that before.

11 MR. SHKOLNIK: I think we did. But I just want to --  
12 we keep seeing it being referred to as class only.

13 THE COURT: Okay.

14 MR. SHKOLNIK: And I'm always concerned.

15 THE COURT: All right. Your concern is noted and it  
16 will apply to all of the cases.

17 MR. SHKOLNIK: Thank you, your Honor.

18 THE COURT: Mr. Novak?

19 MR. NOVAK: I don't think there's anything else.

20 There are -- there was additionally briefing on the issue of  
21 depositions. I don't think we propose currently to take the  
22 depositions --

23 THE COURT: Good.

24 MR. NOVAK: -- of any of the criminally charged  
25 individuals.

1 THE COURT: Okay.

2 MR. NOVAK: The state defendants who are not  
3 criminally charged also briefed their Fifth Amendment issues.  
4 And briefly with respect to that -- and that is Andy Dillon is  
5 one defendant. Govern Snyder is one. There are a couple of  
6 other defendants who have not -- who are individual defendants  
7 who have not been criminally charged who have raised a more  
8 generic Fifth Amendment issue.

9 We attached to our brief in response to that a  
10 protocol. When I was at the Attorney General's Office 17  
11 years ago, we developed a protocol for dealing with  
12 depositions of individuals who were not criminally charged but  
13 may --

14 THE COURT: Yeah.

15 MR. NOVAK: -- be willing to address a Fifth  
16 Amendment or assert a Fifth Amendment privilege. And that  
17 protocol was developed in the vitamin litigation. The reason  
18 I bring it up is in the Suboxone litigation that's currently  
19 pending in the Eastern District of Pennsylvania, the State of  
20 Michigan who is a plaintiff in that case in attempting to  
21 obtain discovery including depositions from people who have  
22 not been criminally charged but may want to assert a Fifth  
23 Amendment privilege, when the shoe is on the other foot and  
24 the State of Michigan as a plaintiff wanted to address that  
25 issue, rather than saying, oh, discovery or depositions should

1 be stayed as to those individuals, they put forward the  
2 vitamins protocol that we negotiated when I was in the office  
3 17 years ago.

4 And I submit that to the Court as an appropriate  
5 method of addressing depositions for individual defendants who  
6 have not been criminally charged here. Rather than saying for  
7 such an individual, oh, Fifth Amendment we can't depose them  
8 at all. The vitamins protocol set out a number of steps that  
9 would be taken in that regard.

10 THE COURT: Did you file that protocol?

11 MR. NOVAK: I filed the protocol. And I also cited  
12 the Suboxone case --

13 THE COURT: Yeah.

14 MR. NOVAK: -- where the state actually proposed use  
15 of the same protocol.

16 THE COURT: I heard you.

17 MR. NOVAK: But I didn't file the right order when I  
18 was referencing the Suboxone.

19 I've given it to opposing counsel.

20 THE COURT: Okay.

21 MR. NOVAK: If I could approach the bench just to  
22 provide a copy of that?

23 MR. MASON: Wayne Mason on behalf of LAN LAD. As the  
24 Court pointed out incrementally, if we can move this forward  
25 then that's great. But I think the dialogue of what Mr. Novak

1 was just saying is clearly premature. It's like a bellwether  
2 trial discussion we had earlier.

3 The discovery is of depositions and the like is not  
4 appropriate as yet. We need to get this other issue resolved.  
5 And in fairness, I think I have proven to the Court that when  
6 it is appropriate, that I will not oppose depositions.  
7 Yesterday our corporate representative was deposed on the  
8 jurisdictional issue.

9 THE COURT: Right.

10 MR. MASON: And so I told the Court that I would --  
11 we would do that.

12 THE COURT: But that's very different. You're hoping  
13 to get him out altogether.

14 MR. MASON: I agree. But my point is we're not  
15 trying to --

16 THE COURT: To not do that deposition would prolong  
17 the litigation for him.

18 MR. MASON: Understand. Understand. But the reality  
19 is at the appropriate time we should have this discussion.  
20 Whether there are Fifth Amendment issues or not is premature.

21 THE COURT: Okay.

22 MS. BETTENHAUSEN: Just briefly.

23 THE COURT: Yes.

24 MS. BETTENHAUSEN: I echo we think it's also  
25 premature to start any depositions. Beyond this Fifth

1 Amendment issues, we've got also our qualified immunity  
2 defenses.

3 THE COURT: Yes.

4 MS. BETTENHAUSEN: All of that. And like in the  
5 Guertin case, if we go forward with all of this, you know, I  
6 don't know exactly what I'm talking about or I'm talking about  
7 hypothetical depositions things like that. It's kind of hard  
8 to put it into context. But if we have another order entered  
9 on the qualified immunity that's taken up to appeal.

