

November 7, 2018

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

*In Re* FLINT WATER CASES Case No. 16-10444

\_\_\_\_\_  
STATUS CONFERENCE

BEFORE THE HONORABLE JUDITH E. LEVY  
UNITED STATES DISTRICT JUDGE

NOVEMBER 7, 2018

APPEARANCES IN ALPHABETICAL ORDER:

Charles E. Barbieri  
Foster, Swift, Collins & Smith, P.C.  
313 South Washington Square  
Lansing, MI 48933

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

Margaret A. Bettenhausen  
Michigan Department of Attorney General  
525 West Ottawa Street, P.O. Box 30755  
Lansing, MI 48909

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

(Continued on next page)

**TO OBTAIN A  
CERTIFIED  
TRANSCRIPT:**

**JESECA C. EDDINGTON, RDR, RMR, CRR, FCRR**  
FEDERAL OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT  
200 E. LIBERTY ST. - ANN ARBOR, MI 48104

November 7, 2018

2

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

5 Jordan S. Bolton  
6 Clark Hill  
7 500 Woodward Avenue, Suite 3500  
8 Detroit, MI 48226

9 Peretz Bronstein  
10 Bronstein, Gewirtz & Grossman LLC  
11 60 East 42nd Street, Suite 4600  
12 New York, NY 10165

13 Michael S. Cafferty  
14 Michael S. Cafferty & Associates  
15 333 West Fort Street, Suite 1400  
16 Detroit, MI 48226

17 James M. Campbell  
18 Campbell, Campbell, Edwards & Conroy  
19 One Constitution Plaza, Suite 300  
20 Boston, MA 02129-2025

21 Jordan W. Connors  
22 Susman Godfrey L.L.P.  
23 1201 Third Avenue, Suite 3800  
24 Seattle, WA 98101

25 Eugene Driker  
Barris, Sott, Denn & Driker, PLLC  
333 West Fort Street, Suite 1200  
Detroit, MI 48226

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

Joseph F. Galvin  
Genessee County Drain Commissioners  
4610 Beecher Road  
Flint, MI 48532

Nathan A. Gambill  
Michigan Department of Attorney General  
ENRA Division, P.O. Box 30755  
Lansing, MI 48909

November 7, 2018

3

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

5 Philip A. Grashoff, Jr.  
6 Kotz Sangster Wysocki P.C.  
7 36700 Woodward Avenue, Suite 202  
8 Bloomfield Hills, MI 48304

9 John A.K. Grunert  
10 Campbell, Campbell, Edwards & Conroy  
11 One Constitution Plaza, Suite 300  
12 Boston, MA 02129-2025

13 Sarah T. Hansel  
14 Berezofsky Law Group, LLC  
15 210 Lake Drive East, Suite 101  
16 Cherry Hill, NJ 08002

17 Larry R. Jensen  
18 Hall Render Killian Heath & Lyman, PLLC  
19 201 West Big Beaver Road, Suite 1200  
20 Troy, MI 48084

21 Sheldon H. Klein  
22 Butzel Long, P.C.  
23 Stoneridge West, 41000 Woodward Avenue  
24 Bloomfield Hills, MI 48304

25 Kurt E. Krause  
Chartier Nyamfukudza P.L.C.  
1905 Abbot Road, Suite 1  
East Lansing, MI 48823

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

Deborah A. LaBelle  
Law Offices of Deborah LaBelle  
221 North Main Street, Suite 300  
Ann Arbor, MI 48104

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

November 7, 2018

4

1 Theodore J. Leopold  
2 Cohen Milstein Sellers and Toll PLLC  
3 2925 PGA Boulevard, Suite 200  
4 Palm Beach Gardens, FL 33410

5 Emmy L. Levens  
6 Cohen Milstein Sellers and Toll PLLC  
7 1100 New York Avenue, NW, Suite 500  
8 Washington, DC 20005

9 Cynthia M. Lindsey  
10 Cynthia Lindsey & Associates  
11 8900 East Jefferson Avenue, Number 612  
12 Detroit, MI 48214

13 J. Brian MacDonald  
14 Cline, Cline  
15 1000 Mott Foundation Building  
16 503 South Saginaw Street  
17 Flint, MI 48502

18 Wayne Brian Mason  
19 Drinker Biddle & Reath LLP  
20 1717 Main Street, Suite 5400  
21 Dallas, TX 75201

22 Todd R. Mendel  
23 Barris, Sott, Denn & Driker, PLLC  
24 333 West Fort Street, Suite 1200  
25 Detroit, MI 48226-3281

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

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

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

November 7, 2018

5

1 Marie Napoli  
2 Napoli Shkolnik PLLC  
3 360 Lexington Avenue, 11th Floor  
4 New York, NY 10017

5 Paul F. Novak  
6 Weitz & Luxenberg, P.C.  
7 Chrysler House  
8 719 Griswold Street, Suite 620  
9 Detroit, MI 48226

10 Todd Russell Perkins  
11 Perkins Law Group, PLLC  
12 615 Griswold, Suite 400  
13 Detroit, MI 48226

14 Solomon M. Radner  
15 EXCOLO LAW, PLLC  
16 26700 Lahser Road, Suite 401  
17 Southfield, MI 48033

18 Alexander S. Rusek  
19 White Law PLLC  
20 2400 Science Parkway, Suite 201  
21 Okemos, MI 48864

22 Herbert A. Sanders  
23 The Sanders Law Firm PC  
24 615 Griswold Street, Suite 913  
25 Detroit, MI 48226

Elliot Schaktman  
Marc J. Bern & Partners LLP  
60 East 42nd Street, Suite 950  
New York, NY 10165

Ashley Shea  
Shea Aiello, PLLC  
26100 American Drive, Second Floor  
Southfield, MI 48034

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

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

November 7, 2018

6

1 Craig S. Thompson  
2 Sullivan, Ward  
3 25800 Northwestern Highway, Suite 1000  
4 Southfield, MI 48075  
5  
6 Renner K. Walker  
7 Levy Konigsberg, LLP  
8 800 Third Avenue, Suite 11th Floor  
9 New York, NY 10022  
10  
11 Valdemar L. Washington  
12 718 Beach Street, P.O. Box 187  
13 Flint, MI 48501  
14  
15 Todd Weglarz  
16 Fieger, Fieger, Kenney & Harrington, PC  
17 19390 West 10 Mile Road  
18 Southfield, MI 48075  
19  
20 Jessica B. Weiner  
21 Cohen Milstein Sellers and Toll PLLC  
22 1100 New York Avenue, NW, Suite 500  
23 Washington, DC 20005  
24  
25 Marvin Wilder  
Lillian F. Diallo Law Offices  
500 Griswold, Suite 2340  
Detroit, MI 48226  
Michael R. Williams  
Bush, Seyferth & Paige, PLLC  
3001 West Big Beaver Road, Suite 600  
Troy, MI 48084  
Kenneth Wilson  
Perkins Law Group, PLLC  
615 Griswold, Suite 400  
Detroit, MI 48226  
Matthew Wise  
Foley & Mansfield, PLLP  
130 East Nine Mile Road  
Ferndale, MI 48220  
To Obtain a Certified Transcript Contact:  
Jeseca C. Eddington, RDR, RMR, CRR, FCRR  
Federal Official Court Reporter  
United States District Court  
200 East Liberty Street - Ann Arbor, Michigan 48104

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

MISCELLANY

Proceedings.....	8
Certificate.....	55

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

THE CLERK: Calling the Flint Water Cases.

THE COURT: Okay. Please be seated. And we are going to have a brand new protocol which is no appearances being made on the record because everyone should have already checked in with Jeseca. So if you have not checked in with the court reporter, raise your hand. Okay.

And I'm just going to -- one of the benefits of the appearances I get to sort of say hello and see who's here. But I think I'm scanning our group and I have a sense of who's here. So welcome to everybody. And I'm sorry for the delay in getting started. But I think the time was being used productively by a meeting in chambers to discuss the issues that we're about to discuss largely. And try to navigate a positive way forward.

