

March 11, 2020

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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

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STATUS CONFERENCE

BEFORE THE HONORABLE JUDITH E. LEVY  
UNITED STATES DISTRICT JUDGE

MARCH 11, 2020

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I N D E X

MISCELLANY

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P R O C E E D I N G S

THE CLERK: Now calling the Flint Water Cases. And also joining us is the Honorable Joseph J. Farah of the Genesee Circuit Court.

THE COURT: Welcome and please be seated. And I'm not happy that we have a coronavirus global pandemic, but I'm really liking the numbers of people in the courtroom right now. So it just -- our work together has been so highly pressurized and so many people filling every seat. And today we have so many empty seats. So I hope that that means that we can be efficient and everyone can be heard.

So prior to today's hearing, I sent out a notice that I understand law firms are limiting domestic travel. And particularly we have Jordan Connor's for example from Seattle whose travel is most certainly limited. And I'm thankful to him and to the others who are on by telephone. They're following the rules that have been set forth by their firms and in the interest of protecting themselves and all of us.

So with that said, why don't we -- I want to also, before we have appearances, thank Judge Farah again for his presence here in the federal court. And I think it's very helpful for the cases that the state and federal cases be coordinated so that both judicial resources but really more importantly all of your resources and those of your clients are not wasted in any way as this litigation goes forward.

1           So I did, in fact, invite Judge Linda Parker to  
2 participate in this hearing and offered to hold it in Detroit  
3 in the event that would make it easier for her. And that was  
4 not available to her. So or it did not take place. But just  
5 so you know, we're trying to get as much of this coordinated  
6 as we can.

7           So why don't I, before I even turn it to Judge Farah,  
8 have appearances for the record.

9           MS. GREENSPAN: Deborah Greenspan, Special Master.

10          MR. WASHINGTON: Val Washington on behalf of the  
11 Anderson and Joel Lee plaintiff.

12          MR. NOVAK: Paul Novak on behalf of the class  
13 plaintiffs.

14          MR. BLAKE: Jayson Blake, liaison counsel to the  
15 state court class plaintiff.

16          MR. STERN: Good afternoon. Corey Stern as liaison  
17 counsel for individual plaintiffs.

18          MR. PITT: Good afternoon. Michael Pitt, co-lead  
19 counsel for class.

20          MR. LEOPOLD: Ted Leopold, co-lead counsel for class.

21          MS. BETTENHAUSEN: Margaret Bettenhausen, state  
22 defendants.

23          MR. BERG: Good afternoon, Your Honor. Rick Berg for  
24 the City of Flint.

25          MR. KIM: Good afternoon, Your Honor. William Kim



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1 for the City of Flint.

2 MR. RUSEK: Good afternoon, Your Honor. Alexander  
3 Rusek on behalf of Howard Croft.

4 MR. CAMPBELL: Good afternoon again, Your Honor.  
5 James Campbell. I represent the three VNA defendants.

6 MR. ERICKSON: Good afternoon, Your Honor. Philip  
7 Erickson for the LAN defendants and Leo A Daly Company.

8 MR. MASON: Wayne Mason also for the LAN defendants.

9 MR. WILDER: Marvin Wilder for the gist, Savage, and  
10 Kirkland plaintiffs.

11 MR. MATEO: Santino Mateo for Darnell Earley.

12 MS. SHEA: Ashley Shea for the class plaintiffs.

13 THE COURT: Ashley who?

14 MS. SHEA: Shea.

15 THE COURT: Okay. Thank you.

16 MR. ROGERS: David Rogers for the VNA defendants.

17 MR. KUHL: Good afternoon, Your Honor. Richard Kuhl  
18 for the state defendants.

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

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

22 MR. PATTWELL: Mike Pattwell on behalf of Dan Wyant  
23 and Brad Wurfel.

24 MS. SMITH: Susan Smith on behalf of McLaren Regional  
25 Medical Center.

1 MR. MONROE: Steven Monroe for the Washington and  
2 Chapman plaintiffs, Your Honor.

3 MR. BAJOKA: Edward Bajoka on behalf of Daugherty  
4 Johnson.

5 MR. GAMBILL: Nathan Gambill on behalf of the people  
6 of the State of Michigan in the state cases.

7 MR. MARKER: Chris Marker on behalf of Michael  
8 Glasgow.

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

10 THE COURT: Okay. Well, thank you all. And then on  
11 by telephone I'd like to have appearances. I understand that  
12 the telephone audio is not working such that it will broadcast  
13 to everybody.

14 We're going to call in again. They're still on the  
15 line I hope. And this is just one of those moments where we  
16 see how ill prepared we are for remote handling of things.  
17 But we will improve with time.

18 So I also want to welcome Jeseca Eddington back to  
19 the case. She has had a healthy baby and is a most amazing  
20 court reporter and is now back with the court. And I'm so  
21 thrilled to have her.

22 For the counsel who are on the phone, could I have  
23 appearances for the record? And let me tell you, I think Bill  
24 or Abigail may have told you this already, that our very --

25 UNIDENTIFIED PERSON: Your Honor, I'm having great

1 trouble hearing you.

2 THE COURT: Is this helpful? No? Is this helpful?  
3 Can you hear me? Okay. Great. We're having technical  
4 difficulties. By the next time we do this, the telephone  
5 system that's really phenomenal in the courtroom will be  
6 working again I hope.

7 So what I'm going to do is ask for appearances for  
8 the record for those who are on the telephone. And I think  
9 it's going to be pretty difficult for you to participate, but  
10 let met know if you have something to say and we'll sort it  
11 out if we need to. So let's start with any plaintiffs'  
12 counsel on the line.

13 MR. BURDICK: James Burdick [Inaudible].

14 THE COURT: That being defense counsel James Burdick.

15 MR. BURDICK: Mr. Fajan is also on the line.

16 THE COURT: Mr. Fajan?

17 MR. FAJAN: Yes, I am.

18 MR. CONNORS: Your Honor, Jordan Connors for class  
19 plaintiffs.

20 THE COURT: Thank you.

21 MS. BEREZOFSKY: [Inaudible] and the Gulla  
22 plaintiffs.

23 THE COURT: Is that Esther Berezofsky?

24 UNIDENTIFIED SPEAKER: [Inaudible].

25 THE COURT: Wait. Let me make sure that was Esther

1 Berezofsky earlier.

2 MS. BEREZOFSKY: Yes.

3 THE COURT: And then Jessica Weiner for class  
4 plaintiffs. Was that correct?

5 MR. DAWSON: Your Honor, Don Dawson and Todd Weglarz  
6 on behalf of the plaintiffs Brandon Rogers [Inaudible]  
7 legionella plaintiff.

8 THE COURT: Who's with you Mr. Weglarz? Oh, Dawson.

9 MR. DAWSON: Don Dawson.

10 MS. PSAI: Cindy Tsai, T-S-A-I, on behalf of the  
11 individual Marble plaintiffs.

12 THE COURT: Anyone else?

13 MR. LANCIOTTI: Good afternoon, Your Honor. Patrick  
14 Lanciotti for the individual plaintiff.

15 THE COURT: Okay. All right.

16 MS. SIMMONS: Attorney Sandrika (sp) Simmons on  
17 behalf of Alexander, et al, plaintiffs.

18 THE COURT: Okay. Anyone else? Well this is -- let  
19 me try to move a few things on the bench so that the telephone  
20 is closer to where I'm speaking. And I have to speak into the  
21 microphone so that it's picked up on the audio recording for  
22 the court reporter to check the transcript.

23 Ms. Simmons, can you spell your first name please? I  
24 think she signed off. That might have been her. Simmons, are  
25 you there? Okay. She's no longer there. Okay.

1           We're going to do the best we can. And whatever is  
2 happening here is undoubtedly being replicated across the  
3 country right now in various venues that are at least as  
4 important if not far more important than what we're doing. So  
5 we'll do the best we can with this.

6           So Judge Farah, I want to welcome you again --

7           THE HONORABLE JUDGE FARAH: Thank you, Judge.

8           THE COURT: -- to our courtroom and to the Eastern  
9 District of Michigan. And I know that you have some  
10 scheduling issues that you raised in chambers and I think with  
11 worth repeating here.

12           THE HONORABLE JUDGE FARAH: Thank you, Judge. We  
13 have before my court 17 pending motions on what we call the  
14 Flint Water Cases. Many of those were filed in advance of my  
15 being assigned the cases in November. Two have been filed  
16 since then. We owe you a lot of decisions on these cases.

17           I asked in chambers and it will be reported I'm sure  
18 here that we have now or are attempting to establish a time  
19 table to establish a time table as to when you folks will be  
20 visiting our court on these motions. Not meant to rush you.  
21 Not meant to disrupt anything that's going on here. But we  
22 would like you to know that we would like to work on your  
23 cases.

24           So if that information is provided to me, we'll get  
25 things scheduled on my docket obviously in conjunction with

1 your own schedules and we'll get moving on the motions that we  
2 have to hear.

3 One other thing I wanted to bring up and I'm glad my  
4 staff reminds me by supplying me with something. And let me  
5 just call out a particular name and see if I have this right.  
6 Is there a Attorney Choudhury here? Is there anyone here from  
7 the ACLU?

