

November 6, 2019

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re FLINT WATER CASES Case No. 16-10444

STATUS CONFERENCE

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

NOVEMBER 6, 2019

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P R O C E E D I N G S

THE CLERK: Now calling the Flint Water Cases.

THE COURT: Well, thank you. Please be seated. And before we put appearances on the record, I want to introduce everyone to Darlene May. And Darlene is a court reporter for the Eastern District of Michigan.

And our court reporter, Jeseca, will be taking a maternity leave at some point between now and the end of the year when her baby is due to be born. And since we don't know when that is, we thought it would be a good idea for Darlene to be here to see the process that takes place and get -- start to become familiar with these cases so she can take over and there will be a seamless transition in terms of the record being accurate and complete.

So welcome to Darlene. And just hoping for the best for Jeseca and her family.

So why don't we start with appearances for the record. Yes.

MS. GREENSPAN: Deborah Greenspan, Special Master.

MR. WASHINGTON: Good afternoon, Judge. Val Washington on behalf of the Anderson plaintiffs and Joel Dennis Lee.

MS. BINGMAN: Good afternoon, Your Honor. Teresa Bingman representing class plaintiffs.

MR. NOVAK: Good afternoon, Your Honor. Paul Novak

1 on behalf of class plaintiffs.

2 MS. LINDSEY: Good afternoon, Your Honor. Cynthia
3 Lindsey on behalf of class plaintiffs.

4 MR. GOODMAN: Good afternoon, Your Honor. Bill
5 Goodman on behalf of the Marble plaintiffs and class
6 plaintiffs. And I have with me my assistant law student
7 intern Mr. James Johnson.

8 THE COURT: Great. Wonderful. I think I met Mr.
9 Johnson recently and suggested to him that he come along. We
10 just happen to be at a federal bar event that I was
11 participating in and I met him there.

12 MR. BLAKE: Good afternoon, Your Honor. Jayson
13 Blake, liaison counsel for the state court class action.

14 THE COURT: Thank you.

15 MS. YOUNG: Good afternoon, Your Honor. Trachelle
16 Young with the class plaintiffs.

17 MS. BEREZOFSKY: Good afternoon, Your Honor. Esther
18 Berezofsky for the class plaintiffs.

19 THE COURT: Okay.

20 MR. STERN: Your Honor, Corey Stern on behalf of
21 individual plaintiffs.

22 MR. NAPOLI: Good afternoon. Paul Napoli on behalf
23 of individual plaintiffs.

24 MR. PITT: Michael Pitt for class.

25 MR. LEOPOLD: Ted Leopold for the putative class.

1 MR. KIM: Good afternoon, Your Honor. William Kim
2 for the City of Flint and former Mayor Dayne Walling.

3 MR. BERG: Good afternoon, Your Honor. Rick Berg
4 here on behalf of City of Flint.

5 MR. RUSEK: Good afternoon, Your Honor. Alexander
6 Rusek on behalf of defendant Howard Croft.

7 MR. ERICKSON: Good afternoon, Your Honor. Philip
8 Erickson on behalf of defendants Lockwood Andrews and Newnam
9 and Leo A Daly company.

10 MR. CAMPBELL: Good afternoon, Your Honor. James
11 Campbell. I represent the VNA defendants.

12 MS. DEVINE: Alaina Devine for the VNA defendants.

13 MS. NAPOLI: Marie Napoli for individual plaintiffs.

14 MR. FAJEN: James Fajen, Adam Rosenthal.

15 THE COURT: Thank you.

16 MS. FLETCHER: Good afternoon, Your Honor. Shayla
17 Fletcher on behalf of Alexander plaintiffs.

18 MR. SEGARS: Good afternoon. Darryl Segars for the
19 Alexander plaintiffs.

20 MR. BARBIERI: Charles Barbieri for Patrick Cook and
21 Michael Prysby.

22 MR. THOMPSON: Good afternoon, Your Honor. Craig
23 Thompson for defendant Rowe Professional.

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

25 MR. MASON: Good afternoon, Your Honor. James Mason

1 for Washington plaintiffs.

2 THE COURT: Okay.

3 MR. MATEO: T. Santino Mateo on behalf of Darnell
4 Earley.

5 MR. PERKINS: Good afternoon, Your Honor. May it
6 please this honorable Court, my name is Todd Russell Perkins
7 appearing on behalf of Mr. Earley.

8 THE COURT: Thank you.

9 MR. MARKER: Good afternoon, Your Honor. Christopher
10 Marker here on behalf of Michael Glasgow.

11 MR. KUHL: Good afternoon. Richard Kuhl for the
12 state defendants.

13 MS. JACKSON: Krista Jackson for Stephen Busch.

14 MR. WEGLARZ: Good afternoon. Todd Weglarz for Brown
15 and Rogers plaintiffs.

16 MR. BERGER: Good afternoon, Your Honor. Jay Berger
17 on behalf of Brad Wurfel and Daniel Wyant.

18 MR. BAJOKA: Good afternoon, Your Honor. Edward
19 Bajoka appearing on behalf of Daugherty Johnson.

20 MR. KLEIN: Good afternoon. Sheldon Klein for the
21 city.

22 MS. CHINONIS: Good afternoon. Nancy Chinonis on
23 behalf of McLaren Flint.

24 MR. WISE: Good afternoon, Your Honor. Matt Wise on
25 behalf of Jeffrey Wright.

1 MR. GALVIN: Good afternoon, Your Honor. Joseph
2 Galvin on behalf of Jeffrey Wright.

3 MR. WOLF: Good afternoon, Your Honor. Barry Wolf on
4 behalf of Gerald Ambrose.

5 MR. JENSEN: Good afternoon, Your Honor. Larry
6 Jensen on behalf of Hurley Medical Center, Ann Newell, and
7 Nora Birchmeier.

8 MS. LEVENS: Emmy Levens on behalf of the proposed
9 class.

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

11 What we have is an agenda that has a fair amount on
12 it so we'll try to work through it pretty efficiently. I do
13 want to mention for anyone who's here from the City of Flint
14 who's not a lawyer or who is a defendant who's also not a
15 lawyer or anyone in between all of that, that in the last
16 month and a half or so since the last status conference on I
17 think it was September 25th, there has been a lot of activity
18 in the case.

19 Depositions are now being scheduled.
20 Interrogatories, document requests are going back and forth
21 and are being worked on. And so it just bears repeating that
22 this is remarkably complex litigation with a lot of moving
23 pieces. And that from my observation, the lawyers are working
24 hard on behalf of their clients on all sides of this case.

25 And so even though it may look as if we're not making

1 progress, it's my view from where I am that we are keeping to
2 the schedule that was set in the case management order. We
3 are making progress although it's never as fast as anybody
4 wants it to be.

5 So the first item on the agenda was to discuss issues
6 that came up in a proposed deposition protocol. At our last
7 status conference, I appointed a group of lawyers who
8 essentially volunteered. That was open to any lawyer on the
9 case so that we would have a representative group to come up
10 with a proposed protocol for scheduling depositions in a case
11 as complicated as this one.

12 That protocol was submitted to me through a e-mail to
13 my law clerk, Abigail DeHart. And I had some feedback and so
14 on. And then somewhat surprise to me, I received both some
15 e-mail and a motion from Mr. Kuhl and e-mail I think from MDEQ
16 defendants with some concerns about one narrow part of the
17 protocol.

18 So I don't know whether Mr. Kuhl wishes to have
19 anything further to say. I've read your motion. And as a
20 result of both the protocol looking at your motion, the
21 e-mails, and so on, I am prepared to amend the deposition
22 protocol.

23 And what the issue was is that the State of Michigan
24 was identified in the deposition protocol as a defendant given
25 16.6 percent of defendant's time at each deposition as opposed

1 to being viewed as a plaintiff, which the State of Michigan
2 lawyers represent the people in their case. The People of the
3 State of Michigan in state court in their case against the
4 Veolia defendants and the LAN defendants.

5 And so we had an initial discussion sort of a problem
6 solving discussion upstairs in chambers as to what could
7 resolve this dispute. And I'm prepared as a result of that to
8 enter additional time for the State of Michigan.

9 And I realized in coming downstairs from upstairs
10 that my math needs some sharpening of those skills. My math
11 skills were never strong. And I think they're only getting
12 weaker over time. So I'm not going to set forth those hours
13 right now.