So I issued an agenda for this status conference. And the first item on the agenda is discussing a comprehensive case management plan. And in our meeting in chambers -- the purpose of such a plan is to sort out what discovery can be done now within the Federal Rules of Civil Procedure, rules of evidence, and constitutional concerns that defendants who have been named in criminal complaints might have in terms of Fifth Amendment immunity as well as qualified immunity and Eleventh Amendment immunity, issues that some of the defendants have raised.



November 7, 2018

9

1           So all of that makes it very complicated and  
2 difficult to manage a case and permit factual development to  
3 be undertaken. But I will say that my priority, which I  
4 usually come out and give some sort of at least short speech  
5 on where I think we are. But I think we're just in the middle  
6 of these cases desperately trying for every person in this  
7 room to see the cases go forward.

8           And I say that starting out cases begin with the  
9 plaintiffs. And I know that in this case there are plaintiffs  
10 who very much need and want to know what the resolution is to  
11 these cases. And the longer time that we spend not making  
12 progress, the harder it is for those individuals.

13           And for the defendants there's a combination of  
14 complicated reasons that these cases need to be resolved.  
15 Their lives and the organizations that they represent have a  
16 great deal of uncertainty. And also attorney fees that are  
17 being paid constantly I would imagine. And I know the State  
18 of Michigan is footing quite a bill here as well. And  
19 everyone needs to see these cases move forward in a fair and  
20 equitable way.

21           So to that end we discussed trying to get a  
22 comprehensive case management plan just for the next phase of  
23 this litigation. And an agreement was reached that the lead  
24 counsel for defendants and for plaintiffs would meet and  
25 confer and see if they can make a proposal.

1           And let me just log on so I have my calendar  
2 available.

3           So Mr. Leopold, did we have a date for this?

4           MR. LEOPOLD: No, Your Honor.

5           THE COURT: Okay. Then I'm going to try to set a  
6 date.

7           MR. LEOPOLD: We talked about a few. An initial  
8 meeting date and then dates to provide --

9           THE COURT: Feedback.

10          MR. LEOPOLD: -- papers to adjourn and then a hearing  
11 date after that.

12          THE COURT: So I think -- Mr. Campbell is standing  
13 up. But tell me, Mr. Campbell, did we agree to November 28th?

14          MR. CAMPBELL: This is what I recall, Your Honor, for  
15 the meet and confer.

16          THE COURT: Yes.

17          MR. CAMPBELL: And then we were contemplating a date  
18 perhaps two weeks after that when each parties, if they  
19 choose, could submit to Your Honor a proposed plan, you know,  
20 and reasons for that. I would suggest perhaps December 7th or  
21 10th or something like that.

22          THE COURT: But here's what I don't like about that.  
23 I'd like to get one proposed plan and not 18 or 20 or 30  
24 proposed plans. Yeah. And remember the same rules apply,  
25 which is to state your name and who you represent.

November 7, 2018

11

1 MR. LEOPOLD: Ted Leopold on behalf of the class  
2 plaintiffs. That would be wonderful to be able to have the  
3 opportunity to provide that to the Court and we will use our  
4 best efforts in our meet and confer to do that.

5 I would anticipate that there may be some positions  
6 of some of the defendants that they may want to either object  
7 to some of the issues of some of the other defendants. And  
8 the parties -- some parties at least may want to provide  
9 separate pleadings to Your Honor setting forth their  
10 positions. I would anticipate that may happen.

11 THE COURT: But what would be most helpful to me is  
12 if I have one document. And we've done this in the past where  
13 it's in one color for -- let's say black for the color that  
14 everybody agrees on. One side can have yellow if plaintiffs  
15 want and defendants red or purple.

16 MR. LEOPOLD: And we can do that. And I'll take the  
17 burden on of at the meet and confer that once the parties'  
18 positions are set forth that we provide the Court one document  
19 and in that document setting forth each parties' position  
20 where there is disagreements so the Court will have just one  
21 pleading to deal with.

22 THE COURT: Okay. That would be great. So I'll  
23 anticipate that by the second Friday in December, which would  
24 be the 14th. Okay.

25 MR. LEOPOLD: And then the other date would be a time

1 in January. I think you suggested possibly the second week of  
2 January for perhaps an in person hearing to address those  
3 issues.

4 THE COURT: Yes. And we'll sort that out when we  
5 have a chance to have my case manager involved. Because I  
6 don't dare put something on the calendar.

7 MR. GRASHOFF: Your Honor?

8 THE COURT: Yes.

9 MR. GRASHOFF: Phil Grashoff. I'm having a difficult  
10 time hearing Mr. Leopold.

11 THE COURT: I know.

12 MR. GRASHOFF: I don't know if his mic is on or not.

13 MR. LEOPOLD: It seems like it's on.

14 THE COURT: I think it' on. I think you just have to  
15 speak pretty close.

16 MR. LEOPOLD: Is that better?

17 THE COURT: Yeah, that is better, speaking more  
18 closely. The other thing I'd like to ask you to put in this  
19 order is it is my intention -- I mentioned upstairs in our  
20 conference in chambers that it's my intention to order the  
21 State of Michigan to provide data that is maintained by the  
22 Department of Health and Human Services on blood lead levels  
23 that have been taken from Flint residents.

24 And there are certain legal protections for that data  
25 and I would like this order to address what can be done to

1 provide that to plaintiffs' counsel. Mr. Kuhl.

2 MR. KUHL: Your Honor, Richard Kuhl on behalf of the  
3 state defendants. As I indicated, there's a state law that  
4 prohibits this. So we'll want to have some mechanism to  
5 address that issue.

6 THE COURT: Exactly. That's what I'm asking you to  
7 include in this order is what is the mechanism that would be  
8 needed to be used to provide the data.

9 MR. KUHL: My point is the law prohibits us from --  
10 so I just want to be able to have a chance to voice that  
11 objection.

12 THE COURT: Does the law prohibit you from having a  
13 conversation about how to legally turn it over?

14 MR. KUHL: I think my concern is the law says we  
15 can't.

16 THE COURT: You can't turn it over.

17 MR. KUHL: Correct.

18 THE COURT: But are there any exceptions to that,  
19 that if it's ordered by a federal judge that it's part of  
20 litigation -- and you're still saying it's quite likely there  
21 must be --

22 MR. KUHL: We're happy to address and take -- that's  
23 my understanding is that's a blanket prohibition.

24 THE COURT: Okay. So if it's something that can't  
25 even be done with a court order then I want an explanation of

1 that with a citation to the law.

2 MR. KUHL: Exactly. That's what I was just asking,  
3 to make sure that we had some kind of mechanism to do that.

4 THE COURT: Good.

5 MR. KUHL: Thank you.

6 MR. LEOPOLD: And Your Honor, Ted Leopold, Your  
7 Honor. On that particular issue we would like to be able to  
8 set forth where appropriate, appropriate case law where that  
9 information could and/or can be provided by a federal court  
10 order during the course and scope of a litigation.

11 THE COURT: This proposed document would be the place  
12 to do it.

13 MR. LEOPOLD: Thank you, Your Honor.

14 THE COURT: Or it could be Exhibit A to the document.  
15 Okay. Okay.

16 So before we go to the issues related to the Carthan  
17 motion to amend the consolidated class -- Mr. Barbieri.

18 MR. BARBIERI: May I approach, Your Honor?

19 THE COURT: Yes.

20 MR. BARBIERI: Your Honor, I wish to repeat my  
21 concerns that I expressed in chambers before Your Honor.

22 As I read this agenda for today's conference, it  
23 provided that the Court would hear from counsel on whether to  
24 adopt such a plan. I'm responding to that specifically. And  
25 I made my concerns known to Your Honor in chambers.

1 I am concerned that the Court is proceeding on a  
2 course that's inconsistent with my client's rights. And I'm  
3 Charles Barbieri, by the way. I forgot to mention that. And  
4 I represent the MDEQ defendants Michael Prysby and also  
5 Patrick Cook. And also I'm standing on behalf of the other  
6 MDEQ defendants Wurfel, Wyant, Liane Shekter Smith, and  
7 Stephen Busch.

