

October 25, 2017

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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4  
5 *In re* FLINT WATER CASES Case No. 16-10444  
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7 \_\_\_\_\_/  
8 STATUS CONFERENCE

9 BEFORE THE HONORABLE JUDITH E. LEVY  
10 UNITED STATES DISTRICT JUDGE

11 OCTOBER 25, 2017

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P R O C E E D I N G S

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

THE COURT: Please be seated. Thank you. Well, welcome to everyone. What I'd like to do is make a few initial remarks and then have appearances for the record. And then I have already issued an agenda for the status conference today and we'll begin by working our way through that agenda.

I want to acknowledge that I believe there are two lawyers on the telephone. Is that -- yeah. And I'd like to just -- well, what I've indicated to those individuals -- a couple of attorneys contacted the Court this week and sought permission to appear by telephone. They had apparently been unaware of this case because their case was just recently transferred to me, and other reasons.

And so what I determined is in light of the number of people who are here that it would be fine with me for them to be on by telephone but not to have a speaking role because it's just simply too complicated to conduct a hearing or a conference with this many people in the first place and then to add a layer of trying to figure out who's trying to speak on the phone. So that's what I set up with respect to the phone.

But in a moment when we have appearances, we'll call upon them to say who they are. And I guess what I'd like to

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1 begin by saying is what is obvious, which is that the Flint  
2 Water Cases have been in the news a great deal since we last  
3 met several months ago. And specifically last week, this  
4 week, and on the radio on my way into the office today.

5 I was traveling internationally in the last ten days.  
6 And on a few occasions during my travels, I spoke to people  
7 from around the world who asked what I do for a living. I  
8 mentioned that I'm a judge in Michigan. And several times the  
9 person who was asking me would follow up immediately by asking  
10 if I knew anything about Flint and the water contamination.

11 I say this as a reminder that what we are doing here  
12 today is being watched not just by the individuals in Flint  
13 who are seeking a remedy, the folks throughout the state who  
14 want to know that fairness will prevail for the defendants as  
15 well as the plaintiffs, but people around the globe really are  
16 watching and waiting to see how this issue will be resolved.

17 We will all be judged by how our work proceeds in  
18 these cases.

19 So since our last status conference, I have continued  
20 to think about how best to manage this complicated litigation.  
21 I reached out to some of my colleagues in other districts to  
22 get their ideas. And I've continued to read all of your  
23 submissions, of course, and the cases that you have directed  
24 me to.

25 I can tell that all of the lawyers on this case have

1       been incredibly busy since we were last here and I appreciate  
2       that a great deal. I, of course, prepared the agenda that's  
3       on the docket to make sure that we use the time together  
4       wisely. Nothing would bother me more than to waste anyone's  
5       time and money with appearances in court that do not  
6       accomplish moving this case toward a just resolution.

7               So with that in mind, I'd like to get started with  
8       the agenda. But first, I indicated that if I thought of  
9       additional topics that were not on this list, I would notify  
10      everybody. And I have not notified everybody of any additions  
11      to the list.

12             But I do want to add towards the end, perhaps, a  
13      topic of whether a discovery coordinator, somebody who can  
14      simply deal with documents that are at issue in this case,  
15      would be appropriate. And whether any use of a special master  
16      may be appropriate to assist me in adjudicating the  
17      non-dispositive issues that may come up.

18             So I'll add that now. And if time permits, we'll get  
19      to it. And if not, we'll address that the next time we're  
20      together. But having just violated my own agenda by not  
21      indicating that early and ahead of time, if there's anyone  
22      here who thinks that an issue has come up since you made your  
23      submission to the Court, I'd like to know about that.

24             But I think we'll start with appearances for the  
25      record. And we can either go geographically through the room

1 or we can start with counsel table. Why don't we start with  
2 counsel table.

3 MR. LEOPOLD: Thank you, your Honor. Good afternoon.  
4 Ted Leopold on behalf of the class plaintiffs.

5 THE COURT: Thank you.

6 MR. PITT: Michael Pitt, co-lead with Mr. Leopold.

7 MR. SHKOLNIK: Hunter Shkolnik on behalf of  
8 individual plaintiffs.

9 MR. STERN: Corey Stern on behalf of individual  
10 plaintiffs.

11 THE COURT: Okay.

12 MR. MCALPINE: Mark McAlpine on behalf of the Mason's  
13 class action plaintiffs.

14 THE COURT: Thank you. Let's just -- okay.

15 MS. BINGMAN: Teresa Bingman on behalf of class  
16 plaintiff.

17 THE COURT: Thank you.

18 MS. BEREZOFSKY: Esther Berezofsky on behalf of class  
19 plaintiff and individual plaintiffs in the Gulla matter.

20 THE COURT: Thank you, very much.

21 MR. WASHINGTON: Val Washington on behalf of the  
22 Gulla people as well as an individual plaintiff.

23 THE COURT: Okay. Thank you. And I'd like to  
24 introduce my three law clerks and fall intern, Adam Koshkin  
25 and Alexis Bailey and Jesse Taylor are here with us as well as

1 my intern from the University of Michigan Law School. So  
2 let's move over here to --

3 MR. CAFFERTY: Your Honor, Michael Cafferty on behalf  
4 of defendant Nancy Peeler.

5 THE COURT: Okay.

6 MS. BETTENHAUSEN: Margaret Bettenhausen on behalf of  
7 State defendants.

8 MR. KLEIN: Sheldon Klein on behalf of the City of  
9 Flint.

10 MR. KIM: William Kim on behalf of the City of Flint,  
11 former mayor Dayne Walling, and former emergency manager  
12 Michael Brown.

13 THE COURT: Thank you.

14 MR. RUSEK: Good afternoon, your Honor. Alexander  
15 Rusek on behalf of Howard Croft.

16 THE COURT: Thank you, very much.

17 MR. BERG: Frederick Berg, City of Flint.

18 THE COURT: Thank you.

19 MR. SAWIN: Your Honor, John Sawin on behalf of the  
20 Guertin plaintiffs. John Sawin for Guertin.

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

22 MR. GILDNER: Good afternoon, your Honor. Michael  
23 Gildner on behalf of former emergency financial manager, Ed  
24 Kurtz.

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

1 Everyone speak nice and loud.

2 MR. GILDNER: Michael Gildner for Ed Kurtz.

3 MR. ERICKSON: Philip Erickson on behalf of the LAN  
4 defendants.

5 MR. MASON: Your Honor, Wayne Mason also on behalf of  
6 the LAN defendants in Veolia.

7 THE COURT: Thank you.

8 MR. CAMPBELL: Good afternoon, your Honor. My name  
9 is James Campbell and I represent the three North America  
10 Veolia entities. Thank you.

11 THE COURT: Thank you, very much.

12 MR. GRUNERT: John Grunert. I also represent the  
13 three North America Veolia entities.

14 MS. CHARTIER: Mary Chartier. I represent Robert  
15 Scott.

16 THE COURT: Okay.

17 MR. BARBIERI: Charles Barbieri representing the MDEQ  
18 defendants, Michael Prysby, Adam Rosenthal, and Patrick Cook.

19 MR. GRASHOFF: Good afternoon, your Honor. Phil  
20 Grashoff representing MDEQ defendants Stephen Busch.

21 MR. MORGAN: Thaddeus Morgan, your Honor, on MDEQ  
22 defendant Liane Shekter Smith.

23 THE COURT: Okay.

24 MS. MORAN: Jennifer Moran on behalf of defendant  
25 Rowe.

1 THE COURT: Yes, okay. Thank you.

2 MR. STAMATOPOULOS: Gregory Stamatopoulos on behalf  
3 of class plaintiffs.

4 MR. NOVAK: Paul Novak also on behalf of class  
5 plaintiffs.

6 MR. CUKER: Mark Cuker on behalf of the Gulla and  
7 Lowery plaintiffs.

8 MR. MORRISSEY: Steve Morrissey on behalf of class  
9 plaintiffs.

10 MR. WITUS: Morley Witus on behalf of Governor  
11 Snyder.

12 MR. LARSEN: Zach Larsen on behalf of State  
13 defendants.

14 MR. KUHL: Richard Kuhl --

15 MADAM COURT REPORTER: Can you slow down, please?  
16 And Zach, can you repeat your appearance?

17 MR. LARSEN: Zach Larsen on behalf of the State  
18 defendants.

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

21 MR. CONNORS: Good afternoon. Jordan Connors on  
22 behalf of class plaintiffs.

23 MR. PATTWELL: Good afternoon, your Honor. Mike  
24 Pattwell. I'm here with my partner Jordan Bolton and we  
25 represent Dan Wyant and Brad Wurfel.

1 THE COURT: Okay. Thank you.

2 MR. SANDERS: Good afternoon, your Honor. Herb  
3 Sanders along with Karen Brooks, Shayla Fletcher, and  
4 Shawntane Williams on behalf of the Troy Alexander plaintiffs.

5 THE COURT: Thank you, very much.

6 MR. BROADDUS: John Broaddus, class plaintiffs.

7 MS. MCGEHEE: Good afternoon, your Honor. Cary  
8 McGehee on behalf of class plaintiffs.

9 THE COURT: Thank you.

10 MR. GOODMAN: Bill Goodman, your Honor, on behalf of  
11 class plaintiffs and individual plaintiffs.

12 THE COURT: Okay.

13 MR. BLAKE: Jason Blake on behalf of class  
14 plaintiffs.

15 MR. SHEA: David Shea on behalf of class plaintiffs.

16 MR. POLK: If it please this honorable Court, Larry  
17 Polk on behalf of plaintiffs Savage, Kirkland, and Gist.

18 THE COURT: Okay. Thank you.

19 MR. WISE: Matt Wise on behalf of Jeff Wright.

20 MR. GALVIN: Good afternoon, your Honor. Joseph  
21 Galvin also on behalf of defendant Jeff Wright.

22 MR. WOLF: Good afternoon, your Honor. Barry Wolf on  
23 behalf of Gerald Ambrose.

24 MR. MEYERS: Good afternoon, your Honor. David  
25 Meyers on behalf of defendant Daugherty Johnson.

1 MR. ERIKSSON: Good afternoon, your Honor. Reed  
2 Eriksson on behalf of the City of Flint, Dayne Walling, and  
3 Michael Brown.

4 THE COURT: Thank you.

5 MR. MEYER: Good afternoon, your Honor. Brett Meyer  
6 on behalf of defendant Michael Glasgow.

7 MS. LABELLE: Deborah LaBelle, your Honor, and Peggy  
8 Pitt on behalf of class plaintiffs.

9 THE COURT: Thank you.

10 MS. BRANCH: Good afternoon, your Honor. Nikkiya  
11 Branch on behalf of Darnell Earley.

12 THE COURT: Thank you, Ms. Branch.

13 MR. BRONSTEIN: Good afternoon, your Honor. Peretz  
14 Bronstein on behalf of class plaintiffs.

15 THE COURT: Thank you.

16 MS. WEINER: Jessica Weiner also on behalf of class  
17 plaintiffs.

18 MR. WEISS: Daniel Weiss on behalf of individual  
19 plaintiffs.

20 THE COURT: Okay. So the first order of business is  
21 to make sure that everyone who has just made an appearance on  
22 the record has also filled out a sign-in sheet form. And if  
23 you have not, they're on a table outside the courtroom. And  
24 please do that before you leave today.

25 For those who are seated at counsel table, you are

1 welcome to speak throughout the conference without identifying  
2 yourself by name each time. But for anyone who is not at  
3 counsel table, if you will state your name and your client  
4 before you speak, that would be helpful to making sure that  
5 the record reflects accurately who's speaking. It would also  
6 be good for my memory purposes of making sure that I'm  
7 learning everyone's name properly.

8 So on the telephone, who do we have?

9 MS. MEEDER: Your Honor, this is Jessica Meeder for  
10 the Boler plaintiffs.

11 THE COURT: Okay. Well, welcome, Ms. Meeder.

12 MR. SZOKOLY: And your Honor, Nick Szokoly on behalf  
13 of the Boler plaintiffs.

14 THE COURT: Thank you. All right. Well, I think  
15 that's who we have on the telephone. Thank you, very much.

16 Well, the first issue is just to identify that the  
17 case caption has now been established. And the plaintiffs  
18 will need to re-file their amended master class action in that  
19 case specific caption. And I indicated on the agenda that  
20 that should be at a date that we will set today. So I guess  
21 what I would ask, Mr. Leopold, is how much time you would need  
22 to accomplish that?

23 MR. LEOPOLD: Your Honor, I think we should be able  
24 to do that by the end of the week.

25 THE COURT: Okay. All right. Well, then what we'll

1 do is anticipate that being done by the end of the week.

2 So the first issue that's on the agenda is really  
3 items 1 and 2, which is dealing with the issue of the  
4 appropriateness and scope of preliminary discovery. And this  
5 came to the Court's attention through the motions filed by the  
6 various defendants.

7 So also through the -- well, I guess everybody  
8 brought it to my attention. But the defendants most loudly  
9 brought it to my attention as something that they oppose. And  
10 so I would invite representatives of those who filed the  
11 motions to quash to address the Court. And then we will have  
12 a response.

13 MR. BARBIERI: Your Honor, for the record, Charles  
14 Barbieri. Again, I represent the MDEQ defendants Prysby --

15 MR. LEOPOLD: Excuse me, your Honor. I'm not sure  
16 the microphone's working.

17 THE COURT: That one doesn't work well. But I think  
18 Jeseca has got something there so that she can hear. So the  
19 record is going to be accurate. But could you speak up so  
20 that others --

21 MR. BARBIERI: Oh, absolutely. I'm Charles Barbieri.  
22 I represent the MDEQ defendants. Specifically Prysby,  
23 Rosenthal, and Cook. I also, when I filed the motion for  
24 protective order, made that motion on behalf of MDEQ  
25 defendants Busch, Liane Shekter Smith, and Wurfel, and Wyant.

1           And your Honor, the motion, I think, is fairly well  
2     set forth in our brief that we filed and also our reply brief.  
3     We submit that as far as our clients are concerned, discovery  
4     that has been presented was somewhat surprising after this  
5     Court had its conference back in July.

6           At that time, the Court merely indicated an interest  
7     in having the parties meet and confer. It didn't allow or  
8     authorize any discovery actually to be filed. So it was  
9     somewhat surprising before even the opportunity to meet and  
10    confer that a discovery request would be made.

11          Further, as the Court is well aware, there is no  
12    operative complaint insofar as the plaintiffs that brought  
13    this discovery request for this particular matter. The class  
14    action complaint has not been filed at this point. And  
15    therefore, precludes in any event the case from preceding in  
16    the meaningful way that it normally does.

17          We have not been able to file a dispositive motion,  
18    which would most certainly include the assertion and defense  
19    of immunity. Also, there has been obviously no answer filed  
20    given the procedural status of the case. There's been no Rule  
21    26(f) conference that has been scheduled or held. And we  
22    submit that discovery is wholly inappropriate given all those  
23    sets of circumstances.

24          Beyond that, the clients that are involved, at least  
25    in terms of five of the seven MDEQ defendants, face criminal

1 charges. And as a result of the fact that there will be  
2 overlap between the criminal charges and the civil  
3 allegations, we are very concerned about preserving their  
4 right against self-incrimination. We submit that any  
5 discovery puts that at peril.