14 But what I understand the State of Michigan to be
15 asking for is a total of three hours to be taken. Half from
16 plaintiffs' time. Half from defendant's time. And I think
17 that may be a little bit more than can possibly be given so
18 that other defendants and plaintiffs all have time to ask
19 their questions.

20 But I'm prepared to enter something close to that for
21 when at least VNA and LAN individuals or witnesses are being
22 deposed. Something less for other witnesses. And the
23 question outstanding is how much time when the City of Flint
24 witnesses are being deposed. So I think I've got enough
25 information to go back upstairs and make this decision.

1 But Mr. Kuhl, is there anything further you want to
2 say on your motion?

3 MR. KUHL: No, Your Honor. We stand by what we
4 filed.

5 THE COURT: Okay. And is there anything further from
6 this? Okay. Mr. Barbieri.

7 MR. BARBIERI: Yes, Your Honor. As indicated --

8 THE COURT: You know, it would be very helpful if
9 you're going to say more than a short yes or no such as what
10 Mr. Kuhl did, if you state your name for the record. Because
11 although Jeseca and I have now gotten to know most of you,
12 we're introducing Darlene.

13 MR. BARBIERI: Thank you, your Honor. Charles
14 Barbieri. I'm speaking on behalf of the MDEQ defendants at
15 this point.

16 As indicated in chambers, we had requested that we be
17 allotted some time which we did not believe to be the case in
18 reviewing the draft of the amended case management order and
19 protocol.

20 And I didn't suggest a percentage, but I suggested
21 some minutes, about 30 minutes in particular for what would be
22 considered to be plaintiffs' depositions. And then for any
23 other depositions involving other defendants, I suggested
24 around one hour.

25 THE COURT: Okay.

1 MR. BARBIERI: Thank you, your Honor.

2 THE COURT: Okay. So I'll sort all of that out. And
3 I just should note for everybody the second amended case
4 management order has not yet been entered. But as soon as I
5 resolve this issue, I intend to enter it. So now would be the
6 time to set forth your concerns about it.

7 And what I decided in looking through it is that it
8 is my intention to have one consolidated case management order
9 that progresses with the case.

10 So instead of just filing a new appendix in three
11 months or some new issue comes up, we'll reenter the third
12 amended case management order so there's one working document
13 that anyone in this case can take a look at and it will be the
14 most recent amended case management order that will be the
15 operative order.

16 So to that end, I had asked the lawyers to
17 consolidate this all into one document. And I think Ms.
18 Devine may have been the one responsible for assisting with
19 that. And thank you for that work.

20 So is there anything else on the first with respect
21 to discovery at this point?

22 The second amended case management order also has
23 incorporated into it the Court's discovery dispute resolution
24 process. So I would just recommend that you look at it before
25 the calling or contacting the court via e-mail for the next

1 discovery dispute which will inevitably take place so that it
2 can be adhered to strictly. And then we know what -- everyone
3 knows what will be discussed and what won't.

4 And to the extent anyone sort of wonders why am I
5 handling these discovery disputes when I have 219 other cases
6 on my docket. And I can answer that quite simply, which is
7 that all of the cases are important cases. But this is a
8 particularly important case in terms of management of the case
9 itself.

10 And the bird's eye view that I get by being able to
11 participate in the discovery dispute resolution, it helps me
12 understand what the lawyers are doing, how you're approaching
13 the litigation, what the problem areas are, and what I can do
14 to help resolve them. So I think it helps me in the long --
15 for the long haul in being able to make fair decisions as the
16 cases progress in terms of just understanding what -- who is
17 doing what and how are they doing it and what's going on.

18 So if it gets to a point where it is just
19 overwhelming, then I'll try to get some help with an
20 additional special master or some other method. Or I'll beg
21 Ms. Greenspan to help if needed. But for now, I'm learning a
22 great deal about the case staying on top of it. And I think
23 it will help me ultimately manage it in the future.

24 So the next item was coordination of cases involving
25 the EPA. And as many of you know, there are federal tort

1 claims act cases, some 8,000 individual plaintiffs in front of
2 Judge Parker in I think there are now five cases with a sum
3 total of those individuals in it.

4 Several people suggested or several parties suggested
5 this as an issue for discussion. We talked about it upstairs
6 as well. My goal is that all of the Flint water cases be
7 handled in an efficient and fair productive way. So I think
8 the parties are going to have further discussion on whether
9 you're going to seek to have Judge Parker's case assigned to
10 this Court and then to have me consolidate if it is
11 reassigned.

12 But is there anything further? I think that was Mr.
13 Campbell who had already circulated a request for concurrence
14 in that.

15 MR. CAMPBELL: Yes, Your Honor.

16 THE COURT: So Mr. Campbell on behalf of VNA.

17 MR. CAMPBELL: I'm sorry, Judge.

18 THE COURT: That's all right.

19 MR. CAMPBELL: James Campbell on behalf of VNA.

20 Your Honor, as we discussed in your chambers, we'll
21 convene on a meet and confer and determine where the parties
22 are and proceed from there.

23 THE COURT: Okay.

24 MR. CAMPBELL: Thank you.

25 THE COURT: Thank you. Then next up is the motion to

1 strike class allegations.

2 MR. CAMPBELL: Good afternoon again, Your Honor.
3 James Campbell on behalf of VNA, the three VNA defendants.

4 So this motion has been pending for some time. And
5 we filed it with the motions to dismiss originally. It's had
6 some refinement and with the fourth amended complaint Your
7 Honor decided to hear it today. So there is a history with
8 this.

9 I feel as though the issues are in the brief. So as
10 I prepared for this, I was somewhat -- I don't want to belabor
11 the point. And I -- the issues are really three. The class
12 definition as it currently stands is a failsafe class for the
13 reasons why we state in the briefing. That is that the -- it
14 incorporates liability issues so that if the case were tried
15 and lost by the plaintiffs, no one would be bound other than
16 the class representative plaintiffs.

17 THE COURT: In what words do you think incorporate
18 liability? The word toxic?

19 MR. CAMPBELL: It's the two phrases read together,
20 Judge. Exposed to toxic water and experienced injuries and
21 damages. With that is implicit a causation argument.

22 In the plaintiffs' briefing in response it was it
23 could be any injuries or damages. You know it's not related
24 to the toxic water, the alleged toxic water in Flint. That
25 somehow that that's different. But that's one of the issues,

1 that causation is implicit when those are read together.

2 Injuries and damages presuppose that there are
3 injuries and damages related to the water. And that creates a
4 management issue for the Court in figuring out whether or not
5 any individual plaintiff is actually injured or damaged by the
6 Flint water issues.

7 So those would be -- there's really two or three
8 toxic water as it's phrased in the complaint injuries and
9 damages. That phrase. And the causation element that is
10 created when those phrases are read together.

11 THE COURT: Okay.

12 MR. CAMPBELL: So and that's throughout the class
13 definitions in the fourth amended complaint.

14 The other issues that we raise, Your Honor, are that
15 is apparently the class definitions are overinclusive as they
16 apply to the VNA defendants. It's undisputed that VNA didn't
17 arrive in Flint until February 2015. And the involvement
18 ended in 30 to 60 days or so.

19 THE COURT: But can't that issue just be handled in
20 an efficient way either in a verdict form that here's the
21 class definition with respect to VNA? If you find for
22 plaintiffs you may only find damages that occurred from
23 whatever date in 2015 to the following day?

24 MR. CAMPBELL: I think that that is an inefficient
25 way to deal with it, Your Honor. Because it's undisputed that

1 VNA was not on scene until nine months after the issue
2 started. With the water switch in April 2014 there's nine
3 months of time that VNA simply can't have anything to do with.

4 THE COURT: So if the Court were to certify a class,
5 you're suggesting there would be a separate class for VNA?

6 MR. CAMPBELL: As it would be for VNA in order for it
7 to make sense as to VNA and not be overinclusive, it would
8 start from the date of our involvement going forward. And we
9 can't -- you know, we weren't there. We didn't -- and it's
10 not that this is a fact outside the pleadings. That's how
11 it's alleged in the complaint. It's undisputed.

12 THE COURT: No, it's undisputed. It's absolutely
13 undisputed. And any order of damages for things that took
14 place before VNA arrived on the scene that are determined
15 against VNA would have to be set aside. So there would have
16 to be a method at trial to ensure that the jury understands
17 that the date that VNA's liability could have possibly begun
18 was the date you began your work there.