8 Your Honor, very briefly. Any discovery here is  
9 premature as decisions on the motion to dismiss have just  
10 started to occur and appeals are likely which raise the issues  
11 on what the Court can do, particularly as to jurisdiction.  
12 Our clients are --

13 THE COURT: And Mr. Barbieri, I don't want to  
14 interrupt your argument. But you're absolutely right that  
15 there are pending motions to dismiss in the individual cases.  
16 There's a motion to amend and motions to reconsider in the  
17 class cases. And those cases are also have notices of appeal.

18 Those notices of appeal may very likely require that  
19 the case be stayed as to those defendants once those appeals  
20 are active. My review of that law indicates that it's  
21 strongly in your favor for staying the action pending the  
22 outcome of a qualified immunity appeal. But we're not there  
23 yet.

24 The Court of Appeals has indicated in its order  
25 pursuant to Federal Rule of Appellate Procedure 4(a)(4) that

1 it currently will not take jurisdiction until I finish  
2 adjudicating pending motions in Carthan.

3 So during that time, the case -- I know you have a  
4 pending -- that still means you have a motion to dismiss and  
5 you're seeking qualified immunity. And your clients have a  
6 Fifth Amendment right not to incriminate themselves in a  
7 criminal proceeding.

8 So I understand all of that, but there are active  
9 litigants in this case who do not have motions to dismiss on  
10 appeal. And so this case has to go forward to some extent  
11 with respect to those parties that are still a part of it  
12 making your client's potentially third parties during a period  
13 of time during which they still have constitutional rights not  
14 to incriminate themselves.

15 So I will be very mindful of that. And I will  
16 examine any interrogatory or document request submitted to me  
17 to determine if it's testimonial in nature if the response  
18 requires anything that's testimonial. I'll be reading the  
19 Enron case three times a day to make sure I don't violate  
20 anyone's rights. So and those are meaningful rights. I mean,  
21 the constitution means something and I believe in it.

22 So I will be very mindful of that. But that doesn't  
23 mean we can't make some progress.

24 MR. BARBIERI: Your Honor, I respectfully understand  
25 what the Court's decision will be. Let me just finish my



1 objection for the record politely.

2 THE COURT: Okay.

3 MR. BARBIERI: I actually submit to Your Honor that  
4 in addition to the Fifth Amendment rights which you  
5 acknowledge that these immunities which I believe should be  
6 acknowledged here not only protect us against the cause of  
7 action but also protect us against the very discovery which  
8 this Court is now allowing or suggesting can occur. And I  
9 just want to be clear on the record that I believe that the  
10 Court is acting inconsistently with that view --

11 THE COURT: But I haven't acted at all. All I'm  
12 asking for -- I've done nothing. I'm just sitting here asking  
13 for by November 28th for you all to talk -- come up with a  
14 plan that is constitutional that does follow the Rules of  
15 Civil Procedure.

16 MR. BARBIERI: All right. Well, I respectfully  
17 submit that it cannot for the reasons I stated. I also just  
18 want to make it clear that the whole parameters of this  
19 lawsuit are truly unknown where the Court is considering the  
20 possibility of filing or considering motions to amend that  
21 have been filed or will be filed.

22 I find it inconsistent to embrace a comprehensive  
23 case management plan where we don't even know whether a cause  
24 of action exists, whether it will survive, and whether it has  
25 to be appealed. So respectfully --

1 THE COURT: Well, I can say this, a cause of action  
2 exists. It has been challenged. Its sufficiency has been  
3 challenged. Some decisions have been made in the Guertin case  
4 and in the Carthan class action that are still being  
5 challenged. But for the time being, it exists. And I agree  
6 with you, I'm as frustrated as you. Maybe not as frustrated,  
7 but I am very concerned that we don't have a final complaint  
8 with answers so that this case can get fully litigated.

9 So I'm not happy about that, but it's just the way  
10 the process is moving and I think everyone's doing their best  
11 to do their part in it. But I don't think there's anything  
12 wrong.

13 The federal rules contemplate limited discovery  
14 before an answer or after an answer and before a scheduling  
15 order. There are various ways in which limited discovery can  
16 be ordered within the rules. And furthermore, there are  
17 defendants -- your client could very well get out of this  
18 altogether depending on the Sixth Circuit's decision. That  
19 the case will go forward and they will be called as witnesses,  
20 so.

21 MR. BARBIERI: Well, Your Honor, I just simply wanted  
22 to put my concerns and objections on the record. I believe  
23 I've done that.

24 THE COURT: I think you have.

25 MR. BARBIERI: I appreciate the dialogue that the

1 Court has had with me.

2 THE COURT: Thank you.

3 MR. BARBIERI: And I'm admonished where I need to be  
4 admonished.

5 THE COURT: Okay. Thank you. Mr. Grashoff -- Ms.  
6 Bettenhausen, you're next.

7 MS. BETTENHAUSEN: Thank you, your Honor. Margaret  
8 Bettenhausen on behalf of state defendants. We just wanted to  
9 say real quickly that we wanted to adopt the DEQ defendants  
10 objections for the record.

11 THE COURT: Okay. I appreciate that.

12 MS. BETTENHAUSEN: Thank you.

13 THE COURT: Mr. Grashoff.

14 MR. GRASHOFF: Your Honor, may I speak from here?

15 THE COURT: As long as you project.

16 MR. GRASHOFF: I have no problem doing that.

17 THE COURT: Okay.

18 MR. GRASHOFF: I just want to make it clear that Mr.  
19 Barbieri spoke on behalf of all the MDEQ employee defendants  
20 and we join in. But the Court said something during the  
21 exchange that's bothering me.

22 THE COURT: Okay.

23 MR. GRASHOFF: You said that the Court of Appeals  
24 ordered that the underlying motions in Carthan be resolved  
25 before it goes forward. That's not what they ordered. They

1 ordered --

2 THE COURT: They ordered that the --

3 MR. GRASHOFF: -- motions for reconsideration get  
4 resolved. And those are so narrow. I don't think our clients  
5 are involved in any of those particular motions. So that  
6 means that those can possibly be handled independently and the  
7 Court of Appeals can move it forward.

8 THE COURT: There is a thoughtful body of law that  
9 addresses 4(a)(4) in the Sixth Circuit and in other circuits.  
10 And there are commentary to those rules that indicate that  
11 once the court -- that essentially that rule of appellate  
12 procedure divests the Court of Appeals of its jurisdiction  
13 while the motions to reconsider that are listed on that order  
14 are being addressed. And during that time I retain  
15 jurisdiction over the case.

16 And so it takes a little digging to get that all put  
17 together, but we were able to do that here in chambers. And  
18 so the filing of those motions to reconsider and the 4(a)(4)  
19 order from the Court of Appeals says I have jurisdiction over  
20 the cases until I resolve them.

21 So if my order of -- that I choose to take things in  
22 is to address the motion to amend and then the motions to  
23 reconsider, it's still sitting here with me during that time.

24 MR. GRASHOFF: I didn't mean to get into that level  
25 of detail.

1 THE COURT: Oh.

2 MR. GRASHOFF: But only to point out to the Court  
3 that the Court of Appeals is pretty specific about what  
4 they're waiting on. That's all.

5 THE COURT: Exactly. And I'm sorry if I misspoke and  
6 said they're waiting on the motion to amend. They're not.

7 MR. GRASHOFF: I know they're not.

8 THE COURT: Yeah. They're waiting on the motion to  
9 reconsider. But during their patient waiting, I got another  
10 motion that I believe I'm permitted to address. But we can  
11 discuss that more fully in a minute.

12 MR. GRASHOFF: Thank you, your Honor.

13 THE COURT: Thank you. Okay. So that -- so we now  
14 know that we have some dates for the first issue on our  
15 agenda.

16 Moving to the Carthan motion to amend the  
17 consolidated class action, I guess we've already had some  
18 discussion of whether I have jurisdiction to address that.  
19 And if there's any one of the defendants who wants to argue  
20 their position on that or set forth something that's not  
21 already set forth, let me know.

