

September 12, 2018

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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

SEPTEMBER 12, 2018

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United States District Court

200 East Liberty Street - Ann Arbor, Michigan 48104

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PROCEEDINGS

THE COURT: Well, please be seated. What I'd like to do is log on to my computer and on to the docket on this case. And then have appearances for the record. So just one second.

And in the meantime, I'll introduce Hal Stanton is the new Jesse Taylor. So he has taken the position that my law clerk Jesse Taylor had. And I have a number of other new law clerks and an intern, an undergraduate from the University of Michigan, Elijah Arons. And then next to him is Katie Brown, Allison Hall, and Leslie Calhoun. So we're all working on this together trying to do the best that we can.

So what I'd like to do is have appearances. And why don't we start with counsel table and then work from there.

MR. LEOPOLD: Good afternoon, your Honor. Ted Leopold and Michael Pitt on behalf of the class.

THE COURT: Thank you.

MR. NAPOLI: Paul Napoli from Napoli Shkolnik on behalf of the individual plaintiffs.

MR. STERN: Corey Stern from Levy Konigsberg on behalf of the individual plaintiffs.

THE COURT: Thank you.

MR. WALKER: Good afternoon, your Honor. Renner Walker from Levy Konigsberg on behalf of the individual plaintiffs.

THE COURT: Oh, okay. Nice to meet you.

1 MR. LANCIOTTI: Good afternoon, Patrick Lanciotti
2 from Napoli Shkolnik on behalf of the individual plaintiffs.

3 MR. ALTMAN: Good afternoon, your Honor. Keith
4 Altman on behalf of EXCOLO on behalf of the Washington
5 plaintiffs.

6 MR. CONNORS: Jordan Connors from Susman Godfrey for
7 the class plaintiffs.

8 MR. BLAKE: Good afternoon. Jayson Blake on behalf
9 of state court class plaintiffs.

10 MR. WASHINGTON: Good afternoon, Judge. Val
11 Washington on behalf of the Anderson plaintiffs, local counsel
12 for the Gulla plaintiffs on behalf of Joel Lee. And I think
13 that's it, Judge.

14 THE COURT: Okay. Well, thank you.

15 MR. GOODMAN: Good afternoon, your Honor. Bill
16 Goodman on behalf of the Marble plaintiffs and class
17 plaintiffs as well.

18 THE COURT: All right. Thank you.

19 MS. BEREZOFSKY: Esther Berezofsky on behalf of the
20 class plaintiffs and the Gulla plaintiffs.

21 MR. NOVAK: Good afternoon, your Honor. Paul Novak
22 of Weitz & Luxenberg on behalf of the class plaintiffs.

23 MR. STAMATOPOULOS: Greg Stamatopoulos on behalf of
24 the class plaintiffs, your Honor.

25 MR. BURDICK: James Burdick on behalf of Adam

1 Rosenthal, your Honor.

2 THE COURT: Okay. Thank you.

3 MS. WEINER: Good afternoon, your Honor. Jessica
4 Weiner on behalf of the class plaintiffs.

5 MR. WILDER: Marvin Wilder. I'm appearing of Lillian
6 Diallo and Larry Polk on behalf of plaintiffs Gist, Savage,
7 and Kirkland.

8 MS. DUDA: Good afternoon, Melanie Duda from Fieger
9 Law on behalf of Plaintiff Odie Brown and Gradine Rogers.

10 THE COURT: Thank you.

11 MR. HART: Good afternoon, your Honor. David Hart on
12 behalf of the Guertin plaintiffs.

13 THE COURT: Good. Thank you, Mr. Hart.

14 MR. ERICKSON: Good afternoon. Philip Erickson on
15 behalf of the LAN defendants.

16 MR. MASON: And Wayne Mason, your Honor, also on
17 behalf of the LAN defendants and Leo A Daly.

18 MR. CAMPBELL: Good afternoon again, your Honor.
19 James Campbell. I represent the VNA defendants.

20 MR. GRUNERT: John Grunert, your Honor. VNA
21 defendant.

22 MR. WILLIAMS: Good afternoon, your Honor. Michael
23 Williams for the VNA defendants.

24 MR. THOMPSON: Good afternoon. Craig Thompson on
25 behalf of defendant Rowe Professional.

1 MR. KRAUSE: Good afternoon, your Honor. Kurt Krause
2 on behalf of defendant Robert Scott.

3 MR. LARSEN: Good afternoon, your Honor. Zack Larsen
4 on behalf of the state defendants.

5 MR. PATTWELL: Good afternoon, your Honor. Mike
6 Pattwell, Clark Hill, on behalf of Dan Wyant and Bradley
7 Wurfel.

8 MR. MACDONALD: Good afternoon, your Honor. Brian
9 MacDonald on behalf of Defendant McLaren.

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

11 MR. BARBIERI: Charles Barbieri for MDEQ defendants
12 Michael Prysby and Patrick Cook.

13 MS. JACKSON: Krista Jackson on behalf of Steven
14 Busch.

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

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

18 MR. MEYER: Good afternoon, your Honor. Brett Meyer
19 on behalf of Michael Glasgow.

20 MR. WISE: Good afternoon, your Honor. Matt Wise on
21 behalf of Jeffrey Wright.

22 MS. SHEA: Good afternoon, your Honor. Ashley Shea
23 on behalf of the class plaintiffs.

24 MS. FLETCHER: Good afternoon, your Honor. Shayla
25 Fletcher on behalf of the Alexander plaintiffs.

1 MR. KUHL: Richard Kuhl on behalf of the state
2 defendants.

3 MR. MENDEL: Todd Mendel on behalf of Governor
4 Snyder.

5 MR. CAFFERTY: Good afternoon, your Honor. Michael
6 Cafferty on behalf of MDHS employee Nancy Peeler.

7 MR. CAPELLI: Good afternoon, your Honor. Joe
8 Capelli from Marc Bern & Partners on behalf of multiple
9 plaintiffs in multiple actions.

10 THE COURT: Thank you.

11 MR. HOMA: Good afternoon, your Honor. Jonathon Homa
12 from Sinas Dramis Law Firm on behalf of plaintiff Margaret
13 Beam.

14 MS. NAPOLI: Good afternoon, your Honor. Marie
15 Napoli, Napoli Shkolnik, for the plaintiffs.

16 MR. PERKINS: Good afternoon, your Honor. May it
17 please this honorable Court, Todd Russell Perkins appearing on
18 behalf of Mr. Earley. Although Mr. Mateo does not have an
19 appearance, I just wanted to recognize him for the record.
20 This is Santino Mateo.

21 THE COURT: All right. Thank you.

22 MR. PERKINS: Thank you.

23 THE COURT: And just so that you know, sometimes I
24 say thank you but I try not to because it just makes your
25 transcript order that much longer because that's a whole line.

1 So I'm thinking of all of you consciously and not doing that.
2 Although I'm always thinking about Jeseca. So I probably
3 should say thank you each time.

4 MR. JENSEN: Good afternoon, your Honor. Larry
5 Jensen on behalf of Defendant Hurley Medical Center and Newell
6 and Norbert Birchmeier.

