

May 15, 2019

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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

MAY 15, 2019

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P R O C E E D I N G S

THE CLERK: Calling the Flint Water Cases.

THE COURT: Welcome. And thank you for moving over to this courtroom. I feel like Goldilocks. The chair is not the chair I'm used to. And I'm sure that's true for all of you as well.

So could we have appearances for the record?

But before doing that, I'm going to try to log on to make sure that I can get access to all of the materials. I'll just do that first. Okay. I'm on.

So could we have appearances for the record, please?

MR. LEOPOLD: Good afternoon, Your Honor. Ted Leopold, co-lead counsel for the punitive class.

THE COURT: Thank you.

MR. PITT: Michael Pitt, co-lead for class.

MR. SHKOLNIK: Hunter Shkolnik, co-liaison counsel.

MR. STERN: Corey Stern, co-liaison counsel.

THE COURT: Thank you. Hold on just a minute. I'm going to borrow some of Judge Grand's paper. I'll just borrow this brief. Oh, here's some paper. Oh, never mind. Okay. All right. Mr. Goodman. No, Ms. Greenspan.

MS. GREENSPAN: Deborah Greenspan, special master.

MR. GOODMAN: William Goodman appearing on behalf of class plaintiffs and the Marble family.

THE COURT: Thank you.



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1 MR. BRONSTEIN: Peretz Bronstein, plaintiffs class.

2 MS. BINGMAN: Good afternoon, Your Honor. Teresa  
3 Bingman appearing on behalf of the class plaintiffs and the  
4 Marble family.

5 THE COURT: Okay. Thank you.

6 MR. STAMATOPOULOS: Gregory Stamatopoulos on behalf  
7 of class plaintiffs.

8 MS. BEREZOFSKY: Good afternoon, Esther Berezofsky on  
9 behalf of the class and the Gulla plaintiffs.

10 THE COURT: Okay. Thank you.

11 MS. SHEA: Ashley Shea on behalf of the class  
12 plaintiffs.

13 MS. HURWITZ: Good afternoon, Your Honor. Julie  
14 Hurwitz appearing on behalf of the class plaintiffs.

15 MS. DEVINE: Alaina Devine on behalf of the VNA  
16 defendants.

17 MR. CAMPBELL: James Campbell on behalf of the three  
18 VNA defendants.

19 MR. NOVAK: Paul Novak on behalf of class plaintiffs.

20 MR. THOMPSON: Craig Thompson on behalf of defendant  
21 Rowe Professional.

22 MR. RUSEK: Good afternoon, Your Honor. Alexander  
23 Rusek on behalf of Howard Croft. And joining me is my law  
24 clerk Shelby Well.

25 THE COURT: Oh, great. Thank you.

1 MR. KIM: Thank you, Your Honor. William Kim  
2 appearing on behalf of the City of Flint and former Mayor  
3 Dayne Walling.

4 MR. BERG: Good afternoon, Your Honor. Rick Berg for  
5 the City of Flint.

6 MR. BARBIERI: Charles Barbieri for MDEQ defendants  
7 Michael Prysby and Patrick Cook.

8 THE COURT: Okay. And I did get your message that  
9 you ran into traffic. So I'm glad that you --

10 MR. BARBIERI: A number of us did. Sorry, Your  
11 Honor.

12 THE COURT: Okay.

13 MR. GRASHOFF: Your Honor, Phil Grashoff appearing on  
14 behalf of Stephen Busch, MDEQ employee defendant.

15 MR. PATTWELL: Mike Pattwell on behalf of Brad Wurfel  
16 and Dan Wyant.

17 MR. WISE: Your Honor, Matt Wise on behalf of Jeffrey  
18 Wright.

19 MR. KUHL: Richard Kuhl on behalf of the state  
20 defendants.

21 MR. LARSEN: Zack Larsen on behalf of state  
22 defendants.

23 MS. BETTENHAUSEN: Margaret Bettenhausen for state  
24 defendants.

25 MR. MCALPINE: Mark McAlpine state class liaison

1 counsel.

2 MS. SEALEY: Shermane Sealey on behalf of class  
3 plaintiffs.

4 MR. FAJAN: James Fajan on behalf of Adam Rosenthal.

5 MR. WILDER: Marvin Wilder for Lillian Diallo for  
6 individual plaintiffs Savage, Kirkland, and Gist.

7 MR. MATEO: T. Santino Mateo on behalf of Mr. Earley,  
8 Darnell Earley.

9 MS. PIPER: Kailen Piper on behalf of defendant  
10 Glasgow.

11 MR. MONROE: Stephen Monroe on behalf of the class  
12 plaintiffs, Your Honor.

13 MR. JENSEN: Larry Jensen on behalf of Hurley Medical  
14 Center and Ann Newell and Nora Birchmeier.

15 MR. MEYERS: David Meyers on behalf of defendant  
16 Daugherty Johnson.

17 MS. CHRISTOPHERSON: Gladys Christopherson on behalf  
18 of Anderson, Lee, and local counsel for Gulla plaintiff.

19 MR. WASHINGTON: Val Washington on behalf of  
20 Anderson, Lee, local counsel for part of the Gulla plaintiffs,  
21 Judge.

22 THE COURT: Thank you.

23 MR. KRAUSE: Kirk Krause on behalf of Robert Scott,  
24 Your Honor.

25 MR. CAFFERTY: Michael Cafferty on behalf of Nancy

1 Peeler.

2 MR. SANDERS: Herb Sanders on behalf of the Alexander  
3 plaintiffs.

4 MS. FLETCHER: Shayla Fletcher on behalf of the  
5 Alexander plaintiffs.

6 MR. SEGARS: Darryl Segars on behalf of the Alexander  
7 plaintiffs.

8 THE COURT: They're well represented I see. Thank  
9 you.

10 MR. GESKE: Paul Geske on behalf of the Guertin  
11 plaintiffs.

12 THE COURT: Okay.

13 MS. SMITH: Susan Smith on behalf of McLaren Regional  
14 Medical Center.

15 MR. WEGLARZ: Todd Weglarz for plaintiff Odie Brown  
16 and plaintiff Gradine Rogers.

17 MR. LANCIOTTI: Patrick Lanciotti for the individual  
18 plaintiffs.

19 THE COURT: All right. Thank you, very much.

20 MR. ERICKSON: Your Honor, there's a few of us left I  
21 think. Philip Erickson on behalf of the LAN defendants and  
22 Leo A Daly.

23 MR. KLEIN: Sheldon Klein on behalf of the city.

24 MS. LEVENS: Emmy Levens for class plaintiffs.

25 THE COURT: Okay. Anyone else want to make an

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1 appearance? Now is your chance. Okay.

2 Well before we go any further, I had a request from  
3 Mr. Hart on behalf of the Guertin plaintiffs to appear by  
4 telephone. He's not answering his telephone. So in light of  
5 the fact that we have other counsel here, we're just going to  
6 proceed and assume that you'll be here to handle his request  
7 to be appointed as appellate liaison counsel. So thank you  
8 very much for that.

9 I apologize for getting started late. We had the  
10 regular standing meeting in chambers. And that went over a  
11 little bit. So that's the cause of starting late.

12 So the first issue on the agenda is the outstanding  
13 motions in the Carthan case. And essentially there -- I will  
14 be issuing written decisions on the plaintiffs' motion for  
15 reconsideration regarding the Elliott Larsen claim. I've  
16 already issued an hour or two ago a decision on Veolia's  
17 motion to correct.

18 And so what's stated here that no oral argument on  
19 those will be permitted, they have been -- there's a plan for  
20 those.

21 With respect to the Guertin plaintiffs to appoint  
22 motion -- or appellate counsel as lead appellate counsel, I've  
23 considered the motion that was submitted in writing. And  
24 although I appreciate it that this is obviously complex  
25 litigation, that there are many balls in the air at any given

1 time, I have already appointed lead counsel for both the  
2 individual plaintiffs' cases and the class cases.

3 And at this point, I don't see that it would benefit  
4 the cases to have additional counsel appointed in terms of the  
5 appellate work that's going on. I do appreciate that there  
6 are amicus briefs that are to be coordinated, that there are  
7 arguments to be made, but I trust that counsel is capable of  
8 working cooperatively with the lead counsel in achieving that.

9 So the motion for appointment of liaison appellate  
10 counsel will be denied because there is currently lead counsel  
11 for all of the folks who are to be represented. And I trust  
12 that Mr. Hart and counsel who's present today will coordinate  
13 successfully with the lead counsel.

14 In terms of Veolia's motion to -- and then we'll  
15 issue an order that just says for the reasons set forth on the  
16 record that that is the decision.

17 On Veolia's motion to strike the proposed classes, a  
18 brief discussion -- there's Mr. Campbell. A brief discussion  
19 was held in chambers that wherein I learned that plaintiffs'  
20 counsel, plaintiffs' class counsel is currently in the process  
21 of developing revised proposed classes.

22 So at this point, Veolia's motion will be denied as  
23 moot. Or not as moot. But it simply -- we're going to see a  
24 new proposed class definitions. I said upstairs and I'll  
25 repeat here, there's a good deal of the motion that I think is

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1 correct and would be granted if this were the class that  
2 plaintiffs were planning to stick with.

3 But in light of the fact that I've been informed that  
4 the definitions are in a state of flux, I don't think it would  
5 be helpful to grant the motion at this point. And so it will  
6 be either denied. Or if Veolia wants to withdraw it and then  
7 just file a new one if you don't care for the new classes,  
8 that would be your prerogative. Mr. Campbell.

9 MR. CAMPBELL: James Campbell for the VNA defendants,  
10 Your Honor. I'll have to check with Mr. Grunert. If I could  
11 just get back to the Court on that with the way we want to  
12 proceed.

13 THE COURT: Okay.

14 MR. CAMPBELL: I can do that in a day.

15 THE COURT: Okay. If you can get back to us by close  
16 of business on Friday.

17 MR. CAMPBELL: Perfect. Thank you, your Honor.

18 THE COURT: Then we'll enter an order after that. If  
19 you don't withdraw the motion -- either way, the denial will  
20 be without prejudice. Once we know what the class definitions  
21 are, and I trust that we'll be learning that relatively soon,  
22 then you certainly can challenge those definitions.

