

June 19, 2019

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re Flint Water Cases Case No. 16-10444

_____ /

STATUS CONFERENCE

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

JUNE 19, 2019

APPEARANCES IN ALPHABETICAL ORDER:

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

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

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

(Appearances continued on next page)

For a Certified Transcript Contact:

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

June 19, 2019

2

1 Jayson E. Blake
2 McAlpine PC
3 3201 University Drive, Suite 100
4 Auburn Hills, MI 48326

5 Peretz Bronstein
6 Bronstein, Gewirtz & Grossman LLC
7 60 East 42nd Street, Suite 4600
8 New York, NY 10165

9 Michael S. Cafferty
10 Michael S. Cafferty & Associates
11 333 West Fort Street, Suite 1400
12 Detroit, MI 48226

13 James M. Campbell
14 Campbell, Campbell, Edwards & Conroy
15 One Constitution Plaza, Suite 300
16 Boston, MA 02129-2025

17 Nancy K. Chinonis
18 Cline, Cline & Griffin
19 503 Saginaw Street
20 Flint, MI 48502

21 Gladys L. Christopherson
22 Washington Legal
23 718 Beach Street, P.O. Box 187
24 Flint, MI 48501

25 Allison Collins
Foster, Swift, Collins & Smith, P.C.
313 S. Washington Square
Lansing, MI 48933

Alaina Devine
Campbell Conroy & O'Neil PC
1 Constitution Wharf, Suite 310
Boston, MA 02129

Philip A. Erickson
Plunkett & Cooney
325 East Grand River Avenue, Suite 250
East Lansing, MI 48823

James A. Fajen
Fajen & Miller, PLLC
3646 West Liberty Road
Ann Arbor, MI 48103

June 19, 2019

3

1 William H. Goodman
2 Goodman and Hurwitz, P.C.
3 1394 East Jefferson Avenue
4 Detroit, MI 48207

5 Deborah E. Greenspan
6 Special Master

7 David Hart
8 Maddin, Hauser, Roth & Heller, PC
9 28400 Northwestern Highway
10 Southfield, MI 48034-1839

11 William Young Kim
12 City of Flint
13 1101 South Saginaw Street, Third Floor
14 Flint, MI 48502

15 Sheldon H. Klein
16 Butzel Long, P.C.
17 Stoneridge West, 41000 Woodward Avenue
18 Bloomfield Hills, MI 48304

19 Kurt E. Krause
20 Chartier Nyamfukudza P.L.C.
21 1905 Abbot Road, Suite 1
22 East Lansing, MI 48823

23 Richard S. Kuhl
24 Michigan Department of Attorney General
25 ENRA Division, P.O. Box 30755
Lansing, MI 48909

Patrick J. Lanciotti
Napoli Shkolnik Law PLLC
360 Lexington Avenue, 11th Floor
New York, NY 10017

Theodore J. Leopold
Cohen Milstein Sellers and Toll PLLC
2925 PGA Boulevard, Suite 200
Palm Beach Gardens, FL 33410

Emmy L. Levens
Cohen Milstein Sellers and Toll PLLC
1100 New York Avenue, NW,
Suite 500, West Tower
Washington, DC 20005

June 19, 2019

4

1 Moshie Maimon
2 Levy Konigsberg LLP
3 800 Third Avenue
4 New York, NY 10022

5 Christopher J. Marker
6 O'Neill, Wallace & Doyle P.C.
7 300 Saint Andrews Road, Suite 302
8 Saginaw, MI 48638

9 Wayne Brian Mason
10 Drinker Biddle & Reath LLP
11 1717 Main Street, Suite 5400
12 Dallas, TX 75201

13 T. Santino Mateo
14 Perkins Law Group, PLLC
15 615 Griswold, Suite 400
16 Detroit, MI 48226

17 David W. Meyers
18 Law Office of Edward A. Zeineh
19 2800 Grand River Avenue, Suite B
20 Lansing, MI 48912

21 Stephen F. Monroe
22 Marc J. Bern & Partners LLP
23 225 West Washington Street, Suite 2200
24 Chicago, IL 60606

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

Paul F. Novak
Weitz & Luxenberg, P.C.
Chrysler House
719 Griswold Street, Suite 620
Detroit, MI 48226

Michael J. Pattwell
Clark Hill, PLC
212 East Cesar E. Chavez Avenue
Lansing, MI 48906

Todd Russell Perkins
Perkins Law Group, PLLC
615 Griswold, Suite 400
Detroit, MI 48226

June 19, 2019

5

1 Michael L. Pitt
2 Pitt, McGehee, Palmer & Rivers, PC
3 117 West Fourth Street, Suite 200
4 Royal Oak, MI 48067-3804

5 Alexander S. Rusek
6 White Law PLLC
7 2400 Science Parkway, Suite 201
8 Okemos, MI 48864

9 Herbert A. Sanders
10 The Sanders Law Firm PC
11 615 Griswold Street, Suite 913
12 Detroit, MI 48226

13 Hunter Shkolnik
14 Napoli Shkolnik Law PLLC
15 1301 Avenue of the Americas, 10th Floor
16 New York, NY 10019

17 Corey M. Stern
18 Levy Konigsberg, LLP
19 800 Third Avenue, Suite 11th Floor
20 New York, NY 10022

21 Craig S. Thompson
22 Sullivan, Ward
23 25800 Northwestern Highway, Suite 1000
24 Southfield, MI 48075

25 Valdemar L. Washington
718 Beach Street, P.O. Box 187
Flint, MI 48501

Todd Weglarz
Fieger, Fieger, Kenney & Harrington, PC
19390 West 10 Mile Road
Southfield, MI 48075

Marvin Wilder
Lillian F. Diallo Law Offices
500 Griswold, Suite 2340
Detroit, MI 48226

Barry A. Wolf
Barry A. Wolf, Attorney at Law, PLLC
503 South Saginaw Street, Suite 1410
Flint, MI 48502

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Federal Official Court Reporter
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I N D E X

MISCELLANY

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P R O C E E D I N G S

THE CLERK: Calling the Flint Water Cases.

THE COURT: Thank you. Please be seated. Why don't we begin with appearances for the record, please. And I should tell you we're joined by interns, summer interns, who are working in my office as well as Judge Friedman's. And Judge Friedman is spending three or four months upstairs while his chambers are under renovations for the heating and air conditioning and all of that.

So I see there's seats at defense counsel's table that no one wants to take. This is a first. Thank you, Mr. Berg.

MR. BERG: My pleasure.

THE COURT: Okay. So welcome to the interns. And Judge Friedman would say, channeling him, it's not too late to go into podiatry. After this, they might consider it. So okay.

So let's have these appearances. Maybe starting -- well Ms. Greenspan. Well, this is obviously Deborah Greenspan, the special master.

MR. BLAKE: Good morning, Your Honor. Jayson Blake, liaison counsel for the state court class.

THE COURT: Thank you.

MS. CHRISTOPHERSON: Gladys Christopherson representing Anderson and Lee.

1 THE COURT: Thank you.

2 MR. WASHINGTON: Good afternoon, Judge. Val
3 Washington representing Anderson and Lee. And I'd ask for
4 permission to work in short sleeves this afternoon.

5 THE COURT: Go right ahead. And you and I are -- I'm
6 in physical therapy over the broken arm and shoulders, so.

7 MR. WASHINGTON: You've gotten rid of your companion.
8 I'm two weeks in, two weeks to go.

9 THE COURT: Okay. Good luck.

10 MS. BINGMAN: Good afternoon, Your Honor. Teresa
11 Bingman representing class plaintiffs and also the Marble
12 family.

13 THE COURT: Okay. Thank you.

14 MR. HART: Good afternoon, Your Honor. David Hart on
15 behalf of the Guertin plaintiffs.

16 THE COURT: Thank you.

17 MS. BEREZOFSKY: Esther Berezofsky on behalf of the
18 class plaintiffs and the Gulla plaintiffs.

19 MR. GOODMAN: Bill Goodman on behalf of the class
20 plaintiffs and Marble plaintiffs.

21 MR. BRONSTEIN: Peretz Bronstein, class plaintiffs.

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

23 MR. STERN: Corey Stern, co-liaison counsel, Your
24 Honor.

25 MR. PITT: Michael Pitt, co-lead class counsel.

1 MR. LEOPOLD: Good afternoon, Your Honor. Ted
2 Leopold, co-lead class.

3 THE COURT: Thank you.

4 MR. KIM: Good afternoon, Your Honor. William Kim on
5 behalf of the City of Flint and former Mayor Dayne Walling.

6 MR. BERG: Good afternoon, Your Honor. Rick Berg
7 here on behalf of the City of Flint.

8 MR. RUSEK: Good afternoon, Your Honor. Alexander
9 Rusek on behalf of Mr. Croft.

10 MS. LEVENS: Good afternoon, Emmy Levens for class
11 plaintiffs.

12 MR. MONROE: Steve Monroe on behalf of the Bern
13 plaintiffs, Your Honor.

14 MR. NOVAK: Good afternoon. Paul Novak on behalf of
15 class plaintiffs.

16 MR. LANCIOTTI: Patrick Lanciotti on behalf of
17 individual plaintiffs.

18 MR. MAIMON: Good afternoon, Your Honor. Moshie
19 Maimon on behalf of the Walters plaintiffs.

20 THE COURT: Thank you.

21 MR. PERKINS: Good afternoon, Your Honor. May it
22 please this Honorable Court, my name is Todd Russell Perkins
23 appearing on behalf of Darnell Earley followed by co-counsel.