7 MS. BETTENHAUSEN: Margaret Bettenhausen for state
8 defendant.

9 MR. KIM: William Kim, your Honor, for City of Flint
10 and for Former Mayor Dayne Walling.

11 MR. BERG: Good afternoon. Rick Berg here for the
12 City of Flint.

13 MR. RUSEK: Good afternoon, your Honor. Good
14 afternoon to your new staff members. Alexander Rusek on
15 behalf of Howard Croft.

16 THE COURT: Thank you. I think that just about takes
17 up the whole afternoon. So let me go over a couple of just
18 housekeeping items. If you're going to speak or when you do
19 speak, please come the lectern so that we can hear you and the
20 record can be complete.

21 Speak loud enough to be heard. Jeseca is sitting in
22 a new location and there's a fan above her head that makes it
23 a little bit difficult for her to hear. So please speak into
24 the microphone.

25 All transcripts need to be ordered through the court

1 reporter. And she now has a realtime service that you can get
2 and it's on an iPad and it's coming in in realtime. But you,
3 of course, would need to order that if that's what you want to
4 do. And you would need to make arrangements with her ahead of
5 time to do that.

6 So thank you all for being here and for your
7 patience. We're starting a little bit late today. There is
8 an agenda that was issued and is on the docket. And it begins
9 with introducing -- here she is -- Deborah Greenspan, who I
10 guess should have an appearance here also on the record.

11 SPECIAL MASTER GREENSPAN: Deborah Greenspan, Special
12 Master.

13 THE COURT: And so that is -- permits everybody to
14 know that Ms. Greenspan is here. She attended our in-chambers
15 status conference before this hearing and has been working for
16 several months on the case. Currently has a referral from me
17 to make a decision and issue an order on the request for a
18 census order.

19 And on that issue I wanted to let you know that I had
20 an opportunity to talk to Ms. Greenspan about her progress in
21 making a decision on that order. And I will enter an order
22 indicating that there will be an additional week until that
23 order needs to be filed.

24 So the current order which is docket entry 563 says
25 that she will make that decision by September 17th. And now

1 it will be September 24th and we'll put that on the record.
2 And of course there are all the mechanisms for you all to
3 appeal if you disagree. And those are set forth in the order
4 that appointments her. But I'm very hopeful that that won't
5 happen.

6 So the other thing is that Ms. Greenspan came to
7 Michigan today and I think she has some meetings set up but is
8 available to meet with counsel. And following this hearing
9 would be a good time to at least introduce yourself if you
10 haven't already.

11 I know that I had a request from Mr. Pitt to move up
12 one of the agenda items. But I think we can move through this
13 in a pretty efficient way. So until it turns out that we
14 aren't, let's just keep going.

15 The next thing is that we're going to have a hearing
16 on the multiple motions to dismiss in the Walters and Sirls
17 case. And that's set for September 26th. And instead of
18 setting forth a separate order regarding how the hearing will
19 be conducted, what I'll do is just go through the counts
20 chronologically in order and have each count argued before
21 moving to the next count.

22 And but what I want to ask counsel to do on all sides
23 of this case is to distinguish -- essentially many of the
24 issues in Walters and Sirls have previously been adjudicated
25 in Carthan and Guertin. So to the extent the individual

1 either facts set forth in the complaints or defendants or you
2 think that the law applies differently to an individual than
3 it would be to a putative class, that's what I want the focus
4 of the argument to be and I am not interested in it sort of
5 serving as a motion to reconsider all of the Court's decisions
6 in Guertin and Walters -- or Carthan if it's the same
7 material.

8 But if you can point out to me what is different,
9 then that would be most helpful. There are a number of counts
10 that were decided in Guertin but that were not in Carthan.
11 And so the same would apply to that. And then there are a
12 handful just three I think -- that are brand new and those are
13 in the Sirls' case. So I would just ask that that be the
14 focus of the argument as opposed to rearguing everything
15 that's been previously decided.

16 So are there any questions or concerns about how
17 that's going to proceed?

18 I think also for interim co-lead counsel, is it your
19 intention to be here for that argument?

20 MR. LEOPOLD: We'll be here, your Honor, whether or
21 not we need to address anything at this point, we don't
22 believe so. But we'll be here.

23 THE COURT: Okay. I was going to ask that you be
24 here just in the event that there is something that comes up
25 that might be helpful for me to ask you how that differs or

1 your perspective on how it differs. I'd like to be able to do
2 that. Okay.

3 So then in light of the fact that there has been some
4 briefing in Marble -- I think I'm looking for Mr. Goodman over
5 there -- that was extended out a little further than
6 anticipated and the fact that it's now so close to the oral
7 argument in Walters and Sirls, I plan to adjourn the current
8 date of oral argument of October 30th so that the decision in
9 Walters and Sirls can be reached before we hold that oral
10 argument. And then it become even more efficient as well.

11 MR. GOODMAN: With the Court's permission --

12 THE COURT: Say who you are and you have to go to the
13 lectern.

14 MR. GOODMAN: William Goodman on behalf of the Marble
15 plaintiffs, your Honor. And all I was going to say is that we
16 have no objection to the adjournment of the oral argument in
17 the Marble case. But that in light of that perhaps we can
18 attend and if appropriate comment in the course of the Sirls'
19 argument.

20 THE COURT: That would be just fine.

21 MR. GOODMAN: And also the Court's permission, if I
22 could approach your clerk and hand him the judge's copy of our
23 motion that we just filed in Marble, I'd appreciate it.

24 THE COURT: Certainly. Okay. The next issue --
25 thank you, Mr. Goodman.

1 MR. GOODMAN: Thank you, your Honor.

2 THE COURT: The next issue is there has been a
3 question about what is the schedule for -- what happens to all
4 of the short form individual complaints while the Walters and
5 Sirls -- well, I guess after that decision is reached. And I
6 think what would be most helpful to me is if a proposed
7 stipulated order can be reached about what you think is most
8 appropriate.

9 But for now, no answers are needed in those cases
10 because there's still -- they're sort of just on hold until we
11 make decisions in the Walters and Sirls' cases. So if I
12 understand the question was -- who raised that in your
13 proposed agenda item? Well, I don't know who it was. I've
14 got them all here. But that's all right. We'll address that
15 after a decision is made in the Walters and Sirls' cases.
16 Okay.

17 The next issue is that there had been several motions
18 to stay filed. The time has not yet passed for responses to
19 be filed. But I want to at least have some initial discussion
20 or I'll say a couple of words about it, which is that from my
21 perspective reading the city defendant's motion to stay as
22 well as the joint motion for stay pending appeal that was
23 filed by Mr. Barbieri on behalf of his clients -- there are
24 many of them -- as well as several of the other defendants.

25 And I understand there may -- once the motions to

1 reconsider are adjudicated, there could still be other motions
2 to stay filed. And my initial research shows that the court's
3 decision in Guertin, that nothing has changed legally in the
4 landscape about my -- essentially I do not see that I have a
5 great deal of discretion in the matter.

6 If it's an appeal not from a summary judgment
7 decision on qualified immunity but from a motion to dismiss
8 legal decision, I think the case law is quite clear that it is
9 not an issue of fact mixed with law, but it is an issue of
10 law. I do not see any of the appeals as frivolous. And so I
11 just want the parties to be thinking about that as we try to
12 understand how this case will continue to go forward.