22 Because essentially 4(a)(4) indicates that if a party  
23 files a notice of appeal after the Court enters a judgment,  
24 which I did on August 1st in Carthan, but before it disposes  
25 of any motions listed in the 4(a)(4), which is the motion to

1 reconsider, the notice becomes effective to appeal a judgment  
2 or order in whole or in part when the order disposing of the  
3 last such remaining motions is entered.

4 So if the order that I take them in is the motion to  
5 amend and then the motions to reconsider, I understand that I  
6 have jurisdiction. So and there are a number of cases that I  
7 think set that forward pretty clearly.

8 So in light of that, we will move to -- okay. What  
9 we had as a separate item here is the motion to stay and for  
10 reconsideration in Carthan. But it's kind of collapsed. I do  
11 have pending motions to stay pending the outcome of the  
12 appeal. Those are currently also sort of stayed in that I  
13 have jurisdiction back in the case.

14 And so my research I should tell you, I will just  
15 repeat what I said upstairs, is that there is strong case law  
16 requiring that the Court or directing the Court to stay  
17 matters that are on appeal for qualified immunity. Because  
18 what individuals are immune from is suit, especially at the  
19 12(b)(6) stage.

20 It would be different if we were at summary judgment  
21 or if I could say it was a frivolous appeal. I can't say it's  
22 a frivolous appeal. It's not. It's a serious appeal. It was  
23 taken seriously the first time it was filed.

24 So I just caution you that that's out there yet to be  
25 actually decided because it's not ripe, so to speak, right

1 now.

2 On the Bacon Motion to Amend, I think we have that  
3 addressed. Mr. Stern, is there anything -- it was just a  
4 funny situation that took place where in that case there was a  
5 motion to amend before it had been served I believe so I  
6 wanted to make sure that the defendants knew that there was a  
7 motion to amend present in it but it's not going to be  
8 addressed until after the Walters and Sirls cases. Anything  
9 further? Okay.

10 Then we discussed -- there were issues with the  
11 Alexander, Brown, and Rogers individual complaints. Mr.  
12 Sanders, you filed an amended complaint in your Alexander case  
13 and that was just this week I believe.

14 MR. SANDERS: That is correct, Your Honor.

15 THE COURT: Herb Sanders on behalf of the Alexander  
16 -- thank you.

17 MR. SANDERS: Would you like an explanation as to why  
18 it was filed yesterday?

19 THE COURT: Not really. As long as it was filed.  
20 But only thing I can tell you is that the defendants haven't  
21 really had a chance to examine it. I've looked at it briefly  
22 and I think the only thing I wanted to make absolutely certain  
23 is in your attachment you -- that you were able -- when in  
24 your attachment Exhibit A, when you have your many plaintiffs  
25 listed and some own property, is the dates when you have from

1 and to, that's the dates that they owned that property?

2 MR. SANDERS: That's the date of exposure I believe  
3 to lead poisoning. I don't believe we have in the document  
4 the date when they initially acquired their property. But I  
5 think it is -- well, we understood that they had property  
6 during the time of exposure.

7 THE COURT: We may have to -- paragraph 7 states that  
8 in Exhibit A it should say if plaintiff or plaintiffs owned  
9 more than one property list -- each property as well as the  
10 dates the property was owned on an additional sheet, for each  
11 property state which plaintiff owned which property.

12 MR. SANDERS: May I ask what you're reading from?

13 THE COURT: I'm reading the short form complaint that  
14 references your Exhibit A.

15 MR. SANDERS: And we had began to -- part of our  
16 delay was we had began to gather information pursuant to the  
17 special master's order and then that was put on hold. And so  
18 we said, well, we think we have less to do here if we don't  
19 deal with that order.

20 And we went back to the transcript from the  
21 discussion which required us to amend the complaint in which  
22 Your Honor I believe specifically said we need to detail who  
23 has what type of damages --

24 THE COURT: Right.

25 MR. SANDERS: Who were property owners. To the



1 extent that it is required that we state the specific date of  
2 acquiring the ownership, I believe we do have most of that  
3 data, but not all. And that was part of our problem.

4 THE COURT: I see.

5 MR. SANDERS: With 40 plus individuals we didn't want  
6 to piecemeal amendments and give you 10 here, 10 there, 13  
7 here. So we tried to get a full and complete document for all  
8 of these plaintiffs and I think we did that except for which  
9 you're requesting now is the date in which the property was  
10 acquired.

11 THE COURT: Because what paragraph 7 of the short  
12 form says, it says that if you're alleging property damage,  
13 then you have to include -- fill in the blank, plaintiffs  
14 owned property in Flint, Michigan, from approximately A until  
15 approximately B, you know, blank, at the following address.

16 And it looks like that's what you did. But you're  
17 telling me that those were the dates of exposure. But take a  
18 look at it again and I would anticipate some phone calls from  
19 defendants seeking to clarify which it is.

20 MR. SANDERS: We -- and we can do that I would  
21 anticipate in the next 14 days if Your Honor would be so --

22 THE COURT: Okay. That would be good.

23 MR. SANDERS: And I can just say -- I think I can  
24 speak on behalf of the other individual plaintiffs. It's  
25 quite encompassing to try to communicate with some of the

1 folks and to gather information, to get this information. It  
2 took us two meetings, two letters, and a litany of phone calls  
3 to some. And other folks who didn't have phones. But we will  
4 supplement.

5 THE COURT: Thank you, Mr. Sanders.

6 In Brown and Rogers, I think we have that addressed,  
7 Mr. Stern.

8 MR. STERN: Yes, your Honor. As we discussed --  
9 sorry. Corey Stern on behalf of the individual plaintiffs.

10 The counsel for Brown and Rogers have submitted a  
11 stipulation to the other defendants or to the defendants in  
12 those cases to amend the caption of those cases. And I think  
13 as of the time of this hearing, all of the defendants have  
14 responded that they would agree to the stipulation.

15 Mr. Weglarz from the Fieger firm will be filing those  
16 stipulations by the end of the week.

17 THE COURT: Okay. Good. Thank you. Then the status  
18 of Mays versus Snyder's Elliott Larsen Civil Rights Act claim  
19 was the subject of some discussion upstairs. It would be a  
20 very interesting exam topic for law students taking  
21 jurisdiction or federal courts or something.

22 It is -- so I think the resolution -- and just for  
23 those of you who weren't a part of it , it's just the  
24 strangest procedural challenge where this case began in  
25 Genesee County. It got split because I don't want to say

1 severed because that has a legal conclusion and I don't want  
2 to say. So it got split for a while.

3 And now we need to know where this state court claim  
4 is because the remainder of the case came here while the  
5 Elliott Larsen Civil Rights Act act case was winding its way  
6 to the Michigan Supreme Court and back to Judge Yuille in  
7 Genesee circuit court. But by the time it got back to Judge  
8 Yuille, the rest of the case was with me.

9 And I think if I understand the communication from  
10 his chambers, they thought they didn't have the case anymore  
11 so they just simply closed it on the docket assuming I had it.  
12 So now there are motions in front of Judge Yuille to retain  
13 this claim in that case. And there's a motion if I have it to  
14 remand it to him.

15 And so my approach in this is going to be to contact  
16 Judge Yuille tomorrow if possible or very soon and see whether  
17 we can hold a joint hearing on these pending motions and I  
18 will offer to go to his chambers for that hearing.

19 So and by going to the chambers, I'm not implying  
20 that I think the case belongs there or here. It's just that  
21 he's come here before and it would be time for me to go there.  
22 So that's what we're going to do there.

23 Yes.

24 MR. KUHL: Your Honor, Richard Kuhl again for state  
25 defendants. We had agreed on some dates for some additional

1 briefing, if you want to put those on the record.

2 THE COURT: We did. Could you? Just to make sure.

3 MR. KUHL: And Ms. LaBelle, correct me if I'm wrong,  
4 but I had that the plaintiffs will file their brief within one  
5 week.