19 MR. CAMPBELL: That's right.

20 THE COURT: So I have no doubt that you're right on
21 that. My doubt is that it has to take place at this point in
22 the case and that it has to involve a whole separate class
23 being identified for VNA to avoid this problem.

24 MR. CAMPBELL: As these allegations are advanced
25 against VNA, I respectfully disagree with you, Your Honor. On

1 a class definition basis as to VNA as opposed to some other
2 defendant, this class is overbroad based upon fair reading of
3 the complaint itself because of the issue we're talking about.

4 THE COURT: Right. No, I agree with you that it's
5 overbroad as currently defined with respect to your client
6 looking just at the dates. It just can't possibly be that if
7 somebody was only living in Flint from April 25, 2014, until a
8 month before VNA arrived, they could be in the class as it's
9 currently defined but they couldn't find against your client.

10 MR. CAMPBELL: That's correct.

11 THE COURT: The jury couldn't find against your
12 client on behalf of those plaintiffs. So that will have to
13 get resolved.

14 MR. CAMPBELL: And I was thinking about why should
15 Your Honor take action now on the pleadings.

16 THE COURT: Yeah. And you said in your papers I
17 should take action now because you don't know what discovery
18 to take.

19 MR. CAMPBELL: It's a discovery issue, Your Honor.
20 It's a large case as you have frequently opened your
21 conferences on. And for -- just for the efficiency reasons or
22 the discovery reasons and when we ultimately get to a class
23 certification hearing --

24 THE COURT: But tell me what discovery -- let's say
25 today I say I must strike these classes and I must create one

1 this afternoon and it's going to say exposed to water in Flint
2 from the date VNA showed up moving forward. What discovery
3 would you do differently?

4 MR. CAMPBELL: Well, Your Honor, discovery is defined
5 by Rule 26 so it has to be related to a claim that's advanced.
6 Since there can't be any claim advanced against VNA for things
7 that took place before we were there, the discovery as the
8 those issues is improper.

9 THE COURT: Well, I'm here to tell you you don't have
10 to worry about those issues before you showed up. It's on the
11 record now. Don't take any discovery about what VNA did in
12 Flint before VNA went to Flint.

13 MR. CAMPBELL: Okay. Well, I can tell you that at
14 least a fair reading of some of the discovery it goes beyond
15 that, so.

16 THE COURT: There may be relevant discovery of your
17 company about how do you prevent negligence or how -- what are
18 your duties and how -- so I'm not saying you don't have to
19 answer discovery about your company's work before April 25th
20 of 2014.

21 I'm just suggesting when you go to defend yourself
22 and figure out what depositions you need to take and what
23 questions you need to take, your liability starts when you
24 showed up. And it can't -- you can't be held responsible for
25 things that happened before then.

1 So I don't find that to be very complicated. That's
2 the one thing in this whole case that seems uncomplicated to
3 me.

4 MR. CAMPBELL: The other points that we raised are
5 there's claims about injunctive relief that may effect other
6 defendants. They don't effect VNA. So those class
7 definitions should be amended because it doesn't apply to us.
8 There's no claim.

9 THE COURT: Okay.

10 MR. CAMPBELL: And the final issue we raise is as to
11 the issues that are identified. I think the fourth amended
12 complaint identifies 12 issues, only six of which originally
13 pertain to VNA. I believe the plaintiffs agree that three of
14 the remaining six have been eliminated by Your Honor's
15 previous rulings and there's only three issues that pertain to
16 VNA.

17 THE COURT: Right. And so currently there's a class
18 that's defined by race, for example. Is this what you're
19 getting at at this time?

20 MR. CAMPBELL: That's correct.

21 THE COURT: Yeah. And so -- well, let me hear a
22 response from plaintiffs.

23 MR. CAMPBELL: Thank you.

24 MS. LEVENS: Good afternoon, Your Honor. Emmy Levens
25 for the putative class.

1 THE COURT: Thank you.

2 MS. LEVENS: It's class plaintiffs' position that
3 Veolia and the other defendants that have signed on have not
4 overcome the strong presumption that we're entitled to get
5 discovery before proceeding with the discussion of whether or
6 not this class should be certified.

7 THE COURT: Yeah. This isn't about certification or
8 discovery leading up to a motion for class certification. As
9 I understand Mr. Campbell and his client's argument it's that
10 he disagrees with your proposed definitions of the class.

11 MS. LEVENS: Yes, Your Honor. But it's commonplace
12 that the class definitions were fined to conform to what comes
13 out of discovery at the point at which we move for class
14 certification.

15 And then the Court has the benefit of both a refined
16 class definition as well as the examples of the types of
17 evidence the class plaintiffs intend to rely on. And that is
18 how the Court is able to assess that evidence to see how many
19 of the issues that the plaintiffs are trying to get certified
20 are provable using class wide evidence.

21 I think if you look at how the Sixth Circuit has
22 addressed this in a couple of cases, both Randleman and Young
23 were insurance cases. They both involved essentially breach
24 of contract cases. And they both had definitions that on some
25 level talked about injuries or damages.

1 In Randleman the Sixth Circuit said this isn't okay.
2 This is failsafe. We need -- we can't certify this class. In
3 Young, the court said it was fine.

4 So what was the key difference between these two
5 cases? The key difference was the type of evidence the
6 plaintiffs wanted to proffer to prove up their claims.

7 In Young, the plaintiffs had evidence that there were
8 certain presumptions that it was a common policy that applied
9 to all of the proposed class members. Whereas in Randleman
10 through discovery it became apparent that the actual issue
11 that the class representatives were bringing did not apply in
12 a widespread manner to the entire class.

13 And so that's why I think there is this strong
14 presumption of attempting to modify, amend, strike class
15 definitions at this stage.

16 It's why in Your Honor's opinion you said unless the
17 class definition as phrased clearly violates established law,
18 that we shouldn't be striking it now. We should be proceeding
19 with discovery and then assessing the exact class that
20 plaintiffs seek to have certified. And the precise types of
21 evidence that we're providing Your Honor with to prove those
22 different classes' claims.

23 THE COURT: Okay. So here's my perspective on this,
24 Mr. Campbell and Ms. Levens, which is that I don't see that
25 much has changed from my decision in the Carthan fourth

1 amended complaint in that the state of the law in the Sixth
2 Circuit and I think in the Supreme Court, but mostly in the
3 Sixth Circuit is set forth in the Operating Engineers Local
4 324 Healthcare Plan case that motions to strike are not
5 frequently granted because there's a presumption in a class
6 action lawsuit should be that plaintiffs will have the
7 opportunity to conduct discovery and to proceed to argue
8 certification of the class.

9 Now that shifts if you can show that it's an
10 impermissible class, which I think is what Mr. Campbell is
11 trying to do and has put forth as a failsafe class where heads
12 I win, tails you lose. And I think the plaintiffs have made
13 an argument that is colorable and is reasonable that saying
14 exposed to toxic Flint water.

15 We know whether the word toxic implies something more
16 than it is meant. I don't know. But we know the water
17 changed April 25th of 2014. We know that issues took place.
18 So I don't think that on its own incorporates an issue of
19 liability.

20 And the fact that injuries and damages are in there,
21 this may need work. I'm not suggesting that this is the final
22 class that ought to be proposed by the plaintiffs. But I do
23 -- the law states that either the Court or the plaintiffs can
24 refashion the class. And the plaintiffs have suggested some
25 alternative classes in their motion or in their last proposed

1 amended complaint.

2 I'm not prepared to rule on what I think -- how I
3 think they should proceed, if they should proceed at all. I
4 think that's something that I'm better off leaving to the
5 plaintiffs in the first instance.

6 If they come forward at the motion to certify stage
7 and can't get over the finish line and I think there is a way
8 that it can happen, then it would be my duty to set that
9 forth. But I don't think that we're there yet.

10 And I think plaintiffs have pointed out, Ms. Levens
11 in her brief on this, that there are still legal questions
12 where somebody could be a member of this class and still lose
13 but not be able to bring their own case. So there are still
14 questions.

15 She's pointed out approximate cause that are separate
16 from determining class membership that are not incorporated
17 into the definition in other words. There are other issues
18 that would still need to be resolved.