6 We also submit from the standpoint of these MDEQ  
7 defendants that are charged, they are subject to, in essence,  
8 some type of gag order that prevents them from disclosing  
9 documents that they receive through the Special Assistant  
10 Attorney General that's prosecuting the cases against our  
11 client.

12 So there's a concern about in terms of their honoring  
13 an already existing order issued by a court that limits the  
14 circumstances of their revelation of what documents that they  
15 have had produced to them or to comment on any of the same.

16 The value of discovery here is rather dubious because  
17 the documents that they apparently seek to request I believe  
18 have already been submitted by the State, by putting it on  
19 websites, by the press who's been able to obtain through  
20 Freedom of Information Act documents which have been made  
21 widely available.

22 And I submit that no prejudice ensues to the  
23 plaintiffs whatsoever in terms of having this response  
24 demanded of our client or any of the other defendants in this  
25 matter.

1           So respectfully, we submit that a protective order  
2   ought to issue --

3           THE COURT: Mr. Barbieri.

4           MR. BARBIERI: Yes.

5           THE COURT: You're suggesting that all of this  
6   material is already a matter of public record?

7           MR. BARBIERI: I believe that it is because of what  
8   has been put on websites, that's correct.

9           THE COURT: And so the Fifth Amendment issues would  
10   dissolve. The individuals who are criminally charged already  
11   have exposure to everybody in the world if they're publically  
12   available. Am I mistaken about --

13          MR. BARBIERI: I think if we have to gauge in any  
14   thoughtful evaluative process in terms of producing documents  
15   beyond those that are in that public domain, I'm concerned  
16   about whether I'm going to be forfeiting their rights against  
17   self-incrimination. I think it's a dangerous slope or a  
18   slippery slope to walk on at this point, your Honor. And I  
19   don't think we need to.

20          We don't need to create that type of error here. And  
21   it certainly is contrary to the idea that if we have immunity  
22   that we shouldn't be required to participate in any discovery.  
23   Because that immunity defense is more than just the defense  
24   but it's also protection against discovery.

25          THE COURT: Okay. Well, thank you, very much.

1 MR. BARBIERI: I know that a number of other parties  
2 filed objections in addition to the folks that have been brave  
3 enough to file the motion, your Honor.

4 THE COURT: You're absolutely right about that. So  
5 Mr. Klein?

6 MR. KLEIN: Good afternoon, your Honor. Sheldon  
7 Klein for the City of Flint. I have a housekeeping question,  
8 which is there were two different sets of documents filed, one  
9 were the various protective orders and motions to quash the  
10 discovery. The other was I think generally described as the  
11 various parties' position statement regarding preliminary  
12 discovery.

13 I understood that that second -- that the discussion  
14 would cover both --

15 THE COURT: Yes.

16 MR. KLEIN: -- and not just the protective order. So  
17 I'll start by saying first that the City chose to file a  
18 response to the discovery request which essentially repeated  
19 pretty much the same arguments that were in various motions to  
20 quash, etcetera. So technically on that one we don't have a  
21 motion before you.

22 THE COURT: Okay.

23 MR. KLEIN: As far as the position statements -- and  
24 I guess one final housekeeping matter. The position  
25 statements which are part of the first item on the agenda also

1 covered the same items as item 3 on your agenda. I'm glad to  
2 treat them separately. I'm glad to treat them together.  
3 Whatever is most logical, convenient for the Court.

4 THE COURT: Handling it together is probably best.

5 MR. KLEIN: Okay. So let me start with what's  
6 really, for the most part, covered by 3, which is a few very  
7 limited scope types of preliminary discovery. And what I'll  
8 say, laying some of the administrative groundwork for things  
9 like protective orders and the like. But let me briefly  
10 address the City's position on those. And then I'll move on  
11 to the substance of the argument as to the appropriateness of  
12 any preliminary discovery before motions to dismiss are filed.

13 First, the City has already produced its insurance  
14 agreements. So that's moot. I mean, they were produced  
15 informally. Not in response, I believe, to a discovery  
16 request. But plaintiffs have them.

17 Various parties suggested that plaintiffs produce  
18 what were called "fact sheets", and it's the term that was  
19 used in the Genesee County action for --

20 THE COURT: Tell me what a fact sheet is in this  
21 context.

22 MR. KLEIN: A fact sheet -- and I wish I would have  
23 brought an example from the Genesee County action, but I  
24 didn't. It is, in the basic sense, the type of information  
25 that you would get through preliminary interrogatories. It

1 covers what addresses did you live in? What types of plumbing  
2 do you have? Do you have water tests, you know, lead level  
3 water tests for your home? Do you have blood level water  
4 tests for your body?

5 THE COURT: And that is something that the City of  
6 Flint -- tell me your position on that?

7 MR. KLEIN: That would be fine. I mean, it wasn't  
8 our proposal. It's already been done in Genesee County. And  
9 I think one of the other parties, and I forget whom, proposed  
10 a specific form to be used here. As far as the specific form,  
11 I don't necessarily have a position. But we don't object to  
12 getting these plaintiffs' fact sheets at the outset.

13 THE COURT: So you don't object to the plaintiffs  
14 providing that information which would be preliminary  
15 discovery, but you still are objecting to providing the  
16 documents requested?

17 MR. KLEIN: Well, the documents requested, but it  
18 goes beyond that.

19 THE COURT: Okay.

20 MR. KLEIN: The one other item of preliminary  
21 discovery that we don't oppose is there was some suggestion,  
22 the daily jurisdictional discovery.

23 THE COURT: Of course.

24 MR. KLEIN: We have no dog in that fight, but we  
25 certainly don't oppose it.

1 THE COURT: And I think no one opposes that at this  
2 point, but we'll get to that. Or maybe --

3 MR. KLEIN: Okay. I just wanted to check all of the  
4 boxes. I read all of these motions and made a list of what  
5 various people had read. There was a suggestion the plaintiff  
6 should produce releases for the medical records. The City has  
7 no problem with that.

8 There was a suggestion that we should put an ESI  
9 protocol in place. The City does not object with the  
10 following caveat. There was already one in place in Genesee  
11 County. It would make no sense to have different ESI  
12 protocols. I mean, we're not going to produce here and PDFs  
13 or at least would be -- it wouldn't make a lot of sense.

14 In the ESI protocol, it's very technical details of  
15 how data files are going to be formatted and etcetera. It's  
16 not a substantive discovery, the issue.

17 THE COURT: Yes.

18 MR. KLEIN: You would certainly think you would want  
19 a common protocol for the state and federal cases.

20 And finally we have no objection to getting the  
21 confidentiality, a protective order. I assume those both  
22 refer to the same documents. We have no objection to getting  
23 that in place. Let's just get it out of the way.

24 THE COURT: What about the preservation order?

25 MR. KLEIN: I was going to move on to that.

1 THE COURT: Okay.

2 MR. KLEIN: Oddly -- I don't know if it's odd.

3 Normally I would never object to a document preservation  
4 order. Here's where I think it's problematic here. We're  
5 basically two years into this. Everyone, I assume, certainly  
6 the City of Flint, put in place its document preservation  
7 processes going on two years ago. The work has been done.

8 So I guess, second, of course you don't need a  
9 document preservation order to be obligated to avoid  
10 spoliation and the like. And either the document preservation  
11 order would be duplicative of what's already happening --

12 THE COURT: Slow down just a little bit.

13 MR. KLEIN: Okay. It would either be duplicative of  
14 what's already happened or it would create new obligations  
15 which would create burdensome rework. To some extent, it's  
16 probably impossible. You can't un-ring the bell.

17 I mean, certainly the City of Flint and I assume  
18 everyone else took in good faith their obligations to preserve  
19 documents when this situation arose. And so I think either at  
20 best it serves no purpose, or worst it creates more confusion  
21 and rework. So we would in this instance just don't think  
22 it's a good idea.

23 Finally, there was a suggestion from the plaintiffs  
24 about a joint repository, document repository. That's  
25 something that I think should be discussed by the parties for

1 a very simple reason.

2 In my experience, it may or may not be cheaper and it  
3 may or may not be more effective to go to a joint repository.  
4 It's actually quite complicated to find a tool that serves  
5 everyone, provides all the needed functionality, and to set up  
6 the permissions so that the City of Flint doesn't get to see  
7 plaintiffs' analytic.

8 I mean, if plaintiffs are issue coding in this online  
9 repository, obviously they don't want to see it and vice  
10 versa, etcetera. It could be done, but it may or may not be  
11 cheaper and more efficient. So that's something for the  
12 parties to discuss.

13 I think everyone would like to be as cheap as  
14 possible consistent with an effective tool. We shouldn't have  
15 a conflict of interest here. It's just a question of fact  
16 gathering.

17 Finally -- I shouldn't say finally. There were  
18 suggestions made that the government defendants should produce  
19 documents produced to the Attorney General. And in fact, I  
20 think that was the primary thrust of the first set of  
21 interrogatories.

22 And I represent the City and I'm not involved in the  
23 criminal matters. But I do understand -- the City can't agree  
24 to that because I do understand that there's a State statute  
25 which, in essence, prohibits the disclosure of subpoenaed

1 investigative files. And I'm told that Todd Flood, the  
2 special prosecutor, has made it very clear that he will  
3 enforce this, including prosecution.

4 So at a minimum, it's premature to take such a  
5 complicated, potentially prejudicial step at this point from  
6 the City's perspective would be unfair. And I would defer to  
7 the attorneys who are working on the individuals, criminal  
8 defendants, to elaborate on that risk.

9 The final topic that was suggested in some of the  
10 papers as appropriate for preliminary discovery is third-party  
11 discovery. To me, that makes no sense. The suggestion that  
12 it's too burdensome for us to get started with discovery but  
13 third parties should be burdened seems to turn logic and the  
14 law on its head.

15 And I would go even further and suggest that when it  
16 is time for third-party discovery, the parties should be  
17 ordered to work together to have a common discovery request.  
18 A common document request for a subpoena. Third parties  
19 shouldn't be hit with scatter shot subpoenas from every  
20 different party. It's unfair to them.

21 And so when that comes -- and again, we don't think  
22 this was the time for it to come -- we think that would be a  
23 very useful part of a discovery order to make this sufficient  
24 and minimize the burden on third parties.

25 Beyond that, we oppose discovery at this time and

1 really prior to the resolution of the motions to dismiss. I'm  
2 not going to repeat the points that Mr. Barbieri made. And  
3 frankly, I think every defendant made some version of the same  
4 points. But I'll just hit on a couple of points that may not  
5 have been covered.

6 One is prior to the resolution of motions to dismiss,  
7 either discovery is going to be overinclusive or under  
8 inclusive. Either it's going to cover claims and parties that  
9 ultimately aren't part of the case or it's going to omit  
10 claims and parties that ultimately are part of the case.

11 In the first instance, obviously it's wasteful. In  
12 the second instance, you are likely going to need to do a  
13 whole new round of discovery, a second set of discovery, to  
14 cover what you failed to discover the first time around.  
15 That's just not an orderly process. It makes what's already  
16 an enormously burdensome process more burdensome.

17 The second point that I would make is and in part  
18 it's a technical issue of complying with Rule 26 conferences  
19 and disclosures and Rule 16 conferences, etcetera, but there's  
20 a more fundamental point that makes discovery inappropriate  
21 here. And that is in a case of this complexity, there needs  
22 to be a comprehensive discovery plan which lays out discovery  
23 in a logical orderly manner that is most likely to lead to the  
24 early resolution of the cases.

25 If you simply fire the starters pistol and say start

1 discovery, very quickly we'll wind up in a gridlock and we'll  
2 make no progress towards actually getting this case into a  
3 shape that can be processed. And in our mind, the key to this  
4 orderly process leading towards the -- I won't say early. But  
5 the earliest possible resolution is to phase the discovery and  
6 to focus on the central issue of what I'll refer to as  
7 exposure and causation.

8 And I'll explain what that means in a moment. But  
9 I'll start by pointing out, and I'll probably elaborate in a  
10 bit, that this is central both to the individual cases and the  
11 class cases.

12 What I may mean by discovery or exposure and  
13 causation is that plaintiffs are going to need to prove, one,  
14 that they were, in fact, exposed to, I'll just use the word,  
15 defective water. Won't argue now about what exactly that  
16 means. Water with excessive levels of lead measured by  
17 whatever standard. And that may seem obvious except there's a  
18 very important fact here.

19 The underlying law, the lead and copper rule that we  
20 need to comply with is tied to a 90th percentile lead  
21 measurement, meaning that if more than ten percent of the  
22 people have too much lead in the water, you have problems. Of  
23 course that leaves the other 89 percent or 86 percent or  
24 whatever. So the mere fact that someone drank a cup of Flint  
25 water doesn't get you very far at all.

1           So you need -- the plaintiffs are going to need to  
2     prove, one, that they consumed bad water. Two, that that  
3     affected their body.

4           THE COURT: Of course.

5           MR. KLEIN: I mean, they had elevated blood lead --  
6     or they had elevated lead levels in their body. And again,  
7     that isn't automatic. It needs to be proved. And three, that  
8     as a result, they suffered some sort of cognizable injury.  
9     From the class standpoint, that is clearly going to be the  
10    central question on class certification.

11           Can they prove in a common manner that all umpteen  
12    thousand of the people that are members of the class can prove  
13    each of these things without having umpteen thousand mini  
14    trials?

15           From the individual standpoint, it is, we think, the  
16    most logical way to getting to resolution. If you start at  
17    the other end of the telescope, which is focused on the  
18    defendants and that they violate legal duties, well that  
19    doesn't get you very far because you still have all these very  
20    profound exposure and causation questions.

21           So we believe if we focus on causation and injury, as  
22    I've labeled in shorthand, that will separate the wheat from  
23    the chaff. That will drive the resolution of class  
24    certification. And for those reasons, it's the most efficient  
25    way forward in these cases.

1 THE COURT: Okay.

2 MR. KLEIN: And if the Court has no questions, I  
3 don't think I have anything else on this point.

4 THE COURT: I don't think I do have any questions. I  
5 read your submissions as well, so.

6 MR. KLEIN: Thank you.

7 THE COURT: Thank you.

8 MR. CAMPBELL: Good afternoon, your Honor.

9 THE COURT: Good afternoon.

10 MR. CAMPBELL: My name, again, your Honor, is James  
11 Campbell and I represent the three North American Veolia  
12 entities. And I think, your Honor, if I may, I'd like to  
13 address the first three issues in your --

14 THE COURT: Yes, please. I should have added the  
15 third.

16 MR. CAMPBELL: So first of all, your Honor, I think  
17 and Veolia's position really is that the various claims for  
18 immunity, the Eleventh Amendment claims, and those issues  
19 really need to be addressed first somehow. Because those  
20 issues from so many of the defendants are we cannot proceed or  
21 we should not be forced to proceed because of those issues.  
22 And I think your Honor can address those.

23 We have a December 1 filing for the response to the  
24 consolidated complaint. My understanding is that those  
25 immunity issues will be raised again. They're on appeal in

1 Guertin. So I believe they'll be teed up, if you will.

2 So if your Honor is inclined to let that process go,  
3 that's appropriate. But should your Honor want to do  
4 something else, I do believe that we can address documentary  
5 or discovery and documents.