24 MR. MATEO: T. Santino Mateo also on behalf of
25 Darnell Earley.

1 THE COURT: Okay. Thank you.

2 MR. WILDER: Marvin Wilder appearing for Lillian
3 Diallo and Larry Polk for the Gist, Savage and Kirkland
4 plaintiffs.

5 MR. FAJAN: James Fajan for Adam Rosenthal.

6 MR. CAFFERTY: Michael Cafferty for Nancy Peeler.

7 MR. WEGLARZ: Todd Weglarz for plaintiffs Brown and
8 Rogers.

9 MR. SANDERS: Herb Sanders, Alexander plaintiffs.

10 MR. SEGARS: Darryl Segars Alexander plaintiffs.

11 MR. WOLF: Barry Wolf on behalf of Gerald Ambrose.

12 MR. MARKER: Christopher Marker here on behalf of
13 Michael Glasgow.

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

16 MR. KRAUSE: Kurt Krause on behalf of Robert Scott.

17 MR. THOMPSON: Craig Thompson for defendant Rowe
18 Professional.

19 MR. KUHL: Good afternoon, Your Honor. Richard Kuhl
20 for the state defendants.

21 MS. CHINONIS: Nancy Chinonis on behalf of McLaren
22 Flint.

23 MR. KLEIN: Sheldon Klein for the City of Flint.

24 MR. PATWELL: Mike Patwell for Dan Wyant and Brad
25 Wurfel.

1 MS. COLLINS: Allison Collins for Patrick Cook and
2 Michael Prysby.

3 MR. MORGAN: Thaddeus Morgan for Liane Shekter Smith.

4 MR. GRASHOFF: Philip Grashoff on behalf of Stephen
5 Busch.

6 MR. MASON: Wayne Mason and Phil Erickson on behalf
7 of the LAN defendants.

8 THE COURT: Thank you.

9 MR. CAMPBELL: James Campbell on behalf of the VNA
10 defendants.

11 MS. DEVINE: Alaina Devine on behalf VNA defendants.

12 THE COURT: Okay. Well thank you, very much. The
13 agenda was issued and we'll just work our way through it.

14 The first issue is to have oral argument on the
15 individual city defendant's motion to stay the proceedings
16 which was joined by Daugherty Johnson and Michael Glasgow's
17 filing on May 13th.

18 MR. RUSEK: Good afternoon, again, Your Honor.
19 Alexander Rusek. I represent Howard Croft, former director of
20 Public Works for the City of Flint. Our motion is a joint
21 motion also with Mr. Earley and Mr. Ambrose, the former
22 emergency managers for the City of Flint at various times.
23 And as you said, joined by Mr. Glasgow and Mr. Johnson who are
24 former employees of the City of Flint at the water treatment
25 plant.

1 Discussing this matter with the Court in the
2 pre-hearing conference today, I think that some of our issues
3 have been briefed. The Court's fully aware of those. The
4 qualified immunity argument for a stay at this point in
5 Carthan as that's still being appealed on. The qualified
6 immunity issues, I believe that that itself justifies a stay.

7 What I'd like to focus on the Fifth Amendment stay
8 argument. That's argument number 4. And to give the Court a
9 little bit more of a background on what's going on in the
10 criminal cases --

11 THE COURT: But do you think that the qualified
12 immunity argument has the same force and effect now that we
13 have the mandate in the Guertin case?

14 MR. RUSEK: I don't believe it does, Your Honor,
15 because that has been resolved. I would note for the Court
16 that Mr. Johnson is actually not a part of the Guertin case.

17 THE COURT: Okay.

18 MR. RUSEK: So his qualified immunity claims have not
19 been resolved at this point.

20 THE COURT: Okay. Thank you.

21 MR. RUSEK: So that is a difference there. I'm not
22 sure if any of the MDEQ or MDHHS individual defendants are in
23 that same position. But I can speak to Mr. Johnson. He was
24 not in Guertin.

25 THE COURT: Okay. Thank you.

1 MR. RUSEK: So to give the Court some background and
2 to avoid the hearsay and a lot of the media that has been
3 going around, what happened was that on July -- or excuse me,
4 June 13th, last Thursday, Fadwa Hammoud, our new Solicitor
5 General made an announcement that all Flint cases that were
6 currently pending were being dismissed and they were being
7 dismissed without prejudice by the Attorney General's office.

8 THE COURT: And when you say Flint cases you mean the
9 Flint criminal charges against the individuals?

10 MR. RUSEK: That's correct, Your Honor. Some of
11 those were pending in the district court in Genesee County
12 such as Mr. Earley and Mr. Croft who had approximately an hour
13 of preliminary examination conducted over the last two and a
14 half years. While some cases were pending in the circuit
15 court, such as Mr. Lyon.

16 So all of those pending criminal cases in Genesee
17 County were dismissed. And notably they were dismissed
18 without prejudice.

19 We have not received information at this time that
20 those dismissed cases are going to be recharged immediately.
21 But what we do have is a couple of press releases that came
22 out on June 13th that I think shine light on where those cases
23 were at.

24 The first one -- and these were published to the
25 Attorney General's website -- was a release from Dana Nessel

1 who has effectively firewalled herself off from the criminal
2 prosecutions. She comments in part that they have a fearless
3 and dedicated team of career prosecutors and investigators.
4 They're hard at work to ensure those who harmed you are held
5 accountable.

6 She's saying this as the criminal charges are being
7 dismissed. Solicitor General Hammoud in her press release
8 noted that additionally we will evaluate criminal culpability
9 for all legionnaires deaths that occurred after the switch to
10 the Flint River which was never done by the OSC. And that
11 would --

12 THE COURT: OS --

13 MR. RUSEK: That would be the office of special
14 counsel formerly led by Mr. Flood. Solicitor General
15 Hammoud's press release also discussed that they had found
16 vast amounts of new evidence since Ms. Nessel came into office
17 on January 1st.

18 And it's my understanding that they found
19 approximately two dozen boxes of documents. And also
20 approximately 65 hard drives that contain downloads from
21 digital devices that were taken from former state and city
22 officials.

23 A considerable amount of new evidence that apparently
24 was sitting in a basement in a state office and was never
25 turned over to the defense to our knowledge. Although the

1 correction of documents in the criminal cases has been
2 questionable, it seems to be --

3 THE COURT: But you learned that through the
4 newspaper or through the press release.

5 MR. RUSEK: This is only a press release coming from
6 the Attorney General.

7 THE COURT: Okay.

8 MR. RUSEK: I think that's a reliable indicator of
9 where they're at right now. And what the Solicitor General --

10 THE COURT: The Attorney General we know has -- she
11 has announced that she has walled herself off from the
12 criminal prosecution. So she can't be making a decision about
13 reopening or renewing criminal charges.

14 MR. RUSEK: Yes. And the Solicitor General, I should
15 clarify, Your Honor, has also issued a press release available
16 on the AG's website. And I think the solicitor general's
17 press release goes into significantly more detail about that
18 this is an investigation that's not done.

19 And specifically in that press release from the
20 Solicitor General who will be issuing charges in the future if
21 she deems it appropriate is that they're going to conduct a
22 complete investigation this time around. Essentially what we
23 have is the start of the investigation all over again. And we
24 have charges that were dismissed without prejudice.

25 So the Solicitor General can come back in six months

1 and say Mr. Croft, Mr. Earley, Mr. Ambrose, Mr. Lyon, you're
2 being charged with the exact same crimes that you were
3 previously charged with by the office of special counsel in
4 2016.

5 THE COURT: So do you -- are you arguing that there's
6 no difference legally between pending charges in a press
7 release that doesn't exclude the possibility of future pending
8 charges?

9 MR. RUSEK: Your Honor, in cases especially like
10 E.M.A. Nationwide, we have two factors of a six-factor test.
11 And those -- the two most important factors are the first and
12 second one. One of those factors is has there been an
13 indictment --

14 THE COURT: What's your authority for which are the
15 most important factors? Because I didn't read the cases the
16 way you did, but ...

17 MR. RUSEK: In the Chao case, Your Honor, that's a
18 decision by Judge Quist in the Western District. Chao v
19 Fleming, which I believe that all parties who briefed the
20 matter relied upon to some degree. He describes the first and
21 second factors as the most important and he relies on other
22 cases. I can grab the case and refer the Court to that.

23 THE COURT: That's okay. I have it.

24 MR. RUSEK: But I believe that the case do show the
25 big questions are is there an indictment returned and what is

1 the overlap between the criminal case and the civil case.