10 And regardless of which way, you know, the Court  
11 decides on the qualified immunity issue it's almost, you know,  
12 a foregone conclusion that's going to be appealed. Then we  
13 don't have jurisdiction in this court again just like in the  
14 Guertin case and you have to stay proceedings with respect to  
15 those individuals.

16 So I think that could just cause a -- open a whole  
17 new can of worms. So I think, you know, it just depends on  
18 what we're talking about in terms of what the preliminary  
19 discovery issues are.

20 THE COURT: Right.

21 MS. BETTENHAUSEN: So it's not just Fifth Amendment.  
22 It goes way beyond that.

23 THE COURT: Oh, it does. And so here's the thing, is  
24 what the plaintiffs have currently requested is this one set  
25 of documents. And that was approved. And now what I

1 understand from Mr. Campbell is that there is a pending  
2 request by the defendants to get some discovery. And what's  
3 good for one side is good for another side kind of argument,  
4 that it shouldn't be one sided.

5 So what I'm simply trying to say now is I don't  
6 intend to start ordering full out discovery in this case  
7 whatsoever at this point. But I do want to take care of some  
8 early preliminary issues that can be taken care of.

9 And so I will consider at the February 20th status  
10 conference what that might entail that the defendants have  
11 already requested. And I'll take a look at it and it can be  
12 included in both sides -- all sides proposed agenda items for  
13 the next conference.

14 MR. LEOPOLD: Just for clarification.

15 THE COURT: Yeah.

16 MR. LEOPOLD: Is it the Court's ruling at this point  
17 that --

18 THE COURT: Oh, yes.

19 MR. LEOPOLD: -- that the private defendants --

20 THE COURT: It is.

21 MR. LEOPOLD: -- now have to respond to our documents  
22 irrespective of their objections? And if so, could we have a  
23 date certain by which that should be done?

24 THE COURT: Thank you. That's where I was hoping to  
25 go next. It is. And so Mr. Campbell and Mr. Mason, that is

1 where this issue evolved to, which is that I accepted at some  
2 point during one of the earlier status conferences that this  
3 discovery request was going to go forward. And that's why  
4 we've been doing all of this work.

5 I'm not precluding discovery that the defendants have  
6 requested and I'll address it by the February 20th. So how  
7 much time do you need to provide this? Starting with  
8 Campbell.

9 MR. CAMPBELL: Your Honor, I would request the 30  
10 days.

11 THE COURT: Mason, can you agree?

12 Mr. Mason: That would be fine, your Honor.

13 THE COURT: So 30 days from today. Mr. Goodman.

14 MR. GOODMAN: Your Honor, Bill Goodman. I know the  
15 Court put a pin on the issue of the status of the Marble case.  
16 But with regard to the availability of discovery in terms of  
17 private defendants in this action or these actions, we would  
18 ask that that be -- that that apply as well to McLaren  
19 Hospital which, as I said, there's a question mark with regard  
20 to the status of those cases, so.

21 THE COURT: Are you asking to get the discovery in  
22 the cases while you request to be on a separate track?

23 MR. GOODMAN: No. What I'm asking is that the  
24 Court's ruling, if it be that, with regard to the  
25 availability of discovery from private defendants in this case

1 be equally applicable to McLaren and the Marble case?

2 THE COURT: All right. Well, what I'll have to do  
3 is, first, figure out where the Marble case is going to go.  
4 And once that's done, if it's not going to be with all the  
5 rest of the cases, then we'll have to address it in our own  
6 process.

7 MR. GOODMAN: Okay. Thank you, very much.

8 THE COURT: Thank you. Okay. We've got about five  
9 or so more minutes here. Okay. So the LAN motion docket  
10 entry 204, the LAN motion to quash, I think I have just  
11 addressed that. And so that motion is denied. That was to  
12 quash this document production by LAN.

13 And 202 by MDEQ, I'm going to look at those motions  
14 again. But I think that we've just addressed those. Okay.

15 So then we have motion to strike certain allegations  
16 in the consolidated class action complaint brought by Liane  
17 Shekter Smith and Steven Busch. And in our -- so go ahead.