6 And we've put this forth, I believe, in our  
7 submission. But to summarize, I think, first of all, a  
8 protective order, I think all parties agree. Mr. Leopold  
9 circulated one. We've been talking about it. And I think the  
10 consensus is we'd like some time to flesh that out and perhaps  
11 get something by agreement to your Honor.

12 THE COURT: Okay.

13 MR. CAMPBELL: The ESI issue, the electronically  
14 stored information, that's in the Genesee County case  
15 management order. And it really -- I think all the parties --  
16 and I'd stand corrected if not. But I think all the parties  
17 are in agreement that we need one so we don't try and deal  
18 with two different orders.

19 THE COURT: Right.

20 MR. CAMPBELL: And I think that's acceptable to the  
21 parties. So that's easy. We were the ones, I believe, that  
22 put forth the notion of an evidence preservation order and  
23 letter. And we've circulated to the parties as best we can to  
24 identify all the parties some drafts of that. And we'd be  
25 happy to supply that to your Honor should you want to look at

1       them that would address both the parties to the case.

2               But also this is a situation where there's so many  
3       third parties out there that have information that we all want  
4       to gather, we all want to have. And we propose sending some  
5       form of letter that would request them to hold stuff. So  
6       again, we can submit that to your Honor for review.

7               In terms of preliminary discovery, your Honor, the  
8       document request that the plaintiffs served on the various  
9       defendants, we, like the City, filed a response and raised an  
10      objection, which I think pretty much reflect what your Honor  
11      has before you on the motions to quash or protective orders.

12              And setting that aside, if your Honor is inclined to  
13      go beyond the immunity issues and try to get, you know, a  
14      movement going here, our position is it has to be the parties  
15      to the case. It can't focus just on one or the other or the  
16      like. It has to be the parties. And we have a suggestion for  
17      your Honor.

18              THE COURT: Okay.

19              MR. CAMPBELL: In addition to the issue that the  
20      plaintiffs have raised with reference to documents that may  
21      have been provided to government -- you know, the criminal  
22      investigations or other investigations by various entities,  
23      that's what the plaintiffs have proposed. And of course that  
24      only goes to the defendants.

25              We would suggest your Honor needs to consider the

1 issue with Mr. Flood and what has been reported about what he  
2 has in place. That, to me -- and we put it in our papers.  
3 That's an issue for some.

4 But beyond that, there's been a lot of activity by a  
5 lot of the defendants, including Veolia, with regard to  
6 Freedom of Information Act request. Requesting of governments  
7 or those in possession of documents that they provide them  
8 pursuant to those types of statutes. I think we used FOIA as  
9 a shorthand.

10 THE COURT: Yeah.

11 MR. CAMPBELL: But there's probably other means and  
12 methods. So all of the parties, I think, have used that.  
13 Those documents are out there. We have them. Some are  
14 redacted, but they're there. And the same concept that the  
15 plaintiffs are putting forth that the documents are there and  
16 alls you've got to do is copy them again, that goes the same  
17 for FOIA requests and the like.

18 And Mr. Pitt had put in his papers for the interim  
19 lead counsel that he had collected a lot of those documents  
20 and the like. So they're out there and they will be produced.  
21 We agree that there should be -- we should work towards a  
22 common repository of the documents. And that would be a good  
23 start.

24 Another, you know, with the mode of discovery,  
25 document production, in the state court, as you've heard, your

1 Honor, there's these fact sheets that have been put forth by  
2 the plaintiffs there. Same process here. This is information  
3 that's going to have to be put forth by the plaintiffs.

4 We've circulated a proposed fact sheet that generally  
5 tracks I think nearly identical that which we put forth in the  
6 state court. And again, we can share that with your Honor  
7 should you want to see it. But we've circulated for review.

8 And then finally, the nonparty document only  
9 subpoenas, I disagree with Mr. Klein that it's over the top.  
10 But he did make a good point, I think, your Honor, in  
11 coordinating it. If that's the route that we're going to go,  
12 keeping the mode on documents only, there should be  
13 coordination. And you know, that's where we can work together  
14 in order to gather that information.

15 And that would be the suggestion, that if we're going  
16 to go to a preliminary discovery method while the motion  
17 practice goes forth. And if you go forth with what we need to  
18 do just on the motion to dismiss, just on the consolidated  
19 complaint, you know, it brings us into 2018 at some point. So  
20 these are things, suggestions for your Honor that could go  
21 happen.

22 But I guess the primary point is if your Honor is  
23 going to go there, it has to be -- you know, the parties to  
24 the litigation have to participate.

25 THE COURT: Certainly.

1 MR. CAMPBELL: I think for the three issues in the  
2 first three, I think those are what I have to say, your Honor.  
3 Thank you.

4 THE COURT: Okay. Well, thank you, very much. And  
5 now Mr. Rusek.

6 MR. RUSEK: Yes, your Honor. Alexander Rusek on  
7 behalf of Mr. Howard Croft. He's the former director of  
8 public works for the City of Flint. Also today I am speaking  
9 on behalf of former EM, Mr. Earley; former EM Mr. Ambrose;  
10 former utilities administrator, Mr. Johnson; and also former  
11 water treatment plant employee, Mr. Glasgow.

12 All of those defendants have been charged with  
13 crimes. Mr. Glasgow has entered into a plea agreement. The  
14 other defendants currently are facing multiple charges in  
15 Genesee County District Court at this time. And they have  
16 preliminary examinations coming up in early December of this  
17 year if planning goes as according to schedule at this point.  
18 They, of course, may be moved.

19 Just addressing two primary points on behalf of the  
20 defendants that are charged with crimes. First and foremost  
21 is that their Fifth Amendment rights must be protected in this  
22 matter. These cases are ongoing. There's a lot going on in  
23 them. And all of the criminal cases arise out of these  
24 gentlemen's roles at the City of Flint and the water treatment  
25 plant.

1           Upon review of the cases, two of the primary  
2       considerations when a court is looking at a stay when there's  
3       concurrent civil and criminal cases is whether or not, one,  
4       there's been an indictment. All these gentlemen have been  
5       charged at this point. And two --

6           THE COURT: Tell me -- I am aware of that. And I  
7       appreciate the reminder of that case law. But tell me how  
8       these documents might jeopardize their Fifth Amendment right  
9       against self-incrimination.

10          MR. RUSEK: Any production that they make can be --

11          THE COURT: In light of the fact that I've been  
12       informed that the documents are already available in various  
13       formats to the public.

14          MR. RUSEK: My understanding, your Honor, is that the  
15       documents that the City has would be in their possession, not  
16       the individual defendants' possession. Mr. Croft resigned, I  
17       believe, December of 2015.

18          If we were required to produce the documents that  
19       have been attained in the criminal case through discovery  
20       there, that implicates many issues with the investigative  
21       subpoenas that were used to discover those documents  
22       specifically. And perhaps most importantly the investigative  
23       subpoenaed testimony that was taken pursuant to those  
24       investigative subpoenas.

25          THE COURT: Okay. So is that exclusively request 1

1 and 2A? Or does that go to any other of the requests?

2 MR. RUSEK: It goes to any request at this time being  
3 made, your Honor.

4 THE COURT: Okay.

5 MR. RUSEK: I believe that based on case law, it's  
6 inappropriate to engage in any discovery as to the individual  
7 criminal defendants. One, because they have been indicted.  
8 And two, the case law also focuses on how close the cases  
9 track each other on the civil side and on the criminal side.

10 Here, but for these gentlemen's roles with the City  
11 of Flint and the role in the water crisis, the switch of  
12 water, there would not be either civil cases or criminal  
13 cases. They align perfectly. And I believe that the case law  
14 supports when those circumstances exist, we have to really  
15 look at the Fifth Amendment right of those defendants and we  
16 have to protect them.

17 The cases where courts have decided not to stay  
18 discovery, those are generally cases that are pre-indictment.  
19 And that's because there's uncertainty. And that indictment  
20 can come years down the road or never. But even in cases that  
21 there is no indictment. And specifically in the Western  
22 District, there was -- excuse me -- Chao v Fleming in 2007.  
23 And that's relied on FTC v E.M.A. Nationwide, a Sixth Circuit  
24 decision 2014.

25 And in the Chao case, that was also pre-indictment.

1 But there was indications that an indictment was coming and a  
2 stay was appropriate in that case.

3 THE COURT: Okay.

4 MR. RUSEK: And the primary focus is is there an  
5 indictment. And that's because you have that immediate impact  
6 on the Fifth Amendment rights of those defendants in how close  
7 the cases track each other. Here, those first two factors  
8 weigh heavily in favor of staying any discovery as to the  
9 individual defendants in this case.

10 I believe that the other four factors also weigh in  
11 that favor. But those first two I believe are particularly  
12 dispositive. And also if we look at the case law in addition  
13 to the six factors that we look at, the final factor in that  
14 balancing test is what is the extent that the Fifth Amendment  
15 rights of these defendants is implicated.

16 Here, it's completely implicated their case that  
17 they're pending. Any actions they take in discovery, whether  
18 asserting that Fifth Amendment right or producing documents,  
19 it puts them in some sort of liability on the criminal side.

20 THE COURT: Okay.

21 MR. RUSEK: In addition for Mr. Glasgow, too, just  
22 because he does have that State case that is --

23 THE COURT: You're suggesting they have additional  
24 criminal liability for asserting their Fifth Amendment rights  
25 in this case? In these cases?

1 MR. RUSEK: I don't believe it would be additional  
2 criminal liability, but it would be liability on the civil  
3 side. If they have an adverse inference made for asserting  
4 that Fifth Amendment.

5 Mr. Glasgow also has, I believe there's a pending  
6 federal investigation. So while he doesn't have charges  
7 pending on the state side, he also has those Fifth Amendment  
8 concerns related to any federal charges that may come down at  
9 some point.

10 And then your Honor, just because I'm here, the issue  
11 of defense liaison counsel, we're objecting to that. And  
12 that's simply because we do have very unique rights that other  
13 defendants, such as the engineering firms, they don't have.  
14 And if they're going to be pointing the finger at us at some  
15 point in this litigation, then having defense liaison counsel,  
16 it just will not work with asserting those specific --

17 THE COURT: I'm glad you brought that up. Because to  
18 the extent I put that on the agenda, the purpose that I am  
19 contemplating is exclusively a procedural purpose that would  
20 have no substantive duties. So it would be someone who if we  
21 are trying to figure out whether to change the time to three  
22 o'clock from two o'clock could be contacted and would then get  
23 that information out to other defense counsel.

24 And that person would have defined duties. And if  
25 those duties were not lived up to and something that appears

1 administrative becomes substantive because someone is not  
2 given the information, that would be a problem for that  
3 person, so.

4 MR. RUSEK: That's much more clear to me, your Honor.  
5 I appreciate that. And I would defer to the Court as far as a  
6 procedural liaison counsel in that single role with some sort  
7 of system to object to decisions and so forth.

8 THE COURT: Okay. Well, thank you, very much.

9 MR. RUSEK: Thank you.

10 THE COURT: All right. Mr. Mason.

11 MR. MASON: Thank you, your Honor. Wayne Mason  
12 representing LAN and Leo Daley. Something new that we haven't  
13 discussed, I know you mentioned it, the jurisdictional issue  
14 of discovery is one that is appropriate for me to address with  
15 my client. And we do not oppose working with counsel for  
16 limited written discovery and then a deposition of our  
17 representative in order to flush that out.

18 THE COURT: Okay.

19 MR. MASON: And so I believe that that is something  
20 that can go forward as far as we're concerned. We're willing  
21 to go forward.

22 THE COURT: And that's what I discerned from the  
23 filings. And what I would appreciate it is if there could be  
24 a stipulated order regarding the timing of this. Is that  
25 something that you can participate in?

1 MR. MASON: I'm sure we can work that out, your  
2 Honor.

3 THE COURT: Okay. I see Mr. Leopold nodding. So if  
4 that could be submitted by a week from today.

5 MR. MASON: All right.

6 THE COURT: That becomes November 1st. And if you  
7 can submit it earlier, that's even better. But what I would  
8 anticipate is that there is a proposed stipulated order about  
9 the length of time for the personal jurisdiction, discovery,  
10 and the extent of it, whether it's -- well, it sounds like  
11 it's going to be a deposition and some documents.

12 MR. MASON: I'm presuming that's what they'll want.

13 THE COURT: Okay.

14 MR. MASON: But we will work with them on that and  
15 provide it as you requested a week from today.

16 THE COURT: And then what we will need is some  
17 supplemental briefing so that I can be informed of what was  
18 discovered in the course of discovery. So if you'd include  
19 that, a proposed timetable for supplemental briefing, that  
20 would be helpful.

21 MR. MASON: We will do that, your Honor.

22 THE COURT: Okay.

23 MR. MASON: So in addition to that, I would say,  
24 without repeating, we would agree with the Veolia counsel.  
25 With respect to the priority of the government, we should be

1 respectful of those defenses and indemnity and those type of  
2 things. And I leave that to your Honor to sort out with them  
3 in discussions about how that's done. But I do think it would  
4 be prioritizing things appropriate.

5 The jurisdictional issue that we'll be participating  
6 in but also those issues that could otherwise hinder the  
7 ability to get fruitful discovery. So we do recommend that.

8 As for the other issues that were described,  
9 certainly we should be able to use the ESI agreement from the  
10 Genesee County litigation that I think everyone would agree  
11 to. You know, from a preservation order standpoint I do think  
12 we do support that. To the extent that there are, we can deal  
13 with that in terms of to the extent that something is in place  
14 that has already been substantially utilized, that should be  
15 adequate.

16 So there wouldn't have to -- the concern about  
17 reissuing it, nobody wants people to do more work. But there  
18 is a desire to make sure that matters are preserved, and in  
19 some cases in third parties. Which leads me to third party  
20 discovery which we think would be appropriate.

21 I mean, the truth is, your Honor, we are not saying  
22 that discovery isn't important to get going. Because the  
23 reality here is when we -- you know, as the Court knows, when  
24 we subpoena records and we request records, whether we do it  
25 jointly as Mr. Klein has suggested or not, once you get the

1 records, they've got to be loaded. They've got to be  
2 reviewed. And that is critical information for parties to  
3 make important judgments with respect to the case and the  
4 ability to get down the road. And so we actually agree and  
5 are not opposed to that.

6 Also, from my suggestion to the Court is the  
7 preliminary discovery, I think it was unfortunate that the  
8 discover request was issued. And I'm well aware of the early  
9 Rule 34 request, but I don't think it fits here and I don't  
10 think it was appropriate in light of the Court's prior  
11 discussion with us. And rather than throw stones about it, I  
12 would just -- we did ask counsel if they would withdraw it and  
13 they would not.

14 I guess, again, I would ask -- suggest that the most  
15 streamlined thing to do would be to withdraw it. Particularly  
16 since it's tied to the Rule 26 conference in terms of when  
17 it's, you know, triggered. And so we don't have that yet  
18 either.

19 And so I think that request can be used as a template  
20 for what information they're requesting and whatever your  
21 Honor decides. But procedurally rather than arguing over, we  
22 objected so they have the burden to carry it forward or we  
23 sought -- you know, procedurally I think we should hopefully  
24 dispose of that if counsel are willing to do that and focus on  
25 discovery and what is appropriate. It seems to me that that's

1 a streamlined approach.