19 So I think it's not a glaring failsafe class. It
20 kind of looks like it and feels like it a little bit. I'll
21 put that out there, that it's close. When you say we're
22 limiting this to people who were exposed to toxic water and
23 had damages.

24 But I -- what I looked at most carefully Mr. Campbell
25 in your brief was the allegation or concern that you don't

1 know how to litigate your case with these current definitions
2 out there. And I'm sympathetic to that so I tried to think it
3 through of how would it change a single deposition
4 interrogatory or document request or request to admit or
5 anything about your case to have a new definition put forward
6 by plaintiffs right now.

7 And I simply can't see how it would impact you in any
8 way that cries out or calls out in any way for relief at this
9 point.

10 So my perspective on this is what I think I've been
11 trying to telegraph the whole time, which is to deny it
12 without prejudice. I mean, this very well could be set forth
13 in your response to the motion to certify when we know exactly
14 which of these alternatives the plaintiffs are going to stick
15 with.

16 We know the equal protection claim is out. So I
17 suggest you not spend a lot of time defending that. Even if
18 it's still listed as a class, it's just a thought. So that's
19 what I would do -- what I will do with this at this point.

20 And you certainly had a right to bring the motion,
21 brief it. It was responded to. And I think you can litigate
22 your case and not be at a disadvantage with the current
23 definitions. Thank you. You may sit down.

24 MS. LEVENS: Thank you.

25 MR. CAMPBELL: Thank you, your Honor.

1 THE COURT: Sure. Thank you.

2 So let's see where we are. Now we are up to the
3 motion for protective order by Mr. Ambrose, Mr. Earley, and
4 Mr. Croft.

5 MR. RUSEK: Good afternoon, again, Your Honor.
6 Alexander Rusek on behalf of Mr. Croft. And I'm also speaking
7 today for Mr. Ambrose and Mr. Earley.

8 These are the three defendants who have brought this
9 motion. And the three defendants who are in pretty much the
10 same position in relation to this civil case and the criminal
11 cases that are currently ongoing.

12 All three of these gentlemen were charged with false
13 pretenses over a hundred thousand dollars, conspiracy to
14 commit the same. Mr. Ambrose and Mr. Earley were charged with
15 additional essentially negligence in office charges. And then
16 all three of these gentlemen have been put on notice or
17 threatened in the past with being charged with involuntary
18 manslaughter by the former Office of Special Counsel.

19 We spent quite a bit of time in our briefing giving
20 the background and the facts leading up to this motion. So
21 I'm not going to be belabor them other than to discuss some of
22 the very relevant points that we have right now.

23 THE COURT: Okay.

24 MR. RUSEK: The charges against the three gentlemen
25 were brought in December of 2016 when they were charged. The

1 false pretenses charges arose from their alleged roles in the
2 City of Flint and the bonding that surrounded the switch from
3 DWSD water to the KWA pipeline system that eventually resulted
4 in the switch of the water in April of 2014.

5 In June of this year, those charges were officially
6 dismissed by the new solicitor general, Ms. Hammoud and they
7 were dismissed without prejudice. These gentlemen were under
8 the specter of these charges for multiple years.

9 Mr. Ambrose waived his preliminary examination. Mr.
10 Cross and Mr. Earley had approximately a morning of testimony
11 at preliminary examination. Otherwise the cases were still
12 ongoing up until a point that they were dismissed in June of
13 this year.

14 Over the course of time, the former Office of Special
15 Counsel produced millions of documents. It is a huge criminal
16 case. It's pretty unprecedented to have a preliminary
17 examination be open for years at a time.

18 Generally you have a preliminary examination in state
19 court within 21 days of arraignment. Here these gentlemen
20 were under indictment for years. And right now, the solicitor
21 general is reviewing those millions of pages of documents.
22 She only came into office in January of this year. And she
23 was appointed to look into this case along with Wayne County
24 prosecutor Kim Worthy a couple of months after she came into
25 office.

1 So they haven't had a ton of time to review this
2 case. As recent as Monday of this week, the defense teams for
3 Mr. Earley and Mr. Croft have been in contact with both
4 Solicitor General Hammoud and Kim Worthy. And the criminal
5 cases are active at this point even though these gentlemen
6 aren't charged. The specter --

7 THE COURT: What do you mean they were in touch with
8 her or them? That criminal defense counsel for these three
9 individual city defendants were in touch with the prosecutors?

10 MR. RUSEK: For Mr. Croft and Mr. Earley, I can't
11 reveal the contents. But we are in active negotiations and
12 contact with the prosecutorial team --

13 THE COURT: I see.

14 MR. RUSEK: -- in regards to the prior charges and
15 these involuntary manslaughter charges that were threatened by
16 the former team.

17 THE COURT: Okay.

18 MR. RUSEK: So it's still an active open
19 communication without revealing what that is at this time.

20 THE COURT: Okay. Fair enough.

21 MR. RUSEK: So right now that investigation is still
22 open. The charges were dismissed without prejudice.

23 THE COURT: Right.

24 MR. RUSEK: So these gentlemen who were under
25 indictment for years still have a very real fear that they may

1 once again be charged with crimes. But because of the statute
2 of limitations for false pretenses, we know that there is an
3 end date because the allegations all arose before April of
4 2014.

5 THE COURT: Right.

6 MR. RUSEK: They involved a switch and the bonding
7 for -- to pay for the switch. So we know that six years after
8 April of 2014 places this in April of next year. We expect
9 that the prosecutor team that's now in place is going to make
10 some substantial decisions about these charges because they're
11 forced to by April of next year. Otherwise they can't bring
12 those cases.

13 The Veolia defendants in their response, they brought
14 up a valid point that involuntary manslaughter does have a
15 ten-year statute of limitations which would put us several
16 years down the line before that decision has to be made.

17 But we have significant charging decisions that will
18 be made by April of next year. They just have to. Otherwise
19 those charges are lost forever. There's no tolling and
20 provisions that I can think of that would preclude or, excuse
21 me, would allow the prosecutors to come back.

22 So the three defendants who are in this similar
23 position, we conferred and we thought through how can we
24 balance these gentlemen's Fifth Amendment rights and
25 protections along with participating in this litigation,

1 moving things forward, not asking to stay the entire case to
2 them or anything like that.

3 And these three defendants they've already engaged in
4 document production, I believe tens of thousands of documents
5 individually. And then the city has also produced all of the
6 e-mails that these gentlemen sent during their time when they
7 were with the city. Which their time with the city is
8 concurrent with the criminal charges that may be brought
9 against them.

10 It's only their roles at the city. There's nothing
11 that I've heard in this litigation or that litigation for any
12 wrongdoing that they may have done outside of their position.

13 THE COURT: Mr. Rusek, have these three individuals
14 depositions been scheduled already?

15 MR. RUSEK: They were originally scheduled by LAN
16 which prompted us to file the motion for protective order.
17 And because we wanted to address critical issues going forward
18 at the same time, part of that protective order and motion was
19 also to address interrogatories and admissions that have not
20 been served on the three defendants at this time.

21 THE COURT: Okay.

22 MR. RUSEK: And the depositions were adjourned as
23 soon as we filed that motion for protective order. And so
24 that the Court could rule on it. Because these three
25 defendants are in I believe a very unique position in this

1 litigation.

2 We have defendants such as Daugherty Johnson and
3 Michael Glasgow who were also with the city. They entered
4 into plea agreements. And they're currently on probation and
5 they'll have their charges dismissed as part of their plea
6 agreements. They don't have the same Fifth Amendment concerns
7 that we do. And the same applies to some of the MDEQ
8 defendants and DHS defendants as well.

9 So with that in mind, we tried to balance as best we
10 could those two factors of protecting their rights, not
11 wasting the time of the litigants in this matter by doing
12 depositions where potentially we're spending two days saying
13 upon advice of counsel, I am respectfully declining to answer
14 because of the Fifth Amendment.

15 THE COURT: I don't want to come between you and your
16 -- the recommendation to your client as to how your client or
17 the other lawyers and their clients proceed. But if I
18 balanced the I believe it's five factors -- maybe there's more
19 than five -- as to whether to grant a stay in this -- under
20 these circumstances -- there are six factors.