18 MR. MORGAN: Your Honor, Thaddeus Morgan on behalf of  
19 Liane Shekter Smith. And for purposes of this motion, I'm  
20 also arguing on behalf of Stephen Busch.

21 THE COURT: Okay.

22 MR. MORGAN: Is the Court okay if I argue from here?

23 THE COURT: Yes.

24 MADAM COURT REPORTER: Can you come to the microphone  
25 actually?

1 THE COURT: Please come to the microphone. I'm just  
2 trying to save time, but we do need a clear record of all  
3 this, so.

4 MR. MORGAN: I understand, your Honor. For the  
5 record, Thaddeus Morgan on behalf of Liane Shekter Smith. I  
6 was simply trying to save time as well because I could tell  
7 from the Court's agenda, it appears as though the Court was  
8 leaning towards ordering a change to the allegations that are  
9 at issue.

10 And put simply, what happened was this. When the  
11 amended consolidated class action complaint was filed, it  
12 included allegations saying Liane Shekter Smith and Stephen  
13 Busch were charged with involuntary manslaughter, which is  
14 absolutely incorrect and untrue. And we provided plaintiffs'  
15 counsel with proof of that fact.

16 THE COURT: I understand that. I've read everything.

17 MR. MORGAN: Yeah, and asked that they strike it.  
18 Instead they came back in their papers and said, well, we're  
19 not going to strike it --

20 THE COURT: Slow down. I know we don't have a lot of  
21 time, but I'd rather get the record.

22 MR. MORGAN: So instead of agreeing to our request to  
23 strike it, the proposal, as I see it in the response papers,  
24 is that we're just going to change the allegations to say they  
25 face involuntary manslaughter charges, which to me is a

1 distinction without a difference.

2 And so we're asking that the entirety of the  
3 allegations be stricken. Rule 12 is very clear that if the  
4 allegations are prejudicial and not relevant, that they should  
5 be taken out of the pleading. And there's no argument that  
6 I've seen that those allegations, which are false, patently  
7 false, make a fact of consequence somehow more or less likely  
8 in this case and they're certainly prejudicial to my clients.  
9 So I'm asking that they be stricken.

10 THE COURT: Okay. And as of today, we checked as of  
11 this morning, they are not facing, as of this morning,  
12 involuntary manslaughter charges. But it was again in the  
13 news that they may face it.

14 MR. MORGAN: It was inaccurately reported.

15 THE COURT: Oh, okay. Well, I'm not surprised about  
16 that. So I think it's very reasonable to have that deleted  
17 from the complaint. Mr. Leopold?

18 MR. LEOPOLD: Yes, your Honor. We have no strong  
19 objection to that. Only that to be entirely stricken is where  
20 our concern was. We certainly want to be accurate in our  
21 papers. So if the Court wants us to redact that total  
22 sentence out, we can do that. But I'm not sure that that  
23 would be appropriate if there was other language. Perhaps we  
24 can consult with counsel and have an agreement of what we can  
25 put in there, may be a more appropriate way to handle it.

1 THE COURT: Yeah. That seems fair. Because there  
2 certainly has been -- someone is talking about involuntary  
3 manslaughter charges for these two individuals. And I don't  
4 know enough about how the news got it wrong and so on. But if  
5 the allegation reads it has been reported or -- I don't know.  
6 I don't want to harm your clients in any way because these are  
7 incredibly serious. Well, that just says it all. They're  
8 incredibly serious charges that shouldn't be bandied about  
9 without justification.

10 So I guess I would just order that plaintiffs review  
11 the current state of whatever these charges are likely to be  
12 filed. And whatever's accurate going to this complaint.

13 MR. LEOPOLD: And we have -- I'm sorry.

14 MR. MORGAN: So to be clear, you're ordering that the  
15 allegations as they currently exist be stricken?

16 THE COURT: Currently existed.

17 MR. MORGAN: And then we will meet and confer --

18 THE COURT: Yes.

19 MR. MORGAN: -- to see if we agree upon a language.  
20 And if we can't, then --

21 THE COURT: Exactly.

22 MR. LEOPOLD: And we certainly understand the  
23 concern. I'm sure if we can't come to an agreement at the end  
24 of the day in order to protect the interest of the defendant,  
25 we will redact that information in its entirety.