6 THE COURT: That's right.

7 MR. KUHL: And that we will then respond in the  
8 normal course and under the federal rules.

9 THE COURT: Right. Plaintiffs have filed a motion  
10 without a brief. They're going to add the brief. And then  
11 you'll respond.

12 MR. KUHL: Correct.

13 THE COURT: Okay. All right. So now we're on the  
14 nonparty document only subpoenas. Just a report that was on  
15 several of the submissions. And I don't know what it relates  
16 to any more than I can read my own writing. So who's going to  
17 address that?

18 MR. STERN: John Grunert's always been the  
19 spokesperson for the subpoena.

20 THE COURT: Okay. So John Grunert.

21 MR. GRUNERT: John Grunert for the VNA defendants. I  
22 don't purport to be a spokesperson for anyone.

23 THE COURT: Can you speak right into the microphone?  
24 You don't purport to, but we're appointing you.

25 MR. GRUNERT: All right. I raise the subject simply

1 because, number one, I thought it was important for you to  
2 know how that things are progressing there.

3 THE COURT: Yeah.

4 MR. GRUNERT: But there are also a couple of I think  
5 pretty minor procedural issues that I simply wanted your  
6 guidance on. How things are proceeding is that we have  
7 received nothing so far in response to any of these nonparty  
8 document requests.

9 The closest we've come is with a nonprofit company in  
10 Flint called Edible Flint which has information concerning  
11 lead contamination and soil at various locations in Flint.  
12 And they have -- they're ready to produce documents to us.  
13 And they just want to know, well, can we amend the Exhibit B  
14 to the confidentiality order so that -- you know, so that we  
15 can get the protection of the confidentiality order. I told  
16 them we'll raise it with Judge Levy.

17 They just want to amend it to make clear that the  
18 person signing it is signing it on behalf of Edible Flint not  
19 personally. If we can agree with that, then we will get some  
20 documents from them.

21 THE COURT: Well, let's just stop right there. Would  
22 there be any reason to disagree with that?

23 MR. GRUNERT: I can't think of any. I circulated an  
24 e-mail and I didn't hear from any of the other lawyers  
25 disagreeing with it. It just -- I'm reluctant to tell

1 somebody, yeah, we'll amend a court order without asking the  
2 judge is that okay.

3 THE COURT: Right. Okay. And the answer is it's  
4 okay, so.

5 MR. GRUNERT: Okay. Otherwise we have been meeting a  
6 lot of what I would call stonewalling. A bunch of us are  
7 actually going to Washington next week for our face-to-face  
8 meeting with EPA because they insisted on a face-to-face  
9 meeting to confer about their very extensive objections to the  
10 subpoena that was served on EPA. So we've got nothing from  
11 them.

12 When we were upstairs there was some discussion of --

13 THE COURT: Let's stop there. We're going to have a  
14 conference in January to address a comprehensive case  
15 management order for the next period of time. Would it be  
16 helpful for me to order EPA to show up?

17 I have done that with Federal Government entities  
18 that are not parties of -- to cases before because they seem  
19 to think that it's okay to stay in Washington and refuse to do  
20 what is required of them?

21 MR. GRUNERT: Well, I think that's part of sort of  
22 one of the procedural questions I wanted to raise with you.  
23 Because it's not only EPA. There are a lot of nonparties who  
24 are just really taking a very hard line for one reason or  
25 another.

1           Now maybe we'll be able to work the situation out  
2 with the EPA. It certainly at this point would be premature  
3 for you to think that you need to order them to appear.

4           THE COURT: Right. Oh, no, I wouldn't order them to  
5 appear until after you have the meeting and they say they're  
6 not going to produce documents. And then I would want to hear  
7 directly from them.

8           MR. GRUNERT: The general procedural question I  
9 wanted to raise with you is you have your local rule that says  
10 before a discovery motion can be filed, we have to convene a  
11 telephone conference with you or if you referred it to the  
12 special master, with the special master.

13           But since we are talking about nonparties, I wonder  
14 if you would want us to proceed that way or to proceed with  
15 the more typical motion practice after having conferred and  
16 tried to work out the problem.

17           THE COURT: What I would ask you to do is contact  
18 counsel for these entities that are not responding. Tell them  
19 that I prefer to have them get on the phone and tell me why  
20 they shouldn't respond and without having a separate subpoena  
21 enforcement action or something of that nature.

22           They're not required to, that they're not in the case  
23 aside from me claiming that I'm going to order the EPA to be  
24 here. Generally we don't have jurisdiction over people who  
25 aren't in cases. But that if they don't want to participate

1 in the telephone problem solving technique, then they --  
2 you'll just file a motion.

3 MR. GRUNERT: Okay.

4 THE COURT: To enforce your subpoena.

5 MR. GRUNERT: Thank you. I did want to --

6 THE COURT: But I would also ask if you could advise  
7 the EPA that I just have a low threshold for retaining  
8 information that could be relevant to a case. And that I  
9 would want them to come here and tell me in person why.

10 MR. GRUNERT: Fair enough.

11 THE COURT: Okay.

12 MR. GRUNERT: They wanted us to go meet them in  
13 person to tell them why.

14 THE COURT: Okay.

15 MR. GRUNERT: Just returning very briefly to kind of  
16 how things are going. You heard upstairs about information  
17 that the Genesee County Health Department has that is relevant  
18 blood level information. Genesee County Health Department is  
19 one of the entities that was subpoenaed. They serve basically  
20 blanket objections. There were negotiations.

21 They agreed to comply with the subpoena. Basically  
22 they agreed to comply with it by the end of September. They  
23 still haven't done it. So that's another sort of an instance  
24 of the kind of thing that we've been encountering.

25 I don't mean to suggest that we're meeting



1 stonewalling from all of the nonparties. For example, the  
2 Virginia Tech, while it's been a long drawn out process and we  
3 haven't actually gotten anything from them, we're moving in  
4 that direction.

5 THE COURT: Okay.

6 MR. GRUNERT: So it's just for informational purposes  
7 that discovery device has not generated information yet.

8 THE COURT: Okay. Thank you.

9 Mr. Leopold.

10 MR. LEOPOLD: Your Honor, just to piggyback on that  
11 particular issue of nonparty subpoenas and documents, could I  
12 ask the Court if the Court is willing to put this on the  
13 agenda for the January hearing in between now and say by the  
14 end of the year we on counsel, either defense and/or  
15 plaintiffs' side, will work as diligently as we can with the  
16 nonparties but let them know that if there are any objections  
17 and/or refusals to cooperate or not produce documents, that  
18 perhaps -- I don't know if the Court can do this other than  
19 with DOJ have them here so we can tee is issues up so we won't  
20 have any more delays?

21 THE COURT: But the only problem is there sort of  
22 needs to be some process given to them where they can lodge  
23 their objections that this is protected, privacy protected  
24 information.

25 MR. LEOPOLD: And that's what I'm saying. Between

1 now and the end of the year have dates where they have to file  
2 something and it will be heard at that January hearing.

3 THE COURT: Unless the order is you've issued the  
4 nonparty subpoena and then you then file a motion to enforce  
5 it or they file a motion to quash. Which is it in the rules?

6 MR. LEOPOLD: Normally it's a motion to quash.

7 THE COURT: Yeah, it is. And if they have not filed  
8 a motion to quash, then they --

9 MR. LEOPOLD: They should produce or file objections  
10 or something.

11 THE COURT: Yeah.

12 MR. LEOPOLD: Usually it's in the form of a motion to  
13 quash and/or objections to produce something.

14 THE COURT: And then you would file some sort of  
15 motion to order --

16 MR. LEOPOLD: To overrule the objection to enforce  
17 the subpoena.

18 THE COURT: Yeah.

19 MR. LEOPOLD: And if we can have that perhaps all  
20 teed up before the end of the year, then it can be noticed for  
21 this January hearing where they have to appear and/or either  
22 waive it or an order will be forthcoming ordering them --  
23 their objections are overruled.