21 Let's assume -- and we'll go through that in a minute
22 -- that I decide against that. There was an alternative
23 proposal of sealing and otherwise protecting the depositions
24 of these three defendants as well as further written discovery
25 for them. And one of the proposals which I have the authority

1 to do under Federal Rule of Civil Procedure 26(c)(1) was to
2 seal the deposition and the documents pending the May 2020
3 time period when the threat of criminal prosecution
4 dramatically goes down.

5 And I would hesitate to say that if the state isn't
6 considering involuntary manslaughter charges, they certainly
7 would need to make a decision on neglect of duty and the other
8 charges before then. So that could at least be a signal as to
9 whether they're headed in that direction.

10 MR. RUSEK: Absolutely, Your Honor. And that I
11 think is our --

12 THE COURT: Yeah. I think --

13 MR. RUSEK: -- opinion as well.

14 THE COURT: -- that's where you're coming from.

15 MR. RUSEK: We're going to do something by then.

16 THE COURT: But let's say I order this alternative
17 sealing of depositions limiting who can attend to -- I think
18 this is a compelling reason for limiting who can have access
19 to the depositions. Would you still then be objecting to each
20 -- you can't make a blanket objection to questions before
21 they've been asked. But is this going to be a productive
22 exercise?

23 MR. RUSEK: I don't believe so, Your Honor. And that
24 was the LAN proposal, I believe.

25 THE COURT: Yeah.

1 MR. RUSEK: Is, you know, let's do the depositions
2 now. We'll seal them. And then unseal in May of 2020. And
3 essentially that doesn't really do anything to advance the
4 litigation. Because if they testified tomorrow and the
5 prosecutors charge them in March of next year, when that
6 testimony is unsealed, if they didn't assert the Fifth
7 Amendment, they now have under oath sworn testimony that could
8 be used against them in the prosecution of those cases.

9 THE COURT: If they're searched, yeah.

10 MR. RUSEK: So it's very likely highly likely that we
11 would be asserting the Fifth Amendment to essentially every
12 question that could be asked. And that was one of the first
13 factors in deciding whether or not to stay or postpone
14 depositions for the Fifth Amendment is how much do these cases
15 overlap. And for these three defendants, there's not much
16 that can be asked that is not overlapping in both cases.

17 THE COURT: Well, certainly they could be asked about
18 their job duties. They could be asked about did you attend a
19 meeting, not what you said or what your recommendation was.
20 But I can see that there would be questions that could be
21 asked that would not implicate them criminally.

22 MR. RUSEK: There could be, Your Honor. But even if
23 there was a question of, "Did you attend this meeting? Who
24 was there?" That could be used against them to prove such as
25 a neglect of duties. What are your duties? Well, I believed

1 that I had to do XYZ and I didn't do XYZ. That could be a
2 neglect of duty charge potentially. I'm opening up liability.

3 So I think any question that really relates to their
4 role with the city has the potential to be the basis for a
5 charge or lead to more evidence that could support additional
6 charges or be used in the prosecution of these gentlemen.

7 THE COURT: Okay.

8 MR. RUSEK: And we also have the issues I believe it
9 was the Shane Group, Inc. case.

10 THE COURT: Yeah. But Shane is so very different.
11 So very different.

12 MR. RUSEK: I agree.

13 THE COURT: Yeah. Because Shane was after a case was
14 finally resolved, a class action was finally resolved against
15 Blue Cross Blue Shield that had millions supposedly. Well --

16 MR. RUSEK: That's correct, Your Honor. Some of the
17 class members objected to the settlement. And then the basis
18 for that decision was essentially they didn't know what the
19 evidence was so how could they consent to a class settlement.

20 THE COURT: And we don't have that here. We're in
21 discovery. I think everyone in this room should be hopeful
22 that this case resolves prior to a trial by every -- all the
23 plaintiffs. But so we don't know if that's going to happen.
24 And if we get there and these depositions are sealed. And
25 well there wouldn't be any material in the depositions anyway

1 from what you're saying.

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

3 THE COURT: So it's not like the public would be
4 precluded from knowing anything at all.

5 MR. RUSEK: My takeaway from the Shane case is that
6 we have the discovery phase and then the adjudication case.

7 THE COURT: Right.

8 MR. RUSEK: So the sealed transcripts, they're
9 admissions. They would become public at some point. So we
10 know that. They can't just be kept confidential in
11 perpetuity. And that's our concern.

12 THE COURT: Not in perpetuity. But May 2020 is not
13 perpetuity. It's like six and a half or seven months from.

14 MR. RUSEK: It seems far away at this point.

15 THE COURT: It seems close to me.

16 MR. RUSEK: I'm trying to put off winter.

17 THE COURT: Yeah. But see we'll be on the other side
18 of winter.

19 MR. RUSEK: The big problem with unsealing is we
20 don't know if charges -- so if depositions occurred tomorrow,
21 these gentlemen don't assert the Fifth. They can be charged
22 on Friday. And then in May, their cases won't be adjudicated
23 by then in the criminal system. I can pretty much assert the
24 Court of that even if they started on Friday. Then their
25 testimony becomes public and can be used against them.

1 So at this point, until we're in May and we know that
2 statute of limitations has run, the specter of the dangers of
3 providing testimony is very real. And it's at the forefront
4 of these gentlemen's minds. And I can't blame them.

5 I can speak for Mr. Croft is that he's endured years
6 of being under indictment with truly no movement of the cases.
7 And many reasons for that I won't share with the Court.

8 THE COURT: Right.

9 MR. RUSEK: But it's certainly a real concern. And
10 some of the case law I cite is even if you're an innocent
11 person, the Fifth Amendment still protects you.

12 THE COURT: Oh, absolutely.

13 MR. RUSEK: And that's for these gentlemen is really
14 their concerns is how they've been treated in the past in
15 these prosecutions from their point of view of course. And
16 anything that they say, even if they tell the truth and they
17 don't believe they've committed a crime, that could be used
18 against them to pursue charges against them in the future.

19 And I don't think it's fantastical or out there
20 because they've lived this for years. And they've been under
21 those indictments for years until June of this year.

22 We also have a lot of discovery. And I'm not sure
23 how much was shared with the Court as far as the scheduling of
24 depositions. By my count, we have approximately 50
25 depositions scheduled, 100 days of depositions scheduled. And

1 that is through April 16th of next year.

2 So everyone's going to be very busy. And asking to
3 postpone their depositions until May of next year fits right
4 in that timeline of where we're already at.

5 THE COURT: Okay. Well, let me hear -- VNA and LAN
6 filed responses and --

7 MR. ERICKSON: Your Honor, Philip Erickson on behalf
8 of the LAN defendants. We -- the motion was filed in response
9 to our notice of depositions.

10 THE COURT: Right.

11 MR. ERICKSON: So I'll go first. First thing I
12 wanted to mention is respond to the Court's question. The
13 question was have any of these gentlemen already testified?
14 And the answer to that I believe is yes. I believe that both
15 Mr. Ambrose and Mr. Earley have testified at length before
16 Congress regarding matters at issue.

17 I have read the transcript of Mr. Earley. I'm not
18 sure I read the transcript of Mr. Ambrose, but it is my belief
19 that he has also testified. And as for Mr. Earley, I know
20 that he testified at length without taking the Fifth. And
21 those transcripts I think are available through a Google
22 search.

23 THE COURT: When was that testimony?

24 MR. RUSEK: It was part of the congressional
25 investigation. I believe that the testimony would have

1 occurred sometime in early 2018 is a good ballpark.

2 THE COURT: Okay. Have the original criminal charges
3 been lodged by that time?

4 MR. ERICKSON: I don't know. We could check.
5 They're attached to --

6 THE COURT: Mr. Rusek is going to tell us.

7 MR. RUSEK: Alexander Rusek on behalf of Mr. Croft,
8 Your Honor. I believe that that testimony came prior to
9 December of 2016 when the criminal charges were issued. Not
10 after the criminal charges were issued.

11 THE COURT: Okay.

12 MR. ERICKSON: Turning to our --

13 THE COURT: Mr. Erickson, what benefit will you or
14 your client have if the depositions are sealed -- take place,
15 sealed or unsealed, and they take the Fifth?

16 MR. ERICKSON: So these witnesses are central to the
17 litigation. Mr. Earley and Mr. Ambrose were emergency
18 managers, key decisionmakers at the time that the decision was
19 made. They were -- Mr. Ambrose and Mr. Croft were key
20 decisionmakers at the time the decision was made to join KWA.
21 Mr. Earley was the emergency manager at the time of the
22 changeover to the new water source in April of 2014.

