STATE OF MICHIGAN
IN THE SUPREME COURT

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, and RHONDA KELSO,

Plaintiffs-Appellees,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.
_____/

Supreme Court No. 157335-7

Court of Appeals No. 335555
Consolidated with Docket Nos. 335725 and 335726

Court of Claims No. 16-000017-MM

STATE DEFENDANTS-APPELLANTS' APPENDIX, VOLUME 1

Richard S. Kuhl (P42042)
Margaret A. Bettenhausen (P75046)
Nathan A. Gambill (P75506)
Zachary C. Larsen (P72189)
Assistant Attorneys General
Attorneys for Defendants-Appellants former Gov. Rick Snyder, State of Michigan, MDEQ, and MDHHS
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
kuhlr@michigan.gov
bettenhausenm@michigan.gov
gambilln@michigan.gov
larsenz@michigan.gov

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CASE

Judicial Officer	Date Filed	Adjudication	Status
MURRAY, CHRISTOPHER	1/21/16	STAY OF PROCEEDINGS 11/4/16	ADJUDICATED

PARTICIPANTS

PLAINTIFF 1	MAYS, MELISSA	FILED: 1/21/16
	ATTY: MICHAEL L. PITT # 24429 PRIMARY RETAINED	
PLAINTIFF 2	MAYS, MICHAEL ADAM	FILED: 1/21/16
	ATTY: MICHAEL L. PITT # 24429 PRIMARY RETAINED	
PLAINTIFF 3	PEMBERTON, JACQUELINE	FILED: 1/21/16
	ATTY: MICHAEL L. PITT # 24429 PRIMARY RETAINED	
PLAINTIFF 4	PEMBERTON, KEITH JOHN	FILED: 1/21/16
	ATTY: MICHAEL L. PITT # 24429 PRIMARY RETAINED	
PLAINTIFF 5	CARTHAN, ELNORA	FILED: 1/21/16
	ATTY: MICHAEL L. PITT # 24429 PRIMARY RETAINED	
PLAINTIFF 6	KELSO, RHONDA	FILED: 1/21/16
	ATTY: MICHAEL L. PITT # 24429 PRIMARY RETAINED	
DEFENDANT 1	SNYDER, RICK	FILED: 1/21/16
	ATTY: RICHARD S. KUHL # 42042 PRIMARY RETAINED	
DEFENDANT 2	STATE OF MICHIGAN	FILED: 1/21/16
	ATTY: RICHARD S. KUHL # 42042 PRIMARY RETAINED	
DEFENDANT 3	DEPARTMENT OF ENVIRONMENTAL QUALITY	FILED: 1/21/16
	ATTY: RICHARD S. KUHL # 42042 PRIMARY RETAINED	
DEFENDANT 4	DEPARTMENT OF HEALTH AND HUMAN SERVICES	FILED: 1/21/16
	ATTY: RICHARD S. KUHL # 42042 PRIMARY RETAINED	
DEFENDANT 5	EARLEY, DARNELL	FILED: 1/21/16
	ATTY: ANTHONY CHUBB # 72608 PRIMARY RETAINED	
DEFENDANT 6	AMBROSE, JERRY	FILED: 1/21/16
	ATTY: ANTHONY CHUBB # 72608 PRIMARY RETAINED	

RECEIVABLES/PAYMENTS

	Assessed	Paid/Adjusted	Balance
PTF 1 MELISSA MAYS	$190.00	$190.00	$0.00
	Assessed	**Paid/Adjusted**	**Balance**
DEF 1 RICK SNYDER	$65.00	$65.00	$0.00
	Assessed	**Paid/Adjusted**	**Balance**
DEF 5 DARNELL EARLEY	$40.00	$40.00	$0.00

CHRONOLOGICAL LIST OF ACTIVITIES

Activity Date	Activity		User	Entry Date
1/21/16	SUMMONS AND COMPLAINT - VERIFIED CLASS ACTION COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND EQUITABLE RELIEF AND DAMAGES	$150.00	mmla mmla	1/21/16 1/21/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
	DEF 5			
	DEF 6			
1/21/16	JUDICIAL OFFICER ASSIGNED TO BOONSTRA, MARK 36046		mmla	1/21/16
1/21/16	JUDICIAL OFFICER REASSIGNED FROM BOONSTRA, MARK 36046		mmla	1/21/16
1/21/16	RECEIVABLE FILING FEE	$150.00	mmla	1/21/16
1/21/16	PAYMENT	$150.00	mmla	1/21/16
	RECEIPT NUMBER: COC-LAN.0001064			
	METHOD: CHECK $150.00			
1/21/16	JUDICIAL OFFICER ASSIGNED TO TALBOT, MICHAEL 21245		mmla	2/16/16
1/25/16	COMMENT		mmla	1/25/16
	Reassignment of case to Judge Talbot is done under Administrative Order 2015-02			
2/3/16	MOTION TO RE-ASSIGN CASE BY BLIND DRAW AS REQUIRED BY MCLA 600.6410(3) AND BRIEF IN SUPPORT (ORAL ARGUMENT REQUESTED)	$20.00	mmla mmla	2/4/16 2/4/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
2/3/16	RECEIVABLE MOTION FEE	$20.00	mmla	2/4/16
2/4/16	PAYMENT	$20.00	mmla	2/4/16
	RECEIPT NUMBER: COC-LAN.0001095			
	METHOD: CHECK $20.00			
2/4/16	APPEARANCE OF ATTORNEY DEBORAH LABELLE ON BEHALF OF PLAINTIFFS		mmla	2/5/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			

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Activity Date	Activity	User	Entry Date
2/8/16	PROOF OF SERVICE MOTION TO RE-ASSIGN CASE BY BLIND DRAW	mmla	2/9/16
	PTF 1		
	PTF 2		
	PTF 3		
	PTF 4		
	PTF 5		
	PTF 6		
2/8/16	APPEARANCE OF ATTORNEY TRACHELLE YOUNG ON BEHALF OF PLAINTIFFS	mmla	2/9/16
	PTF 1		
	PTF 2		
	PTF 3		
	PTF 4		
	PTF 5		
	PTF 6		
2/9/16	RETURN OF SERVICE - NONPERSONAL	mmla	2/9/16
	DEF 1		
	DEF 2		
	DEF 3		
	DEF 4		
	DEF 5		
	DEF 6		
2/10/16	PROPOSED STIPULATED ORDER TO FILE EXCESS PAGES IN DEFENDANTS' MOTION FOR SUMMARY DISPOSITION	mmla	2/10/16
	PTF 1		
	PTF 2		
	PTF 3		
	PTF 4		
	PTF 5		
	PTF 6		
	DEF 1		
	DEF 2		
	DEF 3		
	DEF 4		
2/11/16	APPEARANCE OF WILLIAM H. GOODMAN	mmla	2/11/16
	PTF 1		
	PTF 2		
	PTF 3		
	PTF 4		
	PTF 5		
	PTF 6		
2/11/16	APPEARANCE OF JULIE H. HURWITZ	mmla	2/11/16
	PTF 1		
	PTF 2		
	PTF 3		

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Activity Date	Activity	User	Entry Date
	PTF 4		
	PTF 5		
	PTF 6		
2/11/16	APPEARANCE OF KATHRYN BRUNER JAMES	mmla	2/11/16
	PTF 1		
	PTF 2		
	PTF 3		
	PTF 4		
	PTF 5		
	PTF 6		
2/11/16	STIPULATED ORDER TO FILE EXCESS PAGES IN DEFENDANTS' MOTION TO DISMISS	mmla mmla	2/11/16 8/3/16
	TALBOT, MICHAEL 21245		
2/16/16	JUDICIAL OFFICER REASSIGNED FROM TALBOT, MICHAEL 21245	amd	2/16/16
2/16/16	ORDER OF REASSIGNMENT	amd amd	2/16/16 2/16/16
	TALBOT, MICHAEL 21245		
2/16/16	JUDICIAL OFFICER ASSIGNED TO BOONSTRA, MARK 36046	amd	2/16/16
2/18/16	PROOF OF SERVICE STIPULATED ORDER TO FILE EXCESS PAGES	mmla	2/19/16
	DEF 1		
	DEF 2		
	DEF 3		
	DEF 4		
2/18/16	APPEARANCE OF RICHARD S. KUHL	mmla	2/19/16
	DEF 1		
	DEF 2		
	DEF 3		
	DEF 4		
2/18/16	APPEARANCE OF MEGEN E. MILLER	mmla	2/19/16
	DEF 1		
	DEF 2		
	DEF 3		
	DEF 4		
2/18/16	APPEARANCE OF NATHAN GAMBILL	mmla	2/19/16
	DEF 1		
	DEF 2		
	DEF 3		
	DEF 4		
3/3/16	STIPULATION AND PROPOSED ORDER TO EXTEND THE DEADLINE TO FILE A RESPONSE TO COMPLAINT	mmla	3/3/16
	PTF 1		
	PTF 2		
	PTF 3		
	PTF 4		
	PTF 5		

Activity Date	Activity		User	Entry Date
	PTF 6			
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
	DEF 5			
	DEF 6			
3/3/16	APPEARANCE AND NOTICE OF APPEARANCE		mmla	3/4/16
	DEF 1			
3/4/16	ORDER		mmla mmla	3/4/16 5/17/18
	BOONSTRA, MARK 36046			
3/8/16	PROOF OF SERVICE ORDER GRANTING 3/2/16 STIPULATED ORDER TO EXTEND THE DEADLINE		mmla	3/8/16
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
4/1/16	NOTICE OF SCREENING DEVICE		mmla	4/1/16
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
4/1/16	PROPOSED STIPULATED ORDER EXTENDING RESPONSE DATE		mmla	4/5/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
	DEF 5			
	DEF 6			
4/4/16	MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4), (C)(7), AND (C)(8) AND BRIEF IN SUPPORT	$20.00	mmla mmla	4/4/16 5/25/18
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
4/4/16	RECEIVABLE MOTION FEE	$20.00	mmla	4/4/16
4/5/16	STIPULATED ORDER EXTENDING RESPONSE DATE		mmla	4/5/16
	BOONSTRA, MARK 36046			

Activity Date	Activity		User	Entry Date
4/6/16	STIPULATION AND PROPOSED ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PTF 1 PTF 2 PTF 3 PTF 4 PTF 5 PTF 6 DEF 1 DEF 2 DEF 3 DEF 4 DEF 5 DEF 6		mmla	4/6/16
4/7/16	ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION BOONSTRA, MARK 36046		mmla	4/7/16
4/18/16	MOTION FOR SUMMARY DISPOSITION BY THE FORMER EMERGENCY MANAGERS AND BRIEF IN SUPPORT DEF 5 DEF 6	$20.00	mmla mmla	4/18/16 5/25/18
4/18/16	RECEIVABLE MOTION FEE	$20.00	mmla	4/18/16
4/18/16	PAYMENT RECEIPT NUMBER: COC-LAN.0001205 METHOD: CHECK $20.00	$20.00	mmla	4/18/16
4/22/16	PROOF OF SERVICE MOTION TO DISMISS DEF 5 DEF 6		mmla	4/22/16
4/25/16	STIPULATION AND PROPOSED ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS TO FILE AN AMENDED COMPLAINT PTF 1 PTF 2 PTF 3 PTF 4 PTF 5 PTF 6 DEF 1 DEF 2 DEF 3 DEF 4 DEF 5 DEF 6		mmla	4/25/16
4/26/16	ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS TO FILE AN AMENDED COMPLAINT BOONSTRA, MARK 36046		mmla	4/26/16
4/27/16	PAYMENT	$20.00	mlh	4/27/16

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Activity Date	Activity	User	Entry Date
	RECEIPT NUMBER: COC-LAN.0001223 METHOD: ELECTRONIC FUND TRANSFER $20.00		
5/23/16	NOTICE OF WITHDRAWAL OF ARGUMENT SET FORTH IN DEFENDANTS EARLEY AND AMBROSE'S MOTION FOR SUMMARY DISPOSITION DEF 5 DEF 6	mmla mmla	5/23/16 1/2/19
5/25/16	AMENDED COMPLAINT - CLASS ACTION COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, EQUITABLE RELIEF, AND DAMAGES PTF 1 PTF 2 PTF 3 PTF 4 PTF 5 PTF 6	mmla	5/27/16
5/27/16	PROOF OF SERVICE NOTICE OF PARTIAL WITHDRAWAL DEF 5 DEF 6	mmla	5/27/16
6/17/16	STIPULATION AND PROPOSED ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS TO FILE A RESPONSE TO THE STATE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PTF 1 PTF 2 PTF 3 PTF 4 PTF 5 PTF 6 DEF 1 DEF 2 DEF 3 DEF 4	mmla	6/17/16
6/20/16	ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS TO FILE A RESPONSE TO THE STATE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION BOONSTRA, MARK 36046	mmla	6/20/16
6/21/16	STIPULATION AND PROPOSED ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PTF 1 PTF 2 PTF 3 PTF 4 PTF 5 PTF 6 DEF 1 DEF 2 DEF 3 DEF 4	mmla	6/21/16

Activity Date	Activity		User	Entry Date
	DEF 5			
	DEF 6			
6/22/16	ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION		mmla	6/22/16
	BOONSTRA, MARK 36046			
6/24/16	MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT	$20.00	mmla mmla	6/24/16 6/24/16
	DEF 5			
	DEF 6			
6/24/16	RECEIVABLE MOTION FEE	$20.00	mmla	6/24/16
6/24/16	PAYMENT	$20.00	mmla	6/24/16
	RECEIPT NUMBER: COC-LAN.0001327			
	METHOD: CHECK $20.00			
6/24/16	MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4), (C)(7), AND (C)(8) AND BRIEF IN SUPPORT (ORAL ARGUMENT REQUESTED)	$20.00	mmla mmla	6/24/16 5/25/18
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
6/24/16	RECEIVABLE MOTION FEE	$20.00	mmla	6/24/16
7/6/16	STIPULATION AND PROPOSED ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS TO FILE A RESPONSE TO DEFENDANTS DARNELL EARLEY AND GERALD AMBROSE'S MOTION FOR SUMMARY DISPOSITION		mmla mmla	7/7/16 12/5/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
	DEF 5			
	DEF 6			
7/8/16	ORDER EXTENDING THE DEADLINE FOR PLAINTIFFS TO FILE A RESPONSE TO DEFENDANTS DARNELL EARLEY AND GERALD AMBROSE'S MOTION FOR SUMMARY DISPOSITION		mmla mmla	7/8/16 7/8/16
	BOONSTRA, MARK 36046			
7/14/16	RESPONSE TO THE 6/24/2016 MOTION FOR SUMMARY DISPOSITION FILED BY DARNELL EARLEY AND GERALD AMBROSE		amd	7/14/16
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
8/3/16	PAYMENT	$20.00	mlh	8/3/16
	RECEIPT NUMBER: COC-LAN.0001403			
	METHOD: ELECTRONIC FUND TRANSFER $20.00			
8/15/16	RESPONSE TO DEFENDANTS DARNELL EARLEY'S AND GERALD AMBROSE'S MOTION FOR SUMMARY DISPOSITION		mmla	8/18/16
	PTF 1			
	PTF 2			

Activity Date	Activity		User	Entry Date
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
8/15/16	RESPONSE TO STATE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4), (C)(7), AND (C)(8) (ORAL ARGUMENT REQUESTED)		mmla	8/18/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
8/15/16	MOTION TO EXTEND THE PAGE LIMIT (EX PARTE MOTION)	$20.00	mmla mmla	8/18/16 8/18/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
8/15/16	RECEIVABLE MOTION FEE	$20.00	mmla	8/18/16
8/18/16	PAYMENT	$20.00	mmla	8/18/16
	RECEIPT NUMBER: COC-LAN.0001432			
	METHOD: CASH $20.00			
8/19/16	ORDER GRANTING PLAINTIFFS' EX PARTE MOTION TO EXTEND PAGE LIMIT		mmla mmla	8/19/16 12/5/16
	BOONSTRA, MARK 36046			
8/26/16	REPLY TO 8/15/16 PLAINTIFFS' RESPONSE TO 6/24/16 STATE DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(4), (C)(7), AND (C)(8)		mmla	8/26/16
	DEF 1			
	DEF 2			
	DEF 3			
	DEF 4			
8/29/16	APPEARANCE		mmla	8/30/16
	DEF 5			
	DEF 6			
8/29/16	REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION BY DARNELL EARLEY AND GERALD AMBROSE		mmla	8/30/16
	DEF 5			
	DEF 6			
9/1/16	AMENDED - CERTIFICATE OF SERVICE FOR REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION BY DARNELL EARLEY AND GERALD AMBROSE		mmla mmla	9/1/16 5/8/18
	DEF 5			
	DEF 6			

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10/10/16	STIPULATION AND PROPOSED ORDER EXTENDING DEADLINE FOR MOTION FOR CLASS CERTIFICATION			amd	10/10/16
10/10/16	ORDER EXTENDING THE DEADLINE FOR MOTION FOR CLASS CERTIFICATION BOONSTRA, MARK 36046			amd	10/10/16
10/26/16	OPINION AND ORDER BOONSTRA, MARK 36046 PTF 1 PTF 2 PTF 3 PTF 4 PTF 5 PTF 6 DEF 1 DEF 2 DEF 3 DEF 4 DEF 5 DEF 6			mmla mmla	10/26/16 1/18/18
10/28/16	NOTICE OF STATUS CONFERENCE BOONSTRA, MARK 36046			mmla mmla	10/28/16 8/16/17
10/28/16	STATUS CONFERENCE LOCATION: HALL OF JUSTICE BEFORE: BOONSTRA, MARK LOC: JUDGE'S OFFICE PTF 1 PTF 2 PTF 3 PTF 4 PTF 5 PTF 6 DEF 1 DEF 2 DEF 3 DEF 4 DEF 5 DEF 6	CANCELLED 11/8/16 3:00 P		mmla	10/28/16
11/4/16	CLAIM OF APPEAL DEF 1 DEF 2 DEF 3 DEF 4		$25.00	mmla mmla	11/4/16 9/7/18
11/4/16	RECEIVABLE APPEALS FEE		$25.00	mmla	11/4/16
11/4/16	COMMENT NOTIFICATION form was generated.			mmla	11/4/16

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11/4/16	STATUS CONFERENCE 11/8/16 3:00 PM		mmla	11/4/16
	CANCELLED			
	CASE ADJUDICATED			
	Case has been appealed due to governmental immunity			
11/4/16	ADMINISTRATIVE ACTION		mmla	11/4/16
	DEF 1 RICK SNYDER			
	DEF 2 STATE OF MICHIGAN			
	DEF 3 DEPARTMENT OF ENVIRONMENTAL QUALITY			
	DEF 4 DEPARTMENT OF HEALTH AND HUMAN SERVICES			
	DEF 5 DARNELL EARLEY			
	DEF 6 JERRY AMBROSE			
	DISPOSITION: STAY OF PROCEEDINGS			
11/4/16	NOTIFICATION OFFICIAL COURT OF CLAIMS NOTIFICATION - STAY OF PROCEEDINGS		amd amd	11/4/16 11/4/16
11/10/16	APPEARANCE OF PAUL F. NOVAK		mmla	11/14/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
11/10/16	APPEARANCE OF GREGORY STAMATOPOULOS		mmla	11/14/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
11/23/16	NOTICE OF CLAIM OF APPEAL WITH PROOF OF SERVICE		mmla mmla	11/23/16 12/5/16
	DEF 5			
	DEF 6			
11/28/16	CLAIM OF CROSS-APPEAL		mmla	11/28/16
	PTF 1			
	PTF 2			
	PTF 3			
	PTF 4			
	PTF 5			
	PTF 6			
12/1/16	PAYMENT	$25.00	mlh	12/1/16
	RECEIPT NUMBER: COC-LAN.0001626			
	METHOD: ELECTRONIC FUND TRANSFER $25.00			
12/21/16	ORDER FROM THE COURT OF APPEALS		amd	12/28/16
2/6/17	NOTICE OF CHANGE OF FIRM AFFILIATION OF GREGORY STAMATOPOULOS		mmla mmla	2/9/17 2/9/17

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2/6/17	NOTICE OF CHANGE OF FIRM AFFILIATION OF PAUL F. NOVAK	mmla mmla	2/9/17 2/9/17
2/28/17	AGREEMENT FOR E-MAIL SERVICE FROM THE COURT OF CLAIMS DEF 1 DEF 2 DEF 3 DEF 4	mmla	2/28/17
3/22/17	COMMENT Notification from the Court of Appeals requesting file/record within 21 days.	amd	3/22/17
3/27/17	NOTICE OF WITHDRAWAL OF JOHN HUGHES OF MILBERG LLP	mmla	3/27/17
3/29/17	COMMENT File prepared and sent to the Court of Appeals electronically.	amd	3/29/17
4/26/17	ORDER FROM THE MICHIGAN SUPREME COURT (ADM FILE NO. 2017-01) ASSIGNMENT OF JUDGES TO THE COURT OF CLAIMS AND REAPPOINTMENT OF CHIEF JUDGE	amd	4/27/17
4/27/17	COMMENT NOTIFICATION form was generated.	amd	4/27/17
4/28/17	ORDER OF REASSIGNMENT TALBOT, MICHAEL 21245	amd	5/1/17
5/1/17	JUDICIAL OFFICER REASSIGNED FROM BOONSTRA, MARK 36046	system	4/28/17
5/1/17	JUDICIAL OFFICER ASSIGNED TO MURRAY, CHRISTOPHER M. 43849	system	4/28/17
5/15/17	APPEARANCE DEF 5	mmla mmla	5/15/17 5/15/17
11/2/17	NOTICE OF SCREENING DEVICE DEF 1 DEF 2 DEF 3 DEF 4	mmla	11/3/17
1/25/18	OPINION AND ORDER (FROM APPELLATE COURT)	amd	1/25/18
1/25/18	OPINION AND ORDER (FROM APPELLATE COURT) DISSENTING	amd	1/25/18
1/26/18	COURT OF APPEALS ORDER	mmla mmla	1/29/18 5/21/18
3/8/18	COPY OF DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL DEF 1 DEF 2 DEF 3 DEF 4	mmla	3/8/18
3/12/18	NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL WITH THE MICHIGAN SUPREME COURT DEF 5 DEF 6	mmla	3/12/18
4/23/18	STIPULATION AND PROPOSED ORDER EXTENDING DEADLINE FOR FILING MOTION FOR CLASS CERTIFICATION PURSUANT TO MCR 3.501 (B)(1)(B) PTF 1 PTF 2	mmla	4/25/18

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	PTF 3		
	PTF 4		
	PTF 5		
	PTF 6		
	DEF 1		
	DEF 2		
	DEF 3		
	DEF 4		
	DEF 5		
	DEF 6		
4/26/18	ORDER EXTENDING DEADLINE FOR FILING MOTION FOR CLASS CERTIFICATION PURSUANT TO MCR 3.501(B)(1)(B)	amd mmla	4/26/18 5/8/18
5/8/18	AMENDED - CERTIFICATE OF SERVICE FOR STIPULATION AND ORDER EXTENDING DEADLINE	mmla	5/8/18
5/17/19	REVIEW FOR OUTCOME OF APPEAL SET 11/1/19 8:00 A	nmh	3/11/19

Case Search

Case Docket Number Search Results - 335555

Appellate Docket Sheet

COA Case Number: 335555

MSC Case Number: 157340

MELISSA MAYS V GOVERNOR RICK SNYDER

1	MAYS MELISSA Oral Argument: Y Timely: Y	PL-AE-XE-XT	RET	(33614) **RIVERS BETH M**
			RET	(34720) **HURWITZ JULIE H**
			CO	(39524) **NOVAK PAUL F**
2	MAYS MICHAEL ADAM	PL-AE-XE-XT	SAM	
3	PEMBERTON JACQUELINE	PL-AE-XE-XT	SAM	
4	PEMBERTON KEITH JOHN	PL-AE-XE-XT	SAM	
5	CARTHAN ELNORA	PL-AE-XE-XT	SAM	
6	KELSO RHONDA/ALL OTHERS SIMILARLY SITUATED	PL-AE-XE-XT	SAM	
7	GOVERNOR RICK SNYDER Oral Argument: Y Timely: Y	DF-AT-XE	AG	(75506) **GAMBILL NATHAN A**
8	MICHIGAN STATE OF	DF-AT-XE	SAM	
9	ENVIRONMENTAL QUALITY DEPARTMENT OF	DF-AT-XE	SAM	
10	HEALTH AND HUMAN SERVICES DEPARTMENT OF	DF-AT-XE	SAM	
11	EARLEY DARNELL Oral Argument: Y Timely: Y	DF-XT-XE	CTY	(77085) **ERIKSSON REED E**
12	AMBROSE JERRY	DF-XT-XE	SAM	
13	FLINT CITY OF	NP	RET	(70902) **RICHOTTE JOSEPH E**

Show only the first 10 parties

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application

Case Flags: Electronic Record

Consolidations:

335725 MELISSA MAYS V GOVERNOR RICK SNYDER (Case Concluded; File Open)

335726 MELISSA MAYS V GOVERNOR RICK SNYDER (Case Concluded; File Open)

11/04/2016 1 Claim of Appeal - Civil

Proof of Service Date: 11/04/2016

Jurisdictional Checklist: Y

Register of Actions: Y

Fee Code: EPAY

Attorney: 75506 - GAMBILL NATHAN A

10/26/2016 2 Order Appealed From

From: COURT OF CLAIMS

Case Number: 16-000017-MM

Court of Appeals Docket Sheet

Trial Court Judge: 36046 BOONSTRA MARK T
Nature of Case:
Summary Disposition Denied - Gov'tal Immunity

11/04/2016 4 No Transcript Will Be Filed
Date: 11/04/2016
Filed By Attorney: 75506 - GAMBILL NATHAN A
Comments: Linked to Evt. 1

11/07/2016 3 Correspondence Sent
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Attorney: 75506 - GAMBILL NATHAN A
Comments: Only four parties indicated in body of claim of appeal docketed as AT's despite inconsistent caption

11/16/2016 5 Claim of Cross Appeal
Date: 11/16/2016
For Party: 11 EARLEY DARNELL DF-XT-XE
Attorney: 76411 - KIM WILLIAM Y

11/22/2016 6 Claim of Cross Appeal
Date: 11/22/2016
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 33614 - RIVERS BETH M

11/29/2016 7 Docketing Statement MCR 7.204H
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Proof of Service Date: 11/29/2016
Filed By Attorney: 75506 - GAMBILL NATHAN A

12/05/2016 8 Pleadings Rejected
Date: 12/02/2016
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 34720 - HURWITZ JULIE H
Comments: Motion to extend time to file answer to application should be filed in No. 335726

12/08/2016 9 Correspondence Sent
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 34720 - HURWITZ JULIE H
Comments: Chf Clk Advised ImageSoft Will Reverse Motion Fee On Your Credit Card Account

12/14/2016 10 Docketing Statement MCR 7.204H
For Party: 11 EARLEY DARNELL DF-XT-XE
Proof of Service Date: 12/14/2061
Filed By Attorney: 76411 - KIM WILLIAM Y

12/21/2016 11 Order: Consolidate - Administrative
View document in PDF format
Panel: HWS,DAS,ELG
Comments: Consl: 335555, 335725, 335726

01/03/2017 15 Brief: Appellant
Proof of Service Date: 01/03/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE

01/11/2017 17 Brief: Cross-Appellant
Proof of Service Date: 01/11/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 77085 - ERIKSSON REED E
For Party: 11 EARLEY DARNELL DF-XT-XE

Court of Appeals Docket Sheet

02/01/2017 18 Motion: Extend Time - Appellee/Cross-Appellant
Proof of Service Date: 02/01/2017
Filed By Attorney: 33614 - RIVERS BETH M
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Fee Code: EPAY
Requested Extension: 03/15/2017
Answer Due: 02/08/2017
Comments: ext time to file one combined AE/XE/XT bf - also mot file bf in excess of 50 pages

02/02/2017 19 Defective Filing Letter
Event: 18
Defect:
Fees: $100 Motion - Cured

02/02/2017 20 Telephone Contact
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 33614 - RIVERS BETH M
Comments: v/m- need add'l motion fee

02/02/2017 21 Defect Cured
Event: 18
Defect:
Fees: $100 Motion - Cured

02/02/2017 22 Fee - Motion - Defect Cured
Date: 02/02/2017
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 33614 - RIVERS BETH M
Fee Code: EPAY

02/14/2017 23 Submitted on Administrative Motion Docket
Event: 18 Extend Time - Appellee/Cross-Appellant
District: T
Item #: 11

02/16/2017 24 Order: Extend Time - Appellee/Cross-Appellant Brief - Grant
View document in PDF format
Event: 18 Extend Time - Appellee/Cross-Appellant
Panel: ELG
Attorney: 33614 - RIVERS BETH M
Extension Date: 03/15/2017
Comments: combined appellee/cross-appellee/cross-appellant brief shall not exceed 65 pages

03/15/2017 25 Brief: Appellee & Cross-Appellant
Proof of Service Date: 03/15/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 33614 - RIVERS BETH M
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Comments: also XAE brief - exhibits not placed in file due to volume

03/20/2017 26 Brief: Cross-Appellee
Proof of Service Date: 03/20/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 76411 - KIM WILLIAM Y
For Party: 11 EARLEY DARNELL DF-XT-XE

03/21/2017 27 Noticed
Record: REQST
Mail Date: 03/22/2017

03/22/2017 28 Telephone Contact
For Party: 11 EARLEY DARNELL DF-XT-XE
Attorney: 77085 - ERIKSSON REED E
Comments: may be filing errata sheet for XAE bf for TOC & IOA

03/22/2017 29 Motion: Consolidate
Proof of Service Date: 03/22/2017
Filed By Attorney: 70902 - RICHOTTE JOSEPH E
For Party: 13 FLINT CITY OF NP
Fee Code: EPAY
Answer Due: 03/29/2017
Comments: Motion to Consolidate 335555, 335726 & 335725 with 337383

03/23/2017 30 Telephone Contact
For Party: 13 FLINT CITY OF NP
Attorney: 70902 - RICHOTTE JOSEPH E
Comments: need pos for mot on parties 1 & 22-24 in 337383

03/23/2017 31 Motion: Extend Time - Reply Brief
Proof of Service Date: 03/23/2017
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Fee Code: STATE
Requested Extension: 05/17/2017
Answer Due: 03/30/2017
Comments: extend time to file combined reply/XAE brief

03/29/2017 32 Answer - Motion
Proof of Service Date: 03/29/2017
Event No: 29 Consolidate
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Filed By Attorney: 75506 - GAMBILL NATHAN A

03/29/2017 33 Answer - Motion
Proof of Service Date: 03/29/2017
Event No: 29 Consolidate
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 33614 - RIVERS BETH M

03/30/2017 37 Correspondence Received
Date: 03/30/2017
For Party: 13 FLINT CITY OF NP
Attorney: 70902 - RICHOTTE JOSEPH E
Comments: Letter indicating that reply to answer & motion may be filed on 4/7

03/30/2017 34 Electronic Record Filed

03/31/2017 39 Answer - Motion
Proof of Service Date: 03/31/2017
Event No: 29 Consolidate
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 34720 - HURWITZ JULIE H

04/03/2017 41 Motion: Extend Time - Reply Brief
Proof of Service Date: 04/03/2017
Filed By Attorney: 76411 - KIM WILLIAM Y
For Party: 11 EARLEY DARNELL DF-XT-XE
Fee Code: EPAY
Requested Extension: 05/17/2017
Answer Due: 04/10/2017
Comments: indicates atty Rivers agrees with relief - extend time to file combined reply/XAE brief

04/04/2017 36 Submitted on Administrative Motion Docket
Event: 31 Extend Time - Reply Brief
District: T
Item #: 11

04/04/2017 38 Submitted on Administrative Motion Docket
Event: 29 Consolidate
District: T
Item #: 11

04/04/2017 40 Order: Consolidate - Deny
View document in PDF format
Event: 29 Consolidate
Panel: ELG
Attorney: 70902 - RICHOTTE JOSEPH E

04/05/2017 42 Order: Extend Time - Reply Brief - Grant
View document in PDF format
Event: 31 Extend Time - Reply Brief
Panel: ELG
Attorney: 75506 - GAMBILL NATHAN A
Extension Date: 05/17/2017
Comments: extend time to file combined reply/XAE brief

04/10/2017 44 Brief: Reply
Proof of Service Date: 04/10/2017
Timely Filed: Y
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE

04/11/2017 43 Submitted on Administrative Motion Docket
Event: 41 Extend Time - Reply Brief
District: T
Item #: 11

04/13/2017 45 Order: Extend Time - Reply Brief - Grant
View document in PDF format
Event: 41 Extend Time - Reply Brief
Panel: ELG
Attorney: 76411 - KIM WILLIAM Y
Extension Date: 05/17/2017
Comments: The combined reply/cross-appellee brief shall be filed by May 17, 2017.

04/24/2017 46 Telephone Contact
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 33614 - RIVERS BETH M
Comments: Atty Rivers intends brief filed today to be reply to brief in evt 26

04/24/2017 47 Pleadings Rejected
Date: 04/24/2017
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 33614 - RIVERS BETH M
Comments: cannot accept reply to brief in evt 26 - untimely & over 10 pages

04/27/2017 48 Correspondence Sent
Date: 04/27/2017
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 33614 - RIVERS BETH M
Comments: Letter sent re event 47

05/17/2017 49 Brief: Cross-Appellee
Proof of Service Date: 05/17/2017

Court of Appeals Docket Sheet

Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 76411 - KIM WILLIAM Y
For Party: 11 EARLEY DARNELL DF-XT-XE
Comments: combined reply/cross-appellee brief

05/17/2017 50 Brief: Cross-Appellee
Proof of Service Date: 05/17/2017
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Comments: combined reply/cross-appellee brief

06/21/2017 51 Brief: Supplemental Auth`y
Proof of Service Date: 06/21/2017
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE

06/21/2017 52 Brief: Supplemental Auth`y
Proof of Service Date: 06/21/2017
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE

06/21/2017 53 Brief: Supplemental Auth`y
Proof of Service Date: 06/21/2017
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE

06/21/2017 54 Brief: Supplemental Auth`y
Proof of Service Date: 06/21/2017
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE

08/23/2017 55 Brief: Supplemental Auth`y
Proof of Service Date: 08/23/2017
Oral Argument Requested:
Timely Filed:
Filed By Attorney: 75506 - GAMBILL NATHAN A
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE

12/21/2017 60 Appearance - Appellee
Date: 12/21/2017
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 39524 - NOVAK PAUL F
Comments: as co counsel

01/02/2018 62 Brief: Supplemental Auth`y
Proof of Service Date: 01/02/2018
Oral Argument Requested:
Timely Filed:
Filed By Attorney: 33614 - RIVERS BETH M
For Party: 1 MAYS MELISSA PL-AE-XE-XT

01/08/2018 63 Telephone Contact
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 33614 - RIVERS BETH M
Comments: alerted attys of req for media coverage

01/08/2018 64 Telephone Contact
Comments: Gus Burns at MLive indicates coverage may include audio/video recording using cell phone only

01/08/2018 65 Telephone Contact

Comments: Advised Steve Carmody that media request was approved, can use wireless mic in ctroom

01/08/2018 66 Telephone Contact

Comments: Advised Fergus Burns of MLive that media request approved, may use cell phone to record audio/video

01/09/2018 59 Submitted on Case Call

District: D
Item #: 2
Panel: KJ,KFH,MJR

01/09/2018 67 Oral Argument Audio

01/09/2018 68 Other

Date: 06/05/2015
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Attorney: 75506 - GAMBILL NATHAN A
Comments: complaint for injunctive relief

01/09/2018 69 Other

Date: 07/06/2015
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Attorney: 75506 - GAMBILL NATHAN A
Comments: US District Court 1st Amended Complaint

01/19/2018 71 Motion: Oral Argument - Access to Recording

Proof of Service Date: 01/19/2018
Filed By Attorney: 33614 - RIVERS BETH M
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Fee Code: EPAY
Answer Due: 01/26/2018

01/22/2018 72 Motion: Strike

Proof of Service Date: 01/22/2018
Filed By Attorney: 39524 - NOVAK PAUL F
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Fee Code: EPAY
Answer Due: 02/05/2018
Comments: Mtn to Strike Documents in event 68 and 69

01/22/2018 73 Motion: Supplemental Brief

Proof of Service Date: 01/22/2018
Filed By Attorney: 39524 - NOVAK PAUL F
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Fee Code: EPAY
Answer Due: 01/29/2018
Comments: E-Filed pleadings are the same as in event 72

01/24/2018 76 Correspondence Sent

For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 39524 - NOVAK PAUL F
Comments: Chf Clk Advised ImageSoft Will Void $100 Fee On Credit Card Acct; Only $200 Fees Required For Mtns

01/25/2018 78 Order: Strike - Motion - Deny

View document in PDF format
Event: 72 Strike
Event: 73 Supplemental Brief
Panel: KJ,KFH,MJR
Attorney: 39524 - NOVAK PAUL F
Comments: Deny motion to strike and Deny motion to submit supplemental brief; Order emailed

01/25/2018 79 Opinion - Authored - Published

View document in PDF format
Pages: 40

Panel: KJ,KFH,MJR
Author: KJ
Result: L/Ct Judgment/Order Affirmed

01/25/2018 80 Opinion - Dissent
View document in PDF format
Pages: 12
Author: MJR

01/25/2018 81 Order: Oral Argument - Grant Access to Recording
View document in PDF format
Event: 71 Oral Argument - Access to Recording
Panel: KJ,KFH,MJR
Attorney: 33614 - RIVERS BETH M
Comments: E-mailed order

01/26/2018 82 Order: Amend Prior Opinion
View document in PDF format
Panel: KJ,KFH,MJR
Comments: Pg 8, Paragraph 2, June 21, 2015 is amended to read July 21, 2015. Clerical error

01/30/2018 74 Submitted on Motion Docket Affecting Call
Event: 71 Oral Argument - Access to Recording
Event: 73 Supplemental Brief
District: C
Item #: 1

01/31/2018 83 Oral Argument Recording - Request for Copy (Motion Grntd)
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Attorney: 75506 - GAMBILL NATHAN A

02/01/2018 84 Oral Argument Recording - Rec`d Fee; Sent Temp Link
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Attorney: 75506 - GAMBILL NATHAN A
Fee Code: STATE
Comments: gambilln@michigan.gov

02/05/2018 85 Oral Argument Recording - Request for Copy (Motion Grntd)
For Party: 11 EARLEY DARNELL DF-XT-XE
Attorney: 77085 - ERIKSSON REED E

02/05/2018 86 Oral Argument Recording - Rec`d Fee; Sent Temp Link
For Party: 11 EARLEY DARNELL DF-XT-XE
Attorney: 77085 - ERIKSSON REED E
Comments: jdelaney@cityofflint.com

02/05/2018 87 Oral Argument Recording - Request for Copy (Motion Grntd)
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 31595 - LABELLE DEBORAH A

02/05/2018 88 Oral Argument Recording - Rec`d Fee; Sent Temp Link
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Attorney: 31595 - LABELLE DEBORAH A
Comments: betsyllewis@gmail.com

02/06/2018 75 Submitted on Motion Docket Affecting Call
Event: 72 Strike
District: C
Item #: 1

03/08/2018 89 SCt: Application for Leave to SCt
Supreme Court No: 157335
Answer Due: 04/05/2018

Fee: AG E-Transfer
For Party: 7
Attorney: 75506 - GAMBILL NATHAN A
Comments: Governor Application; Same application 157335 - 157337, ALL EVENTS IN 157335

03/08/2018 90 SCt Case Caption
Proof Of Service Date: 03/08/2018
Comments: 157335

03/08/2018 91 SCt: Application for Leave to SCt
Supreme Court No: 157340
Answer Due: 04/05/2018
Fee: E-Pay
For Party: 11
Attorney: 76411 - KIM WILLIAM Y
Comments: Earley Application; Same application 157340 - 157342, ALL EVENTS IN 157340; CoA and Cir Ct records already ordered for SC 157335

03/08/2018 93 Other
Date: 03/08/2018
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Attorney: 75506 - GAMBILL NATHAN A
Comments: Notice of filing application for leave to appeal in the Supreme Court.

03/09/2018 92 SCt Case Caption
Proof Of Service Date: 03/09/2018
Comments: 157340

03/12/2018 94 Other
Date: 03/12/2018
For Party: 11 EARLEY DARNELL DF-XT-XE
Comments: Notice of filing application for leave to appeal in the Supreme Court filed on behalf party 11 & 12

03/15/2018 95 Supreme Court - File Sent To
File Location: Z
Comments: sc#157335 *E-record

03/15/2018 96 SCt: COA and TCt Received
3 files

03/20/2018 97 SCt Motion: Housekeeping
Party: 1
Filed by Attorney: 33614 - RIVERS BETH M
Comments: 157340 - Motion to extend time to 05-03-2018 to file answer and to extend page limit to 65 pages

03/20/2018 98 SCt Motion: Housekeeping
Party: 1
Filed by Attorney: 33614 - RIVERS BETH M
Comments: 157335 - Motion to extend time to 05-03-2018 to file answer and to extend page limit to 65 pages

03/30/2018 99 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant PLAEs motion to extend time for filing answer to 5/3/18.

03/30/2018 100 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Grant PLAEs motion to extend time for filing answer to 5/3/18.