2 I do want to say that it is important though that we  
3 believe for equity that discovery not go forward just other  
4 than jurisdiction as to the engineering defendants because the  
5 government says we can't or won't do anything. And so we  
6 don't think that that's appropriate or fair because the issues  
7 are inextricably intertwined. And it is -- we think that all  
8 of the information should come out.

9 There's plenty to be done as has already been  
10 discussed. These fact sheets -- your Honor, if the Court will  
11 permit, this is a draft of what was circulated of the proposed  
12 fact sheet. Your Honor asked what that would look like. If I  
13 might approach just to give the Court an idea.

14 THE COURT: Sure.

15 MR. MASON: So the fact sheet is a very critical  
16 piece of evidence that is important in moving the case  
17 forward. It allows the plaintiffs to tell their story early  
18 on in the case with respect to their medical, their exposure,  
19 their lead pipes in their home, when they discovered it,  
20 things like that. It serves many purposes and amass towards  
21 litigation.

22 It's an incredibly important tool because it allows  
23 us to evaluate the severity of the claims and the claims that  
24 are sought and the information and the weight to be given to  
25 them and the like. But it also has an opportunity for those

1 that believe that they have been wronged to communicate that  
2 in a specific way as to them.

3 So there are multiple benefits. And in addition to  
4 the fact sheets, getting releases from these folks so that we  
5 can get medical records. You can imagine with the issue of  
6 lead and the like, medical information and their medical  
7 history is critical. That takes time. And so the ability to  
8 move that forward and the plaintiff to provide that is  
9 critically important.

10 And the third thing I'd say about the fact sheets is  
11 it's incredibly important to the class determination. Mr.  
12 Klein mentioned common issues. But as you know, Rule 23 there  
13 are very important typicality and other issues that  
14 predominate or not in terms of the analysis here. And these  
15 fact sheets provide that.

16 So the sooner we get that. We do have it. As I've  
17 reported before I'm involved in lead counsel for the State  
18 litigation. We have that in place and we're getting some of  
19 those there. We think hopefully there's not pushback from  
20 being able to do the same thing in getting releases. And we  
21 think that's an appropriate thing to do.

22 THE COURT: Okay.

23 MR. MASON: And we think it could be valuable in  
24 moving forward. So we think that there are a number of things  
25 that can be accomplished and that could be valuable. And we'd

1 offer those at this time. Thank you.

2 THE COURT: Okay. Thank you, very much, Mr. Mason.

3 MR. KIM: Your Honor?

4 THE COURT: Yes.

5 MR. KIM: Thank you, your Honor. I just wanted to  
6 clarify one brief thing related to the production -- or not  
7 productions, but the publically available documents versus the  
8 subpoena request for production. The subpoena -- and we're  
9 kind of talking at two different levels here, because we're  
10 talking about the specific about the requests to produce that  
11 we received in early August, or late August. And we're also  
12 talking about kind of the overall larger issue of preliminary  
13 discovery in general.

14 In regards to the specific request, what that request  
15 was is for all documents that we had produced to any other  
16 investigative authority. And it was directed both -- well, to  
17 all of the defendants, I believe. But the one specific to us  
18 was directed to the City and to the City defendants.

19 So for one thing, you know, as the attorney for the  
20 City, I don't have any idea of once the individual counsel has  
21 taken over --

22 THE COURT: Slow down just a little.

23 MR. KIM: Sorry. Since once the individual counsel  
24 took over, I'm not sure what documents they may have produced  
25 to the investigative authorities on their own initiative or in

1 the course of their own representation and that's an issue.

2 MADAM COURT REPORTER: Counsel, slow down.

3 MR. KIM: Sorry. And also as Mr. Klein mentioned,  
4 the City produced those. Any documents that it did produce  
5 are not necessarily the same thing as saying all of them are  
6 publically available.

7 We have certain documents that are publically  
8 available under the Freedom of Information Act. But the  
9 investigative subpoenas, response to those are not -- can  
10 reach beyond the scope of the Freedom of Information Act and  
11 the other statutes that make certain city records publically  
12 available.

13 So to just conclude that the documents that they  
14 requested would all otherwise be publically available is not  
15 necessarily correct, your Honor.

16 THE COURT: Okay. Thank you.

17 MR. KIM: Thank you.

18 THE COURT: Ms. Bettenhausen.

19 MS. BETTENHAUSEN: Thank you, your Honor. The State  
20 defendants didn't file a motion for a protective order or to  
21 quash the document request. So really I don't have much to  
22 add to the statement we filed on preliminary discovery.

23 We think the case law is pretty clear regarding  
24 immunity and jurisdictional issues being resolved before  
25 discovery commences. And I think it's important to note that

1 that applies both to discovery from the State defendants and  
2 also to discovery that the State defendants would otherwise  
3 have a right to participate in.

4 So proceeding with third party discovery would, you  
5 know, it would complicate things. We believe you can't engage  
6 in third party discovery without, you know, losing our  
7 immunity defense. It would necessarily be violated. That  
8 said, we understand that the Court is eager to move forward.  
9 But I guess we're trying to -- I'm trying to figure out  
10 exactly what --

11 THE COURT: If there is a decision to move forward  
12 with some preliminary discovery, isn't it possible for each of  
13 the State defendants to indicate in a -- or for the Court to  
14 issue an order that they're not waiving any of their defenses.

15 MS. BETTENHAUSEN: I mean, I think you have to  
16 consider the difference between saying you haven't waived it  
17 and going ahead and ordering discovery and just violating it,  
18 subjecting -- we believe -- our position is subjecting us to  
19 discovery in federal court violates that immunity. So and I  
20 think that's why the rule's there and I think the case law is  
21 very clear on that.

22 But that said, we understand the Court's desire to  
23 move forward, get things moving. So you know, just to make  
24 the Court aware, we have worked out with plaintiffs' counsels  
25 that are also counsel in the state court cases a way to get

1 the state documents produced in the state court cases.

2 THE COURT: Right.

3 MS. BETTENHAUSEN: So we have just as of Monday  
4 produced hundreds of thousands of documents in the state court  
5 case. Our intent isn't to delay this. By subjecting us to  
6 discovery in federal court, we think that violates the case  
7 law on this issue.

8 And I think as just one other issue to make the Court  
9 aware, kind of maybe bring into focus what we're talking  
10 about, we did receive a request from plaintiffs to depose  
11 Governor Snyder and Harvey Hollins.

12 I think your Honor's right. You know, at the  
13 beginning of this status conference today you mentioned that,  
14 you know, people are watching. This is one of those things  
15 where, you know, we have a national, if not international,  
16 audience. And you know, we want to do things right. So we  
17 received this request. So we're going beyond just talking  
18 about third party discovery or document discovery.

19 You know, we're getting pushed towards something and  
20 I don't know what the end point is. But I did want to address  
21 their request because I'm pretty sure they're going to bring  
22 it up. You know, we asked why they wanted these depositions.  
23 I believe it's clear that, you know, everyone's hearing the  
24 news that comes out and this was potentially some political  
25 posturing or something of that nature. I do want --

1 THE COURT: On the part of the plaintiffs in the  
2 case.

3 MS. BETTENHAUSEN: Yes, your Honor.

4 THE COURT: Are various plaintiffs running for  
5 office?

6 MS. BETTENHAUSEN: I don't mean -- no, Your Honor,  
7 not that kind of posturing.

8 THE COURT: Oh, okay.

9 MS. BETTENHAUSEN: No, no.

10 THE COURT: Because I know there's elections coming  
11 up.

12 MS. BETTENHAUSEN: No, Your Honor, no. Just some  
13 posturing.

14 THE COURT: I see.

15 MS. BETTENHAUSEN: But I did want to address it and  
16 bring it up. We asked them, you know, to explain what the  
17 reasons were for the requests. And all we -- the only  
18 response we received was that the litigation was over two  
19 years old. Now you know that their amended complaint though  
20 was just filed --

21 THE COURT: Yes.

22 MS. BETTENHAUSEN: -- on September 29th. We have  
23 not -- our deadline to respond hasn't passed yet. So as you  
24 know in Michigan, I just wanted to remind the Court under the  
25 law, there's a rule similar to the apex rule that requires

1 basically high-ranking officials such as the governor are not  
2 subject to deposition generally at all.

3 But even when those requests come, the court goes  
4 through the process. And they have to determine whether the  
5 official has firsthand knowledge, whether that knowledge  
6 relates to the claims or defenses at issue, and whether or not  
7 the information can be gleaned from any other source.

8 THE COURT: Okay.

9 MS. BETTENHAUSEN: Well, here, we've just produced  
10 hundreds of thousands of documents to them, you know, and  
11 they're asking for depositions. So I think it's important to,  
12 at this point, to kind of understand the scope of what's being  
13 asked for. And that our intent isn't to delay. And that is  
14 exactly what the plaintiffs were accusing us of in their  
15 preliminary discovery statement. So I think that's about all  
16 the points I have.

17 THE COURT: Okay. Well, thank you, very much.

18 MS. BETTENHAUSEN: Thank you, your Honor.

19 THE COURT: Is there anyone else, okay, who's filed,  
20 okay, a response in this matter? So let me turn to the  
21 plaintiffs. Mr. Leopold.

22 MR. LEOPOLD: Thank you.

23 THE COURT: And Mr. Leopold, if you could begin by  
24 addressing whether these -- whether you have these documents  
25 through other sources than these two requests would provide

1 and what the purpose of them is at this time.

2 MR. LEOPOLD: I'm sorry, your Honor?

3 THE COURT: If you could begin by addressing whether  
4 you have -- whether you believe you have any or all of these  
5 documents available to you through other sources. And second,  
6 why these particular requests are the ones that you think are  
7 important at this time.

8 MR. LEOPOLD: Yes, your Honor. We have certainly  
9 during the last two years of the beginning of this issue and  
10 then subsequent litigation, there have been documents that  
11 have been in the public domain which we have gathered. So we  
12 do have a core of those documents, which I certainly agree  
13 with the defendants we have no problem working along with the  
14 Court in figuring out how we provide those to everyone.

15 These are documents certainly within the course and  
16 scope and custody of these defendants. So they have them, but  
17 we certainly have no problem providing them. And probably as  
18 part of Rule 26, it would be incumbent upon us to provide  
19 those to them anyway.

20 In regards to the State issue of documents that were  
21 just provided to us the other day, I think it sort of runs  
22 into the gambit of a variety of different issues that have  
23 been touched upon here by the defendants and primarily the  
24 State defendant. That is mainly the State defendant's  
25 position, if I understand it correctly, is they want no role,

1 no role in any way, shape, or form in the federal proceedings  
2 until all motions, appellate issues are resolved on the issue  
3 of immunity in those matters.

4 The reason why in order to get those documents, we  
5 went through the state proceeding. They are a nonparty in the  
6 state class action matter. We did a nonparty subpoena. And  
7 one of the attorneys said that we did it through an unofficial  
8 type source. No, we did it through an actual service of a  
9 nonparty subpoena in the state court class action and obtained  
10 those documents just the other day.

11 That also runs into other issues that we have touched  
12 upon a little bit today in terms of how those documents were  
13 produced, in terms of coordination, duplicative in nature,  
14 Bates numbers and things of that sort, which we could also  
15 work out over a period of time.

16 So in terms of the Court's query in terms of do we  
17 have all the documents, I would venture to say whatever  
18 documents the parties have made public, I can't tell you if we  
19 have them all. I don't know how they made them public. I  
20 would need to consult with our team and figure out where we  
21 got them, how we got them, and when we got them.

22 So we can certainly do that. But my impressions  
23 would be, no, we don't have all the documents. The State has  
24 told us that they have produced just this week all of the  
25 documents that have been produced in, I believe, other

1       litigations that they have in their custody.

2               That being said, there are from what appears to be  
3       five different separate privilege logs, one privilege log of  
4       82 pages, one of 55 pages, one of 30, one of I believe 5, and  
5       one of 2 pages, a vast number of privileged, quote, unquote,  
6       documents and/or work product basis to withhold the documents  
7       that we're going to need to both examine, review, analyze and  
8       then come to the Court and ask for some review on that.

9               I do have just from a very -- and this came just  
10      before I left town. But from a very general view of the  
11      privilege log, I am not sure -- and I don't say definitively,  
12      but I have some concerns when I looked at it of whether or not  
13      it met the rules of procedure in terms of what should be in a  
14      privileged log. Because it is hard just by the mere reading  
15      of the log and the subject matter of the log of whether or not  
16      it's true privileged.

17              Not, as your Honor well knows, everything that is  
18      between an attorney and/or a client is privileged. And just  
19      because they have names of lawyers on it doesn't make it so.  
20      So it was difficult to make that determination by what is in  
21      the documents. So certainly we have some concerns along those  
22      lines.

23              THE COURT: Okay.

24              MR. LEOPOLD: If the Court has any particular  
25      questions along those lines that I've just tried to answer.

1 THE COURT: Not specific along those lines. What I'm  
2 interested in is why this is the preliminary discovery that  
3 you think is necessary at this point that would take us out of  
4 the general flow of litigation that the rules contemplate.

5 MR. LEOPOLD: Well, first, I think it would be  
6 important to take a step back, if we can, for just a moment.  
7 As we all know, discovery and the rules of discovery are there  
8 in order to find the truth and to allow justice to be  
9 accomplished. It is not allowed, not to be used as a shield  
10 to prevent the truth from coming out or delaying justice in  
11 any way, shape, or form.

12 This is now a two-year litigation where there has  
13 been a lot of information that has been gathered, that has  
14 been stored, has been accumulated, and has been produced in  
15 many different ways, shapes, and forms. It is odd, at best,  
16 that there have been a number of counsel for the defendant to  
17 stand before this podium here today and speak to the Court  
18 about all the things they want to get from the plaintiff.

19 And at the same time saying but we, the defendants,  
20 for the most part don't want to give you any discovery. We  
21 don't want to provide you any documents. We don't want to  
22 provide any depositions. We want to delay the matter for  
23 months, if not another couple of years, until all of the  
24 issues filter through on the appellate aspect and this Court  
25 rules on certain things.

1           It is not uncommon, not uncommon once there is a  
2     filing of a complaint in any type of civil proceeding -- here  
3     we have a consolidated amended complaint -- to begin  
4     discovery. Document requests, initial fact discovery via  
5     documents and/or depositions. There's nothing untoward about  
6     that.

7           THE COURT: No, there certainly isn't as a matter of  
8     law and so on. But what we have is the State defendants  
9     saying they have a qualified immunity defense that should  
10    shield them from being exposed to the expense and other costs  
11    of litigation. And we have the Fifth Amendment issue.

12          MR. LEOPOLD: Right. So let me address both of  
13    those, if I could.

14          THE COURT: Okay.

15          MR. LEOPOLD: And let me take the Fifth Amendment  
16    issue first. Because I think certainly I am and I'm sure  
17    everybody here in this court is sensitive to that issue of a  
18    party's right not of self-incrimination, and I think we all  
19    hold that very dear. But I would also site to the court to  
20    the FTC case versus E.M.A. Nationwide, Inc., which is a Sixth  
21    Circuit 767 F.3d 611 case, 2014, where the court set forth a  
22    number of different criteria that the court should evaluate.