23 And these people are so central to the litigation
24 that all the parties other than these individuals would be
25 harmed by not getting information that they have to place

1 other events into context as discovery proceeds.

2 THE COURT: But it's sounding like you're not going
3 to get that information.

4 MR. ERICKSON: Well, what we have proposed --

5 THE COURT: You proposed the sealing, which I think
6 is very -- sealing, S-E-A-L-I-N-G -- which is a very
7 thoughtful proposal, very appealing to me. But we're also
8 learning that these witnesses may perceive risk and plead the
9 Fifth and not testify, not answer your questions.

10 MR. ERICKSON: I will get to your direct question.

11 THE COURT: Okay.

12 MR. ERICKSON: But let me back up a step and set it
13 up if I might.

14 So the witnesses Ambrose, Earley, and Croft, have
15 asserted that they shouldn't have to testify at all until
16 April of next year. Excuse me, May of next year. And the
17 Veolia defendants have said that they shouldn't have any
18 relief and they should be forced to testify now and they
19 should have to make decisions now about whether they want to
20 take the Fifth or not.

21 And our only tweak from the Veolia position is that
22 the transcripts would be sealed between now and May 1st. So
23 that would give them some relief. But they still would have
24 to make decisions now about whether to take the Fifth or not.

25 And as --

1 THE COURT: But Mr. Rusek says if you take his
2 client's deposition in February and he's charged in March and
3 it's unsealed in May and he -- his client answers the
4 questions, that will be evidence that could be used against
5 him in the March prosecution.

6 MR. ERICKSON: And that is true. And that is why
7 they have to make a determination now as to whether to take
8 the Fifth or not question by question.

9 I would note that most of the lawyers -- the lawyers
10 pretty much agree on all of the law here. We agree that they
11 have to make that -- we agree that if they make that
12 determination and they take the Fifth, that there can be a
13 negative inference that the Court or the jury could take with
14 regard to that testimony.

15 So I don't believe that these people are going to be
16 as cavalier as was suggested in taking the Fifth.

17 THE COURT: I see.

18 MR. ERICKSON: Because you know, are they really
19 going to say we don't want to tell you what meetings we
20 attended? I mean, I don't think they would. I think that
21 would be not a good strategy on their part.

22 So you know they're the ones who suggested the end
23 date. They suggested the end of April as the end date that
24 they needed some relief for. And so we proposed what we
25 proposed as a compromise. And I think it's maybe the most

1 workable approach.

2 THE COURT: Okay.

3 MR. ERICKSON: Veolia raised an argument that we
4 didn't raise in our brief that I think is important here. I
5 mean, they lay out that there's due process considerations for
6 the Court and for the plaintiffs and for all the other
7 defendants. And you know these witnesses are essential to the
8 litigation.

9 THE COURT: Okay.

10 MR. ERICKSON: The final thing that I want to say, I
11 just want to emphasize the case that we cited on page 2 of our
12 brief, FTC v E.M.A. Nationwide.

13 THE COURT: Right.

14 MR. ERICKSON: Stands for the proposition that this
15 is extraordinary relief that the witnesses are requesting and
16 the Court is not at all required to do this what they offer.

17 And then finally, they had suggested in their papers
18 that as an alternative form of relief the Court should limit
19 the areas of inquiry. And there's never really been any
20 fleshing out of what that means. And our position is that
21 it's unduly vague and just unworkable.

22 THE COURT: Right. I agree with that.

23 MR. ERICKSON: And that's all I have. Thank you.

24 THE COURT: Mr. Campbell.

25 MR. CAMPBELL: Good afternoon again, Your Honor.

1 James Campbell. I represent the VNA defendants.

2 THE COURT: And just say anything that Mr. Erickson
3 didn't say you can add in.

4 MR. CAMPBELL: I was going to actually start with
5 that.

6 THE COURT: Oh, good.

7 MR. CAMPBELL: The only thing I want to add to what
8 Mr. Erickson said was to perhaps emphasize the point that in
9 our view, Your Honor, this is not going to be the last time
10 that we hear about this. I don't think that the exposure that
11 these three gentlemen have to the criminal process ends next
12 year.

13 I think that there's -- you know, the Flint issues
14 extended into 2015. I have to confess I haven't studied the
15 criminal complaints or issues. Mr. Rusek, I defer to him.

16 But there are issues that happened in 2015 that may
17 or may not cause them to come to the Court when this if you
18 were to agree to this stay or hold until May of next year.
19 And the argument is going to be we need more time. We can't
20 do it because we're still at risk. Not only because of the
21 manslaughter issue but because of the conduct I think goes
22 into 2015.

23 We have our schedule. Your Honor, I think as Mr.
24 Erickson said, we understand what the rules are. And a
25 blanket assertion of the privilege is really what we're doing

1 here. We should go question by question.

2 THE COURT: Oh, certainly.

3 MR. CAMPBELL: Thank you.

4 THE COURT: Thank you. Now Mr. Leopold, did you file
5 a brief in this?

6 MR. LEOPOLD: We did not file -- Ted Leopold on
7 behalf of the putative class plaintiffs. We did not file a
8 brief on it, Your Honor. But if the Court is allowing us to
9 speak, I can address a specific question I think the Court
10 inquired about because it affects us as well in terms of
11 asking questions during the scope of depositions.

12 THE COURT: Okay. Well, I would just ask you to
13 limit your remarks to about two minutes.

14 MR. LEOPOLD: I can do it in probably less than that,
15 Your Honor.

16 THE COURT: Okay.

17 MR. LEOPOLD: Clearly the issue before the Court is a
18 sensitive issue and I think we all understand that. Right now
19 there is not a criminal proceeding going on. But there
20 possibly or potentially could be in the long run.

21 What I would tell the Court is for purposes of
22 discovery even if they take the Fifth, there's a lot of
23 information that can be garnered during the course of these
24 depositions. And I think that's the key that transpires these
25 types of litigations with these types of issues having

1 experiencing something in a high profile case like this where
2 I dealt exactly with this issue.

3 For example, if there are e-mails with these
4 gentlemen's name on it, either they wrote them or they
5 received them or in a meeting, documents don't speak.
6 Witnesses have to speak.

7 And if we try to get those documents into evidence, I
8 can assure you these defendants would object to all of that
9 evidence without laying the preparatory foundation for each
10 one of those documents.

11 And by putting these documents in front of these
12 individuals going through just is this a document, is this a
13 e-mail, does it have your name, what's the date, who was in
14 attendance, and having go through that document without any
15 admissions on their part lays a tremendous foundation for
16 getting those documents into evidence.

17 And I think that's what really what we are looking to
18 do. I don't think any of us are intending to put any
19 additional burden on those individuals by breaching their
20 Fifth Amendment.

21 THE COURT: Okay. Thank you. Well, what I have done
22 is started working on an opinion and order on this particular
23 question. I think it's worth setting forth in writing and not
24 simply on the record. Because it is an important and
25 compelling issue.

1 I am required to look at six different factors when
2 deciding whether a stay is appropriate where a defendant has
3 raised Fifth Amendment concerns. The first is the extent to
4 which the issues in the criminal case overlap with those in a
5 civil. And in this instance that's neutral in the sense that
6 there is no current criminal case.

7 The cases that discuss factor one as being
8 dispositive, there are pending criminal charges in those
9 cases. And in this instance we have the prosecutor
10 withdrawing the charges entirely. Admittedly without
11 prejudice to bringing them again.

12 But at least at the present time when the testimony
13 would be sought, there are no pending criminal cases. And I
14 have -- there are many cases that stand for this which is that
15 courts generally do not stay proceedings in the absence of an
16 indictment. And the stay of a civil proceeding due to a
17 pending criminal investigation is an extraordinary remedy.
18 And that's from the E.M.A. Nationwide case.

19 So the second factor is the status of the case
20 including whether defendants have been indicted. And again at
21 this time they have not. The third is the private interests
22 of the plaintiffs in proceeding expeditiously weighed against
23 the prejudice to plaintiffs caused by the delay.

24 And that factor weighs against the relief being
25 sought by the individual city defendants in that these cases

1 have now been pending for many years. And it would from my
2 perspective potentially injure all parties, plaintiffs and
3 defendants, to have any further delays in the discovery.