04/05/2018 101 SCt: Answer - SCt Application/Complaint
Filing Date: 04/05/2018
For Party: 11 EARLEY DARNELL DF-XT-XE
Filed By Attorney: 76411 - KIM WILLIAM Y
Timely: Y

Comments: Answer of DFAE Earley & Amrose to application in #157335 (Evt #89).

04/26/2018 102 SCt: Reply - SCt Application/Complaint
Filing Date: 04/26/2018
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Filed By Attorney: 75506 - GAMBILL NATHAN A
Comments: 157335 - Reply to Earley Answer

05/03/2018 103 SCt: Answer - SCt Application/Complaint
Filing Date: 05/03/2018
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 39524 - NOVAK PAUL F
Comments: 157335 and 157340; See events 104 and 105 for corrected answer

05/04/2018 104 SCt: Answer - SCt Application/Complaint
Filing Date: 05/04/2018
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 39524 - NOVAK PAUL F
Comments: 157335 - Corrected Answer

05/04/2018 105 SCt: Answer - SCt Application/Complaint
Filing Date: 05/04/2018
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 39524 - NOVAK PAUL F
Comments: 157340 - Corrected Answer

05/23/2018 106 SCt: Reply - SCt Application/Complaint
Filing Date: 05/23/2018
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Filed By Attorney: 75506 - GAMBILL NATHAN A
Comments: 157335 - Reply to Mays Answer

05/23/2018 107 SCt: Reply - SCt Application/Complaint
Filing Date: 05/23/2018
For Party: 11 EARLEY DARNELL DF-XT-XE
Filed By Attorney: 76411 - KIM WILLIAM Y
Comments: 175340 - Reply to Mays Answer

06/06/2018 108 SCt: Miscellaneous Filing
Filing Date: 06/06/2018
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 39524 - NOVAK PAUL F
Comments: 157335 - Notice of issues related to potential disqualification pursuant to MCR 2.003

06/06/2018 109 SCt: Miscellaneous Filing
Filing Date: 06/06/2018
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 39524 - NOVAK PAUL F
Comments: 157340 - Notice of issues related to potential disqualification pursuant to MCR 2.003

07/23/2018 110 Michigan Appeals Reports Publication
323 Mich App 1

09/14/2018 111 Copy Request Fulfilled
Date: 09/14/2018

11/29/2018 112 Correspondence Sent
Proof Of Service Date: 11/29/2018
Comments: Ltr to attys re KTW's non-participation.

11/30/2018 113 SCt: Supplemental Authority
Filing Date: 11/30/2018
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE

Filed By Attorney: 75506 - GAMBILL NATHAN A

01/07/2019 114 SCt: Supplemental Authority
Filing Date: 01/07/2019
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 39524 - NOVAK PAUL F

01/07/2019 115 SCt: Supplemental Authority
Filing Date: 01/07/2019
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 39524 - NOVAK PAUL F

01/17/2019 116 SCt: Miscellaneous Filing
Filing Date: 01/17/2019
For Party: 7 GOVERNOR RICK SNYDER DF-AT-XE
Filed By Attorney: 75506 - GAMBILL NATHAN A
Comments: DFAT response to PLAEs supp authority.

05/22/2019 117 SCt Order: Application - Grant
View document in PDF format
Comments: To be argued with Nos. 157340-2. Combined 30 mins of OA each side. Justice Clement not participating.

05/22/2019 118 SCt Order: Application - Grant
View document in PDF format
Comments: To be argued with Nos. 157335-7. Combined 30 mins of OA each side. Justice Clement not participating.

05/29/2019 119 SCt: Appearance of Attorney
Filing Date: 05/29/2019
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 24429 - PITT MICHAEL L

05/29/2019 120 SCt: Appearance of Attorney
Filing Date: 05/29/2019
For Party: 1 MAYS MELISSA PL-AE-XE-XT
Filed By Attorney: 42318 - MCGEHEE CARY

06/04/2019 121 Correspondence Sent
Proof Of Service Date: 06/04/2019
Comments: Resent event #118 (5-22-19 order) to updated address for Party #1 atty (Novak).

06/20/2019 122 SCt Motion: Housekeeping
Party: 7
Filed by Attorney: 75506 - GAMBILL NATHAN A
Comments: Motion to extend time to 8-7-2019 to file AT brf and for 10-page extension

06/21/2019 123 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Nos. 157335-7: Grant DFATs motion to extend time for filing brf to 8-7-19 and for a 10-pg extension to pg limitation.

07/03/2019 124 SCt Motion: Housekeeping
Party: 11
Filed by Attorney: 76411 - KIM WILLIAM Y
Comments: 157340 motion to extend time to 08-07-2019 to file brief and for 10-page extension

07/10/2019 125 SCt Order: Chief Justice - Grant
View document in PDF format
Comments: Nos. 157340-2: Grant DFATs motion to extend time for filing brf to 8-7-19 and to exceed pg limit by 10 pages.

Case Listing Complete

STATE OF MICHIGAN

COURT OF CLAIMS

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN and RHONDA KELSO,

Plaintiffs,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, DARNELL EARLEY and JERRY AMBROSE,

Defendants.

OPINION AND ORDER

Case No. 16-000017-MM

Hon. Mark T. Boonstra

This putative class action arises out of the water contamination crisis commonly referred to as the "Flint Water Crisis." Plaintiffs commenced this litigation on behalf of the water users and property owners of the City of Flint. Named as defendants are various state defendants[1] and two former emergency managers of Flint. Plaintiffs seek, in part, to recover monetary damages attributable to alleged violations of the due process and fair and just treatment clauses of Const

[1] The state defendants are: Governor Rick Snyder, the State of Michigan, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services. This use of the term "state defendants" in this opinion derives from the manner in which the parties have identified themselves in the briefing of the pending motions, and is not indicative of any conclusion by the Court on the issue presented regarding whether the former emergency manager defendants are state or local officials. That issue will be discussed later in this opinion and without regard to the characterization of certain named defendants as the "state defendants."

1963, art 1, § 17, and the taking clause of Const 1963, art 10, § 2. Before the Court are dual motions seeking summary disposition pursuant to MCR 2.116(C)(4) (lack of jurisdiction), (C)(7) (immunity granted by law) and (C)(8) (failure to state a claim); one is brought by the state defendants and one is brought by the former emergency managers, Darnell Earley and Jerry Ambrose. For the reasons detailed in this opinion, the Court GRANTS summary disposition in favor of all defendants on Counts I and III of plaintiffs' first amended complaint. The Court DENIES summary disposition, as to all defendants, without prejudice, on Counts II and IV.[2]

I. FACTUAL BACKGROUND

Because the instant matter presents on motions for summary disposition that were filed at an early stage of this litigation, the factual record is yet to be developed. For the limited purpose of providing context for the rulings that follow with regard to the merits of defendants' motions for summary disposition brought pursuant to MCR 2.116(C)(8), the Court accepts as true, as it must (for purposes of the pending motions), plaintiffs' well-pleaded allegations and views those allegations in a light most favorable to plaintiffs. In doing so, the Court acknowledges that defendants offer a different view of the facts; the state defendants expressly maintain, for example, that "the State and Governor recognize the seriousness of these issues," and recite to a

[2] Defendants Earley and Ambrose also seek summary disposition with regard to plaintiffs' request for injunctive relief. That request for summary disposition is not properly before the Court. "It is well settled that an injunction is an equitable remedy, not an independent cause of action." *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008). Summary disposition may be granted with respect to a claim or a defense. MCR 2.116(B)(1). A remedy is neither a claim nor a defense and, thus, is not subject to summary disposition. Consequently, the Court concludes that the summary disposition request is improperly brought as it pertains to the request for injunctive relief. The propriety of the remedy of injunctive relief is more properly addressed after a finding, if any, of liability.

number of steps that they maintain have been taken that "demonstrate[] their commitment to resolving the crisis;" similarly, defendants Earley and Ambrose offer that "[t]he Flint Water Crisis has resulted in the mass mobilization of resources by city, county, state, federal, and non-governmental actors as they work to protect the residents of the City of Flint . . . and Genesee County, identify the root causes of the Crisis, prevent its reoccurrence, and address the long term issues that have resulted or will result." In any event, having acknowledged that the parties hold differing perspectives regarding the facts and circumstances that have given rise to this litigation, the Court reiterates that it is its obligation at this juncture of the proceedings to accept plaintiffs' factual allegations as true for purposes of a (C)(8) motion, and the Court therefore will not in this opinion further summarize defendants' factual contentions. Rather, the factual recitation that follows is, for the reasons noted, derived entirely from plaintiffs' first amended complaint. The reader should therefore appreciate that, for these reasons, and given the early stage of this litigation, this factual description does not reflect any findings by the Court.

From 1964 through late April 2014, the Detroit Water and Sewage Department ("DWSD") supplied Flint water users with their water, which was drawn from Lake Huron. Flint joined Genesee, Sanilac and Lapeer Counties and the City of Lapeer, in 2009, to form the Karegondi Water Authority ("KWA") to explore the development of a water delivery system that would draw water from Lake Huron and serve as an alternative to the Detroit water delivery system. On March 28, 2013, the State Treasurer recommended to the Governor that he authorize the KWA to proceed with its plans to construct the alternative water supply system. The State Treasurer made this decision even though an independent engineering firm commissioned by the State Treasurer had concluded that it would be more cost efficient if Flint continued to receive its water from the DWSD. Thereafter, on April 16, 2013, the Governor authorized then-Flint

Emergency Manager Edward Kurtz to contract with the KWA for the purpose of switching the source of Flint's water from the DWSD to the KWA beginning in mid-year 2016.

At the time Emergency Manager Kurtz contractually bound Flint to the KWA project, the Governor and various state officials knew that the Flint River would serve as an interim source of drinking water for the residents of Flint. Indeed, the State Treasurer, the emergency manager and others developed an interim plan to use Flint River water before the KWA project became operational. They did so despite knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water and despite the absence of any independent state scientific assessment of the suitability of using water drawn from the Flint River as drinking water.

On April 25, 2014, under the direction of then Flint Emergency Manager Earley and the Michigan Department of Environmental Quality ("MDEQ"), Flint switched its water source from the DWSD to the Flint River and Flint water users began receiving Flint River water from their taps. This switch was made even though Michael Glasgow, the City of Flint's water treatment plant's laboratory and water quality supervisor, warned that Flint's water treatment plant was not fit to begin operations. The 2011 study commissioned by city officials had noted that Flint's long dormant water treatment plant would require facility upgrades costing millions of dollars.

Less than a month later, state officials began to receive complaints from Flint water users about the quality of the water coming out of their taps. Flint residents began complaining in June of 2014 that they were becoming ill after drinking the tap water. On October 13, 2014, General Motors announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about the corrosive nature of the water. That same month, Flint officials expressed

concern about a Legionellosis outbreak and possible links between the outbreak and Flint's switch to the river water. On February 26, 2015, the United States Environmental Protection Agency ("EPA") advised the MDEQ that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level. That same month, the MDEQ was also advised of the opinion of Miguel Del Toral of the EPA that black sediment found in some of the tap water was lead.

During this time, state officials failed to take any significant remedial measures to address the growing public health threat posed by the contaminated water. Instead, state officials continued to downplay the health risk and advise Flint water users that it was safe to drink the tap water while at the same time arranging for state employees in Flint to drink water from water coolers installed in state buildings. Additionally, the MDEQ advised the EPA that Flint was using a corrosion control additive with knowledge that the statement was false.

By early March 2015, state officials knew they faced a public health emergency involving lead poisoning and the presence of the deadly Legionella bacteria, but actively concealed the health threats posed by the tap water, took no measures to effectively address the dangers, and publically advised Flint water users that the water was safe and that there was no widespread problem with lead leaching into the water supply despite knowledge that these latter two statements were false.

Through the summer and into the fall of 2015, state officials continued to cover up the health emergency, discredit reports from Del Toral of the EPA and Professor Marc Edwards of Virginia Tech confirming serious lead contamination in the Flint water system, conceal critical information confirming the presence of lead in the water system, and advise the public that the

drinking water was safe despite knowledge to the contrary. In the fall of 2015, various state officials attempted to discredit the findings of Dr. Mona Hann-Attisha of Hurley Hospital, which reflected a "spike in the percentage of Flint children with elevated blood lead levels from blood drawn in the second and third quarter of 2014." (First Amended Complaint, p 21, ¶ 102.)

In early October of 2015, however, the Governor acknowledged that the Flint water supply was contaminated with dangerous levels of lead. He ordered Flint to reconnect to the Detroit water system on October 8, 2015, with the reconnection taking place on October 16, 2015. This suit followed.

II. SUMMARY DISPOSITION STANDARDS

Summary disposition is appropriate under MCR 2.116(C)(4) when the trial court lacks subject matter jurisdiction. *Packowski v United Food and Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010). To determine whether summary disposition is appropriate under this subrule, this Court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate a lack of subject matter jurisdiction. *Id*. at 139 (internal quotation marks and citation omitted).

A motion for summary disposition brought pursuant to MCR 2.116(C)(7) (on which defendants rely in this case in asserting "immunity granted by law") requires this Court to accept as true the well-pleaded allegations of plaintiffs and to construe those allegations in favor of plaintiffs, unless the allegations are specifically contradicted by the affidavits or other appropriate documentation submitted by the movant. *Adair v State of Michigan*, 250 Mich App 691, 702; 651 NW2d 393 (2002), aff'd in part and rev'd in part on other grounds 470 Mich 105 (2004). "If the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if

the affidavits or other documentary evidence show that there are no genuine issues of fact, judgment must be rendered without delay." *Id*.

A trial court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Dalley v Dykema Gossett*, *PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). When deciding a motion brought under this subrule, this Court accepts all well-pleaded factual allegations as true and views those allegations in a light most favorable to the nonmoving party. *Id*. at 304-305. A party may not support a motion under subrule (C)(8) with documentary evidence. *Id*. at 305. Summary disposition should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id*.

III. JURISDICTIONAL ISSUES

A. The Notice Requirement of MCL 600.6431(3)

Generally, governmental entities in Michigan are statutorily immune from tort liability. Because the government may voluntarily subject itself to tort liability, however, it may also place conditions or limitations on the liability imposed. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). Moreover, "it being the sole province of the Legislature to determine whether and on what terms the state may be sued, the judiciary has no authority to restrict or amend those terms." *Id*. at 732. In other words, "no judicially created savings construction is permitted to avoid a clear statutory mandate." *Id*. at 733. Thus, courts may not engraft an actual prejudice requirement or otherwise reduce the obligation to fully comply with the legislatively-imposed conditions or limitations. *Id*. at 747.

One such condition precedent on the right to sue the state is satisfaction of the notice provision of the Court of Claims Act, MCL 600.6431. *McCahan*, 492 Mich at 736; see also, *Fairley v Dep't of Corrections*, 497 Mich 290, 292; 871 NW2d 129 (2015). The notice provision at issue in this litigation provides: "In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3). This provision applies to constitutional torts. *Rusha v Dep't of Corrections*, 307 Mich App 300, 301, 304; 859 NW2d 735 (2014). "Section 6431(3) is an unambiguous 'condition precedent to sue the state,' *McCahan v Brennan*, 291 Mich App 430, 433; 804 NW2d 906 (2011), aff'd 492 Mich 730 (2012), and a claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted, *McCahan v Brennan*, 492 Mich 730, 746-747; 822 NW2d 747 (2012)." *Rusha*, 307 Mich App at 307. "[S]ubstantial compliance does not satisfy MCL 600.6431(3)." *McCahan*, 291 Mich App at 433.

Plaintiffs commenced the instant suit on January 21, 2016.[3] According to defendants, the six-month notice period set forth in MCL 600.6431(3) began to run either in June of 2013, the date on which plaintiffs allege that "the State created a dangerous public health crisis for the users of Flint tap water" by "order[ing] and set[ting] in motion the use of highly corrosive and toxic Flint River water knowing that the [water treatment plant] was not ready" (First Amended

[3] Plaintiffs did not separately file a "notice of intention to file a claim," MCL 600.6431(1), (3). Rather, plaintiffs allege that their "original Complaint [wa]s filed within six months of the accrual of Plaintiffs' claim and satisfies all timeliness requirements of MCL §§ 600.6431 . . . ." (First Amended Complaint, p 7, ¶ 34).

Complaint, p 12, ¶ 59), or on April 25, 2014, the date Flint water users began receiving Flint River water from their taps (First Amended Complaint, p 12, ¶¶ 58-59). Regardless of which date is selected, defendants assert that the conclusion in the same: plaintiffs failed to file the requisite notice within six months of either date and, therefore, their complaint must be dismissed in its entirety pursuant to MCR 2.116(C)(4) and (7). The Court is unpersuaded by defendants' argument. Were the Court to accept defendants' position, it would have to find that plaintiffs' claims are barred because they should have filed suit (or notice) at a time when the state itself was stating that it lacked any reason to know that the water supply was contaminated. The Court is disinclined to so find. Rather, the Court finds that defendants' request for summary disposition on this ground is at best premature for the reasons that follow.

Plaintiffs assert only constitutional claims. In *Rusha*, the Court of Appeals acknowledged that "Michigan courts routinely enforce statutes of limitation where constitutional claims are at issue." *Rusha*, 307 Mich App at 311. The Court also acknowledged that an exception to such enforcement lies where it can be demonstrated that a statute of limitations is so harsh and unreasonable in the consequences that it "effectively divest[s]" a plaintiff "of the access to the courts intended by the grant of the substantive right." *Rusha*, 307 Mich App at 311 (citations and internal punctuation omitted). The Court then observed that no obvious reason existed not to extend this exception to statutory notice requirements, particularly the notice requirements of MCL 600.6431(3). The Court elaborated:

> We see no reason – and plaintiff has provided none – to treat statutory notice requirements differently. Indeed, although statutory notice requirements and statutes of limitations do not serve identical objectives, *Davis v Farmers Ins Group*, 86 Mich App 45, 47; 272 NW2d 334 (1978), both are *procedural* requirements that ultimately restrict a plaintiff's remedy, but not the substantive right. See [*American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 599; 560 NW2d 644 (1996)] (statutory notice periods are " 'devices . . . which have the

> effect of shortening the period of time set forth in' statutes of limitation") (omission in *American States*), quoting *Carver v McKernan*, 390 Mich 96, 99; 211 NW2d 24 (1973), overruled on other grounds by [*Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 213, 222-223; 731 NW2d 41 (2007)]; see also *Brown v United States*, 239 US App DC 345, 362; 742 F2d 1498 (1984) (en banc) (Bork, J., dissenting) ("Like statutes of limitations, notice-of-claims provisions go primarily to remedy.") (citation omitted). [*Rusha*, 307 Mich App at 311-312 (emphasis in original).]

The Court then concluded, however, that on the facts presented, there was no reason to relieve the plaintiff in that case from compliance with the notice requirement. The Court explained:

> Here, it can hardly be said that application of the six-month notice provision of § 6431(3) effectively divested plaintiff of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogated a constitutional right. Again, plaintiff waited nearly 28 months to file a claim. But § 6431 would have permitted him to file a claim on this very timeline had he only provided notice of his intent to do so within six months of the claim's accrual. Providing such notice would have imposed only a minimum procedural burden, which in any event would be significantly less than the "minor 'practical difficulties' facing those who need only make, sign and file a complaint within six months." *Brown*, 239 US App DC at 365 (Bork, J., dissenting), quoting *Burnett v Grattan*, 468 US 42, 51; 104 S Ct 2924; 82 L Ed 36 (1984). To be sure, providing statutory notice " 'requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this [statutory notice provision] that would not be applicable to any other statute of limitation.' " *Rowland*, 477 Mich at 211, quoting *Ridgeway v Escanaba*, 154 Mich 68, 73; 117 NW 550 (1908). [*Rusha*, 307 Mich App at 312-313.]

In the present litigation, unlike in *Rusha*, a granting of summary disposition at this stage of the proceedings could potentially divest plaintiffs of the ability to vindicate the alleged constitutional violations by depriving them of access to the courts. Unlike a suit, for example, brought to recover for personal injuries sustained in an automobile accident where the event giving rise to the cause of action is the accident, *McCahan*, 492 Mich at 734; *Kline v Dep't of Transportation*, 291 Mich App 651, 652, 654, 657 n 1; 809 NW2d 392 (2011), in the present suit the event giving rise to the cause of action was not readily apparent at the time of its happening. Similarly, a significant portion of the injuries alleged to persons and property likely became

manifest so gradually as to have been well established before becoming apparent to plaintiffs because the evidence of injury was concealed in the water supply infrastructure buried beneath Flint and in the bloodstreams of those drinking the water supplied via that infrastructure. Matters are further complicated by allegations of affirmative acts undertaken by a variety of state actors between April 25, 2014 and October of 2015, not only to conceal the fact that the tap water was contaminated and posed a threat to the health of all who drank it, but to obfuscate the occurrence of the very event or events that would trigger the running of the six-month notice period. Under these unique circumstances, and assuming plaintiffs' allegations to be true, providing statutory notice would have required much more than "only ordinary knowledge and diligence on the part of the injured and [their] counsel," such that there indeed is "reason for relieving them from the requirements of this [statutory notice provision]." *Rusha*, 307 Mich App at 312 (citations and internal quotation marks omitted). Rather, and again under these unique circumstances, and assuming plaintiffs' allegations to be true, such affirmative acts of concealment and obfuscation would "effectively divest[] plaintiff[s] of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogate[] a constitutional right," *id*., if permitted to further become a vehicle for manipulating the date on which the notice period began to run, only to then reward those acts by dismissing the claims of ordinary citizens who possessed less information about the events than did the state actors themselves. See e.g., *The Cooke Contracting Co v Dep't of State Highways #1 (On Rehearing)*, 55 Mich App 336, 339; 222 NW2d 231 (1974).[4] In

[4] In so concluding, the Court does not adopt and, to the contrary, rejects plaintiffs' argument that the fraudulent concealment tolling provision found in MCL 600.5855 should be applied in this case. MCL 600.5855 extends the time for commencing an action, notwithstanding that it "would otherwise be barred by the period of limitations," "[i]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable

light of these circumstances and the Court's review of the allegations contained in plaintiffs' first amended complaint and the content of the documentary evidence presented by the parties, the Court finds, at a minimum, that there are fact questions that if answered favorably to plaintiffs would, under the established exception recognized by existing caselaw, justify "relieving [plaintiffs] from the requirements of" MCL 600.6431(3). *Rusha*, 307 Mich App at 312.[5]

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for the claim from the knowledge of the person entitled to sue on the claim." The Court of Appeals has twice declined to import this provision into MCL 600.6431 because the latter provision is a notice provision and not a statute of limitation provision. See *Brewer v Central Michigan Univ Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2013 (Docket No. 312374), unpub op at 2-3; *Zelek v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 305191), unpub op at 2. Although "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis," MCR 7.215(C)(1), an unpublished opinion can be instructive or persuasive, *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). More telling, however, is the fact that the Legislature imported the fraudulent concealment provision into the statute of limitation provisions of the Court of Claims Act, MCL 600.6452(2); MCL 600.5855, but not into the notice provisions of the Act. The absence of such a similar provision is persuasive evidence that the Legislature did not intend for the fraudulent concealment tolling provision of MCL 600.5855 to be read into the notice provisions of MCL 600.6431.

Yet, while the Court of Appeals in *Brewer* and *Zelek* properly declined to import the fraudulent concealment tolling provision of MCL 600.5855 into the notice provisions of the Court of Claims Act, MCL 600.6431, the Court finds it noteworthy, as did the Court of Appeals in *Brewer*, that the plaintiff in that case had timely knowledge of his injuries yet waited years before asserting (or giving notice of) his claim. Further, the claim in *Zelek* arose from a motor vehicle accident, an identifiable event of which the plaintiff obviously was aware at the time of its occurrence. Although the plaintiff claimed that she should have been advised that the vehicle with which she had collided was an unmarked state police vehicle, the accident reports sufficiently identified the vehicle and driver that the plaintiff with due diligence could have ascertained that she was required to file a timely notice in the Court of Claims. Thus, the unique and distinctive circumstances of the instant case stand in stark contrast to the very distinguishable circumstances that were present in *Brewer* and *Zelek*, and while those cases properly support the non-importation of the tolling provisions of MCL 600.5855 into the notice provisions of MCL 600.6431, they do not in any way address or undermine this Court's recognition and application of the established exception recognized in *Rusha*.

[5] The Court notes that the Michigan Supreme Court denied leave to appeal in *Rusha*. See, *Rusha*, 498 Mich 860; 865 NW2d 28 (2015).

Nevertheless, even if strict compliance with the notice requirements were required, the Court concludes that summary disposition would still be premature. Plaintiffs acknowledge that not every injury suffered by every user of Flint water is necessarily actionable, depending on when the actionable event(s) occurred, when each user suffered injury, and when the claim(s) of each accrued, relative to the filing of notice (or of the claim). Some injuries suffered by some plaintiffs or putative class members may thus be actionable, while other injuries experienced by those or other plaintiffs or putative class members may not be actionable, depending on the various factors giving rise to the cause of action. Under such circumstances, at a minimum, material fact questions exist with regard to whether (and which) plaintiffs complied with the notice requirement, and as to which claim(s), such that summary disposition on all counts of plaintiffs' first amended complaint, on that ground, would be inappropriate at this time. The record is simply insufficiently developed for this Court to determine, at this juncture, which claims of which plaintiffs or putative class members may not be viable as not timely filed within the six-month notice provision of MCL 600.6431(3).

For these reasons, summary disposition pursuant to MCR 2.116(C)(4) and (7) based on an application of the six-month notice provision is denied.

B. Emergency Managers

The state defendants assert that the Court of Claims lacks subject matter jurisdiction over plaintiffs' claims against defendants Earley and Ambrose because neither former emergency manager acted in the capacity of a state officer while serving Flint in the office of emergency manager. Rather, the state defendants argue that defendants Earley and Ambrose, when acting as

emergency managers for the City of Flint, "were local, not state, officials."[6] For this reason, the state defendants assert that summary disposition pursuant to MCR 2.116(C)(4) is appropriate as to defendants Earley and Ambrose on all counts of plaintiffs' first amended complaint. This Court disagrees with the underlying premise of the state defendants' argument, and therefore declines to grant summary disposition in favor of defendants Earley and Ambrose on this ground.

Under MCL 600.6419(1)(a), the Court of Claims possesses exclusive subject-matter jurisdiction to hear and determine "any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable or declaratory relief . . . against the state or any of its departments or officers." See also, *Fulicea v Michigan*, 308 Mich App 230, 231; 863 NW2d 385 (2014). The Legislature defined the phrase "the state or any of its departments or officers" in MCL 600.6419(7). In relevant part, that phrase means "this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state . . . ." MCL 600.6419(7).

[6] The state defendants advance this argument not in support of their own motion for summary disposition, but instead in response to the separate motion for summary disposition filed by defendants Earley and Ambrose. Defendants Earley and Ambrose do not make the same argument, and the state defendants acknowledge that Earley and Ambrose "accept . . . as accurate" plaintiffs' contention that the emergency managers were acting as "official agents/policymakers for the State of Michigan." (First Amended Complaint, p 7, ¶ 29).

The Court finds that defendants Earley and Ambrose operated as officers of the state, while executing their responsibilities as emergency managers and overseeing the receivership[7] of Flint. As observed by this Court in its prior decision in *Collins v City of Flint*, 16-000115-MZ, its finding is consistent with

> the long-recognized principle that a receiver serves as the administrative or ministerial arm or officer of the authority exercising the power of appointment. See *Arbor Farms, LLC v Geostar Corp*, 305 Mich App 374, 392; 853 NW2d 421 (2014) (A receiver serves as an arm of the court.); *In re Guaranty Indemnity Co*, 256 Mich 671, 673; 240 NW 78 (1932) ("Generally speaking a receiver is not an agent, except of the court appointing him[.] He is merely a ministerial officer of the court, or, as he is sometimes called, the hand or arm of the court."); *Woodliff v Frechette*, 254 Mich 328, 329; 236 NW2d 799 (1931) (A receiver serves as an arm of the court*.); Detroit Trust Co v Wayne Circuit Judge*, 223 Mich 49, 52; 193 NW 879 (1923) (A receiver serves as an arm of the court.); *Band v Livonia Associates*, 176 Mich App 95, 108; 439 NW2d 285 (1989) ("A receiver is sometimes said to be the arm of the court . . . ."). [*Collins*, 8/25/16 opinion & order, pp 12-13.]

The Court's finding is also supported by the provisions of the local financial stability and choice act, MCL 141.1541 et seq. Again, as explained in *Collins*,

> [a]n emergency manager is a creature of the Legislature with only the power and authority granted by statute. *Kincaid v City of Flint*, 311 Mich App 76, 87; 874 NW2d 193 (2015). An emergency manager is appointed by the governor following a determination by the governor that a local government is in a state of financial emergency. MCL 141.1546(1)(b); MCL 141.1549(1). The emergency manager serves at the governor's pleasure. MCL 141.1515(5)(d); MCL 141.1549(3)(d); *Kincaid*, 311 Mich App at 88. The emergency manager can be removed by the governor or by the Legislature through the impeachment process. MCL 141.1549(3)(d) and (6)(a). The state provides the financial compensation for the emergency manager. MCL 141.1549(3)(e) and (f). All powers of the emergency manager are conferred by the Legislature. MCL 141.1549(4) and (5); MCL 141.1550 – MCL 141.1559; *Kincaid*, 311 Mich

[7] The local financial stability and choice act, MCL 141.1541 et seq., which provides for the appointment of emergency managers, describes the resulting state of affairs as a "receivership." MCL 141.1549(2); MCL 141.1542(q).

> App at 87. Those powers include powers not traditionally within the scope of those granted municipal corporations. See MCL 141.1552(1)(a) – (ee). The Legislature conditioned the exercise of some of those powers upon the approval of the governor or his or her designee or the state treasurer. MCL 141.1552(1)(f), (x), (z) and (3); MCL 141.1555(1). The Legislature has also subjected the emergency manager to various codes of conduct otherwise applicable only to public servants, public officers and state officers. MCL 141.1549(9). Through the various provisions within the act, the state charges the emergency manager with the general task of restoring fiscal stability to a local government placed in receivership – a task which protects and benefits both the state and the local municipality and its inhabitants. The emergency manager is statutorily obligated to create a financial and operating plan for the local government that furthers specific goals set by the state and to submit a copy of the plan to the state treasurer for the treasurer's "regular[] reexamin[ation]." MCL 141.1551(2). The emergency manager is also obligated to report to the top elected officials of this state and to the state treasurer his or her progress in restoring financial stability to the local government. MCL 141.1557. Finally, the Act tasks the governor, and not the emergency manager, with making the final determination whether the financial emergency declared by the governor has been rectified by the emergency manager's efforts. MCL 141.1562(1) and (2). Under the totality of these circumstances, the core nature of the emergency manager may be characterized as an administrative officer of state government. See 65 Am Jur 2d, Receivers, § 128, p 745 (A receiver's duties are administrative in nature.). [*Collins*, 8/25/16 opinion & order, pp 13-14.]

For the foregoing reasons, and at all times relevant to this action, defendants Earley and Ambrose acted as state officers while executing their duties as an emergency manager. Consequently, this Court has jurisdiction over plaintiffs' claims against the former emergency managers. Summary disposition pursuant to MCR 2.116(C)(4) is denied.[8]

[8] Among the arguments advanced by the state defendants for the proposition that emergency managers are local, not state, officials, is the fact that, according to the state defendants, "[t]he Legislature expressly requires the *local*, not state government, to represent emergency managers and pay for judgments against them. MCL 141.1560(5)." The Court rejects the state defendants' position that the Legislature's creation of such a "liability arrangement," to use the state defendants' terminology, converts the emergency managers into local, rather than state, officials for purposes of this action. Conceivably, issues may arise at some juncture regarding whether the state may have a claim for those damages, if any, or those litigation expenses, if any, that may arise out of the actions or defense of defendants Earley and Ambrose. However, those

IV. CONSTITUTIONAL TORTS

Plaintiffs advance three theories of recovery under Const 1963, art 1, § 17: first, in Count I, a constitutional tort predicated on an application of the state-created danger theory; second, in Count II, a constitutional tort predicated on a violation of the protection afforded to an individual's bodily integrity by the substantive component of the due process clause; and third, in Count III, a constitutional tort predicated on a violation of the fair and just treatment clause. The Court agrees with defendants that plaintiffs have failed to state a claim with regard to Counts I and III of their first amended complaint. Defendants are entitled to summary disposition with regard to those counts pursuant to MCR 2.116(C)(8). With regard to Count II, however, the Court finds that plaintiffs have properly pleaded a cognizable substantive due process claim for a violation of their respective individual rights to bodily integrity. Summary disposition is inappropriate with regard to Count II.

A. General Principles

Under Michigan law, it is settled that a damage remedy for a violation of the Michigan Constitution may be recognized against the state in appropriate cases. *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000); *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Dep't of State Police*, 491 US 58, 109 S Ct 2304, 105 L Ed 2d 45 (1989). "[T]he state will be liable for a violation of the state constitution only 'in cases where a state "custom or policy" mandated the official or employee's action.' " *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996), quoting *Smith*, 428 Mich at 642

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issues are not currently before the Court, and the Court expressly declines to address them at this time.

(Opinion by BOYLE, J.). Moreover, "[t]he tortious conduct alleged 'must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing *government* power . . . . [I]t must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.' " *Williams v Berney*, 519 F3d 1216, 1221 (CA 10, 2008), quoting *Livesy v Salt Lake Co*, 275 F3d 952, 957-958 (CA 10, 2001); see also, *Collins v City of Harker Heights*, 503 US 115, 128; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (The substantive component of the federal Due Process Clause is violated by executive action only if it can be classified, in a constitutional sense, as arbitrary or shocking to the conscience.); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198-202; 761 NW2d 293 (2008) ("[W]hen executive action is challenged in a substantive due process claim, the claimant must show that the action was so arbitrary [in a constitutional sense] as to shock the conscience."). Whether conduct shocks the conscience depends on the matter at hand. *County of Sacramento v Lewis*, 523 US 833, 849; 118 S Ct 1708; 140 L Ed 2d 1043 (1998); *Williams*, 519 F3d at 1220-1221; *Robinson v Michigan*, unpublished opinion[9] per curiam of the Court of Appeals, issued November 7, 2006 (Docket No. 270781), unpub op at 3. "The case law . . . recognizes official conduct may be more egregious in circumstances allowing for deliberation . . . than in circumstances calling for quick decisions." *Williams*, 519 F3d at 1220-1221. "Substantive due process protections 'apply to transgressions above and beyond those covered by the ordinary civil tort system; the two are not coterminous.' " *Johnson v City of*

[9] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Unpublished opinions can be instructive or persuasive, however. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

Murray, 909 F Supp 2d at 1265, 1292 (DC Utah, 2012), aff'd 544 Fed Appx 801 (CA 10, 2013), quoting *Williams*, 519 F3d at 1221.

For purposes of deciding the merits of defendants' motions, the Court must determine whether a violation of the Michigan Constitution by virtue of a governmental custom or policy has been alleged with regard to each of the three constitutional torts asserted. *Smith*, 428 Mich at 545; *Johnson v Wayne Co*, 213 Mich App 143, 156; 540 NW2d 66 (1995); *Estate of Braman*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2012 (Docket Nos. 302545; 302622), unpub op at 7. If plaintiffs' allegations, when taken as true, are sufficient to sustain any of the claimed violations of art 1, § 17, then the Court must determine whether this case would be an appropriate one to recognize a damage remedy under art 1, § 17. *Estate of Braman*, unpub op at 7.

B. Count I - State-Created Danger

The state defendants assert that Count I of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action under the state-created danger theory. It is unnecessary for this Court to reach the issue of whether such a cause of action is or should be recognized, however, because even if the state-created danger theory is a viable theory of recovery in Michigan, plaintiffs have not alleged, and cannot allege, facts to state a claim under the theory. Thus, Count I of plaintiffs' first amended complaint must be dismissed pursuant to MCR 2.116(C)(8).

The Michigan Constitution commands that the state cannot deprive any person of "life, liberty or property without due process of law." Const 1963, art 1, § 17. Substantive due

process protects the individual from arbitrary and abusive exercises of government power; certain fundamental rights cannot be infringed upon regardless of the fairness of the procedures used to implement them. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998).

The state-created danger theory has its genesis in *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989). In *DeShaney*, the United States Supreme Court considered whether the due process clause of the Fourteenth Amendment imposed upon the states an affirmative duty to protect an individual against private violence where a special relationship exists between the state and private individual. A minor commenced suit against several social workers and other local officials after the boy was beaten and permanently injured by his father. The minor asserted that the social workers and other officials deprived him of his due process liberty interest when they failed to remove him from the custody of his father despite receiving complaints that the child was being abused by his father and despite having reason to believe that this was the case. *Id*., 489 US at 191. The Supreme Court began its analysis by recognizing that the purpose of the Due Process Clause is to protect the people from the state, not to impose an affirmative obligation on the state to protect people from each other. *Id*., 489 US at 195-196. Nevertheless, the Supreme Court noted that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id*., 489 US at 198. The Court elaborated:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . The affirmative duty to protect arises not from the State's

> knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.
>
> . . . Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua. [*Id*., 489 US at 199-201 (internal citations omitted).]

Applying these principles to the facts in *DeShaney*, the Supreme Court found no due process violation because the harms suffered by the child occurred while he was in the custody of his father and because the harm faced by the child was no greater due to any affirmative state action. *Id*., 489 US at 201.

As observed in *Kneipp v Tedder*, 95 F3d 1199, 1205 (CA 3, 1996), "[i]n *DeShaney*, the Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship when it stated: 'While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.' " Various federal circuit courts of appeals have relied on this sentence from *DeShaney* as support for employing a state-created danger theory to establish a constitutional claim under 42 USC 1983, although the theory has yet to be recognized by the United States Supreme Court. *Walker v Detroit Pub School Dst*, 535 Fed Appx 461, 464 (CA 6, 2103); *Henry v City of Erie*, 728 F3d 275, 282 (CA 3, 2013); *Jane Doe 3*

v White, 409 Ill App 3d 1087; 951 NE2d 216, 230 (2011), aff'd 362 Ill Dec 484; 973 NE2d 880 (2012); *Aselton v Town of East Hartford*, 277 Conn 120, 134 n 8; 890 A2d 1250, 1258 n 8 (2006); *Nelson v Driscoll*, 295 Mont 363, 379-380; 983 P2d 972, 983 (1999). Although the state-created danger theory is recognized by most federal circuits, the test employed by the various circuits somewhat varies among jurisdictions. *Nelson*, 983 P2d at 983; compare *Henry*, 728 F3d at 282; *Cartwright v Marine City*, 336 F3d 487, 493 (CA 6, 2003); *Currier v Doran*, 242 F3d 905, 918 (CA 10, 2001); *Nelson*, 983 P2d at 983. The United States Court of Appeals for the Sixth Circuit has articulated the test as follows:

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. [*Cartwright*, 336 F3d at 493.]

The Michigan Court of Appeals has applied this same test to claims brought under 42 USC 1983. See *Manuel v Gill*, 270 Mich App 355, 365-366; 716 NW2d 291 (2006), aff'd in part and rev'd in part 481 Mich 637 (2008); *Dean v Childs*, 262 Mich App 48, 54-57; 684 NW2d 894 (2004), rev'd in part on other grounds 474 Mich 914 (2005); *Buck v City of Highland Park*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2015 (Docket No. 320967), unpub op at 2-3; *Doe v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued December 8, 2009 (Docket No 285274), unpub op at 1-3; *Lofton v Detroit Bd of Ed*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 2008 (Docket No. 276449), unpub op at 7-9; *Robinson v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued November 7, 2006 (Docket No. 270781), unpub op at 4-5; *Conley v Bobzean*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2006 (Docket No.

257276), unpub op at 5-6; *Rollo v Guerreso*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2005 (Docket No. 251826), unpub op at 6-7; *Fortune v City of Detroit Public Schools*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 248306), unpub op at 2-4.

Defendants assert that plaintiffs have failed to state a claim under the state-created danger theory because plaintiffs have failed to allege that defendants' actions "created or increased the risk that plaintiff[s] would be exposed to an act of violence by a third party." Plaintiffs respond, however, that harm committed by a private third party is not a necessary requirement for the imposition of liability under the state-created danger theory. Plaintiffs refer this Court to *Stiles v Grainger Co, Tennessee*, 819 F3d 834, 854 (CA 6, 2016), wherein the Sixth Circuit set forth the elements of the state-created danger theory as follows:

> To prevail on a state-created danger theory, Plaintiffs must establish three elements: (1) an affirmative act that creates or increases the risk to the plaintiff, (2) a special danger to the plaintiff as distinguished from the public at large, and (3) the requisite degree of state culpability.