13 And I heard in our in-chambers conference I think
14 that Mr. Leopold or Mr. Pitt want to say a couple of words
15 about that. This is not a full out oral argument and I'm not
16 going to want to hear that.

17 MR. LEOPOLD: Yes. Thank you, your Honor. Mr.
18 Connors is going to address --

19 THE COURT: Okay. Say your name, Mr. Ted Leopold.

20 MR. LEOPOLD: I'm sorry. Ted Leopold on behalf of
21 the class. And I'm going to defer to Jordan Connors who's
22 going to address the Court on a limited basis on this issue.

23 THE COURT: Okay.

24 MR. CONNORS: Thank you, your Honor. Jordan Connors
25 for the class plaintiffs. You will receive our brief on this.

1 I believe it's due a week from Friday. I wanted to say we
2 appreciate what your Honor has said today. And what you said
3 in your order in the Guertin case.

4 I think there was a number of other issues raised by
5 the defendants who filed their motion to stay seeking a
6 broader stay of all of the actions against all of the
7 defendants. And we'll certainly be addressing that as well.

8 I think your Honor ruled on that issue earlier in the
9 Guertin case. And as far as we're concerned, nothing has
10 changed since that on that issue either. That's really all
11 there is to say now and we'll file our brief in a little more
12 than a week.

13 THE COURT: Okay. And I'm not sure entirely what
14 you're referring to, which is okay, in terms of a broader
15 stay. The issue for me is that I am going on a case by case
16 basis. This is a motion to stay in Carthan. And I have
17 Walters and Sirls and Washington and Marble and other cases
18 that wouldn't even be at that stage yet.

19 So I'm not inclined to stay cases that don't have a
20 motion to stay and aren't even at this stage where they would
21 qualify for that.

22 MR. CONNORS: Of course. What I meant is the motion
23 to stay filed in the Carthan case didn't just ask to stay the
24 case against the individual government defendants who had
25 their motion to dismiss denied. It also asked for a massive

1 stay of all parties in the Carthan case, including the
2 engineering defendants.

3 THE COURT: I see. Okay.

4 MR. CONNORS: And any discovery whatsoever. I
5 believe your position in the Guertin case previously was to
6 grant the motion to stay for those specific parties, but to
7 find that there was no cause to stay all actions against all
8 defendants.

9 And in fact because the very defendants who have had
10 their motion to dismiss denied on these issues and have filed
11 an interlocutory appeal are going to have quite a lot of
12 relevant material to the other defendants who are going to be
13 proceeding.

14 THE COURT: Right.

15 MR. CONNORS: There is cause to proceed with the
16 discovery that we'd be doing anyway. I believe --

17 THE COURT: And from what I'm hearing, because we had
18 Judge Yuille here earlier, that discovery is going forward
19 regardless of what I do. So because the similar plaintiffs
20 and those very defendants are in Genesee County Circuit Court
21 and they have a very tight scheduling order that either is or
22 is about to be entered there.

23 So I'm not making a decision, but I'm acknowledging
24 that I hear what you're saying and it's a complicated issue.

25 MR. CONNORS: Thank you, your Honor.

1 THE COURT: Okay. All right. Then we have the
2 motion to certify the Monell issue for interlocutory appeal.
3 Is that Mr. Kim?

4 MR. KIM: Yes, your Honor. Good afternoon, your
5 Honor. William Kim appearing for the City of Flint here. The
6 city is requesting that you amend your August 1 order to
7 certify the issue for appeal of whether Monell liability
8 applies here.

9 And I don't want to rehash the arguments that were
10 made last month or in July on this issue. But I just want to
11 summarize the reasons why your Honor should certify this issue
12 for appeal.

13 The standard for that has been set forth most
14 recently in the In Re Trump case, your Honor, in that
15 interlocutory appeal is warranted where the order involves
16 controlling question of law where there is substantial ground
17 for difference of opinion, and where an immediate appeal may
18 immediately advance the termination of this litigation. And
19 here all three of those conditions are met.

20 The question here is essentially a question of law
21 because it involves the application and interpretation of both
22 the state law statute, the emergency manager act PA 436 as
23 well as the conditions under which Monell liability applies.

24 With respect to -- we obviously disagree with the
25 Court's ruling on this issue. But in respect to whether

1 substantial grounds for differences of opinion exist, we
2 believe we set forth in our briefing how another reasonable
3 jurist could come to a different conclusion, especially given
4 as your Honor acknowledged, this is really an issue of first
5 impression in that whether or not --

6 THE COURT: You know, I found that it was an issue of
7 first impression but I didn't find that it was a difficult
8 issue of first impression. And I want to say one other thing
9 about the In Re Trump because that panel also had a fourth
10 factor that I don't think is flushed out in your brief, which
11 is whether prudential factors should guide the Court's
12 decision or it sort of acknowledged that they should.

13 And here the Sixth Circuit says that interlocutory
14 appeal of this nature is appropriate in "exceptional cases
15 only".

16 And the Sixth Circuit also says in the Kraus v Board
17 of County Road Commissioners that it should not be granted
18 cavalierly. I try not to be cavalier in anything I do.

19 MR. KIM: I don't believe this would be a cavalier to
20 certify this for oral argument. They did look to the
21 prudential factors as well. But I believe in that case they
22 were distinguishing the analysis that they were required to do
23 as a panel of the Court of Appeals with the requirements as
24 set forth in 28 U.S.C. 1292 that set the conditions for when a
25 district court judge such as yourself can certify an issue for

1 appeal.

2 I read that as the prudential requirement being an
3 additional factor that the Sixth Circuit considers. Because
4 as your Honor knows, simply because your Honor certifies this
5 issue for appeal, what you're certifying is that those
6 conditions are met. We would then have ten days in which we,
7 the city, would have to file a petition with the Sixth Circuit
8 to essentially have the Sixth Circuit see if they agree or
9 disagree with that reasoning.

10 And in addition to those three factors, they would
11 also be able to consider the question of whether the
12 prudential factors are satisfied.

13 THE COURT: Okay.

14 MR. KIM: I think that it's clear that while your
15 Honor found this to be a clear question, your Honor, as we set
16 forth in our briefing, I think that there are legitimate
17 criticisms that could be made and another reasonable judge
18 could come to the exact opposite conclusion and determine that
19 the Monell liability because of the way in which Monell
20 liability is intended to hold municipalities and local
21 governments responsible for policies that they enact, that it
22 should not apply in this very specific, very unusual
23 circumstance.

24 Finally, your Honor, I think it's very clear that
25 because this is the only claim that is remaining against the

1 city, that an appeal on this issue would materially advance
2 the termination of litigation because if -- sorry, your Honor.
3 Because if the Sixth Circuit were to find contrary to what you
4 determined, the city would no longer be a party in this
5 matter.

6 Finally, your Honor, I would just like to point out
7 that while we filed our motion well in advance of this date,
8 the plaintiffs did not file a written response here.