2 Here we had indictments. These gentlemen and women
3 were charged with crimes. Some were bound over after
4 preliminary examination and they still face those exact same
5 charges that could be charged in the future by the Solicitor
6 General.

7 THE COURT: Hypothetically could be brought again.

8 MR. RUSEK: That's correct, Your Honor.
9 Hypothetically. However from all public indications, this
10 investigation is going on. It's being actively conducted
11 against these same individuals.

12 And it's being conducted -- from the solicitor
13 general's press release, she's even indicating that there's
14 going to be a focus on the legionella and legionnaires cases
15 of which we know that some of those victims in the criminal
16 cases who died from legionnaires' disease are plaintiffs in
17 this case or could be plaintiffs in this case.

18 And we have from our special master's report
19 knowledge now that there are many legionnaires cases that are
20 out there. And that forms the potential for these people to
21 be charged with not only what they were charged with before
22 but also the additional crime of involuntary manslaughter.

23 For Mr. Croft and Mr. Earley, Todd Flood, the former
24 prosecutor, had issued in a unconventional way a notice of
25 intent to seek bindover on the charge of involuntary

1 manslaughter for those two gentlemen. He had threatened other
2 defendants with that charge. And now the Solicitor General is
3 saying we're going to look even more into the legionnaires's
4 cases.

5 So the threat is very real to those who were
6 previously charged and dismissed at this point that these
7 charges that were dismissed, additional charges are coming.

8 That the Chao v Fleming case I discussed earlier from
9 the Western District, that is actually pre-indictment case.
10 And that is where Ms. Chao, the secretary of labor at the
11 time, she had filed a civil complaint for violations of ERISA.

12 The civil investigation started in 2005 --

13 THE COURT: Also in that case, Judge Quist says that
14 based upon the materials the court has reviewed, an indictment
15 appears to be much more than some fanciful and far off
16 possibility and it is likely that any delay will not be
17 substantial.

18 MR. RUSEK: That's correct, Your Honor.

19 THE COURT: So here from the switch to the Flint
20 River was in April of 2014, symptoms showing up thereafter.
21 When were the charges initially filed?

22 MR. RUSEK: December of 2016 for the individual city
23 defendants. I believe there were a number of those charges
24 filed in the summer of '16 against the other defendants.

25 THE COURT: So late '16. And we're now in mid almost

1 late '19. So a significant amount of time passed by. And if
2 new charges you said -- I forget how many boxes were in the
3 basement and how many hard drives have to be analyzed. How
4 would that not be a magnificent delay in the civil litigation?

5 MR. RUSEK: It's hard to say right now, Your Honor.

6 THE COURT: And are you suggesting that there be a
7 stay as to the clients you're representing and those who have
8 joined -- I'm sure -- of any and all participation in this
9 litigation?

10 MR. RUSEK: Well, we have participated already, Your
11 Honor. And I think that the Court in its discretion can weigh
12 that participation protecting the Fifth Amendment rights of
13 these defendants going forward.

14 For example, Mr. Croft on his own before being
15 represented produced a number of documents, I believe it's
16 about 1,500 pages, to the prosecutors prior to being charged.
17 Those were produced last year I believe to all of the parties
18 in this case.

19 Mr. Croft doesn't have access to any other documents.
20 They're going to be in City of Flint's possession, the MDEQ's
21 possession. He's not the custodian of anything else at this
22 time relating to his appointment.

23 THE COURT: So no document request in this litigation
24 would cause him to testify against himself in the Fifth
25 Amendment sense because his answer is I don't have any

1 documents.

2 MR. RUSEK: That's correct, Your Honor. The concern
3 is interrogatories, depositions, and filing the answer. Right
4 now if we were to answer, who knows what are statements in
5 there to be interpreted by the Solicitor General as they're
6 now doing a new investigation and exploring all avenues.

7 Which goes to the second factor of the MA Nationwide
8 test which is the overlap between these different actions. We
9 attached as Exhibit B to our reply brief just a short table
10 that compares some of the allegations in the prior criminal
11 complaint with the allegations in the Carthan master
12 complaint.

13 And if we look at those, it is essentially a copy and
14 paste job. And there's not a ton of allegations against the
15 individual city defendants in the Carthan complaint. But
16 we've pulled out I believe some of the most telling
17 allegations.

18 So in Exhibit B, the very first box, the criminal
19 complaint at paragraph 4 discusses Mr. Earley admitting to
20 being responsible for compliance with state and federal laws
21 regarding the Safe Drinking Water Act. That is almost a word
22 for word from the criminal complaint into the Carthan
23 complaint.

24 The paragraph below that, paragraph 13 in the
25 criminal complaint compared to paragraphs 373 of the civil

1 complaint, that both of those regard a MDEQ conference call
2 that came before the switch.

3 Another example is that paragraph 26 of the criminal
4 complaint and paragraph 383 of the civil complaint discuss Mr.
5 Ambrose's actions regarding the issuance of the KWA bonds, the
6 issuance of those bonds and he alleged actions that were taken
7 by Mr. Ambrose, Mr. Earley, and Mr. Croft formed the basis for
8 the former false pretenses, a conspiracy to commit false
9 pretenses charges that they previously faced in the criminal
10 cases.

11 And again, almost word by word these are the same.

12 THE COURT: So you're telling me that the factor that
13 I'm to consider about the coextensive nature of the civil and
14 the criminal weighs heavily in favor of the state because
15 you're quoting from the civil complaint and saying that is
16 also the very same material that's in the criminal?

17 MR. RUSEK: That's correct, Your Honor.

18 THE COURT: Okay.

19 MR. RUSEK: There is almost a complete overlap in the
20 allegations for the five city defendants. Their actions in
21 their roles with the city is what forms the basis for both the
22 criminal complaint and the civil complaint. Both before the
23 switch and after the switch.

24 THE COURT: And those charges are now dismissed.

25 MR. RUSEK: They are, Your Honor.

1 THE COURT: Yeah.

2 MR. RUSEK: Under threat of having them reissued.

3 And the additional I won't say threat but knowledge that there
4 could be involuntary manslaughter charges against these
5 gentlemen for their actions as employees of the City of Flint.
6 And I think that the plaintiffs agree that that forms the
7 basis of a lot of their claims against these gentlemen, too,
8 is the legionnaires cases.

9 So we have almost complete overlap between the two.
10 That is one of the most two most important factors under
11 E.M.A. Nationwide. Really I think that that factor about the
12 overlap should be dispositive in this case.

13 We have a very --

14 THE COURT: And are you suggesting a stay would be in
15 place until those criminal adjudications come to a complete
16 close? Or when would the stay be lifted as to your clients?

17 MR. RUSEK: I think right now it would be reasonable
18 to wait for the Solicitor General to make a decision one way
19 or another. I think that a case of this magnitude will not
20 just be pushed to the side by anyone. It won't just be we're
21 going to wait out the statute of limitations on it and no
22 one's going to remember.

23 So what I would request is an opportunity for the
24 Solicitor General to complete her investigation. And I'll say
25 I have more faith in that investigation than the previous one

1 that was done. There are a number of career prosecutors. Ms.
2 Worthy has now joined that team. Several other Wayne County
3 prosecutors have come on board, all of them who I respect.

4 THE COURT: Okay.

5 MR. RUSEK: And I think that the investigation is
6 moving more swiftly than it had before. That's my subjective
7 take on it because of the people that are now in place in that
8 criminal investigation.

9 THE COURT: Okay. Anything further?

10 MR. RUSEK: No, Your Honor.

11 THE COURT: Okay.

12 MR. RUSEK: Thank you.

13 THE COURT: I certainly understand your argument. I
14 think you presented it very effectively. And there are -- I
15 guess we have a response. Who will -- is there anyone -- Ms.
16 Levens. Okay.

17 MS. LEVENS: Thank you, your Honor. Ms. Levens for
18 class plaintiffs. The E.M.A. case from the Sixth Circuit
19 tells us that granting a stay of discovery is an extraordinary
20 remedy. It cites six factors and does not weigh one more
21 heavily than the other.

22 Here the factors that the city defendants themselves
23 or the city individual defendants themselves are saying are
24 most critical, the existence of a criminal indictment is no
25 longer a factor. And if --

1 THE COURT: Well Mr. Rusek is arguing that that's
2 more of a technicality, that we've got newer and better and
3 more trustworthy prosecutors who are now going to do it right.

4 MS. LEVENS: I believe that that would be far too
5 attenuated to justify the extraordinary remedy of a stay,
6 especially where there is significant prejudice to the
7 plaintiffs here. It's been years since these injuries were
8 first incurred. And there is no idea for when or even if
9 additional criminal indictments will come down.

10 In those circumstances, this -- there's no
11 justification for requiring plaintiffs to wait even longer to
12 obtain the discovery and ultimately the justice that they
13 deserve. As is supported by their own cases.

14 The Sixth Circuit has also said that pre-indictment
15 stays are very rare and certain courts have denied them based
16 on that factor alone. If we were to stay discovery every time
17 there was a possibility of a criminal indictment even where
18 there is a press statement generally asserting the intensity
19 with which the government intends to pursue the case, then
20 that would be a justification to stay civil litigation in
21 almost any circumstance.