What plaintiffs fail to recognize is that *McQueen v Beecher Community Schools*, 433 F3d 460, 464 (CA 6, 2006), the case cited in *Stiles* to support the above-quoted statement of the elements of the offense, expressly states that "[l]iability under the state-created danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence." (Quoting *Kallstrom v City of Columbus*, 136 F3d 1055, 1066 [CA 6, 1998]). They also fail to point out that *Stiles* itself involved a claim of third party violence, i.e., student-on-student sexual harassment. *Stiles*, 819 F3d at 840-847, 854-855. Thus, neither *Stiles* nor *McQueen* provides persuasive support for plaintiffs' assertion that a showing of harm inflicted by a private third party is not a prerequisite to an application of

the state-created danger theory. Under the applicable caselaw, the Court is therefore constrained from applying the theory as broadly as plaintiffs suggest it should apply, even though the very name of the theory, i.e. state-created danger, facially suggests that it could implicate what happened in Flint and even though other jurisdictions may not condition an application of the theory on the presence of private violence. See e.g., *Kneipp*, 95 F3d 1199.

The Court further declines to apply the theory expansively in light of the general reluctance of this state's appellate courts to expand the doctrine of substantive due process. *Sierb*, 456 Mich at 528, 531-533; *Smith*, 428 Mich at 544; *Bestway Recycling, Inc* v *State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No. 226926), unpub op at 2. Likewise, the United States Supreme Court has underscored its own reluctance to expand the doctrine of substantive due process, explaining:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. [*Collins v City of Harker Heights*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992).]

As noted, to the extent that the Michigan Court of Appeals has addressed the state-created danger theory, the Court has restricted its application to the more narrow application involving private violence. See e.g., *Manuel*, 270 Mich App at 367. Finally, this Court concludes that a narrow application of the theory is consistent with *DeShaney*. *DeShaney* expressly recognized a single exception to the general rule that a state's failure to protect an individual from private violence does not violate due process. That exemption applies whenever an individual suffers harm from private third-party violence while the state has physical custody of the victim and the aggressor through incarceration or institutionalization or other similar

restraint of personal liberty. *DeShaney*, 489 US at 195, 199-200. This general exception did not apply in *DeShaney* because the child was injured by an act of private violence while the child was outside state custody. Nevertheless, the *DeShaney* Court left open the possibility that a constitutional violation might have been cognizable under the circumstances present in *DeShaney*, despite the absence of a special relationship arising from a custodial situation, when it stated: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." This comment informs the scope of the state-created danger theory. The genesis of the theory is in language cognizant that the dangers faced by the child in the free world were dangers associated with private violence. Under such circumstances, the quoted language suggests "a *narrow exception*, which applies only when a state actor affirmatively acts to create, or increase[] a plaintiff's vulnerability to danger from private violence. It does not apply when the injury occurs due to the action of another state actor." *Gray v Univ of Colorado Hosp Authority*, 672 F3d 909, 921 (CA 10, 2012), quoting *Moore v Guthrie*, 438 F3d 1036, 1042 (CA 10, 2006) (italics in original).

For these reasons, the Court concludes that if the state-created danger tort is a cognizable constitutional tort in Michigan, the tort would be narrow in scope and limited to circumstances involving a state actor's affirmative acts that either created or increased the risk that the plaintiff would be exposed to an act of private violence. Inasmuch as this Court is bound to apply the law as it exists, any expansion of the scope of that constitutional tort must come from a higher court. Because plaintiffs have not alleged any harm caused by private violence, summary disposition is appropriate, in favor of all defendants, on Count I of plaintiffs' first amended complaint, pursuant to MCR 2.116(C)(8).

C. Count II - Injury to Bodily Integrity

The state defendants assert that Count II of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action for a violation of their respective individual rights to bodily integrity under the substantive due process component of Const 1963, art 1, § 17. Defendants further assert that Count II must be summarily dismissed pursuant to MCR 2.116(C)(8) because plaintiffs have not stated, and cannot state, a cause of action for damages. The Court finds defendants' arguments unpersuasive.

1. Requirements for Establishing the Constitutional Tort

The Court begins its analysis of the merits of defendants' arguments by examining the allegations of a substantive due process violation. *Estate of Braman*, unpub op at 7. Substantive due process has long been recognized, at least in the context of the federal constitution, as encompassing a "right to bodily integrity." See, e.g., *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994); *Sierb*, 456 Mich at 523, 529 (interpreting the Michigan due process provision as "coextensive with the federal provision"). As observed above, an actionable constitutional tort does not exist unless a state "custom or policy" mandated the actions of the governmental official or employee and, thus, was the "moving force behind the constitutional violation." *Carlton*, 215 Mich App at 505. A government's policy or custom may be "made by its lawmakers or by those whose acts or edicts may fairly be said to represent official policy." *Monell v New York City Dep't of Social Services*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). A single decision by such a body "unquestionably constitutes an act of official government policy" regardless whether that body had taken similar action in the

past or intended to do so in the future. *Pembaur v City of Cincinnati*, 475 US 469, 480; 106 S Ct 1292; 89 L Ed 2d 452 (1986). "To be sure, 'official policy' often refers to formal rules or understandings – often but not always committed to writing – that intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Id*., 475 US at 480-481. In other words, "[i]f a decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of government 'policy' as that term is commonly understood." *Id*., 475 US at 481.

In the present suit, plaintiffs allege that the Governor and the State Treasurer approved Flint's participation in the KWA's water delivery system, and that the State Treasurer, the emergency managers and other state officials, including state officials employed by the MDEQ, developed an interim plan to use Flint River water before the KWA project became operational and, through the implementation of that plan, delivered Flint River water to the taps of the Flint water users. These allegations, taken as true, establish a series of decisions to adopt a particular course of action made by the state's authorized decision-makers and, thus, establish the existence of state policies. These policies played a role in the alleged violation of plaintiffs' constitutional rights and the infliction of injury. Likewise, the alleged decisions of various state officials to defend the original decision to switch to using the Flint River as a water source, to resist a return to the Detroit water distribution system, to downplay and discredit accurate information gathered by outside experts regarding lead in the water supply and elevated lead levels in the bloodstreams of Flint's children, and to continue to reassure the Flint water users that the water was safe and not contaminated with lead or Legionella bacteria, played a role in the alleged violation of plaintiffs' constitutional rights and the infliction of injury. With regard to allegations of covering up the health crisis created by the switch to Flint River water, plaintiffs

allege a coordinated effort involving, among others, MDEQ's Chief of Office of Drinking Water and Municipal Assistance Liane Shekter-Smith, MDEQ's Water Treatment Specialist Patrick Cook, MDEQ District Supervisor Stephen Busch, MDEQ Engineer assigned to Genesee County Michael Prysby, MDEQ spokesperson Brad Wurfel, and Michigan Department of Health and Human Services Director Nick Lyon. These latter allegations are sufficient, when taken as true, to establish a decision to adopt a particular course of action made by the state's authorized decision-makers and, thus, establish that the state officers and employees' alleged tortious conduct occurred while implementing a state policy.

The Court also concludes that plaintiffs have pleaded sufficient facts, if proven, that the actions taken by the state actors were so arbitrary, in a constitutional sense, as to shock the conscience. Plaintiffs allege that it was state actors who made the decision to switch to the Flint River as the source of drinking water, after a period of deliberation, despite knowledge of the danger posed by the water, without a state-conducted scientific assessment of the suitability of using water from the Flint River as drinking water and with knowledge of the inadequacies of Flint's water treatment plant. They also allege that various state actors intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water, despite possessing scientific data and actual knowledge that the water supply reaching the taps of Flint water users was contaminated with Legionella bacteria and dangerously high levels of toxic lead, both of which were poisoning those drinking the tap water. Such conduct on the part of the state actors, and especially the allegedly intentional poisoning of the water users of Flint, if true, may be fairly characterized as being so outrageous as to be "truly conscience shocking."

Defendants correctly observe that the California Court of Appeals has opined that an individual's right to bodily integrity is not implicated in the context of public drinking water and that the neither state nor federal substantive due process protections guarantee a right to a healthful or contaminant-free environment. *Coshow v City of Escondido*, 132 Cal App 4th 687, 709-710; 34 Cal Rptr 3d 19 (2005). Indeed, the California court also noted that "the right to bodily integrity is not coextensive with the right to be free from the introduction of an alleged contaminated substance in the public drinking water." *Id*. at 709. The court's rulings were informed, however, by the fact that the alleged contaminating substance at issue was fluoride, and by the court's acknowledgement that "courts throughout the United States have uniformly upheld the constitutionality of adding fluoride to the public water supply as a reasonable and proper exercise of the police power in the interest of public health" and that "[n]o court has recognized a substantive due process claim entitling citizens to drinking water in a form more pure than that required by federal and state drinking water standards." *Id*. *Coshow* did not address whether substantive due process protections are implicated where state actors allegedly abuse state police powers by knowingly and intentionally delivering drinking water contaminated with Legionella bacteria and dangerous levels of lead to a discrete population and thereby create a public health emergency. Moreover, none of the cases relied on by the court in *Coshow* address circumstances even remotely similar to those present in this case. Thus, the Court finds that *Coshow* provides no persuasive rationale to support defendants' request for summary disposition.

For the foregoing reasons, the Court concludes that plaintiffs have alleged sufficient facts, when taken as true, to establish a violation of each plaintiff's respective individual right to

bodily integrity under the substantive due process component of art 1, § 17. Summary disposition on that basis, pursuant to MCR 2.116(C)(8), is therefore inappropriate.

2. Availability of a Damage Remedy

Because plaintiffs have pleaded facts that could establish a claim for a violation of their respective individual rights to bodily integrity, the question becomes whether this case is an appropriate one, assuming plaintiffs' allegations to be proven, in which to impose a damage remedy on the state for a violation of art 1, § 17. To answer this question, the Court looks to the factual allegations set forth in plaintiffs' first amended complaint and the documentary evidence supplied by the parties, and takes guidance from Justice Boyle's separate opinion in *Smith*, as have the appellate courts of this state. See e.g., *Jones*, 462 Mich at 336-337; *Reid*, 239 Mich App at 628-629. Justice Boyle observed that the "first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself. *Smith*, 428 Mich at 648 (Opinion by BOYLE, J.). As previously noted, plaintiffs have alleged facts, if proven, that are sufficient to establish a violation of the protection constitutionally afforded to an individual's bodily integrity. Consequently, this factor weighs in favor of recognizing the availability of a damage remedy for the injuries alleged.

Justice Boyle identified the second step of the analysis as requiring a review of "the text, history, and previous interpretations of the specific provision for guidance on the propriety of a judicially inferred damage remedy." *Smith*, 428 Mich at 650 (Opinion by BOYLE, J.). There are several Michigan appellate decisions that acknowledge that the substantive component of the federal due process clause protects an individual's right to bodily integrity. See e.g., *Sierb*, 456 Mich at 527, 529; *Fortune v City of Detroit Public Schools*, unpublished opinion per curiam of

the Court of Appeals, issued October 12, 2004 (Docket No. 248306), unpub op at 2. There are no Michigan appellate decisions expressly recognizing the same protection under art 1, § 17, even though the due process clauses of the state and federal constitutions are considered coextensive, *Cummins v Robinson Twp*, 283 Mich App 667, 700-701; 770 NW2d 421 (2009). There are also no Michigan appellate decisions, published or unpublished, that recognize a stand-alone constitutional tort predicated on a violation of the right to bodily integrity. These circumstances weigh against recognizing the availability of a damage remedy for the injuries alleged.

Finally, Justice Boyle instructed that

> various other factors, dependent upon the specific facts and circumstances of a given case may militate against a judicially inferred damage remedy for violation of a specific constitutional provision. For example, the federal courts have refused a damage remedy in the face of Congress' exercise of its special authority over the military, see *Chappell v Wallace*, [462 US 296, 304; 103 S Ct 2362; 76 L Ed 2d 586 (1983)], and its special role in personnel management vis-à-vis federal employees, *Bush v Lucas*, [462 US 367; 103 S Ct 2404; 76 L Ed 2d 648 (1983)]. Other concerns, such as the degree of specificity of the constitutional protection, should also be considered. For example, there was no question in *Bivens* [*v Six Unknown Federal Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971)], that the defendants had violated the warrant requirements of the Fourth Amendment. These search and seizure protections are, however, relatively clear-cut in comparison to the Due Process and Equal Protection Clauses. See Monaghan, The Supreme Court, 1974 term forward: *Constitutional common law*, 89 Harv L R 1, 44-45 (1975) (substantive guarantees of due process and equal protection are troubling in their character). The clarity of the constitutional protection and violation in a given case should be a factor in determining the propriety of a judicially imposed damage remedy. Another factor important in federal cases has been the availability of another remedy. In *Bivens*, *supra*, the lack of any alternative remedy was certainly a matter of concern to the United States Supreme Court. On the other hand, the presence of an alternative remedy in *Chappell v Wallace*, *supra*, was a factor weighing against a damage remedy for constitutional violations. [*Smith*, 428 Mich at 651-652 (Opinion by BOYLE, J.).]

Defendants assert that plaintiffs have other remedies available to vindicate a violation of their respective rights to bodily integrity, should plaintiffs be able to prove such a violation. To

determine whether there is an alternative remedy available to an award of monetary damages under a constitutional tort theory, the Court begins its analysis with the following backdrop of legal principles. First, as noted, the Michigan Supreme Court in *Smith* held that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, 428 Mich at 544. This was reaffirmed by the Supreme Court in *Jones*, 462 Mich at 337 ("*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy."). The *Jones* Court's use of the term "only" derived from the fact that it was addressing (as was the Court principally addressing in *Smith*) claims against a municipality and individual municipal employees (rather than a state or individual state officials who generally enjoy greater immunities).

Defendants in this case nonetheless seize on certain language from *Jones* (referencing the availability of alternative remedies both against "a municipality" and "against an individual defendant" to suggest that *Jones* necessarily precludes a constitutional tort claim against *any* individuals, including individual state officials. Defendants thus argue that, as a matter of law, plaintiffs cannot assert a constitutional tort against the Governor or Earley and Ambrose. This Court disagrees, and finds that a proper reading of the pertinent caselaw compels the conclusion that the remedy allowed in *Smith*, while narrow, extends beyond the state itself to also reach state officials acting in their official capacity. The Supreme Court in *Jones*, for example, evaluated the availability of alternative remedies against municipalities and their employees as "[u]nlike states *and state officials sued in an official capacity*." *Jones*, 462 Mich at 337 (emphasis added). In doing so, it affirmed the opinion of the Court of Appeals (authored by now Chief Justice Young), which even more expressly stated, "we conclude that the *Smith* rationale simply does not apply outside the context of a claim that *the state* (*or a state official sued in an official*

capacity) has violated individual rights protected under the Michigan Constitution." *Jones*, 227 Mich App at 675 (emphasis within parenthetical added).

Plaintiffs have sued the Governor, Earley and Ambrose not in their respective capacities as individual government employees, but in their official capacities only. As observed in *Will v Michigan Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 2d 45 (1989), "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." (Internal citations omitted.); see also, *McDowell v Warden of Michigan Reformatory at Ionia*, 169 Mich 332, 336; 135 NW 265 (1912); *Carlton*, 215 Mich App at 500-501. The named state officials are merely "nominal party defendant[s]." *McDowell*, 169 Mich at 336. Thus, plaintiffs' suit "is not a suit against the official personally," and plaintiffs can pursue a state constitutional tort claim against the Governor, Early and Ambrose in this case because, in the eyes of the law, state officers acting in their official capacities are indistinguishable from the state. *Jones*, 462 Mich at 337; *Estate of Braman*, unpub op at 6 n 7. However, plaintiffs must look to the state to recover on a judgment for monetary damages should one enter in their favor; the Governor and the former emergency managers may not be held personally liable for any such damages. *Carlton*, *supra*.

This Court thus concludes that the caselaw does not preclude a damage remedy arising out of plaintiffs' constitutional tort claims against the individual named defendants in this action—Governor Snyder and former emergency managers Earley and Ambrose—who are sued only in their official capacity. The Court reiterates, however, that because those individuals are sued only in their official capacity, they in essence are nominal defendants only, such that the

state and the state alone (and not the individuals themselves) are accountable for any damage award that may result in this action.

Having determined that a damage remedy against state officials sued in their official capacity is not precluded, the Court will examine whether, in fact, there are alternative remedies available. Defendants suggest that plaintiffs have alternative remedies available in part because plaintiffs have not alleged that a constitutional tort claim is their only available remedy. Defendants have provided no authority, however, nor has the Court located any, for the proposition that a failure to *allege* the lack of an alternative available remedy is a pleading deficiency that is fatal to a plaintiff's constitutional tort claim.[10]

Defendants further argue that plaintiffs in fact are pursuing certain "virtually identical" claims (albeit under the federal constitution, rather than the Michigan Constitution) against individual state officials in federal court, and that they also are pursuing certain similar claims against individual state officials in the Genesee Circuit Court. Based on the complaints filed in

[10] The Court notes that MCL 600.6440 expressly provides that, although a claim in this Court may not proceed if there is "an adequate remedy upon [the] claim in the federal courts," "*it is not necessary in the complaint filed to allege that claimant has no such adequate remedy*, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof." (Emphasis added).

Further, the Court recognizes that our Michigan Supreme Court has held, in the context of state-law tort claims, that a "plaintiff must plead [his] case in avoidance of immunity." *Mack v City of Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002). Further, "[a] plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id*. at 204. However, this requirement is inapplicable here, because plaintiffs have in this case alleged claims arising under the Michigan Constitution. As the Court held in *Smith*, "[w]here it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." *Smith*, 428 Mich at 544. Therefore, plaintiffs in this case need not plead in avoidance of immunity.

those cases, as appended to the parties' briefs in this case, defendants' position in that regard appears to be correct. The Court notes, however, that plaintiffs name the Governor and the state as defendants in the federal suit for the purposes of prospective injunctive relief only.[11] See *Bay*

[11] The Court recognizes that a panel of the Court of Appeals in *77th District Judge v State of Michigan*, 175 Mich App 681, 696; 438 NW2d 333 (1989), overruled on other grounds by *Parkwood Limited Dividend Housing Ass'n v State Housing Development Authority*, 468 Mich 763; 664 NW2d 185 (2003), stated, in rejecting a damage remedy under an equal protection challenge, that the plaintiff "has as an alternative the remedy of prospective injunctive relief." However, this Court does not find that statement to be controlling or dispositive here, for several reasons. First, the Court in *77th District Judge* acknowledged that "equal protection is a broad and amorphous concept, not readily lending itself to the relative degree of certainty associated with theories underlying recognized constitutional torts." *Id*. Second, the opinion in that case was issued shortly after the fractured opinions were released in *Smith*, and before subsequent decisions by Michigan appellate courts that endorsed the reasoning of Justice BOYLE's separate minority opinion (whereas the Court in *77th District Judge* principally relied on the separate minority opinion of Justice BRICKLEY, which this Court in any event principally reads as favoring a finding "that there is no implicit right to sue the state for damages on the basis of violations of Const. 1908, art. 2, §§ 1 and 16 of the Michigan Constitution," *Smith*, 428 Mich at 639 (Opinion by BRICKLEY, J.)). Third, the Court in *77th District Judge* expressly limited its holding to "the specific facts, circumstances, and theories advanced in [that] case." *Id*., 175 Mich App at 696. Fourth, because *77th District Judge* was overruled on the basis of its jurisdictional ruling, the balance of its analysis was dicta. *Harvey v State of Michigan*, 469 Mich 1, 14 n 14; 664 NW2d 767 (2003). Finally, because *77th District Judge* is not precedentially binding under MCR 7.215(J)(1), prudence dictates that this Court await more definitive and precedential authority from our appellate courts before disallowing a damage remedy for a constitutional tort simply because a plaintiff may be seeking, or may be able to seek, prospective injunctive relief in another court.

That being said, the Court does note that plaintiffs' related federal court action, while purportedly seeking against the Governor "exclusively . . . prospective equitable relief to correct the harm caused and prolonged by state government and to prevent future injury," and while similarly indicating that it seeks "prospective relief only" against the State of Michigan, it describes the equitable relief sought as an order "to remediate the harm caused by defendants [sic] unconstitutional conduct including repairs or [sic] property, [and] establishment of as [sic] medical monitoring fund . . . ." Plaintiffs also generally seek an award of compensatory and punitive damages. Developments in that and other Flint Water Crisis litigation, including the extent to which any "equitable" relief awarded may essentially equate to an award of monetary damages, may impact this Court's future conclusions both with regard to the availability of alternative remedies and other matters, including the remedies, if any, that may be appropriate in this action.

Mills, 244 Mich App at 749 (Under certain circumstances, suits against state officers for injunctive relief under § 1983 are allowed.). Moreover, plaintiffs name none of the defendants in this suit as party defendants in the Genesee Circuit Court action. Yet, defendants have not provided the Court with any authority, nor has the Court located any, for the proposition that an available remedy against a *different* party constitutes an available "alternative remedy" within the meaning of *Smith* and *Jones*. To the contrary, this Court concludes that it must look to a particular named defendant and discern whether a plaintiff would have recourse to enforce his or her rights against *that* defendant by means other than an award of monetary damages under a constitutional tort theory. See *Jones*, 462 Mich App at 335-337 (contrasting claims against the state and state officials, on the one hand, with claims against municipalities and individual municipal employees, on the other hand); *Estate of Braman*, unpub op at 6 n 7 (same).

The Court next observes that, regardless of what claims plaintiffs have actually asserted in other courts, the dispositive question is whether plaintiffs have alternative remedies *available* to them. See, e.g., *Jones*, 462 Mich at 337 ("*Smith* only recognized a narrow remedy against the state on the basis of the *unavailability* of any other remedy.") (emphasis added). Again, the Court begins its analysis of that question with certain general principles. A suit for monetary damages brought under 42 USC 1983, for a violation of rights guaranteed by the federal constitution or a federal statute, cannot be maintained in either a federal court or a state court against a state or a state agency or a state official sued in his or her official capacity, all of which have traditionally enjoyed Eleventh Amendment immunity. *Howlett v Rose*, 496 US 356, 365; 110 S Ct 2430; 110 L Ed 2d 332 (1990); *Bay Mills Indian Community v State of Michigan*, 244 Mich App 739, 749; 626 NW2d 169 (2001); *Hardges v Dep't of Social Services*, 201 Mich App 24, 27; 506 NW2d 532 (1993). Further, "the elective or highest appointive executive official of

all levels of government" is absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority." MCL 691.1407(5). "[T]here can be no dispute" that this includes the Governor. *Duncan v State of Michigan*, 284 Mich App 246, 271-272; 774 NW2d 89 (2009), aff'd on other grounds 486 Mich 906 (2010). The defendant state departments similarly are "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function," absent the application of a statutory exception, MCL 691.1407(1); *Duncan*, 284 Mich App at 266-267, while, generally, governmental employees acting within the scope of their authority are immune from tort liability except in cases in which their actions constitute gross negligence, MCL 691.1407(2). Moreover, even if the lower-level state employees are eventually found liable under a gross negligence theory, there would be no vicarious liability as to the state. *Malcolm v East Detroit*, 437 Mich 132; 468 NW2d 479 (1991). Also, there is no intentional tort exception to governmental immunity for intentional torts committed by governmental employees during the exercise or discharge of a governmental function, *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 328; 869 NW2d 635 (2015), and a governmental employer cannot be held vicariously liable for the intentional torts of its employees, *Payton v City of Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995); *Lowery v Dep't of Corrections*, 146 Mich App 342, 357; 380 NW2d 99 (1985); *Trosien v Bay Co*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2005 (Docket Nos. 257363; 257364; 257413), unpub op at 4.

An as yet unanswered question arising from this recitation of general principles is whether former emergency managers Earley and Ambrose fall within the category of "the elective or highest appointive executive official of all levels of government" who, like the

Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5), or whether, alternatively, they count among the lower-level state employees who lack governmental immunity for acts found to constitute gross negligence, MCL 691.1407(2)(c), or for intentional torts committed by them *other than* during the exercise or discharge of a governmental function, *Genesee Co Drain Comm'r*, 309 Mich App at 328 The Court concludes that they fall within the former category and, therefore, like the Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5).

Defendant Earley was appointed as the emergency manager for the City of Flint in September 2013. (First Amended Complaint, p 11, ¶ 56.) Defendant Ambrose was appointed as the emergency manager for the City of Flint in January 2015. (First Amended Complaint, p 14, ¶ 70.) Both Earley and Ambrose were appointed pursuant to the local financial stability and choice act, MCL 141.1541 et seq., which became effective on March 28, 2013. See 2012 PA 436. That statute provides in part:

> An emergency manager is immune from liability as provided in section 7(5) of 1964 PA 70, MCL 691.1407. [MCL 141.1560(1).]

The Legislature has thus expressly granted emergency managers the same level of immunity as is granted to the Governor as "the elective or highest appointive executive official of all levels of government," and the emergency managers, like the Governor, are therefore absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5). Indeed, this

level of immunity for emergency managers flows from other aspects of the statutory scheme that established the emergency manager position. For example, MCL 141.1549 states in part:

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act and are subject to any conditions required by the emergency manager. [MCL 141.1549(2).]

Emergency managers also are obliged to "issue to the appropriate local elected and appointed officials and employees, agents, and contractors of the local government the orders the emergency manager considers necessary to accomplish the purposes of this act, including, but not limited to, orders for the timely and satisfactory implementation of a financial and operating plan . . . ." MCL 141.1550(1). Further, orders issued by an emergency manager are "binding on the local elected and appointed officials and employees, agents, and contractors of the local government to whom it is issued." *Id*. Emergency managers are also empowered to take certain actions if the failure to carry out such an order "is disrupting the emergency manager's ability to manage the local government." MCL 141.1550(2).

As the Court of Appeals has recently observed,

> The Legislature has conferred upon emergency managers broad authority to act for and in place of the governing body of the local government:
>
> * * * [Quoting the above language from MCL 141.1549(2).]

Among other things, emergency managers are specifically empowered to

> "[r]emove, replace, appoint, or confirm the appointments to any office, board, commission, authority, or other entity which is within or is a component unit of the local government," MCL 141.1552(1)(ff), and "[t]ake any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government," MCL 141.1552(1)(ee). "The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities." MCL 141.1552(1)(ee).

Martin v Murray, 309 Mich App 37, 48; 867 NW2d 444 (2015).

Thus, while in their capacity as emergency managers of the City of Flint, defendants Earley and Ambrose were state officials (see discussion, *supra*), the Court further concludes that they were "the elective or highest appointive executive official of [a] level[] of government," in this case the City of Flint. Therefore, they, like the Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if [they were] acting within the scope of [their] . . . executive authority," MCL 691.1407(5). See also, *Petripren v Jaskowski*, 494 Mich 190; 833 NW2d 247 (2013) (holding that a village chief of police was the highest appointive executive official of a level of government and acted within the scope of his executive authority even when performing the duties of an ordinary police officer). See also, *Martin*, 309 Mich App at 52 (holding that an emergency manager of a school district had the exclusive authority to fill vacancies on the board of education by appointment, and that the power of the remaining members of the district's board of education was suspended during the financial emergency).

This raises the question of whether the Governor, Earley, or Ambrose were in fact acting within the scope of their executive authority, in relation to the allegations of this case, so as to entitle them to the absolute immunity granted by MCL 691.1407(5). That they were so acting appears in this case to be undisputed, inasmuch as plaintiffs have sued these defendants only in

their official capacity. Similarly, these plaintiffs appear not to have alleged otherwise either in their federal court lawsuit or their Genesee Circuit Court litigation. This indicates that plaintiffs acknowledge that these defendants were acting within the scope of their executive authority such that plaintiffs have no alternative remedy available to them relative to these defendants (and even though, as noted earlier in this opinion, these defendants are nominal defendants only, who are not individually subject to any damage award, and whose appearance in the suit is simply another way of suing the state).

That said, the Court certainly is aware that a multitude of lawsuits have been filed in various state and federal courts relative to the Flint Water Crisis variously naming as defendants numerous state, city, and non-governmental defendants. This Court is not currently in a position to know the full scope and nature of the claims and defenses in that universe of litigation. The Court does take judicial notice, anecdotally, that other plaintiffs in other action(s) have alleged certain claims, including against the Governor, Earley, or Ambrose, that purport to name those defendants in their individual capacity, and that assert claims including gross negligence. The Court must therefore consider whether the seeming potential availability of such claims mandates a conclusion that plaintiffs in this case have alternative remedies available to them with respect to the Governor, Earley, and Ambrose, such that their claims against those defendants should be dismissed.

The Court rejects such a conclusion. First, and without presuming to opine upon the merits of claims or defenses in other litigation, the Court concludes for the reasons noted that the Governor, Earley, and Ambrose are (or were), and are sued as, state officials who are not personally accountable with respect to the claims for damages asserted in this action. Second, while the Court is cognizant that the Court of Appeals in *Estate of Braman* commented that

"[a]lthough plaintiff claims that her available remedies before the circuit courts are not viable, this is irrelevant because the law is concerned with the availability, not the outcome, of plaintiffs' cause of action," *Estate of Braman*, unpub op at 4, n 5, citing *Jones*, 462 Mich at 337, it did so in the context not of state officials, but of lower-level state employees who then were not subject to jurisdiction in the Court of Claims and who enjoyed lesser levels of governmental immunity. Therefore, this Court does not read this observation of the Court in *Estate of Braman* to suggest that this Court must require plaintiffs to pursue alternative remedies against these defendants, in an individual capacity, that their own pleadings recognize would likely be subject to failure by virtue of governmental or sovereign immunity.

Thus, the Court holds that because the state, its agencies, and the Governor and former emergency managers acting in an official capacity, are not "persons" under 42 USC 1983 and enjoy sovereign immunity under the Eleventh Amendment and statutory immunity under MCL 691.1407 from common law claims, plaintiffs have no alternative recourse to enforce their respective rights against them. *Jones*, 462 Mich at 335-337; *Estate of Braman*, unpub op at 6 n 7. However, the Court again reiterates that because the Governor, Earley and Ambrose are sued only in their official capacity in this case, they are nominal defendants only, the state alone remains accountable for any resulting damage liability, and the Governor, Earley and Ambrose suffer no personal exposure to any potential monetary damage liability in this case. The issue whether there is an alternative remedy available against them may therefore be entirely academic in any event. But for these reasons, the Court concludes at this juncture that there is no alternative remedy available against any of the named defendants. With the caveat noted, the

lack of an available alternative remedy weighs in favor of recognizing the availability of a damage remedy for the constitutional tort alleged.[12]

Finally, significant favorable weight must be given to the degree of outrageousness of the state actors' conduct as alleged by plaintiffs, e.g., that various state actors allegedly intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water, despite possessing scientific data and actual knowledge that the water supply reaching the taps of Flint water users was contaminated with Legionella bacteria and dangerously high levels of toxic lead, and the well-settled legal precept that substantive due process protections apply to an individual's right to bodily integrity.

Based on the totality of the circumstances set forth above, the Court finds that plaintiffs have alleged sufficient facts, if proven to be true, to establish a violation of the Michigan Constitution. The Court also finds that it would be appropriate at this juncture to recognize the availability of a damage remedy for the injuries alleged.[13] Summary disposition with regard to

[12] The Court notes that although the Supreme Court in *Jones* characterized *Smith* as recognizing a narrow remedy "on the basis of the unavailability of any other remedy," *Jones*, 462 Mich at 337, Justice Boyle in *Smith* described the existence of a legislative scheme providing an alternate remedy as a " 'special factor[] counselling hesitation,' . . . which militate[s] against a judicially inferred damage remedy." *Smith*, 428 Mich at 647 (Opinion by BOYLE, J.), quoting *Bivens*, 403 US at 396. Thus, absent further guidance from our appellate courts, it remains unclear whether the availability of an alternative remedy, if presumed or found to exist, would constitute an absolute bar to inferring a damage remedy for a constitutional tort, or simply a factor to be considered.

[13] The Court's decision in this regard is further informed by the requirement of MCL 600.6458 that "[i]n rendering any judgment against the state, or any department, commission, board, institution, arm, or agency, the court shall determine and specify in that judgment the department, commission, board, institution, arm, or agency from whose appropriation that judgment shall be paid."

Count II is therefore inappropriate under MCR 2.116(C)(7) and (8).[14]

D. Count III - Fair and Just Treatment

The state defendants assert that Count III of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action under the fair and just treatment clause of Const 1963, art 1, § 17, which provides: "The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." Again, it is unnecessary for this Court to reach the issue of whether such a cause of action is or should be recognized, because even if a cause of action exists for a violation of this clause, plaintiffs have not and cannot allege facts to state a claim under the theory for the reasons set forth below. Count III of plaintiffs' first amended complaint must be dismissed pursuant to MCR 2.116(C)(8).

An individual, firm, corporation, or voluntary association's right to fair and just treatment exists only in the context of legislative and executive hearings and investigations, *By Lo Oil Co v*

[14] Further supporting the denial of summary disposition to the Governor, Earley and Ambrose at this time is the Court's cognizance that plaintiffs seek injunctive relief against these state officials in their official capacities. MCR 2.201(C)(5) requires "[a]n officer of the state" to "be sued in the officer's official capacity" when a plaintiff seeks "to enforce the performance of an official duty." See also, *Gaertner v State of Michigan*, 385 Mich 49, 55; 187 NW 429 (1971) (noting that GCR 1963, 201.3(5), the predecessor rule to MCR 2.201(C)(5), did not require certain state officials to be named as party defendants where the injunction did not require an affirmative act in performance of an official duty and where the presence of the state officials was not necessary to effect complete relief.). At this juncture of this litigation, this Court is unable to determine whether injunctive relief will be proven to be appropriate, and whether the presence of these state officials as named (if nominal) defendants in this case will be necessary to effect complete relief.

Dep't of Treasury, 267 Mich App 19, 40; 703 NW2d 822 (2005); *Johnson v Wayne Co*, 213 Mich App 143, 155; 540 NW2d 66 (1995), and not before a hearing or investigation commences or after a hearing or investigation ceases, *Groves v Dep't of Corrections*, 295 Mich App 1, 12; 811 NW2d 563 (2011). For an investigation to implicate the fair and just treatment clause, the investigation must consist of a "searching inquiry for ascertaining facts" or a "detailed or careful examination of the events surrounding [a] plaintiff's misconduct." *Groves*, 295 Mich App at 12, quoting *Messenger v Dep't of Consumer & Industry Services*, 238 Mich App 524, 534; 606 NW2d 38 (1999); see also *Carmacks Collision, Inc v City of Detroit*, 262 Mich App 207, 210-211; 684 NW2d 910 (2004). Moreover, the fair and just treatment clause requires some "active conduct" engaged in by the state actor during the investigation. *By Lo Oil Co*, 267 Mich App at 41. "[T]he fair and just treatment clause does not mandate adequate investigations." *Traverse Village, LLC, v Northern Lakes Community Mental Health*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014 (Docket Nos. 317194; 317211), unpub op at 7. "Further, the historical context in which this clause was adopted suggests that it was intended to protect against the excesses and abuses of Cold War legislative or executive investigations or hearings." *By Lo Oil Co*, 267 Mich App at 40. As observed in *Jo-Dan Ltd v Detroit Bd of Ed*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2000 (Docket No. 201406):

> we cannot forget that the Constitution of 1963 is a product of those unique times in which certain legislative investigations and hearings, notably those aimed at identifying "subversives," negatively affected citizens even in the absence of proof that they actually committed any illegal conduct. Indeed, Michigan at one time had laws intended to protect government from "subversive" individuals and passed legislation creating a "security investigation division" as well as a "subversive activities investigation division" of the State Police in order to gather information on citizens and then have them register with the government. [Unpub op at 10.]

Like Michigan's Constitution, Alaska's constitution contains a fair and just treatment clause. The clause was included in the Alaska constitution "to protect against abuses of the type experienced during the McCarthy era," *Folsom v Alaska*, 734 P2d 1015, 1018 (Alaska, 1987), including "vilification, character assassination, and an intimation of guilt by association," *Keller v French*, 205 P3d 299, 303-304 (Alaska, 2009). The protections offered by the clause are implicated when a plaintiff is exposed to any such abuses. *Id*. at 304.

Although a plaintiff's recovery for a violation of the fair and just treatment clause is predicated on being personally exposed to the abuse of legislative or executive power, *Groves*, 295 Mich App at 12; *Keller*, 205 P3d at 304, plaintiffs fail to allege any such personal exposure. They do not allege that they were witnesses or potential witnesses in an investigation or investigative targets. They do not allege any facts suggesting that defendants engaged in active conduct that subjected any plaintiff to "vilification, character assassination, . . . an intimation of guilt by association" or other similar abusive behaviors. *Keller*, 205 P3d at 303-304. Rather, their allegations suggest a breach of a duty owed to every individual, firm, corporation and voluntary association of this state. Such allegations are insufficient to state a claim for a violation of art 1, § 17. Moreover, to the extent that plaintiffs assert that their complaints were ignored and went uninvestigated, such facts pertain to acts occurring before any investigation commenced and such acts do not fall within the ambit of the term "investigation" for purposes of art 1, § 17. *Groves*, 295 Mich App at 12. Likewise, plaintiffs' claims of inadequately conducted investigations do not fall within the ambit of art 1, § 17. *Traverse Village, LLC*, *supra*, unpub op at 7. Plaintiffs fail to allege circumstances under which they could prevail and, thus, is it unnecessary for the Court to reach the issue of whether such a cause of action is or should be

recognized in Michigan. Summary disposition is therefore appropriate, in favor of all defendants, on Count III of plaintiffs' first amended complaint, pursuant to MCR 2.116(C)(8).

V. COUNT IV - INVERSE CONDEMNATION

Finally, defendants maintain that plaintiffs have failed to state a claim for inverse condemnation and, therefore, that Count IV of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(8). The Court disagrees.

Eminent domain or condemnation is the power of a government to take private property for public use. *Silver Creek Drain District v Extrusions Division, Inc*, 468 Mich 367, 373-374; 663 NW2d 436 (2003). "US Const, Am V and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation." *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000). In furtherance of its exercise of the constitutional power of eminent domain, the state may follow the procedures codified in the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*., "and condemn, or 'take,' private property for public use by providing the requisite compensation." *Dorman v Twp of Clinton*, 269 Mich App 638, 645; 714 NW2d 350 (2006). A property owner may commence an inverse or reverse condemnation action seeking just compensation for a de facto taking when the state fails to bring a condemnation proceeding under the Act. *Blue Harvest, Inc v Dep't of Transportation*, 288 Mich App 267, 277; 792 NW2d 798 (2010). Additionally, an inverse condemnation action is appropriately commenced where private property has been damaged rather than formally taken for public use by government actions. *In the matter of Acquisition of Land – Virginia Park*, 121 Mich App 153, 158; 328 NW2d 602 (1982). Not every diminution in property values remotely associated with governmental actions will amount to a "taking."

Attorney General v Ankersen, 148 Mich App 524, 561; 385 NW2d 658 (1986). As observed in *Blue Harvest*,

> "[w]hile there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." [*Dorman*, 269 Mich at 645] (citation and quotation marks omitted). Generally, a plaintiff's alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). "Further, a plaintiff alleging inverse condemnation must prove a casual [sic] connection between the government's action and the alleged damages." *Id*. Additionally,
>
> > [a]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entities him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation. [*Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994) (citations and quotation marks omitted).] [*Blue Harvest*, 288 Mich App at 277-278.]

"[T]he courts examine both the intensity and form of the accompanying publicity and the deliberateness of specific actions directed at a particular plaintiff's property by the city to reduce its value." *Heinrich v City of Detroit*, 90 Mich App 692, 698; 282 NW2d 448 (1979).

In the present litigation, plaintiffs allege that state actors made the decision to switch to the Flint River as the source of drinking water despite knowledge of the danger posed by the water, without a state-conducted scientific assessment of the suitability of the use of Flint River water as drinking water, and of the inadequacies of Flint's water treatment plant. They also allege that various state actors concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water. Moreover, plaintiffs' allege that the contaminated water supply flowed from the river to the water plant and then to the taps of

every Flint water user. These allegations are allegations of affirmative state actions that were directly aimed at the property of Flint water users and that exposed those properties to specific dangers not generally experienced by water users outside of Flint. Plaintiffs allege specific damage to plumbing, water heaters and service lines causes by the introduction of corrosive water that left this infrastructure unsafe to use even after the corrosive water stopped flowing. They also allege a diminution of property values. Applying the settled principles governing the establishment of inverse condemnation, accepting all well-pleaded factual allegations as true and viewing those allegations in a light most favorable to plaintiffs, the nonmoving parties, the Court must conclude that plaintiffs have pleaded sufficient facts to state a cause of action for inverse condemnation. The allegations are sufficient, if proven, to allow a conclusion that the state actors' actions were a substantial cause of the decline of the property's value and that the state abused its powers through affirmative actions directly aimed at the property, i.e., continuing to supply each water user with corrosive and contaminated water with knowledge of the adverse consequences associated with being supplied with such water. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). Therefore, summary disposition pursuant to MCR 2.116(C)(8) is inappropriate with regard to the state and its departments, as further factual development could possibly justify recovery. For the reasons previously expressed in the Court's discussion of Count II, the Court finds in unnecessary to further address whether the Governor, Earley and Ambrose, as state officers acting and sued in their official capacities, are proper parties against which to assert the inverse condemnation claim.

VI. CONCLUSION

For all of these reasons, the Court having fully considered the parties' respective arguments on the pending motions, and being otherwise fully apprised;

IT IS ORDERED that summary disposition in favor of all defendants is GRANTED on Counts I and III of plaintiffs' first amended complaint.

IT IS FURTHER ORDERED that summary disposition is DENIED, without prejudice, as to all defendants, on Counts II and IV of plaintiffs' first amended complaint.

This Order does not resolve the last pending claim and does not close the case.