23 MR. CAMPBELL: Understood. Thank you, your Honor.

24 THE COURT: Okay. So the next issue is the update on  
25 Walters, Sirs, and Marble. And with respect to Walters and

1 Sirls, I think everybody here knows that I ruled on the  
2 Carthan motion to amend, motion to dismiss, and so on. That's  
3 currently awaiting the Sixth Circuit's decision on whether  
4 they will take the case en banc to reconsider the three judge  
5 panel's decision.

6 And while that is taking place, I am working on  
7 similar motions in the Walters and Sirls cases. So I will  
8 just update everybody that that is a work in progress. And  
9 although it seems that it should be relatively straightforward  
10 to just apply what was said in Carthan to these two  
11 complaints, it is more complicated than it looks like because  
12 of the nuances in the way the complaints were drafted. But  
13 it's a work in progress and I hope to turn or get it done as  
14 soon as possible.

15 With Marble, the Marble case, Mr. Goodman, as soon as  
16 Walters and Sirls is decided -- I think we've already  
17 discussed this -- I'll turn to Marble as sort of a sample of  
18 legionella that is also suing another defendant, McLaren  
19 Hospital.

20 As I started looking at Marble in preparation for  
21 today's hearing, it occurred to me that we don't have a test  
22 case, for lack of a better word, with Hurley Hospital as a  
23 defendant. And Mr. Jensen is here. There you are.

24 So my decision as of today is to expand the Court's  
25 consideration. When I consider Marble, I'd like to also



1 consider the Brown case. And Mr. Weglarz is here, too. So  
2 that we have a case to test the sufficiency of the pleadings  
3 as far as Hurley is concerned as well as McLaren. So I'll be  
4 -- so we'll be amending the sort of case management process by  
5 including the Brown case.

6 Mr. Weglarz, where are you?

7 MR. WEGLARZ: Right here, Your Honor.

8 THE COURT: There you are. So I take it you hear  
9 what I'm saying and will be prepared for that.

10 MR. WEGLARZ: Yes, Your Honor.

11 THE COURT: Okay. And Mr. Jensen, do you have any  
12 objection to that proposal?

13 MR. JENSEN: Your Honor --

14 THE COURT: Say your name. I'm sorry. We have to go  
15 by the rules, which is make sure you state your name and your  
16 client.

17 MR. JENSEN: Larry Jensen on behalf of Hurley  
18 defendants and Birchmeier as well. Your Honor, as you know  
19 and as I may have the opportunity to --

20 THE COURT: Speak up.

21 MR. JENSEN: Excuse me. Hurley's in only two cases,  
22 Brown and Rogers. So to include them at this point being  
23 lumped in with all of the other cases, but to move that ahead,  
24 it still splits Hurley up in that respect because it leaves  
25 Rogers behind.

1 THE COURT: Well, Rogers will -- is there anything  
2 unique about the Rogers case? Are there any different legal  
3 claims or counts in Rogers that are not in Brown?

4 MR. JENSEN: Not that I'm aware of, no.

5 THE COURT: Okay. So all I'm looking for is a  
6 lawsuit that will test the sufficiency of the pleading as to  
7 your client. And if you want to suggest a different one from  
8 Brown, that's okay with me.

9 MR. JENSEN: No. I'd just like to keep them  
10 together, Your Honor --

11 THE COURT: Oh, you want --

12 MR. JENSEN: -- for sufficiency purposes.

13 THE COURT: Whatever I decide in Brown will apply to  
14 Rogers.

15 MR. JENSEN: That's fine.

16 THE COURT: So they're together in that sense. Okay.

17 So Mr. Goodman, I just want to remind you of sort of  
18 how we got to this point or one of the procedural issues that  
19 has come up which is that the pleading in Marble will  
20 ultimately need to be amended. Because once the Walters and  
21 Sirls decision is made, there will be an amended master  
22 long-form complaint that your pleading will need to conform  
23 to.

24 So what I will permit for -- and this goes to Mr.  
25 Weglarz as well -- is that once the Walters and Sirls decision

1 has been made, even while it's on appeal, while it's pending,  
2 it's en banc in U.S. Supreme Court and all of the things that  
3 might happen to it, I will permit as a right for the  
4 plaintiffs in Marble and the plaintiffs in Brown to file an  
5 amended short-form complaint that tells me which parts of the  
6 master long-form complaint you wish to adopt.

7 And you may automatically bring in the counts, the  
8 claims that you previously raised. If you wish to raise new  
9 claims for any reason, new counts and allege new facts, you  
10 would need to submit a motion to amend.

11 MR. GOODMAN: So that any -- excuse me, Your Honor.  
12 William Goodman appearing on behalf of the Marble family. So  
13 that any factual elaboration then will have to be pursuant to  
14 the motion to amend; is that correct?

15 THE COURT: Yes. Any factual or legal expansion from  
16 what you currently are alleging would need to be subjected to  
17 motion for leave to amend. But if what you're doing is just  
18 conforming your short-form complaint to the new master long  
19 form. Because we already know from what was decided in  
20 Carthan, there will be some changes to the proposed amended  
21 complaint in Walters and Sirls. So if there are any changes  
22 that expand your case, you'd need to file a motion for leave.

23 MR. GOODMAN: Thank you, your Honor. I understand  
24 and will follow the Court's guidance.

25 THE COURT: Okay. And Mr. Weglarz?

1 MR. WEGLARZ: Understood, Your Honor. And I also had  
2 the benefit of Ms. Susan Smith explaining your decision 20  
3 minutes ahead of time. So thank you for that.

4 THE COURT: Thank you. Thank you, Ms. Smith. Okay.  
5 Okay.

6 So now we're on the issue of the case management  
7 plan. And I have briefing from McLaren and Hurley arguing  
8 that you should be exempted from the case management plan  
9 until your pleadings have been tested in some -- with the  
10 motion to dismiss.

11 And I am happy to hear more if there's something  
12 that's not in your written material that you want to add now,  
13 you can add it. But if it's in your written material, then I  
14 won't need to hear it again today.

15 So Ms. Smith, is there anything you want to add that  
16 you have not said in your thorough brief?

17 MS. SMITH: No. We'll await the decision on the  
18 issue after the Walters and Sirls amendment process is  
19 completed.

20 THE COURT: Okay.

21 MS. SMITH: Thank you.

22 THE COURT: Mr. Jensen.

23 MR. JENSEN: Same goes for Hurley defendants, Your  
24 Honor.

25 THE COURT: Okay. So here's what -- the only choice

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1 that I think I have -- obviously I have many choices. But  
2 what I think this case requires is that at this time I deny  
3 the request to be exempted from the case management order.

4 I understand Hurley has made a compelling argument  
5 that it's in three cases, in three individual cases at this  
6 point. McLaren has made a similar compelling argument. And  
7 so I am going to do everything I can to expedite the handling  
8 of Walters, Sirls, Hurley, and Brown -- or Marble and Brown.

9 But in the end I think Hurley and McLaren will need  
10 to proceed as nonparties to the case management order so that  
11 all of this is not duplicated later. And at any rate you  
12 would be nonparties regardless of whether you're in those  
13 cases anyway. You've been listed as nonparties at fault by  
14 other parties in the case, other defendants in the case, and  
15 would be subjected to the case management order.

16 But at the same time, the legionella issues are not  
17 before the Court in the first ruined of bellwether cases. So  
18 it seems to me that the burden is at least lessened by that.

19 So I'll do my part to expedite handling of your  
20 motions to dismiss. And in the meantime you'll remain  
21 subjected to the case management order. In some ways as you  
22 would whether or not you were a defendant in those cases.

23 Now on the case management plan there's also the  
24 issue of the City of Flint and individual Flint defendants who  
25 have just filed I think while we were upstairs, an answer was

1 filed by the city or --

2 MR. KLEIN: By the city only.

3 THE COURT: City only. And so the issue is where --  
4 that now that the city has filed an answer it has a different  
5 status under the case management order. And in light of the  
6 fact that it's relatively soon after the order was entered on  
7 April 30th, the city will just play catchup and be subjected  
8 if to the same timeframes.

9 But Mr. Klein, you alerted me to some other issues  
10 that you'd like to raise.

11 MR. KLEIN: Your Honor, may I speak from here or do  
12 you prefer I go to the podium?

13 THE COURT: I think the podium would be helpful.

14 MR. KLEIN: Thank you, your Honor. Just for the  
15 record, Sheldon Klein for the City of Flint. There's really  
16 only one issue that I want to raise.

17 THE COURT: Okay.

18 MR. KLEIN: And it's this. The Court will recall  
19 that in the case management order there was a provision, and I  
20 frankly don't know the section at hand, in which the  
21 defendants were to serve a large set of common interrogatories  
22 and then not to exceed five defendant specific  
23 interrogatories.

24 The then answering defendants or just to say the  
25 engineering defendants plus Mr. Rosenthal issued those uniform

1 interrogatories and did so in a way that I think makes the  
2 five individual interrogatories unfair to us under the  
3 circumstances. And I'll point to a few examples and then add  
4 one other point.

5 I have in front of me the uniform interrogatory sent  
6 to plaintiff Kelso. Similar -- and of course they weren't  
7 filed but similar interrogatories were sent to a number of  
8 other individual plaintiffs.

9 And the first way that it's unfair to us is that  
10 plaintiffs or excuse me the serving defendants, the  
11 engineering defendants plus Mr. Rosenthal defined --  
12 defendants defined term to include only them and thus to  
13 exclude the other defendants who albeit not answering  
14 defendants were still defendants.

15 And the way that that turns out being unfair to us is  
16 they ask interrogatories such as -- and I'm referring to  
17 interrogatory 17 of these -- describe every public meeting and  
18 hearing you attended in which any of the defendants spoke and  
19 what did they say.

20 Now given the way they've defined defendants they're  
21 not being asked anything the City of Flint said, anything the  
22 MDEQ said, etcetera, etcetera. I mean frankly I think it was  
23 -- I think deliberately opportunistic on their part.

24 But in any case it is a sensible interrogatory but  
25 it's one that we would need to use up our -- do you have the

1 interrogatories up there, Your Honor?

2 THE COURT: I don't have the interrogatories and I  
3 shouldn't have the interrogatories.

4 MR. KLEIN: Right.

5 THE COURT: But I have the case management order.  
6 And it says additionally in paragraph 3 page 10, each  
7 defendant may serve five interrogatories on each named  
8 plaintiff. And you're saying that's not enough for your  
9 clients?