22 THE COURT: What about the statement of the Solicitor
23 General in charge of this process that she's very interested
24 in the legionella deaths?

25 MS. LEVENS: That in no way suggests that criminal

1 indictments against these specific defendants is eminent or
2 even likely. The idea that the Solicitor General is going to
3 vigorously investigate claims in which individuals died, that
4 in and of itself doesn't in any way implicate the city
5 defendant's constitutional rights.

6 Does the Court have any further questions?

7 THE COURT: I don't at this time.

8 MS. LEVENS: Thank you, your Honor.

9 MR. STERN: Your Honor can I just add one comment.

10 THE COURT: Sure.

11 MR. STERN: This is Corey Stern. Our office
12 represents Robert Skidmore, his family, the estate of Robert
13 Skidmore. He died as a result of his contraction of
14 legionella.

15 His children testified before the district court as
16 part of the probable cause hearing for Nick Lyon over three
17 days. The basis of the Nick Lyon bindover in many ways was
18 the testimony and the evidence that was acquired as a result
19 of the legionella death.

20 So irrespective of the press release that says, you
21 know, from the solicitor that we're now going to investigate
22 the legionella deaths which the office of special counsel had
23 never done before, I'm not suggesting that she believes it's
24 true or not. All I'm saying is that to rely on a press
25 release as the evidence behind with why there may be a stay of

1 the civil litigation has some fault to it in light of the fact
2 that there is testimony on record of an investigation that
3 occurred by the office of special counsel to the very nature
4 of what the present solicitor says never happened.

5 THE COURT: Okay. Okay. Yeah. Thank you, very
6 much. And then Veolia. Okay. Mr. Mason.

7 MR. MASON: Thank you, your Honor. Wayne Mason on
8 behalf of the LAN defendants. I would agree that with the
9 others that have spoken opposing this that just based on
10 hypothetical situations is not sufficient to address this
11 issue.

12 As the Court knows, the governor's Flint water
13 advisory task force determined after a thorough investigation
14 that this was a failure of government with respect to this
15 crisis in the first place. And yet from the very beginning
16 the government lawyers have sought stays and to this and it
17 continues to this day. Now with this other changing situation
18 that has dismissed all of these criminal proceedings. Now
19 it's another maybe it will still come back and the like.

20 And Your Honor as I recall about a year ago you said
21 from the bench that you were -- that there was a way to go
22 forward with still protecting individuals' rights. I'm not
23 suggesting that their rights shouldn't be protected. But they
24 can make that decision by pleading the fifth --

25 THE COURT: Right.

1 MR. MASON: -- at the time during discovery and the
2 like that they are presented with. And we're well into this
3 litigation and they should have that right and will have that
4 right. But the litigation should not be stayed on this basis
5 presented today. Thank you.

6 THE COURT: Okay. Thank you, Mr. Mason.

7 MR. RUSEK: Can I respond briefly, Your Honor?

8 THE COURT: Yeah. What would be the harm in your --
9 assuming that I'm not going to issue an adverse inference to a
10 jury at this point. We don't yet -- although the box is
11 filled, we don't have the jury.

12 Assuming we're not going to have an adverse inference
13 and perhaps one will be needed at a certain point much later,
14 but it would be after significant passage of time before we
15 are going to have the first jury impaneled in this case.

16 What would be the harm in advising your clients to
17 take the fifth on certain interrogatories?

18 MR. RUSEK: Your Honor --

19 THE COURT: And even certain paragraphs of an answer.

20 MR. RUSEK: Alexander Rusek again on behalf of Mr.
21 Croft. Your Honor, that is the dilemma that a defendant faces
22 --

23 THE COURT: But I'm not going to do it. I'm not
24 going to issue an adverse inference at this point in the
25 litigation.

1 MR. RUSEK: If -- then we have to worry about what
2 happens when we get down the line to a bellwether trial.
3 Because there is that adverse inference every time you assert
4 the Fifth Amendment. So Mister --

5 THE COURT: There is the potential for -- but whether
6 I'm going to permit that or not will be decided later.

7 MR. RUSEK: If the Court did not permit that adverse
8 inference to be made, then the dilemma almost alleviates
9 itself at this time.

10 We do have other concerns in this case. The time
11 that would be spent answering going question by question at
12 deposition or interrogatories, and there is case law that even
13 a blanket assertion of a Fifth Amendment right could be used
14 in a case such as this where there is a significant overlap or
15 complete overlap between the factual issues on both sides.

16 THE COURT: The assertion could be used in the
17 criminal proceeding that if you say I don't want to answer
18 interrogatory number 38 because it could implicate my criminal
19 culpability, that an assumption could be made by the
20 prosecutor?

21 MR. RUSEK: By the prosecutor. It would not come in
22 as evidence in the criminal case, the assertion in this case.
23 But certainly if a prosecutor's looking at it and asking why
24 are you asserting the Fifth Amendment if you believe that
25 you're innocent of this charge, that can have ramifications.

1 THE COURT: Okay. Well, that's beyond my -- I'm not
2 presiding over that case. I can't make a decision that it's
3 not going to happen. But I appreciate knowing that.

4 Ms. Levens, if -- what is the first stage of the case
5 where an adverse inference would become relevant? Is it at
6 summary judgment?

7 MS. LEVENS: I believe it would be at summary
8 judgment.

9 THE COURT: Okay. And does anyone in this room have
10 the case management order to understand when summary judgment
11 would be potentially first filed?

12 MS. LEVENS: I know in the class case it's not until
13 at least later in 2020 because class isn't until early 2020.
14 Is it earlier for the liaison counsel?

15 MR. STERN: It's not earlier. It's around the same
16 time and I actually think it may be a month later.

17 THE COURT: Okay. So it's in 2020. So okay. Thank
18 you.

19 MR. RUSEK: Your Honor, I just had one other point.
20 Counsel for Mr. Glasgow indicated to me that Mr. Glasgow was
21 dismissed from Guertin and was not a part of that case also
22 going through the appellate process.

23 THE COURT: Okay. Thank you Mr. Rusek.

24 MR. RUSEK: Thank you.

25 THE COURT: Okay. Well here's what I think we need

1 to do with this. This is the second time the issue has been
2 briefed. And argued in this case. And the Court according to
3 the Sixth Circuit and all of the applicable law has some
4 discretion to evaluate the arguments for and against staying
5 the case as a result of the Fifth Amendment rights of the
6 defendants.

7 And this is an interesting case in that there are
8 constitutional rights on both sides of the V that are at
9 stake. The plaintiffs are currently proceeding as a result of
10 orders that I've entered alleging a due process right has been
11 violated. And has been violated in a very serious manner that
12 has impacted their wellbeing and in some cases their very
13 lives themselves.

14 So we have serious constitutional rights on one side
15 of the V. We have other very serious constitutional rights on
16 the other for those who are potentially going to face criminal
17 charges. Those charges as of today simply don't exist right
18 now.

19 I have the official website of Michigan.gov press
20 release where some of the language that Mr. Rusek was quoting
21 to us is present in the press release and I simply can't make
22 a decision based on a press release for one thing. Because
23 I've written press releases.

24 And you -- the first rule of a press release is to do
25 some puffing is to amplify what you're doing and to come up

1 with every possible word that's accurate that will amplify to
2 the greatest degree what you want to convey or communicate.
3 And to try to pick up on a little news -- a little sound bite,
4 too. For those of you wanting to write press releases I'm
5 sure you know this.

6 So I simply can't base a legal decision on a press
7 release. But on the same token I understand that Mr. Rusek
8 has information based on your role in the case that there
9 could still be a criminal investigation. And let me just take
10 -- we're going to just take a two minute break. So I'll be
11 right back.

12 (Brief Recess)

13 THE COURT: Please be seated. Well, I have some
14 exciting news to share with you, which is that Jeseca is
15 expecting a baby. And so when she tells me she needs a break,
16 I take it a little too literally. She informed me that it
17 didn't have to be in the middle of a sentence. But having had
18 three babies myself, I take it very seriously if a pregnant
19 woman says they need to take a break. So okay.

20 So we're back on the record and official
21 congratulations to Jeseca.

22 So I think what I was saying is that we have serious
23 constitutional rights on both sides of the V in this case. In
24 terms of the law that I have got to weigh and come to a
25 conclusion on as a result of this motion.

1 And the power to issue a stay, I'm instructed by the
2 E.M.A. Nationwide case is incidental to the power inherent in
3 every court to control the disposition of the causes in its
4 docket with economy of time and effort for itself, for
5 counsel, and for litigants. And that the issue is within the
6 Court's discretion.

7 But as Ms. Levens said, a stay in a civil case is an
8 extraordinary remedy that should be granted only when justice
9 so requires. And that's the Chao case that Mr. Rusek brought
10 our attention to.