Dated: October 26, 2016

Hon. Mark T. Boonstra
Court of Claims Judge

STATE OF MICHIGAN

COURT OF APPEALS

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees/Cross-Appellees/Cross-Appellants,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants/Cross-Appellees,

and

DARNELL EARLEY and JERRY AMBROSE,

Defendants/Cross-Appellants/Cross-Appellees.

FOR PUBLICATION
January 25, 2018
9:00 a.m.

No. 335555
Court of Claims
LC No. 16-000017-MM

Advance Sheets Version

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and

No. 335725
Court of Claims
LC No. 16-000017-MM

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants,

and

DARNELL EARLEY and JERRY AMBROSE,

Defendants-Appellants.

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 335726
Court of Claims
LC No. 16-000017-MM

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

Advance Sheets Version

and

DARNELL EARLEY and JERRY AMBROSE,

Defendants.

Before: JANSEN, P.J., and FORT HOOD and RIORDAN, JJ.

JANSEN, P.J.

This case involves consolidated appeals from an October 26, 2016 opinion and order of the Court of Claims granting partial summary disposition in favor of defendants Governor Rick Snyder, the state of Michigan, the Michigan Department of Environmental Quality (DEQ), and the Michigan Department of Health and Human Services (DHHS) (collectively, the state defendants) and defendants Darnell Earley and Jerry Ambrose (the city defendants), who are former emergency managers for the city of Flint, in this putative class action brought by plaintiff water users and property owners in the city of Flint, Michigan. For the reasons that follow, we affirm.

I. FACTS AND PROCEDURE

This case arises from the situation commonly referred to as the "Flint water crisis." The lower court record is only modestly developed, and the facts of the case are highly disputed. Because this is an appeal from an opinion of the Court of Claims partially granting and partially denying defendants' motion for summary disposition, we must construe the factual allegations in a light most favorable to plaintiffs.[1] The Court of Claims summarized the factual allegations in plaintiffs' complaint as follows:

> From 1964 through late April 2014, the Detroit Water and Sewage Department ("DWSD") supplied Flint water users with their water, which was drawn from Lake Huron. Flint joined Genesee, Sanilac and Lapeer Counties and the City of Lapeer, in 2009, to form the Karegondi Water Authority ("KWA") to explore the development of a water delivery system that would draw water from Lake Huron and serve as an alternative to the Detroit water delivery system. On March 28, 2013, the State Treasurer recommended to the Governor that he authorize the KWA to proceed with its plans to construct the alternative water supply system. The State Treasurer made this decision even though an independent engineering firm commissioned by the State Treasurer had concluded that it would be more cost efficient if Flint continued to receive its water from the DWSD. Thereafter, on April 16, 2013, the Governor authorized then-Flint Emergency Manager Edward Kurtz to contract with the KWA for the purpose of switching the source of Flint's water from the DWSD to the KWA beginning in mid-year 2016.
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> At the time Emergency Manager Kurtz contractually bound Flint to the KWA project, the Governor and various state officials knew that the Flint River would serve as an interim source of drinking water for the residents of Flint. Indeed, the State Treasurer, the emergency manager and others developed an interim plan to use Flint River water before the KWA project became operational. They did so despite knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water and despite the absence of any independent state scientific assessment of the suitability of using water drawn from the Flint River as drinking water.

[1] See *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010) (explaining that in deciding a motion under MCR 2.116(C)(8), this Court must accept the allegations as true and construe them in a light most favorable to the nonmoving party); *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006) (noting that when deciding a motion under MCR 2.116(C)(7), "all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party" unless contradicted by the submitted evidence) (quotation marks and citation omitted); *Cork v Applebee's of Mich, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000) (explaining that genuine issues of material fact regarding a court's subject-matter jurisdiction preclude summary disposition under MCR 2.116(C)(4)).

On April 25, 2014, under the direction of then Flint Emergency Manager Earley and the Michigan Department of Environmental Quality ("MDEQ"), Flint switched its water source from the DWSD to the Flint River and Flint water users began receiving Flint River water from their taps. This switch was made even though Michael Glasgow, the City of Flint's water treatment plant's laboratory and water quality supervisor, warned that Flint's water treatment plant was not fit to begin operations. The 2011 study commissioned by city officials had noted that Flint's long dormant water treatment plant would require facility upgrades costing millions of dollars.

Less than a month later, state officials began to receive complaints from Flint water users about the quality of the water coming out of their taps. Flint residents began complaining in June of 2014 that they were becoming ill after drinking the tap water. On October 13, 2014, General Motors announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about the corrosive nature of the water. That same month, Flint officials expressed concern about a Legionellosis outbreak and possible links between the outbreak and Flint's switch to the river water. On February 26, 2015, the United States Environmental Protection Agency ("EPA") advised the MDEQ that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level. That same month, the MDEQ was also advised of the opinion of Miguel Del Toral of the EPA that black sediment found in some of the tap water was lead.

During this time, state officials failed to take any significant remedial measures to address the growing public health threat posed by the contaminated water. Instead, state officials continued to downplay the health risk and advise Flint water users that it was safe to drink the tap water while at the same time arranging for state employees in Flint to drink water from water coolers installed in state buildings. Additionally, the MDEQ advised the EPA that Flint was using a corrosion control additive with knowledge that the statement was false.

By early March 2015, state officials knew they faced a public health emergency involving lead poisoning and the presence of the deadly Legionella bacteria, but actively concealed the health threats posed by the tap water, took no measures to effectively address the dangers, and publicly advised Flint water users that the water was safe and that there was no widespread problem with lead leaching into the water supply despite knowledge that these latter two statements were false.

Through the summer and into the fall of 2015, state officials continued to cover up the health emergency, discredit reports from Del Toral of the EPA and Professor Marc Edwards of Virginia Tech confirming serious lead contamination in the Flint water system, conceal critical information confirming the presence of lead in the water system, and advise the public that the drinking water was safe despite knowledge to the contrary. In the fall of 2015, various state officials attempted to discredit the findings of Dr. Mona [Hanna]-Attisha of Hurley Hospital, which

> reflected a "spike in the percentage of Flint children with elevated blood lead levels from blood drawn in the second and third quarter of 2014."
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> In early October of 2015, however, the Governor acknowledged that the Flint water supply was contaminated with dangerous levels of lead. He ordered Flint to reconnect to the Detroit water system on October 8, 2015, with the reconnection taking place on October 16, 2015. This suit followed. [*Mays v Governor*, unpublished opinion of the Court of Claims, issued October 26, 2016 (Docket No. 16-000017-MM), pp 3-6 (citation omitted).]

On January 21, 2016, plaintiffs brought a four-count verified class action complaint against all defendants in the Court of Claims "on behalf of Flint water users, which include but are not limited to, tens of thousands of residents . . . of the City of Flint . . . ." Plaintiffs brought their complaint pursuant to the Michigan Constitution's Due Process/Fair and Just Treatment Clause, Const 1963, art 1, § 17, and Unjust Takings Clause, Const 1963, art 10, § 2, alleging that since "April 25, 2014 to the present, [plaintiffs] have experienced and will continue to experience serious personal injury and property damage caused by Defendants' deliberately indifferent decision to expose them to the extreme toxicity of water pumped from the Flint River into their homes, schools, hospitals, correctional facilities, workplaces and public places." Specifically, plaintiffs alleged that defendants (1) "knowingly took from Plaintiffs safe drinking water and replaced it with what they knew to be a highly toxic alternative solely for fiscal purposes," (2) for more than 18 months, ignored irrefutable evidence that the Flint River water was extremely toxic and causing serious injury to persons and property, (3) failed to properly sample and monitor the Flint River water, (4) knowingly delivered false assurances that the Flint River water was being tested and treated and was safe to drink, and (5) deliberately delayed notification to the public of serious safety and health risks.

Plaintiffs sought class certification and elected to pursue causes of action against all defendants for state-created danger (Count I), violation of plaintiffs' due-process right to bodily integrity (Count II), denial of fair and just treatment during executive investigations (Count III), and unconstitutional taking via inverse condemnation (Count IV). Plaintiffs sought an award of economic and noneconomic damages for, among other things, bodily injury, pain and suffering, and property damage, for "deliberately indifferent fraud" and "unconscionable" deception on the part of defendants while acting in their official capacities.

The state and city defendants separately moved for summary disposition on all four counts, arguing that, among other things, plaintiffs had (1) failed to satisfy the statutory notice requirements of MCL 600.6431, (2) failed to allege facts to establish a constitutional violation for which a judicially inferred damage remedy is appropriate, and (3) failed to allege facts to establish the elements of any of their claims. In a detailed opinion and order, the Court of Claims granted defendants' motions for summary disposition on plaintiffs' causes of action under the state-created-danger doctrine and the Fair and Just Treatment Clause of the Michigan

Constitution after concluding that neither cause of action is cognizable under Michigan law.[2] However, the court denied summary disposition on all of defendants' remaining grounds.

II. STATUTORY NOTICE REQUIREMENTS

On appeal, defendants first argue that the Court of Claims erred when it denied defendants' motions for summary disposition under MCR 2.116(C)(4) and (7) because plaintiffs failed to satisfy the requirement of statutory notice to avoid governmental immunity and seek relief against the state in the Court of Claims. We disagree.

"We review a trial court's decision regarding a motion for summary disposition de novo." *City of Fraser v Almeda Univ*, 314 Mich App 79, 85; 886 NW2d 730 (2016). A motion for summary disposition under MCR 2.116(C)(4) tests the trial court's subject-matter jurisdiction. *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 154; 756 NW2d 483 (2008). "We review a trial court's decision on a motion for summary disposition based on MCR 2.116(C)(4) de novo to determine if the moving party was entitled to judgment as a matter of law, or if affidavits or other proofs demonstrate there is an issue of material fact." *Southfield Ed Ass'n v Southfield Pub Sch Bd of Ed*, 320 Mich App 353, 373; ___ NW2d ___ (2017) (quotation marks and citation omitted). Whether a court has subject-matter jurisdiction over a claim is a question of law this Court reviews de novo. *Jamil v Jahan*, 280 Mich App 92, 99-100; 760 NW2d 266 (2008). Likewise, "whether MCL 600.6431 requires dismissal of a plaintiff's claim for failure to provide the designated notice raises questions of statutory interpretation," which this Court reviews de novo. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012).

Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred because of immunity granted by law. *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). "When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them." *Id*. "If no material facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006) (quotation marks, citation, and brackets omitted).

We hold that the Court of Claims did not err when it determined that genuine issues of material fact still exist regarding whether plaintiffs satisfied the statutory notice requirements of MCL 600.6431. Further, we hold that the harsh-and-unreasonable-consequences exception relieves plaintiffs from the statutory notice requirements and that, depending on plaintiffs' ability to prove the allegations of their complaint, the fraudulent-concealment exception of MCL 600.5855 may provide an alternative basis to affirm the court's denial of summary disposition.

[2] On appeal, plaintiffs take no issue with the Court of Claims' dismissal of their claim for violation of the Fair and Just Treatment Clause.

A. STATUTORY NOTICE REQUIREMENTS

In Michigan, governmental agencies engaged in governmental functions are generally immune from tort liability. *Kline v Dep't of Transp*, 291 Mich App 651, 653; 809 NW2d 392 (2011). The government, by statute, may voluntarily subject itself to liability and "may also place conditions or limitations on the liability imposed." *McCahan*, 492 Mich at 736. "Indeed, it is well established that the Legislature may impose reasonable procedural requirements, such as a limitations period, on a plaintiff's available remedies even when those remedies pertain to alleged constitutional violations." *Rusha v Dep't of Corrections*, 307 Mich App 300, 307; 859 NW2d 735 (2014). "[I]t being the sole province of the Legislature to determine whether and on what terms the state may be sued, the judiciary has no authority to restrict or amend those terms." *McCahan*, 492 Mich at 732. Thus, "no judicially created saving construction is permitted to avoid a clear statutory mandate." *Id*. at 733. When the language of a limiting statute is straightforward, clear, and unambiguous, it must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

One statutory condition on the right to sue governmental agencies of the state of Michigan is the notice provision of the Court of Claims Act (CCA), MCL 600.6401 *et seq*. *McCahan*, 492 Mich at 736. The provision, MCL 600.6431, provides:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

Our Supreme Court has directed that "[c]ourts may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements." *McCahan*, 492 Mich at 746-747. The notice requirement of MCL 600.6431 is an unambiguous "condition precedent to sue the state," *McCahan v Brennan*, 291 Mich App 430, 433; 804 NW2d 906 (2011), aff'd 492 Mich 730 (2012), and a claimant's failure to strictly comply warrants dismissal of the claim, *McCahan*, 492 Mich at 746-747.

There is no dispute that plaintiffs' action involves personal injury and property damage. Plaintiffs filed their complaint in the instant suit on January 21, 2016, without having filed a separate notice of intention to file a claim. Therefore, to have strictly complied with the notice requirement of MCL 600.6431, plaintiffs' claims must have accrued on or after July 21, 2015,

the date six months prior to the date of filing. Defendants argue that plaintiffs' claims accrued, and the statutory notice period began to run, in either June 2013, when plaintiffs allege that the state "ordered and set in motion the use of highly corrosive and toxic Flint River water knowing that the [water treatment plant] was not ready," or on April 25, 2014, when Flint's water source was switched over to the Flint River and residents began receiving Flint River water from their taps. In either circumstance, according to defendants, plaintiffs' complaint was not filed within the six-month statutory notice period and plaintiffs' claims must be dismissed. As the Court of Claims observed, accepting defendants' position would require a finding that plaintiffs should have filed suit or provided notice at a time when the state itself claims it had no reason to know that the Flint River water was contaminated. Like the Court of Claims, we are disinclined to accept defendants' position.

At a minimum, summary disposition on this ground is premature. Plaintiffs have alleged personal injury and property damage sustained as a result of defendants' allegedly knowing and deliberate decision to supply plaintiffs with contaminated and unsafe drinking water. Although defendants assert that plaintiffs' causes of action could only have arisen on the date of the physical switch, our Legislature has not defined claim accrual so narrowly. Rather, for purposes of statutory limitations periods, our Legislature has stated that a claim accrues "at the time the wrong upon which the claim is based was done," MCL 600.5827, and our Supreme Court has clarified that "the 'wrong' . . . is the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty," *Frank v Linkner*, 500 Mich 133, 147; 894 NW2d 574 (2017) (quotation marks and citation omitted).[3] Therefore, the date on which defendants acted to switch the water is not necessarily the date on which plaintiffs suffered the harm giving rise to their causes of action. Although our Supreme Court has abrogated the application of the discovery doctrine in this state, it has also made clear that it is not until "all of the elements of an action for . . . injury, including the element of damage, are present, [that] the claim accrues and the statute of limitations begins to run." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 290; 769 NW2d 234 (2009), quoting *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972) (quotation marks omitted). In other words, while a claimant's knowledge of each element of a cause of action is not necessary for claim accrual, a claim does not accrue until each element of the cause of action, including some form of damages, *exists*. See *Henry v Dow Chem Co*, 319 Mich App 704, 720; 905 NW2d 422 (2017), rev'd in part on other grounds 905 NW2d 601 (2017). Determination of the time at which plaintiffs' claims accrued therefore requires a determination of the time at which plaintiffs were first harmed. See *id*.

Plaintiffs allege various affirmative actions taken by defendants in this case that resulted in distinct harm to plaintiffs. As plaintiffs concede, not every injury suffered by every user of Flint water is necessarily actionable. However, questions of fact remain regarding whether and

[3] The Legislature imported this definition of claim accrual into the CCA under MCL 600.6452(2), which states that "[e]xcept as modified by this section, the provisions of [Revised Judicature Act] chapter 58, [MCL 600.5801 *et seq*.,] relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section."

when each plaintiff suffered injury and when each plaintiff's claims accrued relative to the filing of plaintiffs' complaint. For example, plaintiffs have alleged economic damage in the form of lost property value that did not occur on the date of the water switch. Plaintiffs' claim for lack of marketability did not accrue until the values of their homes decreased, which would have occurred when the water crisis became public and marketability of property in Flint became significantly impaired in October 2015. Further, it is not clear on what date plaintiffs suffered actionable personal injuries as a result of their use and consumption of the contaminated water. Plaintiffs should be permitted to conduct discovery and should be given the opportunity to prove the dates on which their distinct harms first arose before summary disposition may be appropriate.[4] This is especially true where, as here, there are multiple events giving rise to plaintiffs' causes of action.[5] "[T]he fact that some of a plaintiff's claims accrued outside the applicable limitations period does not time-bar all the plaintiff's claims." *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 28; 896 NW2d 39 (2016).

Thus, even if strict compliance with the statutory notice provision is required, summary disposition, at least at this juncture, is premature. Further, as the Court of Claims observed, there are factual questions that, if resolved in plaintiffs' favor, would justify "relieving [plaintiffs] from the requirements of" MCL 600.6431(3). *Rusha*, 307 Mich App at 312 (quotation marks and citation omitted).

B. HARSH AND UNREASONABLE CONSEQUENCES

Plaintiffs have asserted only constitutional claims against the state and various agencies. In *Rusha*, 307 Mich App at 311, the Court of Appeals acknowledged that "Michigan courts routinely enforce statutes of limitations where constitutional claims are at issue." However, the Court also acknowledged an exception to enforcement when strict enforcement of a limitations period is so harsh and unreasonable in its consequences that it "effectively divest[s]" a plaintiff "of the access to the courts intended by the grant of [a] substantive right." *Id*. (quotation marks and citation omitted). The Court then noted that there is no obvious reason not to extend this

[4] Defendants argue that the Court of Claims erred by relying "only" on hypothetical claims of putative class members to find remaining issues of fact. It is true that a plaintiff who has not suffered an injury "cannot maintain the cause of action as an individual [and] is not qualified to represent [a] proposed class." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 604; 865 NW2d 915 (2014) (quotation marks and citation omitted). However, the issue of class certification has not yet been raised, and in any case, defendants' argument is not supported by the record. The Court of Claims fully considered plaintiffs' complaint and cited specific allegations by plaintiffs in this case before concluding that questions of fact remained regarding plaintiffs' ability to establish claims accruing later than the date of the water switch.

[5] The Court of Claims did not err by recognizing that plaintiffs' complaint alleges multiple harms resulting from distinct tortious acts rather than a continuing harm resulting from the single tortious act of switching the water source. For purposes of accrual, each of plaintiffs' individual causes of action must be considered separately. See *Joliet v Pitoniak*, 475 Mich 30, 42; 715 NW2d 60 (2006).

exception, typically applied to relieve a plaintiff of the effects of statutory limitations periods, to statutory notice requirements. Specifically considering MCL 600.6431(3), the *Rusha* Court opined:

> We see no reason—and plaintiff has provided none—to treat statutory notice requirements differently [than statutes of limitations]. Indeed, although statutory notice requirements and statutes of limitations do not serve identical objectives, both are *procedural* requirements that ultimately restrict a plaintiff's remedy, but not the substantive right. [*Rusha*, 307 Mich App at 311-312 (citations omitted).]

Defendants argue that *Rusha* was incorrectly decided and should not influence our decision here. Specifically, defendants assert that the *Rusha* Court's conclusions, first that a harsh-and-unreasonable-consequences exception may relieve plaintiffs from the statute of limitations and second that the same exception applies to statutory notice requirements, are directly contradicted by three earlier decisions of the Michigan Supreme Court: *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007); *Rowland*, 477 Mich 197, and *McCahan*, 492 Mich 730. Defendants argue that these cases unequivocally prohibit the application of any type of judicial "saving construction" to avoid the "clear statutory mandate" of a legislatively imposed limitations period. Defendants are correct that these cases stand for the proposition that a court may not craft an exception to the statutory notice or limitations periods by recognizing viability of a substantially compliant notice, engrafting a prejudice requirement, or similarly reducing the requirements of the statute, even when constitutional claims are at issue. Indeed, the Court in *Rusha* acknowledged that "a claimant's failure to comply strictly with [the notice provision of MCL 600.6431] warrants dismissal of the claim, even if no prejudice resulted." *Rusha*, 307 Mich App at 307, citing *McCahan*, 492 Mich at 746-747. However, the Court also recognized that the strict compliance requirement must be set aside when its application completely divests a plaintiff of the opportunity to assert a substantive right. *Id*. at 311. Despite defendants' assertion to the contrary, *Rusha* should not be read as advocating for the creation of a judicial saving construction to supplement an otherwise valid statute. Rather, it seems that the *Rusha* Court properly recognized the longstanding principle that while the Legislature retains the authority to impose *reasonable* procedural restrictions on a claimant's pursuit of claims under self-executing constitutional provisions, "the right guaranteed shall not be curtailed or any undue burdens placed thereon." *Id*. at 308 (quotation marks and citation omitted).[6]

[6] The Due Process Clause of the Michigan Constitution proscribes specific conduct and sets forth "a sufficient rule by means of which the right which it grants may be enjoyed and protected" and is therefore self-executing. See *Rusha*, 307 Mich App at 309 (quotation marks and citation omitted); see also *Santiago v New York State Dep't of Correctional Servs*, 945 F2d 25, 27 (CA 2, 1991) (considering the coextensive clause of the United States Constitution and opining that the substantive provisions of the Fourteenth Amendment are self-executing in nature). Indeed, the presumption is that all provisions of the Constitution, unless drafted only to reflect mere general

The Michigan Constitution is the preeminent law of our land, and its provisions restrict the conduct of the state government. See *Burdette v Michigan*, 166 Mich App 406, 408; 421 NW2d 185 (1988). Indeed, the Due Process Clause of the Michigan Constitution, as a Declaration of Rights provision, "ha[s] consistently been interpreted as *limited* to protection against state action." *Sharp v Lansing*, 464 Mich 792, 813; 629 NW2d 873 (2001) (quotation marks and citation omitted; emphasis added). The Legislature may not impose a procedural requirement that would, in practical application, completely divest an individual of his or her ability to enforce a substantive right guaranteed thereunder. The harsh-and-unreasonable-consequences exception is merely a judicial recognition that in limited cases, when the practical application of the Legislature's statutorily imposed procedural requirements is unreasonable or completely divests a claimant of his or her right to pursue a constitutional claim, those procedural requirements are unconstitutional.

The *Rusha* Court's recognition of this limitation on legislative power does not conflict with the holdings in *Trentadue*, *Rowland*, or *McCahan*.[7] Importantly, these cases advocate strict compliance with statutory limitations and notice requirements in the context of legislatively granted rights rather than rights granted under the provisions of our Constitution itself. See *McCahan*, 492 Mich at 733 (considering the statutory notice period in relation to a claim for personal injury and property damage arising from a motor vehicle accident); *Trentadue*, 479 Mich at 386-387 (considering the statute of limitations on a wrongful-death action); *Rowland*, 477 Mich at 200 (considering the statutory notice period for a claim against a county defendant under a statutory exception to governmental liability). The right to pursue the tort claims involved in each case arose from enumerated exceptions to the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*—allowances structured by the Legislature's own authority and therefore subject to the Legislature's discretion. Additionally, *Rusha* was decided years after each of these cases and is supported by precedent that has not been overruled.[8]

principles, are self-executing. *Detroit v Oakland Circuit Judge*, 237 Mich 446, 450; 212 NW 207 (1927).

[7] Because we find no conflict between *Rusha* and the earlier Michigan Supreme Court cases cited by defendants here, we decline defendants' request to convene a conflict panel under MCR 7.215(J).

[8] The state defendants direct this Court's attention to *Bacon v Michigan*, unpublished opinion of the Court of Claims, issued June 7, 2017 (Docket No. 16-000312-MM), in which the court suggested in a footnote that "defendants appear correct in their argument that the statement [from *Rusha* recognizing a harsh-and-unreasonable-consequences exception] is no longer a valid statement of the law as it pertains to statutes of limitations . . . ." *Id.* at 8 n 5. The Court of Claims correctly noted that in *Curtin v Dep't of State Highways*, 127 Mich App 160; 339 NW2d 7 (1983), the case cited by *Rusha*, the Court relied on a now-abrogated opinion, *Reich v State Highway Dep't*, 386 Mich 617; 194 NW2d 700 (1972), abrogated by *Rowland*, 477 Mich at 206-207, for this language. *Bacon*, unpub op at 8 n 5. However, the Court of Claims incorrectly concluded that because *Curtin* cited bad caselaw, the principle announced in *Rusha* is "no longer . . . valid." *Id.* Our courts have recognized a harsh-and-unreasonable-consequences

Applying the harsh-and-unreasonable-consequences exception to the facts presented in *Rusha*, the Court concluded that there was no reason to relieve the plaintiff from the requirement of strict compliance with the statutory notice requirement. *Rusha*, 307 Mich App at 312-313. The Court explained:

> Here, it can hardly be said that application of the six-month notice provision of § 6431(3) effectively divested plaintiff of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogated a constitutional right. Again, plaintiff waited nearly 28 months to file his claim. But § 6431(3) would have permitted him to file a claim on this very timeline had he only provided notice of his intent to do so within six months of the claim's accrual. Providing such notice would have imposed only a minimal procedural burden, which in any event would be significantly less than the "minor 'practical difficulties' facing those who need only make, sign and file a complaint within six months." To be sure, providing statutory notice " 'requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this [statutory notice provision] that would not be applicable to any other statute of limitation.' " [*Id*. (citations omitted; alteration by the *Rusha* Court).]

In this case, unlike in *Rusha*, application of the harsh-and-unreasonable-consequences exception is clearly supported. To grant defendants' motions for summary disposition at this early stage in the proceedings would deprive plaintiffs of access to the courts and effectively divest them of the ability to vindicate the constitutional violations alleged. As the Court of Claims observed, this is not a case in which an ostensible, single event or accident has given rise to a cause of action, but one in which the "event giving rise to the cause of action was not readily apparent at the time of its happening." *Mays*, unpub op at 10. "Similarly, a significant portion of the injuries alleged to persons and property likely became manifest so gradually as to have been well established before becoming apparent to plaintiffs because the evidence of injury was concealed in the water supply infrastructure buried beneath Flint and in the bloodstreams of those drinking the water supplied via that infrastructure." *Id*. at 10-11. Plaintiffs in this case did not wait more than two years after discovering their claims to file suit. Rather, they filed suit within six months of the state's public acknowledgment and disclosure of the toxic nature of the Flint River water to which plaintiffs were exposed.

exception to the Legislature's statute of limitations in various lines of cases that have not been overruled. Most recently, this Court affirmed the application of the exception in *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 332-333; 869 NW2d 635 (2015), with the same language employed by the Court in *Rusha*. *Rusha*'s detailed discussion of the exception and its application to the statutory notice period remains valid despite the citation error.

We note that the Michigan Supreme Court denied leave to appeal the *Rusha* decision. *Rusha v Dep't of Corrections*, 498 Mich 860 (2015).

Further supporting the application of the harsh-and-unreasonable-consequences exception to the requirement of statutory notice are plaintiffs' allegations of affirmative acts undertaken by numerous state actors, including named defendants, between April 25, 2014 and October 2015 to conceal both the fact that the Flint River water was contaminated and hazardous and the occurrence of any event that would trigger the running of the six-month notice period. Under these unique circumstances, to file statutory notice within six months of the date of the water source switch would have required far more than ordinary knowledge and diligence on the part of plaintiffs and their counsel. It would have required knowledge that defendants themselves claim not to have possessed at the time plaintiffs' causes of action accrued.[9]

Should plaintiffs' allegations be proved true, defendants' affirmative acts of concealment and frustration of plaintiffs' discovery of the alleged causes of action should not be rewarded. It would be unreasonable to divest plaintiffs of the opportunity to vindicate their substantive, constitutional rights simply because defendants successfully manipulated the public long enough to outlast the statutory notice period. Although circumstances such as these will undoubtedly be few, we believe that in this unique situation, we must not set a standard whereby the state and its officers may completely avoid liability if they manage to intentionally delay discovery of a cause of action until the six-month statutory notice period has expired. Plaintiffs must be afforded the opportunity to support the allegations of their complaint before dismissal of their claims may be deemed appropriate.

Because application of the harsh-and-unreasonable-consequences exception to strict compliance with the statutory notice requirements is appropriate under the unique factual circumstances of this case, this Court need not consider whether, as defendants have asserted, plaintiffs improperly rely on the now-abrogated doctrines of discovery and continuing wrongs. Despite the unavailability of these previously accepted principles, see *Henry*, 319 Mich App at 719-720, plaintiffs' constitutional tort claims survive summary disposition on the nonconflicting basis that dismissal would result in a harsh and unreasonable deprivation "of the access to the courts intended by the grant of [a] substantive right," see *Rusha*, 307 Mich App at 311 (quotation marks and citation omitted).

Finally, we briefly address the dissent's mention of similar pending federal district court and circuit court actions. The dissent argues that even though plaintiffs are precluded from

[9] We flatly reject defendants' contention that the burden on plaintiffs to file statutory notice within six months of the water switch would have been "minimal" because plaintiffs only needed to know that a claim was possible, not that a claim was fully supported, in order to provide timely notice. Defendants assume that plaintiffs had any knowledge of a possible claim during the period when, as plaintiffs allege, defendants were actively concealing information that a claim had accrued and the notice period had begun. If plaintiffs' allegations are proved true, filing notice within six months after the physical water switch would have placed more than a "minimal" burden on plaintiffs and their counsel. Indeed, it would have required clairvoyant recognition of circumstances that the state was working to convince the public did not actually exist.

recovery due to their alleged failure to provide proper notice, "the residents of Flint are not left entirely without remedies" due to several pending actions in the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit, including some actions in which a named plaintiff in this case is also involved. However, until those actions are fully resolved, any recovery is speculative. Further, while many federal statutory remedies are limited, the Court of Claims is able to fashion any reasonable remedy necessary to adequately address the constitutional violations plaintiffs have alleged. Accordingly, we disagree with the dissent that plaintiffs are able to avoid any "harsh consequences" by seeking relief in the federal courts.

C. FRAUDULENT CONCEALMENT

In a footnote, the Court of Claims rejected plaintiffs' argument that the fraudulent-concealment exception of MCL 600.5855 applied to toll the statute of limitations and the statutory notice period in this case. *Mays*, unpub op at 11 n 4. We hold that the Court of Claims erred by reaching this conclusion; the fraudulent-concealment exception may provide an alternative basis for affirming the denial of defendants' motions for summary disposition.

The fraudulent-concealment exception is a legislatively created exception to statutes of limitation. The exception is codified as part of the Revised Judicature Act (RJA), MCL 600.101 *et seq*., in MCL 600.5855, which states:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

This statutory section permits the tolling of a statutory limitations period for two years if the defendant has fraudulently concealed the existence of a claim. For the fraudulent-concealment exception to apply, a "plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment" and "prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery." *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

The Legislature, in crafting the CCA, imported the fraudulent-concealment exception into its statute-of-limitations provision. MCL 600.6452(2). However, as defendants point out, the Legislature did not explicitly import the exception into the statutory notice provision of the CCA. See MCL 600.6431. The Court of Claims rejected plaintiffs' assertion that the fraudulent-concealment exception should apply to the CCA's statutory notice requirement, finding the absence of a similar provision directly applicable to MCL 600.6431 "persuasive evidence that the Legislature did not intend for the fraudulent concealment tolling provision of MCL 600.5855 to be read into the notice provisions of MCL 600.6431." *Mays*, unpub op at 12 n 4. We disagree.

It is a basic tenet of statutory construction that the omission of a statutory provision should be construed as intentional. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Id*. (quotation marks and citation omitted). However, in this case, the Legislature did not "omit" from the CCA any language from the statute-of-limitations provisions of the RJA. Rather, the Legislature specifically *included* language mandating application of the RJA's statute-of-limitations provisions—and exceptions—to the statute-of-limitations provisions of the CCA. See MCL 600.6452(2).

The RJA contains no statutory notice period, and neither the Legislature nor our courts have ever had the occasion to consider whether the fraudulent-concealment exception might apply to such a provision. The Legislature's failure to specifically address the application of the fraudulent-concealment exception to the CCA's statutory notice period therefore cannot be presumed intentional under the rules of statutory construction. While "the Legislature is presumed to be aware of, and thus to have considered the effect [of a statutory enactment] on, all *existing* statutes," *GMAC LLC*, 286 Mich App at 372 (quotation marks and citation omitted; emphasis added), it makes no sense to presume knowledge of a potential future conflict without a context in which such knowledge would arise. Indeed, it would make as much sense to presume that the Legislature did not consider the issue whether the fraudulent-concealment exception would apply to the statutory notice provision of the CCA because, had it done so, it would have made its determination explicit. The Legislature's omission here does not provide dispositive evidence of intent, and we therefore must proceed according to the well-established rules of statutory interpretation and construction.

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Dawson v Secretary of State*, 274 Mich App 723, 729; 739 NW2d 339 (2007) (opinion by WILDER, P.J.). "This Court begins by reviewing the language of the statute, and, if the language is clear and unambiguous, it is presumed that the Legislature intended the meaning expressed in the statute." *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). In such cases, "judicial construction is neither required nor permitted." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 373; 652 NW2d 474 (2002). "However, if reasonable minds can differ concerning the meaning of a statute, judicial construction of the statute is appropriate." *Id*.

We conclude that reasonable minds could differ regarding the meaning of MCL 600.5855 as applied in the context of claims brought under the CCA. First, it must be noted that while MCL 600.5855, a subsection of Chapter 58 of the RJA, is part of the Legislature's statutory scheme for statutory limitations periods, the statutory language does not otherwise express or imply that its exception operates only by exclusively tolling the limitations period. To the contrary, the plain language of the statute provides that an action that has been fraudulently concealed "may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim . . . ." MCL 600.5855. The statute's direction that such an action may proceed notwithstanding that "the action would otherwise be barred by the period of limitations" does not specifically *limit* the exception's application to those claims barred by the expiration of the limitations period. Considering only the plain language of MCL 600.5855, reasonable minds could differ on the

question whether the provision, as imported into the CCA, is intended to grant a claimant whose claim has been fraudulently concealed an affirmative right to bring suit within two years of discovery, regardless of prior noncompliance with the statutory requirements, or whether the exception applies only to toll the statutory limitations period.

The language of MCL 600.5855 becomes more ambiguous when it is practically applied in the context of a claim brought under the CCA. Although MCL 600.5855 clearly permits the commencement of an action within two years after a claimant discovers or should have discovered a fraudulently concealed claim, the statutory notice period of MCL 600.6431 prohibits the commencement of an action without notice filed within six months or one year of the date on which the claim accrued. As previously discussed, the discovery doctrine has been abrogated in this state, see *Trentadue*, 479 Mich at 391-392, and a claim accrues on the date a claimant is harmed, regardless of when the claimant first learns of the harm. If MCL 600.6431 is strictly applied, as it must be, see *McCahan*, 492 Mich at 746-747, then MCL 600.6431 is impossible to reconcile with the Legislature's clear intent to provide claimants with two years from the date of discovery to bring suit on a harm that the liable party has fraudulently concealed.[10]

"[S]tatutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). The Legislature clearly intended to incorporate the statutory limitations periods and exceptions, including the fraudulent-concealment exception of MCL 600.5855, into the CCA. See MCL 600.6452(2). If the fraudulent-concealment exception is not applied equally to the statutory period of limitations and the statutory notice period of the CCA, it cannot be applied at all. See *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007) ("A statute is rendered nugatory when an interpretation fails to give it meaning or effect."). "[C]ourts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *O'Connell v Dir of Elections*, 316 Mich App 91, 98; 891 NW2d 240 (2016) (quotation marks and citation omitted). Further, when there is "tension, or even conflict, between sections of a statute," this Court has a "duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them." *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002). In this case, to read MCL 600.5855, as imported into the CCA, and MCL 600.6431 in harmony requires the conclusion that when the fraudulent-concealment exception applies, it operates to toll the statutory notice period as well as the statutory limitations period.

[10] We reject defendants' contention that to find a conflict between MCL 600.5855 and MCL 600.6431 one must "wrongly assume[] that a notice of intent is the same as a legal complaint." It is true that a claimant requires only minimal information to file a notice of intent and that the knowledge required distinguishes a notice of intent from a legal complaint. However, a claimant that can satisfy the fraudulent-concealment exception will have *no* knowledge of the potential claim prior to the date he or she discovers or should reasonably be expected to discover it. It is simply nonsensical to argue that a claimant may satisfy the notice requirement and still claim the benefit of the fraudulent-concealment tolling provision.

Importantly, application of the fraudulent-concealment exception to statutory notice periods does nothing to undermine the purpose of requiring timely statutory notice. As defendants concede, the purpose of the notice provision in MCL 600.6431 is to establish a "clear procedure" for pursuing a claim against the state and eliminate "ambiguity" about whether a claim will be filed. *McCahan*, 492 Mich at 744 n 24. The provision gives the state and its agencies time to create reserves and reduces the uncertainty of the extent of future demands. *Rowland*, 477 Mich at 211-212. But when the state and its officers, having knowledge of an event giving rise to liability and anticipating the possibility that claims may be filed, actively conceal information in order to prevent a suit, the state suffers no "ambiguity" or surprise. In cases in which the fraudulent-concealment exception may be applied, the state possesses the necessary information and the object of the statutory notice requirement is self-executing. Application of the fraudulent-concealment exception to the statutory notice requirement of the CCA is therefore consistent with both the legislative intent behind the exception itself and the purpose of the statutory notice period. In keeping with the principles of statutory construction and the Legislature's clear intent to permit the application of the fraudulent-concealment exception to claims brought under the CCA, we hold that the fraudulent-concealment exception applies at least to toll the statutory notice period commensurate with the tolling of the statute of limitations in situations in which its requirements have been met.[11]

If plaintiffs can prove, as they have alleged, that defendants actively concealed the information necessary to support plaintiffs' causes of action so that plaintiffs could not, or should not, have known of the existence of the causes of action until a date less than six months prior to the date of their complaint, application of the fraudulent-concealment exception will fully apply and plaintiffs should be permitted to proceed regardless of when their claims actually accrued. Whether plaintiffs can satisfy the exception is a question that involves disputed facts and is subject to further discovery. Summary disposition on this ground is therefore inappropriate.

[11] We recognize that this Court, in two unpublished opinions, has declined to import the fraudulent-concealment provision into MCL 600.6431. See *Brewer v Central Mich Univ Bd of Trustees*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 2013 (Docket No. 312374); *Zelek v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2012 (Docket No. 305191). These opinions are not binding on this Court. MCR 7.215(C)(1). Additionally, in both *Brewer* and *Zelek*, the panel's conclusion that the fraudulent-concealment exception did not apply to toll the statutory notice period was reached without recognition that the Legislature specifically imported the fraudulent-concealment exception into the statute-of-limitations provision of the CCA and without consideration of the practical conflict created when the fraudulent-concealment exception is applied to the statutory limitations period without also being applied to the statutory notice period. Because both cases also involved strikingly dissimilar factual situations, we find them unpersuasive.

III. JURISDICTION OVER THE CITY DEFENDANTS

Next, the state defendants argue that the Court of Claims erred when it found that it could exercise jurisdiction over claims brought against the city defendants because emergency managers are considered "state officers" under the CCA.[12] We disagree.

"Jurisdiction is a court's power to act and its authority to hear and decide a case." *Riverview v Sibley Limestone*, 270 Mich App 627, 636; 716 NW2d 615 (2006). "The Court of Claims is created by statute and the scope of its subject-matter jurisdiction is explicit." *O'Connell*, 316 Mich App at 101 (quotation marks and citation omitted). "A challenge to the jurisdiction of the Court of Claims presents a statutory question that is reviewed de novo as a question of law." *Id*. at 97 (quotation marks and citation omitted).

With MCL 600.6419(1)(a), the Legislature endowed the Court of Claims with exclusive jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, . . . *against the state or any of its departments or officers* notwithstanding another law that confers jurisdiction of the case in the circuit court." (Emphasis added.) In the same statutory section, the Legislature specified that

> [a]s used in this section, "the state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties. [MCL 600.6419(7).]

The jurisdiction of the Court of Claims does not extend to local officials. *Doan v Kellogg Community College*, 80 Mich App 316, 320; 263 NW2d 357 (1977).

Whether an emergency manager falls within the definition of state "officer" provided in MCL 600.6419(7) is a question of statutory interpretation. When interpreting a statute, "[o]ur duty is to ascertain and effectuate the intent behind the statute . . . from the language used in it."

[12] In the lower court and in this Court on appeal, the city defendants argue that in their official capacities as emergency managers, they were state officers subject to the jurisdiction of the Court of Claims under MCL 600.6419. However, the state defendants argued in the lower court, and argue again on appeal, that the Court of Claims lacks subject-matter jurisdiction over plaintiffs' claims against Earley and Ambrose because neither, in his official capacity, was a state officer. Although neither the state defendants nor the city defendants raises the issue of standing on appeal, we note that because an official-capacity suit against the city defendants is, for practical purposes, a suit against the state, *Carlton v Dep't of Corrections*, 215 Mich App 490, 500-501; 546 NW2d 671 (1996), the state defendants have a significant interest in the outcome of plaintiffs' case.

Attorney General v Flint, 269 Mich App 209, 211-212; 713 NW2d 782 (2005). "Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). "When statutory language is unambiguous, we must presume that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted." *Attorney General*, 269 Mich App at 213 (quotation marks and citation omitted).