8 THE COURT: No.

9 THE HONORABLE JUDGE FARAH: Okay. And I don't know  
10 if the ACLU is still representing anybody in this case, but I  
11 want to make this disclosure that I'll make in writing  
12 pursuant to our Rule 2.003.

13 I am a board member of a charitable group in Flint  
14 called Metro Community Development. They have just moved to a  
15 new location. They are renting office space to ACLU attorneys  
16 working on the Flint Water Cases.

17 The rest of the disclosure as follows. I didn't pick  
18 them as tenants. Not part of my job. It is a non compensated  
19 job. I get no money. So if we get their rent money or not it  
20 has really nothing to do with me. Lastly, I don't know what  
21 their rent is. But let's just say for the sake of discussion  
22 it's a thousand dollars a month. This charitable foundation  
23 is a multimillion dollar operation. And so that they are  
24 renting from a group that I am a board member of will have  
25 absolutely nothing to do with my impartiality on the case.

1           But if anybody feels otherwise, then you can make a  
2 motion under Michigan Court Rule 2.003 and we'll take up your  
3 motion. There will be a written disclosure in our files to  
4 all the lawyers so that you are well aware of that.

5           Additionally -- since I just noticed this name, too  
6 -- I saw a case called a number of plaintiffs and Concerned  
7 Pastors v Khouri. I'm going to assume without knowing that  
8 that is Treasurer Nick Khouri.

9           Treasurer Nick Khouri is a distant cousin of mine. I  
10 have had no contact whatsoever with him about this case. I've  
11 not talked about this case with him. He's not asked me about  
12 this case. Frankly it just rang a bell right now when I was  
13 looking over the document prepared by my staff.

14           That, too, will have absolutely nothing to do with  
15 any decisions I make in the case. It will not affect my  
16 impartiality. I'm not going to decide one way or the other  
17 for Nick Khouri's benefit. And that will be in a formal  
18 written disclosure in my cases as well.

19           So those disclosures are made -- just in case you're  
20 not coming to my court, those disclosures are made out of,  
21 well, a very common phrase now, an overabundance of caution,  
22 okay. So thank you, Judge.

23           THE COURT: Thank you, very much, Judge Farah. I  
24 think caution is always wise. So I appreciate that and I'm  
25 sure everyone else does as well.

1           Could those of you on the telephone mute your call so  
2 that we don't hear noises from you. Thank you. I was about  
3 to say something that I won't say. Okay.

4           So let's get busy on the agenda in addition to what  
5 we've just covered. The third amended case management order  
6 is almost ready to be entered. And I received a great deal of  
7 briefing about a proposed extension that originated with an  
8 extension that I indicated I would be interested in hearing  
9 about, a request from the putative class co-lead counsel to  
10 extend the deadline for filing the class certification motion.

11           And having reviewed all of the briefing and materials  
12 submitted, I decided and indicated in the meeting ahead of  
13 today's hearing that was just held upstairs that I will grant  
14 a one month extension for class certification so it will now  
15 -- for a motion of class certification. It will now be  
16 Tuesday, May 26th.

17           There will be other dates that follow including the  
18 deadline for filing 26A2 expert reports and disclosures,  
19 oppositions, and supporting expert disclosures, and reply  
20 brief. So all of that will be taken into consideration.

21           I will also postpone the bellwether, the beginning of  
22 the bellwether trials I think by only a month but I'm thinking  
23 it may have to be ever so slightly more than that based on  
24 when dispositive motions would be filed in that -- in those  
25 cases. So it may be a month and a half or so instead of one



1 month.

2 But in general right now I'm looking at dispositive  
3 motions to be filed by August 3rd of 2020 in the bellwether  
4 plaintiffs' cases. And any responses August 24th and replies  
5 September 8th. Discovery in the bellwether cases that are  
6 selected for trial would close on July 3rd of 2020.

7 So that's the general framework that we're looking at  
8 now. And with the understanding that the evolution of this  
9 virus situation may require some depositions to be held by  
10 video teleconference and if for some reason that's not  
11 possible, I'll certainly talk about what would be a reasonable  
12 extension. But I would just urge everyone to get done  
13 remotely what you can if there are travel restrictions that  
14 are imposed in your community.

15 So that is generally the decision based on the  
16 briefing that was submitted. Any questions regarding that  
17 item? Okay.

18 So the next issue is entitled discovery coordination.  
19 And this is where I was going to see if Judge Farah had  
20 anything further. But we sort of moved that ahead. And  
21 you'll be receiving responses from everyone.

22 THE HONORABLE JUDGE FARAH: Yes. We're going to get  
23 some responses on dates and time tables hopefully in the next  
24 couple of weeks.

25 THE COURT: And then the next issue regarding

1 discovery coordination is the class plaintiffs had submitted a  
2 request to discuss a process for obtaining discovery from the  
3 VNA defendants parent company Veolia Environment SA and Veolia  
4 Environment is not a defendant in this litigation.

5 And having reviewed really a small portion of what  
6 was submitted -- and generally I believe in reading everything  
7 submitted, but I could not bring myself to do that because it  
8 was not relevant to my consideration. So I stopped. And but  
9 what I did learn is that class plaintiffs' counsel would like  
10 to take a deposition of someone who lives in France who's part  
11 of a third party that's not a party to our litigation. And  
12 that in order to do that they follow The Hague Convention for  
13 subpoenaing that person for a deposition.

14 And I have absolutely no objection to that  
15 whatsoever. And I really -- I thought I had no involvement  
16 with it. But I learned that perhaps there's something called  
17 letters rogatory that will be presented to me that we have a  
18 case or something to that effect.

19 If and one those letters show up here, I assume, Mr.  
20 Leopold, they will be served on the other side. Speak into  
21 the microphone if you will.

22 MR. LEOPOLD: They will, Your Honor. They'll be  
23 served through the regular normal process of filing and then  
24 provided to the Court for proposed order for the Court to sign  
25 as well.

1 THE COURT: Okay. So there would be an opportunity  
2 for anyone from Veolia or anyone else in this case to file an  
3 objection at that point if they thought one would be well  
4 placed.

5 So is there anything further on that? Okay. Well  
6 there's always something new to learn about. Okay.

7 So the next issue was I had asked for briefing on the  
8 issue of the implications of the protective orders that are  
9 filed in Judge Manley's Genesee County Circuit Court cases  
10 involving certain defendants and the issue of discovery  
11 materials obtained or materials obtained pursuant to  
12 investigative subpoenas in the state court.

13 And so what I'd like to do is hear argument on that.  
14 And I will tell you that I have reviewed not in as much detail  
15 as I would like to your submissions. I have a few questions  
16 about them. But I've had another case taking a good deal of  
17 my time right now. So I have not gotten quite as far as I  
18 would like to in understanding this Michigan compiled law  
19 767A.8. But I think I've got a little bit of a grip on it.

20 So I think perhaps we start with the city. The city  
21 defendants, VNA defendants, MDEQ all filed. So I see Mr.  
22 Rusek. You're going to go first.

23 MR. RUSEK: Alexander Rusek on behalf of Howard  
24 Croft, Your Honor.

25 THE COURT: Yes.

1 MR. RUSEK: I'm also speaking on behalf of the other  
2 individual city defendants today Mr. Earley, Mr. Ambrose, Mr.  
3 Johnson, and Mr. Glasgow.

4 THE COURT: Good.

5 MR. RUSEK: To give you a little bit of information  
6 about the city defendants, there were no protective orders  
7 entered in any of the city defendants' criminal cases that  
8 were in the Genesee County District Court.

9 So we were in a little bit different position than  
10 the DEQ and DHHS defendants that did have those protective  
11 orders entered. But I believe all of these issues go to all  
12 of the criminal defendants on our side. And I did attach the  
13 protective orders, as many as I could find, to my motion.  
14 Even though they're not for my client or the city defendants.  
15 To give a little bit more context --

16 THE COURT: And I will tell you that we contacted  
17 Judge Manley's court, her chambers, and spoke to her. And  
18 from her perspective, the protective orders -- which I know  
19 don't apply to your specific client and those you're also  
20 representing or arguing on behalf of -- and she indicated that  
21 the protective orders are no longer in effect now that her  
22 cases are closed.

23 So far as she's concerned, her criminal cases are  
24 closed. The protective orders no longer apply.

25 MR. RUSEK: Absolutely, Your Honor. I'd have to

1 defer probably to Mr. Barbieri or Adam Rosenthal. I believe  
2 that he's in a slightly different position as well as far as  
3 their protective orders. So I'll defer on that side of  
4 things.

5 THE COURT: Okay. And Mr. Barbieri's standing up.  
6 But we won't hear from him until his turn to argue.

7 MR. RUSEK: So to give the Court a little bit more  
8 background about where we're at and what happened in the  
9 criminal cases. Originally, the criminal cases against the  
10 city defendants were initiated by the Special Assistant  
11 Attorney General Todd Flood who was appointed by then Attorney  
12 General Bill Schuette.

13 In 2016 the city defendants were charged with various  
14 crimes, misdemeanors and felonies. Mr. Glasgow was the first  
15 one charged. He pled relatively quickly. And then in  
16 December of 2016, the remainder of the city defendants were  
17 charged with felonies and misdemeanors.