23          The mere fact that there is some criminal proceeding  
24    or someone is being investigated or indictment doesn't make it  
25    that there's an automatic stay of those proceedings. And the

1 court in those six different criteria that they looked at,  
2 several of them I think are applicable to indicate, A, there  
3 should be not a stay of any discovery. B, there should be, at  
4 a minimum, limited discovery of documents that have already  
5 been accumulated, such as in the State proceedings, have been  
6 produced in various different domains, if you will.

7 But that being said --

8 THE COURT: So these are -- are you suggesting that  
9 these are documents that the criminally charged defendants  
10 have already produced so they would not be exposing themselves  
11 to testimonial evidence?

12 MR. LEOPOLD: Certainly any documents that the named  
13 criminal defendants have produced are -- would not be  
14 inhibiting their rights, if you will, Fifth Amendment rights,  
15 in any way.

16 Now, I think where we do walk a fine line is what  
17 documents the State attorney in the criminal proceeding has  
18 obtained in the criminal case. And whether or not those  
19 documents can be produced and/or used in these proceedings  
20 pending the resolution of the criminal case.

21 I agree that that is an issue. I don't -- without  
22 seeing the documents and seeing the effect on the individuals,  
23 I don't know the answer to that. Although I do think they are  
24 highly relevant to the civil proceeding that is transpiring  
25 here.

1 Now, whether we -- similar in other types of cases,  
2 we get those documents under a strict confidentiality attorney  
3 eyes only, and for purposes of discovery if depositions are  
4 attorney eyes only and to be used for those purposes, there  
5 are certainly precautions that can be taken so that none of  
6 the Fifth Amendment issues are affected.

7 So I do think that there are some protections along  
8 those lines. But also as the FTC court indicated and set  
9 forth, there are also the public interest that play into the  
10 matter. We certainly have that here. We have -- as your  
11 Honor expressed in its opening comments to us here in the  
12 courtroom, the public nature of an interest not only to the  
13 public but also to the courts itself in that regard.

14 The private interest and the burden on the  
15 defendants. I don't think anybody could argue there's any  
16 burden on the defendants to produce these materials. These  
17 are materials already accumulated, collated, provided to some  
18 individuals, whether the State attorneys, whether in other  
19 litigations, whatever it may be.

20 So I don't think that there's any prejudice or  
21 burden, if you will. And in fact, almost all of the pleadings  
22 the defendants in this case on either the issue of the motion  
23 to quash the subpoena and everything else is about how  
24 harassive and/or burdensome all of this is.

25 And as the Court well knows, it's one thing saying

1 that in a pleading. But generally it's the burden of the  
2 party that is claiming burdensome and/or harassment to come  
3 forward with some evidence. There's not one affidavit of  
4 anybody that has been filed in this case saying it would be  
5 abundantly harrassive or burdensome to do any of this. It is  
6 respectfully lawyers talk in pleading saying how difficult it  
7 would be but no evidence of that. And the burden is on the  
8 defendants to make that proffer.

9 So again, I understand the issues of the Fifth  
10 Amendment, but I think there are ways to address it.

11 THE COURT: Okay.

12 MR. LEOPOLD: Now, on the issue -- the second issue  
13 was?

14 THE COURT: The second issue of why this information  
15 is the place where you're starting.

16 MR. LEOPOLD: Well, this --

17 THE COURT: I mean, I think you've addressed that.

18 MR. LEOPOLD: Yeah. I mean, it's the most logical  
19 because it's already information they have --

20 THE COURT: Yeah.

21 MR. LEOPOLD: It's not burdensome or harassive, it's  
22 information they already have, has been provided and/or  
23 accumulated or collated in some fashion by all of the parties.  
24 Whether the State, the City of Flint, whatever it may be. So  
25 I don't think that that is an issue.

1 THE COURT: Is there anything you want to add -- say  
2 regarding the third item on the agenda, the general protective  
3 order, the ESI from --

4 MR. LEOPOLD: I do, your Honor. I do. There's a  
5 couple -- first, a couple of items. In our papers we sort of  
6 set forth a Rule 26 type of disclosure and some of the  
7 documents we set forth in our nonparty subpoena to the State  
8 and to the other defendants. We have the jurisdictional issue  
9 which your Honor has addressed already which we'll work with  
10 Mr. Mason on as well.

11 I do want to address the third party discovery for a  
12 moment, if I may.

13 THE COURT: Okay.

14 MR. LEOPOLD: Because that's an important issue from  
15 our perspective. And as one or more of the defendants have  
16 raised the issue of coordinating third-party discovery, that's  
17 fine. We, the plaintiffs, which is the vast majority of  
18 occupants in this courtroom, at least on the left-hand side of  
19 the room from where the Court is sitting, we have coordinated  
20 and we are coordinating our third-party discovery.

21 I think so that third parties are not inundated with  
22 a lot of discovery, the defendants should coordinate amongst  
23 themselves on third-party discovery that they want to submit  
24 out there. So that any third parties at the most are only  
25 getting two nonparty subpoenas. One from the plaintiff and

1 one from the defendant.

2 Now, if there comes a time where we can agree on  
3 mutuality of a timeframe to submit or serve the nonparty  
4 discovery and we can put it into one document, that's fine.  
5 But I think the defendants appear to have enough problem  
6 amongst themselves on agreeing what to do, when to do it, and  
7 how to do it that they should work amongst themselves to  
8 formulate their own discovery. We, on the plaintiffs, have  
9 already done that.

10 THE COURT: Okay.

11 MR. LEOPOLD: Now, on the issue of, first, the  
12 protective order, I approximately two weeks ago sent around to  
13 the defendants a draft of a protective order. And it was  
14 uniform in a matter of hours of getting emails back from all  
15 of them.

16 Appreciate the draft protective order, but we're not  
17 going to address this issue now. We're not going to address  
18 it until at least this hearing. And we're not going to  
19 address it until the court rules on the motion to dismiss and  
20 appellate issues and things of that sort. So we have a draft  
21 protective order out there. I'm happy to work with perhaps a  
22 representative of the defendant.

23 THE COURT: And does it differ substantively from the  
24 Genesee County protective order?

25 MR. LEOPOLD: There is no protective order in place

1 in Genesee County.

2 THE COURT: I see.

3 MR. LEOPOLD: And perhaps Mr. Stern can address that  
4 issue when he gets up here.

5 THE COURT: Okay.

6 MR. LEOPOLD: So the reason why, I don't know the  
7 answer to that.

8 THE COURT: Okay.

9 MR. LEOPOLD: But that also -- so just leaving the  
10 protective order, again going back to some other issues we've  
11 talked about. That's a good procedural issue where if they  
12 can review a protective order and come back with one red line,  
13 if you will, as opposed to 12 different red lines, it might be  
14 helpful in some regard, if it's possible. I'm not sure that's  
15 necessarily a substantive issue.

16 THE COURT: Yeah.

17 MR. LEOPOLD: But it may be. I don't know. But it's  
18 going to be difficult to try and get all the different  
19 agreements of many different defendants with the plaintiffs  
20 trying to go to each one. That may be difficult.

21 The ESI issue, that there is an ESI issue from what I  
22 understand in the Genesee County matter at first blush we hear  
23 have no strong objection to looking at it. But without --  
24 since we were not a part of it, we would want to at least  
25 evaluate it and see if it is -- we can coexist with it.

1           We may need to alter it and amend it a little bit,  
2           but I'm sure the parties on both sides can work to get a -- to  
3           use that as a wonderful benchmark. And perhaps, if  
4           necessary -- and it may not be necessary -- to refine it in  
5           some way, shape, or form.

6           The preservation orders from the plaintiffs'  
7           perspective is not necessarily to the defendants. Because I'm  
8           assuming at this point they understand that preservation  
9           shouldn't be an issue. They have to preserve everything.

10          Where we do have an issue that I have raised  
11          internally and the reason why I put preservation order on the  
12          agenda to speak about is as your Honor may be aware, the  
13          State, I believe, or perhaps the City of Flint has contracted  
14          out to third parties for redoing the lines from the public  
15          areas into homes.

16          We need to address the issue of those third parties  
17          and preservation issues because of not only documents and what  
18          was requested, but we also want to take samples from the pipes  
19          that are being extracted from the public domain and do testing  
20          on those.

21          So as opposed to we don't know at this point in time  
22          what they have been doing with the pipes that they have been  
23          extracting from the locations, whether they're putting them --  
24          storing them, destroying them. I don't know. But we're going  
25          to want to at least get some protocol in place on doing some

1 samplings on some of them.

2 THE COURT: Okay.

3 MR. LEOPOLD: So that was the reason for our  
4 preservation related issue.

5 On the issue of the fact sheet, I want to make sure  
6 at least from plaintiffs' perspective in the class case we are  
7 on the same page as the defendant. We have no real issue so  
8 long as we can agree on a fact sheet for the class  
9 representatives. Because that is all we are dealing with.

10 If the defendants are saying they want to get fact  
11 sheets from a hundred thousand potential Flint residents, then  
12 we would object to that. We're not at that stage yet.

13 THE COURT: They seem to be saying that they need  
14 some quantity of fact sheets in order to address a motion for  
15 class certification. What is your response to that?

16 MR. LEOPOLD: Well, for class certification, the core  
17 issue for the Court is the adequacy of the class  
18 representatives, which is --

19 THE COURT: But there's also the commonality and  
20 typicality.

21 MR. LEOPOLD: I agree. But I'm not sure what the  
22 fact sheets are going to help elicit along those lines. The  
23 issues of commonality and typicality are people which we have  
24 set forth in our consolidated amended complaint -- who, what,  
25 when, members of -- residents of Flint, homeowners, business

1 owners. So I'm not sure what they would be seeking. But  
2 clearly we have no problem with the class representatives  
3 providing the fact sheets.

4 THE COURT: Okay.

5 MR. LEOPOLD: I think to do anything otherwise at  
6 this stage is not proper prior to class certification.  
7 Because the Court, yes, has to look at typicality and  
8 commonality, but those are issues that I don't think are going  
9 to be ascertained or garnered through any type of fact sheets  
10 for any particular person that is not a class representative.

11 THE COURT: Okay. And just so I understand what I  
12 have, the thing that's called plaintiff fact sheet, this was  
13 drafted by whom?

14 MR. LEOPOLD: This was drafted, is my understanding  
15 -- and Mr. Stern can address this as well -- in the Genesee  
16 County individual plaintiffs' cases. Mr. Stern has several  
17 hundreds or perhaps thousands of clients. And he has agreed  
18 to provide fact sheets for his clients to the defendant.

19 There are other personal injury counsel, if I  
20 understand correctly, in Genesee County, that I'm not sure  
21 that applies to. Maybe part of the CMO in that case. I'm  
22 just not sure. But it's only for the personal injury cases,  
23 not the class cases. There are no fact sheets that have been  
24 ordered for the class cases in Genesee County.

25 THE COURT: Okay. Mr. Mason.

1 MR. MASON: I can wait until he's done and address  
2 these or I can address --

3 THE COURT: If you can just answer that question,  
4 that would be helpful.

5 MR. MASON: That particular proposed fact sheet was  
6 drafted by Veolia for use with slight modifications from what  
7 we were utilizing in the Genesee County litigation. He  
8 disseminated that and it's part of our discussion. And so  
9 that's what I provided the Court with.

10 THE COURT: Okay. Thank you.

11 MR. PITT: One second.

12 MR. MASON: And just to be clear, your Honor, it does  
13 include more of a personal injury. And it does relate and is  
14 critical to the class issue since we're discussing this visa  
15 vie you asked counsel about it. But to say commonality,  
16 they're all residents of the City of Flint, is not the  
17 determinative of individual issues. And so there are many  
18 individual issues that are represented there.

19 A plaintiff in a class case cannot have a class  
20 representative, one class representative, and say you can only  
21 talk to that one person.

22 THE COURT: No, I understand that. Thank you.

23 MR. LEOPOLD: And your Honor, that leads us into sort  
24 of the other core issue that I think your Honor was asking  
25 along sort of the fact sheets for commonality and typicality.

1 We, too, for class certification need a lot of information  
2 from the defendants. We need all of the replacement database  
3 type of information that the defendants have. We need the  
4 water testing results that the defendants have from the City  
5 of Flint and the schools and the businesses.

6 That's all in their domain. That's in their custody.  
7 There's nothing -- no Fifth Amendment issues about that.  
8 There's no privilege issues about that. It's part of their  
9 database. It's part of their documents.

10 We need the testing data with the residents' codes  
11 and key information, criteria, that is part of that. This is  
12 all part -- goes to class certification issues. We need the  
13 parcels and tax assessment database for the City of Flint.

14 THE COURT: And is that represented in these two --

15 MR. LEOPOLD: No.

16 THE COURT: No.

17 MR. LEOPOLD: But that wasn't for purposes -- that  
18 particular -- again, this goes to a little bit of a broader  
19 issue. That was a request -- initially it was all request to  
20 parties. And then because of the State's concern about Fifth  
21 Amendment or sovereign immunity, if you will, issues, which we  
22 agreed to stipulate that nothing is waived --

23 THE COURT: I saw that.

24 MR. LEOPOLD: -- here in the federal court, so they  
25 can participate. But they have a base -- didn't want to do

1 that. I respect that. I think that's an issue the Court is  
2 going to have to resolve here. But that -- the motion -- the  
3 subpoena, if you will, or the request for production was just  
4 initially to get those core pieces of documents that they've  
5 already produced in cases that they already have.

6 These additional documents, documentation, that goes  
7 to class certification issues, we are going to need soon. And  
8 this isn't -- again, this is not burdensome. This is  
9 information that they -- is readily accessible to them.

10 In order for us to do our due diligence and provide  
11 the support the Court is going to require us to provide the  
12 class certification as relates to residents, schools,  
13 businesses, we need the Flint -- the contractors who are doing  
14 the work, the databases for them, what was required, the  
15 request for proposals, the responses to those request for  
16 proposals. How they -- going to need to do some third party  
17 discovery of what they were asked to do, when they were asked  
18 to do it, why they were asked to do it, how they've gone about  
19 doing it.

20 THE COURT: Okay.

21 MR. LEOPOLD: So these are all -- where they were  
22 doing it. How did they pick the locations first to do it?  
23 Why did they pick the locations? So these are all issues  
24 again. They want information from us. We also need  
25 information from them.

1 And your Honor, there's also another issue that one  
2 of the private engineering defendants has agreed to provide.  
3 The other, which is LAN. Veolia has not, from my  
4 understanding. Mr. Campbell maybe could address that. I  
5 believe that's their position. But we have asked for  
6 insurance information from those two private engineering  
7 entities.

8 They provided their policies. We had a lot of  
9 followup based upon what was in the policies and what they --  
10 how they actually applied excess policies, riders and things  
11 of that sort. We've asked for a lot of followup information  
12 in a letter that I provided well over a month ago. And Mr.  
13 Mason has agreed to provide that information.

14 I'm still waiting. So perhaps we can get a timeframe  
15 from him. And Mr. Campbell's position is they are not going  
16 to provide that type of information. It is information not  
17 only about policies but reservation of rights and things of  
18 that sort.