The state defendants acknowledge that the Michigan Supreme Court has determined that the question whether an official is a state officer in a particular circumstance is "governed by the purpose of the act or clause in connection with which it is employed." *Schobert v Inter-Co Drainage Bd*, 342 Mich 270, 282; 69 NW2d 814 (1955). The state defendants assert that it is 2012 PA 436,[13] the act creating and governing the office of an appointed emergency manager, that is the focus of this inquiry, and the state defendants devote substantial portions of their appellate briefs to explaining the purported distinction between state officers and emergency managers on the basis of the language of that act. The state defendants have either offered this Court a red herring or confused an otherwise straightforward determination. The question is not, as the state defendants contend, whether the Legislature in passing 2012 PA 436 intended to make emergency managers state officers. While 2012 PA 436 and its characterization of emergency managers may be relevant in another context, the question presented here is one of jurisdiction, and it is the intent behind the Legislature's grant of jurisdiction to the Court of Claims, through MCL 600.6419 in particular, that must direct this Court's analysis. See *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 521; 821 NW2d 117 (2012) ("[T]he first step of statutory interpretation is to review the language of the statute at issue, not that of another statute."). Thus, in determining whether claims against an emergency manager fall within the jurisdiction of the Court of Claims, we begin by examining the plain language of MCL 600.6419(7).

This Court need not, and in fact may not, look past the CCA for a definition of "state officer" as employed therein. "Where a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined." *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001). The Legislature has provided a definition of the term in the CCA. That definition includes "an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties." MCL 600.6419(7). But the state defendants have not bothered to address this definition. Regardless of whether emergency managers might be considered state officers in any context outside the CCA, the city defendants clearly fall within the act's own definition and, as intended, within the Court of Claims' jurisdiction.

There is no dispute that the city defendants made the decision to switch the city of Flint's water supply to the Flint River while acting within the scope of their official authority and in the

[13] 2012 PA 436 created the Local Financial Stability and Choice Act, MCL 141.1541 *et seq*.

discharge of a government function. Further, there is no doubt that the city defendants were acting, at all times relevant to plaintiffs' claims, as employees or officers of the state of Michigan and its agencies. As the Court of Claims observed,

> "[a]n emergency manager is a creature of the Legislature with only the power and authority granted by statute. *Kincaid v City of Flint*, 311 Mich App 76, 87; 874 NW2d 193 (2015). An emergency manager is appointed by the governor following a determination by the governor that a local government is in a state of financial emergency. MCL 141.1546(1)(b); MCL 141.1549(1). The emergency manager serves at the governor's pleasure. MCL 141.1549(3)(d); *Kincaid*, 311 Mich App at 88. The emergency manager can be removed by the governor or by the Legislature through the impeachment process. MCL 141.1549(3)(d) and (6)(a). The state provides the financial compensation for the emergency manager. MCL 141.1549(3)(e) and (f). All powers of the emergency manager are conferred by the Legislature. MCL 141.1549(4) and (5); MCL 141.1550 – MCL 141.1559; *Kincaid*, 311 Mich App at 87. Those powers include powers not traditionally within the scope of those granted municipal corporations. See MCL 141.1552(1)(a) – (ee). The Legislature conditioned the exercise of some of those powers upon the approval of the governor or his or her designee or the state treasurer. MCL 141.1552(1)(f), (x), (z) and (3); MCL 141.1555(1). The Legislature has also subjected the emergency manager to various codes of conduct otherwise applicable only to public servants, public officers and state officers. MCL 141.1549(9). Through the various provisions within the act, the state charges the emergency manager with the general task of restoring fiscal stability to a local government placed in receivership – a task which protects and benefits both the state and the local municipality and its inhabitants. The emergency manager is statutorily obligated to create a financial and operating plan for the local government that furthers specific goals set by the state and to submit a copy of the plan to the state treasurer for the treasurer's "regular[] reexamin[ation]." MCL 141.1551(2). The emergency manager is also obligated to report to the top elected officials of this state and to the state treasurer his or her progress in restoring financial stability to the local government. MCL 141.1557. Finally, the Act tasks the governor, and not the emergency manager, with making the final determination whether the financial emergency declared by the governor has been rectified by the emergency manager's efforts. MCL 141.1562(1) and (2). Under the totality of these circumstances, the core nature of the emergency manager may be characterized as an administrative officer of state government." [*Mays*, unpub op at 15-16, quoting *Collins v Flint*, unpublished opinion of the Court of Claims, issued August 25, 2016 (Docket No. 16-000115-MZ), pp 13-14 (citation omitted).][14]

[14] Neither the Court of Claims opinion in this case nor the quoted opinion is binding on this Court. However, we adopt the court's accurate summary of the law as stated.

We agree that the totality of the circumstances indicates that an emergency manager operates as an administrative officer of the state.[15] Further, it is beyond dispute that at a minimum, an emergency manager must be characterized as an employee of the state. Although the CCA does not provide a specific definition for "employee," this Court may look to dictionary definitions to "construe undefined statutory language according to common and approved usage." *In re Casey Estate*, 306 Mich App 252, 260; 856 NW2d 556 (2014). *Black's Law Dictionary* (10th ed) defines "employee" as "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Emergency managers, who are appointed by the governor, serve at the governor's pleasure, are subject to review by the state treasurer, and operate only within the authority granted by the state government, easily fall within this definition. Indeed, our Court has recognized that political appointees, like the emergency managers here, serve as at-will employees of the governmental agency that appointed them. See *James v City of Burton*, 221 Mich App 130, 133-134; 560 NW2d 668 (1997). An emergency manager, as an appointee of the state government, is an employee of the state government. Claims against an emergency manager acting in his or her official capacity therefore fall within the well-delineated subject-matter jurisdiction of the Court of Claims.

We note that if this Court were to accept the state defendants' suggestion that the Court must consider whether 2012 PA 436 authorizes the Court of Claims to assume subject-matter jurisdiction over claims against emergency managers, the result would be the same. The state defendants argue that 2012 PA 436 does not contemplate suits against emergency managers in the Court of Claims. However, while 2012 PA 436 does not expressly authorize suits against emergency managers in the Court of Claims, it specifically contemplates proceedings involving emergency managers in that court. Under 2012 PA 436, an emergency manager is granted the express authority to bring suits in the Court of Claims "to enforce compliance with any of his or her orders or any constitutional or legislative mandates, or to restrain violations of any constitutional or legislative power or his or her orders." MCL 141.1552(1)(q). This authorization acknowledges the status of an emergency manager as a state officer and is consistent with the CCA, which grants the Court of Claims jurisdiction over all claims brought by the "state or any of its departments or officers against any claimant . . . ." MCL 600.6419(1)(b).

Because the city defendants' status as employees of the state during all times relevant to this appeal satisfies the jurisdictional question, we need not address the state defendants' challenge to the Court of Claims' characterization of emergency managers as receivers for the

[15] The state defendants argue that this Court should find persuasive a recent opinion, *Gulla v Snyder*, unpublished opinion of the Court of Claims, issued August 16, 2017 (Docket No. 16-000298-MZ), in which the Court of Claims judge concluded that emergency managers are not state officers for purposes of the CCA. This Court is not bound to follow the opinion of the Court of Claims, which directly conflicts with the Court of Claims opinion at issue here. Further, we note that the Court of Claims judge who considered the issue in *Gulla* had analyzed the issue according to the provisions of 2012 PA 436 rather than the jurisdictional provision of the CCA—an erroneous approach this Court, as discussed in this opinion, specifically disavows.

state. However, we believe that the analogy is quite apt and provides additional support for the conclusion that claims against an emergency manager fall within the subject-matter jurisdiction of the Court of Claims. Under 2012 PA 436, an emergency manager's relationship with a municipality is specifically described as a "receivership." MCL 141.1542(q) (" 'Receivership' means the process under this act by which a financial emergency is addressed through the appointment of an emergency manager."). MCL 141.1549(2) provides, in pertinent part:

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers *in receivership* to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. [Emphasis added.]

Additionally, the powers and responsibilities delegated to an emergency manager under 2012 PA 436 mirror those of an appointed receiver:

> A receiver is sometimes said to be the arm of the court, *appointed to receive and preserve the property* of the parties to litigation and in some cases *to control and manage it* for the persons or party who may be ultimately entitled thereto. A receivership is primarily to preserve the property and not to dissipate or dispose of it. [*Westgate v Westgate*, 294 Mich 88, 91; 292 NW 569 (1940) (emphasis added).]

The state defendants argue that emergency managers cannot be compared to court-appointed receivers because unlike court-appointed receivers, emergency managers are appointed to represent the city rather than to act as neutral arbiters. The state defendants mischaracterize the relationship between emergency managers and the municipalities whose finances they are appointed to oversee. In their appellate brief, the city defendants aptly summarize the role of an appointed emergency manager:

> The concept behind emergency management is that the State needs to appoint a neutral party to help eliminate a financial emergency because local officials have proven (in the State's view) unable to govern in a financially responsible way. An [emergency manager]'s job is to create and implement a financial plan that assures full payment to creditors while still conducting all aspects of a municipality's operations. Once the Governor agrees that the emergency has been sustainably resolved, power passes from the neutral receiver back to local officials. [Citations omitted.]

The city defendants' characterization of emergency managers as neutral overseers is supported by the provisions of 2012 PA 436. See MCL 141.1551(1)(a) and (b); MCL 141.1562(3); MCL 141.1543.

It has long been recognized that a receiver serves as the administrative arm or officer of the authority exercising the power of appointment. See *In re Guaranty Indemnity Co*, 256 Mich

671, 673; 240 NW 78 (1932) ("Generally speaking a receiver is not an agent, except of the court appointing him . . . . He is merely a ministerial officer of the court, or, as he is sometimes called, the hand or arm of the court.") (quotation marks and citation omitted); *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 392-393; 853 NW2d 421 (2014) (noting that a receiver is both an officer and an administrative arm of the appointing court); *Hofmeister v Randall*, 124 Mich App 443, 445; 335 NW2d 65 (1983) (explaining that "a receiver is the arm of the court, appointed to receive and preserve the litigating parties' property"); *Cohen v Bologna*, 52 Mich App 149, 151; 216 NW2d 586 (1974) (explaining that a receiver "function[s] as officer of the court" that appointed him). Again, the definition of "the state or any of its departments or officers" for purposes of Court of Claims jurisdiction includes any "arm, or agency of the state," or any officer or employee of an "arm, or agency of this state . . . ." MCL 600.6419(7). The Court of Claims did not err when it concluded that the city defendants, in their official capacities as emergency managers, operated as arms of the state during all times relevant to the instant suit.

The state defendants argue that the characterization of emergency managers as ministerial arms or officers of the state "directly contradicts" this Court's holding in *Kincaid*, 311 Mich App 76, in which we concluded that an act of an emergency manager cannot be considered an act of the governor. In *Kincaid*, the Court considered whether an emergency manager could exercise power textually granted to the governor on a theory that an act of the emergency manager, as a gubernatorial appointee, was an act of the governor himself. *Id*. at 87-88. This Court rejected the city's argument that an emergency manager acts on behalf of the governor after considering the role of an emergency manager as described in 2012 PA 436. *Id*. at 88. Specifically, this Court held that 2012 PA 436 in no way authorized the governor to delegate his or her authority to an emergency manager, who could act "only on behalf of numerous *local* officials" and whose "authority is limited to the local level." *Id*. The state defendants argue that this holding precludes a finding that emergency managers are arms or agents of the state. However, the state defendants divorce this Court's holding from its context. The issue in *Kincaid* was not whether an emergency manager is a state official subject to the subject-matter jurisdiction of the Court of Claims, but whether the range of power granted to an emergency manager includes the governor's power to ratify. While the *Kincaid* Court held that emergency managers do not inherit all the powers of the governor, the Court did not hold that emergency managers cannot act as agents of the state. The fact that an emergency manager is not authorized to act *as* the governor does not mean that an emergency manager is not authorized to act as an *agent* of the governor.

More importantly, the *Kincaid* holding in no way precludes a finding that emergency managers are employees of the state subject to the jurisdiction of the Court of Claims under MCL 600.6419, regardless of whether they are also considered agents acting on behalf of the governor. For these reasons, we hold that the Court of Claims did not err when it concluded that plaintiffs' claims against the city defendants, sued in their official capacities as employees and administrative officers of the state, are within the subject-matter jurisdiction of the Court of Claims.

IV. INJURY TO BODILY INTEGRITY

Next, defendants argue that the Court of Claims erred when it concluded that plaintiffs had pleaded facts that, if proved true, established a constitutional violation of plaintiffs'

substantive due-process right to bodily integrity for which a judicially inferred damage remedy is appropriate. We disagree.

Defendants moved for summary disposition of plaintiffs' injury-to-bodily-integrity claims under MCR 2.116(C)(8). Summary disposition is proper under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "For purposes of reviewing a motion for summary disposition under MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). A motion under MCR 2.116(C)(8) may only be granted "where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004) (quotation marks and citation omitted). This Court reviews constitutional questions de novo. *Associated Builders & Contractors v Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016).

A. GENERAL PRINCIPLES OF CONSTITUTIONAL TORTS

"Typically, a constitutional tort claim arises when a governmental employee, exercising discretionary powers, violates constitutional rights personal to a plaintiff." *Duncan v Michigan*, 284 Mich App 246, 270; 774 NW2d 89 (2009), rev'd on other grounds 486 Mich 1071 (2010). The Michigan Supreme Court has held that "[a] claim for damages against the state arising from [a] violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987). "The first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself." *Marlin v Detroit (After Remand)*, 205 Mich App 335, 338; 517 NW2d 305 (1994) (quotation marks and citation omitted).

Following *Smith*, this Court held that to establish a violation of the Constitution, a plaintiff must show that the state action at issue (1) deprived the plaintiff of a substantive constitutional right and (2) was executed pursuant to an official custom or policy. *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996), citing *Monell v New York City Dep't of Social Servs*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). The Court further directed that "[t]he policy or custom must be the moving force behind the constitutional violation in order to establish liability." *Carlton*, 215 Mich App at 505.

We note at the outset that the Court of Claims articulated the proper test before engaging in a thorough analysis of the viability of plaintiffs' constitutional tort claim for injury to bodily integrity. However, we must review the matter de novo, giving no deference to the lower court decision, in order to determine whether defendants were entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Thus, before we may decide whether it is appropriate to recognize a cause of action under the Due Process Clause of the Michigan Constitution for violation of plaintiffs' rights to bodily integrity, we must first determine whether plaintiffs have alleged facts that, if proved true, are sufficient to establish such a violation.

B. SUBSTANTIVE RIGHT TO BODILY INTEGRITY

The Due Process Clause of the Michigan Constitution provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. "The due process guarantee of the Michigan Constitution is coextensive with its federal counterpart." *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013). "The doctrine of substantive due process protects unenumerated fundamental rights and liberties under the Due Process Clause of the Fourteenth Amendment." *Gallagher v City of Clayton*, 699 F3d 1013, 1017 (CA 8, 2012), citing *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997).

"The substantive component of due process encompasses, among other things, an individual's right to bodily integrity free from unjustifiable governmental interference." *Lombardi v Whitman*, 485 F3d 73, 79 (CA 2, 2007); see *Glucksberg*, 521 US at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to bodily integrity . . . ."); *Alton v Texas A&M Univ*, 168 F3d 196, 199 (CA 5, 1999) ("[T]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process.") (quotation marks and citation omitted). As early as 1891, the United States Supreme Court recognized that "[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). The Court has since recognized a liberty interest in bodily integrity in circumstances involving such things as abortions, *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), end-of-life decisions, *Cruzan v Dir, Missouri Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990), birth control decisions, *Griswold v Connecticut*, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965), corporal punishment, *Ingraham v Wright*, 430 US 651; 97 S Ct 1401; 51 L Ed 2d 711 (1977), and instances in which individuals are subject to dangerous or invasive procedures that restrain their personal liberty, see, e.g., *Rochin v California*, 342 US 165; 72 S Ct 205; 96 L Ed 183 (1952) (determining that a detainee's bodily integrity was violated when police ordered doctors to pump his stomach to obtain evidence of drugs); *Screws v United States*, 325 US 91; 65 S Ct 1031; 89 L Ed 1495 (1945) (holding that an individual's bodily integrity was violated when a citizen was beaten to death while in police custody).

Violation of the right to bodily integrity involves "an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective." *Rogers v Little Rock, Arkansas*, 152 F3d 790, 797 (CA 8, 1998), citing *Sacramento Co v Lewis*, 523 US 833, 847 n 8; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). In this case, plaintiffs clearly allege a nonconsensual entry of contaminated and toxic water into their bodies as a direct result of defendants' decision to pump water from the Flint River into their homes and defendants' affirmative act of physically switching the water source. Furthermore, we can conceive of no legitimate governmental objective for this violation of plaintiffs' bodily integrity. Indeed, defendants have not even attempted to provide one. However, to survive dismissal, the alleged "violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Villanueva v City of Scottsbluff*, 779 F3d 507, 513 (CA 8, 2015) (quotation marks and citation omitted); see also *Mettler Walloon, LLC v*

Melrose Twp, 281 Mich App 184, 198; 761 NW2d 293 (2008) (explaining that in the context of individual governmental actions or actors, to establish a substantive due-process violation, "the governmental conduct must be so arbitrary and capricious as to shock the conscience").

"Conduct that is merely negligent does not shock the conscience, but 'conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.' " *Votta v Castellani*, 600 F Appx 16, 18 (CA 2, 2015), quoting *Sacramento Co*, 523 US at 849. At a minimum, proof of deliberate indifference is required. *McClendon v City of Columbia*, 305 F3d 314, 326 (CA 5, 2002). A state actor's failure to alleviate "a significant risk that he should have perceived but did not" does not rise to the level of deliberate indifference. *Farmer v Brennan*, 511 US 825, 838; 114 S Ct 1970; 128 L Ed 2d 811 (1994). To act with deliberate indifference, a state actor must " 'know[] of and disregard[] an excessive risk to [the complainant's] health or safety.' " *Ewolski v City of Brunswick*, 287 F3d 492, 513 (CA 6, 2002), quoting *Farmer*, 511 US at 837. "The case law . . . recognizes official conduct may be more egregious in circumstances allowing for deliberation . . . than in circumstances calling for quick decisions . . . ." *Williams v Berney*, 519 F3d 1216, 1220-1221 (CA 10, 2008).

We agree with the Court of Claims' conclusion that "[s]uch conduct on the part of the state actors, and especially the allegedly intentional poisoning of the water users of Flint, if true, may be fairly characterized as being so outrageous as to be 'truly conscience shocking.' " *Mays*, unpub op at 28. Plaintiffs allege that defendants made the decision to switch the city of Flint's water source to the Flint River after a period of deliberation, despite knowledge of the hazardous properties of the water. Additionally, plaintiffs allege that defendants neglected to conduct any additional scientific assessments of the suitability of the Flint water for use and consumption before making the switch, which was conducted with knowledge that Flint's water treatment system was inadequate. According to plaintiffs' complaint, various state actors intentionally concealed scientific data and made false assurances to the public regarding the safety of the Flint River water even after they had received information suggesting that the water supply directed to plaintiffs' homes was contaminated with Legionella bacteria and dangerously high levels of toxic lead. At the very least, plaintiffs' allegations are sufficient to support a finding of deliberate indifference on the part of the governmental actors involved here.

Plaintiffs have alleged facts sufficient to support a constitutional violation by defendants of plaintiffs' right to bodily integrity.[16] We therefore proceed to consider whether the deprivation of rights resulted from implementation of an official governmental custom or policy.

[16] Defendants ask this Court to rely on an extrajurisdictional opinion, *Coshow v City of Escondido*, 132 Cal App 4th 687, 709-710; 34 Cal Rptr 3d 19 (2005), as support for the conclusion that plaintiffs' right to bodily integrity is not implicated in the context of public drinking water because the Due Process Clause does not guarantee a right to contaminant-free drinking water. While the California court noted that "the right to bodily integrity is not coextensive with the right to be free from the introduction of an allegedly contaminated substance in the public drinking water," *id*. at 709, it did not hold that the introduction of

C. OFFICIAL CUSTOM OR POLICY

"[T]his Court has held that liability for a violation of the state constitution should be imposed on the state only where the state's liability would, but for the Eleventh Amendment, render it liable under the standard for local governments as set forth in 42 USC 1983 and articulated in [*Monell*]." *Reid v Michigan*, 239 Mich App 621, 628; 609 NW2d 215 (2000). Thus, the state and its officials will only be held liable for violation of the state Constitution " 'in cases where a state "custom or policy" mandated the official or employee's actions.' " *Carlton*, 215 Mich App at 505, quoting *Smith*, 428 Mich at 642 (BOYLE, J., concurring in part). Official governmental policy includes "the decisions of a government's lawmakers" and "the acts of its policymaking officials." *Johnson v Vanderkooi*, 319 Mich App 589, 622; 903 NW2d 843 (2017) (quotation marks and citation omitted). See also *Monell*, 436 US at 694 (stating that a governmental agency's custom or policy may be "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy"). A "single decision" by a policymaker or governing body "unquestionably constitutes an act of official government policy," regardless of whether "that body had taken similar action in the past or intended to do so in the future[.]" *Pembaur v Cincinnati*, 475 US 469, 480; 106 S Ct 1292; 89 L Ed 2d 452 (1986). In *Pembaur*, the United States Supreme Court explained:

> To be sure, "official policy" often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However . . . a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the [government] is equally responsible whether that action is to be taken only once or to be taken repeatedly. [*Id*. at 480-481.]

The Court clarified that not all decisions subject governmental officers to liability. *Id*. at 481. Rather, it is "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id*. at 483.

contaminated substances could never form the basis of a claim for injury to bodily integrity. Additionally, this Court finds *Coshow* unpersuasive as factually dissimilar. The alleged "contaminant" in that case was fluoride, which is frequently introduced into water systems. *Coshow* did not address whether substantive due-process protections might be implicated in the case of intentional introduction of known contaminants by governmental officials, and its reasoning is inapplicable here.

The facts of this case as plaintiffs allege, if true, are sufficient to support the conclusion that their constitutional claim of injury to bodily integrity arose from actions taken by state actors pursuant to governmental policy. Plaintiffs allege that various aspects of Flint's participation in the KWA project and the interim plan to provide Flint residents with Flint River water during the transition were approved and implemented by the Governor, the State Treasurer, the emergency managers, and other state officials, including officials employed by the DEQ. These allegations implicate the state and city defendants, state officers, and authorized decision-makers in the adoption of particular courses of action that ultimately resulted in violations of plaintiffs' substantial rights. Likewise, as the Court of Claims observed,

> the alleged decisions of various state officials to defend the original decision to switch to using the Flint River as a water source, to resist a return to the Detroit water distribution system, to downplay and discredit accurate information gathered by outside experts regarding lead in the water supply and elevated lead levels in the bloodstreams of Flint's children, and to continue to reassure the Flint water users that the water was safe and not contaminated with lead or Legionella bacteria, played a role in the alleged violation of plaintiffs' constitutional rights . . . . [*Mays*, unpub op at 27.]

Plaintiffs allege a coordinated effort involving various state officials, including multiple high-level DEQ employees, to mislead the public in an attempt to cover up the harm caused by the water switch. If these allegations are proved true, they also support the conclusion that governmental actors, acting in their official roles as policymakers, considered a range of options and made a deliberate choice to orchestrate an effort to conceal the awful consequences of the water switch, likely exposing plaintiffs and other water users to unnecessary further harm. The allegations in plaintiffs' complaint are therefore sufficient to establish a violation of constitutional rights arising from the implementation of official policy.

D. AVAILABILITY OF DAMAGE REMEDY

Because plaintiffs' allegations, if proved true, are sufficient to sustain a claim for injury to bodily integrity, we must determine whether this case is one for which it is appropriate to recognize a damage remedy for the state's violation of Article 1, § 17, of the 1963 Michigan Constitution. We conclude that this is such a case.

As our appellate courts have done, the Court of Claims correctly addressed the propriety of an inferred damage remedy under the multifactor balancing test first articulated in an opinion by Justice BOYLE in *Smith*, 428 Mich at 648 (BOYLE, J., concurring in part). See, e.g., *Jones v Powell*, 462 Mich 329, 336-337; 612 NW2d 423 (2000); *Reid*, 239 Mich App at 628-629. To apply the test, we consider the weight of various factors, including, as relevant here, (1) the existence and clarity of the constitutional violation itself, (2) the degree of specificity of the constitutional protection, (3) support for the propriety of a judicially inferred damage remedy in any "text, history, and previous interpretations of the specific provision," (4) "the availability of another remedy," and (5) "various other factors" militating for or against a judicially inferred damage remedy. See *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part).

We have already determined that plaintiffs have set forth allegations to establish a clear violation of the Michigan Constitution. Like the Court of Claims, we conclude that the first factor weighs in favor of a judicially inferred damage remedy. However, Justice BOYLE rightly opined that the protections of the Due Process Clause are not as "clear-cut" as specific protections found elsewhere in the Constitution. *Id*. at 651. Michigan appellate courts have acknowledged that the substantive component of the federal Due Process Clause protects an individual's right to bodily integrity, see, e.g., *People v Sierb*, 456 Mich 519, 527, 529; 581 NW2d 219 (1998); *Fortune v City of Detroit Pub Sch*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2004 (Docket No. 248306), p 2, but this Court is unaware of any Michigan appellate decision expressly recognizing the same protection under the Due Process Clause of the Michigan Constitution or a stand-alone constitutional tort for violation of the right to bodily integrity. Although our Due Process Clause is interpreted coextensively with the Due Process Clause of the United States Constitution, *Cummins v Robinson Twp*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009), we do not believe that the federal courts' application and interpretation of the right to bodily integrity provides an appropriate degree of claim specificity under our own prior jurisprudence. We therefore conclude that the second and third factors weigh slightly against recognition of a damage remedy for the injuries alleged.

In considering the fourth factor, the availability of an alternate remedy, we note that we agree with the Court of Claims' conclusion that the question posed is whether plaintiffs have any *available* alternate remedies against these specific defendants. See *Jones*, 462 Mich at 335-337 (contrasting claims against the state and state officials with claims against municipalities and individual municipal employees). Thus, at this stage of the proceedings, the fact that plaintiffs might be pursuing causes of action in another court is largely irrelevant. We proceed to determine whether plaintiffs are presented with alternative avenues for pursuit of remedies for the violations alleged.

It seems clear that a judicially imposed damage remedy for the alleged constitutional violation is the only available avenue for obtaining *monetary* relief. A suit for monetary damages under 42 USC 1983 for violation of rights granted under the federal Constitution or a federal statute cannot be maintained in any court against a state, a state agency, or a state official sued in his or her official capacity because the Eleventh Amendment affords the state and its agencies immunity from such liability. *Howlett v Rose*, 496 US 356, 365; 110 S Ct 2430; 110 L Ed 2d 332 (1990); *Bay Mills Indian Community v Michigan*, 244 Mich App 739, 749; 626 NW2d 169 (2001). The state and its officials also enjoy broad immunity from liability under state law. "[T]he elective or highest appointive executive official of all levels of government" is absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority." MCL 691.1407(5).[17] It is undisputed that this applies to the Governor, *Duncan*, 284 Mich App at 271-272, and for the reasons

[17] MCL 141.1560(1) of the Local Financial Stability and Choice Act, MCL 141.1541 *et seq*., specifically grants emergency managers immunity from liability as provided in MCL 691.1407, which grants complete immunity to "the elective or highest appointive executive official of all levels of government . . . ."

articulated by the Court of Claims, we conclude that it also applies to the city defendants for actions taken in their official roles as emergency managers, see *Mays*, unpub op at 37-40. Absent the application of a statutory exception, state agencies are also "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); *Duncan*, 284 Mich App at 266-267. Governmental employees acting within the scope of their authority are immune from tort liability unless their actions constitute gross negligence, MCL 691.1407(2), and even if governmental employees are found liable for gross negligence, the state may not be held vicariously liable unless an exception to governmental immunity applies under the GTLA. *Yoches v Dearborn*, 320 Mich App 461, 476-477; 904 NW2d 887 (2017), citing MCL 691.1407(1). Further, there is no exception to governmental immunity for intentional torts committed by governmental employees exercising their governmental authority, *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 328; 869 NW2d 635 (2015), and governmental employers may not be held liable for the intentional tortious acts of their employees, *Payton v Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995).

We have already determined that plaintiffs' alleged constitutional violations occurred as a result of policy implementation by defendants in their official capacities. Like the Court of Claims, we hold on the basis of the aforementioned principles that "the state, its agencies, and the Governor and former emergency managers acting in an official capacity, are not 'persons' under 42 USC 1983 and enjoy sovereign immunity under the Eleventh Amendment and statutory immunity under MCL 691.1407 from common law claims, [and] plaintiffs have no alternative recourse to enforce their respective rights against them." *Mays*, unpub op at 42, citing *Jones*, 462 Mich at 335-337.

Defendants argue for the first time on appeal that plaintiffs' constitutional tort claims, arising from plaintiffs' alleged exposure to toxic drinking water, may be vindicated under the federal Safe Drinking Water Act (SDWA), 42 USC 300f *et seq*., and the Michigan Safe Drinking Water Act (MSDWA), MCL 325.1001 *et seq*. Defendants do not cite specific provisions of the statutes to support their argument. Generally, this Court will not address issues that were not raised in or addressed by the trial court, *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 330; 539 NW2d 774 (1995), or those that are insufficiently briefed, *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). However, we would note that while the SDWA contains a citizen-suit provision allowing for a private action against any person violating its terms, the statutory scheme provides for injunctive relief only. *Boler v Earley*, 865 F3d 391, 405-406 (CA 6, 2017), citing 42 USC 300j-8. The MSDWA, as defendants concede, does not contain a citizen-suit provision.

Contrary to defendants' assertion, the SDWA and its Michigan counterpart do not provide a legislative scheme for vindication of the alleged constitutional violations that would " 'militate against a judicially inferred damage remedy' " under *Jones*. *Jones*, 462 Mich at 337, quoting *Smith*, 428 Mich at 647 (BOYLE, J., concurring in part). Indeed, in a related federal case, the Sixth Circuit Court of Appeals considered whether Congress intended for the SDWA to preclude remedies for constitutional violations and concluded that it did not. *Boler*, 865 F3d at 409. The court explained:

> Under some circumstances, actions that violate the SDWA may also violate the . . . Due Process Clause. The Defendants argue that this is necessarily the case, and that the Plaintiffs' [constitutional] claims could not be pursued without showing a violation of the SDWA. But as noted, that is often not the case, particularly where the SDWA does not even regulate a contaminant harmful to public drinking water users. The contours of the rights and protections of the SDWA and those arising under the Constitution, and a plaintiff's ability to show violations of each, are "not . . . wholly congruent." This further supports the conclusion that Congress did not intend to foreclose [constitutional claims under 42 USC 1983] by enacting the SDWA. [*Id*. at 408-409 (citation omitted).]

Additionally, neither the SDWA nor the MSDWA addresses the conduct at issue in this case, which includes knowing and intentional perpetuation of exposure to contaminated water as well as fraudulent concealment of the hazardous consequences faced by individuals who used or consumed the water. These statutes therefore do not provide an alternative remedy for plaintiffs' claim of injury to bodily integrity.

We note here that plaintiffs seek injunctive relief against several of the named defendants in a related federal court action. Plaintiffs' complaint in that action indicates that plaintiffs seek "prospective relief only" against the Governor and the state, but the complaint "describes the equitable relief sought as an order 'to remediate the harm caused by defendants [sic] unconstitutional conduct including repairs or [sic] property, [and] establishment of as [sic] medical monitoring fund . . . .' " *Mays*, unpub op at 35 n 11. Plaintiffs also seek an award of compensatory and punitive damages. The "availability" of these remedies remains to be seen, and as previously noted, the fact that plaintiffs seek alternative remedies does not affect our decision regarding the *availability* of alternative remedies. We will not opine on the merits of plaintiffs' federal cause of action. However, we agree with the Court of Claims' observation that "[d]evelpments in that and other Flint Water Crisis litigation, including the extent to which any 'equitable' relief awarded may essentially equate to an award of monetary damages, may impact this Court's future conclusions both with regard to the availability of alternative remedies and other matters, including the remedies, if any, that may be appropriate in this action." *Id*.

Defendants argue that this fourth factor must be considered dispositive and that the availability of any other remedy should foreclose the possibility of a judicially inferred damage remedy. Although the Supreme Court in *Jones*, 462 Mich at 337, stated that "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy," we agree with the Court of Claims' conclusion that the *Jones* Court's use of the word "only" referred to the sentence that followed, distinguishing claims against the state and specifically limiting the Court's holding to cases involving a municipality or an individual defendant. *Mays*, unpub op at 32, citing *Jones*, 462 Mich at 337. In *Smith*, Justice BOYLE described the availability of an alternative remedy only as a " 'special factor[] counselling hesitation,' . . . which militate[s] against a judicially inferred damage remedy." *Smith*, 428 Mich at 647 (BOYLE, J., concurring in part), quoting *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 480 US 388, 396; 91 S Ct 1999; 29 L Ed 2d 619 (1971). We therefore decline to hold that the availability of an alternative remedy acts as a complete bar to a judicially inferred damage remedy. However, given the cautionary nature of Justice BOYLE's language, we

conclude that this factor, if satisfied, must be strongly weighted against the propriety of an inferred damage remedy.

Finally, we agree with the Court of Claims' conclusion that it is appropriate to give significant weight "to the degree of outrageousness of the state actors' conduct as alleged by plaintiffs . . . ." *Mays*, unpub op at 43. If plaintiffs' allegations are proved true, "various state actors allegedly intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water, despite possessing scientific data and actual knowledge that the water supply reaching the taps of Flint water users was contaminated with Legionella bacteria and dangerously high levels of toxic lead . . . ." *Id*. We agree that the egregious nature of defendants' alleged constitutional violations weighs considerably in favor of recognizing a remedy.

On the basis of the totality of the circumstances presented, this Court holds that at this stage of the proceedings, it is appropriate to recognize a judicially inferred damage remedy for the injuries here alleged. Summary disposition of plaintiffs' injury-to-bodily-integrity claim is therefore inappropriate.

V. STATE-CREATED DANGER

On cross-appeal, plaintiffs argue that the Court of Claims erred when it granted defendants' motion for summary disposition of plaintiffs' constitutional claims under the state-created-danger doctrine. We disagree.

This Court has never before considered whether a cause of action for state-created danger is cognizable under Michigan law. However, plaintiffs assert that this Court may recognize such a cause of action arising from "the broad protections of the Due Process Clause of the Michigan Constitution . . . ." The Due Process Clause of the Michigan Constitution commands that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. This constitutional provision is nearly identical to the Due Process Clause of the United States Constitution, see US Const, Am XIV, § 1, and "[t]he due process guarantee of the Michigan Constitution is coextensive with its federal counterpart." *Grimes*, 302 Mich App at 530. "The substantive component of the due process guarantee 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' " *Id*. at 531, quoting *Glucksberg*, 521 US at 720. As the Court of Claims aptly explained, "[s]ubstantive due process protects the individual from arbitrary and abusive exercises of government power; certain fundamental rights cannot be infringed upon regardless of the fairness of the procedures used to implement them." *Mays*, unpub op at 19-20, citing *Sierb*, 456 Mich at 523. However, in general, "the due process clause does not require a state to protect its citizens' lives, liberty and property against invasion by private actors . . . [or] require a state to guarantee a minimum level of safety and security." *Markis v Grosse Pointe Park*, 180 Mich App 545, 554; 448 NW2d 352 (1989). Our courts have been reluctant to broaden the protections of the Due Process Clause without legislative guidance. *Sierb*, 456 Mich at 531-532; *Collins v Harker Heights*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (warning against expansion of "the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended").

Plaintiffs ask this Court to recognize and allow plaintiffs to pursue a cause of action under the so-called state-created-danger theory, first recognized by the United States Supreme Court in *DeShaney v Winnebago Co Dep't of Social Servs*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989). As the Court of Claims noted, "the very name of the theory, i.e. state-created danger, facially suggests that it could implicate what happened in Flint . . . ." *Mays*, unpub op at 24. However, the moniker "state-created danger" is somewhat misleading. The doctrine has been applied in all contexts as a narrow exception to the general rule that while the state may be held liable under the Due Process Clause for its own actions, the state has no affirmative obligation to protect people from *each other*. In *DeShaney*, the Court considered whether a minor who had been beaten by his father had been deprived of a due-process liberty interest by state social workers who failed to remove the minor from his father's custody despite receiving complaints of abuse. *DeShaney*, 489 US at 191. After noting that the Due Process Clause of the United States Constitution imposes no affirmative duty on the state to protect individuals from private violence, the Court recognized a necessary exception to this general rule in cases in which the state has undertaken some responsibility for an individual's care and well-being or in which the state has deprived an individual of the freedom to care for himself or herself:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. *In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means*. [*Id*. at 199-200 (citations omitted; emphasis added).]

The Court explained that it is only in "certain limited circumstances [that] the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals" acting other than on behalf of the state. *Id*. at 198. Applying the foregoing principles to the facts in that case, the *DeShaney* Court found no due-process violation by the state because the minor's injuries were sustained while he was in his father's custody, rather than in the custody of the state, and the danger of abuse had not been made greater by any affirmative action of the state. *Id*. at 201.

Although the United States Supreme Court did not explicitly adopt a cause of action for "state-created danger," various federal appellate courts have relied on the Court's language to support a constitutional claim for state-created danger under 42 USC 1983 and the Due Process

Clause of the United States Constitution. *McClendon*, 305 F3d at 330 (acknowledging that various federal circuit courts have "found a denial of due process when the state create[d] the . . . dangers faced by an individual") (quotation marks and citation omitted). See also *TD v Patton*, 868 F3d 1209, 1221-1222 (CA 10, 2017); *Kennedy v Ridgefield*, 439 F3d 1055, 1061-1062 (CA 9, 2006); *Bright v Westmoreland Co*, 443 F3d 276, 280-282 (CA 3, 2006); *Pena v DePrisco*, 432 F3d 98, 108-109 (CA 2, 2005); *Gregory v City of Rogers, Arkansas*, 974 F2d 1006, 1009-1010 (CA 8, 1992); but see *Doe v Columbia-Brazoria Indep Sch Dist*, 855 F3d 681, 688-689 (CA 5, 2017) (noting that a state-created-danger exception has not yet been recognized in the Fifth Circuit).

According to the principles announced by the United States Supreme Court in *DeShaney*, the state-created-danger exception applies in situations in which an individual in the physical custody of the state, by incarceration or institutionalization or some similar restraint of liberty, suffers harm from third-party violence resulting from an affirmative action of the state to create or make the individual more vulnerable to a danger of violence. So the state-created-danger theory arose, and so it has been consistently applied. Although the elements of a state-created-danger cause of action vary slightly between federal circuits, courts consistently require some third-party, nongovernmental harm either facilitated by or made more likely by an affirmative action of the state. See, e.g., *Patton*, 868 F3d at 1222 (recognizing a constitutional violation when a "state actor affirmatively act[s] to create or increase[] a plaintiff's vulnerability to danger from private violence") (quotation marks and citation omitted); *Gray v Univ of Colorado Hosp Auth*, 672 F3d 909, 921 (CA 10, 2012) (describing the state-created-danger theory as a "*narrow exception*, which applies only when a state actor affirmatively acts to create, or increase[] a plaintiff's vulnerability to, danger from private violence") (quotation marks and citation omitted); *Kneipp v Tedder*, 95 F3d 1199, 1208 (CA 3, 1996) (noting that a "third party's crime" is an element common to "cases predicating constitutional liability on a state-created danger theory"). Indeed, most federal appellate courts have adopted a test substantially similar to the one employed by the Sixth Circuit Court of Appeals, which enumerates the elements of a state-created-danger cause of action as follows:

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. [*Cartwright v City of Marine City*, 336 F3d 487, 493 (CA 6, 2003).]

Additionally, the Michigan Court of Appeals has applied the test articulated by the Sixth Circuit to claims brought under 42 USC 1983. See *Manuel v Gill*, 270 Mich App 355, 365-367; 716 NW2d 291 (2006), aff'd in part and rev'd in part 481 Mich 637 (2008); *Dean v Childs*, 262 Mich App 48, 53-57; 684 NW2d 894 (2004), rev'd in part on other grounds 474 Mich 914 (2005).

As previously discussed, the "first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is . . . to establish the constitutional violation itself." *Marlin*, 205 Mich App at 338 (quotation marks and citation omitted). In this case, defendants argue that plaintiffs' state-created-danger cause of action cannot be sustained

because plaintiffs have not alleged any actions by defendants that "created or increased the risk that . . . plaintiff[s] would be exposed to an act of violence by a third party." *Cartwright*, 336 F3d at 493. We agree. While plaintiffs suggest that harm committed by a third party is not a necessary element of a cause of action for state-created danger, no court that has recognized or applied the state-created-danger theory has done so in the absence of some act of private, nongovernmental harm. Indeed, plaintiffs acknowledge that, at the very least, the harm necessary to sustain a constitutional tort claim of state-created danger must spring from a source other than a state actor. Were this Court to recognize a cause of action for state-created danger arising from the Michigan Constitution, it would be narrow in scope and so limited.