10 MR. KLEIN: Because the so called uniform  
11 interrogatories --

12 THE COURT: Oh.

13 MR. KLEIN: -- were drafted in a way that  
14 deliberately prevented us from getting information that should  
15 have been available from the uniform interrogatories.

16 THE COURT: And who -- were those propounded by VNA?

17 MR. KLEIN: They were propounded by the engineering  
18 defendants plus Mr. Rosenthal.

19 THE COURT: Rosenthal.

20 MR. KLEIN: It's a perfectly sensible question.

21 THE COURT: Okay.

22 MR. KLEIN: And had defendants meant defendants  
23 rather than only the propounding defendants, then we would  
24 have the information that we need as to what they say we said.

25 THE COURT: Okay. Well let me stop you right there



1 and ask either Mr. Stern or Mr. Shkolnik if you have a  
2 response. Say your name and go to the podium.

3 MR. STERN: Corey Stern. I mean, I firmly believe  
4 that the CMO allows for those interrogatories to be served in  
5 the manner that they were.

6 THE COURT: Yes, it does. He's not doubting that.  
7 He's just saying that he may need more than five to make up  
8 for the fact that he wasn't a part of that process.

9 MR. STERN: But the reason that there wasn't -- I  
10 mean --

11 THE COURT: I know.

12 MR. STERN: I think everybody should have the ability  
13 to prosecute and defend their cases in a meaningful way. Why  
14 there wasn't -- why he wasn't involved in the process --

15 THE COURT: Well, he hadn't answered until noon  
16 today.

17 MR. STERN: I understand.

18 THE COURT: So he wasn't a defendant by the  
19 definition of defendant in the CMO at that time.

20 MR. STERN: But does that mean that when each of the  
21 individual city defendants answer that we get, you know -- are  
22 we going to -- what happens then? I mean --

23 THE COURT: Mr. Klein, would a total of 10 for the  
24 City of Flint --

25 MR. KLEIN: A total of 10 would be more than fair.

1 THE COURT: Okay.

2 MR. KLEIN: I have more to say. But given that 10 is  
3 more than fair, I won't say it if that's the outcome.

4 THE COURT: Okay. Then what I'll do is permit a  
5 total of 10 in paragraph 3 for the City of Flint and for each  
6 additional answering defendant.

7 MR. STERN: Okay.

8 MR. KLEIN: Thank you, your Honor.

9 THE COURT: Because we're going to -- God willing  
10 we're going to have other answers in the case. And people  
11 will need to play catchup at that point, so.

12 MR. STERN: Okay.

13 THE COURT: All right. But the question is do we --

14 MR. STERN: The trigger for the 10 comes when they  
15 answer?

16 THE COURT: After you answer. You don't become a  
17 defendant who can propound discovery under this until you file  
18 an answer. Until then, you're treated as a nonparty even  
19 though you're a named defendant.

20 Is there anything wrong with what I just said?

21 MR. STERN: Nothing. I'm just thinking 8 months  
22 ahead or 10 months ahead because there's going to come a point  
23 in time potentially where nonparty defendants presently become  
24 answering defendants. And they're going to have an  
25 opportunity at that point in time to start serving discovery

1 and that may --

2 THE COURT: But they were always going to have that  
3 opportunity and they were always going to get five new  
4 interrogatories.

5 MR. STERN: Understood.

6 THE COURT: So now they're going to get 10.

7 MR. STERN: Ten. Okay.

8 MR. KLEIN: Thank you, your Honor.

9 THE COURT: So the question is what do we do to  
10 memorialize this decision? And I guess I'll issue an amended  
11 case management order. Because we need to have one document  
12 everyone's working from as it gets amended over time.

13 MR. KLEIN: I guess I defer to the Court as to  
14 whether a supplemental, you know, just dealing with this issue  
15 or amended is the most convenient way.

16 THE COURT: Okay.

17 MR. KLEIN: The same difference.

18 THE COURT: I'll figure it.

19 MR. STERN: It's pretty common just to have first  
20 amended. It could be 50th amended CMO.

21 THE COURT: I think that's what we'll do so that the  
22 last standing one on the docket is the one for everybody to  
23 turn to. Okay.

24 So on the plaintiff fact sheets, I'm happy to report  
25 that during the in chambers discussion I ruled on it. It just

1 went through every page and made some decisions. And so the  
2 fact sheet is being amended to a certain extent.

3 MR. RUSEK: Your Honor, Alexander Rusek on behalf of  
4 Howard Croft.

5 THE COURT: Yes.

6 MR. RUSEK: Would you like me to address the  
7 individual city defendants who have filed a motion to stay and  
8 who have not answered at this time in regards to the CMO?

9 THE COURT: Please do. Thank you for bringing that  
10 to my attention.

11 MR. RUSEK: Thank you for the opportunity, Your  
12 Honor. Three of the individual city defendants filed a motion  
13 to stay last Friday on the grounds that qualified immunity is  
14 being resolved right now. And then also on our Fifth  
15 Amendment concerns because those three are still criminally  
16 charged right now.

17 THE COURT: Yes.

18 MR. RUSEK: We're asking the Court to stay the cases  
19 as to us. Because of those very serious concerns, and it was  
20 brought to my attention by Mr. Kim that the Court would like  
21 to hear about my thoughts on answering the complaint at this  
22 time while also being under indictment in the criminal justice  
23 system.

24 THE COURT: And here's my -- one thing I'd like to  
25 say before you get started, which is that I have not had a

1 chance to review the law again. I've done some initial  
2 research well over a year ago on the Fifth Amendment concerns.  
3 I saw your brief and I intend to pay careful attention to it.

4 So what I'd like you to limit your remarks -- and I  
5 think you said you were going do this -- is to whether filing  
6 an answer implicates your client's Fifth Amendment rights. We  
7 can get to the issue of discovery once an answer is filed.

8 MR. RUSEK: So I believe that it does, Your Honor.  
9 And I think that it's a different implication than say  
10 answering an interrogatory is or request for admission. Those  
11 of course are verified documents. An answer is not verified.

12 But in answering the complaint, a criminal defendant  
13 is essentially given two choices. One invoking the Fifth  
14 Amendment and not answering it. And then you're faced with  
15 the adverse inference there. Or an answer is provided and  
16 information is put out there by that defendant that while it  
17 may not technically be their statement under oath, it still  
18 can lead a prosecutor to find more evidence or lead them down  
19 a path that they would not have had before.

20 And I think that particularly is a concern for the  
21 two defendants who have not -- or excuse me who pled and are  
22 still potentially under investigation by federal authorities.  
23 That would be Mr. Glasgow and Mr. Johnson.

24 I know that they had those additional concerns. And  
25 certainly the three city defendants who are charged have very

1 serious concerns right now. Especially with the appointment  
2 of the new solicitor general to review everything in the  
3 cases. And I believe that she's publically said that she's  
4 reviewing not just for the validity of the charges that have  
5 been brought but also for any new potential charges that may  
6 arise through their review.

7 THE COURT: And just because I was logging back on to  
8 my computer that keeps shutting down on me, did you say that  
9 -- I understand that argument with respect to answering an  
10 interrogatory or a document request or a deposition for sure.  
11 But filing an answer, you're suggesting that that also could  
12 expose your clients to further criminal liability?

13 MR. RUSEK: I think so, Your Honor. I believe there  
14 is a difference but it is providing information that would be  
15 coming from the client and then through the attorney that  
16 potentially could be used, you know, maybe not as directly  
17 against them as answer admission, an interrogatory, but  
18 certainly it's information that could come to light that could  
19 be used against them in the future.

20 THE COURT: All right. Well, we don't -- thank you,  
21 Mr. Rusek. We don't currently sort of have the adversarial  
22 process. I don't have anyone -- the other side hasn't been  
23 briefed. I haven't done the research. I appreciate knowing  
24 what you're saying, hearing what you're saying. And so what  
25 I'll do is turn to that issue.

1                   And do any of the plaintiffs plan to respond in  
2 writing?

3                   MS. LEVENS: Class plaintiffs will be filing.

4                   THE COURT: That's Ms. Levens.

5                   MS. LEVENS: Sorry.

6                   MR. RUSEK: And Your Honor, not to get into the  
7 weeds. I know the Court hasn't seen the arguments.

8                   THE COURT: Yeah.

9                   MR. RUSEK: But in this circuit, the most important  
10 factor for the Court to look at is the extent that the issues  
11 in each proceeding overlap. And when we look at the Carthan  
12 operative complaint right now, it takes just actual sections  
13 out of the criminal complaint against my client, against Mr.  
14 Earley and Mr. Ambrose, and puts it as an allegation in the  
15 actual complaint.

16                   THE COURT: Okay.

17                   MR. RUSEK: So the issues are near 100 percent  
18 overlapping.

19                   THE COURT: Okay. And now you're successfully  
20 arguing your motion.

21                   MR. RUSEK: And I will rest on that, Your Honor.  
22 Thank you.

23                   THE COURT: Okay. Thank you. So what I'll do is  
24 await a timely response from class plaintiffs to individual  
25 plaintiffs. Don't feel like you have to respond.

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1 MR. STERN: Your Honor, I think because it's based on  
2 the operative complaint and we're still unaware of what's  
3 going to happen in Walters and Sirls that it would be  
4 inappropriate for us to respond.

5 THE COURT: Okay. Good. All right. So what I'll do  
6 is we've got a status conference scheduled for June 19th. And  
7 so what I'm assuming right now is if I'm unable to make a  
8 decision before then based on the written submissions, we'll  
9 have oral argument on the issue on the 19th potentially. So  
10 I'm just flagging that as if there's not a decision before  
11 then, then most likely it will be on the agenda at least in  
12 some form at that time. Okay. Okay.

13 Now on the issue of nonparty documents only subpoena  
14 -- oh, Mr. Rusek.

15 MR. RUSEK: Your Honor, I apologize. Under the  
16 Court's order denying the motion to strike, the city  
17 defendants were required to answer by today.

18 THE COURT: Oh.

19 MR. RUSEK: Can we push that date off potentially  
20 until a resolution of the motion to stay for the individual  
21 city defendants and those who have joined in that motion to  
22 stay?

23 THE COURT: Yes.

24 MR. RUSEK: Thank you.

25 THE COURT: Okay. We'll include that in our order



1 following this conference. When I originally put the nonparty  
2 documents only subpoena issue on the agenda, I thought it was  
3 because there was a happy report from the committee that this  
4 was moving along and they were going to wish to add two  
5 meetings per month to discuss this.