19 THE COURT: Okay.

20 MR. LEOPOLD: I think I've addressed I believe the  
21 inquiries from the Court and what has been raised by the  
22 defendants. But let me just ask Mr. Pitt.

23 I was just reminded but I'm assuming the Court  
24 understood this if I didn't say it specifically. This  
25 discovery is not only that we are requesting from the State

1 government's, etcetera, but also from the private defendants.

2 THE COURT: Yes. Okay. I understood that.

3 MR. LEOPOLD: The initial disclosure and some  
4 document requests.

5 THE COURT: I guess I don't understand what the scope  
6 is that you're requesting now. What I have before me is  
7 request for production number one and number two as clearly  
8 defined here. And I understand there's the request for  
9 insurance disclosure. But tell me what else it is you're  
10 requesting at this point before there's an answer to this.

11 MR. LEOPOLD: Well, as we -- after the last hearing,  
12 your Honor had indicated that we possibly may be able to do  
13 discovery, initial discovery. We then also, at your Honor's  
14 request, the parties had several meet and confers with the  
15 various different defendants. And although, of course, the  
16 conversations were helpful and professional and cooperative,  
17 they were all of the positions that you've heard essentially  
18 here today, that thank you but no thank you positions, if you  
19 will.

20 THE COURT: Yes.

21 MR. LEOPOLD: That being said, we still felt that we  
22 -- that it was appropriate to send out, under the rules, these  
23 initial core requests of documents that we know they have  
24 produced and have ready at the get-go to produce. We were of  
25 the belief that today was also a time to have a discussion

1 about some other discovery as we move down the road in the  
2 short term along the lines of what I've indicated to the Court  
3 both from third parties as well as, for example, the private  
4 defendants.

5 I mean, there are certainly request for production  
6 that can go directly to them that relates to core initial  
7 substantive issues about requests for proposals, when you were  
8 hired, why you were hired, correspondence, emails, all the --  
9 what you were asked to do, how you were asked to do it, when  
10 you were asked to do it. All the variety of things that are  
11 in an initial set of discovery that happens in the normal  
12 course of any litigation as it gets off the ground.

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

14 MR. LEOPOLD: And we have not submitted that yet.

15 THE COURT: Right.

16 MR. LEOPOLD: We were waiting for today to do it.

17 THE COURT: I understand that.

18 MR. LEOPOLD: And I'm happy to address any further  
19 questions that the Court has.

20 THE COURT: I don't have any further questions on  
21 this topic. What I'm thinking about is it's now 3:52 PM. And  
22 we're through three issues. But we have not heard any  
23 response. We have sort of argument, response, and we haven't  
24 had a reply.

25 MR. SHKOLNIK: Your Honor, there's also some issues

1 from the individual side of the case --

2 THE COURT: Oh, of course.

3 MR. SHKOLNIK: -- on these very topics.

4 THE COURT: Oh, on these issues. Okay.

5 MR. SHKOLNIK: Even though it was included, the way  
6 the agenda came out, these are applicable to both sides of the  
7 case. I'm not suggesting we -- if the Court wants to take a  
8 break or --

9 THE COURT: No, no. I'm not worried about a break.  
10 Although I'll check with Jeseca about that. But she has one  
11 of the hardest -- it's probably the hardest job in here right  
12 now. But what I'm trying to sort out is how we move  
13 productively through this agenda. But maybe we will take a  
14 short break and reconvene between five to ten minutes and I'll  
15 have a plan by then.

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

17 (Brief Recess)

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

19 THE COURT: Please be seated. When I interview law  
20 clerks, I have them do an "all rise", so Jesse obviously got  
21 the job. So let me add that Marissa Embola is my intern from  
22 the University of Michigan Law School who's just been doing a  
23 fantastic job working with us this semester.

24 Well, okay, during that break, I had a chance to  
25 think about the fact that it is ten minutes after 4:00. The

1 agenda has a lot more on it. And I have not heard from Mr.  
2 Stern and Mr. Shkolnik on these issues, so. And I certainly  
3 haven't given the defendants an opportunity to reply.  
4 Although there's already quite a bit in writing and quite a  
5 bit that has been said.

6 So what I'd like to do is hear from the individual  
7 plaintiffs' counsel on the issues that we've already  
8 discussed. I have one or two questions for either Mr. Berg or  
9 Mr. Barbieri about Fifth Amendment issues that you've raised.  
10 And then I have a plan that I would like to set forth with  
11 respect to what we've discussed thus far.

12 And then I think we will probably at a certain point  
13 need to adjourn and schedule a follow-up conference to make  
14 sure the rest of the issues are addressed. And I have a  
15 tentative date for that as well.

16 So is it Mr. Stern?

17 MR. STERN: I think we both may say something, but  
18 I'll be first.

19 THE COURT: Okay. And the reason -- I'm willing to  
20 work until 10:00 or 11:00 or 12:00. I don't have any -- and I  
21 will for that matter. But our court security officers are  
22 sensitive about this many people being here. And they are not  
23 authorized under the contract that they have with the marshal  
24 service to work overtime.

25 And so they have to leave the premises and there's

1 nothing any of us can do about it. So we will have to adjourn  
2 at five o'clock so people can pack up and be out the door by  
3 5:30. Go ahead.

4 MR. STERN: Thank you, your Honor. Corey Stern as  
5 co-liaison counsel for the individual plaintiffs. I think  
6 it's important to give you a bit of a 30,000 view of some of  
7 these issues. Because the fact sheets have been addressed,  
8 the ESI in Genesee County has been addressed. And while I may  
9 not know more than anybody about most things when it comes to  
10 the fact sheets in Genesee County and what was in the CMO  
11 other than Mr. Mason for the defendants, I probably can speak  
12 most fluently about these issues.

13 THE COURT: Okay.

14 MR. STERN: First and foremost, the fact sheets are,  
15 in fact, in Genesee County intended both for individual  
16 plaintiffs who have filed lawsuits as well as for proposed  
17 class representatives who were named in lawsuits.

18 THE COURT: Okay.

19 MR. STERN: The case management order requires both  
20 individual plaintiffs as well as those proposed class reps to  
21 submit fact sheets. For lawyers who have over 100 plaintiffs,  
22 those lawyers are required to submit 100 per month beginning  
23 at a particular time until such time as they've completed all  
24 the fact sheets for their clients. For anybody with less than  
25 a hundred plaintiffs, they were required to produce fact

1 sheets for their plaintiffs by a particular date.

2 It is true that I have the majority of the individual  
3 plaintiffs in Genesee County. And for the last four months,  
4 we've been producing 100 fact sheets per month to the  
5 defendants. That said, it is important to express not as a  
6 lawyer for those 2,000 plaintiffs, but as the lawyer that your  
7 Honor has appointed on some level to speak for other lawyers  
8 who have individual cases that to, not flippantly, but to sort  
9 of brush over some other lawyers about, well, we'd like to  
10 have these fact sheets.

11 Irrespective of their obligations under the rules of  
12 discovery and whether they believe discovery should go both  
13 ways, the process of getting these fact sheets from individual  
14 clients is extremely difficult to say the least. And I am not  
15 the only lawyer in this courtroom who has had difficulty. Now  
16 mind you, I am aware that these are my clients, that I have  
17 chosen to represent them, that I have contracts of  
18 representation with them. And it is my obligation under the  
19 case management order and as their lawyer to provide these  
20 fact sheets.

21 However, it must be noted when your Honor is  
22 juxtaposing the equities of Fifth Amendment immunity, Eleventh  
23 Amendment issues, qualified immunity, what should be required  
24 of all the parties, that for anybody to come up here -- and  
25 not picking on Mr. Klein, but he was the first one to come up

1 here.

2           You know, what I heard was we believe very strongly  
3 that the way the flow of the litigation should go is that we  
4 get fact sheets from all of the plaintiffs in the litigation  
5 so that we can identify how their hurt and causation and those  
6 issues while simultaneously asserting that on the other end of  
7 the V, the other side of the V, discovery should either be  
8 stayed, which should be extremely limited, or it shouldn't be  
9 stayed but shouldn't occur in any meaningful way based on some  
10 of the issues that have been raised.

11           I think it is fundamentally, fundamentally  
12 inequitable. Having now gone through the process for four  
13 months in state court, to put that requirement on plaintiffs  
14 and their counsel. And I'll describe briefly what it entails.

15           The individuals and their parents in Flint who have  
16 hired all of us in this room on some level, they don't  
17 typically use email. They don't always stay at the same  
18 address. They use drop phones such that the cellphone numbers  
19 that we got the first three times we met with them or had a  
20 committee meeting or had a seminar of some kind with them no  
21 longer works.

22           Some of them live in neighborhoods where if we send  
23 people to their homes, they won't answer the door because  
24 they're not sure if it's someone collecting taxes for liens  
25 that have recently been placed on their homes because they

1 haven't paid their water bills, or if it's somebody who wants  
2 child support or alimony, or if it's just somebody who's there  
3 to harm them.

4 I believe that we are required to do this for the  
5 defendants as plaintiffs lawyers. How and when that happens  
6 should not simply be addressed because there's been a fact  
7 sheet presented and we don't have Eleventh Amendment immunity  
8 issues.

9 So my hope is that when your Honor is weighing the  
10 equities associated with what type of discovery, if any,  
11 occurs, that it is not -- that the difficulties associated  
12 with providing these fact sheets is part of that  
13 consideration.

14 As for the ESI, everyone is correct that there is an  
15 ESI as part of the initial case management order that was  
16 entered in Genesee County. There hasn't been any exchange of  
17 meaningful discovery that would have had the ESI apply to it.  
18 It's not to say that the ESI isn't good and it shouldn't be  
19 used here. I simply bring that up to say that if there's a  
20 better way to do it, litigations involved, that ESI was  
21 entered in -- on November 15th, 2016.

22 We're about to celebrate the one-year anniversary of  
23 the initial CMO that was entered and there's yet to be any  
24 production in state court or really in federal court that  
25 would be pursuant to the rules of that ESI such that if Mr.

1 Leopold or mister -- or any of the defendants and their  
2 counsel believe that there's a better way to do it or a way to  
3 improve it, it couldn't be done. But I just suggest that the  
4 parties get together and look at the original ESI that was a  
5 part of the case management order and if there are suggestions  
6 that need to be made to improve it -- if there are suggestions  
7 that need to be made to improve it, that everybody get  
8 together and make those suggestions.

9 The only other issue that I would like to address for  
10 the individuals is the idea of third-party discovery. And  
11 I've heard at least one lawyer for a defendant suggest that  
12 third-party discovery be coordinated amongst counsel. I'm not  
13 sure if that attorney or those attorneys mean that the  
14 defendants and the plaintiffs together serve third-party  
15 discovery or if they simply mean that their -- each side of  
16 the V gets together to serve third or nonparty discovery.

17 THE COURT: That's the way I understood it.

18 MR. STERN: So I think to the extent that it was  
19 intended to mean the defendants --

20 THE COURT: I think it was intended to mean the  
21 plaintiffs.

22 MR. STERN: Fair. And that's fine. I would be  
23 opposed to -- I'm all about collaborating and coordinating and  
24 trying to work together with the defendants. I think that the  
25 parties have significantly different interests when it comes

1 to the discovery that's propounded on third or nonparties such  
2 that it would not inure itself to the benefit of the  
3 litigation for us to have to coordinate that.

4 I also believe that there was a statement made about  
5 protecting the rights of third parties and nonparties. I'm  
6 all for not burdening nonparties and third parties. But the  
7 law allows for certain things to happen under the federal  
8 rules. And to the extent we're talking about coordinating  
9 with Genesee County, under the rules that apply in Genesee  
10 County. And third parties and nonparties very much don't have  
11 the same type of immunity defenses that we know of that are  
12 currently being raised by the defendants in this case.

13 Finally, it should be noted in all of this to the  
14 extent that your Honor has the discretion to allow discovery  
15 to take place in any way, that while the Eleventh Amendment  
16 and qualified immunity and Fifth Amendment protections may  
17 limit or, in fact, stay the idea of discovery in this case,  
18 the reality of this case, which is not necessarily the reality  
19 in all the cases that have been cited by the defendants is  
20 this.

21 We've already received notice of nonparty fall from  
22 engineering defendants suggesting that in the cases where the  
23 government is not a party or where those individuals are not  
24 parties to the lawsuit, that they intend to provide evidence  
25 at trial. That there are other people responsible as

1 nonparties for whatever they're being accused of civilly in  
2 this litigation.

3 No matter what happens with your Honor's decisions or  
4 any other court's decision on the Eleventh Amendment immunity,  
5 qualified immunity, or with an eye towards protecting Fifth  
6 Amendment rights, the reality is at some point in time  
7 somewhere down the road the very defendants that are asserting  
8 these defenses to participating in discovery are going to have  
9 to participate in discovery in some form or fashion. Be it as  
10 a party to the litigation, or as a nonparty to the litigation.

11 And to the extent that a nonparty to this litigation  
12 will not be required to do the same things that a party would  
13 be required to do, I don't know why it's not a compromise of  
14 some kind that's completely reasonable and expected for these  
15 defendants now, who may be nonparties later, to at a minimum  
16 provide the type of discovery that they would be required to  
17 provide as nonparties subject to, of course, the Fifth  
18 Amendment immunity issues. That's all I have.

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

20 MR. STERN: Thank you.

21 THE COURT: Mr. Shkolnik.

22 MR. SHKOLNIK: Judge Levy, I'm going to just be very  
23 brief.

24 THE COURT: Okay.

25 MR. SHKOLNIK: And most of the topics were covered.

1 But we just found out in the last couple of days that these  
2 documents, the supposed publically produced documents, or  
3 however they were kept, were produced by way of an agreement  
4 through a state court class action subpoena.

5 One of the concerns we have when we're representing  
6 potentially thousands, tens of thousands of plaintiffs in this  
7 court is that if agreements are reached where you can back  
8 door getting documents in through one case in state court  
9 that's a class action, and then there's protective orders that  
10 limits the use of those documents, Mr. Stern and myself as  
11 representatives, liaison on behalf of individuals, don't have  
12 access to those documents because we're not signatories to  
13 whatever agreement was reached.

14 I don't want to belabor the Court on something like  
15 this. I think it's something counsel can work out together.  
16 But if there's going to be end runs around to get documents  
17 into this court to make it look like it's a way of producing  
18 it, that they are available to everybody, that they're useable  
19 in this court.

20 I don't want to see down the road objections that  
21 documents are -- were produced by way of a special agreement  
22 that we're not going to be able to rely on for motions, for  
23 proof, for depositions. And it's something I'm sure we can  
24 work out administratively. But it's something the Court has  
25 to take into consideration when we hear that, oh, they were

1 produced anyway. They weren't really produced through the  
2 appropriate channels that would allow us to use them against a  
3 party or parties.

4 And that's really it. And other than that fact,  
5 there was a question about plaintiff's fact sheets. The  
6 manual for complex litigation is very clear when we're dealing  
7 with these mass cases, and it's been referred to as one of the  
8 biggest cases. Things such as -- tools such as the  
9 plaintiffs' fact sheets to replace interrogatories,  
10 defendants' fact sheets.