4 The private interest of and burden on the defendants.
5 And here I'm looking at the word defendants writ large in
6 terms of co-defendants as well as these individual defendants
7 or that factor of the other defendants could easily be placed
8 with the public's interest. Because certainly the other
9 co-defendants are members of the public.

10 So this factor of the private interests of and burden
11 on these named individual city defendants certainly weighs in
12 their favor. But that's essentially the six factors, one that
13 weighs in their favor. But at this point without an
14 indictment or a criminal charges, the burden is at least
15 lessened.

16 The interests of the Court and in here I can tell you
17 without any doubt my interests as the spokesperson for this
18 Court is to see these cases make progress. We've set forth in
19 a case management order a timeline that will ultimately
20 resolve these cases, which will be to the benefit of everyone
21 involved. And beyond just the named plaintiffs or putative
22 class members. But to a much larger sort of public interest
23 in seeing a resolution of these cases.

24 So I can tell you that's the direction I'm headed in.
25 I am sensitive to the burden that these individual defendants

1 have been facing with criminal charges and civil litigation
2 pending at the same time. But having balanced that, I think
3 the proposal that -- LAN's proposal I guess it is, of setting
4 forth a protective order is one that will assist in balancing
5 that fourth factor in protecting the defendants as much as
6 possible. Which would be to during the course of discovery at
7 least until May of 2020 to seal both the responses to requests
8 to admit.

9 Are there -- there are outstanding requests for
10 documents, Mr. Rusek?

11 MR. RUSEK: There been requests for production of
12 documents. Excuse me. Alexander Rusek. To all three of the
13 individual city defendants. I believe all those have been
14 complied for.

15 THE COURT: Okay.

16 MR. RUSEK: I can say on Mr. Croft we've produced
17 documents that we have as has Mr. Ambrose. And I believe Mr.
18 Earley has as well.

19 THE COURT: Okay. Well, then the real issue is the
20 request to admit and depositions. But you could certainly
21 seek relief beyond that. But I would order that those be
22 sealed and that those present at the deposition hearings be
23 limited to counsel for parties in the case to further protect
24 their rights.

25 So I'll sort out how exactly to fashion that order.

1 I'll continue to think about it. But that's certainly the
2 direction I'm headed in. And I think everyone here -- no one
3 has suggested otherwise -- that a party cannot have a blanket
4 Fifth Amendment objection.

5 So your clients would need to attend the deposition,
6 answer every question they possibly can and then certainly
7 raise their Fifth Amendment rights upon advice of counsel
8 question by question.

9 MR. RUSEK: Alexander Rusek. May I address one point
10 that was brought up by Mr. Erickson?

11 THE COURT: Sure.

12 MR. RUSEK: And keeping in mind the position that the
13 Court just laid out. The case that was cited by LAN in their
14 response, that was the State Farm Mutual case. In there a
15 co-defendant wanted to take the deposition of another
16 co-defendant who also had the possibility of criminal charges
17 hanging over him. It was an Eastern District case.

18 THE COURT: Right. Exactly.

19 MR. RUSEK: And the case really discusses meaningful
20 discovery. What can we get here that's going to be
21 meaningful. And for me, after April 25, 2020, I believe that
22 there probably will be much more meaningful discovery
23 available through depositions and admissions than there is
24 now. Because I can say it's very highly likely there's not
25 going to be much meaningful discovery taken at this point

1 until that statute of limitations runs.

2 THE COURT: I'm glad you took the opportunity to say
3 that because you're now sending a message to those who would
4 take your client's deposition before then. It sure seems
5 valuable that if you've got how many depositions in the next
6 100 days?

7 MR. RUSEK: Approximately 50, Your Honor.

8 THE COURT: Fifty depositions. That these three
9 could be at the very end of that after April 25th of 2020.

10 MR. RUSEK: And --

11 THE COURT: That sure seems like a favorable way to
12 go.

13 MR. RUSEK: I would agree with you. There's also
14 some case law in the Sixth Circuit that there can be a blanket
15 assertion of Fifth Amendment when the case is overlap so much.
16 I have a case, United States v Medina, 992 F.2d.

17 THE COURT: I looked at that.

18 MR. RUSEK: So that's out there. And that was cited
19 more recently by case Nunn v Michigan Department of
20 Corrections that when the cases overlap, there can be a
21 blanket assertion or a blanket assertion to specific areas of
22 questioning.

23 THE COURT: Okay.

24 MR. RUSEK: That was the Nunn case and that was a
25 sexual assault that occurred in a prison I believe where no

1 questions were allowed about the actual sexual assault. But
2 the corrections officer was able to be questioned about his
3 training and things like that, if I can remember correctly.

4 THE COURT: Okay. Well, thank you.

5 MR. RUSEK: Thank you, Judge.

6 THE COURT: Okay. So I'll work on a written opinion
7 and order on this issue. Okay.

8 Now we're up to my least favorite subject matter
9 which is Ms. Shekter Smith. And I only say that -- I mean,
10 I've never met her. I hope I have that opportunity at some
11 time. But it's just a procedural quagmire that doesn't have
12 an easy answer.

13 But here's what I think is -- Mr. Morgan submitted a
14 brief on behalf of your client. And I have read it a couple
15 of times. And thank you for the brief. But it sadly wasn't
16 able to help me because I think it's just very procedurally
17 unusual what has happened here.

18 But the way I'm seeing this -- and I see Mr. Goodman
19 over there getting ready to stand up. But I'm not sure it's
20 necessary. Because if I understand what happened, in the
21 Walters and Sirls case, Ms. Shekter Smith was not originally
22 listed as a defendant. But in the motion to amend she was
23 listed as a defendant with allegations against her but they
24 were after the statute of limitations had run. So I granted
25 her motion to dismiss on the basis of statute of limitations.

1 I'm not even sure it was raised by her. But I have a
2 duty to make sure I have jurisdiction over everybody in a
3 case.

4 In the meantime, in the Marble and Brown cases, the
5 motions -- your amended complaints were filed before the
6 statute ran. The statute ran on October 19th of 2018 for
7 Shekter Smith and both Marble and Brown were filed before then
8 by checking the box on the short form for Shekter Smith.

9 However, that related back to originally back to the
10 master form complaint that didn't have allegations against
11 her. But now you do have allegations against her, if I
12 understand this properly, that were filed before the -- I
13 believe before the statute ran. Which would mean that she
14 simply is in the Marble and Brown litigation.

15 And Mr. Thaddeus Morgan on her behalf can file or can
16 even amend your motion to dismiss because perhaps you thought
17 that she wasn't going to be in those cases. But there simply
18 are not easy or good answers for the procedural complexity
19 we're facing here.

20 And so she is in the Guertin case. We know that.
21 She survived my consideration of the motion to dismiss and the
22 Sixth Circuit's consideration of it. She's also in the
23 Carthan case.

24 So we know that she is in this litigation as a
25 defendant. And certainly every case, every case matters

1 separately. And so at this point I think I have no choice but
2 to keep her in the Marble -- and I think Mr. Weglarz is there
3 -- Brown litigation. And see how she fairs in response to the
4 currently existing motion to dismiss.

5 And Mr. Morgan, if based on what you've heard now you
6 want to amend your motion to dismiss, we can discuss that.
7 But I would leave that to you. You've already filed it and
8 had all of the arguments available to you at that time.

9 MR. MORGAN: Your Honor, Thad Morgan on behalf of
10 Liane Shekter Smith. What timeframe would the Court give me
11 to amend that motion?

12 THE COURT: Hold on. I've just been informed by my
13 law clerk that I think plaintiffs' reply brief -- no. It
14 would be response brief is due Friday. Mr. Goodman on behalf
15 of the Marble -- you can stay there. But just speak loudly.

16 MR. GOODMAN: Thank you, Your Honor. That's correct.
17 And that was pursuant to a stipulation of all counsel and an
18 order from the Court.

19 THE COURT: Right.

20 MR. GOODMAN: However and I would like to make clear
21 that I'm acting only as local counsel in this matter, that the
22 lead counsel is the law firm of Loevy and Loevy from Chicago.
23 And the attorney is Ms. Cindy Tsai, who is unfortunately is in
24 trial and could not be here today. So I'm speaking on her
25 behalf.