6 I learned in chambers that there are a few kinks in  
7 the process that are not -- that it's not as efficient as we  
8 were all hoping that it could be. And so we're going to have  
9 a report. But when will we have that?

10 MR. STERN: Mr. Campbell, his office and I are going  
11 to submit a report to the Court by Wednesday.

12 THE COURT: By Wednesday.

13 MR. STERN: Would you like that e-mailed to Mr.  
14 Stanton or do you want something filed?

15 THE COURT: I think we can e-mail it to Mr. Stanton.  
16 I can figure out what you're saying and what we're going to  
17 do. But I'd like your proposal on Wednesday to be as concrete  
18 as possible about a solution.

19 MR. STERN: I think we discussed a stipulation.

20 THE COURT: Yes.

21 MR. STERN: So once Mr. Campbell and I have something  
22 we've drafted it's likely we have to circulate it to the rest  
23 of the subpoena committee. So we'll do our best to get you a  
24 stipulation from everybody.

25 THE COURT: Okay. Yeah. And for the others who are

1 here, the issues are partly that we're trying to come up with  
2 a process that subjects entities to only one subpoena in this  
3 case and not multiple subpoenas from plaintiffs and  
4 defendants.

5 And the process in theory can work and it will work.  
6 But it's -- there have been some short turnarounds and there  
7 have been some parties who want to have input on to the  
8 subpoena but not be a signatory to it. So we're just trying  
9 to resolve those issues. Okay.

10 The next issue is the plaintiffs' authorizations for  
11 medical records and mental health records, substance abuse  
12 records, HIV, and genetic testing. And I guess the first  
13 question I have on that is I assume that no one has briefed  
14 anything since the briefing. Okay. Never mind. All right.

15 So what I'd like to do is start out with the time  
16 limitation on medical records. And at the initial decision  
17 that I made on this issue, which I believe was over the  
18 telephone if I'm not mistaken, I had said that the medical  
19 records should go back ten years. And I think I was thinking  
20 about adults at that time.

21 But and the defendants have argued that that means  
22 only five years prior to the 2014 switch. And that five years  
23 of medical records according to I think specifically the VNA  
24 but LAN defendants is inadequate.

25 And I noted that there seems to be an agreement on

1 employment records and educational records going back to 2004.  
2 So I guess my question of either Mr. Stern -- who's going to  
3 handle this.

4 MR. STERN: So I think these authorizations apply  
5 right now to the class plaintiffs.

6 THE COURT: That's right.

7 MR. LEOPOLD: And Ms. Berezofsky's going to argue for  
8 the class plaintiffs.

9 THE COURT: Okay. So Ms. Berezofsky, do the class  
10 plaintiffs agree that '04 should apply to the medical records  
11 as well as the educational and employment records?

12 MS. BEREZOFSKY: Would you like me to approach?

13 THE COURT: Yeah. I think it would be helpful if you  
14 were here.

15 MS. BEREZOFSKY: Esther Berezofsky for the class  
16 plaintiffs. Plaintiffs believe that the ten-year limitation  
17 is sufficient and appropriately balances the defendants' right  
18 to discovery against the plaintiffs' right to privacy. And  
19 the request for 20 years or lifetime of records is excessive.

20 THE COURT: We have a request by I think for Mr.  
21 Washington for you to speak up. This courtroom doesn't have  
22 the sound system that the other one has. So everybody has to  
23 speak up.

24 MS. BEREZOFSKY: Okay. Apologies.

25 THE COURT: Okay. Well and let me ask you, do you

1 agree that for minors that their medical records should be  
2 their entire life?

3 MS. BEREZOFSKY: Your Honor, we don't. I think that  
4 there should be some showing if there is a request for a  
5 lifetime of records. So we don't. A minor would be anybody  
6 under 18. And conceivably that would be 18 years of records.  
7 And we really think that that is excessive.

8 We have -- plaintiffs have produced 65 authorizations  
9 for 11 plaintiffs. Many of them are medical record  
10 authorizations for a period of ten years. I think at the very  
11 least that's a sufficient and it is a -- it's an accepted  
12 period of time in the context of this type of litigation for  
13 the access to plaintiffs' records.

14 To the extent that down the road there are -- and  
15 they're also not targeted. So to the extent that the  
16 defendants at some point determine that there is some  
17 additional targeted or are additional targeted records for  
18 specific conditions that they may want, that request can be  
19 made then.

20 But this -- you know, so in response to your  
21 question, I think for children or minors it would still be  
22 excessive.

23 THE COURT: Is Ms. Devine -- who's responding? Mr.  
24 Campbell.

25 MR. CAMPBELL: I'll respond, Your Honor.

1 THE COURT: Okay.

2 MR. CAMPBELL: Good afternoon again, Your Honor.  
3 James Campbell. I represent the three VNA defendants. On the  
4 specific issue of the amount of time that is addressed by the  
5 medical disclosures, I think this is not like some other case  
6 unless it's a lead case. Because lead is stored in the body  
7 for a long time. And it's particularly an issue for young  
8 people.

9 And you're going to -- will hear that throughout the  
10 litigation. We'll hear from a young person, a child that was  
11 exposed or allegedly exposed in Flint, that that exposure  
12 would result in years, you know, a lifetime or through  
13 adulthood that that person might be having lead issues.

14 So if that's the case and we think about just two  
15 alternative sources of lead that might be out there, lead  
16 paint or lead in the soil. And if you look at that, we need  
17 to have access to those records that go back and capture that.

18 Just as an example, Your Honor, I believe there's one  
19 of the minor plaintiffs identified in the Carthan complaint is  
20 3 K K, a minor child. And I think based upon the record in  
21 the complaint that that child is 14. So if we did the math,  
22 that would bring us back to when that person or now  
23 14-year-old, we wouldn't get the records when that person was  
24 most vulnerable.

25 And the evidence I think, Your Honor -- I don't know

1 that anyone would disagree with this. But the amount of lead  
2 that was in Flint and in everywhere has substantially  
3 decreased over time. So that back at this time period that  
4 we're talking about, there was more lead sources in Flint than  
5 probably everywhere than there was in 2014. So at least we  
6 should have access to when these people were most vulnerable.

7 Alternative causes for adults would be the same. If  
8 you have someone that's now 20 or 30 years old, when the  
9 exposure of that person back when he or she was young, an  
10 infant or a child, that's when they're most vulnerable.

11 So that's why we need these records and that's why  
12 the 10-year lookback now five years post the start of the  
13 Flint water issues doesn't make sense in this case.

14 THE COURT: Okay. Thank you. Well, I'm going to go  
15 through each of these. So I'll need Ms. Berezofsky back here  
16 in a minute. But with respect to the timeframe, Rule 26(b) of  
17 the Federal Rules of Civil Procedure controls the scope of  
18 discovery and requires that parties obtain or permits parties  
19 to obtain discovery regarding any non privileged matter that's  
20 relevant to a party's claim or defense and relevant to what  
21 we're discussing proportional to the needs of the case.

22 And I'm convinced that for the minors a lifetime of  
23 medical records is proportional to the needs of the case in  
24 light of the allegation -- the serious allegations of damage  
25 to minor's brains in their capacity in the future. And so if

1 | there was lead exposure through paint or some other source, I  
2 | think that would be very important.

3 | I'm not convinced that 20 years is needed for the  
4 | adults. And so I'm going to continue with the 10 year  
5 | limitation that's currently in place.

6 | And the other thing about this is you can certainly  
7 | request that these records -- once you're taking the  
8 | deposition and you find out that somebody had the very  
9 | condition that they're alleging was caused by lead had it  
10 | before when you're in the deposition, you can by all means go  
11 | and get additional documentation at that time.

12 | MR. CAMPBELL: So just to be clear on that, Your  
13 | Honor, you're suggesting that if as we work through these  
14 | cases we discover something that in this particular instance  
15 | based upon this developed evidence we can come back to Your  
16 | Honor?

17 | THE COURT: Absolutely, yes.

18 | MR. CAMPBELL: And if I could just one more time on  
19 | the adults. Are you saying that it's ten years from today?  
20 | And I just would reiterate, Your Honor, that that excludes the  
21 | time period when there would have been most vulnerable to a  
22 | lead issue, so.

23 | THE COURT: The adults?

24 | MR. CAMPBELL: Adults, correct. That's why a longer  
25 | period of time is reasonable.

1 THE COURT: But the adults -- what are the range of  
2 claims that the adults are making?

3 MR. CAMPBELL: Well, I believe and I'd stand  
4 corrected that they include lead exposure. But there's also  
5 all manner of other types of injuries including skin lesions  
6 and hair loss. And I can't reiterate them now. But there's  
7 certainly --

8 THE COURT: But the skin lesions and hair loss was  
9 due to the -- they're alleging is due to the Flint water  
10 source changing in April of 2014. So if they had earlier lead  
11 exposure in their early years as a child, it wouldn't lead to  
12 skin lesions in 2015.

13 MR. CAMPBELL: But it would lead to issues regarding  
14 lead related issues, Your Honor. I agree with you on the  
15 other things I think.

16 THE COURT: Okay.

17 MR. CAMPBELL: I don't particularly understand some  
18 of the damage claims.

19 THE COURT: Okay.

20 MR. CAMPBELL: I can say the words but I'm not quite  
21 sure I fully understand them.

22 THE COURT: Okay. Well, here's -- I'm confident that  
23 ten years for the adults is an appropriate balance in this  
24 case at this time. But as you look at those records, and if  
25 the records says patient reports past exposure to lead



1 exacerbated by this exposure, then you'll certainly have a  
2 right to get information on the past exposure.

3 So this doesn't foreclose your ability to come back  
4 either seeking relief from the Court or an agreement from  
5 plaintiffs to expand the scope.

6 MR. CAMPBELL: Understood, Your Honor. Thank you.

7 THE COURT: In those instances.

8 MR. CAMPBELL: Should I stay or vacate?

9 THE COURT: Yeah. Why don't you stay. And Ms.  
10 Berezofsky, if you want to join us. On the mental health  
11 records, we have a difficult situation -- I guess I need Ms.  
12 Berezofsky here. Because you are alleging serious physical  
13 and emotional injury, extreme disruption, inconvenience,  
14 discomfort, and emotional distress.