11 And I think if we get to a Rule 26 discussion, which  
12 might be helpful before the next conference, that we come to  
13 you and have proposals for you that would cover these type of  
14 issues that are contemplated by Rule 26. Irrespective of the  
15 motions that are pending, the Court will deal with motions as  
16 you see fit. But we, as counsel, have obligations to all  
17 these plaintiffs to at least engage in that process and come  
18 to you with some proposals.

19 THE COURT: Okay. Well, thank you, very much.

20 MR. SHKOLNIK: Thank you.

21 THE COURT: Let me just ask -- well, I'll just start  
22 with Mr. Barbieri, whether you believe there are any  
23 protections that can be fashioned by the Court for your  
24 clients who have Fifth Amendment immunity issues?

25 MR. BARBIERI: Your Honor, I submit respectfully that

1 the Court shouldn't try to weigh into that when it's fairly  
2 clear that the benefit of going through the process of the  
3 criminal proceeding may be to help what might later be  
4 litigated in the civil litigation. In fact --

5 THE COURT: I don't see it that way.

6 MR. BARBIERI: Well, I respectfully disagree, your  
7 Honor.

8 THE COURT: Okay.

9 MR. BARBIERI: The Chao case, which is one that  
10 Attorney Kim brought to your Honor's attention and I think  
11 it's been cited by several folks --

12 THE COURT: But I'm not asking you to go into the  
13 five factors and all of that. What I'm asking is whether you  
14 are aware of case law that provides for any method that a  
15 Court can fashion an order for production of documents that  
16 would protect an individual facing criminal charges.

17 MR. BARBIERI: I have not seen that type of remedial  
18 order ever attempted or accomplished, your Honor.

19 THE COURT: Okay.

20 MR. BARBIERI: And I'm very concerned that you will  
21 jeopardize our clients' Fifth Amendment rights.

22 THE COURT: Well, I wish to put you at ease. I don't  
23 want to do that.

24 MR. BARBIERI: Okay.

25 THE COURT: That's not what I'm here to do. But what

1 I'm just looking for what you know because you know more about  
2 this than I do at this point and I'll set about seeing what I  
3 can learn. But is whether you know of any way to protect your  
4 client short of no documents.

5 MR. BARBIERI: I have not seen that carefully  
6 tailored order that has attempted to accomplish that, your  
7 Honor. And I think when you look at --

8 THE COURT: And can you limit -- can you point to,  
9 just with respect to the first two requests for production of  
10 documents, any of the A through F entities that you think  
11 would not jeopardize your clients Fifth Amendment rights, such  
12 as the Michigan Civil Rights Commission, the Michigan State  
13 Administrative Board. Are all of those documents -- you think  
14 there could be documents among each of those batches that  
15 would jeopardize your clients?

16 MR. BARBIERI: Well, I certainly think the MDEQ  
17 records do. I can't talk about the others because I've never  
18 seen any of those documents to be perfectly honest, your  
19 Honor, in the course of my defense of my clients.

20 THE COURT: When you say the MDEQ, you mean the  
21 production that MDEQ did for -- to each of these A through F?

22 MR. BARBIERI: MDEQ has made a separate production.  
23 Our clients have never made any production.

24 THE COURT: I understand that. You've never made any  
25 production in the state court litigation or this litigation.

1 MR. BARBIERI: That's correct. In fact, we're not  
2 parties at this point in the state court proceedings, your  
3 Honor.

4 THE COURT: Right. That's not my question. My  
5 question is whether the documents that were produced by your  
6 client pursuant to the Michigan Attorney General, the United  
7 States Department of Justice, Genesee County, etcetera,  
8 whether any of those productions -- are all of those  
9 productions jeopardizing your clients?

10 MR. BARBIERI: Your Honor, if you're asking me to  
11 participate in evaluating, I believe it does infringe. To the  
12 extent that they're already out in the public domain, I'm not  
13 going to complain about that, your Honor.

14 But to put me in the position of having to start  
15 going through documents and records, I think you're ignoring  
16 my immunity defense. I believe that the Fifth Amendment is  
17 intended to protect against you being involved in these types  
18 of proceedings before the criminal case is resolved.

19 THE COURT: Okay. Thank you.

20 MR. BARBIERI: Can I just briefly respond to some of  
21 the points?

22 THE COURT: Tell me which points you wish to respond  
23 and then I'll find out if that would be helpful to me.

24 MR. BARBIERI: All right.

25 THE COURT: But don't -- don't provide the response,

1 just list them.

2 MR. BARBIERI: Okay. All right. You asked  
3 plaintiffs' counsel why are these documents are necessary.  
4 And I have a response to that.

5 THE COURT: Okay.

6 MR. BARBIERI: Very briefly. The only response that  
7 I heard is not to delay justice. I don't think that's an  
8 excuse here for having discovery at this point out of the  
9 order in an unprecedented fashion as suggested here.

10 There's no showing that these documents are necessary  
11 now, that they're not being preserved, or that they're not  
12 already available in these public websites that currently  
13 exist or what was produced recently in state court. So I  
14 don't think they've made a convincing case to your Honor about  
15 why it is necessary.

16 We're not asking, by the way -- just so it's clear  
17 for our clients -- that we conduct discovery at the same time  
18 or get plaintiffs' fact sheets or anything else. We rely on  
19 the fact that we shouldn't have to participate in any  
20 discovery.

21 THE COURT: Right.

22 MR. BARBIERI: And quite frankly, all this discussion  
23 about class certification is way too early because this Court  
24 may dismiss much, if not all this case, rendering some of the  
25 hypothetical considerations of class certification irrelevant.

1 I think the Court should take into a careful account  
2 when plaintiffs' counsel was asked or attempted to respond to  
3 the investigative subpoena issue, he didn't really have a  
4 response. And that is a legitimate concern this Court cannot  
5 disregard here.

6 THE COURT: Okay. Well, thank you. Okay.

7 MR. KLEIN: Your Honor, if I may, very briefly?

8 THE COURT: You can stand right there very briefly.

9 MR. KLEIN: Okay. My comments are mostly focused on  
10 the question of the intersection of class certification and an  
11 orderly discovery plan. There was a lot of discussion of what  
12 were really just 23A factors. And the crux of this as, you  
13 know, I can't imagine anyone's going to dispute with is  
14 whether they can satisfy their 23B obligation to show that the  
15 preponderance of the issues can be resolved in a common way  
16 through common proofs.

17 And that that is -- so there's no need at this point  
18 to get into numerosity or the like. It's a waste of time to  
19 go into discovery on that.

20 THE COURT: Okay. Thank you.

21 MR. KLEIN: Just one other general point, which is we  
22 haven't dealt with the question of coordination with Genesee  
23 County in any sort of organized way. It comes up here and  
24 there. I might suggest that that would be a good topic for  
25 the next --

1 THE COURT: I think that would be an excellent topic,  
2 yeah.

3 MR. KLEIN: And then finally to clarify, and I won't  
4 repeat my argument, it was my proposal that defendants and  
5 plaintiffs coordinate together on third party subpoenas, not  
6 that we each coordinate amongst ourselves.

7 THE COURT: I see. Okay. That's helpful to know.  
8 Thank you. Mr. Leopold.

9 MR. LEOPOLD: Your Honor, if I could just also just  
10 by way of providing the Court some guidance, if appropriate,  
11 on this whole Fifth Amendment related issue. I would like to  
12 cite the Court to the case of U.S. v Hubbell, H-U-B-B-E-L-L,  
13 530 U.S. 27, a 2002 case, which stands for the act of  
14 production doctrine, which I think addresses the issue  
15 directly on point, which is a person can invoke his Fifth  
16 Amendment rights only where the very act of producing the  
17 documents is incriminating in itself.

18 Here where they have already collected documents,  
19 have already produced the documents, and are producing them  
20 again, there is not that issue.

21 THE COURT: Okay.

22 MR. LEOPOLD: So I cite the Court -- I think that is  
23 really directly on point, which I didn't realize this was  
24 going to be so much of a big -- of a bone of contention.

25 THE COURT: It is an important issue. And I don't

1 think we have time for argument, further argument on it. And  
2 I'm certainly not going to make any decisions right now that  
3 would jeopardize anyone's rights.

4 MR. LEOPOLD: And your Honor, if I could just say,  
5 because the Court may have some experience with this, this  
6 often happens, for example, in antitrust cases.

7 THE COURT: Yeah. I have one antitrust case. N  
8 equals 1. So I'm learning about that. Yes.

9 MS. CHARTIER: Your Honor, Mary Chartier on behalf of  
10 Robert Scott. I just want to mention that a fair number of  
11 the criminally charged defendants are under a protective order  
12 in state court. And the specifics of that are any discovery  
13 that they produce or receive, they cannot disclose. And I  
14 think that's significant when this Court is looking at trying  
15 to fashion an order.

16 So for Mr. Scott, anything that he has produced, we  
17 could not disclose. And anything that he has received, we  
18 could not disclose.

19 THE COURT: In that state court.

20 MS. CHARTIER: Yes. And there's -- I can certainly  
21 file the order with this Court if this Court would like to see  
22 it. But I actually pulled it up while I was sitting here. I  
23 don't see any way around that if we had to try and comply with  
24 an order from this Court.

25 THE COURT: So the state court order prohibits

1 disclosure in federal court.

2 MS. CHARTIER: It prohibits disclosure at all.

3 THE COURT: At all.

4 MS. CHARTIER: It doesn't specifically mention  
5 federal court, but it prohibits disclosure at all, no matter  
6 who is asking.

7 THE COURT: Okay. Thank you.

8 MS. CHARTIER: You're welcome.

9 MR. KIM: Your Honor, somewhat related to that  
10 concern is that the documents, any documents that the City may  
11 have produced under investigative subpoenas issued by the  
12 office of special counsel, I mean, I would find myself in a  
13 difficult position as counsel to --

14 THE COURT: Slow down.

15 MR. KIM: I would find in a difficult position as  
16 counsel to the City in how to advise my clients on whether or  
17 not the office of special counsel would view any disclosure of  
18 the documents produced pursuant to those subpoenas as, itself,  
19 a chargeable act. Under MCL 767A.8, which makes the contents  
20 of -- which makes the records and any records of investigation  
21 produced under that statute to be confidential.

22 And so that would place -- you know, it would place  
23 me in a difficult position of how do I advise my clients as to  
24 if we had a contradictory order from this Court versus a state  
25 law prosecutorial authority who has taken the position that

1 all of these records are confidential and not to be shared  
2 with essentially anyone outside of the immediate criminal  
3 prosecutions.

4 THE COURT: Okay. Thank you. Okay. Well, what I'd  
5 like to do is set forth a proposal for dealing with these  
6 first three agenda items. And in doing that, I will generally  
7 set forth my philosophy, to the extent I have one, about the  
8 rules.

9 And I think I mentioned this at our last status  
10 conference or referenced this concept, which is that I view  
11 the Rules of Civil Procedure as something that -- as a body of  
12 law that serves to equalize the playing field to a certain  
13 extent between parties that would be unequal in life in  
14 general or in the legal realm specifically. And so I do my  
15 best to require parties on both sides to adhere to the rules.

16 In the ordinary course of litigation, generally  
17 speaking and not always, discovery before an answer is served  
18 is generally not undertaken. But there are absolutely  
19 exceptions to that that are both set forth in the rules and  
20 set forth in case law.

21 And I think that this is a case that requires that we  
22 attempt to fashion appropriate pre-answer discovery that does  
23 not jeopardize Eleventh Amendment immunity or Fifth Amendment  
24 immunity and also takes into consideration qualified immunity  
25 and the burden of defending in a case where there is currently

1 an appeal pending. Well, cases generally where there -- we  
2 have Guertin on appeal. We don't have all your cases on  
3 appeal.

4 So what I would like to do is issue a reasoned  
5 decision on this and not attempt to rule from the bench on it  
6 today, because I think the Fifth Amendment and Eleventh  
7 Amendment issues are complicated and nuanced. And I don't  
8 know if you can waive Eleventh Amendment by -- whether an  
9 agreement or an order of the court.

10 I'm doubtful that someone whose -- or the State would  
11 be in a position to comply with an order. But I'm just saying  
12 that that's my thought from what I know about Eleventh  
13 Amendment immunity. And I want to do more research on that.

14 But in the meantime, I do think that it is  
15 appropriate to have the parties meet and confer and propose a  
16 common repository for documents. Because I'm going to do my  
17 reasoned decision, and I'm going to do it as fast and  
18 thoroughly as I can. But in the meantime, I want the parties  
19 to have met and conferred about a common repository form  
20 document in the federal court litigation.

21 I also -- and this is in no order of importance by  
22 the way -- want the appointment of co-liaison counsel for  
23 defendants for administrative purposes only, for  
24 administrative tasks. And what I would like is a proposal  
25 from the defendants as to what those -- what administrative

1 tasks means. I'll change it if I think it should mean  
2 something else. But I'd be interested in what you think it  
3 should mean.

4 What I'm contemplating is someone who, in  
5 anticipation of the hearing, would say we need to have a  
6 PowerPoint. We got a phone call yesterday that there was  
7 going to be a PowerPoint from the City of Flint. And I didn't  
8 get to see the PowerPoint, but you must have decided against  
9 it. That's fine.

10 But this person would gather up those kinds of  
11 concerns and inform us here at the court as to what they are.  
12 They would be able to respond as to whether there is or is not  
13 concurrence that might be sought by the plaintiffs on a  
14 particular issue. And they certainly would not have the  
15 authority to concur or not concur, just to communicate it.

16 I do think also the next area is the electronic  
17 discovery protocol. And I think also I am currently ordering  
18 that there be a meet and confer to develop an appropriate ESI  
19 protocol for this case.

20 I am very concerned that there be a preservation  
21 order for third parties. I was unaware -- perhaps I missed it  
22 in the briefing, but I was unaware of what you were  
23 specifically referring to. And I'm quite concerned that if  
24 there are documents or tangible items that might be relevant  
25 to claims and defenses in this case, that third parties be

1 aware that all of that needs to be preserved.

2 So and I think I'm much less concerned and I think  
3 everyone here is not concerned that the defendants are  
4 destroying documents, or that third parties are intentionally  
5 destroying documents. But at least a preservation order with  
6 respect to third parties I think is critical.

7 I also think it is appropriate for insurance  
8 disclosure, a thorough insurance disclosure to be made at this  
9 time. This case is proceeding slowly. It's proceeding as  
10 best I can keep it moving. But I think there are certain  
11 issues that need to continue while the answer to the master  
12 class complaint is being responded to and then adjudicated.

13 Also, going back to the third party preservation  
14 order. Is there currently, Mr. Leopold, a protocol for  
15 sampling removed pipes? For tangible things, is there a  
16 protocol that the plaintiffs have proposed to the defendant?

17 MR. LEOPOLD: There is not for testing. We can  
18 certainly begin the process of preparing an appropriate  
19 protocol for the sampling for sure. But there is nothing yet.

20 THE COURT: Okay.

21 MR. LEOPOLD: I don't know -- again this goes back to  
22 what we talked about -- whether there is a protocol of what  
23 pipes, when, and how they've been removed, where, and things  
24 of that sort.

25 MR. KIM: Your Honor, the City will be willing to

1 discuss with Mr. Leopold and plaintiffs' counsel on the  
2 appropriate step there. I just want to ensure the Court that  
3 the City's taken steps to preserve documents and materials.