9 THE COURT: Okay. Thank you. Well, let me ask you
10 this, which is that Monell says that whether an official is a
11 final policy maker or has the authority of a final policy
12 maker for the purposes of Monell liability is a question of
13 state law. And then we also know that state law does not
14 answer the question by simply from other cases. We know that
15 the Sixth Circuit has said -- or I guess the Supreme Court --
16 that state law does not answer this question by simply
17 labeling an individual as either a federal, state, or local
18 official, but by describing their official functions.

19 Then we go to how their official functions are
20 described under the emergency manager statute. And we learn
21 there that they are the final policymaking authority on behalf
22 of a municipality. And so that's what leads me to believe
23 that -- I would have a difficult time finding someone who
24 would -- I mean, I know that you disagree with it. And that's
25 understandable. But it seems very clear to me if you just

1 follow that logic.

2 MR. KIM: I think, your Honor, where I would chiefly
3 criticize that chain of logic is that the statute itself
4 doesn't -- what it does is it says that the emergency manager
5 shall act in place of and in the stead of.

6 THE COURT: Yes, it does.

7 MR. KIM: It doesn't create -- say that they are
8 local officials. In fact it says that they are -- it
9 establishes that they are state officials as the state courts
10 have recognized. And under those circumstances, if you look
11 into the reasoning that was set forth by the Supreme Court in
12 Monell, they said that we are allowing a claim to proceed
13 against a municipality where it can be fairly said that the
14 policies were enacted by the local municipality.

15 And here we have a very unique situation in which the
16 city, the policies of the city were not created by the
17 municipality but they were created by state appointed
18 officials who were not accountable in any way to local
19 officials, to the local electorate but were solely responsible
20 to state officials. And so in this very specific and very
21 unusual circumstance.

22 THE COURT: Mr. Kim, who was making City policy at
23 that time then? If it was not the emergency manager, who was
24 it?

25 MR. KIM: The emergency manager had the power to

1 direct the actions of the city. But the emergency managers
2 were not responsible to the city. The emergency managers were
3 only responsible -- they reported to the state treasurer and
4 were appointed by the governor.

5 THE COURT: No, I understand that. But the way I'm
6 reading upon appointment an emergency shall act for the city.
7 For the governing body or the chief administrator of the local
8 government.

9 The statute is telling me that is exactly what they
10 do. They are creating a policy for Flint, Michigan or Detroit
11 or Allen Park or any of the other municipalities during their
12 tenure. So that's where I come out on this unless if there's
13 something that I'm missing or that could be amplified if the
14 plaintiffs wish to respond.

15 MR. LEOPOLD: We do.

16 THE COURT: And then I'll give you a chance for
17 rebuttal. SO yeah, Mr. Leopold.

18 MR. LEOPOLD: Thank you, your Honor. Mr. Goodman --
19 Ted Leopold on behalf of the class. Mr. Goodman is going to
20 respond to the argument by Mr. Kim.

21 THE COURT: Oh, okay.

22 MR. GOODMAN: William Goodman again on behalf of the
23 class plaintiffs, your Honor. We have very little to add to
24 the authority which the Court has noted except to say that we
25 do oppose this motion.

1 We did not file a response in light of the rather
2 confusing procedural status of this motion. And in effect it
3 appears at some stage to have been a motion for
4 reconsideration, which is one to which opposing parties do not
5 respond unless ordered otherwise. We were not. So --

6 THE COURT: I'll just say it reads as -- it doesn't
7 seem confusing to me. But it reads as a motion to amend and
8 certify in part the Court's August 1st -- I guess you're
9 saying the motion to amend would have -- but the amendment was
10 just to certify it.

11 MR. KIM: Correct, your Honor.

12 THE COURT: It wasn't anything reconsidering the
13 decision.

14 MR. GOODMAN: Well --

15 THE COURT: Anyway, be that as it may, you're here to
16 make an argument.

17 MR. GOODMAN: Yes. And we do oppose the motion. And
18 all I would point out is to emphasize the language which the
19 Court has already quoted from the Monell case which states
20 disjunctively that custom is made by lawmakers or those whose
21 edicts or acts may fairly be said to represent official
22 policy.

23 And it's hard to be -- it is hard to understand or
24 acknowledge or characterize how these acts cannot be fairly
25 seen as representing official policy of the City of Flint when

1 the statute imposes that responsibility and liability on these
2 -- that responsibility on these emergency managers. And no
3 one else was in a position to take any acts contrary to what
4 these emergency managers undertook.

5 Given that, given the language of Monell, and
6 notwithstanding the novelty of this issue given the emergency
7 manager act has not been flushed out prudentially, and for
8 reasons that the Court has already noted, and not to take too
9 much time, we oppose this motion.

10 THE COURT: Okay. Mr. Kim.

11 MR. KIM: Your Honor, to answer the question that you
12 were asking me previously, I think the statute is clear that
13 while the emergency managers act for and in the stead of,
14 they're not -- they're never designated as local officers.

15 THE COURT: But it doesn't -- tell me where in your
16 reading of Monell does it say that the person has to be an
17 elected or appointed local official.

18 MR. KIM: Well, your Honor, at 436 U.S. 694 and 95,
19 the court, Supreme Court, laid out its reasoning, the way it
20 reasoned in finding that municipalities could be held liable
21 under 1993. And what it says is that it allows constitutional
22 claims to be made --

23 THE COURT: Slow down.

24 MR. KIM: -- against a municipality only when the
25 municipality unconstitutionally implements or executes a

1 policy statement, ordinance regulation, or decision officially
2 adopted and promulgated by that body's officers.

3 And here we have a situation in which the emergency
4 managers were not that body's officers. They were not
5 officers of the City of Flint. They were state officers who
6 were granted the authority to absolutely control and require
7 the city comply with their orders. And that is the
8 distinction here and that is what makes this an unusual enough
9 case to warrant interlocutory review of that specific issue.

10 And as we said previously, your Honor, this would
11 only be the first stage in order to appeal those things. We
12 would have to petition the Sixth Circuit to also agree with
13 you or disagree that this is an issue worthy of interlocutory
14 review.

15 And I think that in light of the fact that this is
16 such an unusual circumstance where the policies themselves as
17 alleged by the plaintiffs were set forth by state officers and
18 implemented by an emergency manager who was empowered totally
19 to supersede local authority and to which the city had no way
20 in which it could reasonably choose to deal otherwise, that it
21 is simply unfair for and inequitable for Monell liability to
22 apply here.

23 THE COURT: Okay. And here's the situation that I'm
24 faced with, which is that I don't get to decide what's fair or
25 unfair for the City of Flint. The conditions arose that met

1 the qualifications or the criteria for an emergency manager to
2 be imposed whether or not Flint wanted it. This Court had
3 nothing to do with that.

4 So what I'm faced with is a situation where there is
5 a state appointed official who is acting on behalf of the City
6 of Flint setting its policies, making its decisions, approving
7 the switch in April of 2014 to the Flint River on behalf of
8 the City of Flint.

9 And as I read Monell, that is what I am to decide is
10 whether an official has final policymaking authority for the
11 purposes of the city's decisionmaking. I'm instructed that
12 it's a question of state law. I look to the state law which
13 is the emergency manager statute and I find out that that
14 person is absolutely acting for and in the place and stead of
15 the governing body, which is going back to what you just
16 quoted from Monell.