1 THE COURT: Perfect.

2 MR. LEOPOLD: We understand.

3 THE COURT: Okay.

4 MR. RUSEK: Your Honor, if I can be briefly heard on  
5 behalf of Mr. Croft.

6 THE COURT: Yes.

7 MR. RUSEK: Alexander Rusek on behalf of Mr. Croft,  
8 former director of public works in the City of Flint. He's  
9 one of the individual City defendants. There's been a notice  
10 of intent to seek a bindover of manslaughter charges in the  
11 state criminal cases. It's not actually contained within a  
12 complaint.

13 So I'm asking for the same relief as the MDEQ  
14 defendants. The same, I believe, would apply for Mr. Early.  
15 He has also not been charged with manslaughter even though the  
16 Office of Special Counsel for the Attorney General has  
17 published some information about seeking those charges. None  
18 have actually been brought against either of those gentlemen.

19 And recently Mr. Johnson, another former city  
20 attorney, he -- or excuse me, city employee. He pled under a  
21 proffer agreement. So I believe that the allegations against  
22 him in the complaint would also be incorrect at this time.  
23 And I believe that his attorney was going to address that  
24 issue. But those would also need to be corrected in light of  
25 current circumstances.

1 THE COURT: Okay.

2 MR. LEOPOLD: It was brought to my attention also one  
3 of the reasons how this sort of got started and in the  
4 complaint was, if I'm understanding correctly, the Court had  
5 taken judicial notice in the Guertin matter of a lot of these  
6 issues.

7 THE COURT: Right.

8 MR. LEOPOLD: So that's how it sort of got  
9 appropriately, respectfully, into our consolidated master  
10 complaint. So again, I understand the concern whether or not  
11 the Court -- you know, I guess some of the defendants say the  
12 Court couldn't take judicial notice, but the Court did in its  
13 order. We'll just need to work with everybody and have to  
14 address these issues.

15 THE COURT: Okay. Thank you. Okay. We're getting  
16 very close.

17 MR. LEOPOLD: Your Honor, there is one other issue.

18 THE COURT: Oh.

19 MR. LEOPOLD: I don't know if the Court had something  
20 else in the agenda. But there was one other important issue I  
21 think can be done quickly, if appropriate.

22 THE COURT: What is that?

23 MR. LEOPOLD: That is the jurisdictional issue that  
24 we had worked out with LAN. And we had the deposition  
25 yesterday.

1 THE COURT: Yes.

2 MR. LEOPOLD: As Mr. Mason had indicated. We also  
3 have a similar issue as it relates to the parent french  
4 company of Veolia. And we would like to do very limited and  
5 work with Mr. Campbell on a similar type of very truncated  
6 discovery to get some documents, a very concise deposition  
7 like occurred yesterday. But related to his client Veolia  
8 USA.

9 Because we do not believe we can go after and take a  
10 deposition or get documents from the foreign french company at  
11 this time without going through The Hague and creating a lot  
12 of other issues. But we do think it's appropriate to take at  
13 least a deposition narrow in scope of Mr. Campbell's client as  
14 relates only to the jurisdictional issue in relationship of  
15 the parent french company.

16 MR. CAMPBELL: Your Honor, I don't represent the  
17 french company so I can't speak on behalf of it.

18 MADAM COURT REPORTER: State your name.

19 MR. CAMPBELL: James Campbell. I represent the three  
20 U.S. Veolia.

21 MR. LEOPOLD: And to be clear, that's why I phrased  
22 it the way I did. We are not seeking anything from the french  
23 company. So the fact that Mr. Campbell doesn't represent the  
24 french company is a moot issue. He represents the U.S.  
25 entity, who is under the guise of the french company. We want

1 to ask the U.S. entity, his client --

2 THE COURT: To produce --

3 MR. LEOPOLD: -- to produce what they have. And it  
4 will be tailored discovery between the relationship of the two  
5 companies and to ask appropriate questions of the U.S.  
6 employee or representative the relationship to the french  
7 company.

8 THE COURT: I see.

9 MR. CAMPBELL: Your Honor, this wasn't on the agenda  
10 that your Honor sent out.

11 THE COURT: No.

12 MR. CAMPBELL: And I would request at a minimum that  
13 if it's going to be an issue that we put it on to the February  
14 20th agenda.

15 THE COURT: Yeah. There was a catchall prepared to  
16 discuss any other outstanding issues. But you're right, it  
17 wasn't identified.

18 MR. LEOPOLD: And that's fine, your Honor. But just  
19 so the record is clear, not only was it part of your agenda  
20 but these are conversations I've already had with Mr.  
21 Campbell. So it's not as if this is something brand new not  
22 come up before. But we're happy to address it on the 20th.