24 THE COURT: Okay. Well it can certainly be on the  
25 agenda. And I don't know exactly in what format. I see Mr.

1 Klein has something to say about it.

2 MR. KLEIN: If I may, Your Honor? I'll approach  
3 briefly. Sheldon Klein for City of Flint. I'm all in favor  
4 of what we just talked about. However, my understanding of  
5 Rule 45 is we have the burden of moving to enforce.

6 THE COURT: I think so.

7 MR. KLEIN: So I mean, I just think we're going to go  
8 through a lot of effort and at least if they want to lawyer up  
9 and delay this as much as possible, that they're under no  
10 obligation to do what we're telling them they have to do. I  
11 mean, it's not that I prepared for this issue. And if  
12 someone, other counsel, wants to tell me I'm wrong, it won't  
13 be the first time.

14 THE COURT: No, I think you're right. But I'm going  
15 look at Rule 45. Because what I'd like to know is what the  
16 timing is. If you need to just file that relatively soon.  
17 Quashing or modifying.

18 Well, what I would ask everyone to do is read Rule 45  
19 and file some notice of what the process is that you think  
20 should be undertaken. Because I see I can hold somebody in  
21 contempt who having been served fails without adequate excuse  
22 to obey the subpoena or an order related to it. So thank you.

23 MR. KLEIN: Thank you, your Honor.

24 MR. LEOPOLD: Your Honor, within a week can the  
25 parties provide that to the Court?

1 THE COURT: That would be great.

2 MR. GRASHOFF: Your Honor, Phil Grashoff again. I  
3 don't know why, I think it's my role to straighten stuff out.  
4 But maybe that is my role.

5 During the course of this exchange, Mr. Leopold made  
6 various references to a January hearing. We don't have a  
7 January hearing.

8 THE COURT: Well, no, we don't yet. But what we  
9 talked about a moment ago was that with respect to the first  
10 item on the agenda of coming up with a proposed comprehensive  
11 case management plan, there was November 28th to have a meet  
12 and confer, mid-December to try to submit something. And then  
13 a January opportunity to in person here try to work it out.  
14 And now we're adding things to that time together.

15 And I don't know what's going to happen to the  
16 February date.

17 MR. GRASHOFF: I was going to reference we have to be  
18 back here in February.

19 THE COURT: Yeah. We'll see in January whether we  
20 need that date. But we may need it if we're going to have a  
21 hearing on a motion to amend or dismiss.

22 MR. GRASHOFF: Fine.

23 THE COURT: So we won't get rid of it yet.

24 MR. GRASHOFF: Yes.

25 MR. GRUNERT: Your Honor , I'm sorry. I am now

1 confused. May I?

2 THE COURT: Yes.

3 MR. GRUNERT: John Grunert for the VNA defendants.  
4 And I understood when I walked back and sat down that with  
5 respect to these nonparty deponents, nonparty --

6 THE COURT: Subpoenas.

7 MR. GRUNERT: -- subpoenas, document custodians, that  
8 if we had received objections or responses from them that are  
9 inadequate and they're not being cooperative, that we were  
10 supposed to, that I was supposed to, that anybody who wanted  
11 to bring it to your attention was supposed to see if they  
12 would agree to having a typical local rule telephone  
13 conference and proceed in that way.

14 THE COURT: Exactly. No, that is the way.

15 MR. GRUNERT: Okay.

16 THE COURT: But if you can't get that, then we're  
17 going to go to the local -- and if we get them on the  
18 telephone, I'm going to try to say what's your problem here,  
19 what's the issue. They're going to tell me and then I'm going  
20 to try to see if we can work it out to everyone's  
21 satisfaction. The protective order needs to be amended or  
22 something like that.

23 And if that's not possible, then we'll go back to  
24 Rule 45 and the appropriate enforcement motion or motion to  
25 quash will be filed.

1 MR. GRUNERT: All right. So simply -- and I can tell  
2 you that the concern I have is with people who have filed  
3 objections. They're not filed. Have served objections. And  
4 that puts the onus on us to bring a motion --

5 THE COURT: Yes.

6 MR. GRUNERT: -- if we don't like it. We've gotten  
7 responses from a lot of these people that satisfy in my view  
8 the requirement that they serve a written response. I just  
9 wanted to be clear as to the procedure. And now I am and I'm  
10 sorry to have taken more of your time.

11 THE COURT: Oh, that's all right. Okay.

12 So -- oh, on the agenda on page 4 it indicates that  
13 I'll hear from counsel, which is essentially defense counsel,  
14 regarding the apportionment of defense costs for the  
15 facilitation. That was addressed upstairs. We have a  
16 procedure to address that.

17 On the discovery coordination protocol, I understand  
18 that there are other courts with Flint Water Cases that have  
19 not yet entered the protocol. And at this point what was our  
20 actual -- did we resolve that?

21 MR. STERN: Your Honor, Corey Stern.

22 THE COURT: Yeah.

23 MR. STERN: I think we did. I think Your Honor said  
24 that you were going to amend the order to state something  
25 about the EPA cases before Judge Parker. I think

1 representations were made that once the issues of jurisdiction  
2 are resolved, that if the Court retains jurisdiction there and  
3 finds in favor of the plaintiffs at that point, the plaintiffs  
4 in those cases will present a comparable coordination order to  
5 Judge Parker. And I think it was resolved in that.

6 THE COURT: Yeah, but I think what -- my order will  
7 be operative even if it is not yet entered in the Parker  
8 litigation. And I guess I haven't looked at it recently  
9 enough to know whether I want to ask you to just submit a new  
10 one.

11 MR. STERN: I'm happy to do that. It wouldn't take  
12 much tweaking.

13 THE COURT: Okay. Could you do that and circulate it  
14 and then submit it?

15 MR. STERN: Sure. I'll do it to the same group that  
16 created it.

17 THE COURT: Okay.

18 MR. STERN: Thanks.

19 THE COURT: Okay. Okay. So the next issue on the  
20 agenda is the special master census order. And there were  
21 objections to that order that were filed by class plaintiffs.  
22 There was a motion to adopt it. And there was some feedback  
23 also from some of the defendants. So Mr. Leopold.

24 MR. LEOPOLD: Thank you, your Honor. Mr. Novak is  
25 going to handle this issue.

November 7, 2018

40

1 THE COURT: Okay. Mr. Novak.

2 MR. NOVAK: Thank you, your Honor. I can proceed  
3 from here unless you want me at the mic. I think I can speak  
4 loudly enough so that folks --

5 THE COURT: Okay.

6 MR. NOVAK: I'm not going to repeat everything that's  
7 been presented in the briefing. I'll make a couple of  
8 observations that I hope put this -- our objections to the  
9 census data order in the appropriate perspective.

10 In the first observation I'd make is that when that  
11 order was initially proposed, it was proposed for settlement  
12 purposes only. It has, I think, morphed since then to become  
13 data that would be collected for litigation purposes as well.  
14 And our objections to it I think are amplified to the extent  
15 that the data that is being provided under it are in the  
16 litigation context as opposed to the settlement context.

17 THE COURT: Well, let's put that to rest. What I'm  
18 interested in is a census order that can be used at this point  
19 in the litigation to assist the facilitators in the settlement  
20 process. And it could have long term help for this litigation  
21 down the road. But we're not down the road yet.

22 So what I'm interested in is beginning the process of  
23 everyone understanding -- but starting first with the  
24 facilitators, understanding what the universe of cases are  
25 that exist right now. And we -- there may be other efforts to



1 figure out what other claims exist that we don't know about  
2 now.

3 And so that is to -- so that would apply to the  
4 individual plaintiffs would provide that information. The  
5 class plaintiffs would provide obviously the names of the  
6 named plaintiffs as well as those who are retained.  
7 Individuals who have retained class counsel as their lawyers.

8 And I understand that no one's obligated in a class  
9 action situation to retain counsel. They can sit this out or  
10 even be very involved at every possible meeting but not having  
11 retained a lawyer until a later point.

12 But so what I'm most interested in is your argument  
13 that revealing the identity of a client violated the  
14 attorney/client privilege.