17 We know for absolutely certain that that is what the
18 emergency manager was doing according to Michigan Compiled Law
19 141.1549(2). And so I can't see a way that it's more clear
20 than that. And it's not a question of whether the person was
21 the elected mayor or is the city council or a city manager.
22 The question is whether state law gives that person the
23 authority to act in the place of the city. And the state law
24 does.

25 MR. KIM: Well, I think, your Honor, that the one

1 factor that your Honor is not considering here is whether or
2 not that actor is a -- is as was set forth in the text of
3 Monell is one of that body's officers. And here we have a
4 situation where the emergency manager is not just by statute
5 but as has been held by the Michigan Court of Appeals is a
6 state officer.

7 THE COURT: I know the person is a state officer but
8 they are acting for that body. I think we can call this to a
9 conclusion in that we disagree. And I see it -- and the great
10 thing about this job is I get to make the decisions that I
11 think are right.

12 I'm not on the Court of Appeals where I've got to
13 negotiate with two other judges or anywhere else. And I think
14 it's clear that the emergency manager is acting in the place
15 of that governing body. They become that governing body
16 according to the statute.

17 So liability -- their actions create liability for
18 the City of Flint. We'd be in a really unusual situation if
19 that weren't the case. Things would happen in these
20 municipalities with emergency managers. There would be no
21 cause of action against the city and the state would be
22 immune. And so I cannot imagine that that's what the
23 legislature sought to create.

24 MR. KIM: Well, respectfully, your Honor, I think
25 that is one of our key criticisms of your August decision. In

1 that circumstance, the claims could still be made against the
2 individuals as individuals. And the claims, if there was an
3 ongoing constitutional violation, could be made under the Ex
4 parte Young against the state because it would be the state
5 that would need to take the action to direct the city to
6 comply with the actions.

7 THE COURT: I understand that.

8 MR. KIM: So if the state would be the correct actor
9 under Ex parte Young, it would seem logical that the state
10 would also be the correct actor for Monell purposes as well
11 and because it is a very unusual circumstance. But and while
12 a reasonable jurist could come to the conclusion that your
13 Honor did, I think that a reasonable jurist could also come to
14 the alternative conclusion.

15 THE COURT: And in light of the fact that I'm denying
16 your motion, is your -- do you have -- do you -- can you file
17 that still in the Court of Appeals or this concludes that
18 endeavor?

19 MR. KIM: I believe that we would have to file a
20 mandamus action in the Court of Appeals.

21 THE COURT: I see.

22 MR. KIM: I believe that would be the only way short
23 of, again, appealing this after a final decision on the merits
24 of the entire case.

25 THE COURT: Okay. I see.

1 MR. KIM: Which --

2 THE COURT: I mean if you do, I think that's a -- I
3 mean that will get somebody to weigh in and help resolve this
4 issue. Because I can't in good conscious say that I see it
5 any other way than the way I see it. And I don't think it's
6 even debatable.

7 I think you've made your best argument. But for the
8 reasons that we just -- that I just set forth and in
9 disagreement with your brief, I don't think it's unclear.

10 MR. KIM: Thank you, your Honor.

11 THE COURT: But thank you. And the motion will be
12 denied for those reasons.

13 MR. KIM: Will it be a written order entered?

14 THE COURT: Well that's what I'm trying to decide. I
15 just think it's so clear. I'm trying to marshal my resources
16 to focus on the multitude of legal issues here. And I don't
17 know that this is one.

18 So if you'll give me 24 hours to make that decision
19 before you do your mandamus. Because then there would be a
20 reasoned opinion setting forth what I just said.

21 MR. KIM: Thank you, your Honor.

22 THE COURT: So let's say by the close of business on
23 Friday I will let everybody know whether there will be a
24 reasoned opinion or whether this is it, it's just an oral
25 opinion.

1 MR. KIM: Thank you, your Honor.

2 THE COURT: Okay. Thank you. Okay. So next on the
3 agenda is the fact that we -- that I have been informed that
4 the class liaison -- no, co-lead class counsel would like to
5 amend their consolidated complaint.

6 I've been informed that they will do that by October
7 5th. That they will have a motion to amend by October 5th.
8 Responsive briefing would go according to the local rules.
9 And plaintiffs have assured the Court that they will attach
10 their proposed amended complaint so everybody knows what it is
11 that you're opposing.

12 And that will -- I'll determine if there's going to
13 be oral argument once I see it. And once I see the -- I won't
14 make that determination until I see the response to know what
15 the defendants are saying. Is there anything further on that?
16 Okay.

17 MR. BARBIERI: Your Honor.

18 THE COURT: Yes, Mr. Barbieri.

19 MR. BARBIERI: During the chamber's conference you
20 mentioned that you were going to have an abeyance of all
21 answers in the Carthan matter.

22 THE COURT: Yes. We won't -- no one needs to answer
23 the Carthan case for whomever that will be applicable until
24 the motion to amend is fully adjudicated and decided. Thank
25 you. That was Mr. Barbieri.

1 So now what we have is the motion to amend the
2 Carthan complaint filed by the Boler plaintiffs. And who do
3 we have? Is anybody wishing to argue on behalf of the Boler
4 plaintiffs? Okay. That makes it a lot easier.

5 The person who filed the brief is Nicholas Szokoly.
6 Okay. Well, here's the thing, I was going to deny it anyway.
7 So I'll tell you why.

8 The reason is that it's unclear from the motion to
9 amend and from the proposed amended complaints exactly who the
10 defendants are in each of the counts. So we're just going to
11 do the best we can in sorting that out.

12 But a motion to amend. Let's see, at this stage of
13 the case, the decision rests soundly within the Court's
14 discretion. We learned that from the Sixth Circuit. If a
15 proposed amendment is futile, well the definition of that is
16 if it could not withstand a Rule 12(b)(6) motion to dismiss.
17 And in this case, I think the requested amendments couldn't
18 withstand a motion to dismiss by the defendants.

19 And let's see if I can go through these one by one.
20 Well, let's start with the breach of contract and the breach
21 of implied warranty and merchantability would not survive a
22 motion to dismiss implied warranty and merchantability only
23 applies to contracts on the sell of goods. And the city's
24 water service is not a good in that sense.

25 And this was all addressed in more detail in the

1 Guertin opinion and so I'll incorporate that into this oral
2 opinion. But there's nothing that's been set forth factually
3 in this Boler proposed amended complaint that would
4 distinguish it from Guertin so that ruling would apply.

5 In the breach of contract also was addressed in
6 Guertin. And I'll just incorporate the rationale there. The
7 count 20, I believe it is, is the Michigan Consumer Protection
8 Act by deceptively supplying unpotable water I believe would
9 also not survive a motion to dismiss. That's because that
10 particular law does not apply to, quote, a transaction or
11 conduct specifically authorized under laws administered by a
12 regulatory board or officer acting under statutory authority
13 of this state or the United States. And that is exactly the
14 case for the city water department.