23 THE COURT: Okay. We'll put this on the agenda for  
24 the 20th. But Mr. Campbell, are you suggesting that your  
25 client wants to see this in a written motion to the Court?

1 MR. CAMPBELL: I would think so, Judge, yes. So we  
2 have a full -- you know, I can listen -- I can take a phone  
3 call from Mr. Leopold. Always happy to do that. Or answer an  
4 e-mail from Mr. Leopold.

5 But if we're going to address this issue, I mean to  
6 take deposition discovery from my client about a nonparty to  
7 the litigation, to my knowledge anyway, that should be the  
8 subject of some formal briefing, an opportunity for my clients  
9 to address what Mr. Leopold would like to do in these  
10 particular circumstances. It seems reasonable, Judge.

11 MR. LEOPOLD: And we're happy to do that. Also just  
12 so the Court has the full picture, the french company was in  
13 the earlier suit. We have a tolling agreement with the french  
14 company --

15 THE COURT: I see.

16 MR. LEOPOLD: -- to address -- because we knew we  
17 were going to need to address these issues. But we're happy  
18 to put it in, I guess, a motion to take -- well, I guess a  
19 notice of deposition really is what we need to do.

20 THE COURT: And then they can move to quash it.

21 MR. LEOPOLD: As long as we have that teed up for the  
22 20th would be helpful.

23 THE COURT: Yeah. So it will start with document  
24 request or interrogatories for deposition notices that I'm  
25 authorizing you to file and I'm also authorizing, of course, a

1 response. Whether it's a motion to quash or whatever it might  
2 be. And then I'll leave the timing to all of you knowing that  
3 the 20th is -- you have to work back from the 20th. Okay.

4 We have this motion to strike the proposed classes  
5 from the consolidated class action that the Veolia -- I'm  
6 saying Veolia. Is it --

7 MR. CAMPBELL: You're saying it correctly. Mr.  
8 Leopold didn't say it correctly.

9 THE COURT: Mr. Leopold.

10 MR. LEOPOLD: I must have been thinking Viola Davis.

11 THE COURT: You've been watching the Golden Globes.  
12 So I've got that Veolia's motion to strike plaintiffs'  
13 proposed classes, MDEQ concurred in that. And my inclination  
14 on that is that that's -- we're putting the cart before the  
15 horse.

16 We have a motion -- we're going to have an omnibus  
17 motion to dismiss. And so I need to know what claims exist  
18 before I know what the classes should really look like in this  
19 case, if any. So I'm -- so that will just be denied for the  
20 reason that I think it's premature to address that issue at  
21 this point. Okay.

22 MR. CAMPBELL: Your Honor , just to be clear, you're  
23 denying the request by whoever requested it to have it heard  
24 now?

25 THE COURT: Now.

1 MR. CAMPBELL: Because we had agreed that it was put  
2 off and all going to be discussed at the same time.

3 THE COURT: Oh, perfect.

4 MR. LEOPOLD: We didn't have it teed up for today.

5 THE COURT: We're all thinking alike.

6 MR. LEOPOLD: And your Honor, the other issue we had  
7 in terms of an additional outstanding issues, which has sort  
8 of been briefed and presented to the Court, is the issue of  
9 third party subpoenas and preservation orders and letters that  
10 we've provided. We would only, at this point, like the  
11 ability to send out to those third parties the preservation  
12 order.

13 I think there may have been some issues as to whether  
14 it should have any information from the court language in  
15 terms of this is from the Court as opposed to from the  
16 parties. And also the actual request for nonparty documents,  
17 at a minimum that should be preserved.

18 THE COURT: So are you requesting a decision on that?  
19 Or --

20 MR. LEOPOLD: I would like one. But I don't want to  
21 rush the Court either. If the Court wants to take it under  
22 advisement and issue something, that would be fine, too.

23 THE COURT: Okay. I think that's what I'll do. But  
24 I think with the evidence preservation order, there was the  
25 issue of the date that -- was that Mr. Campbell?

1 MR. CAMPBELL: That was me, Judge. It's James  
2 Campbell.

3 THE COURT: Yeah. Where I included the date -- I  
4 don't know if I have --

5 MR. CAMPBELL: I think it's April 11, 2011.

6 THE COURT: Yes. January 1st, 2011. And you would  
7 like it --

8 MR. CAMPBELL: To not make reference to that. The  
9 standard, your Honor, should be whether the evidence is  
10 relevant and should be preserved.