18 After that point, Mr. Flood began what I'll call a  
19 disjointed series of production of documents to the city  
20 defendants over the course of approximately two years that  
21 amounted to hundreds of gigabytes of data.

22 And it was largely produced not in a OCR format that  
23 was searchable. Some materials that at one point were  
24 searchable were rendered unsearchable in the production. We  
25 were never given any real concrete logs of what was being

1 produced. It was basically piles and piles of everything that  
2 you could imagine.

3 At one point on April 25, 2017, when I was coming  
4 into the matters, we had a probable cause conference in front  
5 of Judge Perry in district court. And at that probable cause  
6 conference, Mr. Flood made the assertion -- and I attached  
7 this transcript to my brief as Exhibit B -- that all of the --  
8 I'll quote him exactly in reference to the discovery. All of  
9 this material is pursuant to investigative subpoena. All of  
10 this material is documents -- just being candid with the  
11 court. This is what's going on.

12 THE COURT: Okay. I read that. And whatever Mr.  
13 Flood said, that's what he said. And all of the disjointed, I  
14 absolutely believe it. But let me ask you, VNA in their  
15 response raises the question of whether instead of seeking  
16 this from the prosecutor and in this case that would be the  
17 other side of the Michigan Attorney General's office or the  
18 special prosecutor's office or whatever. They suggest that  
19 many of these documents are in the hands of individual  
20 defendants and that they're not under any obligation pursuant  
21 to this state law to withhold these documents.

22 Do your clients have a set of these electronically or  
23 in any other form?

24 MR. RUSEK: They have some of the documents, Your  
25 Honor. When they were produced to us and in a criminal

1 prosecution the client certainly has an absolute right to look  
2 at the discovery in the case.

3 THE COURT: Yes.

4 MR. RUSEK: So that creates problems for everyone who  
5 is charged criminally is that those clients have a right to  
6 see what was produced in them. MCL 767A.8 I think is  
7 unambiguous. And it says in relevant part that physical  
8 evidence obtained by the prosecuting --

9 THE COURT: Slow down when you're reading.

10 MR. RUSEK: Absolutely. Physical evidence obtained  
11 by the prosecuting attorney pursuant to an investigation under  
12 this chapter are confidential and shall not be available for  
13 public inspection or copying or divulged to any person except  
14 as provided in this chapter. And then it goes on to explain  
15 that they're also not available under FOIA.

16 I believe that's quite unambiguous, Your Honor. The  
17 "or divulged to any person", there's no exception in there  
18 that says the prosecutor can't divulge it. It is simply these  
19 are confidential. They can't be divulged to any person.

20 What I can inform the Court is that we have --

21 THE COURT: What's the "except as otherwise  
22 provided"? Does that mean it goes to the defendant, him or  
23 herself?

24 MR. RUSEK: A defendant, after an information is  
25 filed, after a bindover, they do have a right to their own

1 preliminary -- or excuse me, investigative subpoena testimony  
2 transcript at that point.

3 THE COURT: Okay.

4 MR. RUSEK: In the case law that I cited, the Truel  
5 case, which is a Michigan Court of Appeals case from 2010, the  
6 court there held that the language is unambiguous. That was a  
7 case where the Wayne County Prosecutors Office was subpoenaed  
8 for their entire file. And they produced things that were in  
9 the file that were not subject to confidentiality under the  
10 investigative subpoena statute. And then the Truel court said  
11 everything else is confidential. Testimony given pursuant to  
12 an investigative subpoena is confidential. You do not have to  
13 disclose that under the subpoena.

14 And that was also followed in the People v Cotting  
15 case which is unpublished.

16 THE COURT: What about Judge Drain did, and I think  
17 it was the Moody case, where he reviewed the documents in  
18 camera to determine whether they should be released?

19 MR. RUSEK: Yes. So Judge Moody in that case did  
20 hold that the materials, even though they were relevant, that  
21 they were still confidential. I would not be opposed to the  
22 court reviewing the materials as one option.

23 THE COURT: Well, I might be opposed.

24 MR. RUSEK: I think they could be very opposed. And  
25 I think that --



1 THE COURT: After you described them.

2 MR. RUSEK: I think we would have to get the entire  
3 marshal service in the state on it reviewing documents to do  
4 that. It is a massive amount. A lot of it seems to have been  
5 produced in other contexts. But what happened in the Moody  
6 case is that one of the plaintiffs was actually part of the  
7 criminal investigation into I believe it was price fixing and  
8 horse racing.

9 THE COURT: Yes.

10 MR. RUSEK: And the plaintiff wanted his own  
11 testimony, the transcript of it, that was obtained by the  
12 investigative subpoena and he was denied it in that case even  
13 though it was completely relevant to the lawsuit that was  
14 going on.

15 I think that the statute is unambiguous. And if we  
16 look further to some of our policy concerns that I outlined in  
17 my brief as well, if we look towards the Sixth Circuit and  
18 what it has said about grand jury proceedings in secrecy, even  
19 after the indictment is filed.

20 THE COURT: The Truel case, T-R-U-E-L, stands for the  
21 premise that the prosecutor is prohibited from releasing the  
22 documents.

23 How does it stand for the fact that an individual who  
24 has it who is not the prosecutor and the prosecutor's case is  
25 over for now?

1 MR. RUSEK: Truel -- that is correct. Those are the  
2 facts of Truel. I don't believe that the holding in that case  
3 limited it only to the prosecutor. But that is the facts that  
4 came up there. I don't know of a case on point either in  
5 district, Sixth Circuit, or in Michigan that has the same  
6 issue that we face in this case.

7 THE COURT: So is there any civil case in Michigan  
8 other than Moody which had its in camera review? And it  
9 sounds like if Judge Drain had thought that they were relevant  
10 and for some reason ought to have been released, he would have  
11 ordered it.

12 So anything other than Truel which I think applies to  
13 the prosecutor and Moody that says in a civil case this  
14 material cannot be released?

15 MR. RUSEK: Those are the only civil cases that I  
16 know of, Your Honor. And in Moody, Judge Drain said that he  
17 did find the information was relevant.

18 THE COURT: Right. Oh.

19 MR. RUSEK: And then he still was not going to --

20 THE COURT: Right.

21 MR. RUSEK: -- order that it be produced because it  
22 was confidential under the investigative subpoena statute.

23 THE COURT: Okay.

24 MR. RUSEK: And as I've been talking through this  
25 with co-counsel, there are a lot of these concerns of what

1 would happen if we produce materials. Just going through it  
2 and trying to determine what was filed under investigative  
3 subpoenas, Mr. Flood asserted that everything came to him  
4 under investigative subpoenas.

5 That is what it is. That's his assertions. But we  
6 don't have a practical way of knowing without going to the  
7 solicitor general who's now in charge of the criminal  
8 prosecutions and asking her to tell us, every document, what  
9 was, what was not produced, what do they believe is  
10 confidential.

11 And we have some serious concerns. Some of these  
12 materials, they're marked clearly as being taken -- like  
13 deposition transcripts. They're clearly marked highly  
14 confidential pursuant to investigative subpoenas. We know  
15 that.

16 There's other materials that are just marked  
17 confidential. There's some materials that are marked grand  
18 jury material. We have some materials that have a disclaimer  
19 at the bottom that they belong to the EPA or the FBI and that  
20 they're on loan to your agency.

21 If Mr. Flood erred in producing these, I'm not sure  
22 what happens at that point. Does it waive whatever  
23 confidentiality previously existed with those agencies?

24 One solution to this problem, and it kind of came up  
25 in the Moody court, is I think that this is going to be

1 relevant. You know, I've stood up here and argued that the  
2 civil and criminal cases overlap almost entirely. So clearly  
3 the solicitor general has material that's going to be  
4 relevant.

5 What my proposal would be would be to have a third  
6 party subpoena from whoever wants to get these materials, send  
7 them to the solicitor general, give her an opportunity to be  
8 heard before the Court and assert confidentiality on it.

9 I don't know what the state of their documents are.  
10 But I know that there is going to be a huge burden placed on  
11 the individual city defendants if we have to review all of  
12 these and make calls on what may or may not be confidential.

13 And it's my understanding at least among city  
14 defendants is that our productions in the criminal cases were  
15 not the same across defendants. So each of us would have to  
16 likely engage in outside vendor, an army people to go through  
17 this and take a look at them and make some determinations  
18 about where we're at.

19 THE COURT: Well, I think that's a very appealing  
20 approach. So I'll ask for responses to that at the  
21 appropriate time.

22 MR. RUSEK: And just to close, Your Honor, I did put  
23 a little of this in my brief, but at least in the grand jury  
24 setting, there are some concerns even when a case has been  
25 dismissed or the defendant has pled guilty or an information

1 has been filed in open court is that we still keep the grand  
2 jury proceedings secret.

3 THE COURT: Yes.

4 MR. RUSEK: Not only does that impact on those grand  
5 jurors and that process in the individual case, but it also  
6 can potentially have an impact on grand juries in the future  
7 in investigative subpoenas.

8 THE COURT: Right. But this is not a grand jury.

9 MR. RUSEK: I'm just likening it to that.

10 THE COURT: Okay. I understand.

11 MR. RUSEK: Because in the Truel court they kind of  
12 made the analogy between the investigative subpoenas statute  
13 and grand jury proceedings under Federal Rule of Criminal  
14 Procedure 6E.