15 You're alleging a series of emotional injuries that  
16 appear to me to be more than what we've called garden -- what  
17 some courts call garden variety. And so but I'd also like to  
18 focus on the professional negligence count in particular for  
19 all plaintiffs alleges embarrassment, outrage, mental anguish,  
20 fear and mortification, denial of social pleasures, and stress  
21 related physical symptoms.

22 So I think that the damages that you're alleging flow  
23 from the professional negligence for all of your clients seems  
24 to take you out of the garden variety mental health damages.

25 MS. BEREZOFSKY: Judge, I would submit to you that

1 there is a clear -- we have provided medical authorization for  
2 mental health, authorizations for mental health records for  
3 some of the class plaintiffs --

4 THE COURT: Right.

5 MS. BEREZOFSKY: -- who have alleged specific types  
6 of psychiatric or psychological conditions and ones which do  
7 fall within the parameters that for which the records would be  
8 appropriately disclosed.

9 The garden variety ones, you know, contrary to  
10 defendants' assertion that there is no -- that they have not  
11 been defined, there is a 5 factor test.

12 THE COURT: Yes.

13 MS. BEREZOFSKY: And to the extent that there are no  
14 expert reports being submitted for certain types of claims or  
15 that there is not a claim for negligent or emotional  
16 intentional infliction of emotional distress or a specific  
17 psychiatric condition alleged. The emotional distress damages  
18 that for which we're imposing a disclosure of records for are  
19 ones that one would expect for people who have gone five years  
20 without clean drinking water or water that they can use for  
21 bathing, cooking, and other things.

22 The kinds of emotional distress that flow from those  
23 kinds of damages or injuries or claims. And those are garden  
24 variety as opposed to ones where there's a specific condition  
25 for which expert testimony is being proffered.

1 THE COURT: So do you consider this outrage, mental  
2 anguish, fear and mortification, and stress related physical  
3 symptoms to be garden variety? You're not going to present an  
4 expert on that? You're not presenting any mental health  
5 records to prove that there's been stress related physical  
6 symptoms?

7 How are you going to show that if not through -- I  
8 wonder if we could use the other door instead of the squeaky  
9 door for everybody who's in here at least.

10 MS. BEREZOFSKY: Through the testimony of the  
11 plaintiffs, that's how we would. And so to the extent that we  
12 may need to tweak the language and amend the language to more  
13 accurately or carefully reflect what is garden variety,  
14 plaintiffs are prepared to do that.

15 THE COURT: I think when you say stress related  
16 physical symptoms, there's going to have to be some medical  
17 testimony for that in which case I think Mr. Campbell gets  
18 those records. And that's alleged as to all plaintiffs for  
19 the professional negligence.

20 MS. BEREZOFSKY: And for that reason I would submit  
21 that we would want to perhaps amend the language to reflect  
22 the distinction between what are garden variety emotional  
23 distress damages versus ones where there's a specific  
24 condition being alleged.

25 THE COURT: Okay.

1 MS. BEREZOFSKY: With specific [Inaudible].

2 THE COURT: Mr. Campbell.

3 MR. CAMPBELL: Your Honor, the first thing that comes  
4 to mind is if the cases were tried, the one thing/phrase that  
5 we're not going to hear from any of the fine lawyers  
6 representing the plaintiffs is that the emotional distress  
7 claims that are going to be tried are garden variety. That's  
8 not going to happen.

9 What's going to be presented is an immense -- you  
10 know, a profound effect on any given plaintiff in any given  
11 situation. And those words that are in the complaint, those  
12 give us I would submit to you, Your Honor, the right to  
13 discover this information, which is all subject to  
14 confidentiality orders. They're not going to be disclosed  
15 beyond the people that knew it that need to see it.

16 And beyond that, Your Honor, this is a test of --  
17 we're entitled to test the plaintiffs' damages. If someone  
18 comes in and -- if someone comes in --

19 THE COURT: I'm with you.

20 MR. CAMPBELL: -- into the door and it squeaks -- I  
21 lost my train of thought.

22 THE COURT: Well, you're saying that the plaintiffs  
23 are going to come in here and have extreme emotional distress  
24 and you expect to hear that in opening statements.

25 MR. CAMPBELL: What I was going to say, Your Honor --

1 excuse me. That the defendants are entitled to test that as  
2 to alternative causes.

3 If someone has substantial other mental health issues  
4 or other issues that go to -- that would cause emotional  
5 distress or would cause the things that are alleged in the  
6 complaint that Your Honor has read, we're entitled to test the  
7 alternatives to that. What's going on in an individual's life  
8 that may be a different cause and may not be the cause  
9 regarding Flint water issues.

10 MS. BEREZOFSKY: If I can address that? The case law  
11 is clear. There is a distinction and there is something in  
12 the law, in the case law, that talks about garden variety.  
13 You're right, we may not be talking about that in front of a  
14 jury.

15 But what that means is the emotional reaction, the  
16 distress that's felt by people in a situation where the  
17 circumstances are what causes the response. And that is  
18 amenable to plaintiffs' testimony absent expert testimony.  
19 And that is subject to the weight of the evidence to be heard.

20 THE COURT: Here's the situation though. You are now  
21 telling me the jury -- what I'm going to instruct the jury on  
22 is I'm not going to be using words like extreme serious  
23 physical and emotional injury including neurological  
24 disorders, exhaustion, memory loss, psychologic.

25 I mean, these are things you've already agreed to

1 earlier would warrant a mental health release.

2 MS. BEREZOFSKY: And to the extent that they cover  
3 everyone, what I'm suggesting is that we separate out.  
4 Because we have produced medical authorizations --

5 THE COURT: Right.

6 MS. BEREZOFSKY: -- for people who have those types  
7 of injuries. And it's -- there are other people, many people  
8 who fall into the other category. And they should not be  
9 subject to that kind of privacy invasion or disclosure.

10 THE COURT: Okay. Here's what I think is appropriate  
11 here. I think the Sixth Circuit has instructed me in the  
12 *Maday v Public Libraries* case that if plaintiff were not  
13 seeking emotional distress damages, then her conversations  
14 with the social worker about how she was feeling would likely  
15 be privileged. But when she does put her emotional state at  
16 issue, she waives that privilege. And the records can come in  
17 subject to any reasonable balancing by the district judge.

18 So the balancing -- then I think the five factor test  
19 helps balance -- helps me make that determination of where the  
20 equities lie here. And in the situations that plaintiffs'  
21 class counsel has already more or less agreed such as with Ms.  
22 Carthan that those are more than garden variety damages with  
23 Rhonda Kelso and Tiantha Williams and her minor child.

24 That -- I mean, you're alleging here psychological  
25 disorders including posttraumatic stress, difficulty coping

1 with normal stress, that those are things that do --  
2 defendants have to be able to test those allegations.

3 MS. BEREZOFSKY: They do. But there is a balancing  
4 that this Court has to do.

5 THE COURT: Yes.

6 MS. BEREZOFSKY: And to the extent that the mental  
7 condition of the plaintiff is not at issue and that is one of  
8 the five factors where it is a response to a stressful  
9 situation, to a traumatic situation, to a difficult situation  
10 such as here -- five years not having clean drinking water --  
11 and that is different. And that is what many of these people,  
12 what their claims encompass.

13 And those when you balance that against the invasion  
14 of their privacy to, you know, for disclosure of any mental  
15 health records from the past, I think unbalance that they  
16 should not be -- they should not have to disclose them.

17 If down the road in the course of discovery there is  
18 something that, you know, arises where there is a legitimate  
19 basis for further inquiry for those plaintiffs, you know, then  
20 we would likely agree that that disclosure should be made.  
21 But there are an awful lot of people who do fall into that  
22 category.

23 And to your point about the language that's currently  
24 in the complaint, we would amend that. We would propose to  
25 amend that.

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1 MR. CAMPBELL: Your Honor?

2 THE COURT: Yeah. Yes.

3 MR. CAMPBELL: We've been through this with multiple  
4 hearings. And it's just some of the plaintiffs that you  
5 identified, Barbara and Darrell Davis allege "profound  
6 emotional distress".

7 To the extent that it is as Ms. Berezofsky just said  
8 that it's a response to the drinking water, that's what the  
9 plaintiff claims. And we shouldn't be in a position -- no  
10 defendant should be in a position of just having to accept  
11 that.

12 We should be entitled and I believe the case law  
13 supports it that these issues are an issue and we're entitled  
14 to discover them. And if what is out there is either nothing  
15 or something that doesn't give rise to an alternative cause,  
16 then that's fine.

17 But unless we're entitled to inquire, we have to  
18 accept what the plaintiffs who are suing us, what they say  
19 about it. Oh, you know, it's only a response to the water.  
20 It's not -- it's fundamentally not fair. And I think the  
21 Sixth Circuit case you identified supports that.

22 THE COURT: Here's what I think we have to do, which  
23 is it's not going to be easy. But when I look at the five  
24 factor test, which is what plaintiffs are arguing I should  
25 apply, factor one, intentional or negligent infliction, we



1 don't have those causes of action. Those were alleged.

2 They're not surviving.

3 MS. BEREZOFSKY: Right.

4 THE COURT: Two, an allegation of a specific mental  
5 or psychiatric injury or disorder. When you say posttraumatic  
6 stress disorder, that is a specific psychiatric disorder. And  
7 I think Mr. Campbell is right. He has to have the opportunity  
8 to find out if there was another traumatic event around the  
9 same time that would have caused this.

10 A claim -- the third factor is a claim of unusually  
11 severe emotional distress. And to the extent plaintiff --  
12 several of the named plaintiffs are making those allegations,  
13 I think they will have to sign a release.

14 For instance Darrell and Barbara Davis where it says  
15 pain, suffering, and profound emotional distress and  
16 inconvenience, I think that is exactly what you're talking  
17 about, Ms. Berezofsky, of this is a response to their  
18 allegations of what happened with their water source.

19 But when we get to the other ones that we've been  
20 discussing, PTSD, sleeping disorder, psychological disorder  
21 such as depression and chronic anxiety. If the person had  
22 chronic anxiety before this happened, we just need to know  
23 what can be attributed to your allegations in the complaint.

24 MS. BEREZOFSKY: So Your Honor, I know you're loathed  
25 to have us amend or, excuse me, refine the language in the

1 complaint. But I think given the fact these are class  
2 representatives -- excuse me -- and we are talking about  
3 potentially a large number of people, I think it's worth and  
4 important to do because there is a distinction between a  
5 diagnosis of posttraumatic stress and emotional distress that  
6 is responsive to a stressful situation.