15 MR. NOVAK: With respect to that point -- and really  
16 there are two issues if we are talking about this in the  
17 litigation context. One is jurisdictional and the other is  
18 the attorney/client.

19 The attorney/client privilege issue is implicated  
20 because the individuals have not been revealed. These are  
21 absent class members who have retained us. And irrespective  
22 of whether they have retained counsel or not, I think their  
23 status for purposes of the litigation context is that they are  
24 not before this Court and would not be before this Court until  
25 such time as a class certification order issued.

1           And then if certification were granted, there would  
2 be a process by which members of the class would elect to  
3 participate. We're not obviously at that juncture.

4           And so for us to identify those individuals at this  
5 date who may have retained us not for purposes of filing an  
6 action before this Court either in an individual capacity or  
7 as a class representative, a named class represented in a  
8 class capacity, but instead as an absent class member, to go  
9 further than that and start revealing who those individuals  
10 are and the information that they might have been provided.

11           Those -- that we believe violates the attorney/client  
12 privilege. Because none of those individuals -- the mere fact  
13 that we would identify who they are particularly in the  
14 litigation process. And I'll admit it's less of a concern.

15           THE COURT: Let's go out of the litigation process  
16 for now.

17           MR. NOVAK: Okay.

18           THE COURT: Because I think I would enter -- or I  
19 would enter a separate order if it's going to be provided to  
20 the defendants with names attached.

21           But in terms of providing to the special master only,  
22 who would maintain a confidential database and then would be  
23 able to provide that information to the mediators and would  
24 also -- because the special master would have the names of  
25 everybody -- would be able to do a check to see if there are

1 people who have two, three, or four lawyers. Which could  
2 happen through no fault of anybody including the potential  
3 plaintiff and all of the counsel.

4 But what I'm interested in is getting that process  
5 started. Because as I said when we first started today and  
6 each other day that we have spent time together, a problem  
7 took place and my role is a problem solver. And so I'm trying  
8 to find a way to get to the end of this litigation where a  
9 problem is solved fairly for everybody.

10 And knowing who is -- who has something at stake in  
11 this problem is I think critically important to resolving it.  
12 And to the extent that's resisted, it just holds us back in  
13 the process of getting to a finish line.

14 So my -- I've read the cases that you provided, the  
15 In Re Grand Jury Investigation as well as a number of other  
16 cases. But most of the cases look at discovery of absent  
17 class members. And I'm not asking for discovery from them in  
18 the sense of what -- as a term of art. I don't want that  
19 right now.

20 MR. NOVAK: Our primary concern in presenting this  
21 issue was we didn't want to voluntarily do something that we  
22 thought would waive the attorney/client privilege with respect  
23 to our relationship with these folks.

24 THE COURT: I don't want you to do that either. Do  
25 you think it would waive -- it would be a problem if you're

1 ordered by the Court to produce this information to the  
2 special master with first and last name and address and all of  
3 that information but that will not at this point be provided  
4 with names to the defendants, it may be provided in the  
5 aggregate?

6 There are X number of cases with blood levels of  
7 this, water lead levels of this much. It could be used in  
8 that way. But before any of the names of your clients would  
9 be provided to the defendants, there would be a separate  
10 opportunity to argue that.

11 MR. NOVAK: I think I could certainly envision  
12 presenting arguments at a subsequent point if the Court  
13 ordered that.

14 THE COURT: Yeah.

15 MR. NOVAK: That it would not have waived the  
16 attorney/client privilege. I don't know if the defendants  
17 would agree with those arguments. And that is why we've  
18 postured the concerns that we have.

19 THE COURT: Okay. Well, honestly I don't care right  
20 now what happens later. I mean, I'm always trying to figure  
21 out, well, where is this going. But for now I'm trying to get  
22 one problem solved that won't create other problems but will  
23 at least solve one issue which is beginning to get a grasp on  
24 who is in this litigation that we know of now and how are we  
25 going to find out who else is in it so that we can attempt to

1 resolve it.

2 And so I think that the cases that you've cited  
3 generally stand for the proposition that who -- whether  
4 someone has retained a lawyer or not can certainly be  
5 attorney/client privileged information particularly in the  
6 criminal context, where turning that name over would be an act  
7 of revealing that someone's seeking criminal defense  
8 representation over a specific matter.

9 That is so very different from where we are today  
10 that I don't think that the In Re Grand Jury Investigation  
11 stands for that premise in this context. It indeed -- it says  
12 that as a general rule the court explained -- and this is the  
13 Sixth Circuit -- that a client's identity is not privileged  
14 but there are exceptions.

15 There's -- if there's a strong possibility that  
16 disclosure would implicate the client in a criminal matter  
17 such as that grand jury investigation. And second if the  
18 identity of the client would be privileged where disclosure  
19 would result in the unveiling of confidential information,  
20 which I don't think applies in this case. Do you think either  
21 of those exceptions apply?

22 MR. NOVAK: No. The last point that I wanted to  
23 raise was the jurisdictional one.

24 THE COURT: Okay.

25 MR. NOVAK: I think I've already addressed that, that

1 these are not at this juncture in the proceeding individuals  
2 who are actually before the court. We have that concern in  
3 the context of guidelines calculations purposes.

4 THE COURT: Yeah.

5 MR. NOVAK: Not in the context of settlement  
6 purposes.

7 THE COURT: Okay. So what I'm going to do is deny  
8 the objection to the census order. And with the proviso that  
9 the material that is submitted to the special master will be  
10 submitted in a confidential basis with full names and  
11 addresses and so on. That before it would be -- it will be  
12 shared with the mediators. But before it's shared with the  
13 defendants, there would be an opportunity for notice and  
14 furthered argument that this has become discovery or something  
15 else that would implicate whether the Court has jurisdiction  
16 over unnamed absent class members.

17 MR. NOVAK: There is one line in the existing claims  
18 data order that I think implicates what you're describing now.  
19 And it is the line that says it's for litigation purposes.  
20 And to the extent that the Court intends to modify that line  
21 by the observations in the restrictions that you have just  
22 indicated, I think that addresses in large measure some of the  
23 concerns that we have.

24 THE COURT: Do you mean in the first paragraph where  
25 it says the motion was brought in the current Flint water

1 litigation?

2 MR. NOVAK: No. I think later on -- I have to find  
3 the exact spot -- there is a --

4 THE COURT: Use of the data?

5 MR. NOVAK: Yeah. That might be where it is.

6 THE COURT: The data is appropriate or necessary --  
7 well, why don't you look for it and then let me know when you  
8 find it.

9 MR. NOVAK: Okay.

10 THE COURT: Because I think this information could  
11 very well be helpful in the litigation at a later point, but  
12 we're not at that point yet.

13 MR. NOVAK: Okay.

14 MR. STERN: Your Honor, Corey Stern on behalf of the  
15 individuals. You mentioned the idea of the special master  
16 being able to juxtapose a client list from Attorney A with a  
17 client list from Attorney B to identify if there are  
18 overlapping clients.

19 I would just ask that if possible if you are going to  
20 amend the order, I don't think that would be confidential  
21 information to be shared amongst lawyers.

22 THE COURT: Oh, good point.

23 MR. STERN: And I think it would be very, very  
24 beneficial for all the lawyers in the litigation if Special  
25 Master Greenspan is able to inform us at any point in time

1 where she recognizes that, without breaking any type of  
2 confidentialities, since arguably we will be representing the  
3 same individual.

4 THE COURT: Right. And some resolution would need to  
5 be made to that problem. I think that's important, that she  
6 have that ability. It will help everybody here.

7 MR. NOVAK: The language I was referring to is at the  
8 bottom of page 7 of the order, paragraph 6. Counsel and the  
9 parties may use the information solely for purposes of the  
10 litigation in Flint Water Cases. And we were concerned that  
11 the language be more restrictive than that. But for  
12 settlement purposes only in the litigation.

13 THE COURT: Oh, I see. I mean, I think this was  
14 trying to say you can't use it to start a workers' comp claim  
15 or something else. Okay. We can say that at this point it  
16 will be for the settlement process. But I'm going to keep it  
17 open that it could -- it may very well be part of the  
18 litigation effort at a later date but there would be notice  
19 provided.