15 THE COURT: Okay.

16 MR. RUSEK: And also under 6E, we do have some  
17 procedures where grand jury materials can be disclosed.

18 THE COURT: Right.

19 MR. RUSEK: The investigatory subpoena statute  
20 doesn't have those same procedures. The Michigan court rules  
21 don't have those same procedures.

22 THE COURT: Okay.

23 MR. RUSEK: So I think that there is some comparison  
24 there. But the investigatory subpoena statute I think is even  
25 more restrictive than what we have at least under criminal

1 procedural rule 6E.

2 THE COURT: Okay. Thank you.

3 MR. RUSEK: Thank you.

4 THE COURT: So Mr. Barbieri.

5 MR. BARBIERI: Thank you, your Honor. Charles  
6 Barbieri appearing on behalf of the MDEQ defendants that have  
7 been charged historically in this case. Or not this case, but  
8 in the criminal cases in Genesee County.

9 Just at the outset I will adopt a good chunk of the  
10 argument that was made by Flint's counsel or Flint individual  
11 defendants and I won't repeat it here. But focus primarily on  
12 the fact that in communications that we've had with the  
13 solicitor general, we have been told that as far as they're  
14 concerned the protective order still applies. That's what  
15 we've been told.

16 THE COURT: So the solicitor general says that. But  
17 the order's the order of the court and the court has informed  
18 me informally over the telephone that they no longer apply.

19 MR. BARBIERI: I understand. But because of the  
20 documents in this case were produced via the special  
21 prosecutor and presumably as a successor now the solicitor  
22 general, we have taken that point into account in terms of  
23 what we could arguably produce.

24 We're probably in a similar position although we have  
25 different criminal counsel. So I cannot speak for that

1 criminal counsel for any of our MDEQ defendants. But for  
2 those criminal counsel, they received the records under  
3 direction that they were subject to a protective order. And  
4 we've also been told now by the prosecutor, or the special  
5 prosecutor now the solicitor general, that they are considered  
6 to be pursuant to this investigative subpoena law which Mr.  
7 Rusek I think has accurately set forth along with the Truel  
8 case as being governing here.

9 So we have the problem that we don't have the ability  
10 because we don't represent them in the criminal context of  
11 having any documents. The documents that exist would either  
12 be in the hands of criminal counsel or they would be in the  
13 hands of the solicitor general. So we don't even have --

14 THE COURT: So your clients didn't retain copies?

15 MR. BARBIERI: To my knowledge. It's possible they  
16 might have two or three pages that they may have had. But the  
17 bulk of it was so gigantic it was kept in -- I know for a fact  
18 for one particular client, it was only viewed by electronic  
19 means. There wasn't the capacity to actually produce it in  
20 what I'd call logistical convenient manner. So we have that  
21 issue.

22 The second issue that may exist in terms of --

23 THE COURT: And you know this whole issue came up  
24 because we were trying to find a way to streamline discovery  
25 so that depositions wouldn't have to be taken where sworn

1 testimony --

2 MR. BARBIERI: And that's what I want to get to right  
3 now.

4 THE COURT: Yeah.

5 MR. BARBIERI: It is true that a few MDEQ defendants  
6 have given statements. Number one to the Michigan State  
7 Police. And for the most part, I think VNA has figured out a  
8 method to getting those statements. Okay.

9 But the second part of it is is part of the  
10 cooperation agreement that some of the defendants entered into  
11 as part of having their cases criminally resolved, gave  
12 statements that were not -- that were not produced via court  
13 transcript or any type of documentation. They may have been  
14 recorded at best.

15 And again we're at a disadvantage because, again, I'm  
16 civil counsel not the criminal counsel. Those statements  
17 still are in existence in the possession now of the solicitor  
18 general. And if the Court were to somehow require those, I  
19 have to have the ability to see what those statements had,  
20 even if I have to hear them at this stage in order to defend  
21 my client at a deposition.

22 So I'm at loss --

23 THE COURT: I think the idea was this would be in  
24 lieu of re-deposing people.

25 MR. BARBIERI: Right. And my concern is, Your Honor,



1 this is not simplifying the matter. And if the Court is  
2 insistent that we have to exhaust that, I can assure you that  
3 I have to adjourn some of the depositions that are currently  
4 scheduled because of the fact that I don't want to have  
5 multiple more days added when the transcripts later become  
6 available.

7 If they become available, that's fine. But then my  
8 clients can be deposed at that point. But right now it's an  
9 impossible situation because we have defended our case rightly  
10 or wrongly on what we have had produced in this case or via  
11 whatever records are available through the state.

12 My clients didn't keep records. They were all part  
13 of the state record base. And presumably have been produced  
14 historically as a result of the subpoenas that have occurred  
15 or by, you know, informal exchanges that have happened.

16 THE COURT: Okay. Let me ask you two questions. Is  
17 there any way in which you view the issue of the protective  
18 order and so on, going away when the statute of limitations  
19 has run on criminal charges being filed against your client?

20 MR. BARBIERI: I haven't thought that far, Your  
21 Honor. I would believe that there may be less concern about  
22 having the documents protected from the criminal Fifth  
23 Amendment standpoint. But I'm not sure when that statute  
24 actually runs in the case of some of my clients. It may be  
25 beyond --

1 THE COURT: I thought it was --

2 MR. BARBIERI: -- the switch of the water.

3 THE COURT: Oh.

4 MR. BARBIERI: I think some of them may have that  
5 circumstance. But some of my clients may face activities or  
6 conduct after that.

7 THE COURT: Okay. Mr. Rusek?

8 MR. RUSEK: Your Honor, is this working as a  
9 microphone?

10 THE COURT: I think so, yes.

11 MR. RUSEK: Hi. Alexander Rusek for Howard Croft.  
12 If you have any questions about the statute of limitations,  
13 I'm probably in a better position --

14 THE COURT: Okay.

15 MR. RUSEK: -- as a criminal practitioner as well. I  
16 believe that there will be some statute of limitations that  
17 run. Those will be six years statute of limitations. If  
18 they're related to events prior to the switch in April of  
19 2014 --

20 THE COURT: Right.

21 MR. RUSEK: We're now six years past that point.

22 THE COURT: Right.

23 MR. RUSEK: Arguably I don't think there's any  
24 tolling that would have been going on. But there's arguably  
25 also ten year statute of limitations for involuntary

1 manslaughter under the Michigan criminal procedure or, excuse  
2 me, code.

3 So there are some statute of limitations that will be  
4 coming up. However depending on who's arguing them, they  
5 could considerably be longer than April of this year.

6 THE COURT: Okay.

7 MR. BARBIERI: I can't answer the question any  
8 better.

9 THE COURT: That's a thorough answer. What is your  
10 response to the possibility of a third party subpoena being  
11 issued, a special prosecutor then review this material and  
12 tell us whether she believes any of this material is still  
13 privilege.

14 MR. BARBIERI: As long as I'm entitled to see what  
15 that material is. For example, if it were a log -- and I  
16 think that was one of the suggestions made by Veolia's  
17 counsel. As long as I have the ability to determine whether I  
18 need to assert some sort of privilege or defense or some other  
19 objection to the document, that would be satisfactory.

20 THE COURT: Okay.

21 MR. BARBIERI: That would be preferable than the  
22 situation we currently find ourselves in, which is I'm not in  
23 a position to produce anything.

24 THE COURT: Okay. Thank you. In terms of responses  
25 that I received before I go to VNA, do the class -- Mr. Stern?

1 MR. STERN: Your Honor, not responsive to --

2 THE COURT: Why don't you go to a microphone or pull  
3 that microphone over.

4 MR. STERN: I just wanted to let the Court know that  
5 I communicated with Todd Flood to determine if he, in fact, to  
6 the extent it matters provided copies of all interviews to the  
7 interviewees subsequent to them being taken by way of  
8 investigative subpoena. And he informed me that every single  
9 person who was interviewed received a copy either through  
10 their attorney or directly to them of a transcript of the  
11 interview pursuant to the protective order.

12 So to the extent that's a fact that matters,  
13 obviously I can't testify and he's not here. But as an  
14 officer of the Court he has informed me, in fact, that  
15 everyone was provided those documents.

16 THE COURT: Okay. Because it's those interviews that  
17 seem to be the most valuable in our process as opposed to the  
18 documents.

19 MR. BARBIERI: Your Honor, I'm not able to speak  
20 specifically to the Mr. Flood interviews. This is Charles  
21 Barbieri again. But for the interviews that were done through  
22 the solicitor general, those have never seen the light of day.

23 THE COURT: Okay.

24 MR. BARBIERI: Which if you recall, Your Honor,  
25 certain charges were taken under advisement I believe back in

1 2018. There was cooperation that occurred. Much of that  
2 cooperation occurred during a period of time the solicitor  
3 general was in charge.

4 And as I understand it, those were tape recorded.  
5 There has never been any production one way or the other to my  
6 clients or their criminal counsel of any of those interviews.

7 THE COURT: Okay. Is there any response from class  
8 counsel before I move to VNA?

9 MR. NOVAK: Good afternoon, Your Honor. Paul Novak  
10 on behalf of the class plaintiffs. I'll make a number of  
11 observations. And part of this I think is just to be  
12 constructive about what things I think can be ordered to be  
13 produced today and which not.