15 And for that reason it would be futile to amend to
16 include a violation of the Michigan Consumer Protection Act.
17 And there's some more detail. But in light of the fact that
18 they appear to have abandoned it, the whole proposed amendment
19 anyway, I don't see the point in going through too much more.

20 Because the City of Flint is undoubtedly authorized
21 by law to provide drinking water to its residents. So it
22 would not be liable under the Michigan Consumer Protection Act
23 under the facts set forth in this complaint.

24 We then have a request to amend to include conversion
25 and unjust enrichment. And the city defendants argued

1 successfully that the Michigan Governmental Tort Liability Act
2 applies and that plaintiffs claim should fail because it's
3 insufficiently pleaded to get around that. And I agree with
4 them.

5 Let's see. Conversion requires that somebody took
6 something of someone else's. I couldn't wrap my mind entirely
7 around that so, how that applied here. But I think they're
8 saying they paid for good water and the city took their
9 payment for the good water and provided them bad water. But
10 that's not what this particular count conversion -- it cannot
11 survive under the facts that are pled.

12 And of course with the Governmental Tort Liability
13 Act, the only exception is gross negligence but then only if
14 the defendant being sued is the proximate cause of the injury
15 or damage, which makes it very difficult to apply in this
16 case. And that rationale was set forth in the Guertin
17 opinion.

18 Moving to unjust enrichment. On that claim in
19 Guertin, I did not -- I declined to exercise jurisdiction over
20 that particular claim and would do the same thing here.

21 Then we get to the constitutional contract claims
22 that were all addressed in Guertin. And I will just
23 incorporate that rationale here because the claims as I
24 understood them in the Boler amendment are the same.

25 Then we have the conspiracy to deprive plaintiffs of

1 a constitutional right. But they're referring to those very
2 constitutional contract rights that do not exist. So that
3 count cannot go forward. So that will constitute the ruling.

4 Okay. The next thing that we have is the hardest
5 thing, which is focusing on the combination of coordinating
6 this case with state proceedings and the description of
7 nonparty materials that preliminary discovery would apply to.

8 So with respect to the coordination between the state
9 and federal proceedings, we earlier had Judge Yuille and
10 myself trying to slog through sorting this out. And I'm here
11 to tell you it was not resolved. But a plan was put in place
12 which is to -- at least an initial next step which is that the
13 coordination order that I entered contemplated that a similar
14 order would be drafted and submitted in other courts where
15 Flint water litigation is pending. And the counsel who was
16 present committed to undertaking the next step in that
17 process. And I can't order anybody to do -- to submit
18 something to another judge -- or maybe I can -- but I'm not
19 going to. Because there was a commitment to get it done. Is
20 that the case, Mr. Stern?

21 MR. STERN: Yes, your Honor. There's a group of four
22 or five of us that have been doing that. And Mr. Erickson
23 circulated a draft and just waiting on people to sign off on
24 it before it gets submitted. But it will be done in the next
25 probably five to seven days.

1 THE COURT: Okay.

2 MR. LEOPOLD: Yes. Your Honor, Ted Leopold on behalf
3 of the class plaintiff. Just for clarification perspective,
4 is what the Court just was referring to and what Mr. Stern was
5 just talking about, is that both for federal and state court
6 proceedings or was that only for federal various court
7 proceedings?

8 THE COURT: I think it's a similar -- what I'm
9 talking about is a document similar to the order I entered
10 regarding coordination between state and federal proceedings
11 that would be entered on the -- with the other judges in the
12 case -- cases.

13 MR. STERN: Your Honor, it is precisely that. Sorry.
14 Corey Stern on behalf of the individuals. It's a mirror image
15 essentially of the order that your Honor entered for
16 coordination. In your Honor's order, it was required for the
17 parties to get a similar order entered by the courts where
18 other cases lie and that's all it is. There's not different
19 about it than what you entered. It just hasn't yet been
20 submitted to Judge Yuille.

21 THE COURT: All right. So now what we have is the
22 nonparty materials and disputes about defendants have
23 requested authorizations for the release of medical,
24 education, insurance, and employment records among other items
25 from plaintiffs. And class plaintiffs have objected to that.

1 Do the individual plaintiffs have any objection?

2 MR. STERN: I don't think we've been served with
3 anything.

4 THE COURT: Oh.

5 MR. STERN: So it's not really our fight.

6 THE COURT: Okay.

7 MR. STERN: As part of the -- with respect to the
8 question though, the fact sheets that have been submitted to
9 the extent they've been submitted in state court requires the
10 individual plaintiffs to provide some of that information
11 already. So it would be disingenuous for me to stand up and
12 say we're opposed to it when we're actually doing it in
13 another venue.

14 THE COURT: Okay. I just want to get -- pull it up.
15 So just a second. Okay. Well, Mr. Leopold. Give me one more
16 second. Okay. So it's docket entry number 536 is the notice.
17 Okay. Go ahead.

18 MR. LEOPOLD: Thank you, your Honor. Your Honor,
19 just we have filed an objection to this particular issue so
20 that we can raise with the Court some parameters, if you will,
21 of how this may or may not proceed.

22 First, one of the issues which needs clarification
23 which we have not been able to ascertain at this point in time
24 is whether or not the third party authorizations are for the
25 named class representatives only. We need to sort of filter

1 through that. Because of course getting all this information
2 for the entire approximate 85 to 80,000 members of the
3 potential class is a different issue.

4 I am assuming it is for only the class named
5 plaintiffs but we need clarification on that particular issue
6 as one of the first guideposts.

7 THE COURT: Okay. Whose going to be responding? Is
8 it Mr. Kim or Mr. Grunert?

9 MR. GRUNERT: I will start off.

10 THE COURT: Why don't you come up here.

11 MR. GRUNERT: John Grunert for the VNA defendants. I
12 discussed with some of the other counsel who join with VNA in
13 this issue and I said I would go first and the others could
14 then speak for themselves.

15 The issue was raised by the filing that we made and
16 the ECF number you identified. It was served on -- through
17 the ECF system on July 23rd, 2018. So I believe all counsel
18 for all plaintiffs were served with it.

19 With respect to the matter that Mr. Leopold just
20 raised in the first sentence of the filing, it said that it
21 applied to the plaintiffs, including named plaintiffs in the
22 putative class action.

23 THE COURT: And all plaintiffs --

24 MR. GRUNERT: And all plaintiffs in individual
25 actions.

1 THE COURT: Yeah.

2 MR. GRUNERT: Didn't say anything about unnamed class
3 members who are, in fact, not plaintiffs because there is no
4 class at this point.

5 THE COURT: Okay. Of course. That's what I was
6 going to say, but you beat me to it. So Mr. Leopold, I think
7 your -- do you still have an objection to this material for
8 your named plaintiffs?

9 MR. LEOPOLD: With that clarification, not for the
10 named. However, we do have concerns about authorizations,
11 which is what they're seeking authorizations for, personal
12 information, things of that sort.

13 When the reversed is not necessarily equal, that
14 being none of the defendants have allowed us at this point in
15 time at least where we are at this stage in discovery at least
16 to get the same type of authorizations from the defendants
17 where appropriate type of third party discovery may be
18 necessary, such as certain consultants, records that they may
19 have in that like.