20 MR. GAMBILL: Your Honor?

21 THE COURT: Yes.

22 MR. GAMBILL: Nathan Gambill on behalf of the state  
23 defendants. We were just hoping that Your Honor could clarify  
24 that if the Court's going to amend the special master's order  
25 to identify some information as confidential and some as not



1 confidential, that it be explicit in the order what is and is  
2 not confidential.

3 Because the special master's order has a long list of  
4 information that's going to be provided by the different  
5 plaintiffs. And the defendants, I understand what the Court  
6 is saying that the Court doesn't want the names of those  
7 people to necessarily go to the defendants at this point. But  
8 what about all that other information? I think all that other  
9 information is helpful for settlement purposes also.

10 THE COURT: Okay. But because I'm not a part of the  
11 settlement process, I don't want to sit here and ask you how  
12 would you use that information in the settlement process that  
13 you couldn't do it in the aggregate and so on.

14 So why don't I just put -- I mean, I think that that  
15 is something that between the special master and the mediators  
16 they need to tell me in the first instance how they foresee --  
17 what you've explained to them that you need. You've met with  
18 them. I wasn't there.

19 MR. GAMBILL: Okay.

20 THE COURT: So what I'll do is draft this amended  
21 order with their input. And when it comes -- you can  
22 certainly go to them and tell them we need this and this and  
23 this. They can inform me. I can put out some notice I'm  
24 about to order that to go to Gambill and Bettenhausen. And  
25 then somebody can object, like Mr. Mason is about to do.

1 MR. GAMBILL: Thank you, your Honor.

2 MR. MASON: Thank you, your Honor. Wayne Mason on  
3 behalf of the LAN defendants. I would be remiss to sit here  
4 and not I think address this because I do think it's important  
5 perhaps prospectively going forward, but even for this  
6 dialogue.

7 I think the case law that's been cited is not on  
8 point. And that typically in a civil litigation context that  
9 the fact that one has an attorney/client relationship is not  
10 privilege.

11 THE COURT: I agree.

12 MR. MASON: It is the nature of the communications  
13 between the parties that would be subject to that privilege.

14 THE COURT: Generally speaking, I think you're right.

15 MR. MASON: And the need for this and the dialogue  
16 that counsel just mentioned with respect to some of this. And  
17 I recognize we're in a class action situation not an MDL for  
18 instance. But the issue of Lone Pine orders and things like  
19 that of fleshing out some reality based information for  
20 facilitators is really important in this process.

21 Because signing up clients or making available on a  
22 website an ability to, you know, sign up is one thing. The  
23 reality of too many times in mass tort litigation that we've  
24 all experienced, there are representations about thousands and  
25 thousands of cases for instance. Many times often many go

1 away because they in reality do not meet even the minimum  
2 standard for ultimately satisfying a resolution discussion.

3 And so it's something that we want to be careful  
4 about. I'm not accusing counsel of hiding anything. But I  
5 think for the purposes if initially you're going to address  
6 this for facilitation purposes --

7 THE COURT: Yes.

8 MR. MASON: -- there is value in providing  
9 sufficient information for facilitators even if they're the  
10 ones that have the specifics of it within litigation to have  
11 an understanding of the reality base of more than just a  
12 representation that there's 10,000 or 4,000 or whatever. And  
13 so I just bring that to the Court's attention.

14 THE COURT: I think that's what I'm trying to do. So  
15 how are you disagreeing?

16 MR. MASON: Well, I just -- as you say, you'll hear  
17 from the mediator the and the like. I just wanted to set the  
18 stage --

19 THE COURT: Hearing from the mediators was if they  
20 intend to give you -- if they think they need to give you the  
21 name of each client with the address. Before they do that,  
22 even if it's part of the settlement process, I want to hear  
23 about it.

24 MR. MASON: And that's fair. And I know our special  
25 master's here. And I wanted -- since it's her order, I wanted

1 to just set the stage for the importance of what we're talking  
2 about here.

3 THE COURT: Okay.

4 MR. MASON: And that it can't just be this number and  
5 that type of thing. And there should be some additional  
6 information for the benefit of the special master and then  
7 ultimately the facilitators, if that's your intent.

8 THE COURT: Yeah. No, I agree.

9 MR. MASON: Thank you.

10 THE COURT: Thank you. Okay.

11 The other thing that I wanted to discuss that's not  
12 on the agenda is that I issued an order on November 1st which  
13 is regarding applications for interim individual co-liaison  
14 counsel and interim co-class counsel.

15 And sometime back I entered an order indicating that  
16 the terms for these leadership positions would be one year  
17 terms and that there would be an application process to  
18 evaluate whether the current leadership team continues or if  
19 one or more individuals join it or are substituted in. And  
20 maybe somebody wants to get out of it. Who knows.

21 So the applications are due Friday, November 30th.  
22 They're to be no longer than five pages setting forth  
23 counsel's interest in the position and qualifications for it.  
24 An appendix can be attached if it's necessary. I'm not trying  
25 to read volumes and volumes about everything everyone has ever

1 done, although that would be very interesting. So because I  
2 really do read what you submit. So just be aware.

3 So that has also been posted on the Court's public  
4 website for this case in the event there are people who are  
5 not here, who are not on the docket, who would want to know  
6 about it.

7 Then I think the only remaining issue is the next  
8 status conference is currently February 6th of 2019. But we  
9 will pick a January date to address the issues that were  
10 identified during the course of this hearing and then  
11 determine whether the February 6th case is needed.

12 There was one issue discussed in chambers which is  
13 individual plaintiffs' counsels' decision as to whether to  
14 amend their complaint before a decision is issued on the  
15 motions to dismiss Walters and Sirls.

16 MR. STERN: Three weeks, Your Honor.

17 THE COURT: Three weeks. Okay. There's so many  
18 different dates that we have set. Okay. So within three  
19 weeks you will let me know and to file it.

20 MR. STERN: Within three weeks. Sorry, Corey Stern.  
21 Within three weeks it is our plan to file a motion for leave  
22 to amend --

23 THE COURT: Right.

24 MR. STERN: -- the long form master complaint with as  
25 an exhibit the proposed long form, amended long form master

1 complaint.

2 THE COURT: Of course. Okay. And so at this point,  
3 I'll suspend my work on the current pending motions in Walters  
4 and Sirls.

5 MR. STERN: Yes, your Honor.

6 THE COURT: Okay. Then the other thing is that  
7 defense lawyers will see if they can craft a way to respond to  
8 that that is your material on why I shouldn't permit a motion  
9 to -- a motion to amend combined with in the alternative if I  
10 do, what is your motion to dismiss going to say so that we  
11 don't go through the exercise twice in the event that I permit  
12 the amendment.

13 Mr. Sanders.

14 MR. SANDERS: Your Honor, I just want to clarify for  
15 the record --

16 THE COURT: Could you say Herb Sanders on behalf --

17 MR. SANDERS: Herb Sanders on behalf of the Alexander  
18 plaintiffs. I just want to clarify for the record, I misspoke  
19 as I relates to our Exhibit A earlier. We do have two columns  
20 indicating the date in which property was acquired and the  
21 date up to which property has been held by the plaintiffs or  
22 maintained.

23 We have five individuals whom we have been unable to  
24 identify when they acquired the property and we will  
25 supplement in that regard.

1 THE COURT: Okay. That's what it looked like to me  
2 just glancing at it. Okay. All right.

3 Well, then that will conclude the hearing.

4 (Proceedings Concluded)

5 - - -

6

7 CERTIFICATE OF OFFICIAL COURT REPORTER

8 I, Jeseca C. Eddington, Federal Official Court  
9 Reporter, do hereby certify the foregoing 55 pages are a true  
10 and correct transcript of the above entitled proceedings.

11 /s/ JESECA C. EDDINGTON 12/4/2018  
12 Jeseca C. Eddington, RDR, RMR, CRR, FCRR Date

13

14

15

16

17

18

19

20

21

22

23

24

25