4 And to a large extent, the lead replacement  
5 activities by the City and our contractors, they replaced the  
6 line, but the lines themselves are, to my understanding,  
7 essentially left in the ground. A new connection is  
8 essentially drawn through so that the pipes themselves, that  
9 the older pipes generally remain in the ground that can be  
10 retrieved at a later date.

11 And also to the extent that that's such to be  
12 appropriate, technically the vast majority of those lines are  
13 also going to be owned by the plaintiffs themselves in this  
14 action. Because the lead service lines are from a certain  
15 point to the house owned by the resident of the -- or the  
16 homeowner. And then there's portions that are owned by the  
17 City.

18 So to a certain extent, the City can't necessarily be  
19 liable or responsible for the plaintiffs' own pipes or the  
20 pipes that remain within the plaintiffs' property.

21 MR. LEOPOLD: I think we can work out a protocol for  
22 all of that.

23 THE COURT: Okay.

24 MR. LEOPOLD: One thing we're going to need help with  
25 the preservation order is to get the names and addresses of

1 all of the contracting companies the City has entered into  
2 agreement with so that the order can appropriately be sent to  
3 them.

4 THE COURT: Okay. I think what I've been told is --  
5 I'm interested in more briefing on the Fifth Amendment issue.  
6 I would benefit from supplemental briefing that would inform  
7 my decision. And so I'll set a timeline for that. And Mr.  
8 Leopold, with respect to the fact sheet for the named  
9 plaintiffs, what was your position on that?

10 MR. LEOPOLD: The fact sheets would be only for the  
11 class representatives in the class.

12 THE COURT: That's what I'm -- yeah, that's what I'm  
13 referring to. And I don't know who to turn to, but is there a  
14 timeframe by which the defendants are requesting these fact  
15 sheets?

16 MR. LEOPOLD: Your Honor, I think there first has to  
17 be an agreement on what the fact sheet is.

18 THE COURT: Yeah.

19 MR. LEOPOLD: We're happy to work with them. We're  
20 happy to look at what has transpired in the Genesee County  
21 case. But again, we don't want to be bound by that fact  
22 sheet. But we're happy to work with them with the timeframe  
23 that the Court provides us.

24 THE COURT: Okay. Well, then -- yes.

25 MR. MASON: I agree with that, that we need to agree

1 on that. I was curious about the Court's comment about Mr.  
2 Leopold's position visa vie the fact sheets just for the named  
3 representatives. If there's an outstanding issue in the  
4 Court's mind, I'd ask for an opportunity to brief that issue.

5 THE COURT: I understand that you want vastly more of  
6 these fact sheets.

7 MR. MASON: Not necessarily.

8 THE COURT: Oh.

9 MR. MASON: We can work with them and talk about  
10 that. We're certainly getting them in the individual cases.  
11 This is a different issue with respect to the class. And so I  
12 think we can talk about that.

13 THE COURT: Okay. All right. Then I would ask that  
14 there be a meet and confer regarding the content of the fact  
15 sheets and the extent of the responses that are being  
16 requested.

17 MR. SHKOLNIK: Your Honor, to the extent that these  
18 may also apply to individual cases, should we just do it all  
19 as one?

20 THE COURT: Yes. That would be great. Now, what  
21 I'll do is, hopefully tomorrow, issue an order with a  
22 timeframe for this. But essentially I'm asking that you meet  
23 and confer on a lot of issues.

24 And so I guess I'd like to hear at least some  
25 estimate of how much time would be needed for a common

1 repository for the appointment of co-lead defense -- or  
2 co-liaison defense counsel for administrative tasks,  
3 preservation order of third parties, insurance disclosure  
4 protocol, if you think one is necessary for sampling of  
5 tangible objects. Meet and confer on a fact sheet and the  
6 extent of responses, and supplemental briefing on Fifth  
7 Amendment immunity.

8 MR. LEOPOLD: Your Honor, from the plaintiffs'  
9 perspective, I think we can accomplish all of that -- when I  
10 say within two weeks, meaning the meet and confers, getting  
11 our protocol in place. Probably, you know, the second of the  
12 two weeks, some time in there.

13 And our briefing, you know, probably within a week  
14 plaintiffs can have our brief in. And I don't know if the  
15 Court has any guidance in term of page number or anything of  
16 that sort on that issue. But and also it will be a  
17 simultaneous filing or I'm not sure, or reply to.

18 THE COURT: Yeah. So I have a number of people  
19 seeking -- Mr. Campbell.

20 MR. CAMPBELL: Thank you, your Honor. I agree that  
21 the meet and confer should take place as soon as we can. But  
22 I have concern that that could happen in two weeks. I would  
23 request at least November 17th, which is three weeks. That  
24 brings us up to some holidays.

25 But I just think that with all the people that need

1 to be involved with the meet and confer and the issues that we  
2 talked about, that's going to take some time.

3 And as long as I'm standing, your Honor, if I could  
4 have some clarity on that insurance issue. The comment was  
5 directed at me and my client. We have produced the Rule 26  
6 insurance information. If we can have a chance to -- if we're  
7 required to do something more than that, I don't know what  
8 that is.

9 THE COURT: Oh, okay.

10 MR. CAMPBELL: We have provided the policies and the  
11 limits to the plaintiffs. And that's what we're obligated to  
12 do.

13 THE COURT: And if you have them, then you've  
14 satisfied what I'm talking about right now. And if the  
15 plaintiffs believe you haven't, they'll inform me in that  
16 submission.

17 MR. CAMPBELL: Thank you, your Honor. And just one  
18 other thing. Particularly with the comments from the City  
19 about who owns these pipes and perhaps other information, the  
20 preservation order I think needs to apply to all parties. And  
21 of course the plaintiffs as well.

22 THE COURT: Certainly.

23 MR. CAMPBELL: Thank you.

24 MR. LEOPOLD: Your Honor, if I just quickly address  
25 Mr. Campbell's comment. This sort of goes to the

1 administrative issue for trying to schedule a meet and confer  
2 with everybody at one time. And I think we should do it in  
3 person. I think having a conference call on all this could be  
4 quite difficult. I'm just not sure if the plaintiff is  
5 supposed to try and herd the cattle or what we're supposed to  
6 do.

7 THE COURT: Okay.

8 MR. LEOPOLD: Maybe if there's somebody that can take  
9 the reigns on the defense side and give us one or two dates  
10 when we can meet in person. Perhaps what we've been doing at  
11 the Westin at the airport and we can sit down for six hours,  
12 five hours, whatever time it takes. But to try and  
13 coordinate, you know, the defendants' schedules and all, it's  
14 very unwieldy for us.

15 THE COURT: Mr. Campbell.

16 MR. CAMPBELL: Thank you. I don't disagree with Mr.  
17 Leopold on that point. But what I would disagree with to the  
18 extent that many of the comments, you know, with pointing to  
19 the your right, our left side of the room, the defendants here  
20 are not monolithic by any sense.

21 THE COURT: I understand that.

22 MR. CAMPBELL: So what we did in order to achieve a  
23 meet and confer in response to your Honor's July order to do  
24 so was each of the defendant groups, if you will, had a  
25 representative. And that person was responsible for grouping

1 the City or the MDEQ or the State and the like and that seemed  
2 to work well.

3 I mean, it should not be the burden on the defendant  
4 or a defendant to do this side of the room. If we could have  
5 those groups, that, I think, is an effective way to get people  
6 together.

7 THE COURT: Then here's what I'd like in response to  
8 what you're suggesting. Is that by Wednesday, November 1st,  
9 to have a proposal from the defendants about either some sort  
10 of executive committee for administrative tasks or co-liaison  
11 counsel, whatever you all can meet and confer and come up  
12 with. And what Mr. Campbell was just describing may be the  
13 most effective. If it's worked thus far, it may be able to  
14 continue working.

15 So that would be by Wednesday, November 1st. And I  
16 would ask that that be submitted to the Court in the form of  
17 an email message. That it doesn't need to be a formal filing  
18 unless someone here wishes to have it filed, so.

19 In terms of when this would all -- okay. So we've  
20 got -- you've requested or at least I think Mr. Campbell  
21 requested until Friday the 17th. The problem with that is  
22 that I want to continue this conference before that date. And  
23 I'd like to have additional information by that time.

24 And I was looking at Wednesday the 15th -- no, I  
25 wasn't. What date was I looking at? Yeah. I was looking at

1 Wednesday, November 8th as a date to continue this conference.  
2 But I think that is too early to get all this work done. But  
3 there is plenty of other work that needs to be done in this  
4 case.

5 I understand from Judge Yuille and others that he  
6 meets with counsel in the individual cases on the first  
7 Wednesday of the month. And I think it would make sense to  
8 try to coordinate these status conferences with his to  
9 minimize travel that would not otherwise be necessary. But I  
10 can't see a way to get that done this time.

11 But I'm very open to doing that in the future. So  
12 what I'll do is set a continued hearing on the remaining  
13 agenda items for Wednesday, November 8th.

14 MR. GRASHOFF: Your Honor, Phil Grashoff.

15 THE COURT: Yes.

16 MR. GRASHOFF: You know there's somebody in this  
17 crowd that's going to have a problem.

18 THE COURT: I know that. That's why I didn't ask  
19 anybody.

20 MR. GRASHOFF: I would request that you move it to  
21 the 10th, on Friday. I have to be in the Western District on  
22 the 7th all day and I have --

23 THE COURT: The 10th is Veteran's Day observed.

24 MR. GRASHOFF: Give me at least one more day.

25 MR. SHKOLNIK: Is there any way we can go to the next

1 week, your Honor?

2 THE COURT: Okay.

3 MR. SHKOLNIK: I just happen to have an anniversary  
4 trip planned for a very long time and I'll have a very  
5 difficult discussion tonight.

6 THE COURT: All right. I know. Okay.

7 MR. KIM: Your Honor, for the reasons that I  
8 mentioned previously, the 15th would be preferable for the  
9 City as well.

10 THE COURT: Okay. You all have an election and you  
11 need a little time to know what the outcome of that election  
12 is. Okay. We're on the 15th. Is somebody talking on the  
13 telephone?

14 UNIDENTIFIED PERSON SEATED IN JURY BOX: Time, your  
15 Honor?

16 THE COURT: I haven't gotten that far. What I'd like  
17 to do is 10:00 AM. I know there are flights that get here by  
18 then. Because I have hearings starting at 1:30 all afternoon.  
19 On Wednesday, November 15th, 10:00 AM, to continue this  
20 conference. And I will issue a revised agenda before the  
21 15th. I'll plan to do that by Friday the 10th.

22 And in general what I'll do is set a protocol for  
23 submissions for proposed agenda items. But we already have  
24 more than we can handle.

25 MR. LEOPOLD: Your Honor, just as a housekeeping,

1 sort of a housekeeping matter, only because some of the issues  
2 involved, people that we've not been holding off been part of  
3 the process. But on our submissions for executive committee  
4 members and liaison counsel for the class case, I don't know  
5 if that's something you want to take up next time since we  
6 didn't get to it.

7 But some of the -- a lot of these people are involved  
8 in this process. We're just not sure how to move forward.

9 THE COURT: Okay. Could you repeat what you said? I  
10 was distracted for a minute.

11 MR. LEOPOLD: On the agenda, which the Court asked,  
12 was the submissions of the EC members on the plaintiffs' side  
13 and liaison counsel in the class case.

14 THE COURT: Absolutely.

15 MR. LEOPOLD: And they're all important parts of the  
16 process. And it's sort of holding up our aspect of doing the  
17 various things until the Court has actually signed off on  
18 that. And I'm not sure if the Court wants to wait until the  
19 next hearing or if it's more of a housekeeping issue.

20 THE COURT: I appreciate that. I didn't see an  
21 opposition by any of the defendants. Am I missing anything in  
22 terms of the plaintiffs' proposed executive committee? I've  
23 got Mr. Klein, seems to be saying no.

24 MR. KLEIN: That is no. We don't take a position how  
25 plaintiff should organize themselves.

1 THE COURT: Okay. I read the submission. I read the  
2 resums and other materials related to the proposed members of  
3 the executive committee. They -- each of the members, who are  
4 many of them sitting here, seem eminently qualified. And it  
5 looks to me to be a balanced group of people who have local  
6 contacts, extensive experience, and the time and attention to  
7 do the work. So I'm prepared to make that appointment now.

8 MR. LEOPOLD: And just so the record's clear I'm not  
9 sure if tagalong is right, but later on we had Mr. McAlpine  
10 also as liaison for the state court case. And that's  
11 important because of the State class action that is before  
12 Judge Yuille as well.

13 THE COURT: Yeah. So at this point, what I'm doing  
14 is getting the executive committee in place for the master  
15 consolidated class case here. And I'll deal with the liaison  
16 to the State class case at another time.

17 MR. PITT: Your Honor, there's one housekeeping  
18 matter. We have agreed now to file a new consolidated  
19 complaint by the end of this week.

20 THE COURT: Yes.

21 MR. PITT: In the one that was filed, it was an  
22 oversight. Defendant Nancy Peeler -- Mr. Cafferty is here on  
23 behalf of Ms. Peeler. She was left off of the complaint.  
24 We'd like to amend it to include her back into it. It was  
25 done by oversight.

1 THE COURT: Okay. So she was left out entirely or  
2 just from the case caption or --

3 MR. PITT: The case caption. She's mentioned in the  
4 body of the complaint.

5 THE COURT: Okay.

6 MR. PITT: But she should be named as a defendant.

7 MR. CAFFERTY: She was not identified as a defendant  
8 in their list of defendants. There were factual allegations  
9 that referred to her, but she was never referred to as a  
10 defendant. There may have been some other defendants who  
11 weren't mentioned, too, from my reading of the complaint.

12 THE COURT: Okay. Then what I'll do is direct the  
13 plaintiffs to review carefully who the named defendants should  
14 be and to make those corrections by Friday when you file the  
15 amended complaint.

16 MR. PITT: Thank you, your Honor.

17 MR. CAFFERTY: I thought I'd won, your Honor,  
18 actually.

19 MR. KLEIN: Your Honor, just for clarity. This  
20 amendment is solely to fix this one error. It's not a leave  
21 to amend substantive new claims or anything else.

22 THE COURT: Right. All right. Well, at this point  
23 that will conclude the status conference. And I want to  
24 remind everybody to fill out the sign-in sheet if you made an  
25 appearance here because the record needs to be accurate and

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1 that's the only way we can accomplish that. And we'll just  
2 stop there. Thank you, all, very much.

3 (Proceedings Concluded)

4 - - -

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6  
7 CERTIFICATE OF OFFICIAL COURT REPORTER

8 I, Jeseca C. Eddington, Federal Official Court  
9 Reporter, in and for the United States District Court Eastern  
10 District of Michigan, appointed pursuant to provisions of Title  
11 28, United States Code, Section 753, do hereby certify the  
12 foregoing 110 pages are a true and correct transcript of the  
13 proceedings had in the matter of In Re FLINT WATER CASES, Case  
14 No. 16-10444 held on October 25, 2017.

15  
16 /s/ JESECA C. EDDINGTON  
17 Jeseca C. Eddington, RDR, RMR, CRR, FCRR  
Federal Official Court Reporter

11/14/2017  
Date