1 THE COURT: Okay. Thank you.

2 MR. GOODMAN: Ms. Tsai -- just one other thing
3 though. She has asked for a second extension to file a
4 response to these motions to I believe either the 27th or the
5 28th of this month and has received agreement from a number of
6 defendants. But there are some who have not yet acknowledged
7 her or responded to that.

8 THE COURT: Okay. Well, why don't we cut that
9 process short.

10 Mr. Morgan, how much more time do you need?

11 MR. MORGAN: Ten days.

12 THE COURT: Let me look at the calendar. How about
13 we have you file it by the 15th, which is a week and a half.
14 It's one day short of ten days.

15 MR. MORGAN: Fine.

16 THE COURT: Okay. And then the response can still be
17 due the same time Mr. Goodman is saying. Isn't the 28th
18 Thanksgiving?

19 MR. WASHINGTON: Yes.

20 MR. ERICKSON: Your Honor, it was the Wednesday
21 before Thanksgiving that Ms. Tsai had requested.

22 THE COURT: That's what we'll do. We'll still have
23 it on the 27th. It's going to be a small tweak to Mr.
24 Morgan's brief. So that's granted. We'll include it in our
25 order following this hearing. So no further concurrence is

1 needed. Okay.

2 MR. MORGAN: And Your Honor, Thad Morgan on behalf of
3 Ms. Smith. One other question. Can I file what I'll
4 determine addendum?

5 THE COURT: Sure. That'd be much easier.

6 MR. MORGAN: Rather that have to recite facts.

7 THE COURT: Thank you. No. Just an addendum.

8 Because then we -- yeah.

9 MR. MORGAN: And then I have one other issue for the
10 Court. It's going to further --

11 MADAM COURT REPORTER: Counsel, can you come to the
12 podium?

13 THE COURT: Can you come to the lectern?

14 MR. MORGAN: Thad Morgan on behalf of Liane Shekter
15 Smith. A concern popped in my head that may make the
16 procedural quagmire worse. That being that, for example, if a
17 bellwether individual case goes to conclusion which my client
18 is not a defendant but findings are made against her for
19 example as a nonparty at fault, I think that's something we're
20 going to have to deal with down the road because I'm not going
21 to be able to stand up and argue against that because my
22 client's not a party.

23 THE COURT: But that's just life. That's the way the
24 rules work. Isn't it? I mean, am I missing --

25 MR. MORGAN: How would that affect the cases in which

1 my client is a defendant?

2 THE COURT: So if there's like ten bellwether
3 plaintiffs and your client is in some of them and not others
4 -- is that what you're saying?

5 MR. MORGAN: No. I'm saying what if a bellwether
6 case goes to conclusion in which findings are made and my
7 client is not a party to that case but findings are made as a
8 nonparty at fault against her, how does that affect my ability
9 --

10 THE COURT: I think -- your ability to do what?

11 MR. MORGAN: Argue against whatever findings are in a
12 case in which she is a named defendant?

13 THE COURT: I think it would just happen as if she
14 was out of everything and she's a nonparty at fault. So I
15 think it would just follow the rules.

16 MR. MORGAN: Okay.

17 THE COURT: For nonparty at fault. And I don't know
18 enough about it yet.

19 MR. MORGAN: Okay. Very good. Thank you.

20 THE COURT: To answer any further than that. Okay.
21 We're going to speed this up now.

22 The bellwether selection process, we discussed
23 briefly in chambers that they're the group that initially
24 proposed the case management order will come up with a new
25 proposal for the second round of bellwether cases to be

1 selected. And very likely it will conform to a similar
2 process that we have for the first pool. But if there have
3 been issues they can be resolved the second time around.

4 And Mr. Stern is taking responsibility for making
5 sure that gets to me before the December 10th status
6 conference.

7 So now we're up to the report from the special
8 master.

9 MS. GREENSPAN: Good afternoon, Your Honor. Thank
10 you. I'll be very brief. I have a short report today.

11 The last time I was here I walked through a
12 substantial amount of material about where the process had
13 gone with respect to collecting data about the cases and the
14 claims that have been identified that have either been filed
15 or where people have retained or contacted lawyers. And so we
16 now have information about a substantial number of people.

17 Since the time I was last here, we have received
18 further updated information from 12 law firms. And I now -- I
19 will give you just a few brief numbers for everybody's
20 benefit.

21 The number of what we've called injured party
22 records, these are individuals or entities that have been
23 identified by counsel as having either retained a law firm or
24 contacted a law firm and been in contact with a law firm is
25 now up to 32,301. That's an increase of slightly over 1,300

1 from the last report that I gave.

2 The total number of retained individuals without
3 trying to address the duplicate issue that we've previously
4 identified is up to 20,788.

5 THE COURT: Did you say 28 --

6 MS. GREENSPAN: 20,788. So the numbers are moving
7 up. They're not -- you know there's not a huge spike each
8 month, but we are getting additional claims in the door.

9 I wanted to just point out a couple of other pieces
10 of information. As we've been collecting claim data, we've
11 been collecting information about injuries alleged and the
12 types of injuries.

13 And at this point I'm not prepared to go through the
14 newest compilation of all of these separate injuries. But I
15 can tell you that counsel have provided information about
16 injuries related to lead and injuries related to other
17 contaminants.

18 And I have based on those submissions 88 percent of
19 claimants -- and I'm excluding property damage. These are
20 individual claims -- allege at least one injury that they say
21 results from lead exposure. And 73 percent of claimants,
22 again excluding property damage claims, allege a at least one
23 injury related to non lead contaminant exposure.

24 I have excluded from this information these numbers
25 the psychological injuries. I'm not sure people can relate

1 them to one exposure or another. But at any rate, these are
2 physical injuries.

3 THE COURT: Okay.

4 MS. GREENSPAN: And then finally I just want to
5 report on the duplicate issue. We have as previously reported
6 identified a number of duplicate claims, meaning a law firm --
7 more than one law firm has listed the same individual or
8 entity. It's not an overwhelming number, but there are
9 significant number of duplicates.

10 I sent notices out to law firms. And currently we
11 have resolved 27 percent of the duplicates. So there's a
12 number -- there's a number of disputed issues. And we're
13 about to move into that phase to try to see if we can figure
14 out and resolve who actually represents some of these
15 individuals.

16 I guess one other point. We have also identified
17 some additional firms that had not previously submitted
18 records in this process. I have received a submission from
19 one of those firms. Another is in the process of providing
20 it. One says that they're not -- they don't believe that
21 they're subject to the order. They're not a reporting
22 counsel. So I'm following up on that. But I still have a
23 couple of others to hear from.

24 So we have identified some firms that have not
25 previously been involved and are pursuing getting the

1 information from them as appropriate. Thank you.

2 THE COURT: Okay. Thank you, very much. And I just
3 want to thank Ms. Greenspan for all the work that she does to
4 assist with these cases. Okay.

5 There was one other issue that was brought to my
6 attention in the in chambers discussion which was who may
7 attend deposition -- the fact depositions in this case. And I
8 was provided some feedback about the difficulty in scheduling
9 a location and so on that I will take into consideration.

10 But the big picture that was discussed is that if a
11 member of the public is interested in knowing what goes on in
12 a deposition, that's a legitimate interest and they can order
13 a transcript from the court reporter service. Or if it's a
14 video deposition, a copy of footage of the deposition in order
15 to have access to it.

16 So I'll sort out exactly how best to amend the case
17 management order. Because that way a room of a definite size
18 can be reserved. And the right number of chairs can be
19 provided. And enough desk space for people to put their
20 materials down on.

21 So that -- the purpose of making sure the public can
22 get access to transcripts is to have transparency throughout
23 the process. Anyone who wants to know what's going on in this
24 litigation can find out. And transcripts are probably the
25 best way for that to happen because they're verbatim

1 recordings of what was said in a deposition instead of getting
2 someone's summary that they might put out in some way.

3 So if there's nothing else, next status conference
4 will be on Tuesday, December 10th at 2:00 PM. Everybody got
5 that. Tuesday, December 10th at 2:00 PM. And the proposed
6 agenda items would need to be filed by November 26, 2019. All
7 right. So I think that will sum it up. Thank you everybody.

8 (Proceedings Concluded)

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11 CERTIFICATE OF OFFICIAL COURT REPORTER

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

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

11/27/2019
Date

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