20 If it is a quid pro quo for both parties, then of
21 course we have no objection. At this point in time we have
22 provided --

23 THE COURT: But Mr. Leopold, what it is is they have
24 requested that. Have you requested -- is there a --

25 MR. LEOPOLD: There is not a corresponding request at

1 this time only because we wanted to have this hearing to sort
2 of get the feel and the barometer of where the Court is at.
3 We certainly are under an obligation to provide for now that
4 we have specific clarification as just the class reps. I
5 guess Mr. Stern will have to speak for all of the plaintiffs.
6 And Mr. Napoli for their plaintiffs as well about what to do.

7 But now that we have clarification just for our few
8 class reps we can certainly do that. We can certainly get
9 authorization. And in the Court is inclined for us to do
10 that, we now know that what is -- what we need to do. We can
11 now go forward and request the same type of information where
12 appropriate of authorizations to defendants.

13 We just didn't want to do that and sort of put the
14 cart before the horse and then have more objections, more
15 pleadings, things of that sort. So now if that is where the
16 Court is going, we have no problem doing that. We now know
17 that we can do the same against and submit the same type of
18 discovery, third party, with appropriate authorizations to the
19 various defendants and begin the discovery in that regard.
20 That is what we --

21 THE COURT: Okay.

22 MR. LEOPOLD: -- have been searching for and we look
23 forward to do that.

24 THE COURT: All right. Mr. Stern.

25 MR. STERN: Corey Stern on behalf of the plaintiffs.

1 Your Honor, first I apologize for saying that it didn't apply
2 to the individual cases. Obviously it does. It's in
3 parentheses.

4 Generally speaking, we have no objection to providing
5 those authorizations. I think couching this request as a
6 nonparty request when what it really is is a request for
7 documents and authorizations that would be part of mutual
8 discovery or general discovery, I think that would be a more
9 accurate way to couch it.

10 And I think in light of some of the arguments that
11 had been made with regard to a stay and in light of the fact
12 that there haven't even been answers filed yet and there has
13 not been an engagement of any substantial discovery, I'm not
14 sure the timing of it is now. But fundamentally the idea of
15 providing that information to the defendants is fair game.

16 I think some of the descriptions that they had from
17 when I read it and thought it applied to the class, I think
18 some of it's a little bit overbroad. You know, asking for
19 employment records you know for children. There are no
20 employment records.

21 THE COURT: Well, that would be an easy answer.

22 MR. STERN: I understand. But I just -- I don't
23 technically know how it would work. So your Honor just says
24 -- would issue an order that this stuff is fair game and then
25 they send us a request for that? Or is this the request

1 itself?

2 THE COURT: I think the request would have to be set
3 forth in a formal request. Just because then you have the
4 definition section that's going to go on for 10 pages. You
5 really don't want that.

6 MR. STERN: I'm not -- okay. I'll yield to --

7 THE COURT: But let me just say this, which is that
8 there is a dance that's going on of defendants want to stay
9 the litigation. Plaintiffs want to go forward. Right now I
10 am trying to go somewhere in between to keep -- as I've said
11 over and over and over again, I see my role as a problem
12 solver.

13 There is a -- there was a problem that took place.
14 There may or may not be a solution that can be reached here.
15 But to the extent that there can be, it has to be reached in
16 some kind of timely manner for everyone's sake in this room
17 for it to be a meaningful resolution.

18 So my effort is where permitted by court rule and by
19 law is to keep things going in a reasonable way for both
20 sides. So this seems like one part of the case where work can
21 get done productively. These documents can be exchanged.

22 What I -- I don't think we have a protective order
23 regarding people's -- do we have a protective order regarding
24 personal medical information.

25 MR. GRUNERT: We have a confidentiality order. It is

1 drafted in a way that it governs personal information.

2 THE COURT: Okay.

3 MR. GRUNERT: As well as corporate kind of
4 information.

5 THE COURT: I remember the process but I didn't know
6 if it was ultimately entered. It is entered.

7 MR. GRUNERT: It was entered, yes.

8 THE COURT: Okay. Good, good. I'm glad to hear
9 that.

10 MR. STERN: I can't stand -- I can't upstairs sit and
11 say that we want to have a trial, you know, in March or as
12 soon as possible and then say to Judge Yuille two weeks ago
13 that we'd be willing to try a case tomorrow. And then with a
14 straight face stand up and say we don't want to provide these
15 authorizations.

16 So I would appreciate it if it was done in a more
17 formal way so we know exactly what it is we're supposed to
18 respond to.

19 THE COURT: Yeah. And this was in response to my
20 last order where I said tell me what you're talking about.
21 Now they told me what they're talking about and they can
22 reduce it into a formal request under the Rules of Civil
23 Procedure which will trigger -- and then we need to have a
24 negotiated process for doing this. Because I forget how many
25 named plaintiffs Mr. Leopold has.

1 MR. GRUNERT: Something like eight.

2 THE COURT: Yeah. But you had many more. And so you
3 can't do this in 30 days.

4 MR. STERN: To be honest, I don't know what anybody
5 else can do. I think we already have authorizations --

6 THE COURT: Okay.

7 MR. STERN: -- for many of our clients, so it may not
8 be as difficult as --

9 THE COURT: Okay.

10 MR. STERN: But at the same time knowing how hard it
11 is to get in touch with the folks who have not provided
12 authorizations -- not just for me but for Val Washington, for
13 Herb Sanders, for Paul Napoli, I think there has to be baked
14 into however this works a real opportunity -- Shayla
15 Fletcher -- for them to get in touch with folks who are not
16 always easy to get in touch with.

17 THE COURT: I understand. Absolutely. So I'm just
18 cautioning everybody that -- Mr. Grunert in particular -- that
19 we're going to need to build in additional time that the rules
20 don't contemplate in light of the size of this case.

21 MR. STERN: I feel and see Mr. Napoli wanting to
22 talk.

23 THE COURT: I sort of feel that way, too.

24 MR. STERN: I'm going to sit down.

25 THE COURT: But I'm going to go back and forth. So

1 go ahead, Mr. Grunert.

2 MR. GRUNERT: May I? I would like to address a few
3 of the matters. First of all, today was the first time I
4 heard anything about authorizations that we give to
5 plaintiffs. Then that's fine. But I want to make sure that
6 you understand that we are talking about authorizations for
7 records that the -- that are legally protected and therefore
8 cannot as a matter of law be released to us and that the
9 plaintiffs have a legal right to cause to be released to us.

10 So we're not talking about companies or people who
11 can be subject to a documents only subpoena in accordance with
12 your earlier order where they got a subpoena and they produced
13 the documents. We're talking about people who won't produce
14 them in response to a subpoena --

15 THE COURT: And are prohibited from producing them.

16 MR. GRUNERT: And it's already happened. We served a
17 subpoena, we being collectively served a subpoena on the
18 Genesee County Health Department. And they have indicated
19 that they're going to redact all the personal identifying
20 information because they have to.

21 But to the extent they have information about
22 plaintiffs in this case, if they are given an authorization by
23 those plaintiffs, then they won't redact them.