14 But I'll start with an observation made off of Mr.  
15 Barbieri's last point, which is that they simply don't have  
16 certain documents. If that's the case, obviously they can't  
17 produce them. But I think the standard is not whether they  
18 are in the possession of a particular client's civil counsel.  
19 It is whether they are in the possession, custody, or control  
20 of the client themselves.

21 And so if there are particular documents that are in  
22 the possession of either the client or the client's civil  
23 counsel, or the client's criminal counsel, in any of those  
24 instances they would be produceable by the client.

25 So I've seen in both of the sets of papers --

1 THE COURT: But the oral recordings, the tape  
2 recordings.

3 MR. NOVAK: Right.

4 THE COURT: They may not --

5 MR. NOVAK: They may not have. But if they don't  
6 have them, they can't produce them.

7 THE COURT: Okay.

8 MR. NOVAK: So I don't want to spend any more point  
9 or any more time belaboring that point.

10 There are a couple categories of documents that I  
11 think you can order to the extent that they are in the  
12 possession, custody, or control of any of these individual  
13 defendants that you could order to be produced today that I'll  
14 refer to them as the lowest hanging fruit.

15 THE COURT: Okay.

16 MR. NOVAK: The first is to the extent that any  
17 documents or transcripts were actually presented in any of the  
18 criminal preliminary exams -- and we've seen a number of  
19 documents that we were exhibits that were marked. If they're  
20 marked in open court, by that -- at that point in time any  
21 either statutory privileges with respect to them or any  
22 protective order privileges with respect to them.

23 Unless the court closed down and said, okay, everyone  
24 clear out of the chambers because we're now going to hear  
25 highly protected confidential information that cannot be

1 disclosed under an open record or in open court. Unless --  
2 and I am not aware of any of the Genesee County judges did  
3 that in any instance. At least I haven't seen them in the  
4 transcripts.

5 If -- unless that has been done, then I think any  
6 document that has been marked as an exhibit in any of those  
7 proceedings or any transcript that was marked or statement or  
8 affidavit that has been marked, to the extent that it's in the  
9 possession of any of the defendants today, that should be  
10 ordered to be produced immediately.

11 The second category of documents -- and this is  
12 similar to the issue that came up back at the front end of  
13 this case when we initially talked about document production  
14 is to the extent that any individual defendant actually had  
15 documents in their possession that they produced pursuant to  
16 an investigative subpoena.

17 The fact that they had that document in their  
18 possession means that it was not -- at least their possession  
19 of that document was not by virtue of an investigative  
20 subpoena process.

21 THE COURT: Of course.

22 MR. NOVAK: And those documents, to the extent that  
23 they have not been produced, I think also can be ordered for  
24 production today. But I think most if not all of those have  
25 been produced.

1 THE COURT: Okay. I want to hear about the things  
2 that have not.

3 MR. NOVAK: Okay. The individual city defendants  
4 provided five categories of documents. And I want to start  
5 with the last two that were documents produced by the EPA and  
6 documents produced by the federal bureau of investigation.

7 I haven't 100 percent verified this. But I would be  
8 shocked if either the FBI or the EPA produced documents  
9 pursuant to a states investigative subpoena process. My hunch  
10 is that they would have as a reflexive of a response and  
11 saying we're not producing anything pursuant to a state civil  
12 -- or a state investigative subpoena process as the state's  
13 reflexive Eleventh Amendment position within federal court.

14 And so I believe that to the extent that either of  
15 those tranches of documents are in the possession of  
16 individual defendants, that those can be produced. The only  
17 issue there is the protective order. The Court has already  
18 observed that the protective orders are no longer in effect.  
19 And we don't even need to take Judge Manley's word for it.  
20 The paragraph 6 --

21 THE COURT: That's okay. I've read them.

22 MR. NOVAK: Okay. The only thing I was going to  
23 point out is paragraph 6 of the stip and order. Todd Flood  
24 even signs off on the fact that they're supposed to expire at  
25 the end of the proceedings. So I think those can be produced.



1           The next tranche of documents. My reading of the  
2 Truel v Dearborn decision is that if there is a testimonial  
3 transcript that is produced to a defendant themselves, that  
4 that is something that that defendant would be able to  
5 produce. Or if produced to that defendant is the testimony of  
6 a witness who will testify at that defendant's criminal trial.

7           And consequently that is obligated to be produced to  
8 that defendant. Those two categories or transcripts are  
9 something that that defendant can then subsequently produce in  
10 the civil discovery process that we have here.

11           Those are all I think the easiest categories of  
12 documents that can be produced. I'm somewhat or at least try  
13 to be sensitive to the other concerns that have been raised by  
14 the individual defendants with respect to the other categories  
15 of documents to the extent I haven't outlined them in that  
16 presentation.

17           And as to those, first, if we requested -- and we  
18 have requested. I think there was a joint request for  
19 production propounded to the state Attorney General's criminal  
20 side of the room not represented in court today. And they  
21 responded with objections to the production materials.

22           First, in terms of process that would appropriately  
23 obtain those additional documents, let me make a couple of  
24 observations. The first one is that to the extent that  
25 there's Eleventh Amendment issue that is raised again, you

1 might recall at the beginning of the case on the civil side  
2 the state raised that Eleventh Amendment issue.

3 But Ms. Bettenhausen and I worked out a process where  
4 those documents were actually produced through the state  
5 proceedings so that they can preserve their Eleventh Amendment  
6 argument but we would still have access to documents.

7 THE COURT: Yes.

8 MR. NOVAK: It's gratuitous that Judge Farah showed  
9 up today. If we could have the same coordination of that  
10 process as it relates to those documents, that seems to me  
11 would address any Eleventh Amendment concerns.

12 THE COURT: Okay.

13 MR. NOVAK: The second is --

14 THE COURT: And the state has carefully -- I should  
15 have the record reflect. Carefully protected their Eleventh  
16 Amendment argument.

17 MR. NOVAK: Right. And in this instance it would be  
18 the criminal side who was asserting that Eleventh Amendment.

19 THE COURT: Right.

20 MR. NOVAK: The second thing -- and this is something  
21 that I should point out that is an opportunity either for Mr.  
22 Stern or for class counsel to assert is the Crime Victim  
23 Restoration Act provides in Section 2 -- it's a state statute  
24 --

25 THE COURT: Was all of this in your brief?

1 MR. NOVAK: No.

2 THE COURT: Okay.

3 MR. NOVAK: No. Frankly --

4 THE COURT: None of it was.

5 MR. NOVAK: Frankly when this issue was first  
6 disclosed to us as something that was going to be presented  
7 today, we didn't have the benefit of the earlier proceeding  
8 where it was discussed. So I wasn't sure.

9 THE COURT: Okay. You covered the protective orders.

10 MR. NOVAK: Okay.

11 THE COURT: Okay. Go ahead.

12 MR. NOVAK: The Crime Victim Restoration Act Section  
13 2 provides -- Section 2A. It's MCL 780.752A provides  
14 discretion to the Attorney General or to a prosecutor. They  
15 may furnish information or records to the victim that would  
16 otherwise be closed to public inspection. I think any of the  
17 privileges that we're talking about --

18 THE COURT: But there's not -- you're talking about  
19 somebody who's been convicted of a crime that for those  
20 defendants?

21 MR. NOVAK: No. I'm talking about the victim of the  
22 underlying crime.

23 THE COURT: Well, what is the underlying crime?

24 MR. NOVAK: There are -- well, in the criminal  
25 proceedings that were brought, there were --

1 THE COURT: And that's why I asked you are you  
2 limiting this to documents that might be related to someone  
3 who's pled guilty so far.

4 MR. NOVAK: No, no.

5 THE COURT: Oh.

6 MR. NOVAK: That statute authorizes the prosecutor or  
7 the Attorney General to share documents that were obtained in  
8 criminal investigative proceedings even before anyone is  
9 convicted or not.

10 THE COURT: Okay.

11 MR. NOVAK: With the victim of the underlying issues.  
12 And to the extent that the plaintiffs. And for that matter I  
13 think Mr. Stern's client was actually one of the signing  
14 complainants as a victim to many of the criminal charges in  
15 the complaints that were initially filed in state court.

16 THE COURT: Okay.

17 MR. NOVAK: That individual clearly qualifies. But I  
18 deposit that a more general group or a much broader group of  
19 people or citizens in Flint would similarly qualify.

20 That statutory provision gives the discretion and the  
21 opportunity of the Attorney General to produce any of these  
22 materials.

23 THE COURT: So are you suggesting if we go the route  
24 of a third party subpoena where the materials are then  
25 reviewed by the solicitor general that the solicitor general

1 would -- it would be brought to her attention that the Crime  
2 Victims Restoration Act, that it should be viewed with an eye  
3 to that as well as the investigative subpoena statute?

4 MR. NOVAK: That to the extent that any of these  
5 other statutory obstacles are raised as a basis that disables  
6 the Attorney General from producing those documents the Crime  
7 Victim Restoration Act would provide them nonetheless the  
8 opportunity to produce.

9 THE COURT: Okay.

10 MR. NOVAK: At least to the plaintiffs and presumably  
11 produced to the plaintiffs that can be produced there.

12 THE COURT: Okay. Thank you, Mr. Novak.

13 Now I'm thinking we will hear from Mr. Campbell from  
14 VNA. I'm not going to make a decision today. I'm going to  
15 take this all under advisement.