11 So I, in the E.M.A. Nationwide case, I have six
12 factors to consider. The first being the extent to which the
13 issues in the criminal case overlap with those presented in
14 the civil case. Here there is no criminal case at this time
15 of any overlap. Though I appreciate the exhibit that Mr.
16 Rusek submitted and that he brought our attention to that when
17 there were criminal charges there was a significant overlay of
18 some of the paragraphs in the criminal complaint and the civil
19 case.

20 At this point what I have in my hands is the press
21 release that I think is -- well, I don't want to criticize
22 anyone's press release on the record. And it's a beautiful
23 press release. But that's all that it is, is a press release.
24 But I do appreciate that you have this knowledge that your
25 clients could be criminally charged. And I'll get to that in

1 a moment.

2 Factor two is the status of the case including
3 whether the defendants have been indicted. They have not been
4 indicted.

5 Three is the private interest of the plaintiffs in
6 proceeding expeditiously weighed against the prejudice to the
7 plaintiffs caused by the delay. And here if I could write
8 this factor myself, I would say the private interests of the
9 plaintiffs and the defendants.

10 Although I know you're telling me the defendants
11 would only benefit from delay. But I don't think that that's
12 true. I think everyone benefits in a case in all cases on a
13 judge's docket when they proceed efficiently and
14 expeditiously.

15 Because memories fade. Well, documents were just
16 found in the basement somewhere. But documents get purged and
17 they get eliminated. Cellphones drop. Things happen. The
18 cloud malfunctions. Who knows what can happen. And the
19 evidence that the defendants need to defend themselves is
20 gone. And so I actually think that there are private
21 interests on both sides that benefit from expeditious handling
22 of the case.

23 In this particular case, there is extraordinary
24 private and public interest in seeing these cases come to a
25 just resolution. And I think all of you who have traveled out

1 of the State of Michigan, if you say you're from Michigan,
2 somebody will say Flint, Michigan. You know, it conjures up
3 for people internationally if you say Michigan. Flint,
4 Michigan comes to their attention.

5 And so I think that just reminds everybody that there
6 is a serious interest in a just resolution. And I don't know
7 what the just resolution is sitting here. It may be that
8 we've got appeals to the Supreme Court. They will find on the
9 defendant's side and the key charges civil counts in this case
10 would be dismissed.

11 That could be the just resolution. I don't know.
12 But for the sake of the individual plaintiffs and their
13 community and those who are in this case I guess. It's not
14 the community in the case. It's the plaintiffs. There's --
15 an expeditious resolution is an exceptionally compelling
16 factor.

17 And although we're told by Mr. Rusek that the first
18 two factors, basically the state of the criminal charges, are
19 the most important, I think in light of the fact that there
20 are no criminal charges, these other factors I think weigh
21 very heavily in my decisionmaking.

22 The private interests of and burden on the
23 defendants. And here I think they have significant interests
24 in participating in this litigation, asking the questions of
25 the plaintiffs that they need answered so that they can defend

1 them -- their liability charges here weighs in favor of
2 keeping the defendants in. Because the rest of the case is
3 going to go on.

4 And the defendants who are seeking a stay could be
5 seriously disadvantaged by not having the input and control
6 over the litigation that I think they would benefit from.

7 The interest of the courts -- there's an S there.
8 And here we have these cases pending in some six or seven or
9 eight courts. And I think there is an interest in all of
10 those courts, including the United States Supreme Court, in
11 making efficient expeditious decisions so that the issue can
12 come to a resolution.

13 And the last is the public interest. And I did not
14 mean to fold that into the private interest of the litigants
15 in the case. And there is just clearly significant public
16 interest in having this case come to a fair and efficient
17 resolution. And we're already risking the never being able to
18 accomplish that because it's more than halfway through 2019 or
19 almost halfway and we haven't -- we're just getting out of the
20 gate.

21 So it's my intention in this case to continue with
22 the foot on the gas pedal as much as I can so that the case
23 can be carefully and fairly litigated by both sides.

24 So what I will do, Mr. Rusek, because I think you
25 make a very good point about the adverse inference that your

1 clients could suffer from, if your clients choose to plead the
2 fifth as to any portion of the discovery process, then I'll
3 make a decision as to whether an adverse inference will be
4 permitted.

5 If I understand -- I have not done a thorough review
6 of that law, but I understand that an adverse inference is
7 permitted but not automatic.

8 Do I have that wrong?

9 MR. RUSEK: I believe you're correct, Your Honor.

10 THE COURT: Okay. So if it's discretionary, I'll
11 take a very close look as to whether there are then pending
12 criminal charges. If so, is there anything about this
13 answering of this question that counsel is informing me could
14 adversely impact the criminal liability and liberty interests?
15 And there are few interests as great as liberty interests
16 which is on both sides of the V here.

17 So what I'll do is I'll consider whether to enter a
18 reasoned decision. But my thought now is that my focus is on
19 Walters and Sirls and getting that material decided and not
20 writing an opinion on this issue. But I have given you my
21 oral decision.

22 And let me also mention you had brought up Johnson --
23 who were the two who are not in Glasgow?

24 MR. RUSEK: Alex Rusek again, Your Honor. It was Mr.
25 Glasgow and Mr. Johnson.

1 THE COURT: Yeah. Exactly. And they won't have to
2 file an answer. The first thing -- because they're not in
3 Guertin. So at least there won't be a problem for them. They
4 won't be required to file an answer, not in that case.

5 MR. RUSEK: That's correct, Your Honor. We do have
6 the Carthan answers that have not been filed by those five
7 defendants.

8 THE COURT: I see. Okay. Well then they'll have to
9 make a decision line by line as to what they -- whether they
10 wish to plead the fifth, so. Okay.

11 So the next thing on the agenda here we're going to
12 be moving. On the motion to strike the proposed classes, we
13 had some discussion of this in chambers. And we decided that
14 -- plaintiffs informed me -- unless you wish to say something
15 different -- that you're satisfied at the current time with
16 the class definitions in the fourth amended complaint.

17 And Veolia and probably LAN wish to challenge that so
18 they have 45 days to file that motion. There will be 30 days
19 to file a response. But the response won't be due until the
20 75 days. So if they file it early, you've got the time. You
21 can schedule your calendar for when you're going to work on
22 that.

23 And so then that issue will be addressed once that
24 motion is filed and response. A reply will be pursuant to the
25 local rules.

1 The next item on the agenda is the Guertin case. And
2 here's the situation there, which is that it was its own
3 complaint. It's not -- at the time that it was litigated,
4 there were no interim class counsel and co-liaison counsel for
5 the individual cases. So it is now traveling up to the United
6 States Supreme Court based on the complaint as filed by Mr.
7 Hart.

8 And so my decision with respect to that is that is
9 not to require the Guertin plaintiffs to currently adopt it
10 would be the Walters and Sirls amended complaint which I'm
11 still working on, whether to permit the amended complaint in
12 Walters and Sirls.

13 So in light of the fact that cert petitions are
14 promised by a number of the defendants, I don't want to mess
15 with the nature of the underlying complaint. So it will just
16 continued just as it is. But what that means is we have an
17 operative complaint -- Mr. Grashoff.

18 MR. GRASHOFF: Your Honor --

19 THE COURT: Say Philip Grashoff on behalf ...

20 MR. GRASHOFF: I'm sorry. Philip Grashoff on behalf
21 of Stephen Busch and talking on behalf of the MDEQ defendants.
22 Per our conversation in the pre-meeting, I've had an
23 opportunity to talk to my co-counsel who are here.

24 And I know the Court is moving towards ordering us to
25 file an answer. It's just a matter of when. And we've

1 discussed it. And we'd like to have 30 days after the Court
2 rules on Sirls, Walters, and Marble. Marble is a little bit
3 of a different animal because there's a 14-day period in there
4 for Marble to make a decision on what they want to do. But we
5 think that we can deal with that kind of a timetable based on
6 everything else that's going on.

7 THE COURT: Okay. Thank you Mr. Grashoff. You're
8 right that that is the direction that I was going in. And I
9 had an opportunity to review ECF docket entry number 215 that
10 was October 30th of 2017. And it was the opinion and order
11 granting defendant's motion to stay Guertin.

12 But it's very clear in here that the stay was only
13 for the purpose of the appeal in Guertin and not a general
14 stay for any other reason other than the qualified immunity
15 appeal which I thought was not a frivolous appeal. And so we
16 now have the mandate in Guertin.

17 And so what I'll do is grant the MDEQ defendants 45
18 days from today to file an answer to the case.

19 If we were to wait for Walters, Sirls, and Marble, I
20 just can't tell you exactly when that would be. And I want to
21 see this case makes progress as I want to see all of the cases
22 make progress.

23 MR. KLEIN: Your Honor, Sheldon Klein. If I may be
24 heard?

25 THE COURT: Yes, Mr. Klein.

1 MR. KLEIN: I'm a little confused on the timing. But
2 for present purposes my question is is there a reason that
3 other defendants should be on a different schedule? Or do you
4 intend that other defendants be on a different schedule?