7 And so I would ask that the Court grant the  
8 opportunity to refine that language so that everyone who makes  
9 any claim for emotional distress is not then subject to  
10 invasion of privacy that the defendant is arguing for.

11 THE COURT: Well, what makes -- so the problem is we  
12 want to come to a close with amending the complaint as soon as  
13 possible. So all of these interrogatories and things that are  
14 being propounded right now are worthwhile.

15 On the other hand I understand what you're saying,  
16 this is very sensitive material. And before people subject  
17 themselves to that, it better be worth it. I mean, it needs  
18 to be a valuable endeavor.

19 One question from what you're saying is that if you  
20 don't sign these releases then of course you can't rely on any  
21 of these providers to testify about damages. Or any other  
22 provider to testify about damages.

23 MS. BEREZOFSKY: Psychiatric or psychological  
24 damages, correct.

25 THE COURT: Right. Okay. So the only testimony

1 you're suggesting you're going to bring in is testimony from  
2 your clients' personal testimony?

3 MS. BEREZOFSKY: To the extent that they are limiting  
4 their claims to that kind of emotional distress, for lack of a  
5 better term, garden variety, yes.

6 THE COURT: But that's what I was saying earlier and  
7 you were saying that's not workable. What I was saying  
8 earlier is if you have clients who are not going to bring in  
9 any expert testimony, any treating psychiatrist, social  
10 worker, or mental health provider testimony and are only --  
11 are limiting themselves to pain, suffering, and emotional  
12 distress generally deriving from the water situation, then I  
13 don't think you have to -- I would not order that these  
14 releases be signed.

15 But to the extent you are seeking anything more than  
16 that, memory loss, psychological disorders, chronic anxiety,  
17 PTSD, I think you have to sign the release.

18 MS. BEREZOFSKY: I don't disagree with that. I think  
19 the issue is whether or not the plaintiffs can talk about  
20 their emotional distress.

21 THE COURT: Oh.

22 MS. BEREZOFSKY: That's really what we're talking.  
23 Can they testify about that in a deposition, in a trial, if it  
24 is the emotional distress responsive to a bad situation.

25 THE COURT: Well, if it's the emotional stress

1 responsive to the bad situation and limited to -- well, garden  
2 variety doesn't tell us anything. But limited to saying this  
3 stressed the heck out of me. I felt horrible. You know, I  
4 felt bad about it. I was upset. I cried. Things like that.

5 But if they're going to say I have PTSD. I can't  
6 concentrate at work. I can't -- I have denial of all social  
7 pleasures. I have stress related physical symptoms. Then I  
8 think we have to find -- I think Mr. Campbell's entitled to  
9 test the source of that.

10 And the other thing is if he's only allowed, as  
11 you've been explaining, to test the source of it, if it comes  
12 out in the deposition, I mean then your client is limited to  
13 what they can present to the jury and what you can say in  
14 opening statements about the kinds of -- the ways your clients  
15 suffered, so.

16 MR. LEOPOLD: Your Honor, can I just say -- because  
17 we were talking.

18 THE COURT: Yeah.

19 MR. LEOPOLD: Ted Leopold for the class. While Ms.  
20 Berezofsky was here addressing this issue, I was thinking and  
21 speaking with a few of the class counsel on perhaps the way to  
22 try to address this as opposed to amending anything.

23 THE COURT: Okay.

24 MR. LEOPOLD: Because I think that is a certain  
25 certainly for the Court and is a concern for us.

1 THE COURT: Yeah.

2 MR. LEOPOLD: And I'm not sure why we cannot for each  
3 of our class representatives and potential class people down  
4 the road just stipulate at the time now for our class  
5 representatives, for example, that these are the specific -- I  
6 don't want to use -- I don't like the term garden variety  
7 claims. But these are the normal types of emotional issues  
8 that one is dealing with as a result of the occurrence that  
9 occurred from the bad water in Flint.

10 THE COURT: So you would --

11 MR. LEOPOLD: And affirmatively stipulating, we are  
12 not for this particular person not seeking posttraumatic  
13 stress disorder, all the more specific where one could perhaps  
14 argue that expert testimony may be needed or some foundation.

15 I think the normal emotional issues that are  
16 addressed from the bad water situation is one of credibility  
17 and the weight of the evidence that the jury will have to  
18 ascertain through the testimony of the client. And we would  
19 be able to have supporting testimony from family members or  
20 whatever it may be. And counsel for the defendants can take  
21 appropriate depositions and cross-examination at that time.

22 But I think by a stipulation to each of those  
23 individuals, that alleviates the amending issue. Just like  
24 any trial, you conform to the evidence as you move forward.

25 THE COURT: But that stipulation would have to be

1 made early on. Because the authorizations need to take place  
2 presumably before the deposition takes place presumably way  
3 before the trial.

4 MR. LEOPOLD: We certainly can do that for the class  
5 representatives. The people that are seeking authorizations  
6 for.

7 THE COURT: Right.

8 MR. LEOPOLD: We need to continue to interview them  
9 and drill down on all these issues. And there are additional  
10 people other than those that we've already given  
11 authorizations for. Because of the more intense type of  
12 emotional injuries, we can do that.

13 We can also get a stipulation that for these ABC and  
14 D class representatives, we are not seeking those types of  
15 emotional distress injuries.

16 MS. BEREZOFSKY: And I agree completely and maybe  
17 amending language was too far afield.

18 THE COURT: Okay.

19 MS. BEREZOFSKY: But I think the issue was that --  
20 what defendant's position has been that if we don't -- if  
21 these records are not produced or authorizations are not  
22 produced, that these plaintiffs who have the emotional  
23 distress response to an occurrence would not be able to talk  
24 about any kind of emotional distress. That's been the  
25 position. And that's really the objection.

1 THE COURT: Okay.

2 MS. BEREZOFSKY: So to the extent that we can  
3 identify who of the 11 class representatives, who falls into  
4 what category, I think that would be a solution.

5 THE COURT: Mr. Campbell.

6 MR. CAMPBELL: So this all -- we're still on the same  
7 spot, Your Honor, where it's the plaintiffs that are bringing  
8 the lawsuit, making the claims. And now they're going to  
9 define what the defenses are by somehow saying that this  
10 emotional distress is separate from some other that they may  
11 have had.

12 Now we don't know these people obviously. The only  
13 way we can inquire about that and to develop appropriate proof  
14 and to understand and to -- there might be a plaintiff that,  
15 you know, will testify that, yeah, I came home and the water  
16 made me upset and sad and I cried. But that there was -- that  
17 was going on for years and years beforehand. And it's  
18 documented. I mean, this is standard kind of discovery.

19 THE COURT: But let me compare it to this case for  
20 myself. I felt some stress before I got this case. But then  
21 I got this case. And my stress is way higher than it was.  
22 And so I don't think --

23 MR. CAMPBELL: But I believe you, Judge.

24 THE COURT: We just know intuitively that people have  
25 stress in their lives. And they cry. I cry often. And but I

1 cry more now than I ever have. So we know -- I mean, some  
2 things just don't take an expert and we just know that you  
3 either -- a jury's either going to believe somebody or not  
4 that they were stressed about this situation.

5 But when they're saying that it then led to a  
6 diagnosable mental health condition, then you get -- I think  
7 you get these records. So but the problem is sort of anxiety  
8 I mean, yeah, we're all anxious. I'm anxious right now. But  
9 I don't think no one's going to diagnose me with that because  
10 I'm sitting here.

11 So I think what we need is what -- Ms. Berezofsky and  
12 Mr. Leopold, what I'd like to do is see a submission from you  
13 about what you think goes in the bucket of this is sort of  
14 intuitively something that someone can testify to water  
15 changes, this whole -- you know what we know to be these cases  
16 takes place.

17 But I will tell you if it's borderline, I'll order  
18 the records to be released. Because I do think that if  
19 somebody says I then started drinking more and I started  
20 taking cocaine at night and stuff. Then you get to find out  
21 more about this, whether that was something they were doing  
22 beforehand also.

23 So what I would do is give the plaintiffs two weeks  
24 to submit to the court in a filing what you believe -- we'll  
25 just use the word garden variety -- constitutes the usual sort



1 of pain and suffering, what we just call pain and suffering,  
2 and what goes beyond that.

3 But be aware you're going to be limiting yourself in  
4 what you can say in opening statements on these cases, which I  
5 know you're aware of. And then you'll have an opportunity to  
6 respond.

7 MR. CAMPBELL: Thank you, Judge.

8 THE COURT: And I'll just figure that all out in the  
9 order.

10 MR. ERICKSON: Your Honor could I be heard very  
11 briefly on this?

12 THE COURT: Yes, Mr. Erickson.

13 MR. ERICKSON: Can I do it from here?

14 THE COURT: Yeah. Just speak up.

15 MR. ERICKSON: Philip Erickson on behalf of the LAN  
16 defendants. I just want to, you know, thinking out loud want  
17 to help everybody think through what this means when we're  
18 talking about class representatives.

19 So if a stipulation is offered by the plaintiffs that  
20 these plaintiffs are only going to be asking for garden  
21 variety emotional distress damages, does that mean that nobody  
22 in the putative class is going to be seeking more serious  
23 damages?

24 THE COURT: No. Because I think what's going to  
25 happen is some of the individuals are -- they're alleging PTSD

1 and they have to sign the release and they already have. So  
2 anyone in the putative class who's going to say PTSD,  
3 alcoholism, other mental health medical conditions flowing  
4 from this --

5 MR. ERICKSON: That leads to my point though.

6 THE COURT: Okay.

7 MR. ERICKSON: If you allow the plaintiffs to say  
8 because they want to stipulate and they don't want a  
9 particular plaintiff to be subject to this discovery, then  
10 you're allowing the plaintiffs to put forth only their  
11 strongest cases --

12 THE COURT: No, they're going to put forth --

13 MR. ERICKSON: -- and not allowing us to discover the  
14 weaker cases.

15 THE COURT: But they're going to decide if somebody  
16 is a weaker case in the sense of your terminology. They're  
17 going to say Judy Levy's just garden variety. She's just  
18 basic stressed out. She's not exceptionally.