16 MR. CAMPBELL: Good afternoon, again, Your Honor.  
17 James Campbell. I represent the VNA defendants.

18 I don't have much to add other than what's in the  
19 brief. And what I would say, Your Honor, is I -- as I recall  
20 how this issue came to our attention, Mr. Stern in chambers  
21 raised the issue of taking depositions that we're all doing at  
22 breakneck pace, two and three a day sometimes.

23 And some of the witnesses that we are deposing were  
24 interviewed or gave prior testimony. And now as time has  
25 passed or in this civil process, their answers are -- you

1 know, their memory is perhaps not as good. And that was the  
2 origin of where this came from. So at least that's my memory  
3 of it.

4 The brief that we submitted, Your Honor, I feel like  
5 -- and I defer to what Mr. Novak just said about the specifics  
6 of what can be produced, should be produced, etcetera. I  
7 wasn't at that level. The brief that we wrote, Your Honor,  
8 was really to address some of the legal issues.

9 And I would just simply summarize them by saying the  
10 statute at issue only pertains to the government or the  
11 prosecutor. Not to the defendants at issue. So the statute  
12 that's being cited doesn't preclude -- to the extent that the  
13 documents at issue are in the possession, custody, or control.

14 And then the second point that we make, Your Honor,  
15 is that even if the statute did pertain to anybody in the  
16 litigation, it only is as to documents obtained by way of  
17 investigative subpoena. And there's nothing to suggest that  
18 that is the case.

19 And then finally even if those two things pertain,  
20 there is -- you have discretion to take a look at it. And I  
21 think that Mr. Barbieri already referenced -- I feel like I'm  
22 doing this in the abstract, if you will. Because we don't  
23 have a log of what they have or don't have. And I understand  
24 from Mr. Rusek what that problem might be. But I think that's  
25 a discovery issue that we often face in many forms in civil

1 litigation.

2 I don't know -- have a resolution for you. Because  
3 this briefing also happened at the last minute and I was  
4 wondering how you were going to gather it all. I appreciate  
5 the opportunity to speak.

6 THE COURT: Well, with the help of a very capable law  
7 clerk I gathered some of it together.

8 MR. CAMPBELL: So you've raised the possibility of  
9 asking the solicitor general I think. And I was just sitting  
10 -- if she was really to release whatever it is that we're  
11 talking about, interviews, transcripts, documents, that's  
12 great. But it also as I was sitting there listening to it  
13 does that -- is that what the statute is intended to prevent,  
14 us going to the prosecutor and asking for documents? I don't  
15 know. But if she's willing to give them up, that's fine.

16 What is of most interest I think to the litigants is  
17 getting the recorded testimony of key witnesses that we have  
18 active ongoing discovery from. If those are in the  
19 possession, custody, and control of the defendants in this  
20 litigation, it would seem to me that at a minimum we should  
21 get a log of them so we can then work from there. Or a log of  
22 what we're dealing with.

23 Because I honestly don't know what we're dealing  
24 with. Other than it's purported to be a huge volume that  
25 includes some and transcripts. So that's what I wanted to

1 say, Your Honor.

2 THE COURT: Okay. Thank you.

3 MR. ERICKSON: Your Honor, I'll be very brief.

4 THE COURT: Okay. Phil Erickson on behalf of LAN.

5 MR. ERICKSON: Just a couple quick points, Your  
6 Honor. Philip Erickson for the LAN defendants. The first  
7 thing is that I wanted to remind the Court of some of the  
8 history of the case. At the beginning of discovery, in fact  
9 before discovery formally was opened the LAN defendants and  
10 the VNA defendants received a request for the production of  
11 documents which those defendants had produced to the U.S.  
12 Attorney's Office.

13 THE COURT: Right.

14 MR. ERICKSON: Mr. Flood's office and the Genesee  
15 County Prosecutors Office. And we were previously ordered in  
16 this case to produce those documents.

17 THE COURT: I recall that.

18 MR. ERICKSON: So it's the same situation except that  
19 we were never charged and these defendants were charged but  
20 now the charges are dismissed. So I would assert that the law  
21 of the case might apply.

22 The other point that I want to make is that if these  
23 defendants have a right to request the documents from the  
24 solicitor general -- one other quick point, Your Honor. If  
25 these defendants have the right to request the documents in



1 question including transcripts or recordings from the  
2 solicitor general, then the documents should be considered to  
3 be within the custody or control of the defendants. That's  
4 all.

5 THE COURT: Okay.

6 MR. ERICKSON: Thank you.

7 THE COURT: Mr. Stern, is this still a productive  
8 avenue to go down from your perspective?

9 MR. STERN: Your Honor, Corey Stern for the  
10 individual plaintiffs. I think it is.

11 THE COURT: Okay.

12 MR. STERN: I feel strongly having attended a number  
13 of these depositions that the witnesses on the whole -- and  
14 again it's just my perspective. And Mr. Novak's been to a  
15 few. And Mr. Blake has been to many. They don't have a  
16 strong recollection of what I would perceive to be significant  
17 events that might impact the contours of the litigation.

18 And if there were interviews that took place three  
19 years ago that were taken in a time where their memories may  
20 have served them better and there are no repercussions to them  
21 today criminally or even if there are no obstacles to  
22 obtaining that information, it would just be very beneficial  
23 to all the parties to have.

24 THE COURT: And so is it the interviews and sworn  
25 statements of whatever format that you're after or is it also

1 all of the documents produced?

2 MR. STERN: I think in a perfect world it would be  
3 everything. But we're not living in a perfect world. And we  
4 would be satisfied getting whatever information we could get.  
5 I also would --

6 THE COURT: But what's your priority if I try to --  
7 if I figure this out at some point --

8 MR. STERN: My priority would be their testimony.  
9 And I know it's not necessarily sworn testimony. But the  
10 interviews. The transcripts of what -- how they answered  
11 certain questions that are likely the same questions that have  
12 been posed to them now.

13 And I would add, and it may not feel this way for  
14 their counsel in the civil litigation here for a variety of  
15 reasons, but many of them also seem to appear as though they'd  
16 prefer to be somewhere else in many of these depositions. And  
17 I mean that not tongue in cheek.

18 THE COURT: No.

19 MR. STERN: I mean candidly. And if there's a way to  
20 review these documents which include their previous testimony  
21 or interviews, it very well may be that no one needs to take  
22 their deposition again. Can't predict what's in these papers.

23 In my conversations with Todd Flood wherein he hasn't  
24 revealed necessarily anything of specifics that are in these  
25 documents he has repeatedly told me that if y'all had access

1 to this information you might not be needing to travel nonstop  
2 to and from Michigan to get information that I know we've  
3 already elicited.

4 THE COURT: So the Nick Lyon --

5 MR. STERN: I feel another question.

6 THE COURT: We were just discussing the Nick Lyon  
7 preliminary exam. You've got that?

8 MR. STERN: Correct.

9 THE COURT: Okay. So you've got that already, the  
10 2,800 pages.

11 MR. STERN: Sure. But many of the deposition  
12 questions have been follow-up questions to testimony that's  
13 already been received from various sources. But not -- we  
14 don't have everything.

15 THE COURT: Mr. Novak.

16 MR. NOVAK: Just one clarification. I believe we  
17 have all the transcripts from Mr. Lyons --

18 THE COURT: But do you have the 200 exhibits?

19 MR. NOVAK: No.

20 MR. STERN: No.

21 THE COURT: That sure seems like a matter of public  
22 record. For judge Farah, would those be a matter of public  
23 record?

24 THE HONORABLE JUDGE FARAH: Going strictly by memory,  
25 I nolle prosequi the Nick Lyon case June 14, 2019. So I have

1 to go back in memory and go back in our office.

2 But I remember we received 2,800 pages of exam  
3 transcript and 200 either pages or exhibits that were admitted  
4 in the preliminary examination. Now don't hold me to it  
5 because I haven't thought about the Nick Lyon case for about  
6 six, seven months. But we would be happy to look. I don't  
7 think we're doing anything inappropriate by supplying any log  
8 of what exhibits were admitted. Frankly, I think they're at  
9 the back of the exam transcript.

10 So if those are things you might be looking for  
11 rather than fighting over whether or not they're disclosable  
12 or not disclosable, well guess what, they've been disclosed.

13 THE COURT: Then I think what I'll do is I'll  
14 follow-up with Judge Farah about that and we'll see about at  
15 least those 200 pages or exhibits.

16 MR. STERN: And to the extent that --

17 THE COURT: Speak into the microphone please.

18 MR. STERN: I'm sorry. To the extent that Liane  
19 Walters, who's one of our clients, not only signed off on the  
20 documents related to the criminal proceedings but also  
21 testified, she would be ready and willing to request documents  
22 in her role as a criminal complainant.

23 THE COURT: Okay. So let me go to Alexander Rusek  
24 next.

25 MR. RUSEK: Thank you, your Honor. Alex Rusek. Just

1 a couple of points to address that have come up through other  
2 counsel. I attended or my staff attended many, many days of  
3 preliminary examinations for the other defendants. Mr. Croft,  
4 Mr. Earley, we only had a couple of hours of a preliminary  
5 examination before the cases were eventually dismissed.