5 THE COURT: No.

6 MR. KLEIN: So it's the formula that was just laid
7 out for all of the entry defendants.

8 THE COURT: For all of the defendants who have not
9 yet answered to answer. Yes.

10 So far in Guertin, only LAN and Veolia have answered.
11 So that means we've got Earley, Ambrose, Croft, Busch,
12 Shekter-Smith, Prysby, Wurfel. Do I have that right? So all
13 of those defendants now have 45 days to answer Guertin. Okay.

14 The next item was the coordination of cases involving
15 the EPA. There's -- does City of Flint -- have the City of
16 Flint has not answered in Guertin.

17 MR. BERG: That's correct, Your Honor. It was the
18 one name that you did leave out of your list. That's correct.

19 THE COURT: Okay. So I'm going to add that to my
20 list.

21 MR. HART: Your Honor, David Hart on behalf of the
22 Guertin plaintiffs. Perhaps I missed having not been part of
23 the pre-status conference meeting. The statute report
24 regarding the motions for -- potential motions for stay in the
25 United States Supreme Court. If those motions are

1 contemplated, if they seek that, then perhaps the timing will
2 create a little bit of a problem in that. If they are to
3 answer in say 45 days and that's pending, we have a motion for
4 leave to amend that I think is still pending before the Court
5 --

6 THE COURT: I don't think it is. I think that was --

7 MR. HART: Denied.

8 THE COURT: -- withdrawn or denied as moot.

9 MR. HART: But having -- once we receive those
10 answers again perhaps that is in play. So perhaps maybe even
11 waiting until the Supreme Court has heard or not -- or hasn't
12 received a motion, a stay request would be a good idea.

13 THE COURT: Well, I'm not inclined to do that.
14 Because it could be -- well, the initial motion for stay at
15 the Supreme Court has been denied. So we know that has
16 happened. And now the briefing, you have 91 days I was told
17 from when the mandate issued. So there's several months more
18 before the first brief goes in seeking cert.

19 It can be -- I'm just telling you what others have
20 told me -- six months to a year before it's decided. I don't
21 want to see that delay in this case. And so I think we'd be
22 much better off getting answers, getting those defendants on
23 100 percent engaged in this litigation. And able to shape it
24 in the direction they want it to go as well as be subject to
25 your questions, so.

1 But thank you for that contribution.

2 In terms of *Burgess v The United States*, The United
3 States did file a motion with Judge Parker seeking leave to
4 file an interlocutory appeal on her decision. In light of
5 that, I will not reach out to Judge Parker to see whether she
6 wants to consolidate her cases with these cases until she's
7 made a decision on that motion.

8 On the -- oh, I see. Okay. The nonparty documents
9 only subpoenas that we were here a month ago talking about
10 this one remaining issue.

11 So Mr. Berg, are you going to argue that?

12 MR. BERG: Good afternoon, Your Honor. Rick Berg
13 here on behalf of the City of Flint. We were participants in
14 the opportunity to prepare the proposed subpoena protocol
15 order.

16 THE COURT: Okay.

17 MR. BERG: And had proposed language that was
18 replaced in the version that was submitted to the Court with
19 the language that was contained in the special master's
20 recommendation with regard to cost allocations. And it's very
21 possible that we don't really have a dispute depending on the
22 interpretation of the special master's language.

23 And I can point directly to it. It's in both her
24 proposed -- her recommendation and the proposal before the
25 Court. And the language of that order as proposed says,

1 quote, the initial parties shall not be obligated to provide
2 access unless and until the new party pays the required
3 amount.

4 So if we put that in the context of an example and
5 the -- for example, the VNA defendants propose a subpoena and
6 the City of Flint joins that subpoena and pays, it's shared.
7 It is then under this language not obligated to provide access
8 to the documents to anyone else.

9 It does not say that the city itself may not allow
10 access or is prohibited from allowing the individual
11 defendants, who by the way are being paid out of the same
12 pocketbook --

13 THE COURT: Right.

14 MR. BERG: -- to have access.

15 And so if the city were to choose to allow that
16 access upon their request, it would not violate the terms of
17 this order. On the other hand, based on the way it's written,
18 if all other five city defendants were to join and issue the
19 subpoena with the VNA defendants or one of the VNA defendants,
20 by the terms of this language, they would be responsible for
21 six sevenths of the cost even though it's coming out of the
22 same pocketbook.

23 So I think that's probably not what was intended.
24 And so as a practical solution, we're perfectly content to
25 simply have the city join or the city request the copies after

1 the fact which the procedure may end up being, as long as
2 there's not an objection to us sharing it with our co-city
3 defendants. Because after all we are all coming out of the
4 same pocketbook.

5 THE COURT: It's all coming out of the same
6 pocketbook, but each of those defendants has their own
7 counsel. So I mean they are -- their liability is theirs and
8 theirs alone. The city can end up with liability as a result
9 of those individual actor's conduct.

10 MR. BERG: Well so does the court then suggest that
11 if the VNA defendants, the three of them, or the LAN
12 defendants or the three of them, both of which are large
13 multibillion dollar multinational corporations and can afford
14 this should be treated as one, when Howard Croft and Michael
15 Glasgow are going to share, you know, in a pro rata?

16 Essentially what that would mean is that a game could
17 be played in which -- we now have 73 proposed subpoenas by the
18 way.

19 THE COURT: Oh, we do.

20 MR. BERG: There was a hearing -- there was a
21 conference call on Monday in which I participated and I have a
22 spreadsheet that was circulated for that. And the lion's
23 share of those if not 90 percent are proposed by the VNA
24 defendants. 73 of them. And so for each and every one of
25 those assuming that the city wants to participate, it will

1 have to make choices in each case. Do the co-defendants get
2 to see them or do they not get to see them? Because we'll
3 have to make cost decisions that no one else will have to
4 make.

5 THE COURT: Do you have a joint defense agreement
6 among just the city defendants?

7 MR. BERG: We have one in principle. We do not have
8 one in writing.

9 THE COURT: Okay. All right. Okay. I understand --

10 MR. BERG: So I'm not proposing to change this
11 language --

12 THE COURT: So what you're suggesting is -- tell me
13 again what your interpretation.

14 MR. BERG: My interpretation is that if the city
15 chooses to be initiator of a subpoena or if the city chooses
16 to after the fact after documents are produced to purchase and
17 to ante up and buy in and pay its pro rata share, that I don't
18 interpret this order to prohibit the city from sharing that
19 information with its co-defendants. It does not say it's
20 prohibited from doing so.

21 THE COURT: Well it implies it because it says if a
22 defendant that -- maybe that should have said who because most
23 of these are people. But did not initially request or seek
24 the discovery later wants access to the information, that
25 party shall then become responsible for an equal share.

1 So I understand this to be each individual defendant
2 who has a lawyer. But I understand your argument about the
3 equities of a city that is under emergency management and has
4 no funding.

5 MR. BERG: Well the order also says for purposes of
6 this process a party shall mean an individual named person
7 entity. In which case if I were prohibited from sharing that
8 with my co-defendants and I joined a subpoena promulgated by
9 all three VNA defendants, then I pay 25 percent.

10 THE COURT: Right.

11 MR. BERG: And that doesn't seem right either. So I
12 just -- it's not a sensible solution to prohibit the city from
13 sharing the documents that it paid for at 50 percent or
14 whatever so that essentially it will end up paying three
15 quarters or nine tenths of the cost.

16 THE COURT: How does that impact the MDEQ individual
17 defendants?

18 MR. BERG: I presume they would make the same
19 arguments. I don't know their financial arrangement. In the
20 city, it's clear. The city is funding the defense and the
21 costs of all the defendants.

22 THE COURT: Okay. Then Mr. Glasgow -- or Mr.
23 Grashoff.

24 MR. GRASHOFF: Phil Grashoff on behalf of Stephen
25 Busch.

1 We have the same issue. But unlike the city, we have
2 a common interest counsel agreement among the MDEQ defendants.
3 And we work very closely with the state. If the state orders
4 it and the state is -- they're paying our fees. If the state
5 orders documents, I don't see any reason why they should be
6 precluded from sharing them with us.

7 THE COURT: All right. Who's responding? Is anybody
8 responding?

9 MR. STERN: For the plaintiffs --

10 THE COURT: I guess the plaintiffs don't care because
11 you're 50 percent. Never mind. So Mr. Erickson.

12 MR. ERICKSON: Philip Erickson on behalf of the LAN
13 defendants, Your Honor.

14 There were only I think about three different
15 proposals that were made to the special master as part of the
16 briefing process that went on before the recommended decision.
17 And in the brief that we submitted, we suggested that the
18 allocation be between groups of the separately represented
19 defendants.

20 And the Court just said that it was the Court's
21 understanding that the order apply to each individual
22 defendant who has a lawyer or is separately represented. We
23 believe that was the intent of the proposed order. And we
24 believe that's equitable. That's the way it almost always
25 works in civil litigation.

1 THE COURT: What if it's a joint defense agreement?

2 MR. ERICKSON: I don't think that should make a
3 difference if they're separately represented by different
4 groups of lawyers. Because ultimately each group would have
5 to have -- would have to have access to documents. And if
6 that were the rule, that might promote other people joining
7 into common interest agreements.