11 The way the order is written now, I would suggest is  
12 could create some confusion that if a piece of evidence, a  
13 document, a medical record, employment records, things that we  
14 delineate I think in pages 4 to 6 in one of the submissions we  
15 made regarding our meet and confer session, those types of  
16 things will be relevant. And with this date in there, a party  
17 could be confused about his or her or its obligation to  
18 preserve the relevant information. So that's the point of the  
19 clarification that we're seeking.

20 THE COURT: Okay. I'm going to look at the order  
21 right now. Just one minute.

22 MR. LEOPOLD: Your Honor, it was Exhibit B.

23 THE COURT: Yeah. That's the draft. Now, there's in  
24 the one that I had approved --

25 MR. LEOPOLD: Yes. And you wanted to address that

1 issue in footnotes 2 and 3.

2 THE COURT: Footnotes 2 and 3. And that's what I  
3 need to look at.

4 MR. LEOPOLD: I have a copy here.

5 THE COURT: Okay. I see. I've got it. I've got it.  
6 Thanks, Jesse. Thank you, Mr. Leopold. So footnote two says  
7 this example poses no obligation on Flint residents or parties  
8 to the case to retrieve water samples sent out for testing and  
9 not returned.

10 I know you've got your issue about the date. But let  
11 me just find out about that. Also, with the date, because I  
12 included the date of January 1st, 2011, my understanding of  
13 that date is if a document existed on January 1st, 2011, that  
14 was a school record, it was an IEP, it was anything that might  
15 be relevant to this, you can't throw it away because it wasn't  
16 formed after January 1st. You've got it and you've got to  
17 keep it.

18 So are you, Mr. Campbell, suggesting -- or Mr. Mason,  
19 that that's not --

20 MR. MASON: No. I think why create the ambiguity  
21 then? If it's relevant, then why should be we confusing the  
22 issue as of that date?

23 THE COURT: Yeah.

24 MR. MASON: That's our point. This is important with  
25 lead poisoning and other treatments before then and that type

1 of thing. So I don't think we should --

2 THE COURT: I thought that that date would be helpful  
3 in some ways to the defendants who just can't keep documents  
4 forever and ever and ever. And if there are routine document  
5 retention policies that permit things that are not subject to  
6 pending litigation to be destroyed, then let them be  
7 destroyed. And I don't want the State of Michigan keeping  
8 everything they ever had that could -- but Mr. Leopold, what's  
9 your objection to just removing the date?

10 MR. LEOPOLD: Your Honor, I certainly understand and  
11 appreciate the issue and concern from the defendant. In all  
12 candor, I think at this point in time where the class is from  
13 our perspective -- and I think the liaison counsel may have a  
14 different view, I don't know. But because it's a little bit  
15 more burdensome I think for them in all candor about what  
16 their individuals clients have to hold on to for how long, we  
17 have a smaller group of class representatives.

18 I want to be crystal clear that for the class, this  
19 request is just, you know, for the class. We're not going to  
20 have to go out to all of the potential class members,  
21 thousands and thousands and thousands and address this issue.  
22 You know, that's -- we are moving on the thought process of  
23 this relating only to the class representatives. And  
24 certainly if they have school records or whatever, you know,  
25 they should be kept. I can't argue with that.

1           And similarly if the defendants have research and  
2 studies or all the parties do going back to 2004 or whatever  
3 that could be relevant, they should be kept.

4           THE COURT: Okay.

5           MR. SHKOLNIK: On behalf of the individual  
6 plaintiffs, your Honor, we understand as representative of  
7 plaintiffs that they're going to have to be put on notice of  
8 these preservation requirements. And to the extent they have  
9 documents or information that is relevant to their claims,  
10 they will preserve as appropriate.

11           I think the order as written is fairly clear. This  
12 is probably one of the most litigated preservation order that  
13 I've seen in many a case. And I think to the extent we're  
14 talking about serving it on hospitals, doctors, and schools,  
15 the State, what have you, they know their preservation  
16 responsibilities here. And they're pretty clear in that  
17 order.

18           THE COURT: Mr. Mason? But I'm inclined to take the  
19 date out. If it's confusing to anyone, let's take it out.  
20 Because I thought it would assist the State, the defendants in  
21 permitting them to deploy their usual document policies that  
22 arguably aren't part of this litigation. But now they'll have  
23 a greater burden. And that's okay. Because that's what I'm  
24 hearing is would be -- would safeguard your rights in this  
25 case.