6 But I don't see a reason why the exam transcripts for  
7 Nick Lyon or the other defendants would not be a matter of  
8 public record. To my knowledge, all of those proceedings were  
9 open court, open to the public. I don't have any knowledge of  
10 any closed proceedings in those cases. All of those exhibits  
11 were admitted in open court. So they wouldn't be under some  
12 kind of protective order once admitted and they should be in  
13 the file.

14 HE COURT: Well, within a week I'm going to try to  
15 get my hands on those and make sure that they're provided.

16 MR. RUSEK: I believe that's an easy one, Your Honor.

17 THE COURT: Okay.

18 MR. RUSEK: I don't know of a reason that those  
19 documents are not available to you. Any member of the public  
20 wants to go pay a dollar a page for a copy.

21 THE COURT: Okay.

22 MR. RUSEK: At the end of the day.

23 THE HONORABLE JUDGE FARAH: We will check. Let me  
24 add just quickly, the only other case I know of where the exam  
25 was completed and there was a bindover, which means there

1 would be a transcript and there would be the exhibits, is  
2 People v Eaton Wells. Other than that, to my knowledge no  
3 other case came over after a bindover by the judge based on  
4 exam testimony.

5 MR. RUSEK: That's my understanding as well, Your  
6 Honor. Mr. Ambrose waived his preliminary examination.

7 THE HONORABLE JUDGE FARAH: He did, yes. The reason  
8 I know is because they were all coming. I was lucky that day.  
9 They were all coming to me.

10 MR. RUSEK: Lucky draw.

11 THE HONORABLE JUDGE FARAH: Those are the only two I  
12 got.

13 THE COURT: Okay. And Mr. Erickson?

14 MR. RUSEK: Your Honor, I think I can clarify some of  
15 the other issues that were raised as well.

16 THE COURT: Oh, okay. Why don't you do that.

17 MR. RUSEK: Mr. Novak brought up an issue of  
18 documents produced by the defendants pursuant to an  
19 investigative subpoena. To my knowledge, I'll speak  
20 specifically for Mr. Croft he did not produce any documents  
21 pursuant to an investigative subpoena. And we have produced  
22 all documents that he still has in his possession. And I  
23 believe that's the same case for the other city defendants as  
24 well.

25 My understanding is that none of the city defendants

1 gave testimony pursuant to an investigative subpoena either.  
2 So I think that's basically a non issue for us as far as  
3 documents produced by the actual defendants.

4 It's my understanding I believe Mr. Ambrose and Mr.  
5 Earley have also produced a pretty decent amount of discovery  
6 in response to our POE's that were served I believe a year and  
7 a half, two years ago at this point.

8 There was an issue raised about the FBI and EPA  
9 documents.

10 THE COURT: Yes.

11 MR. RUSEK: And that they probably were not produced  
12 pursuant to investigative subpoena. We cannot know.

13 THE COURT: You what?

14 MR. RUSEK: We can't know.

15 THE COURT: Oh, I see.

16 MR. RUSEK: So the actual applications for  
17 investigative subpoena and the subpoenas themselves are all  
18 confidential under 767A.2 sub 5. That was also the People v  
19 Cotting case.

20 THE COURT: Okay.

21 MR. RUSEK: Where that was a criminal defendant he  
22 tried --

23 THE COURT: I saw that. I think he was just saying  
24 in general that's not how the Federal Government works.

25 MR. RUSEK: We just can't know is my point.

1 THE COURT: Okay.

2 MR. RUSEK: I don't know what -- and I also don't  
3 know if Mr. Flood entered into any kind of agreement to  
4 receive those documents.

5 THE COURT: I don't know.

6 MR. RUSEK: I can't say. He's not here today. The  
7 crime victims rights --

8 THE COURT: I have previously worked as the U.S.  
9 Attorneys Office Civil Division regarding providing documents  
10 pursuant to state court subpoenas. And the hoops and levels  
11 that have to be jumped through are pretty significant.

12 MR. RUSEK: I agree, Your Honor. The Crime Victims  
13 Rights Act that was brought up. I think that would be a great  
14 avenue if the -- or excuse me, the plaintiffs in this case  
15 would go to the solicitor general and ask.

16 I don't know of any case that ever addresses the  
17 interplay between the investigative subpoena statute and the  
18 Crime Victims Rights Act. In my research looking at pretty  
19 much every case I could find for investigative subpoenas in  
20 that statute, I didn't see any mention of the CVRA come up  
21 through my research.

22 THE COURT: Okay.

23 MR. RUSEK: So I'm not aware of that. That is a may  
24 statute as well, the CVRA. Whereas the investigative subpoena  
25 statute is a shall not disclose.



1           Which brings me to my next point that was brought up  
2 by Mr. Campbell. He said that the statute applies to  
3 prosecutors. However my reading of it doesn't say or limit it  
4 in that way. It's evidence obtained by a prosecutor. But  
5 then the next clause of the sentence goes on to say shall not  
6 be divulged to any person.

7           THE COURT: You know, and I think the last time we  
8 talked about this there was an example of, well, if the  
9 investigative subpoena asks me for my telephone number I can  
10 still give my telephone number to Judge Farah. So I think  
11 it's nuanced and I don't know the answer right now.

12           MR. RUSEK: At the end of the day, Your Honor, I  
13 think that having a third party subpoena sent to the solicitor  
14 general will clear up a lot of these issues. It's the  
15 simplest, safest way for counsel.

16           You know, if there are any penalties that are going  
17 to be associated with the investigative subpoena statute and  
18 maybe wrongfully disclosing information that is covered by  
19 that statute. If we go to solicitor general, give her an  
20 opportunity to respond to that subpoena, come here to court, I  
21 think that will clear up a lot of things.

22           THE COURT: Let me just ask Mr. Stern, are you  
23 willing to do that?

24           MR. STERN: Your Honor, I'm willing to do it. I  
25 might suggest that someone other than me would be better

1 served to ask the solicitor general at this point for anything  
2 in light of the motions that I filed. But I think  
3 conceptually, I do think it is probably a good idea.

4 THE COURT: Okay.

5 MR. STERN: For one of us to do it.

6 THE COURT: Okay.

7 MR. RUSEK: And Your Honor, as I'm thinking through  
8 this as we're sitting here today, if the solicitor general had  
9 an opportunity to respond to that subpoena and come before the  
10 Court, I think that we also would get a -- from the horse's  
11 mouth what exactly is going on with the criminal  
12 investigations and their status.

13 THE COURT: Yeah.

14 MR. RUSEK: And that I think could be informative to  
15 the Court with a lot of issues that we've had going on here.  
16 I can cite to press releases that the SG makes.

17 THE COURT: I have that.

18 MR. RUSEK: And but it is what it is. It's a press  
19 release. But I think an actual statement from the solicitor  
20 general informing the Court just where they're headed what the  
21 status is I think that could be beneficial in many ways.

22 THE COURT: Okay.

23 MR. RUSEK: Thank you.

24 THE COURT: Thank you. Mr. Erickson, ever so  
25 briefly. Because --

1 MR. ERICKSON: Two sentences, Your Honor.

2 THE COURT: Okay.

3 MR. ERICKSON: Philip Erickson for the LAN  
4 defendants.

5 There were other criminal preliminary proceedings in  
6 Genesee Circuit. And this would be most helpful to be able to  
7 get the exhibits from those proceedings. In addition to Lyon  
8 and Eaton Wells, in particular there was a proceeding with  
9 four defendants, Mr. Bush, Mr. Prysby, Ms. Shekter-Smith, and  
10 one other. I can't remember which MDEQ employee defendant it  
11 was.

12 And there were hundreds of exhibits that were  
13 admitted in that proceeding. There may be others. We have a  
14 colleague -- I have a colleague in our Flint office, Rhonda  
15 Stowers, who was charged with over monitoring those criminal  
16 proceedings. And if the Court would like, we could provide  
17 within a week or less than a week a listing of all the  
18 criminal preliminary proceedings that occurred. And I don't  
19 know that we can get a list of all the witnesses by then. But  
20 we can get from the court reporters the number of exhibits  
21 that were admitted in each.

22 THE COURT: That would be great.

23 MR. ERICKSON: And the last thing I want to say is  
24 that I believe that those prosecutions were taken over by the  
25 Attorney General's Office.

1 Right when Mr. Flood was asked to no longer be in  
2 charge of those proceedings, those proceedings were taken  
3 over. The prosecutions of those were taken over by the  
4 Attorney General's office. So all of those exhibits should be  
5 in the possession of the Attorney General.

6 THE COURT: Yes. That's my assumption as well.

7 THE HONORABLE JUDGE FARAH: Let me make one  
8 distinction if I could. Attorney General or solicitor  
9 general? Because they both appeared in my court on opposite  
10 sides of an argument.

11 MS. BETTENHAUSEN: If I can respond to that?

12 THE COURT: Yes. Ms. Bettenhausen.

13 MS. BETTENHAUSEN: Margaret Bettenhausen on behalf of  
14 state defendants.

15 THE COURT: Speak into the microphone, please.

16 MS. BETTENHAUSEN: Yes, sure. That's the exact  
17 distinction I want to make. There is a civil side and a  
18 criminal side. And all the discussions today are really  
19 directed towards the solicitor general who is in charge of the  
20 criminal side.