24 THE COURT: Okay.

25 MR. GRUNERT: So we're talking about authorizations

1 that are legally required unless we're going to come in and be
2 getting orders from you requiring their production.

3 Moving along to the statement that you heard again
4 today as you've heard before from Mr. Leopold about how the
5 defendants haven't given him anything. That is false.

6 THE COURT: It doesn't matter.

7 MR. GRUNERT: The VNA defendants were in Flint for a
8 month. And we've turned over more than 12,000 internal
9 documents. LAN has turned over more than 80,000. The state
10 has turned over hundreds of thousands. So the plaintiffs in
11 these cases have given us nothing about their cases. Zero.
12 Zip. Apart from maybe their addresses for some of them.

13 THE COURT: Okay.

14 MR. GRUNERT: So --

15 THE COURT: And we don't -- we don't have to argue it
16 because I'm permitting this to go forward.

17 MR. GRUNERT: In terms of -- you know, we're happy to
18 serve formal Rule 34 requests. But in terms of the time for
19 production, those -- everybody knows or certainly all the
20 defendants know that discovery has to be done insofar as
21 timing and place of production and order of production that
22 those have to be negotiated matters.

23 THE COURT: I know they do.

24 MR. GRUNERT: So that is not going to be a problem.

25 THE COURT: Good.

1 MR. GRUNERT: If there's a problem that is of a legal
2 nature, then we can raise it with you. But those aren't going
3 to be problems, at least not with the VNA defendants.

4 THE COURT: Good. I didn't anticipate they would be
5 problems.

6 MR. GRUNERT: And now perhaps after Mr. Napoli
7 speaks, maybe I'll have something more to shoot my mouth off
8 about.

9 THE COURT: Okay. Thank you.

10 MR. NAPOLI: Your Honor, Paul Napoli. I just wanted
11 to raise a couple of points that I think will sort of benefit
12 everyone in the long run, having gone through this process of
13 exchanging authorizations for thousands of people.

14 We have employed Deborah Greenspan as a special
15 master to assist on the process of discovery. And I think we
16 should take advantage of that in light of what you said when
17 the other counsel stood up --

18 THE COURT: She was appointed for specific pretrial
19 matters and other matters as they come up, which could include
20 discovery for sure.

21 MR. NAPOLI: Sure. So for example, authorizations.
22 I think it should be done in an orderly manner. It certainly
23 should be done. It should be part of a process on a rolling
24 basis where authorizations --

25 THE COURT: But Mr. Grunert just told you he's going

1 to be reasonable and he anticipates his colleagues will be
2 reasonable on that side of the V. Because you are all
3 experienced lawyers who know you have to negotiate these
4 things. So I don't know what the dispute is yet.

5 MR. NAPOLI: I'm not sure that there is a dispute.

6 THE COURT: Okay.

7 MR. NAPOLI: If the order is going to be entered and
8 mirror what the demand is, then I would say let's step back
9 and actually have a case management order that has a process.
10 For example, this -- the way this is written now, it would
11 require us to provide 8, 9 authorizations per defendant.

12 THE COURT: Per plaintiff.

13 MR. NAPOLI: Per plaintiff per defendant.

14 THE COURT: I see. Okay.

15 MR. NAPOLI: So that seems to be an inefficient
16 process asking people to sign a hundred authorizations. In my
17 experience -- and I'm sure the special master has seen this,
18 too -- that there is coordination by the defense liaison with
19 one authorization to distribute the information to all of the
20 defendants.

21 So things like that, I just don't want to have a
22 rushed order without having input with the special master,
23 input with the defendants that something that doesn't
24 overwhelm these individual plaintiffs, doesn't overwhelm the
25 parties.

1 THE COURT: Okay. What we'll do is there will be a
2 meet and confer between plaintiffs' counsel and defense. If
3 you can't resolve it, you'll call my chambers. I'll attempt
4 to resolve it on the telephone with the court reporter
5 present. If I can't resolve it, I'll either have written
6 briefing from you or I'll refer it to Ms. Greenspan. But I'm
7 going to assume that you can work this out.

8 MR. NAPOLI: Thank you.

9 THE COURT: Thank you. Okay. That comes to the
10 conclusion of what I had on our list of things to discuss.
11 The next status conference will be November 7th at 2:00 PM
12 with a meeting in chambers at 1:00 PM and the timing for
13 submitting proposed agenda items is set forth on page 4 of the
14 agenda for today's hearing.

15 But in the meantime, I'll see everyone who wishes to
16 be here on September 26th. And I will make it known by the
17 close of business Friday whether I'll issue a written decision
18 on Flint's motion for interlocutory appeal.

19 Mr. Kuhl has something to say. But state who you
20 are.

21 MR. KUHL: Richard Kuhl for state defendants. One
22 additional issue that we discussed in chambers which we
23 haven't discussed here is what cases are going to be in front
24 of Genesee County, which cases are going to be in front of
25 this Court? But specifically the Mays case. We had the

1 situation where --

2 THE COURT: Can you speak up into the microphone?

3 MR. KUHL: Absolutely. We had the situation where
4 the state --

5 THE COURT: I don't think you got any closer to the
6 microphone.

7 MR. KUHL: The state and the city had transferred
8 certain claims to the court of claims. There is issues as to
9 whether or not those were proper transfers. In the meantime,
10 under the Carthan rule, the Mays case was removed to this
11 Court.

12 And so the question is if those -- the attempt to
13 transfer to the court of claims are denied, do those actions
14 end up back in Genesee County or in this court? I wasn't
15 quite sure we ended up on that except that Judge Yuille said
16 he was going to circulate a chronology of time.

17 THE COURT: Yes. Thank you for bringing that back
18 up. Which is that I think what's going to happen is Judge
19 Yuille is going to provide to me what his staff has put
20 together as their best understanding of the Mays litigation.

21 I will then take a look at it. I may add or order
22 something to it. And then I'll distribute it to counsel of
23 record in this case for your feedback into whether it's
24 accurate or not. And then by the end of that -- and Mr. Kim
25 was going to have some role in that.

1 MR. KIM: Well, originally. But then I believe he
2 was going to send it to you.

3 THE COURT: Yeah.

4 MR. KIM: I guess my only question would be in terms
5 of giving any feedback, if we have any comments or
6 disagreements with Judge Yuille's -- with Judge Yuille's
7 summary, do you want us to -- do you want us to file that with
8 --

9 THE COURT: I'll let you know. Because I think I'll
10 submit it to you via e-mail because I -- it's not an order.
11 It's not anything that the docket contemplates. But we need
12 to know where those -- where that litigation is. And I'm not
13 sure -- probably some of you know but I don't fully understand
14 it, neither does Judge Yuille. So we're going to get that
15 sorted out. So I'll set forth a little way of setting it --
16 of responding in the e-mail.

17 MR. KUHL: And at that point we'll have a further
18 discussion about which case is where.

19 THE COURT: Yes.

20 MR. KUHL: Thank you, your Honor.

21 THE COURT: Okay. Anything else? Well, then, that
22 will conclude the hearing.

23 (Proceedings Concluded)

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September 12, 2018

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CERTIFICATE OF OFFICIAL COURT REPORTER

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

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

9/21/2018
Date