In this case, plaintiffs have alleged harms caused directly and intentionally by state actors. This is simply not the sort of factual situation in which a claim for state-created danger, according to its common conception, may be recognized. The Court of Claims did not err when it concluded that, even if a state-created-danger cause of action is cognizable under Michigan law, plaintiffs have not alleged facts to support it. Summary disposition in favor of all defendants on plaintiffs' state-created-danger claim is therefore appropriate.

VI. INVERSE CONDEMNATION

Next, defendants argue that the Court of Claims erred by denying their motion for summary disposition of plaintiffs' inverse-condemnation claims. We disagree.

"Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation." *Wiggins v City of Burton*, 291 Mich App 532, 571; 805 NW2d 517 (2011), citing US Const, Am V; Const 1963, art 10, § 2. "A de facto taking occurs when a governmental agency effectively takes private property without a formal condemnation proceeding." *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 125; 680 NW2d 485 (2004). Inverse condemnation is " 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *In re Acquisition of Land—Virginia Park*, 121 Mich App 153, 158-159; 328 NW2d 602 (1982) (citation omitted). "Inverse condemnation can occur without a physical taking of the property; a diminution in the value of the property or a partial destruction can constitute a 'taking.' " *Merkur Steel Supply, Inc*, 261 Mich App at 125. Further,

> [a]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation. [*Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994) (quotation marks and citation omitted).]

"While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006) (quotation marks and citation omitted). "[A] plaintiff alleging inverse condemnation

must prove a causal connection between the government's action and the alleged damages." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004).

Stated simply, "a plaintiff alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 277; 792 NW2d 798 (2010). Further, "[t]he right to just compensation, in the context of an inverse condemnation suit for diminution in value . . . exists only where the landowner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated." *Spiek v Dep't of Transp*, 456 Mich 331, 348; 572 NW2d 201 (1998).

Plaintiffs allege that defendants made the decision to switch the city of Flint's water source from Lake Huron to the Flint River despite knowledge of the Flint River's toxic potential and the inadequacy of Flint's water treatment plant. Plaintiffs also allege that immediately after the switch was effected, toxic water flowed directly from the Flint River through the city's service lines to the water plant and then to plaintiffs' properties, where it caused physical damage to plumbing, water heaters, and service lines, leaving the infrastructure unsafe to use even after the delivery of toxic water was halted by the city's reconnection to the DWSD. According to plaintiffs, this damage resulted in reduced property values. Additionally, plaintiffs allege that various state actors concealed or misrepresented data and made false statements about the safety of Flint River water in an attempt to downplay the risk of its use and consumption. We agree with the Court of Claims' conclusion that "[t]he allegations are sufficient, if proven, to allow a conclusion that the state actors' actions were a substantial cause of the decline of the property's value and that the state abused its powers through affirmative actions directly aimed at the property, i.e., continuing to supply each water user with corrosive and contaminated water with knowledge of the adverse consequences associated with being supplied with such water." *Mays*, unpub op at 49.

Disputing the conclusion reached by the Court of Claims, defendants take specific issue with each element of plaintiffs' inverse-condemnation claim. First, defendants argue that plaintiffs have not alleged any affirmative action to support a claim of inverse condemnation because a failure to license, regulate, or supervise cannot be considered an affirmative act. It is true that "alleged misfeasance in licensing and supervising" does not constitute an affirmative action to support a claim for inverse condemnation. *Attorney General v Ankersen*, 148 Mich App 524, 562; 385 NW2d 658 (1986). However, plaintiffs have not alleged any failure to regulate or supervise; instead, plaintiffs have alleged an affirmative act of switching the water source with knowledge that such a decision could result in substantial harm. Defendants' argument in this regard is unsupported, and we therefore reject it. Further, the state defendants attempt to avoid responsibility for the action of switching Flint's water source by arguing that the city defendants alone made the decision and effectuated the switch. This argument, too, is unsupported. Plaintiffs have alleged both knowledge and action on the part of the state defendants, and while it may ultimately be discovered that the state defendants were not responsible for the injury suffered by plaintiffs, this Court here considers only the propriety of judgment as a matter of law and must therefore accept all of plaintiffs' well-pleaded allegations as true.

Defendants also argue that plaintiffs have not alleged that any actions taken by defendants were directly aimed at plaintiffs' property. Defendants compare the act of changing Flint's water supply to the city's affirmative act of removing adjacent residential neighborhoods and diminishing commercial owners' property values in *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). In that case, this Court held that no inverse condemnation had occurred because while the city's actions had affected the value of the plaintiffs' commercial property, the city had taken no deliberate action toward the commercial property that deprived the owners of their right to use the property as they saw fit. *Id*. According to defendants, the city's act of demolishing residential neighborhoods, as described in *Murphy*, represents a more egregious allegation of inverse condemnation than that leveled by plaintiffs here. As in *Murphy*, defendants argue, the government's actions merely *affected* plaintiffs' property.

Defendants' reliance on *Murphy* is misplaced. This is not a situation in which plaintiffs have alleged an incidental reduction in property value resulting from some unrelated administrative action by the government. Instead, plaintiffs allege deliberate actions taken by defendants that directly led to toxic water being delivered through Flint's own water delivery system *directly into* plaintiffs' water heaters, bathtubs, sinks, and drinking glasses, causing actual, physical damage to plaintiffs' property and affecting plaintiffs' property rights.

Finally, defendants argue that plaintiffs have not alleged a unique injury, different in kind from harm suffered by all persons similarly situated. According to defendants, plaintiffs' injury, while perhaps different in degree, is no different from the harm suffered by all property owners exposed to Flint River water during the switch. Although defendants argue that plaintiffs' injuries should be compared only to those suffered by other users of Flint River water, defendants have cited no direct authority for this assertion and, indeed, the assertion is not logically supported by the caselaw on which defendants rely.

In *Richards v Washington Terminal Co*, 233 US 546, 554; 34 S Ct 654; 58 L Ed 1088 (1914), an opinion that the state defendants argue supports their position, the United States Supreme Court held that the plaintiffs, residents situated near a railroad tunnel, could not state a claim of inverse condemnation for cracks in their homes caused by vibrations from nearby trains because risk of such harm, while varying in degree, is shared generally by anyone living near a train. However, as defendants acknowledge, the Court held that the plaintiffs could state a claim for inverse condemnation for damage caused by a fanning system within the tunnel that blew smoke and gases into their homes because this particular harm was suffered uniquely by the plaintiffs. *Id*. at 556. On review, we conclude that the *Richards* holding actually supports plaintiffs' contention that the harm alleged should be compared to the harm suffered by all other municipal water users, rather than compared to all other Flint water users. In *Richards*, the Court did not compare the plaintiffs with all owners of property near a *specific* train, but with all property owners, in general, who own property near *any* train.

Similarly, in *Spiek*, 456 Mich at 333-335, the plaintiffs, who were owners of residential property, alleged entitlement to compensation for damages caused to their property from dust, vibration, and fumes emanating from a newly constructed interstate expressway. The Michigan Supreme Court rejected the plaintiffs' claim because the damage to the plaintiffs' property was no different than the damage "incurred by all property owners who reside adjacent to freeways or other busy highways." *Id*. at 333. In *Spiek*, as in *Richards*, the Court compared the plaintiffs to

all similarly situated property owners, not just the owners of residential property adjacent to the newly constructed expressway at issue in that case.

It follows, therefore, that plaintiffs' injury must be compared to the harm suffered by municipal water users generally, rather than to the harm suffered by other users of Flint River water. As in *Richards* and *Spiek*, plaintiffs have alleged injuries unique among similarly situated individuals, i.e., municipal water users, caused directly by governmental actions that resulted in exposure of their property to specific harm.

Defendants also suggest that because they have taken no affirmative action directly aimed at plaintiffs' property, they cannot possibly have caused plaintiffs' injuries. However, defendants' argument rests on assumptions that this Court, for the reasons discussed, declines to accept. Questions of fact still exist that, if resolved in plaintiffs' favor, support each element of plaintiffs' inverse-condemnation claim. The Court of Claims therefore did not err when it concluded that summary disposition pursuant to MCR 2.116(C)(8) was, at this stage of the proceedings, inappropriate.

VII. OFFICIAL-CAPACITY CLAIMS

Finally, defendants argue that the Court of Claims erred by allowing plaintiffs to proceed with official-capacity claims against the Governor and defendant emergency managers. Again, we disagree.

Defendants argued in the lower court that official-capacity suits against governmental officials for constitutional violations are not recognized in Michigan and, as a matter of law, plaintiffs could not assert their constitutional tort claims against the Governor, Earley, or Ambrose. After considering defendants' argument, the Court of Claims concluded that the relevant caselaw did not preclude a nominal official-capacity constitutional tort claim against these defendants. Because this is a question of law, this Court's review is de novo. *In re Jude*, 228 Mich App 667, 670; 578 NW2d 704 (1998).

As previously discussed, the Michigan Supreme Court held in *Smith* that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, 428 Mich at 544. The *Jones* Court noted that "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy," and continued, explaining that "[t]hose concerns are inapplicable in actions against a municipality or an individual defendant. Unlike states and state officials sued in an official capacity, municipalities are not protected by the Eleventh Amendment." *Jones*, 462 Mich at 337.

The state defendants argue that with the above-cited language, the *Jones* Court acknowledged that state officials have the same immunity from suit under the Eleventh Amendment that the state has when they are sued in their official capacity—a legal "fiction" designed only "to promote the vindication of federal rights." Because the Eleventh Amendment does not apply in state courts, argue the state defendants, the term "official capacity," as employed by the *Jones* Court, has no parallel meaning under Michigan law.

The state defendants misread *Jones*. We agree with the Court of Claims' observation that the *Jones* Court's use of the term "only" derived from the fact that it was addressing claims

against municipalities and individual municipal employees, as distinguished from claims against the state or individual state officials who are afforded protection by the Eleventh Amendment. *Mays*, unpub op at 32. The *Jones* Court's conclusions do not preclude a constitutional tort claim against individuals. Rather, the *Jones* Court specifically contemplated the availability of official-capacity suits and was careful to evaluate the availability of alternative remedies against municipalities and municipal employees as "[u]nlike states and state officials sued in an official capacity . . . ." *Jones*, 462 Mich at 337. The Court of Claims correctly observed that "a proper reading of the pertinent caselaw compels the conclusion that the remedy allowed in *Smith*, while narrow, extends beyond the state itself to also reach state officials acting in their official capacity." *Mays*, unpub op at 32. Indeed, the *Jones* Court affirmed an opinion by the Court of Appeals that made even more clear that "the *Smith* rationale simply does not apply outside the context of a claim that *the state* (or a state official sued in an official capacity) has violated individual rights protected under the Michigan Constitution." *Jones*, 227 Mich App at 675.

We are also unconvinced by the state defendants' argument that Michigan's statutes governing governmental liability distinguish between governmental agencies and governmental officials and do not contemplate an official-capacity suit. Michigan courts have long recognized suits against state officials in their official capacities for claims arising outside of federal law. See, e.g., *Bay Mills Indian Community*, 244 Mich App at 748-749; *Jones v Sherman*, 243 Mich App 611, 612-613; 625 NW2d 391 (2000); *Carlton*, 215 Mich App at 500-501; *Lowery v Dep't of Corrections*, 146 Mich App 342, 348-349; 380 NW2d 99 (1985); *Abbott v Secretary of State*, 67 Mich App 344, 348; 240 NW2d 800 (1976). And Michigan law does, in fact, contemplate official-capacity suits against governmental officials. Indeed, the very provisions of the CCA on which the state defendants rely to argue that emergency managers are not state officers expressly contemplate suits against "an officer, employee, or volunteer of this state . . . acting, or who reasonably believes that he or she is acting" in his or her official capacity. MCL 600.6419(7).

Contrary to the state defendants' assertions, nothing in the provisions of our state's governmental liability statutes[18] precludes an official-capacity suit, particularly one predicated on allegations of constitutional violations. The governmental immunity statutes do not apply where, as here, a plaintiff has alleged violations of the Michigan Constitution. *Smith*, 428 Mich at 544 ("Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court

[18] The state defendants instruct this Court to "see" MCL 691.1407(1), (2), and (5), provisions of the GTLA, but provide nothing in the way of argument supporting their conclusory assertion that the GTLA "in no way contemplate[s] an 'official capacity' claim." "It is not sufficient for a party simply to announce a position . . . and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments . . . ." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation marks and citation omitted). In any case, the state defendants' argument that the GTLA precludes official-capacity suits is belied by an immediately adjacent provision of the GTLA, which specifically contemplates causes of action "against an officer, employee, or volunteer of a governmental agency for injuries to persons or property . . . ." MCL 691.1408(1).

action."). The fact that no statute specifically authorizes a suit against the Governor in his official capacity is irrelevant for the same reason. The liability of the state and its officers for constitutional torts is not something the state must affirmatively grant via statute.

> Under *Smith*, [a state] defendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions. [*Burdette*, 166 Mich App at 408-409.]

Liability of the state and its officers for constitutional torts is simply inherent in the fact that the Constitution binds even the state government as the preeminent law of the land.

Plaintiffs have sued Governor Snyder and emergency managers Earley and Ambrose in their official capacities only, rather than as individual governmental employees. As the Court of Claims noted, " 'a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.' " *Mays*, unpub op at 33, quoting *Will v Mich Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 2d 45 (1989); see also *McDowell v Warden of Mich Reformatory at Ionia*, 169 Mich 332, 336; 135 NW 265 (1912). In other words, if plaintiffs are successful in their causes of action against the Governor, Earley, or Ambrose, plaintiffs must look to recover monetary damages from the state. Plaintiffs' official-capacity suits cannot result in individual liability. As the Court of Claims carefully noted, the Governor, Earley, and Ambrose are merely nominal party defendants, "such that the state and the state alone . . . [is] accountable for any damage award that may result in this action." *Mays*, unpub op at 33-34.

Official-capacity suits are not merely redundant, as the city defendants suggest. Rather, official-capacity suits, while directed at the state, facilitate an efficient and expedient judicial process. In order to prevail on a constitutional-violation claim against the state, plaintiffs are required to prove that the violation of their rights occurred by virtue of a state custom or policy that governmental actors carried out in the exercise of their official authority. Plaintiffs have leveled specific allegations against the Governor, Earley, and Ambrose, and these defendants' participation in the judicial process is required. It is logical, if not necessary, to name the policymakers as nominal defendants in this case. Should plaintiffs' case be tried before a jury, a clear distinction between plaintiffs' allegations against the state as a party and against the Governor, Earley, and Ambrose in their official capacities will aid the jury in understanding the precise issues involved and prevent unnecessary confusion. Given our courts' history of recognizing official-capacity suits and the Court of Claims' care in explaining that these suits are nominal only, we conclude that the Court of Claims did not err by allowing plaintiffs' official-capacity suits against the Governor and the city defendants to proceed.

VIII. CONCLUSION

In sum, we hold that the Court of Claims did not err when it denied defendants' motion for summary disposition of plaintiffs' constitutional injury-to-bodily-integrity and inverse-condemnation claims. Questions of fact remain that, if resolved in plaintiffs' favor, could establish each of these claims and plaintiffs' compliance with, or relief from, the statutory notice

requirements of the CCA. Further, for the reasons described, the Court of Claims did not err when it allowed plaintiffs to proceed with their claims against the Governor, Earley, Ambrose, and all other defendants in the Court of Claims, or when it granted summary disposition in favor of defendants on plaintiffs' constitutional claim for injury to bodily integrity.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

STATE OF MICHIGAN

COURT OF APPEALS

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees/Cross-Appellees/Cross-Appellants,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants/Cross-Appellees,

and

DARNELL EARLEY and JERRY AMBROSE,

Defendants/Cross-Appellants/Cross-Appellees.

FOR PUBLICATION
January 25, 2018

No. 335555
Court of Claims
LC No. 16-000017-MM

Advance Sheets Version

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and

No. 335725
Court of Claims
LC No. 16-000017-MM

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants,

and

DARNELL EARLEY and JERRY AMBROSE,

Defendants-Appellants.

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 335726
Court of Claims
LC No. 16-000017-MM

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

Advance Sheets Version

and

DARNELL EARLEY and JERRY AMBROSE,

Defendants.

Before: JANSEN, P.J., and FORT HOOD and RIORDAN, JJ.

RIORDAN, J. (*dissenting*).

I dissent.

In this consolidated appeal arising out of a putative class action brought by plaintiff water users and property owners in the city of Flint, Michigan, defendants appeal and plaintiffs cross-appeal the Court of Claims' opinion and order granting in part and denying in part defendants' motions for summary disposition. Because plaintiffs failed to comply with MCL 600.6431(3), the notice provision of the Court of Claims Act (CCA), MCL 600.6401 *et seq.*, I would reverse

the trial court's order and remand with direction for the trial court to enter an order summarily disposing of all plaintiffs' claims and dismissing the case.

We review de novo motions for summary disposition and questions of statutory interpretation. *Kline v Dep't of Transp*, 291 Mich App 651, 653; 809 NW2d 392 (2011). "When this Court interprets statutory language, our primary goal is to discern the intent of the Legislature as expressed in the text of the statute." *Grimes v Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). "Where the language is clear and unambiguous, our inquiry ends and we apply the statute as written." *Id*.

Governmental agencies in Michigan engaged in governmental functions are generally immune from tort liability. *Kline*, 291 Mich App at 653. It is "the sole province of the Legislature to determine whether and on what terms the state may be sued . . . ." *McCahan v Brennan*, 492 Mich 730, 732; 822 NW2d 747 (2012). Consequently, "because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed." *Id*. at 736. This Court in *Rusha v Dep't of Corrections*, 307 Mich App 300, 307; 859 NW2d 735 (2014), held that the Legislature is permitted to "impose reasonable procedural requirements, such as a limitations period, on a plaintiff's available remedies even when those remedies pertain to alleged constitutional violations." Considering that the Legislature has the sole power to impose such restrictions, "the judiciary has no authority to restrict or amend those terms." *McCahan*, 492 Mich at 732. Thus, "no judicially created saving construction is permitted to avoid a clear statutory mandate." *Id*. at 733. When the language of a limiting statute is straightforward, clear, and unambiguous, it must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007).

"One such condition on the right to sue the state is the notice provision of the Court of Claims Act, MCL 600.6431." *McCahan*, 492 Mich at 736. That notice provision, in pertinent part, states:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
>
> * * *
>
> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action. [MCL 600.6431.]

The Michigan Supreme Court has been clear that the judiciary is not permitted to "reduce the obligation to comply fully with statutory notice requirements." *McCahan*, 492 Mich at 746-

747. It is well established that MCL 600.6431 "is an unambiguous condition precedent to sue the state, and a claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted." *Rusha*, 307 Mich App at 307 (quotation marks and citations omitted). Michigan appellate courts have consistently held that "the Legislature may impose reasonable procedural requirements, such as a limitations period, on a plaintiff's available remedies even when those remedies pertain to alleged constitutional violations." *Id*. Despite the Michigan Supreme Court's proclamation that courts are not permitted to "reduce the obligation to comply fully with statutory notice requirements," *McCahan*, 492 Mich at 746-747, this Court in *Rusha* indicated, in dicta, that there was an exception to the enforcement of the notice provision "where it can be demonstrated that [such provisions] are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Rusha*, 307 Mich App at 311 (quotation marks and citation omitted).

Plaintiffs assert, and the Court of Claims agreed, that they should be excused from the strict requirements of MCL 600.6431(3) because the enforcement of that statute would be "so harsh and unreasonable in [its] consequences that [it would] effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Id*. (quotation marks and citation omitted). First, I am not convinced that the application of the strict requirements of the notice provision in this case should be considered "harsh" or "unreasonable" given the sequence of events that took place leading up to plaintiffs' filing of the instant litigation and the number of overlapping lawsuits previously filed concerning this matter.

As discussed later in this opinion, plaintiffs had numerous indications that they were suffering harm within six months of the water source switch and so could have reasonably filed their notice of intent in a timely manner. Even construing the notice provision of the CCA and *Rusha* in a manner most beneficial to plaintiffs, there is nothing in the law that establishes that a harsh-and-unreasonable-consequences claim would result and accrue only when the alleged wrongdoer publically, and clearly, admits that it acted improperly. Further, any action by defendants in attempting to cover their errors does not change the fact that there were abundant events—unrelated, and temporally prior, to defendants' cover-up—that should have alerted plaintiffs to their potential claims. In fact, plaintiffs' pleadings show that those events, or red flags, did alert plaintiffs to their potential claims.

Second, to the extent that this Court in *Rusha* may have attempted to create, whether as dicta or otherwise, a "harsh and unreasonable" consequences exception to MCL 600.6431(3), that Court was barred from doing so by the Michigan Supreme Court in *McCahan*, 492 Mich at 733. In *McCahan*, the Supreme Court clearly and unequivocally held that the notice requirements found in MCL 600.6431 "must be interpreted and enforced as plainly written and that *no judicially created saving construction is permitted to avoid a clear statutory mandate*." *Id*. (emphasis added). This Court, in both *Rusha* and now in the present appeal, is "duty-bound to follow [the Michigan Supreme Court's] construction" of MCL 600.6431 found in *McCahan*. *Rowland*, 477 Mich at 202. Quite frankly, if the Legislature had intended the notice provision to be potentially excused by the possibility of harsh and unreasonable consequences, it would have written that into the statute. It chose not to do so, and as the law now stands, there is no such exception. Accordingly, in the instant matter, the majority errs, and the Court of Claims erred, by judicially creating one. See *id*.; see also *McCahan*, 492 Mich at 733.

Plaintiffs also assert that the notice provision in MCL 600.6431 should have been tolled due to defendants' alleged fraudulent concealment. Because the plain language of MCL 600.6431 unambiguously establishes that the Legislature did not intend to have the notice period tolled in such a manner, I disagree. The fraudulent-concealment exception is a legislatively created exception to statutes of limitations and does not apply to the notice provision at issue. The statute-of-limitations tolling exception is codified as part of the Revised Judicature Act (RJA), MCL 600.101 *et seq*., in MCL 600.5855, which states:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

This statutory section permits the tolling of a statutory limitations period for two years if the defendant has fraudulently concealed the existence of a claim. *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

The Legislature, in crafting the CCA, imported the fraudulent-concealment exception into its statute-of-limitations provision. MCL 600.6452(2). In pertinent part, MCL 600.6452, which deals with the "limitation of actions," provides that "the provisions of RJA chapter 58, relative to the limitation of actions, shall also be applicable *to the limitation prescribed in this section*." MCL 600.6452(2) (emphasis added). The notice provision of the CCA does not contain a similar clause. See MCL 600.6431. The language provided in MCL 600.6452(2) clearly delineates that it is *only* to apply to the section on limitations. Statutes of limitations and notice requirements are not the same thing. *Rusha*, 307 Mich App at 311-312. By incorporating the fraudulent-concealment exception from the RJA into the notice requirement of the CCA, the majority ignores the clear intent expressed by the Legislature that such provisions of the RJA apply only "to the limitation prescribed in" MCL 600.6452—the CCA's statute-of-limitations section. Given that the "statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

Therefore, considering that plaintiffs were not entitled to toll or except themselves from the statutory notice period found in the CCA, it is next necessary to consider whether plaintiffs' claims complied with MCL 600.6431(3). Because they did not, I would reverse.

Plaintiffs argue, and the Court of Claims and majority agree, that there were questions of fact regarding when plaintiffs' claims accrued, so summary disposition was premature. I disagree. It is undisputed that plaintiffs did not file a separate notice of intent before filing the instant litigation. Instead, plaintiffs filed the instant claim on January 21, 2016. Therefore, in order to have complied with the notice provision of the CCA, MCL 600.6431(3), "the happening of the event giving rise to the cause of action" must have occurred within six months of January 21, 2016, which raises an interesting question that the majority failed to consider: What is "the happening of the event" in the context of the CCA notice provision? Notably,

MCL 600.6431(1) provides that "[n]o claim may be maintained against the state unless the claimant, *within 1 year after such claim has accrued*, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim . . . ." (Emphasis added.) Meanwhile, MCL 600.6431(3) provides for a shorter time to file a written claim or notice thereof when the action is one "for property damage or personal injuries." However, instead of using the term "accrued" for describing when the notice clock begins to run, MCL 600.6431(3) uses the phrase "the happening of the event giving rise to the cause of action."

In *McCahan*, 492 Mich at 738, the Michigan Supreme Court addressed an issue involving subtle differences in language between Subsections (1) and (3) of MCL 600.6431. Specifically, the plaintiff in that case argued that "her claim, being a claim for personal injury, is not subject to the dictates or bar-to-claims language of MCL 600.6431(1)." The Court held that "subsection (3) must be read in light of subsection (1) . . . ." *McCahan*, 492 Mich at 738. The Court provided the following reasoning:

> When undertaking statutory interpretation, the provisions of a statute should be read reasonably and in context. Doing so here leads to the conclusion that MCL 600.6431 is a cohesive statutory provision in which all three subsections are connected and must be read together. Subsection (1) sets forth the general notice required for a party to bring a lawsuit against the state, while subsection (3) sets forth a special timing requirement applicable to a particular subset of those cases—those involving property damage or personal injury. Subsection (3) merely reduces the otherwise applicable one-year deadline to six months. In this regard, subsection (3) is best understood as a subset of the general rules articulated in subsection (1), and those general rules and requirements articulated in subsection (1)—including the bar-to-claims language—continue to apply to *all* claims brought against the state unless modified by the later-stated specific rules. [*Id*. at 739 (citation omitted).]

In sum, the Court concluded that "the only substantive change effectuated in subsection (3) is a reduction in the timing requirement for specifically designated cases." *Id*. at 741. Stated differently, "subsection (3) . . . does not . . . displace the specific requirements of subsection (1) other than the timing requirement for personal injury or property damage cases." *Id*. at 742 (emphasis omitted).

Considering the Court's reasoning and conclusion in *McCahan*, it is only logical to hold that the phrase "the happening of the event giving rise to the cause of action" used in Subsection (3) means the same thing as "accrued" used in Subsection (1). After all, if the phrase was interpreted differently, such an interpretation would run afoul of the Michigan Supreme Court's holding that "the only substantive change effectuated in subsection (3) is a reduction in the timing requirement for specifically designated cases." *Id*. at 741. Therefore, in order to determine if plaintiffs' claim being filed on January 21, 2016, satisfies MCL 600.6431(3), it is necessary to determine when plaintiffs' claims accrued. See *id*.

Notably, the CCA does not define when a claim accrues. For the reasons discussed when deciding that the fraudulent-concealment provision of the RJA should not apply to the notice provision of the CCA, I believe it would be inappropriate to adopt the definition of "accrued"

from that same set of statutes. See MCL 600.5827 (establishing that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results"). Instead, it would be far more prudent to adopt the definition of "accrued" used by this Court in *Cooke Contracting Co v Dep't of State Highways #1 (On Rehearing)*, 55 Mich App 336, 338; 222 NW2d 231 (1974), citing *Oak Constr Co v Dep't of State Highways*, 33 Mich App 561; 190 NW2d 296 (1971), which provided that "a claim accrues only when suit may be maintained thereon." It only stands to reason that a "suit may be maintained" when a plaintiff knows, or should know, about a potential claim. See *Cooke Contracting Co*, 55 Mich App at 338.[1] This, however, is not to say that plaintiffs are permitted to wait to discover the full range of wrongs and harms committed by defendants before plaintiffs' claims accrued. The Michigan Supreme Court has been clear that "[a]dditional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action." *Frank v Linkner*, 500 Mich 133, 155; 894 NW2d 574 (2017). In sum, if plaintiffs first knew or had reason to know of their potential claims against defendants on or after July 21, 2015, then their notice was timely and their claims are permitted. MCL 600.6431(3). If the accrual date fell anywhere before July 21, 2015, plaintiffs failed to comply with MCL 600.6431(3) and their claims must be dismissed. See *McCahan*, 492 Mich at 742.

Given that the Court of Claims considered this motion before discovery, this Court must rely on the well-pleaded facts in plaintiffs' pleadings. In examining those facts attested to by plaintiffs, it is clear that plaintiffs had reason to know that they had suffered harm due to defendants' actions—and therefore their claims accrued—well before July 21, 2015. The amended complaint provides that a study commissioned by the city of Flint was published in 2011 and "cautioned against the use of the Flint River water and the dormant Flint Water Treatment Plant . . . ." The original complaint clarified that the "report stated that the water from the Flint River was highly corrosive and could not be used safely without an anti-corrosive agent to prevent lead, copper and other heavy metals from leaching into the water . . . ." Despite that report, on April 25, 2014, "Flint water users began receiving Flint River water from their taps . . . ." In their amended complaint, plaintiffs identify their class as "Flint water users . . . who, since April 25, 2014, were and continue to be injured in person and property because they were exposed to highly dangerous conditions . . . ." Subsequently, "[i]n June 2014, citizen complaints about contaminated water continued," with "[m]any Flint water users report[ing] that the water was making them ill." The amended complaint acknowledged that "[o]n October 13, 2014, the General Motors Corporation [(GM)] announced that it would no longer use Flint River water in its Flint plant." Plaintiffs referred to that move by GM as "clear evidence of serious and significant danger . . . ." In January 2015, a Flint homeowner contacted the United States Environmental Protection Agency (EPA) regarding the water, informing the federal agency "that she and her family members were becoming physically ill from exposure to the Flint River water coming from her tap." "On February 17, 2015, Flint water users staged public demonstrations demanding that Flint re-connect with [Detroit's water system]." According to the amended

[1] I note that the Court of Claims has reached a similar conclusion. See *Gulla v Snyder*, unpublished opinion of the Court of Claims, issued September 13, 2017 (Docket No. 16-000298-MZ), pp 3-6.

complaint, the "Flint City Council voted to re-connect to Detroit's water system" on March 25, 2015.

Plaintiffs also provide additional details in their original complaint that are helpful to this analysis. The original complaint notes that the Flint water failed tests administered by the EPA shortly after the switch due to elevated levels of total Trihalomethanes (TTHM), a known carcinogen. In August 2014, the water tested positive for *E. coli*. Flint issued "boil water" advisories in September 2014. Plaintiffs then alleged that for the eight months following the switch, or until December 25, 2014, "Flint water users, including Plaintiffs and/or Plaintiff Class members, expressed their concerns about water quality in multiple ways, including letters, emails and telephone calls to Flint and [Michigan Department of Environmental Quality (MDEQ)] officials, the media and through well publicized demonstrations on the streets of Flint." In January 2015, plaintiffs "received a notice . . . stating that the water was not in compliance with the federal Safe Drinking Water Act because of unlawful levels of TTHMs." The complaint asserted that "[o]n January 20, 2015, citizen protests mounted[,] fueled in part by encouragement from environmental activist Erin Brockovich and her associate, water expert Bob Bowcock." Plaintiffs alleged that those purported experts "offered advice and assistance to the protesting Flint water users due to the serious concerns about the health risks they presented by this toxic water."

The original and amended complaints provide that after July 21, 2015, additional events occurred regarding governmental response to the allegedly toxic water. In August 2015, Dr. Mona Hanna-Attisha, a pediatrician, published a study that "noted and disclosed a dramatic and dangerous spike in elevated blood lead levels in a large cohort of Flint children corresponding with the time of exposure to the highly corrosive Flint River water." Although she published that report in August 2015, she based it on data she accumulated from "blood drawn [from Flint children] in the second and third quarter of 2014." In September 2015, Professor Marc Edwards issued a report that revealed lead in the water supply and that "the Flint River water was 19 times more corrosive than the water pumped . . . by the Detroit water system." On October 8, 2015, Governor Snyder acknowledged that the Flint water was toxic and unsafe, and on October 16, 2015, "Detroit city Water began to flow to Flint water users."

Plaintiffs' claims clearly accrued before July 21, 2015. Prior to that date, it was public knowledge that Flint water users had been switched over to water from the Flint River as of April 25, 2014. The original and amended complaints are rife with statements establishing that from the moment the water was switched, residents indicated that there was something wrong with the water, that it was making them feel ill, and that it looked and smelled foul. Specifically, plaintiffs' pleadings provided that for the eight months following the switch, Flint residents complained "about water quality in multiple ways, including letters, emails and telephone calls to Flint and MDEQ officials, the media and through well publicized demonstrations on the streets of Flint." Indeed, before 2014 ended, Flint issued a "boil water" advisory regarding bacteria in the water, Dr. Hanna-Attisha discovered that children in Flint showed "a dramatic and dangerous spike in elevated blood lead levels," and GM "announced that it would no longer use Flint River water in its Flint plant." Plaintiffs in their pleadings stated that GM's decision was "clear evidence of serious and significant danger . . . ." The residents' complaints of feeling ill and Dr. Hanna-Attisha's data established that plaintiffs' purported class was undisputedly suffering harm before 2014 ended. Further, plaintiffs should have known of the potential claim,

considering that there were "well publicized" public demonstrations occurring and GM had acted in a manner that revealed "clear evidence of serious and significant danger . . . ." Although plaintiffs may have become better informed regarding the specific harms suffered after 2014 and the damages arising therefrom, those more recently discovered harms did "not reset the accrual date or give rise to a new cause of action." *Frank*, 500 Mich at 155. Therefore, by the end of 2014, plaintiffs knew or should have known that they and their property were being harmed by defendants' decision to use water from the Flint River. See *Cooke Contracting Co*, 55 Mich App at 338.

Even giving plaintiffs the benefit of the doubt and observing the events of 2015, plaintiffs' pleadings clearly establish that July 21, 2015, was far past any date when plaintiffs knew or should have known of their claims. In January 2015, the residents of Flint held a public demonstration where notable public figures were present, and the complaint alleges that those public figures expressed their belief that the water was toxic and harmful. In that same month, Flint residents received a notice in the mail stating that their drinking water was not compliant with federal standards due to the presence of TTHMs. Plaintiffs also allege that a Flint resident called the EPA in January 2015 to specifically express that the water was making her and her family ill. Another public demonstration took place in February 2015. In March 2015, responding to concerns regarding the water, the Flint City Council publically voted to reconnect to the Detroit water system. All these facts alleged by plaintiffs plainly support the conclusion that plaintiffs knew or should have known of their claims well before July 21, 2015.

Finally, I would take judicial notice of complaints filed against Flint in the Genesee Circuit Court, Case No. 15-101900-CZ, and the United States District Court for the Eastern District of Michigan, Case No. 2:15-cv-12084-SJM-DRG.[2] In those cases, both filed before July 21, 2015—on June 5, 2015, and July 6, 2015, respectively—the plaintiff, Coalition for Clean Water, alleged that the residents of Flint had been denied their "basic and human right to clean drinking water – free of contamination" and that "usage of the Flint River as a primary source of drinking water has and continues to pose a major and serious threat to the health, safety and welfare of the residents of the City of Flint[.]" The complaints relied on many of the same facts as the present case, including that the water failed EPA tests, Flint issued notices of that failure, public demonstrations had been conducted involving Erin Brockovich, and GM had switched water sources. Melissa Mays, the lead plaintiff in the instant case, signed both those complaints after attesting that she had "read the foregoing complaint and . . . declare[d] that statements contained therein are true to the best of [her] knowledge, information and belief."

Therefore, by the very latest possible date, July 6, 2015, plaintiffs knew or should have known that they and their property were being harmed by defendants' decision to use water from the Flint River. See *Cooke Contracting Co*, 55 Mich App at 338. They specifically

[2] This Court is permitted to take judicial notice of public records. *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015), citing MRE 201; see also *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 73; 858 NW2d 751 (2014).

acknowledged that they were aware of the possibility of such a claim by taking the affirmative step to file lawsuits in other courts. Therefore, their complaint filed on January 21, 2016—more than six months after any reasonably possible, and actually occurring, accrual date—did not satisfy the strict requirements of the CCA's notice provision. MCL 600.6431(3). Consequently, all of plaintiffs' claims are barred, and summary disposition should have been entered in favor of defendants in the Court of Claims. *McCahan*, 492 Mich at 742.

I am cognizant of the fact that the statutory notice provision of the CCA as applied in this case creates what plaintiffs have characterized as a harsh result. The harshness of that result, however, lies partially at the feet of plaintiffs. As discussed earlier, within six months of the switch from Detroit water to Flint River water, it was publically known that something was wrong with the water and that the water was making people sick. The public generally was aware of this danger, especially after GM, within six months of the switch, moved back to Detroit water due to concerns regarding the corrosive nature of the Flint River water. Thus, within six months of the change, the residents of Flint were aware that an emergency manager, who was appointed by Governor Snyder and answerable only to state officials, made the decision to switch water sources and that the new water was corrosive to metal and making people sick. In other words, the Flint residents knew that Michigan officials were involved in the decision to obtain water from the Flint River and suspected that the water was causing harm.

Plaintiffs have not, and likely cannot, explain why they did not file the notice of intent to file a claim at that moment. Any argument that they did not have enough information to actually sustain a claim against defendants due to defendants' alleged fraudulent concealment is not persuasive. The notice requirement of the CCA does not require that a complaint be filed within six months of the claim accruing; it only requires that a "notice of intention to file a claim . . . stat[e] the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained . . . ." MCL 600.6431(1). That notice of intent would not have been held to the more demanding requirements of a complaint pursuant to MCR 2.111(B), would not have been subject to a motion for summary disposition pursuant to MCR 2.116(C)(8) for failure to state a claim for which relief could be granted, and would not have been subject to a motion for sanctions for the filing of a frivolous complaint due to plaintiffs' alleged lack of adequate information to sustain such a complaint at that time pursuant to MCR 2.114(F). In sum, there was little risk involved in filing a notice of intent pursuant to MCL 600.6431(3).

Had the notice of intent been filed in a timely manner, which "is a minimal imposition, especially considering that § 6431 allows the filing of statutory notice in lieu of filing an entire claim," *Rusha*, 307 Mich App at 310, plaintiffs then would have had the benefit of the entire three-year statutory period of limitations of the CCA. MCL 600.6452(1). Thus, plaintiffs would not have had to file a complaint for the instant action until, at the earliest, April 25, 2017, which was three years after the switch occurred. By that time, plaintiffs, according to their arguments, would have been fully aware of the factual circumstances and alleged deceit by defendants. Furthermore, because they would then be dealing with the statute of limitations instead of the notice provision, they would have had the benefit of asserting that the limitations period had been tolled due to defendants' fraudulent concealment. MCL 600.6452(2); MCL 600.5855. Consequently, had plaintiffs been reasonably diligent in their attempts to comply with the notice

provision of the CCA, any claimed inequitable results required in this case could have been entirely avoided.

Even so, it is not within this Court's power to cure legislation of what a party may believe to be inequitable results. See *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 472; 838 NW2d 736 (2013) ("When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so . . . .") (quotation marks and citation omitted). Furthermore, as the Michigan Supreme Court succinctly stated:

> [O]ur judicial oaths require judges to enforce the *Legislature's* policy choices, even when we may personally find the outcome in a given case "unjust," "inequitable," "jarring," "hyper-technical," or contrary to what we intuit an "average person's" sensibilities to be. As this Court has stated, it is a mere "caricature" of judicial restraint for a judge "to assert that her common sense should be allowed to override the language of the statute."
>
> . . . [O]ur judicial duty is more than to "almost always" apply a statute's unambiguous words to the facts presented. The law must *always* guide the outcome, regardless of whether a judge perceives that outcome in a given case to be formalistic or "inequitable."
>
> This Court has prided itself on its commitment to the rule of law, and in particular a return to fundamental constitutional principles regarding judicial interpretation of statutes. This has been true even where, as a personal matter, a Justice may be discomforted by the ultimate result. But in a government characterized by the separation of powers, the people of this state elect judges to enforce the law as the political branches of our government have given it to us.
>
> The rule of law requires a judge to be subservient to the law itself, not the law to be subservient to the personal views of a judge. [*Progressive Mich Ins Co v Smith*, 490 Mich 977, 979-980 (2011) (YOUNG, C.J., concurring) (citations omitted).]

Furthermore, even though the proper application of the notice provision in the instant case would have resulted in what plaintiffs characterize as harsh consequences, I am not unaware of the fact that the residents of Flint are not left entirely without remedies. In the United States District Court for the Eastern District of Michigan, certain Flint water users have survived summary judgment on their "substantive due process bodily integrity" claims against Flint, the emergency managers Earley and Ambrose, as well as several other individual actors. *Guertin v Michigan*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued June 5, 2017 (Case No. 16-cv-12412). An appeal of that decision is currently pending before the United States Court of Appeals for the Sixth Circuit. In an opinion staying the Eastern District proceedings pending the outcome of the appeal, the court noted that plaintiffs sought to amend their complaint to allege a class action against city, state, and individual defendants. *Guertin v Michigan*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 30, 2017 (Case No. 16-cv-12412). Furthermore, a

class action with Mays as the lead plaintiff was filed against state officials, along with others, and was removed to the Eastern District after originally being filed in state court. That case was consolidated with other class actions in federal court. *Mays v Governor*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 14, 2017 (Case No. 17-cv-10996). The *Guertin* opinion indicated that the Eastern District had "consolidated all other pending Flint water class-action litigation as a single suit in *Waid v. Snyder*, Case No. 16-cv-10444." *Guertin*, unpub op issued October 30, 2017, at 2. Finally, there is also a "state-law professional negligence proposed class action" on behalf of the Flint water users against "civil engineering companies responsible for upgrading Flint's municipal water system." *Mason v Lockwood, Andrews & Newnam, PC*, 842 F3d 383, 385-386 (CA 6, 2016). The Sixth Circuit remanded that case to state court pursuant to the local-controversy exception to the Class Action Fairness Act, 28 USC 1332(d)(4)(A). *Id*. at 386.