19 MR. ERICKSON: But Judy Levy, to use your example --  
20 in fact, I'm not comfortable using that example.

21 THE COURT: Okay. We don't want the record to  
22 reflect all of my mental health conditions.

23 MR. ERICKSON: Why don't we just use Ms. Smith.

24 THE COURT: Okay.

25 MR. ERICKSON: Ms. Smith may really have more serious

1 emotional distress.

2 THE COURT: I see.

3 MR. ERICKSON: But there are difficulties with her  
4 mental health background and they don't want that to be  
5 discovered. So they enter into a stipulation as to Ms. Smith.  
6 And defendants never get to discover information --

7 THE COURT: But it won't help --

8 MR. ERICKSON: -- that would be relevant and  
9 significant.

10 THE COURT: It won't help defendants because Ms.  
11 Smith can't collect exceptional damages for exceptional  
12 problems. She's just saying I have a medium small problem  
13 emotionally as a result of this.

14 MR. ERICKSON: Right. But then she's not acting as a  
15 true representative.

16 THE COURT: She's only acting as a representative of  
17 the people with small problems. Then we're going to have --

18 MR. ERICKSON: But she's not a person with small  
19 problems. She is a person with, in my hypothetical, that in  
20 fact has more significant problems.

21 MS. BEREZOFSKY: But she's not alleging them. And so  
22 she --

23 MR. ERICKSON: She has alleged it already but now  
24 there's going to be a stipulation pulling back from that  
25 allegation. That's fundamentally unfair to the defendants.

1 THE COURT: But you're not defending -- you're not at  
2 risk. You're not exposed to her extraordinary damages anymore  
3 because she --

4 MR. ERICKSON: And I understand that. There's a bit  
5 of a double edge sword here.

6 THE COURT: Yeah.

7 MR. ERICKSON: But shouldn't the defendants be  
8 entitled to discover as to all plaintiffs who have made that  
9 allegation and not allow plaintiffs to go forward and  
10 selectively decide who they want to be discovered? That's my  
11 point.

12 THE COURT: I think I understand --

13 MR. ERICKSON: Especially when we're talking about  
14 class representatives.

15 THE COURT: But for instance, Snyder, this is Michael  
16 Snyder personal representative of John Snyder's estate. We  
17 already know that he's saying pain, suffering, loss of society  
18 and companionship. And to me that is just your basic you  
19 don't have to go to a therapist to determine that.

20 And even if he was -- even if he's schizophrenic and  
21 you would just determine this man is a paranoid schizophrenic,  
22 he's eggshell everywhere. He still is going to have some  
23 basic suffering from the loss of John Snyder. And so I don't  
24 think --

25 MR. ERICKSON: I don't have a difficulty with living

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1 with the pleadings as they are and classifying plaintiffs  
2 according to the pleadings. I do have a difficulty with  
3 allowing the plaintiffs now to go forward and say, guess what,  
4 we don't want discovery as to these three.

5 THE COURT: I see.

6 MR. ERICKSON: So we're going to stipulate.

7 THE COURT: I see. Okay. And I get your point  
8 there. And so I think what we have to do is go through the  
9 plaintiffs who you have, which we've sort of already done.  
10 But in your submission, it will be clear that, for example,  
11 Marilyn Bryson, B-R-Y-S-O-N, says serious physical and  
12 emotional injury, what is --

13 Ms. Berezofsky, are you suggesting that that is  
14 garden variety? The physical I'm not worried about. You're  
15 going to get the ten years of medical records.

16 MS. BEREZOFSKY: Excuse me.

17 THE COURT: And emotional injury. Is that serious  
18 emotional injury or is it just and emotional injury.

19 MS. BEREZOFSKY: I would say emotional injury. But I  
20 will look at that again more carefully. And to the extent  
21 it's more than that, then you know what Your Honor's  
22 suggesting we do, we do. But to the extent that it is  
23 emotional injury in response to the occurrence, then those  
24 would be her claims.

25 THE COURT: Okay.

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1 MR. KLEIN: Your Honor, may I be briefly heard?

2 THE COURT: Yes.

3 MR. KLEIN: And I'll note the city did join in this  
4 motion.

5 THE COURT: Yes. Thank you.

6 MR. KLEIN: I really only have one point, which is  
7 this. If we think through what the trial of this case is  
8 going to be like and we've bucketed people into small problems  
9 and big problems. And it's time to instruct the jury. And  
10 you instruct them that plaintiff X has small problems and  
11 plaintiff Y has big problems and therefore -- I'm at a loss as  
12 to what the therefore.

13 THE COURT: No. What we're going to instruct them.  
14 We're going to say serious -- we're going to say -- we're  
15 going to have a jury instruction on what they must find for  
16 extreme emotional distress.

17 We're going to say for extreme emotional distress,  
18 you must find by a preponderance of the evidence that so and  
19 so had these conditions and that mental health professional  
20 verified that. Or whatever the instruction is going to say.

21 And then we're going to say for plaintiff so and so  
22 who has pain and suffering and loss of companionship, you can  
23 determine that based on his testimony. If you believe him,  
24 and this is how we'll know if you believe him, then you may  
25 find in plaintiffs' favor or something like that or you may

1 find in defendant's favor that he did not prove it if you do  
2 not believe him. Whatever.

3 MR. KLEIN: And God forbid the jury should find  
4 liability, the question becomes what dollars you write in the  
5 blank and what difference does it make that you've bucketed --  
6 I mean, the bottom line I think is that the Court is -- and  
7 I'm not going to reargue the brief. But I actually don't  
8 think that this garden variety and forget the label. I don't  
9 think it exists in law. I'm not going to reargue it. It was  
10 briefed as well as we were capable. But I think the fact that  
11 --

12 THE COURT: Well, it exists. We know all these cases  
13 have referred to it. I mean, it exists. People -- case --  
14 other judges have used that terminology.

15 MR. KLEIN: And other judges in this circuit,  
16 district judges in this circuit and I think Maday rejected  
17 distinction. The law is not a seamless web. I think  
18 preponderance favors us. But clear I absolutely don't agree  
19 that there is broad consensus in this circuit or elsewhere  
20 that this garden variety concept is, in fact, an element of  
21 the law.

22 THE COURT: Okay. I understand what you're saying.

23 MR. KLEIN: Thank you, your Honor.

24 THE COURT: Mr. Stern.

25 MR. STERN: Your Honor, I think that it's important

1 whatever you decide and however you decide to do it to  
2 consider that it's very likely whatever you decide is going to  
3 apply to probably 23,000 potential claimants who are all part  
4 of the census.

5 And if the way this is resolved is just by, you know,  
6 for these five plaintiffs suggesting this is garden variety or  
7 this isn't, what's ultimately going to happen is you may have  
8 for 150 pools of bellwether cases arguments on every single  
9 individual about what they've pled, how they've pled it, and  
10 whether it constitutes the type of claim that allows for and  
11 requires mental health records or doesn't.

12 And so I think there needs to be to the extent it's  
13 possible some kind of bright line form pleading such that we  
14 don't go through this process on each and every individual who  
15 ends up being a part of a bucket for bellwether trials.

16 THE COURT: And to that concern, which I'm concerned  
17 about as well, the short form and the fact sheet doesn't set  
18 forth the type of emotional damages that are being sought.

19 So what is your proposed solution for that? Just to  
20 have a bright line rule that if it's sort of pain and  
21 suffering, then no release. If it's --

22 MR. STERN: I don't know if there needs to be a rule.  
23 First of all, for the first bucket of cases, we're talking  
24 about lead cases and it was very narrow and specific. So I'm  
25 not sure that the application of this is really pertinent for



1 the first bellwether round.

2 But to the extent that it is, when people are going  
3 to check a box on a short-form complaint about what their  
4 damages are, it would be better if they knew -- they know  
5 their clients. If I know that my client is more in the -- and  
6 I don't -- to the extent that somebody has a thousand adults  
7 who are making these claims, if they know that these 900 are  
8 the garden variety type that Mr. Leopold and Ms. Berezofsky  
9 just described, then they should be able to appropriately  
10 check the right box so that this issue doesn't continue to  
11 come up on a case by case basis.

12 THE COURT: Okay. All right. Thank you.

13 MR. CAMPBELL: Just on that, the issue of how this  
14 affects the bellwethers and individual plaintiffs, honestly,  
15 Your Honor, I haven't thought it there and whether or not a  
16 checking of the box is going to be sufficient.

17 My sense tells me that I don't think we'll agree with  
18 that. But to the extent that this goes on to the individual  
19 cases, we would just ask for an opportunity to address that  
20 specifically and the like.

21 THE COURT: Okay.

22 MR. CAMPBELL: Because I agree with Mr. Stern that  
23 this will come up.

24 THE COURT: Yeah. I think it will, too.

25 MS. BEREZOFSKY: And Your Honor, excuse me, in the

1 submission that you've requested, presumably that is to create  
2 some sort of a framework or description or definition --

3 THE COURT: Correct.

4 MS. BEREZOFSKY: -- of what we're talking.

5 THE COURT: Yeah. And for what it's worth, to  
6 respond to Mr. Erickson and Mr. Klein as well, what I'm trying  
7 to do is not tie your hands and make your defense more  
8 difficult. I'm trying to undertake a balancing test where we  
9 know that the plaintiffs have brought this case and to a  
10 certain extent they're putting their personal lives and mental  
11 health conditions at issue. And they will have to testify to  
12 what happens to them.

13 But the question is just how invasive does the  
14 process have to be? And I think everybody here wants it to be  
15 as noninvasive as it can consistent with your duty to your  
16 clients. So that's the only thing that I'm trying to do is  
17 balance the interests of individuals in their own privacy with  
18 the capacity to defend the case.

19 And so when the individuals are claiming  
20 extraordinary damages, serious -- well, serious may not be the  
21 right word. But extreme. Then they're putting their mental  
22 health at issue and they waive the privilege. And where they  
23 I think only say pain, suffering, loss of society -- well,  
24 pain and suffering, then I think that they aren't putting that  
25 at issue.

1           So that's what I would like your submission to  
2 define. And I agree with Mr. Erickson that I don't want an  
3 amendment to what's here. I just want you to define where you  
4 think your current plaintiffs fall and why.