8 For example, what would preclude the LAN defendants
9 and the Veolia defendants from entering into a common interest
10 agreement in order to share costs?

11 THE COURT: Well, you might not have a factual basis
12 for it, but ...

13 MR. ERICKSON: And neither may the others that are
14 attempting.

15 THE COURT: Maybe not, yeah.

16 MR. ERICKSON: So that's really all I wanted to say
17 --

18 THE COURT: How much money is at stake --

19 MR. ERICKSON: -- that that was a proposal and we
20 believe that was the intent of the order.

21 THE COURT: Okay. Can you just me what are we
22 actually talking -- Mr. Berg, do you know what we're talking
23 about?

24 MR. BERG: I admit, Your Honor. It would be somewhat
25 speculative.

1 THE COURT: Yeah.

2 MR. BERG: However, I can tell you that we have
3 received multi six figure bills from Virginia Tech with
4 respect to the subpoena to that --

5 MR. ERICKSON: The Mark Edwards documents, related
6 documents.

7 MR. BERG: The Mark Edwards documents. So depending
8 on the organization, it can be extreme. It's easy to predict
9 there will be over a hundred subpoenas at this rate. And some
10 people may have, some institutions may have nothing. Some
11 will have a lot. And it will be in the tens if not the
12 hundreds of thousands of dollars.

13 I have more to say if Mr. Erickson is finished.

14 THE COURT: Okay. Go ahead and finish.

15 MR. ERICKSON: I am finished.

16 THE COURT: Okay.

17 MR. BERG: With respect to the common interest in the
18 factual basis that the Court referred to and the legal basis,
19 what the Court will understand is of course that the reason
20 these individual city defendants are in the case to begin with
21 is because there is no respondeat superior liability in 1983
22 claims. And so but for that fact, perhaps only the city would
23 have been sued to begin with.

24 And so you know we don't want to be faced with a
25 choice in which we're making financial decisions to share or

1 not share or choose to look at something and not look at
2 something such that the deponents will be unprepared or
3 counsel will be unprepared in the future.

4 And those -- with the way this is arranged right now,
5 if we do not have the option to share this having paid for it
6 once with city counsel, the city will be faced with those
7 choices. And these counsel will be disadvantaged to the
8 betterment of the parties that are promulgating the subpoenas
9 and are paying the rest, those being the engineering the
10 private defendants.

11 THE COURT: Okay.

12 MR. BERG: We will be at a -- we will be prejudiced,
13 Your Honor.

14 THE COURT: All right. What I'll do is take this
15 under advisement. And by the end of the week I'll put the
16 outcome of this argument in the order that follows this
17 hearing. But thank you very much.

18 The item called First Bellwether Pool Selection I
19 think was just here so that the Court could be advised that
20 the selection is underway.

21 Mr. Shkolnik?

22 MR. SHKOLNIK: Hunter Shkolnik for plaintiffs'
23 liaison. I'm happy to report -- I wanted to say something
24 today. Happy to report that the bellwether process is on
25 track. And over the next 30 days we'll be able to report

1 further. Things are going well.

2 THE COURT: Good. I'm very glad. The plaintiff
3 authorization since our last hearing I was informed by Ms.
4 Berezofsky I think, or someone, that the plaintiffs were no
5 longer going to oppose the authorizations on mental health and
6 substance abuse issues.

7 MS. BEREZOFSKY: That is correct for the class
8 representatives.

9 THE COURT: Okay. So that issue is now moot as of
10 now. And I have also been informed that a company has
11 selected to undertake this. Mr. Campbell?

12 MR. CAMPBELL: Yes, Your Honor. James Campbell. I
13 represent VNA defendants.

14 We took -- it took a while to get payments in place
15 and the agreements in place. But the group that is in place
16 for selecting the medical records and using those
17 authorizations is a company called Marker, M-A-R-K-E-R. That
18 process, as I understand it, is underway.

19 THE COURT: Good.

20 MR. CAMPBELL: Just perhaps this is a time that I may
21 interject something about the class plaintiffs that we
22 discussed upstairs.

23 THE COURT: Yes. Thank you. I think I didn't import
24 that. Go ahead.

25 MR. CAMPBELL: So after we had the opportunity to

1 issue discovery, Your Honor, two of the named class
2 plaintiffs, EPCO Sales and Ms. Bryson, indicated that they
3 wanted to withdraw as class representatives. That, as we
4 discussed upstairs, needs to be done we say as an amended
5 complaint. And Your Honor said that the Rule 41(a)(1)(ii) I
6 think and a dismissal of those two plaintiffs is the process.

7 THE COURT: Yeah. I glanced at Rule 41(a)(1)(ii).
8 And I think it can be done either post answer, because there
9 is an answer now, either by stipulation or order of the court
10 but not unilaterally by the party, so.

11 MR. CAMPBELL: Your Honor, not to interrupt, but I
12 think there just needs to be something on the docket
13 indicating that those two class named plaintiffs are out of
14 the case. And the reason I brought it up now is that there's
15 no discovery -- we issued discovery and there was no response.

16 THE COURT: I see. So do you have any opposition to
17 me entering an order pursuant to the notice that was filed by
18 Mr. Washington that those two parties are no longer in the
19 case?

20 MR. WASHINGTON: Judge, Val Washington on behalf of
21 EPCO Sales and Marilyn Bryson. I just want to make sure any
22 order that's entered is only dismissing them as class
23 representatives. Fair? Because if that's the case, I don't
24 have any objection. I don't have any opposition to that. I
25 just -- and that was the reason for my contacting the Court

1 before I issued the notice was how do I do this without
2 prejudicing my client's individual claims.

3 THE COURT: I see.

4 MR. WASHINGTON: I want to make sure that those are
5 preserved.

6 THE COURT: Well, why don't you prepare the order.

7 MR. WASHINGTON: Really, Judge? Really? I mean,
8 come on.

9 THE COURT: If you want it done right, you'll do it
10 yourself.

11 MR. WASHINGTON: I'll be happy to consult with
12 counsel as he prepares the order so that we make the language
13 works for everybody.

14 THE COURT: Okay.

15 MR. LEOPOLD: We would just like to be copied in that
16 so we can check from the class perspective, Your Honor.

17 THE COURT: Yes, absolutely. So if you'll circulate
18 that to the -- actually just to be on the safe side, to
19 co-liaison, co-lead class, and the defendants. And then once
20 --

21 MR. WASHINGTON: Does that mean I'm elected to make
22 the language, Judge?

23 THE COURT: That means you're elected.

24 MR. WASHINGTON: Okay. I'll do that.

25 THE COURT: Thank you, very much. Okay.

1 At this point I wanted to ask Ms. Deborah Greenspan
2 if she would give a report on the work that she's been
3 undertaking.

4 MS. GREENSPAN: Thank you, your Honor. This is
5 really a follow up to a report that I gave I believe a couple
6 of months ago on the work that's being done to collect claims
7 data with respect to individuals who have retained counsel or
8 have filed cases, individual cases in this matter.

9 I have now prepared a second interim report based on
10 a substantial amount of new data that was provided by
11 plaintiffs' counsel over the last couple of months. This is
12 not yet filed. I anticipate it will be filed sometime towards
13 the latter part of next week. But I will go over a few items
14 for everybody here.

15 THE COURT: Okay.

16 MS. GREENSPAN: So I currently have -- the numbers
17 have changed from the first report. I currently am counting
18 about 18,700 individual what we've called injured parties.
19 These are individuals who are asserting some kind of claim for
20 damages in different types perhaps. But specific individuals.
21 And as people who have actually retained counsel.

22 This is more than 6,000 lower than the previous
23 report. There are two reasons for that. One is that we have
24 now identified a substantial number of additional duplicate
25 claims. We've done that by comparing dates of birth, names,

1 first name, last name, and then reviewing the data that's been
2 provided for each person to confirm that it looks like it's a
3 duplicate. That is being confirmed and checked with counsel
4 as well.

5 And second there were a number of individuals on some
6 submissions that upon further clarification have not actually
7 retained counsel but have been in contact with counsel. So it
8 removed those individuals from the count of those who have
9 entered into retainer agreements.

10 So I will give you just a brief count of a couple of
11 the key numbers. I previously mentioned there were about --
12 it's actually 18,769 different individual injured parties
13 after counting for duplicates. There are -- primarily these
14 are individual claims. Some of them are businesses, but a
15 very small number out of this total.

16 The vast majority are asserting personal injury or
17 wrongful death claims. It's over 17,000 of that group that
18 are in that category. But some of those in addition -- or
19 within that group of 17,000, some have also asserted property
20 damage claims. So there's some overlap.

21 There are about 570 that have stated that they're
22 asserting a property damage claim. And then there are some
23 that say that they don't know or they haven't responded to the
24 questions.

25 THE COURT: Okay.

1 MS. GREENSPAN: There are of the total number of
2 these individual injured parties, there's about 10,000 appear
3 to be under the age of 18 at least during the time period
4 we're counting.