While this is by no means an exhaustive list of the multitude of claims that have arisen from the Flint water crisis, it demonstrates that, despite the results required by strict application of MCL 600.6431(3), plaintiffs and their purported class are not left without a remedy.[3]

I would reverse and remand for entry of summary disposition in favor of defendants on all of plaintiffs' claims.

/s/ Michael J. Riordan

[3] A review of public records shows that in federal court alone there have been approximately 50 individual lawsuits and seven class actions filed arising out of the Flint water crisis.

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT
COUNTY OF GENESEE

COALITION FOR CLEAN WATER, a
Non-profit organization,

Plaintiffs,

V.

CITY OF FLINT, a municipal entity, and
CITY OF FLINT ADMINISTRATOR NATASHA
HENDERSON, In her official capacity

Defendants.

CASE NO.: 15-101900-CZ

HON. ARCHIE L. HAYMAN
P-37516

TRACHELLE C. YOUNG (P63330)
Attorney for Plaintiffs
2501 N. Saginaw Street
Flint, MI 48505
(810) 239-6302
(810) 234-7357 Fax
trachelleyoung@gmail.com

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge. I do not know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this court.

COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF AND VIOLATION OF PLAINTIFFS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

NOW COMES Plaintiffs, COALITION FOR CLEAN WATER, by and through their attorney, Trachelle C. Young, & Assoc., P.L.L.C., by attorney Trachelle C. Young, and for their Complaint, states as follows:

Parties, Jurisdiction and Venue

1. Plaintiffs, Coalition for Clean Water (Coalition), is a Michigan nonprofit organization, based in Genesee county, Michigan and organized for the purpose of

promoting and ensuring safe, contaminate free drinking water through education, social actions and legal actions designed to eliminate unlawful and illegal actions by all governmental officials, representatives and entities at all levels of government. Coalition for Clean Water is comprised of multiple civic groups, including but not limited to, Concerned Pastors for Social Action, Water You Fighting For, Democracy Defense League Water Task Force, Flint Water Class Action Group, Dr. Laura Sullivan, Phd, 1st Ward City Councilman Eric Mays.

2. Defendant, City of Flint (hereinafter "Flint"), is a city organized under the constitution and laws of the State of Michigan and is a political subdivision of the State of Michigan.
3. Defendant, City of Flint Administrator Natasha Henderson, (hereinafter "City Administrator"), is the City's Chief Administrative Officer operating under expanded powers that give her ultimate day to day control over the City.
4. This matter concerns the City's failure to pass the Environmental Protection Agency's (EPA) locational running annual average (LRAA) of the most recent four quarters water quality tests, thereby subjecting the citizens of Flint to unhealthy, contaminated drinking water.
5. Venue and jurisdiction are proper in this Court because plaintiffs seeks declaratory and injunctive relief to cease the City of Flint's current methods, acts, and/or practices of utilizing the Flint River as the primary source for drinking water as unlawful due to the proven deleterious health effects on the residents of the City and to require the City to return to using water from the Detroit system, at least

temporarily, before the offer from the Detroit Water and Sewerage System Department (DWSD) expires.

6. Jurisdiction is also proper pursuant to Title XIV of the Public Health Service Act a/k/a The Safe Drinking Water Act (Act), Section 1449, which allows citizens to bring suit against any person or agency allegedly in violation of provisions of the Act.

General Allegations

7. That the Coalition incorporates by reference allegations 1 through 6 as though fully set forth herein.
8. That the City of Flint had purchased its drinking water from DWSD for the past thirty plus (30+) years under an original thirty (30) year contract executed in 1964, which continued on a year to year basis.
9. That Genesee County purchased its water from the City to get the Lake source water from DWSD.
10. That the City of Flint River has not been used as a primary source for drinking water in fifty (50) years.
11. That the Flint River hadn't been used as a primary source for drinking water due to a number of threats, including but not limited to improperly disposed of chemicals; animal wastes; pesticides; human wastes; wastes injected deep underground; and naturally-occurring substances affecting surface water.
12. That the source of the water purchased from Detroit was Lake Huron.
13. That Lake water has lower levels of total organic carbon than river water.
14. That Lake water requires a different treatment process than River water.

15. That the City of Flint paid approximately 1 million dollars per month to DWSD for its delivery of the water.

16. That in 2010, the City began disclosing its interest in joining the Karegnondi Water Authority (KWA), which sought to build new pipelines from Lake Huron to the County of Genesee and the City of Flint.

17. That the overall cost of building this pipeline is approximately 600 million dollars and it is not estimated to be completed until sometime towards the end of 2016.

18. That on April 26, 2010, the Flint City Council voted to join the KWA.

19. That on October 26, 2010, the KWA Board of Trustees met for the first time with representatives from the incorporating Cities of Flint (**Mayor Dayne Walling**), Lapeer (City Manager Dale Kerbyson), and County Drain Commissioners of Genesee (Jeff Wright), Lapeer (John Cosens) and Sanilac (Gregory L. Alexander). Walling was elected chair.

20. That on April 16, 2013, Flint's Emergency Manager, Ed Kurtz, ended the City's contract with Detroit by signing a contract with the KWA.

21. That in response to Kurt's actions, on April 17, 2013, the DWSD gave the City of Flint a one (1) year notice based on the termination of its contract to supply water to the City of Flint, effective April 17, 2014.

22. That on October 16, 2013, ten additional trustees were added to the board of trustees: former state House Minority Leader Richard Hammel; **Johsua Freeman**, Flint City Council; Larry Green, Mt. Morris Township supervisor; Ted Henry, Genesee County commissioner; Micki Hoffman, Grand Blanc Township supervisor; Steve Landaal, president of Landaal Packaging; Sheldon Neeley, Flint City Council; Thomas Svcek,

Swartz Creek Department of Public Works director; Tracey Tucker, Flint Township building administrator; and Paula Zelenko, mayor of Burton.

23. That on April 25, 2014, the City of Flint began utilizing the Flint River as its primary source of drinking water.

24. That upon switching to the Flint River water, the City of Flint failed the EPA's LRAA water quality tests on May 21, 2014, August 21, 2014 and November 20, 2014.

25. That as a result of these failed tests, the City of Flint was required to send out Violation Notices to all the residents that stated their water system recently violated a drinking water standard and people who have a severely compromised immune sytem, have an infant, or are elderly may be at increased risk and should seek advice about drinking water from their health providers. See *Exhibit A*

26. This required Notice further stated that the violation was based on elevated levels of total trihalomethanes (TTHM), and that people who drink water containing trihalomethanes in excess of the MCL over many years may experience problems with their liver, kidneys, or central nervous system, and may have an increased risk of getting cancer. See *Exhibit A*

27. That TTHM is an odorless, colorless disinfection byproduct, the fallout of chlorinating water.

28. That in June 2014, Flint emergency manager Darnell Earley finalized the sale of an Eastern Genesee County 9-mile section of water pipeline to Genesee County for $3.9 million.

29. That Genesee County Drain Commissioner Jeff Wright has stated he would allow the City to utilize that 9-mile section of water pipeline if the City goes back to water usage from DSWD.
30. That upon information and belief, that 3.9 million was given directly to the KWA as part of the City's investment in that pipeline.
31. That compliance with EPA standards is calculated using a LRAA of the most recent four (4) quarters.
32. That the City of Flint Mayor admitted the City underestimated the challenges of treating River water.
33. That the City of Flint failed to properly prepare for the transition to River water as a primary drinking source and recklessly endangered the health, safety and welfare of its residents as a result thereof.
34. That in attempting to treat the River water, the City of Flint over chlorinated the water, which directly caused the elevated levels of TTHM.
35. That because the City failed the November 20, 2014 LRAA test, it *cannot* be in compliance with the EPA standards until it passes the February 2015, May 2015, August 2015 and November 2015 tests.
36. That upon information and belief, the City passed the February 2015 tests, was out of compliance at two of the eights sites in March 2015 and passed the May 2015 LRAA tests, but they still required to send out the EPA Violation Notices.
37. That the Notices sent out by the City of Flint appear deceptive and contradicting in that it contains two pages: the first is a colorful, attention grabbing sheet that starts with "**We are pleased to report that the City of Flint water is safe and meets U.S.**

Environmental Protection Agency guidelines…" in bold print (See *Exhibit B*); the second sheet is in black and white and is the actual Violation Notice stating that the City is still out of compliance with the maximum contaminant levels for its drinking water, which is not in bold print and the same health warnings and cautions apply. See *Exhibit C*

38. That due to a major community concern, all of the local major grocery stores lowered the cost of bottled water, there have been and continue to be community giveaways of bottled water for low income residents that can't afford to purchase their water, the Flint hospitals began using and offering bottled water, the Department of Human Service's Bureau of Child and Adult Licensing recommended to the Genesee Intermediate School District, which runs a Head Start program in Flint, to use bottled water and said children have since been given bottled, The Flint Children's Museum has stopped the flow of Flint water at its fountains and the list goes on.
39. That there were three boil water advisories in a 22-day span in the summer of 2014 after positive tests for total coliform and fecal coliform bacteria in the Flint River.
40. That in October 2013, General Motors (GM) shut off its usage of Flint River water at its Flint Engine Operations on West Bristol Road because the water was causing corrosion of its engines and the agreement states GM is not required to return to the usage with the City of Flint until it is back to using water from Lake Huron through the KWA.
41. That members of the Coalition, including those with severely compromised immune systems, infants and elderly, have suffered severe health problems that have been

directly connected to the unhealthy, contaminated River water, including but not limited to mysterious rashes on local children, unexplained illnesses and sick pets.

42. That many other residents have complained of health issues as a result of lead, odor, discoloration, turbidity, particles and sediments in the system.

43. That in February 2015, several concerned citizens contacted activist Erin Brockovich seeking assistance with the growing major health impacts of the Flint River usage.

44. That Erin Brockovich did send an expert from Integrated Resource Management, Inc., Bob Bowcock – free of charge – to review the operations at the Flint Water Plant and the quality of the water being distributed.

45. That Mr. Bowcock prepared and submitted to Mayor Walling and the Flint City Council a report dated February 17, 2015, which made several recommendations on the source supply evaluation, the Water Treatment Plant, the Distribution System Operations and Budget & Rate Concerns. See *Exhibit D*

46. That the City of Flint then paid a consulting company, Veolia, $40 thousand dollars (at $900/hr) in March 2015 to conduct a short term assessment of the operation of the water plant, distribution system and customer communications programs and make recommendations.

47. That the Veolia report made numerous long term and costly recommendations, including but not limited to operational changes and improvements, changes in water treatment, procedures and chemical dosing, adjustments in how current technologies are being used, increased maintenance and capital spending, increased training and improved customer communications. See *Exhibit E*

48. That the City of Flint's Capital Improvement Plan states the City needs to invest $50 million dollars to improve its water plant, properly train its plant personnel and to replace pipes.

49. That the City has disclosed its plans to date to invest $5 million dollars in the following manner:

    a. $900,000 in water main leak protection;
    b. $1.6 million fro a Granular Activated Carbon (GAC) Filter at the plant meant to treat the River water;
    c. $2.1 million to replace pipes along Dupont Street (@ $1 million per mile);
    d. $400,000 in water treatment improvements.

50. That likewise, drinking water that is not properly treated or disinfected, or which travels through an improperly maintained distribution system, may also pose a health risk.

51. That the City of Flint received a $2 million dollar grant and Emergency Manager Jerry Ambrose was allowed to restructure $2 million dollars in water loan debts that would have gone to the EPA.

52. That as a result, $4 million of the $5 million being invested did not come from the excessive water rates the City of Flint charges.

53. That upon information and belief, the City has collected approximately $30 million dollars from its water rates to its customers since it began using the Flint River as the primary source.

54. That upon information and belief, the City has a net $10 million in the water fund from the excessive water rates.

55. That this initial $5 million investment doesn't begin to touch the major investment needed to bring the City of Flint Plant to the point it needs to be.

56. That the KWA line will be bringing untreated Lake water to the Flint Water Plant where it will need to be treated.

57. That whether it's River water, Lake water or a combination of both, the City of Flint's Plant needs the necessary and recommended investments made before it is allowed to continue as the treatment plant for the City of Flint's primary source of drinking water.

58. That the City of Flint charges the highest water rates in the county of Genesee and the rates are almost eight times higher than the national average.

59. That MCL 141.121 requires a municipality to base its water rates at the reasonable cost of delivering the service.

60. That the City's water rates have not declined since it began using the Flint River as a primary source of drinking water, but have increased in spite of the fact that the City is not only saving the $1 million dollars it paid Detroit monthly, but also continues to collect from Plaintiffs and its residents.

61. That the unhealthy quality of the water combined with the excessive rates charged by the city have caused residents to move out of the City of Flint or simply go without water consumption.

62. That the human body is 60% water, water is needed for proper circulation respiration and converting food to energy and every human needs water to live.

63. That the residents of the City of Flint have converged to Flint City Council Meetings demanding something be done about the unhealthy River water.

64. That many residents have held protests and marches to protest the poor quality of the expensive Flint River water.

65. That in response to the cry of the people, the Flint City Council voted and passed a Resolution "to do all things necessary" to reconnect Flint to DWSD, which passed 7-1.

66. That the President of the Flint City Council, Josh Freeman, (who sits on the KWA Board) was the lone vote against the Resolution.

67. That Mayor Dayne Walling (Chair of the KWA Board) is also against reconnecting to DWSD.

68. That both Councilman Freeman and Mayor Walling have positions on the KWA Board that have placed them in a conflict of interest of being either unable or unwilling to represent the interests of the constituents they were elected to represent.

69. That the previous Emergency Manager Gerald Ambrose, pursuant to PA 436, gave the City Administrator the authority and ability to implement executive and legislative directives and policies of the Mayor and City Council subject only to a Receivership Advisory Transition Board (Board).

70. That the City Administrator has chosen not to acknowledge, respect or follow the duly adopted resolution by the City Council.

71. That the City of Flint residents and citizens are the only people in the entire County of Genesee that are being forcibly subjected to Flint River water against their will.

72. That Sue McCormick, Director of DWSD, made a personal appearance to the Flint City Council in addition to stating in a letter to Flint that Detroit would sell treated lake water to Flint for a fixed monthly rate of $846,700 and $14.92 per 1,000 cubic feet without a long term deal and with no strings attached.

73. That the offer from DWSD has an expiration of **June 30, 2015** and time is of the essence. See *Exhibit F*

COUNT 1-CLAIM FOR DECLARATORY RELIEF

74. That the Coalition incorporates by reference allegations 1 through 73 as though fully set forth herein.

75. That a dispute has arisen between the Plaintiffs and Defendants regarding the condition of the City of Flint's water, the City's ability to properly and effectively run the City of Flint Water Plant, whether the water plant operators and personnel are properly trained and certified, the City's ability to treat River water and/or Lake water and whether the City has violated the Safe Drinking Water Act.

76. That Plaintiffs maintain the City of Flint's usage of the Flint River as a primary source of drinking water has and continues to pose a major and serious threat to the health, safety and welfare of the residents of the City of Flint, that the City has not made the necessary investment in the water plant that has been recommended by two experts, that the water plant operators and personnel have not received the recommended and necessary training and certifications to run the plant effectively, that until the City satisfies the EPA standard of passing the four quarterly LRAA tests, it has not proven its ability to effectively treat River and/or Lake water, and that the City has violated the Safe Drinking Water Act.

77. That the Safe Drinking Water Act mandates that states have programs to certify water system operators and make sure that new water systems have the technical, financial, and managerial capacity to provide safe drinking water.

78. That by underestimating the challenges of treating River water, the City of Flint misled the State and failed to have the technical, financial and managerial capacity to provide safe drinking water when they switched from DWSD's lake treated water.

79. That the City of Flint has also failed to demonstrate their ability to properly treat lake water once the transition is made to the KWA.

80. That the decision to switch to the KWA, which led to the termination of the contract with DWSD was never subject to input from the citizens of Flint and they were effectively disenfranchised from any input in such a major decision.

81. That Plaintiffs and the residents of the City of Flint have suffered at the hands of the City of Flint and the City Administrator, both of whom are not acting in the best interest of the residents and citizens of Flint.

82. That the residents and citizens of Flint have a basic and human right to clean drinking water – free of contamination.

83. That an actual and existing controversy exists between the Plaintiffs and the Defendants as to their legal relations in respect to the above identified matters and a declaratory judgment is necessary to guide the Plaintiffs and Defendant's future conduct and in order to preserve and protect the Plaintiffs legal rights.

84. For the reasons set forth above, Plaintiffs seek a declaratory judgment that the City of Flint's usage of the Flint River as a primary source of drinking water has and continues to pose a major and serious threat to the health, safety and welfare of the residents of the City of Flint, that the City has not made the necessary investment in the water plant that has been recommended by two experts, that the water plant operators and personnel have not received the recommended and necessary training and certifications to run the plant effectively, that until the City satisfies the EPA standard of passing the four quarterly

LRAA tests, it has not proven its ability to effectively treat River and/or Lake water, and that the City has violated the Safe Drinking Water Act and such other relief as the Court deems just and appropriate.

COUNT II. INJUNCTIVE RELIEF

85. That the Coalition incorporates by reference allegations 1 through 84 as though fully set forth herein.

86. Should the Court grant plaintiff declaratory relief, and to the extent that it may be necessary, Plaintiffs seek an Temporary and/or Permanent Injunction restraining the Defendants from continuing to utilize the City of Flint Water Plant to treat the Flint River as the City's primary source of drinking water until it can satisfactorily show compliance with either of the expert recommendations by Veolia or Bob Bowcock and from taking or continuing any action contrary to the declaration of rights sought by Plaintiffs and to appoint a Receiver to run and operate the City water plant until further Order of the Court.

87. That Plaintiffs further seek a Temporary Injunction requiring the City of Flint to utilize the DWSD as its primary source of drinking water until such time as it can demonstrate total compliance with the EPA's quarterly LRAA tests.

88. That if the Court finds that the City can continue run the water plant without the necessary and proper training and personnel and attempt to treat the River water at the expense and against the will of the residents and elected officials, Plaintiffs will suffer immediate and irreparable harm to their health, safety and welfare, particularly the most vulnerable individuals (those with compromised immune systems, the elderly and the infants).

89. That in order to ensure that complete and effective relief is afforded to the Plaintiffs, and should the Court grant Plaintiffs request for declaratory judgment, the public interest would be best served by issuance of a temporary and/or permanent injunction granting such relief as the Court deems just and necessary to effectuate the declaratory relief granted.

WHEREFORE, Plaintiff pray that this Honorable Court will declare the rights and responsibilities of the parties hereto, issue a declaratory judgment and Order Temporary and/or Permanent Injunctive Relief as requested.

COUNT III – VIOLATION OF PLAINTIFF'S FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

90. That the Coalition incorporates by reference allegations 1 through 89 as though fully set forth herein.
91. That the City of Flint has a legal obligation to provide municipal water service to its residents.
92. That the Safe Drinking Water Act requires that the water provided meet certain safety standards.
93. That safe drinking water is a necessity to live.
94. That Plaintiffs have a liberty or property interest in receiving safe drinking water to which procedural due process rights apply.
95. That the 14th Amendment to the US Constitution prohibits states from depriving citizens of "life, liberty, or property" without "due process of law.
96. That Plaintiffs were disenfranchised from the decision to terminate the contract with DWSD by the City's Emergency Manager Ed Kurtz and there was no procedure that accompanied that unilateral decision that allowed input, protests, hearings, concerns or questions by the people that were directly impacted.

97. Said decision resulted in Plaintiffs, residents and citizens of the City being deprived of safe drinking water for a substantial period of time and notice was not reasonably calculated, under all the circumstances, to apprise Plaintiffs and residents of the pendency of the action and afford them an opportunity to present their objections.

98. That no "Notices" were sent to the Plaintiffs or residents of Flint explaining the different type of water source, any preparation for the transition, the proposed treatment process or the capability of the plant and the personnel to treat any water, let alone River water.

99. That if the

100. Defendant Equity did attempt to collect monies that Plaintiffs did not owe and created confusion or misunderstanding with respect to the authority of a salesperson, representative or agent to negotiate the final terms of a transaction, in violation of MCL 445.903(1)(m).

101. Defendant Equity has caused a probability of confusion or misunderstanding as to the legal rights, obligations or remedies of a party to a transaction, in violation of MCL 445.903(1)(n).

102. Defendant Equity has engaged in the practice of making liens against real property of homeowners for association dues, assessments, costs and attorney fees associated with the collection of those fees that are grossly excessive, and unless restrained by this court, will continue to engage in such practice.

WHEREFORE , Plaintiffs, by and through their attorney, respectfully requests that this Honorable Court find that Plaintiffs have a liberty or property interest in safe drinking water, that Defendants have violated that right without due process of law and enter judgment in Plaintiffs favor and against Defendants in an amount greater than Twenty-Five Thousand ($25,000.00) Dollars, in accordance with MCL 445.911(3), plus costs, including reasonable attorney fees and grant them such other relief as the Court deems warranted under the circumstances.

COUNT IV - 42. U.S.C. § 1981 & 1983

UNCONSTITUTIONAL DEPRIVATION OF PROPERTWITHOUT DUE PROCESS

103. That the Coalition incorporates and realleges each and every allegation set forth in paragraphs 1 through 102 and incorporate them herein by reference.

104. That Section 1983 states, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

105. That Plaintiffs have a liberty or property interest in clean, safe water.

106. That the City has engaged in a practice that has deprived Plaintiffs of safe, clean water without due process, including notice, input, or public hearings before, during or after said deprivation.

107. That the City has deliberately disenfranchised Plaintiffs and deprived them of their liberty or property interest in clean, safe water without due process of law, or just compensation, in violation of the Fourteenth Amendment of the United States Constitution and Article I § 17 of the Michigan Constitution.

108. § 1981. Equal rights under the law , states "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

109. That Plaintiffs are the victims of discriminatory conduct by the City by virtue of the contract between Plaintiffs and the City whereby the City agrees to provide clean, safe water in exchange for Plaintiffs payment of a monthly usage fee.

110. That the City has breached this contract by failing to provide safe, clean water following their unilateral decision to terminate the contract with DWSD.

111. That as a result of the City's breach, Plaintiffs have been damaged and deprived of their property interests in safe, clean water without due process of law or just compensation, in violation of the Fourteenth Amendment of the United States Constitution and Article I § 17 of the Michigan Constitution.

WHEREFORE , Plaintiffs, by and through their attorney, respectfully requests that this Honorable Court find that Plaintiffs have a liberty or property interest in safe drinking water, that Defendants have violated that right without due process of law and enter judgment in Plaintiffs favor and against Defendants in an amount greater than Twenty-Five Thousand ($25,000.00) Dollars, in accordance with MCL 445.911(3), plus costs, including reasonable attorney fees and grant them such other relief as the Court deems warranted under the circumstances.

I have read the foregoing complaint and I declare that statements contained therein are true to the best of my knowledge, information and belief. MCR 2.114(B)(2)(B).

Dated: June 5, 2015

Pastor Allen C. Overton Sr., Coalition For Clean Water, Plaintiff

Dated: June 5, 2015

Pastor Alfred L. Harris, Concerned Pastors For Social Action, Plaintiff

Dated: June 4, 2015

Melissa Mays, Water You Fighting For

Dated: June 5, 2015

Clair McClinton, Democracy Defense League Water Task Force

Dated: June 5, 2015

Florlisa Fowler, Flint Water Class Action Group

Dated: June 5, 2015

Laura Sullivan, PHD

Dated: June 5, 2015

Eric Mays, 1st Ward Flint City Councilman

Respectfully Submitted,

TRACHELLE C. YOUNG & Assoc., PLLC

Dated: June 5, 2015

By: Trachelle C. Young (P63330)
Attorney for Plaintiffs
2501 N. Saginaw Street
Flint, MI 48505

IMPORTANT INFORMATION ABOUT YOUR DRINKING WATER

City of Flint Did Not Meet Treatment Requirements

Our water system recently violated a drinking water standard. Although this incident was not an emergency, as our customers, you have a right to know what happened and what we are doing to correct this situation.

We routinely monitor for the presence of drinking water contaminants. Samples were collected for total trihalomethanes (TTHM) analysis from eight locations on a quarterly basis (May 21, August 21, November 20 of 2014, and February 17, 2015). The average of the results at ANY of the eight locations must not exceed the maximum contaminant level (MCL) for TTHMs, otherwise our water system exceeds the MCL. The standard for TTHM is 80 micro grams per liter (ug/L). The location reporting the highest TTHM level was 105 ug/L; thus, our water system exceeds the TTHM MCL.

What should I do?

- There is nothing you need to do unless you have a severely compromised immune system, have an infant, or are elderly. These people may be at increased risk and should seek advice about drinking water from their health care providers.
- You do not need to boil your water or take other corrective actions. If a situation arises where the water is no longer safe to drink, you will be notified within 24 hours.

What does this mean?

This is not an emergency. If it had been an emergency, you would have been notified within 24 hours.

People who drink water containing trihalomethanes in excess of the MCL over many years may experience problems with their liver, kidneys, or central nervous system, and may have an increased risk of getting cancer.

What is being done?

We are currently working on solutions to correct the problem. We anticipate resolving the problem in 2015. Our most recent individual sample results were all less than half the 80 ug/L standard, however since compliance is calculated using a locational running annual average (LRAA) of the most recent four quarters, we are still out of compliance with the MCL at two of eight locations.

For more information, please contact Mr. Brent Wright at 810-787-6537, or the Flint Water Plant at 4500 North Dart Highway, Flint, Michigan 48505.

Please share this information with all the other people who drink this water, especially those who may not have received this notice directly (for example, people in apartments, nursing homes, schools, and businesses). You can do this by posting this notice in a public place or distributing copies by hand or mail.

This notice is being sent to you by the City of Flint.

Water Quality Update

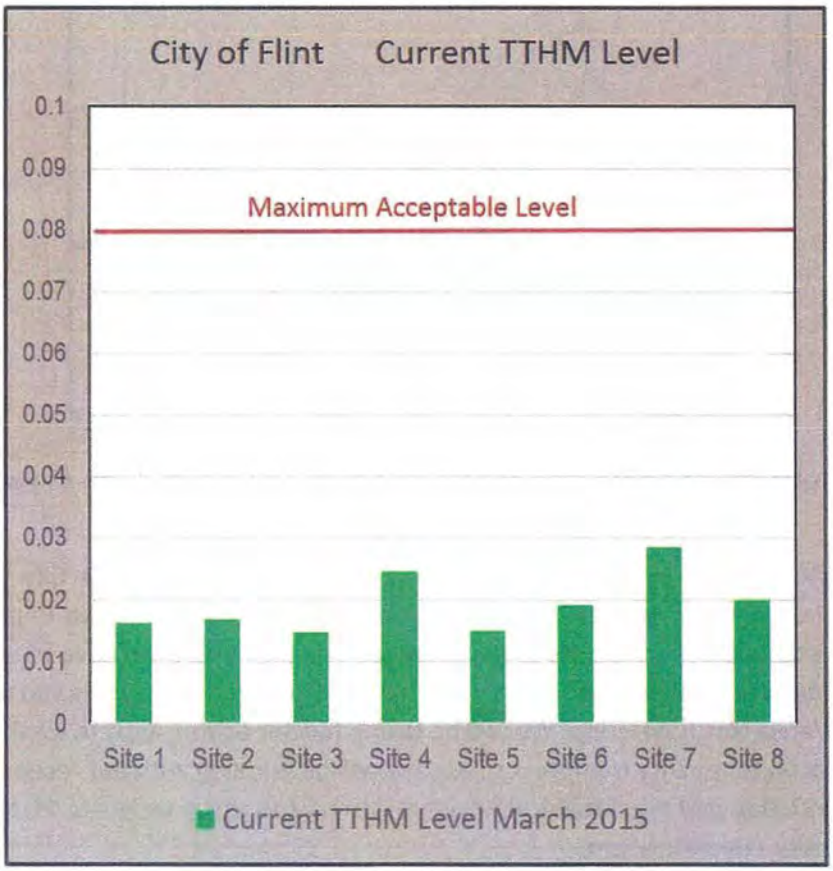
City of Flint Resident:

We are pleased to report that City of Flint water is safe and meets U.S. Environmental Protection Agency guidelines. While we continue to work on improving aesthetic qualities, such as discoloration or odor, you can be confident that the water provided to you today meets all safety standards. Maintaining safety and quality in our water is a top priority of the City.

We accomplished this by:

- Upgrading the ozone treatment process at the Water Treatment Plant
- Increasing water main/hydrant flushing to reduce stagnation
- Conducting additional testing of treatment to identify areas of improvement
- Improving water circulation by repairing valves and adjusting reservoir levels

Our most recent testing in February showed that every testing site was well below allowable levels, as shown below:



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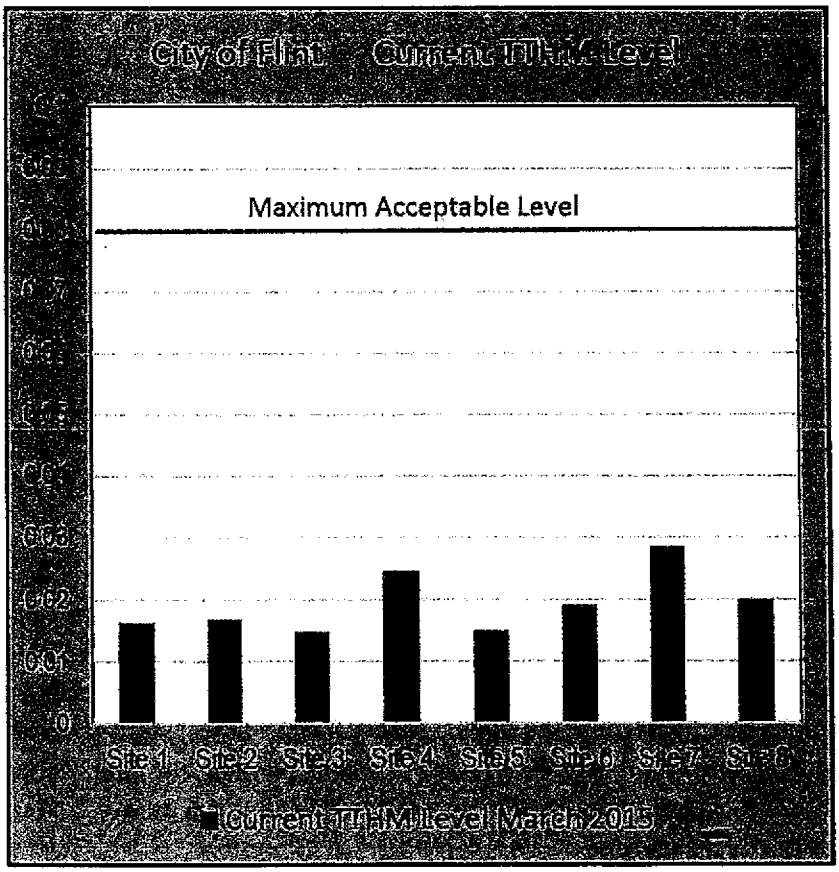
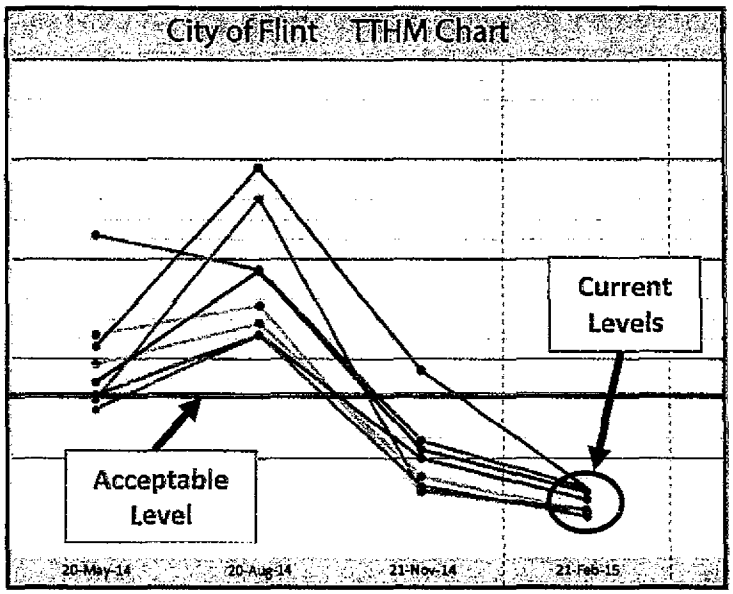


The Michigan Department of Environmental Quality (MDEQ)has acknowledged our progress:

"We are encouraged by the results from the most recent round of compliance samples collected on February 17, 2015, which now show individual TTHM levels at less than half of the 0.080 mg/L standard at all locations throughout the City's system. Operational Evaluation Reports from December 2014, and February 2015, have identified possible causes and corrective measures for the previous elevated TTHM levels, which we encourage the City to continue implementing." -MDEQ

Notification is based on four quarters of test results. Because of last year's test results, the City's *annual* quarterly testing average is not yet below the state's allowable average and the City is required to issue the attached notice ***("Important Information about Your Drinking Water")***.



If you have any questions about this report or would like a test done at your home, free of charge, please call us at 810-787-6537.

Maintaining safe water and improving its quality is a top priority for all of us at the City of Flint, and we apologize for the concerns these notices have raised. We have taken many steps to improve the safety and quality of our water supply and will be taking more. As you may know, we have recently received a series of recommendations from several sources, including a report from international urban water system consultant, Veolia North America. We will be taking further action steps to assure that water remains safe and that water quality is improved, and we will be working with our recently created Citizen Advisory Committee and our Technical Advisory Committee as we progress. Please track our progress on our website **cityofflint.com**.

IMPORTANT INFORMATION ABOUT YOUR DRINKING WATER

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Please share this information with all the other people who drink this water, especially those who may not have received this notice directly (for example, people in apartments, nursing homes, schools, and businesses). You can do this by posting this notice in a public place or distributing copies by hand or mail.

This notice is being sent to you by the City of Flint.

IRM Integrated Resource Management, Inc.

February 17, 2015

Honorable Mayor Dayne Walling
& Members of the City Council
1101 South Saginaw Street
Flint, Michigan 48502

RE: City of Flint Municipal Drinking Water System
Initial Water Quality Investigation and Water Rate Issues

Ladies and Gentlemen:

I would like to thank the Office of the Mayor and City Council Members for extending such a warm welcome to me on my recent visit to the City of Flint this past weekend. Flint, Michigan enjoys a wonderful history and is part of what has made America strong. Clearly, the City of Flint is a community in transition.

While my initial visit focused on the water supply and immediate concerns for the health and safety of the community water supply, the following recommendations are broader in scope and are meant to be purely constructive.

Source Supply Evaluation

- Update and implement the Source Water Protection Plan.
- Define and identify groundwater quality and quantity inflow variables to the Flint River, specifically from the contaminated sources identified adjacent to the river.
- Define and identify reservoir release surface water quality and quantity variables to the Flint River, specifically from the Holloway Reservoir.
- Thoroughly evaluate the Detroit Water Supply quality characteristics.
- Conduct a detailed "cost of treatment assessment" of the Flint River Water Treatment Plant and compare it directly to the cost per unit of water purchased from Detroit. Publish said results and allow for public input as to the choice of water supplied based upon actual costs versus quality.

405 North Indian Hill Boulevard
Claremont, CA 91711-4600
(909) 621-1266
(909) 621-1196 Fax

Water Treatment Plant

In order to achieve immediate improvement to the water quality in the City of Flint, the following recommendations should be considered for implementation. Said recommendations are made with the intent of being migratory toward ultimate treatment of Lake Huron water from the Karegnondi Water Authority.

- Optimize the ozone disinfection system.
- Discontinue the use of sodium bisulfate to reduce pH in the ozone contact chamber.
- Trust the Plant Operator to use the optimum amount of ferric chloride required for coagulation.
- Investigate the use (jar tests) of ferric chloride and various water treatment polymers to reduce the use of corrosive ferric chloride.
- Discontinue the practice of lime softening. Continue the flow through the softener facility and consider adding a low dose of filter aid (additional polymer) as necessary during seasonal high turbidity.
- Discontinue the practice of fluoridation.
- Discontinue the practice of recarbonation.
- Discontinue the use of pre-filtration chlorine.
- Remove the anthracite coal media from the filter beds and replace it with a granular activated carbon (GAC) material. There are specifically engineered products for use in dual media filters. The use of GAC for organic Trihalomethanes (THM) precursor removal will immediately reduce THM formation in the drinking water supply.
- Post chlorinate disinfect based on residual demand requirements. Post chlorination will not be as intensive as the organic material will be dramatically reduced. The GAC will also serve as a barrier to other types of contamination events (petroleum, chemical, and algae blooms).

Distribution System Operations

- Complete development of the water distribution hydraulic flow model.
- Immediately increase distribution system velocities.
- Re-engineer the distribution system to encourage directional sediment transport for evacuation of system contaminates (sludge, biofilm, sediment, and other debris). This will further aid in chlorine demand management.

- Take at least one of the water system storage reservoirs out of service. Thoroughly clean the storage reservoir, perhaps a program of alternative years of service. With the 2 MG elevated tank, perhaps both reservoirs could be removed from service this year.

Budget & Rate Concerns

I have extremely limited information on the rate-setting program. My recommendations here are more about a process that aids communities with transparency. I have been advised to look at a recent study by one of the local colleges; further, I would need access to a detailed budget and expenditure accounting to provide more specific recommendations.

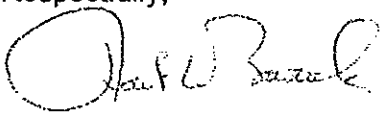
- Prepare a budget that accounts for all fixed/variable debts: loans, capital depreciation of infrastructure, retirement system obligations, etcetera. This will allow the community to understand exactly where it stands in relation to its debt obligations… before one drop of water is produced. The total of the compilation can then be divided among the consumers based on number and class size of services. It is simple, straightforward, and easily understood.

- Prepare a budget that accounts for all commodity/variable costs: salaries, chemicals, energy, contract services, etcetera. This will allow the community to understand exactly where it stands as it relates to the cost of water. Using historic production and sales numbers, project a water sales figure and divide the commodity costs among the units; this is the true cost of water.

Again, this recommendation letter is very limited in scope. I will continue to make myself available to you and members of the community to answer questions.

The City of Flint, while consulting with the Michigan Department of Environmental Quality, must begin to set its own parameters for compliance with the Safe Drinking Water Act. You have a very well qualified staff at the Flint River Surface Water Treatment Plant and they need to be given the latitude and flexibility to get the job done. I am not in anyway advocating violation of the Safe Drinking Water Act… indeed the recommendations I have made should help bring the City of Flint closer to the actual spirit of compliance as opposed to just meeting the statutory requirements.

Respectfully,



Bob Bowcock
Integrated Resource Management, Inc.

cc: Erin Brockovich
Melissa Mays
Pastor Alfred Harris
Howard Croft

VEOLIA

Water Quality Report
March 12, 2015

FROM
Veolia North America

TO
Emergency Manager Gerald Ambrose

Executive Summary

The City of Flint changed water sources, transitioning from Detroit's system to the Flint River. This change created water treatment challenges that have resulted in water quality violations. Aging cast-iron pipe has compounded the situation, leading to aesthetic issues including taste, odor and discoloration. Public interest and scrutiny of the drinking water system intensified following the distribution of required public notices of violation.

The City of Flint has made a number of good decisions regarding treatment changes that have improved water quality. However, this is a very complex water quality issue and the City is seeking additional advice on what to do to ensure healthful drinking water for the community.

Veolia appreciates the City's decision to seek independent third parties to review current treatment processes, maintenance procedures and actions taken to date, and provide ideas for improvement. We are pleased to present this final report to the City of Flint following our experts' 160-hour assessment of the water treatment plant, distribution system, customer service and communications programs, and capital plans and annual budget.

This report provides recommendations and a roadmap for improvement, though our engagement was limited in scope. Our assessment included reviewing actions taken by the City to date, validating the City's plans going forward, and making recommendations for ideas not being considered.

Although a review of water quality records for the time period under our study indicates compliance with State and Federal water quality regulations, Veolia, as an operator and manager of comparable utilities, recommends a variety of actions to address improvements in water quality and related aesthetics including: operational changes and improvements; changes in water treatment processes, procedures and chemical dosing; adjustments in how current technologies are being used; increased maintenance and capital program activities; increased training; and, an enhanced customer communications program.

We are also providing a recommended schedule and estimated costs for implementing changes. It is our desire to help Flint residents and public officials better understand the current situation so that informed decisions can be made to ensure safe drinking water for the city's customers.

Review of Actions Taken to Date

To address water quality issues, the city has made operational changes, sought help from the State, hired engineering firm Lockwood, Andrews & Newnam, Inc. (LAN) to provide additional advice, and hired Veolia for an assessment from a utility operator's perspective. The City has also reached out to different specialty vendors (chemical suppliers, filter companies and tank aeration companies) for information about products to help with the TTHM issues. These are logical steps to take.

Flint is not alone in dealing with TTHM problems, as many utilities across the country are facing this challenge. The City appears to be following standard steps that many of those communities are taking to successfully correct the problem.