5           MR. LEOPOLD: Your Honor, when would you like that  
6 due from --

7           THE COURT: Two weeks from today.

8           MR. LEOPOLD: Thank you.

9           MR. CAMPBELL: And Your Honor, just to follow on some  
10 of our discussion from the timeframe on the adults, I would  
11 think clearly and obviously to the extent we take discovery  
12 and issues develop that make it clear at least to whoever's  
13 doing the discovery that additional releases or information  
14 that the plaintiff is not -- we believe the plaintiff is not  
15 properly characterized --

16           THE COURT: Right.

17           MR. CAMPBELL: -- and we're entitled to more, we can  
18 request. Thank you.

19           THE COURT: On the HIV records, I'm not convinced  
20 that you get those records unless you have reason to believe  
21 the person has HIV or AIDS or their -- is life expectancy at  
22 issue in this case?

23           MS. BEREZOFSKY: You know, it may be but it is not --  
24 it's so attenuated, the request for HIV records and impact on  
25 life expectancy is so attenuated, there's no basis for saying

1 that there is necessarily [Inaudible] impact. And I think it  
2 is such highly protected sensitive information that I think at  
3 the very least defendants would have to make a showing or a  
4 proffer why they should be entitled to that information.

5 THE COURT: I think so, too. Also just factually,  
6 .16 percent of the county's population is HIV positive. Of  
7 the entire county. So we're talking about a very small number  
8 of possible plaintiffs in this case on the one hand. But on  
9 the other hand, this is extremely sensitive information.

10 I know we have a protective order, but I would want  
11 to see a showing that the plaintiff is alleging their life  
12 expectancy is going to be shortened by the defendant's  
13 conduct. And that you have reason to think HIV may bring  
14 their life to a close before lead or legionella.

15 MR. CAMPBELL: Understood, Judge. That's fair. And  
16 I was going to bring to your attention that there is a I would  
17 call it substantial literature out there that relates HIV and  
18 some of the allegations being made in a case. Skin lesions,  
19 rashes. There's even an article --

20 UNIDENTIFIED PERSON: Can't hear.

21 THE COURT: He's saying that HIV might -- well, not  
22 HIV infection but AIDS --

23 MR. CAMPBELL: Agreed, yes.

24 THE COURT: -- causes skin lesions. But those are  
25 Kaposi sarcoma. Those are different lesions than the lesions

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1 in this case.

2 MR. CAMPBELL: Your Honor, I understand your ruling.  
3 And to the extent that we find the need to pursue it we can  
4 bring it to your attention.

5 THE COURT: Okay.

6 MR. CAMPBELL: I just wanted to let Your Honor know  
7 that there's literature out there that supports.

8 THE COURT: Okay. And if you get to a particular  
9 deposition and the plaintiff says, you know, I now have AIDS  
10 and it's caused by the stress I underwent, well then you'll  
11 get more information on when they were diagnosed and have they  
12 had AIDS since before 2014, or did they only have HIV  
13 infection. Then you can go into it. But before then, I think  
14 it's -- they have not waived their right to privacy on that  
15 issue.

16 On the substance abuse records, I think we've got the  
17 same thing going on as we have with AIDS and HIV, which is  
18 that first of all if you get ten years of medical records,  
19 you're going to get -- I know every time I go to the doctor  
20 they ask me how many glasses of wine I drink a night. And I  
21 say are you talking about a Flint water day?

22 They ask you every time you go if you've taken some  
23 street drugs that week or only prescription and all of that.  
24 So you're going to get this.

25 MR. CAMPBELL: Understood, Your Honor. It's the same

1 issue. If we develop it, if it pertains and there's evidence  
2 that we see that we need to pursue, again we can bring it to  
3 your attention. But I agree with you about where we might  
4 discover.

5 THE COURT: Okay. So at this point I'm not going to  
6 require that plaintiff -- I'm not going rule that they have  
7 waived their right to confidentiality on this issue. If it  
8 comes to your attention and you think it's relevant, then you  
9 can seek a release at that point. And the same with genetic  
10 testing. I didn't see that thoroughly briefed.

11 MR. CAMPBELL: I don't think it was in the brief,  
12 Judge.

13 MS. BEREZOFSKY: We addressed it in the event that it  
14 be raised.

15 THE COURT: Yeah. Okay. All right.

16 MR. CAMPBELL: Thank you, so much.

17 MS. BEREZOFSKY: Thank you.

18 MR. ERICKSON: Your Honor?

19 THE COURT: Yes, Mr. Erickson.

20 MR. ERICKSON: I was unclear and maybe I didn't hear  
21 the court. When does the ten year period start for adult  
22 medical records?

23 THE COURT: It starts when I last made -- when we had  
24 that telephone call a month ago.

25 MR. STAMATOPOULOS: It was February 28th, Your Honor.

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1 THE COURT: Thank you.

2 MR. ERICKSON: Thank you.

3 THE COURT: February 28th. That was a long time ago.  
4 Okay.

5 The next issue is coordination of cases involving the  
6 EPA. Since our last time together, Judge Parker made a  
7 decision in the Burgess case versus United States. And she  
8 denied the EPA's motion to dismiss.

9 So at this point Judge Parker has extended the time  
10 for defendants to answer or file a motion for interlocutory  
11 appeal. So we'll see what happens with that by June 7th and  
12 then discuss further how to coordinate with those cases at  
13 that time or before if the cases develop such that we need to  
14 address it before.

15 In terms of other coordination, I had invited Judge  
16 Yuille to join us today. He was unable at the last minute to  
17 make it here. So I just want to let you know I've been in  
18 touch. I've had some conversation with Judge Yuille. And I  
19 know that you all had a May 9th I think status conference with  
20 him.

21 So is there anything that either class or individual  
22 counsel wants to report about coordination with the state  
23 cases at this time?

24 MR. STERN: Your Honor, Corey Stern. We simply --  
25 Judge Yuille I think is aware of the case management order

1 that you entered.

2 THE COURT: He is.

3 MR. STERN: And seems to be inclined to mirror your  
4 case management order. But he hasn't signed anything.  
5 Nothing's happened in state court for quite some time.

6 THE COURT: Okay.

7 MR. STERN: So there is no -- everything's  
8 coordinated because he entered an order, but there's nothing  
9 happening presently with regard to discovery in state court  
10 until he enters an order. And when he does, I would expect it  
11 to mirror the order that you entered here.

12 THE COURT: Okay. Good.

13 MR. STERN: Mr. McAlpine may have something to add.

14 MR. MCALPINE: No. I think that's fine.

15 THE COURT: Okay. Well, Ms. Greenspan. I would  
16 appreciate it if you could provide an update on your work.

17 SPECIAL MASTER GREENSPAN: Thank you. This will be  
18 brief. We've been here for a while.

19 THE COURT: No one can hear you.

20 SPECIAL MASTER GREENSPAN: Oh. How do I make --

21 THE COURT: The mic doesn't work. I mean, it feeds  
22 into a recorder but it doesn't work to amplify.

23 SPECIAL MASTER GREENSPAN: That one doesn't work  
24 either?

25 THE COURT: None of them work for amplification.



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1           SPECIAL MASTER GREENSPAN: Okay. All right. I'll  
2 talk this -- if i can talk this direction?

3           THE COURT: Yes, please.

4           SPECIAL MASTER GREENSPAN: Okay. All right. Just a  
5 quick update. In accordance with the case management order,  
6 yesterday was the date to provide to counsel the list of cases  
7 from which there will be a selection of bellwether cases for  
8 the initial bellwether process. So that was posted.

9           And I've notified counsel if there's anyone who needs  
10 to have access to that information, did not get notified, just  
11 please contact me. And I can provide the information about  
12 how you get access to that case list.

13           Second in terms of the census information, we have  
14 been collecting updated information and more case information  
15 or claimant information since the first interim report was  
16 filed. And I am about very close to filing a second interim  
17 report that will have additional information, will include  
18 more claims, will have more specific information about the  
19 status of some of those claims.

20           So there will be refinement in the data. And as I  
21 said a little bit more additional information. So that is  
22 forthcoming and hopefully will flesh out the information that  
23 people have so you can understand what it is exactly that has  
24 been identified or what claimants have really -- how many  
25 claimants have actually sought the assistance of counsel, how

1 many have actually filed cases. This covers both state and  
2 federal court.

3 So again, I hope it will be helpful to everybody and  
4 it should be out in the next couple of days. And that's my  
5 update.

6 THE COURT: Good. Thank you, very much. And I  
7 wanted to take an opportunity to thank Ms. Greenspan for her  
8 work. She has incredibly detailed work to be done on this  
9 case and I appreciate it a great deal. So thank you on behalf  
10 of everybody here.

11 Let me go back to the discovery coordination. I did  
12 have a request I believe from class plaintiffs to update the  
13 Court on discussions with state defendants regarding  
14 production of materials identified in the ongoing criminal  
15 litigation.

16 Mr. Leopold, why did I put that --

17 MR. LEOPOLD: I'm not sure. I think Mr. Novak can  
18 bring us up to speed.

19 THE COURT: Okay.

20 MR. LEOPOLD: I know he's had conversations with  
21 Richard Kuhl and some others.

22 THE COURT: Okay. Thank you.

23 MR. NOVAK: Your Honor, Paul Novak on behalf of class  
24 plaintiffs. We've had some initial telephonic conferrals with  
25 Mr. Kuhl in the Attorney General's office with respect to

1 documents that had been identified primarily by virtue of some  
2 motion practice in some of the criminal proceedings in Genesee  
3 County Circuit Court.

4 I think at this point the production, if I understand  
5 it correctly, is in the possession of the criminal  
6 prosecutorial counsel. And consequently I don't know that  
7 it's available. I think at some point we will work through  
8 those issues. Also in the context of what is now a broader  
9 process of until the state defendants are parties in our case,  
10 or answering parties I should say, we'll work this through as  
11 part of the broader process of seeking discovery in a third  
12 party capacity.

13 THE COURT: Okay. So at this point there's nothing  
14 that can be done or ordered or it's in a wait and see?

15 MR. NOVAK: I think it would be premature to seek  
16 some compelling order at this point.

17 THE COURT: Okay. Thank you. All right.

18 Well then the next status conference is planned for  
19 June 19th at 2:00 PM. And the rest is set forth in the  
20 agenda. So thank you all very much and I will see you then.

21 (Proceedings Concluded)

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CERTIFICATE OF OFFICIAL COURT REPORTER5

I, Jeseca C. Eddington, Federal Official Court Reporter, do hereby certify the foregoing 75 pages are a true and correct transcript of the above entitled proceedings.

/s/ JESECA C. EDDINGTON  
Jeseca C. Eddington, RDR, RMR, CRR, FCRR

6/13/2019  
Date