5 You know every day that goes by somebody who was
6 under the age of 18 based on a submission, you know, that we
7 received earlier that were counted will obviously change their
8 -- they will become older in the current date. But I'm
9 counting them as of specific dates that are identified in
10 charts that will be provided in the report that I file. So
11 you will understand how the date ranges work.

12 There are about 8,000 of these individuals are in a
13 filed case either in state court or federal court. So there's
14 a substantial number of actual cases filed, but it doesn't
15 account for every one of the injured parties.

16 I have also collected some data on parties that have
17 asserted that they've had blood lead level tests performed.
18 Got about 3,900 who say that they've had such testing. Not
19 all of them have reported the results of the test. But
20 approximately 3,900 have asserted that they've undergone
21 testing. And about 2,400 have provided test results.

22 That's all ages by the way. That is not just -- it
23 is injured parties of all ages, adults and children. Have
24 about 900 test results from children in the data.

25 That's a quick overview. But this will be filed and

1 people will be able to study the information at their leisure.

2 THE COURT: Thank you very much. And you've asked
3 for comments from those who submitted data by June 25th.

4 MS. GREENSPAN: I've asked for -- yes. I have asked
5 for comments by the lead counsel and the defendants who've
6 been participating as lead counsel in the case.

7 THE COURT: Okay. Excellent. Thank you very much.

8 Well, in terms of other issues that aren't just set
9 forth here, I think we're coming to a close. The status of
10 Walters Sirls and Marble is that I'm still working on them.
11 Mr. Mason?

12 MR. MASON: I apologize.

13 THE COURT: Oh.

14 MR. MASON: When you're done, I do have other
15 business. I did want to address one thing.

16 THE COURT: Okay. So I'm charging ahead doing my
17 level best to work on those. The written discovery requests I
18 wanted to -- I mean, I've heard about the nonparty subpoenas.
19 I understand that other discovery requests are now being
20 exchanged and that there may be a need for a discovery -- some
21 help between the parties.

22 And for the next immediate period of time at least
23 until our next status conference, I will be the one to provide
24 that help to you. So you'll follow the practice guidelines
25 that are on the Eastern District's website of meeting and

1 conferring with one another and then contacting my chambers.
2 And I'll set up an on-the-record telephone call to resolve
3 those.

4 And by the time of our next status conference we'll
5 have some discussion of whether to expand the special master's
6 duties or how we're going to continue to address those so that
7 they can be dealt with in a timely way as they come up.

8 In terms of the amended case management order, we
9 need to just get this third party subpoena issue resolved.
10 And that will be amended to expand to tend interrogatories
11 answering defendants' capacity for issuing those.

12 And the next status conference will be on Wednesday,
13 August 7th. Not on July 15th -- or 31st as we had in there.
14 So and I'll set forth the dates for submitting proposed agenda
15 items and forth.

16 So Mr. Mason?

17 MR. MASON: Wayne Mason on behalf of the LAN
18 defendants, Your Honor. I'd like to first apologize to the
19 Court for speaking while others were speaking with Mr. Kim and
20 Mr. Berg.

21 THE COURT: Thank you.

22 MR. MASON: I did not mean to be disrespectful to the
23 Court. What I was doing is related to this issue.

24 THE COURT: Okay.

25 MR. MASON: And that I was trying to be professional

1 and to advise them of my desire to bring this to the Court's
2 attention, what I'm about to say, and actually offering them
3 to approach the bench if they preferred to handle it at the
4 bench.

5 THE COURT: Okay. Well thank you. I will mention to
6 everyone now that you say that, that in the Eastern District
7 of Michigan when you're sworn into the bar to practice in the
8 Eastern District of Michigan, you take an oath. And in that
9 oath, the civility principles are elevated above the United
10 States Constitution and the laws of the United States.

11 So I appreciate that you undertook advising them of
12 this. Because civility by this bench in general is of the
13 utmost importance. And there's a reason for that. It's the
14 way you get things done effectively and efficiently. So thank
15 you.

16 MR. MASON: So having said that, I just wanted to,
17 because the Court took the issue under advisement that Mr.
18 Berg raised to you and I respect Mr. Berg's advocacy skills
19 and his passion for what he was trying to communicate, I just
20 in fundamental fairness believe it's important for the Court
21 to understand that he really misspoke about my client. He
22 tried to suggest, you know, this rich billion dollar company,
23 which is not factually correct. And in fact my client has
24 very limited insurance that is diminishing.

25 THE COURT: Yeah.

1 MR. MASON: And so to suggest that the poor City of
2 Flint was not in a position to deal with this, I will say --
3 and they can speak to it themselves, that in disclosures the
4 reality is that -- and again, I won't get into numerical. But
5 there's more money disclosed with respect to their coverage
6 than my client.

7 So I say that only because the Court will have to
8 address this issue. I do believe that the special master has
9 already addressed it with respect to if you're represented by
10 counsel. I think we've had some individuals who have pled
11 nolo in the criminal matters, their individual culpability and
12 the like.

13 And so I think that this has been taken into account.
14 And it's important for my client, for the Court to be aware as
15 you make this decision I think that by, you know, granting Mr.
16 Berg's argument, it does prejudice my client.

17 THE COURT: Okay.

18 MR. MASON: In that it does shift cost and the like.
19 And as Mr. Erickson said, typically in litigation if you are
20 represented by counsel, regardless of your ability to pay, if
21 they're indemnifying that's not the problem of the rest of the
22 case. But thank you for letting me address that.

23 THE COURT: Okay. And I appreciate it. And I think
24 you've made that argument or you've informed me of your
25 client's financial status before. And so I did remember that.

1 But thank you.

2 MR. MEYERS: Briefly, Your Honor?

3 THE COURT: Yes.

4 MR. MEYERS: David Meyers on behalf of Daugherty
5 Johnson. Your Honor, I hate to take us back to the first
6 point, but I did want to clarify your opinion in regards to
7 the individual city defendant's motion to stay.

8 In the sense of we were talking about the burden of
9 the discovery that there will be subject to upon answering --

10 MADAM COURT REPORTER: Excuse me, Counsel. Can you
11 slow down and speak up?

12 MR. MEYERS: I apologize.

13 THE COURT: Just go back.

14 MR. MEYERS: Given that the Court has taken the
15 financial burden of the discovery under consideration as we
16 were just talking about, in the opinion I did not hear the
17 Court give any consideration in regard to Johnson and Glasgow
18 in the sense that their claim has not been addressed by the
19 Sixth Circuit as they were not geared.

20 I also didn't hear and I may have missed it. I
21 didn't hear when that answer would be due assuming the Court
22 is still going to have them answer given that --

23 THE COURT: I think what I said was all -- see I
24 think what you're doing is answering Guertin and Johnson and
25 Daugherty -- or and Glasgow are not in Guertin.

1 MR. MEYERS: Correct.

2 THE COURT: So they don't have to file an answer.

3 MR. MEYERS: But our motion to stay was actually in
4 the Carthan matter.

5 THE COURT: Okay.

6 MR. MEYERS: Which they are in. And are pending
7 appeal on issues that -- on claims that have not been
8 addressed to those two defendants.

9 THE COURT: Okay. And so what I will do -- I
10 appreciate you bringing this up because it was in the back of
11 my mind and I never got back to them. And so what I will do
12 is apply the same decision that I've reached in the Guertin
13 case with respect to Johnson and Glasgow. And they will not
14 be required to answer in Carthan until their qualified
15 immunity has been addressed by the Sixth Circuit.

16 MR. MEYERS: Thank you, your Honor.

17 THE COURT: Because I did see in Guertin the three
18 judge panel did dismiss the number of defendants that I had
19 kept in. And so that could happen again and we'll find out if
20 it does.

21 MR. MEYERS: Thank you, very much.

22 MS. LEVENS: Your Honor, Emmy Levens. Just to
23 clarify though, those defendants would still be subject to
24 discovery to the extent a third party would be subject?

25 THE COURT: Yes, absolutely. Absolutely. Yes.

1 MS. LEVENS: Thank you.

2 THE COURT: They'll be third parties just as they
3 were defined in the case management order. Okay.

4 So let me make sure -- I'm not sure if I covered the
5 class definition issue. Did we cover that? Plaintiffs at
6 this time don't intend to modify 45 days plus 30 days to
7 respond, a total of 75 days from now plaintiffs' response.

8 MR. LEOPOLD: Ted Leopold on behalf of the class.
9 That's correct, Your Honor.

10 THE COURT: Okay. Anything further that we haven't
11 addressed or muddled up in some way?

12 MR. KIM: Your Honor, given that we set the briefing
13 schedule for the class definition issue, do we want to set a
14 reply brief schedule as well?

15 THE COURT: I just said it will go according to the
16 local rules for non-dispositive motions. And the lengths are
17 all according to the local rules. Okay.

18 MR. KIM: Thank you, your Honor.

19 THE COURT: Okay. Well thank you all very much.
20 I'll see you again in August.

21 (Proceedings Concluded)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Jeseca C. Eddington, Federal Official Court Reporter, do hereby certify the foregoing 63 pages are a true and correct transcript of the above entitled proceedings.

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

7/12/2019
Date