21 THE COURT: Exactly.

22 MS. BETTENHAUSEN: So really she's the one that would  
23 be most, you know, critical to getting you the answers that  
24 you need to resolve this, Your Honor.

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

1           Then so I will certainly take that submission from  
2 Mr. Erickson. I would like to have a submission by close of  
3 business Monday if one or more plaintiffs' counsel will submit  
4 a third party subpoena to the special prosecutor and who that  
5 would be and when it would be done.

6           MR. STERN: We can do it together, Your Honor.

7           THE COURT: Okay.

8           MR. STERN: I don't think that they'll hold it  
9 against everybody that I filed a motion.

10          THE COURT: All right. Okay. Good. And then I'll  
11 proceed from there.

12          I do want to mention in terms of discovery  
13 conferences, I've set aside time on Friday, March 20th at 3:00  
14 PM and Wednesday, April 8th at 3:00 PM. In the agenda I may  
15 have said 2:00 PM, but I'm changing it to 3:00 PM on April 8th  
16 for discovery calls if needed.

17          Now there's also a series of motions to dismiss that  
18 MDEQ defendants have filed. And what I'd like to do -- those  
19 were filed on February 10th. And so what I'd like to do is  
20 get responses to those by March 25, 2020 and replies by April  
21 8, 2020. And I'll put that in an order. And I believe I'll  
22 be prepared to address those at the next status conference on  
23 April 15th.

24          The bellwether selection process I had --

25          MR. STERN: Your Honor?

1 THE COURT: Yes.

2 MR. STERN: I'm so sorry. With regards to those  
3 motions to dismiss, I could anticipate a situation where  
4 clients that are not mine or Mr. Shkolnik have had motions  
5 filed against them. And it might be helpful just to fend off  
6 attorneys coming in and saying I didn't know or whatever.

7 If we can just get a list of against whom the motions  
8 have been filed so that if they're not our cases, we can  
9 contact -- and it could come from the MDEQ who filed the  
10 motions so we can let those attorneys know that they have  
11 responsive pleadings due. Because I can see down the road how  
12 it may come back to us and say, you know, we didn't know that  
13 these were filed against us or that we needed a response.

14 THE COURT: I believe that they're all filed by  
15 Mr. Shkolnik.

16 MR. BARBIERI: That's correct.

17 THE COURT: Okay. Mr. Barbieri has confirmed that.

18 MR. STERN: Well, then I'm not even going to tell  
19 him.

20 THE COURT: Okay. I think he's here on the phone  
21 somewhere. Or maybe he's not on the phone. Anyway. We'll  
22 make sure he knows because it will be in the order. Okay.

23 So the next issue is the next round of bellwether  
24 selection -- bellwether cases and how they will be selected.  
25 There were proposals submitted by VNA and LAN defendants and a

1 proposal by individual co-liaison counsel. And I had a chance  
2 to look at those. They only differ in the very small way.

3 So what we will do is the initial on page 2 of the  
4 proposal from VNA and LAN, the number 150 will be reduced to  
5 100 for pool one. And that will remain reduced in paragraph 3  
6 on page 2. And then on the issue of deficiencies and fact  
7 sheets, those numbers will go to deficiencies being identified  
8 within 20 days by defendants and cured within 30 days after  
9 notice.

10 And then the language that VNA and LAN suggest  
11 regarding substantial completion at the end of paragraph 4  
12 will be incorporated.

13 And I think we're actually up to the point from our  
14 special master. Thank you, Deborah.

15 MS. GREENSPAN: Thank you. Good afternoon. Deborah  
16 Greenspan, Special Master. I am going to give a brief report  
17 with a slight update since the last time I was here.

18 But I want to inform everybody that I have prepared  
19 what is now going to be the third interim report. I filed two  
20 in the past. This will be the third one that will incorporate  
21 all of the information received through basically last week.

22 One little footnote to that is that I did receive  
23 another submission yesterday from plaintiffs' counsel. That  
24 will appear in the next report that I give. I just want to  
25 cut it off so I can get something circulated. As in the past,

1 I will circulate the draft to counsel before it is actually  
2 filed.

3 So just briefly since January 22nd, the last time I  
4 gave a report we've had a total of 88 new individual  
5 plaintiffs identified, 73 of them are people that have  
6 identified themselves as having retained counsel. The others  
7 are what we've been calling contacts. We've had 500 updates  
8 though to existing information in the data that had previously  
9 been provided.

10 So the total numbers right now are as follows: The  
11 total retained -- the total individuals who've been identified  
12 in this census process as having retained counsel is 21,156.  
13 There are some duplicates within those numbers, but we're  
14 still sorting through those so that I don't have a precise  
15 number. But it's going to be slightly less than that when we  
16 address the duplicates.

17 Total contacts 11,872. So there's a large number of  
18 people that are identified as having been in contact with  
19 lawyers or actually retained lawyers.

20 We have addressed some of the duplicates that we've  
21 seen previously in the data. We've been able to reduce that  
22 number. But then of course every time somebody files  
23 something new, we potentially add to that duplicate count. So  
24 it seems like an never ending process here.

25 The total number of minors in this data collection



1 7,027. It's a slight increase from the January report. And  
2 then the total number of cases filed and I want to be clear  
3 about this. I think in my last report I gave a number but it  
4 was a combined number and I want to be a little bit more clear  
5 today.

6 There are 5,453 individuals who've identified that a  
7 case has been filed either in state or federal court in the  
8 Flint Water Cases. There's an additional 2,648 who've  
9 identified a case against -- only against the department of --  
10 or the United States government, the EPA cases. But those  
11 individuals have not filed other cases.

12 THE COURT: How many? Could you repeat that last  
13 number?

14 MS. GREENSPAN: Yes. 2,648 individuals who have  
15 identified themselves as having filed a lawsuit but that  
16 lawsuit is against only the United States government. It is  
17 not a lawsuit that involves the other defendants in this  
18 world. They may be encompassed within the putative class but  
19 they haven't filed individual cases.

20 So I wanted to clarify that because I think I  
21 combined those numbers in my last report.

22 THE COURT: Okay.

23 MS. GREENSPAN: So I have nothing else. I will be  
24 circulating the document as I mentioned earlier and it will  
25 have all the detailed charts that I previously have provided.

1 And counsel certainly can ask questions and ask for more  
2 information if they would so choose.

3 THE COURT: Okay. Thank you, very much. And I  
4 assure you that in addition to this data, Deborah is staying  
5 very busy and useful and helpful in the case. And so thank  
6 you very, very much.

7 I think the only thing left is that our next status  
8 conference will be Wednesday, April 15th, 2:00 PM, here in  
9 this courtroom.

10 I have received the Court's administrative order  
11 regarding coronavirus just a couple of minutes ago. And it  
12 just indicates that for instance I shouldn't be here right now  
13 because I've been coughing. But I just have a cold. But it  
14 does require -- I just want to let you know that the  
15 administrative order, that is a public order, will require  
16 court security to turn away people coming from China, South  
17 Korea, Italy, and Iran, or someone who has had close contact  
18 with someone in those countries, etcetera, or persons with  
19 fever, cough, or shortness of breath.

20 And if you're a lawyer and that applies to you,  
21 you'll call the judge's chambers and then be permitted to  
22 appear by telephone or whatever that judge decides. And in  
23 this case, it's me, and you would be able to appear by  
24 telephone. So I ask that you take it very seriously and  
25 follow the Court's order.

1 MR. LEOPOLD: Judge, can I just on that particular  
2 issue just raise one issue? Just in the last hour and a half  
3 --

4 THE COURT: None of that's on the record until you're  
5 at the microphone.

6 MR. LEOPOLD: Ted Leopold on behalf of the punitive  
7 class plaintiffs.

8 Just in follow-up to what Your Honor was saying.  
9 Just in the last hour and a half since we've here in terms of  
10 my -- well probably many of our iPhones, news information from  
11 the government has been coming out. And there's going to be  
12 indicated severe restrictions on travel. Some of the airlines  
13 are thinking of closing down.

14 The whole state of Seattle or excuse me, Washington  
15 public schools are closing down. And it seems to be  
16 permeating. I just raise that in light of the issues that  
17 we've talked about earlier today in terms of a lot of issues  
18 going on in terms of getting together, how we're going to  
19 handle the discovery from hereon out over the next 60 to 90  
20 days perhaps. I'm not sure.

21 THE COURT: Okay. We'll I'll be very sensitive to  
22 that. But I also know that what we've learned also late this  
23 afternoon from Mr. Stern and others is that memories fade.  
24 The best of intentions, memories fade. And it hurts  
25 plaintiffs and it hurts defendants when that happens.

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So to the extent any work that can get done gets done remotely if that does happen or if local counsel are able to go to depositions on behalf of those who would be traveling, I just urge you to do it the safely, do it within the guidelines that the CDC and the court sets forth, but to try to continue to make as much progress as can safely be done. So thank you all very much. And I'll see you soon.

(Proceedings Concluded)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Jeseca C. Eddington, Federal Official Court Reporter, do hereby certify the foregoing 68 pages are a true and correct transcript of the above entitled proceedings.

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

4/27/2020  
Date