1 MR. LEOPOLD: Class counsel --

2 THE COURT: Because --

3 MR. LEOPOLD: We're fine with --

4 MR. SHKOLNIK: We're fine.

5 THE COURT: It's okay.

6 MR. MASON: We don't ask for double standard.

7 THE COURT: Yes.

8 MR. MASON: We'll deal with it as well as for my  
9 client. Mr. Leopold did say something I do not agree with  
10 though. And that is that the class -- there's no need to  
11 disseminate this preservation to the potential class members  
12 because --

13 THE COURT: Well, we don't know if there's going to  
14 be a class. So he can't just -- he can't go up in an airplane  
15 and just drop --

16 MR. MASON: I understand. And there will be a time  
17 where we can revisit this.

18 THE COURT: Yeah.

19 MR. MASON: But to suggest that class members because  
20 they're not named as individual --

21 THE COURT: No.

22 MR. MASON: -- class reps --

23 THE COURT: No.

24 MR. MASON: -- will never have to --

25 THE COURT: Point well made and taken. It's just at

1 this stage of the litigation we don't know who they are.

2 MR. MASON: I understand.

3 THE COURT: Yeah.

4 MR. SHKOLNIK: And your Honor, if I can just have one  
5 comment --

6 THE COURT: Sure.

7 MR. SHKOLNIK: -- to that point. With respect to  
8 being liaison counsel for individuals, we know that there are  
9 law firms that represent in excess of 10,000 or maybe upwards  
10 of 20,000 plaintiffs at this point. We're going to be under  
11 our obligations notifying the law firms --

12 THE COURT: Yes.

13 MR. SHKOLNIK: -- that these orders are in place.  
14 And they must likewise notify their clients, which is probably  
15 better than the helicopter approach. We'll get it out there.

16 THE COURT: All right. Thank you. Let's go to  
17 footnote 2. I don't know what these water samples are. So  
18 you're suggesting -- the defendants are suggesting that there  
19 are individuals who found private companies to test their  
20 water, sent the samples out, and that potentially you'll want  
21 them to get the samples back if they still exist? Is that --  
22 which defendant wanted that in there?

23 MR. CAMPBELL: Your Honor, James Campbell again.

24 THE COURT: Yeah.

25 MR. CAMPBELL: I believe that's accurate that there's

1 to our knowledge just reading stuff there's been a lot of  
2 testing done by a lot of different people under a lot of  
3 different circumstances.

4 THE COURT: Yeah.

5 MR. CAMPBELL: Some of those might be the plaintiffs.  
6 Some of those might have been done on behalf of the plaintiffs  
7 by individuals that we don't know. I mean, that's part of the  
8 issue here.

9 And what the important issue here is sort of just  
10 like what you just described, that if there's a water sample  
11 out there that is under the -- is in the possession, custody,  
12 or control of the plaintiffs, even if it was sent out to  
13 another lab, those types of things should be preserved. Not  
14 simply because it's not in the possession of a particular  
15 plaintiff or complainant. That's not the standard.

16 THE COURT: Okay.

17 MR. CAMPBELL: It should be -- they're not doing the  
18 testing. If there is testing or samples out there that  
19 remain, they should be preserved. And the plaintiffs on whose  
20 behalf that testing was done should be required to do that.

21 MR. STERN: Your Honor, with due respect, the same  
22 whatever the website was or the news article was that  
23 anybody's read that has said that there are these tests that  
24 were done by these companies, we then know which companies  
25 these are.

1           And the reality is is that if Lee-Anne Walters goes  
2 and has blood drawn from one of her kids and it's sent to a  
3 lab to test for lead, is she required then to go get the blood  
4 sample back from the lab in order to produce it to the  
5 defendants? Or is whatever the lab came up to with regard to  
6 the blood test enough to suffice in terms of evidence?

7           There were Virginia Tech tests that were done. There  
8 were State of Michigan tests that were done. There were city  
9 of Flint tests that were done. There were various groups  
10 within the community that had tests done. Many of people  
11 don't know who tested their water or how many people tested  
12 their water.

13           And so to put a burden on a plaintiff to go get the  
14 proverbial blood test back from the lab that they sent it to  
15 seems pretty burdensome when there's actually a lab that  
16 tested the blood that can just send you the results.

17           And if we're able to know by sitting here today  
18 enough so that we can make an argument to the Court if I'm a  
19 defendant that these lab samples should be sent back, then we  
20 have to also know who the labs are and we can get that  
21 information directly from the lab.

22           By requiring a plaintiff to go get a sample of water  
23 back that they sent to one of these three or four or ten  
24 facilities is an impossible burden that would never be met and  
25 ultimately would lead to tons of motions to compel and

1 potential requests for contempt. And it's just something  
2 that's extremely unrealistic for potentially 10, 20, 30,000  
3 people who may have had their water tested.

4 THE COURT: Let me ask you, Mr. Stern, what would  
5 happen if I do not include this or I include the portion where  
6 it imposes no obligation on the residents to retrieve their  
7 examples, then Mr. Mason issues a third party subpoena to the  
8 company and says I want to come in for testing of all the  
9 samples, would you oppose that?

10 MR. STERN: I mean, it's a hypothetical, but it's  
11 fair. I don't think so. I think that so long as a chain of  
12 custody exists such that we know that the sample is the same  
13 as what was tested at the time it was tested, such that  
14 there's some expert opinion that says over the course of one  
15 or two or --

16 THE COURT: Slow down.

17 MR. STERN: Sorry. I flew in with the gentleman  
18 Baltimore, but I didn't drink any coffee. You know, so long  
19 as there's enough information that suffices to show that the  
20 same water is being tested and that there's no detriment that  
21 time has passed to the testing of the water --

22 THE COURT: Yeah.

23 MR. STERN: -- I think it wouldn't be an issue.

24 THE COURT: Okay. As long as the defendants seem to  
25 think there could be some defense related to this. And I

1 don't want to deny them that defense. So as long as there's  
2 another way to get these samples, which is a third-party  
3 subpoena or whatever that thing is where you go on the lam,  
4 you know, the thing where you're going to actually go through  
5 and do an inspection in review of it.

6 MR. MASON: Right. And that this underlines --

7 MADAM COURT REPORTER: Say your name, counsel.

8 THE COURT: Yes.

9 MR. MASON: I'm sorry. Wayne Mason. That's why it  
10 underlines why how critical these fact sheets are and why we  
11 feel like that discovery is appropriate. We can then identify  
12 those labs in light. Not burden Mr. Stern's clients  
13 individually, but get a subpoena out before they might be  
14 disposed of.

15 THE COURT: Okay. We'll detail with that directly  
16 and I will include the footnote that this must not impose an  
17 obligation on the residents themselves to retrieve the  
18 samples. And knowing now that the samples, if they exist, can  
19 be retrieved through a third party subpoena and that we have a  
20 process here in this case to get that underway.

21 MR. CAMPBELL: I would just add, your Honor -- James  
22 Campbell. I would just add that we don't know who those labs  
23 might be, what testing may have taken place. And to the  
24 extent that the plaintiffs do, all we're asking is that the  
25 standard that would apply for document production are

1 preservation, possession, custody, or control, that that  
2 applied to this like it would other material evidence to the  
3 case.

4 THE COURT: Yeah. But it's not in the plaintiffs'  
5 possession. It's at the company.

6 MR. CAMPBELL: Possession, custody, or control. If  
7 they have no control over it, then obviously they can't do  
8 anything about it. But if they do --

9 THE COURT: Well, tell me in your experience  
10 representing in this case, do private companies send back  
11 samples?

12 MR. CAMPBELL: Your Honor, I wish I knew the answer  
13 to that. I probably should, but I don't. What I do think I  
14 know is that there's a bunch of testing that has been done.  
15 As Mr. Stern said, by a variety of different testing  
16 organizations. I don't know who those are for sure. I don't  
17 know which plaintiffs may have used them. And what we are  
18 suggesting is that possession custody and control standard  
19 apply.

20 THE COURT: Okay. What if we say samples that were  
21 sent out for testing and no longer in plaintiffs' possession,  
22 custody, or control?

23 MR. STERN: That's fine.

24 MR. PITT: Yes, your Honor.

25 THE COURT: Great. Okay. That will conclude our

1 hearing. Anyone who wants to stay around for the criminal  
2 cases, I promise they're very interesting.

3 (Proceedings Concluded)

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6 CERTIFICATE OF OFFICIAL COURT REPORTER

7 I, Jeseca C. Eddington, Federal Official Court  
8 Reporter, do hereby certify the foregoing 149 pages are a true  
9 and correct transcript of the above entitled proceedings.

10 /s/ JESECA C. EDDINGTON  
11 Jeseca C. Eddington, RDR, RMR, CRR, FCRR

1/29/2018  
Date

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