Although the primary focus of this review was based on solving the TTHM problem, the public has also expressed its frustration over discolored and hard water. Those aesthetic issues have understandably increased the level of concern about the safety of the water.

The review of the water quality records during the time of Veolia's study shows the water to be in compliance with State and Federal regulations, and, based on those standards, the water is considered to meet drinking water requirements.

The City has been proactive in its efforts to reach out to the medical community, to set up a phone number and email address to receive complaints, to post State Water Quality reports, to provide the list of EPA required water tests, and offer to test the water at customers' homes.

From our review, these numerous efforts demonstrate how the city is trying to be transparent and responsive beyond what many other communities might do in similar circumstances.

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State Report

The Michigan Department of Environmental Quality (MDEQ) has requested specific actions be taken related to the total trihalomethane (TTHM) issues. The February 2015 report from LAN (*Operational Evaluation Report TTHM Formation Concern*) indicated apparent reasons for the elevated levels of TTHM in the distribution system. These generally relate to high Total Organic Carbon (TOC) in the water source, improperly operating equipment both in the plant and the distribution system, less-than-optimal plant TOC removal and old cast-iron pipe in the distribution system. **Our assessment confirms that these reasons are likely given our on-site laboratory testing and analysis, as well as our first-hand observations.**

Due to time constraints, LAN's report to the State was submitted prior to Veolia's final analysis and recommendations, and contained a number of key initial and contingent steps the City should consider, including:

Initial Actions

- Hire a Third Party Water Quality Expert to Complete Independent Audit
- Obtain a THM Analyzer
- Carry Out Jar Testing
- Water Plant Optimization Softening
- Water Plant Optimization Disinfection of Filter Beds (Pre-Chlorination)
- Water Plant Optimization Polymer Aid to Coagulation and Flocculation
- Increase Water Main Flushing
- Water Modeling Cedar Street Pump Recirculation
- Water Modeling West Side Pump Recirculation
- Broken Valve Locations
- Increase Flushing

Contingent Actions

- Fix Ozone System
- Start Feeding Coagulant and Flocculation Polymer
- Convert to Lime and Soda Ash Softening
- Change Disinfection to Chloramine or Chlorine Dioxide Temporarily
- Install Pre-Oxidant at Intake
- Replace Filter Media Implement Advanced Treatment
- Increase Main Flushing
- Continue Valve Replacement
- Emphasize Cast Iron Pipe Replacement

Veolia's Recommendations

While many of Veolia's recommendations match the initial assessment provided by LAN, our approach, as an operator and manager of comparable utilities, considers a more comprehensive solution. These improvements include operational changes, differences in water treatment regimes and chemical dosing, increased maintenance, and increased training.

- **Addition of Permanganate** – The addition of a permanganate chemical will help reduce ozone demand as well as chlorine demand. The reduction of ozone is needed to help eliminate the possibility of violating the bromate limit. The addition of the chemical will require state approval, submission of design documents for approval, procurement of the equipment and installation. The State has indicated they will work with the City on expediting review and approval of any requested changes. The required dosage of permanganate is estimated to range from 0.5 mg/L to 1.2 mg/L with a corresponding price of $160,000 to $320,000 per year. (Please note – The water in the river is dynamic which means it will change with weather, seasons and other factors. The estimates provided are based on bench testing at a given time and as such require the operators to test water and to verify chemical dosages on a frequent basis.)
- **Reduction of Ozone Feed** – Treating water is a delicate balance - increasing ozone to fix the TTHM problem can raise bromate levels to a point of violation. The introduction of permanganate is being recommended to reduce the demand for ozone so that feed rates will not exceed 5 mg/L. The current ozone dosing has been as high as 8 mg/L and, as such, if allowed to continue, will increase the risk of violating the bromate levels.
- **Increase of Ferric Chloride** – Four coagulants were tested by Veolia -ferric chloride, ferric sulfate, polyaluminum chloride (PACl) and aluminum chlorohydrate (ACH). Ferric chloride and ACH were found to be the best choice of product for effectiveness in removing TOC, a precursor to TTHM formation. Current ferric chloride dosages are too low and dosages of 100 mg/L or more are recommended. Again, please note, that the amount of chemical needed changes with the nature of the river and as such, water must be tested multiple times a day with corresponding changes in chemical dosages. This increase to 100 mg/L is twice what is currently being fed and much higher than what had previously been fed last year. The increase in chemical costs could be up to $1,000,000 per year. This change in dosage (using ferric chloride) can be made immediately without state permit review.
- **Reduction of Lime** – Lime is currently being overfed. A higher dosage of lime does not necessarily mean better treatment. A review of different dosages with jar testing indicates that the current dosage of 280 mg/L can be reduced to 230 mg/L. This represents a potential range of savings of up to $270,000 per year. This change can be made immediately. It should be noted that the current softening equipment is in poor condition, which does complicate the treatment process with a poor balance of flow between the two basins, weirs that are not level causing bypassing with the softener basins, and simply old mechanical equipment that periodically breaks down. This equipment is not going to be needed when a change to lake water occurs. Addition of soda ash to help further reduce hardness in cold weather might require dosages up to 40 mg/L with an annual chemical cost up to $320,000. There have also been some questions or complaints from the public regarding hard water. The water entering the plant is currently 360 mg/L and the plant is reducing that level of hardness to about 210 mg/L. Optimization of the dosage can reduce the hardness

further to about 180 mg/L. This reduction however has been sporadic as equipment breakdowns and high flows have caused problems keeping the softening process on-line. As we have noted before, the dosage needs to be adjusted daily or more often based on process control monitoring. The raw water hardness in the summer is much less than in the winter. For illustration purposes, the difference could be 360 mg/L in raw water in winter compared with 220 mg/Lin the summer.

- **Eliminate Pre-Chlorination on the Filters** – The reduction of pre-chlorination on the filters during the summer months can help reduce TTHM formation. This action has to be considered carefully with procedures documented and reviewed for engineering principles. As such, it will take time for the design engineer to determine what could be done to assure the proper chlorine contact time and document that other safety protocols in water are met. This requires state approval. Any submission should be considered along with a possible change in filter media. If Granulated Activated Carbon (GAC) is installed then the pre-chlorination would be stopped or drastically reduced because of the chlorine impact on the GAC filter media. Veolia's initial investigation into changes in chlorine feed point indicate that the recommended action can be accomplished while maintaining the required regulatory contact time for disinfection.

- **Change Filters to Granulated Activated Carbon (GAC)** – The object of the other changes being made is to reduce the TOC before chlorine is added into the process. The plant by design is limited on the amount of TOC removal possible. A maximum removal of only 60% is likely if the plant is properly optimized. The change of filter media to GAC would provide the best reduction possible and provide better than 90% removal dramatically reducing the potential for TTHM formation and thus ensuring compliance with that parameter for the water system. The change in filter media; however, is complicated requiring approval by the state, design of the changes, procurement of the media and a contractor to install it. That will take time and is likely in a range of $1.5 million (more or less) in cost. The use of GAC also requires more testing and monitoring of the media and the TOC than with the current media. GAC will accumulate TOC and begin to become in effective after a period of time. Depending upon the level of TOC reaching the filters this could be as short as 3 months and as long as 9 months. The amount of TOC is dependent upon the river water quality and operation of the other plant processes. Once the ability of the filters to remove TOC is diminished, the GAC media has to be replaced if river water continues as a source. The change to lake water will not require TOC removal and the media could continue to be used as filter media for that new water source.

- **Corrosion Control** – The primary focus of this study was to assure compliance with the TTHM limits. That is not the only problem facing the city and its customers though. Many people are frustrated and naturally concerned by the discoloration of the water with what primarily appears to be iron from the old unlined cast iron pipes. The water system could add a polyphosphate to the water as a way to minimize the amount of discolored water. Polyphosphate addition will not make discolored water issues go away. The system has been experiencing a tremendous number of water line breaks the last two winters. Just last week there were more than 14 in one day. Any break, work on broken valves or hydrant flushing will change the flow of water and potentially cause temporary discoloration.

- **Eliminate a Storage Tank** - The water system has more storage than it requires, due to excess capacity in the water lines in combination with the storage tanks. The City has already employed LAN to update the hydraulic model. The hydraulic model should be used to help determine if water levels can be lowered further and even to remove some storage tanks from service. That decision may need to be made

seasonally. For example demand during water main breaks last week required extensive amounts of water. The excess storage is more a problem with TTHM formation for the system in summer than winter.

- **Prioritize Valve Replacement** - The hydraulic model shows long water age in portions of the system that appear to be contributing to the TTHM problems. LAN has updated the model to include the location of broken valves and that added information is being used to identify other system problems. The City has a contract for valve turning and repair work that should be focused on known broken valves, particularly in sections of the distribution system with old water age. This activity however must wait until warmer weather in fear of causing problems in the water system with lines freezing.
- **Target and Increase Flushing** – Flushing the fire hydrants can be useful in cleaning out lines to minimize discolored water complaints and also helping reduce the age of water. This DOES NOT mean just opening hydrants. The hydraulic model needs to be used to determine which hydrants should be opened and for how long to ensure the lines are properly cleaned. For example, this might require 15 minutes or even several hours of flushing depending on location. The flushing of hydrants also needs to include records of hydrant condition, color of water initially and after periodic increments plus chlorine residual testing. All of that information will help provide information to the engineers on the effectiveness of the procedure. Each crew doing the work should be trained to help explain the process to the public and also warn neighborhoods about flushing so that staining of laundry can be avoided.
- **Change to Lake Water** – The changes being made now to the water plant will not be the same changes required to treat lake water once it becomes available. A thorough analysis and plan needs to be made in preparation of that switch. This is going to need to include changes in how the plant is operated, like eliminating lime softening and reducing the dosages of many chemicals. Consideration will also have to be given to algae treatment when lake water is being used.
- **Operating Programs** – All of the changes discussed above are based on testing and techniques proposed by engineers and skilled operators of both LAN and Veolia. The staff will need further training and implementation of detailed protocols to successfully implement the changes and to ensure long-term success at the plant. This means the City needs to implement a series of programs to ensure success in these changes.
    - **Process Control Management Plan** (PCMP) – The amount of testing and resulting changes in chemical dosages, along with monitoring the impact on the water, will require a well-documented process that all operators follow. An example of this is jar testing, which is used by the operators to identify the most effective chemicals and dosages to optimize treatment. The staff understands the basic treatment process but needs further practice and training to become proficient in the use of routine process control to adjust for water quality. This is commonly referred to as a PCMP and is used as a standard operating procedure so that the operators on the day shift can communicate with the night shift, that operators are following the same treatment plan for water, that the adjustments are unified between different shifts and different people, that a desired water treatment quality is defined and variations from it signal alarms and that the staff knows what to do when the water quality setpoints begin to drift away from its desired quality levels.
    - **Lab QA/QC** – The operation of the water plant is dependent upon accurate lab results. Standard operating procedure needs to be set and lab technicians trained in that process. EPA and the State

set procedures and standards to be met and the staff should strive to meet those standards. The City has already purchased a TTHM analyzer but should also consider a TOC analyzer that can be an online continuous device to provide immediate information on influent and effluent levels of TOC. Part of the lab records should be historical review of data to help operators better understand the changes they make in the plant.

- **Maintenance Management** – The key to water equipment is having all the equipment effectively maintained and functioning properly. The current capital program is fixing many broken pieces of equipment and updating the plant to current standards. This however must be followed with a rigorous maintenance program that ensures the proper preventive maintenance; is able to predict when maintenance is needed to keep equipment functioning properly and responsive to changes in flows and source water quality.
- **Training** – The changes being suggested are new to the staff and as such training needs to be provided in what the changes involve, why they are being made, the impact on the water quality, and how best to run the plant. A good demonstration of skill level is for the staff to become certified by the State as a licensed water plant operator. Many utilities now require all operators to hold at least the minimum certification level as a starting point and offer incentives to increase their certification level.

- **Communication Program** – The city should lay out an immediate, written strategy for communicating with the public in the short-term, as well as a 6-to-12 month strategy that contemplates known, future events like the KWA pipeline and switch to lake water. A wide range of activities are underway to work with the public but a comprehensive and coordinated effort, with a strategic focus, will help the utility and its customers.
  - **Dedicated Communications Personnel** – The City has a single, dedicated public information officer, tasked with providing service to all of city government. The current focus on communications support for Public Works, and the anticipated needs over the next several years, indicate the city would benefit from the hiring of a staff person in Public Works who could establish a communications program designed to provide clear and concise information to a broad audience though a number of different channels. In the interim, the city could hire a communications intern, local communications firm, or somebody with experience who is able to provide reduced or no-cost services for the immediate future.
  - **Communications Planning – Public Notification** – The City should be congratulated on its efforts to keep the public informed. It is posting its monthly reports on the web page to provide transparency, though these reports are highly technical – and may be too technical for the customer base at large. They are valuable to those customers who do want this level of detail. The city should create a single-page dashboard of information that outlines the water utility's performance for the previous month, post the dashboard on the website, print copies for distribution at customer service or other reception areas, and be provided during speaking engagements or other events. This dashboard should be easy to understand, and include:
    - The number of water quality tests conducted the previous month
    - The number of violations reported

- Whether these results are in or out of compliance
- Information about other proactive measures such as main and hydrant replacements, or other programs to improve performance of the water utility
- Benchmarking information so the reader has a greater understanding of how Flint compares with other similar utilities in the region and across the country

- **Public Meetings** –There should be additional, proactive coordination with neighborhood, community and civic groups to provide speakers on timely topics. Given the list of numerous responsibilities, the Public Works director cannot do it alone – the city should identify three or four other staff members, knowledgeable about the water utility who can also speak to various groups, provide information and answer questions. The development of an outreach strategy to target key neighborhood, community and civic groups also will advance the communications effort and the dissemination of information in both the short and long term.
- **Standard tools** – Work crews in the field are often the faces of the utility – the city should create standardized tools for communicating with the public that can be easily and quickly delivered to the community in the event of main breaks, flushing or pre-planned capital improvements. Tools should include:
  - Door hangers for individual distribution
  - Yard signs with simple messaging to be placed near work-sites
  - A simple tri-fold brochure with useful information about the utility and appropriate contact information
  - Specific flyers about a range of topics
  - Infographics about how the water system works, from the intake to the customer's site
- **Change in Billing Format** – The City currently has no real way to reach all customers on a regular basis and provide information. The city should consider changing from a billing postcard to using an envelope and bill stuffer. Monthly or bi-monthly bill inserts are typically used to provide educational material for customers and are standard ways to provide information. Understandably, budget considerations must be taken into account.
- **Use Public Affairs Programming and Opportunities** – The news media has been covering this topic quite extensively – there are other media-related opportunities that may reach a wider audience. Taking advantage of these opportunities will help the city relay information to its customers and the community.
  - Participate in regular editorial-board meetings to provide background information and updates on key milestones or events.
  - Identify a local weekly television program and offer to provide guests to speak about key milestones or upcoming events.

Conclusions and Next Steps

The focus of this report is to help assure TTHM compliance and then improve general water quality. The City had good results in its most recent TTHM tests, although that is to be expected with the changes made to date and the cooler weather which contributes to low TTHM formation. Warm weather will be a different situation both in the nature of the Flint River water quality and in the formation of TTHM. With those changes coming, the City needs to act quickly to make improvements before additional testing takes place this spring and summer. The summary below provides the recommended actions, a priority for their implementation and projected costs either operational or capital. The costs are rough orders of magnitude and will vary with changes in water quality, operational decisions, and engineering choices being made and in some cases require State approval. Although a priority is assigned many of these actions can take place simultaneously.

Priority	Action	Annual Operational Cost	One Time Capital Cost
1	Implement operating programs for process control, lab QA/QC, maintenance, and training. These programs are needed regardless of the TTHM issue and will help with transition to lake water. The City has decided upon a central maintenance software and the water system should be the first to utilize this program since costs are already budgeted. These programs should be initiated immediately.	$ 25,000	$ 250,000 - $ 350,000
2	Contract with your engineer and initiate discussions with the State on the reduction of chlorine prior to the filters and changing the filter media to GAC. This activity has the longest time frame for design and approval, but also is extremely critical to assuring reduced TTHM production. The current filter cleaning and maintenance project needs to be adjusted to take into consideration the change in filter media both to dispose of the anthracite instead of cleaning and to install the GAC. This entire project needs to be done by early July to assure a flow of water throughout the system. Several months are required for the engineering design, State approval, bidding of work and installation of GAC and as such needs to begin now.	$ 0	$1,500,000
	Contract with your engineer and initiate discussions with the State on the addition of 0.5 to 1.2 mg/L of either potassium permanganate (dry) or sodium permanganate (liquid). This will take time to get approved and to implement. The use of liquid tanks at the raw water pump station may be the quickest and least expensive alternative for a temporary measure.	$ 160,000 - $ 320,000	$ 50,000

	Contract with your engineer and initiate discussions with the State on the addition of a corrosion control chemical. This action can be submitted and discussed with the state at the same time as the other chemical and filter changes saving time and effort. A target dosage of 0.5 mg/L phosphate is suggested for improved corrosion control.	$ 50,000	$ 50,000
3	Increase the ferric chloride dosage to 100 mg/L depending on river water TOC levels. (Lower TOC levels can be treated with less ferric chloride.) This change can be made now and is allowed by the State.	$ 1,000,000	$ 0
	Reduce the ozone feed rate to 5 mg/. This change can be done now and does not require State approval.	($50,000 – $100,000	$ 0
	Reduce the lime dosage to minimize hardness levels after softening. This will eliminate magnesium removal during treatment, but will also reduce total hardness. A reduction in carbon dioxide dosing for recarbonation treatment also is expected due to the reduction in lime feed. This change can be made now and does not require State approval.	($270,000)	$ 0
4	Confirm with the engineer when the revised hydraulic model will be completed and if necessary for time to focus on areas of longest water age if that would speed up the effort. Identify impact of reducing tank levels or eliminating a tank seasonally to improve water age. Include with this effort a list of hydrants to flush along with time required to assure drawing fresh water through the system. The engineer has been assigned this task already and confirmation of the timing of a delivery is needed.	$ 0	Already Contracted
	Ask the engineer to identify closed valves on a map that are impacting water age and that can be bid for replacement as soon as weather permits. Have the engineer identify areas of the system where the valve contractor should be focused on finding and fixing closed valves.	$ 0	Already Budgeted
5	Implement the recommendations in the communications program including a person assigned to public works education, using envelopes instead of cards along with bill stuffers for education and provide training for staff. Envelopes and bill stuffers are expensive and might be done periodically and not every month. The cost of TTHM notices, Annual Water Quality Reports and City notices should be figured into if any additional costs would exist. Many of these changes are underway now by the City.	Position Being Budgeted	

Notes

- The costs provided are rough order of magnitude which final engineering will firm up but will fluctuate with final decisions on engineering, operating technique and water quality.
- The change from river to lake water will dramatically cut the chemical costs as less is needed once the change occurs. This means that potassium permanganate will likely not be needed, ferric will drop as much as it went up, ozone levels will be lower and little lime will be needed.

Results Expected

The real question is what changes can be expected from these results in lowering the TTHM, improving the aesthetics and preparing for the change to lake water.

- **TTHM** – The City has already made great strides in reducing the TTHM levels with the changes already made. The additional suggestions by Veolia will further reduce TTHM in the water and help get the city released from the notices being provided to customers.
- **Hardness** – The hardness entering the plant this winter is 360 mg/L with the current system reducing it to 210 mg/L and optimization will reduce to about 180 mg/L. During the summer the levels will be lower probably in the 140 mg/L to 150 mg/L range. The target set by the current best operating practices is 120 mg/L to 150 mg/L.
- **Discolored Water** – The discolored water is caused by the old unlined cast iron pipe. The water from the plant can have an impact on discolored water, but a greater concern is the breaks and construction work that disrupt the flow of water causing discoloration. A polyphosphate is suggested to help bind the old cast iron pipe reducing instances of discolored water. This along with improve flow of water and programmed hydrant flushing will help, BUT WILL NOT eliminate discolored water occurrences.
- **Change to Lake Water** – The recommendations include the suggestion of programs to help the staff better manage the treatment process, additional testing to adjust the plant and additional lab monitoring, a maintenance program focused on keeping equipment properly functioning and more training for staff to improve their skill level. Those actions will prepare the staff for the change of water sources when it comes next year in addition to developing a thorough plan for the switch.

Resourcing the world

Veolia North America
101 West Washington Street, Suite 1400 East • Indianapolis, IN 46204
tel. (859 582 0104 • fax (317) 917 3718
rob.nicholas@veolia.com
twitter: @veolia_na
www.veolianorthamerica.com

City of Flint, Michigan

Third Floor, City Hall
1101 S. Saginaw Street
Flint, Michigan 48502
www.cityofflint.com

Meeting Agenda - Final

Wednesday, June 3, 2015

4:30 PM

AMENDED to include Resolution #150448

Committee Room

FINANCE & ADMINISTRATION COMMITTEE

Monica Galloway, Chairperson, Ward 7
Kerry Nelson, Ward 3
Scott Kincaid, Ward 9

Inez M. Brown, City Clerk

	A	B	C	D	E
228					
229					
230	**Fund 590 - Sewer Fund**				
231	REVENUES				
232	Drawings from fund balance	-445,071			0%
233	Charges for service rendered	30,352,249	24,081,126		79%
234	Other revenues	93,646	89,614		96%
235	Transfers in	800,000	800,000		100%
236	Total Revenues	30,800,825	24,970,739		
237					
238	General government	3,765,455	3,462,144		92%
239	Public works	1,990,000	187,000		9%
240	Debt services - interest	695			0%
241	Debt services - principal	6,016	4,996		83%
242	Transfers out	1,860,000	2,195,000		118%
243	Utilities	23,178,658	12,811,432		55%
244	Total Appropropriations	30,800,825	18,660,572		
245					
246	NET OF REVENUES/APPROPRIATIONS	0	6,310,168		
247					
248					
249	**Fund 591 - Water Fund**				
250	REVENUES				
251	Drawings from fund balance	2,528,798			0%
252	Charges for service rendered	36,096,500	27,051,431		75%
253	Other revenues	37,000	30,656		83%
254	Gain on sale of fixed assets	200,000	225,646		113%
255	Total Revenues	38,862,298	27,307,733		
256					
257	General government	4,255,508	3,785,890		89%
258	Public works	2,760,000	49,245		2%
259	Transfers out	1,660,571	753,333		45%
260	Utilities	26,803,749	13,808,917		52%
261	Total Appropropriations	35,479,828	18,397,385		
262					
263	NET OF REVENUES/APPROPRIATIONS	3,382,470	8,910,348		

CITY OF DETROIT
WATER AND SEWERAGE DEPARTMENT
OFFICE OF THE DIRECTOR

735 RANDOLPH STREET
DETROIT, MICHIGAN 48226-2830
WWW.DETROITMI.GOV

January 12, 2015

Mr. Darnell Earley, Emergency Manager
Mr. Dayne Walling, Mayor
City of Flint
1101 S. Saginaw Street
Flint, Michigan 48502

Regarding: Reestablishing Detroit Water and Sewerage Department Water Service

Dear Messrs. Earley and Walling:

I was recently referred to a report in MLive in which there was reference to the City of Flint (City) potentially re-visiting its decision to utilize Flint River water as a water source prior to the completion of the KWA pipeline. Within that report, there appeared to be some incorrect assumptions about the cost of water service from the Detroit Water and Sewerage Department (DWSD). I write to you today to express the willingness of DWSD to resume delivery of drinking water to the City and its residents. We have monitored the water quality issues that have troubled the City since May, 2014, and understand that many of the difficulties stem from the limited access to source water. Please know that DWSD is ready, willing and able to resume service to the City if you so desire.

If the City is interested in a long term arrangement with DWSD, with this goal in mind, we offer that the City can immediately reconnect to the DWSD system at no additional charge to the City and at the same "expired contract" rate that the City was paying in April, 2014, modified to reflect the 4% increase experienced by all other wholesale customers in July, 2014. The resulting rate structure is a fixed monthly rate of $846,700 and a commodity rate of $14.92/Mcf. In order to facilitate contract negotiations, DWSD is willing to extend this rate to the City (and to Genesee County as the City's partner and former customer) until June 30, 2015.

We at DWSD take very seriously the matter of drinking water quality, and we are as concerned as you must be by the continued quality issues faced by the City and the concerns expressed by your citizens. We are confident that DWSD can provide you with a solution for reliable, safe, high quality water on an expeditious timeline. Please contact me directly at (313) 224-4701 if you wish to discuss this offer further.

Sincerely yours,

Sue F. McCormick
Director

cc: Governor Rick Snyder
Flint City Council
Jeff Wright, GCDC
Mayor Mike Duggan
James Fausone, BOWC
Robert Daddow, GLWA

[redacted]

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Michigan

Coalition for Clean Water,

Plaintiff,

v.

Case No. 2:15–cv–12084–SJM–DRG
Hon. Stephen J. Murphy III

Flint, City of, et al.,

Defendant.

SUMMONS IN A CIVIL ACTION

To: Dayne Walling

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Trachelle C. Young
250) ~~1101~~ N. Saginaw Street
~~Room 307~~
Flint, MI
~~48502~~

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DAVID J. WEAVER, CLERK OF COURT

By: s/ S Osorio
Signature of Clerk or Deputy Clerk

Date of Issuance: July 7, 2015

Summons and Complaint Return of Service

Case No. 2:15–cv–12084–SJM–DRG
Hon. Stephen J. Murphy III

A copy of the Summons and Complaint has been served in the manner indicated below:

Name of Defendant Served: Dayne Walling

Date of Service: _____

Method of Service

____ Personally served at this address:
_____
_____
_____

____ Left copies at defendant's usual place of abode with (name of person):
_____
_____
_____

____ Other (specify):
_____
_____
_____

____ Returned unexecuted (reason):
_____
_____
_____

Service Fees: Travel $_____ Service $_____ Total $_____

Declaration of Server

I declare under the penalty of perjury that the information contained in this Return of Service is true and correct.

Name of Server: _____

Signature of Server: _____

Date: _____

Server's Address: _____
_____
_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

COALITION FOR CLEAN WATER, a Non-profit organization,

Plaintiffs,

V.

CITY OF FLINT, a municipal entity, and CITY OF FLINT ADMINISTRATOR NATASHA HENDERSON, Individually and In her official capacity, and MAYOR DAYNE WALLING, Individually and In his official Capacity

Defendants.

CASE NO: 2:15-cv-12084-SJM-DRG
HON. Stephen J. Murphy III
Magistrate Judge David R. Grand

PLAINTIFF'S 1st AMENDED COMPLAINT & REQUEST FOR REMAND

TRACHELLE C. YOUNG (P63330)
Attorney for Plaintiffs
2501 N. Saginaw Street
Flint, MI 48505
(810) 239-6302
(810) 234-7357 Fax
trachelleyoung@gmail.com

ANTHONY CHUBB (P72608)
WILLIAM Y. KIM (P76411)
CITY OF FLINT, NATASHA HENDERSON
Attorneys for Defendants
1101 S. Saginaw Street, 3rd Floor
Flint, MI 48502
(810) 766-7146
achubb@cityofflint.com
wkim@cityofflint.com

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge. I do not know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this court.

PLAINTIFF'S 1ST AMENDED COMPLAINT

NOW COMES Plaintiffs, COALITION FOR CLEAN WATER, by and through their attorney, Trachelle C. Young, & Assoc., P.L.L.C., by attorney Trachelle C. Young, and for their 1st Amended Complaint, states as follows:

Parties, Jurisdiction and Venue

1. Plaintiffs, Coalition for Clean Water (Coalition), is a Michigan nonprofit organization, based in Genesee county, Michigan and organized for the purpose of promoting and ensuring safe, contaminate free drinking water through education, social actions and legal actions designed to eliminate unlawful and illegal actions by all governmental officials, representatives and entities at all levels of government. Coalition for Clean Water is comprised of multiple civic groups, including but not limited to, Concerned Pastors for Social Action, Water You Fighting For, Democracy Defense League Water Task Force, Flint Water Class Action Group, Dr. Laura Sullivan, Phd, 1st Ward City Councilman Eric Mays.
2. Defendant, City of Flint (hereinafter "Flint"), is a city organized under the constitution and laws of the State of Michigan and is a political subdivision of the State of Michigan.
3. Defendant, City of Flint Administrator Natasha Henderson, (hereinafter "City Administrator"), is the City's Chief Administrative Officer operating under expanded powers that give her ultimate day to day control over the City.
4. Defendant, Mayor Dayne Walling, is the duly elected Chief Executive Officer of Defendant City of Flint.
5. Venue and jurisdiction are proper in the 7th Judicial Circuit Court, Genesee County, Michigan because the actions complained of arose within the City of Flint, County of Genesee. and
6. Jurisdiction is also proper because it is where Defendants maintain and conduct their principal place of business.

General Allegations

7. That the Coalition incorporates by reference allegations 1 through 6 as though fully set forth herein.
8. That the Coalition includes members who reside in Flint and purchase water service from the City of Flint.
9. That the Coalition includes members who reside in Flint, purchase water service from the City, and are elderly/over the age of 65, reside with an infant, and/or have a severely compromised immune system.
10. That the City of Flint had purchased its drinking water from DWSD for the past thirty plus (30+) years under an original thirty (30) year contract executed in 1964 and expiring in 1994, which continued on a year to year basis thereafter.
11. That Genesee County purchased its water from the City to get the Lake source water from DWSD.
12. That the City of Flint River has not been used as a primary source for drinking water in fifty (50) years.
13. That the Flint River hadn't been used as a primary source for drinking water due to the number of health threats, including but not limited to improperly disposed of chemicals; animal wastes; pesticides; human wastes; wastes injected deep underground; and naturally-occurring substances affecting surface water.
14. That the source of the water purchased from Detroit was Lake Huron.
15. That Lake water has lower levels of total organic carbon than river water.
16. That Lake water requires a different treatment process than River water.

17. That the City of Flint paid approximately 1 million dollars per month to DWSD for its delivery of the water.

18. That the treated water from Detroit included corrosion control treatment so as to not adversely impact or accelerate the deterioration of the City's aging pipe infrastructure and service lines.

19. That in 2010, the City began disclosing its interest in joining the Karegnondi Water Authority (KWA), which sought to build new pipelines from Lake Huron to the County of Genesee and the City of Flint.

20. That the overall cost of building this pipeline is approximately 600 million dollars and it is not estimated to be completed until sometime towards the end of 2016.

21. That on April 26, 2010, the Flint City Council voted to join the KWA.

22. That on October 26, 2010, the KWA Board of Trustees met for the first time with representatives from the incorporating Cities of Flint (Mayor Dayne Walling), Lapeer (City Manager Dale Kerbyson), and County Drain Commissioners of Genesee (Jeff Wright), Lapeer (John Cosens) and Sanilac (Gregory L. Alexander). Walling was elected chair.

23. That on April 16, 2013, Flint's Emergency Manager, Ed Kurtz, ended the City's contract with Detroit by signing a contract with the KWA.

24. That in response to Kurt's actions, on April 17, 2013, the DWSD gave the City of Flint a one (1) year notice based on the termination of its contract to supply water to the City of Flint, effective April 17, 2014.

25. That the City continued to utilize water from DWSD after the April 17, 2014 termination date.

26. That DWSD never stopped the supply of water to the City of Flint.

27. That on October 16, 2013, ten additional trustees were added to the board of trustees: former state House Minority Leader Richard Hammel; Johsua Freeman, Flint City Council; Larry Green, Mt. Morris Township supervisor; Ted Henry, Genesee County commissioner; Micki Hoffman, Grand Blanc Township supervisor; Steve Landaal, president of Landaal Packaging; Sheldon Neeley, Flint City Council; Thomas Svcek, Swartz Creek Department of Public Works director; Tracey Tucker, Flint Township building administrator; and Paula Zelenko, mayor of Burton.
28. That on April 25, 2014, Defendant Mayor Dayne Walling pushed the button to cease the supply and usage of the treated lake water from DWSD and the City of Flint began utilizing the Flint River as its primary source of drinking water.
29. That upon switching to the Flint River water, the City of Flint failed the EPA's LRAA water quality tests on May 21, 2014, August 21, 2014 and November 20, 2014.
30. That as a result of these failed tests, the City of Flint was required to send out Violation Notices to all the residents that stated their water system recently violated a drinking water standard and people who have a severely compromised immune sytem, have an infant, or are elderly may be at increased risk and should seek advice about drinking water from their health providers. See *Exhibit A*
31. This required Notice further stated that the violation was based on elevated levels of total trihalomethanes (TTHM), and that people who drink water containing trihalomethanes in excess of the MCL over many years may experience problems with their liver, kidneys, or central nervous system, and may have an increased risk of getting cancer. See *Exhibit A*

32. That TTHM is an odorless, colorless disinfection byproduct, the fallout of chlorinating water.

33. That in June 2014, Flint emergency manager Darnell Earley finalized the sale of an Eastern Genesee County 9-mile section of water pipeline to Genesee County for $3.9 million.

34. That Genesee County Drain Commissioner Jeff Wright has stated he would allow the City to utilize that 9-mile section of water pipeline if the City goes back to water usage from DSWD.

35. That upon information and belief, that 3.9 million was given directly to the KWA as part of the City's investment in that pipeline.

36. That compliance with EPA standards is calculated using a LRAA of the most recent four (4) quarters.

37. That the City of Flint and Mayor Dayne Walling have admitted the City underestimated the challenges of treating River water and were not prepared for the switch.

38. That the City of Flint failed to properly prepare for the transition to River water as a primary drinking source and recklessly endangered the health, safety and welfare of its residents as a result thereof.

39. That in attempting to treat the River water, the City of Flint over chlorinated the water, which directly caused the elevated levels of TTHM.

40. That because the City failed the November 20, 2014 LRAA test, it *cannot* be in compliance with the EPA standards until it passes the February 2015, May 2015, August 2015 and November 2015 tests.

41. That upon information and belief, the City passed the February 2015 tests, was out of compliance at two of the eights sites in March 2015 and passed the May 2015 LRAA tests, and they are still required to send out the EPA Violation Notices.

42. That the Notices sent out by the City of Flint appear deceptive and contradicting in that it contains two pages: the first is a colorful, attention grabbing sheet that starts with "**We are pleased to report that the City of Flint water is safe and meets U.S. Environmental Protection Agency guidelines**…" in bold print (See *Exhibit B*); the second sheet is in black and white and is the actual Violation Notice stating that the City is still out of compliance with the maximum contaminant levels for its drinking water, which is not in bold print and the same health warnings and cautions apply. See *Exhibit C*

43. That due to a major community concern, all of the local major grocery stores lowered the cost of bottled water, there have been and continue to be community giveaways of bottled water for low income residents that can't afford to purchase their water, the Flint hospitals began using and offering bottled water, the Department of Human Service's Bureau of Child and Adult Licensing recommended to the Genesee Intermediate School District, which runs a Head Start program in Flint, to use bottled water and said children have since been given bottled, The Flint Children's Museum has stopped the flow of Flint water at its fountains and the list goes on.

44. That there were three boil water advisories in a 22-day span in the summer of 2014 after positive tests for total coliform and fecal coliform bacteria in the Flint River.

45. That the City, although maintaining the water is safe for consumption, acknowledges the water has odors and discoloration and has instructed residents to "pre-flush" their taps prior to drinking the water and/or collecting water compliance samples.

46. That the City has also engaged in flushing numerous hydrants under the guise of getting rid of the stagnated water in the system that they don't want entering into the homes of residents.

47. That this process of "pre-flushing" has contributed to higher water bills for the Plaintiffs and residents of the City.

48. That upon information and belief, this process of "pre-flushing" also has been shown to result in the minimization of lead capture and significant underestimation of lead levels in the drinking water, resulting in unknown and unwarned lead exposure for Plaintiffs and the residents of the City.

49. That in October 2013, General Motors (GM) shut off its usage of Flint River water at its Flint Engine Operations on West Bristol Road because the water was causing corrosion of its engines and the agreement states GM is not required to return to the usage with the City of Flint until it is back to using water from Lake Huron through the KWA.

50. That members of the Coalition, including those with severely compromised immune systems, infants and elderly, have suffered severe health problems that have been directly connected to the unhealthy, contaminated River water, including but not limited to mysterious rashes on local children, unexplained illnesses and sick pets.

51. That many other residents have complained of health issues as a result of lead, odor, discoloration, turbidity, particles and sediments in the system.

52. That in February 2015, several concerned citizens contacted activist Erin Brockovich seeking assistance with the growing major health impacts of the Flint River usage.

53. That Erin Brockovich did send an expert from Integrated Resource Management, Inc., Bob Bowcock – free of charge – to review the operations at the Flint Water Plant and the quality of the water being distributed.

54. That Mr. Bowcock prepared and submitted to Mayor Walling and the Flint City Council a report dated February 17, 2015, which made several recommendations on the source supply evaluation, the Water Treatment Plant, the Distribution System Operations and Budget & Rate Concerns. See *Exhibit D*

55. That the City of Flint then paid a consulting company, Veolia, $40 thousand dollars (at $900/hr) in March 2015 to conduct a short term assessment of the operation of the water plant, distribution system and customer communications programs and make recommendations.

56. That the Veolia report made numerous long term and costly recommendations, including but not limited to operational changes and improvements, changes in water treatment, procedures and chemical dosing, adjustments in how current technologies are being used, increased maintenance and capital spending, increased training and improved customer communications. See *Exhibit E*

57. That the City of Flint's Capital Improvement Plan states the City needs to invest $50 million dollars to improve its water plant, properly train its plant personnel and to replace pipes.

58. That the City has disclosed its plans to date to invest $5 million dollars in the following manner:

a. $900,000 in water main leak protection;
b. $1.6 million fro a Granular Activated Carbon (GAC) Filter at the plant meant to treat the River water;
c. $2.1 million to replace pipes along Dupont Street (@ $1 million per mile);
d. $400,000 in water treatment improvements.

59. That drinking water that is not properly treated or disinfected, or which travels through an improperly maintained distribution system, may pose a health risk.

60. That the City of Flint received a $2 million dollar grant and Emergency Manager Jerry Ambrose was allowed to restructure $2 million dollars in water loan debts that would have gone to the EPA.

61. That as a result, $4 million of the $5 million being invested did not come from the excessive water rates the City of Flint charges.

62. That upon information and belief, the City has collected approximately $30 million dollars from its water rates to its customers since it began using the Flint River as the primary source.

63. That upon information and belief, the City has a net $10 million in the water fund from the excessive water rates.

64. That this initial $5 million investment doesn't begin to touch the major investment needed to bring the City of Flint Plant to the point it needs to be.

65. That the KWA line will be bring untreated Lake water to the Flint Water Plant where it will need to be treated.

66. That whether it's River water, Lake water or a combination of both, the City of Flint's Plant needs the necessary and recommended investments made before it is allowed to continue as the treatment plant for the City of Flint's primary source of drinking water.

67. That the City of Flint charges the highest water rates in the county of Genesee and the rates are almost eight times higher than the national average.

68. That MCL 141.121 requires a municipality to base its water rates at the reasonable cost of delivering the service.

69. That the City's water rates have not declined since it began using the Flint River as a primary source of drinking water (as promised by Defendant Mayor Dayne Walling), but have increased in spite of the fact that the City is not only saving the $1 million dollars it paid Detroit monthly, but also continues to collect from Plaintiffs and its residents.

70. That the unhealthy quality of the water combined with the excessive rates charged by the city have caused residents to move out of the City of Flint or simply go without water consumption.

71. That the human body is 60% water, water is needed for proper circulation, respiration and converting food to energy and every human needs water to live.

72. That the residents of the City of Flint have converged to Flint City Council Meetings and the Mayor's Office demanding something be done about the unsafe, unhealthy River water.

73. That many residents have held protests and marches to protest the poor quality of the expensive Flint River water.

74. That in response to the cry of the people on March 23, 2015, the Flint City Council voted and passed a Resolution "to do all things necessary" to end the use of the Flint River and reconnect Flint to DWSD, which passed with a vote of 7-1.

75. That the President of the Flint City Council, Josh Freeman, (who sits on the KWA Board) was the lone vote against the Resolution.

76. That Mayor Dayne Walling (Chair of the KWA Board) is also against reconnecting to DWSD.

77. That both Councilman Freeman and Mayor Walling have positions on the KWA Board that have placed them in a conflict of interest of being either unable or unwilling to represent the interests of the constituents they were elected to represent.

78. That the previous Emergency Manager Gerald Ambrose, pursuant to PA 436, gave the City Administrator the authority and ability to implement executive and legislative directives and policies of the Mayor and City Council subject only to a Receivership Advisory Transition Board (Board).

79. That the City Administrator has chosen not to acknowledge, respect or follow the duly adopted resolution by the City Council.

80. That the City of Flint residents and citizens are the only people in the entire County of Genesee that are being forcibly subjected to unsafe Flint River water against their will.

81. That Sue McCormick, Director of DWSD, made a personal appearance to the Flint City Council in addition to stating in a letter to Flint that Detroit would sell treated lake water to Flint for a fixed monthly rate of $846,700 and $14.92 per 1,000 cubic feet without a long term deal and with no strings attached.

82. That the offer from DWSD had an expiration of June 30, 2015. See *Exhibit F*

83. That since the switch to Flint River water, the City of Flint has experienced a number of water quality issues resulting in violations including acute and non-acute Coliform

Maximum Contaminant Level (MCL) violations as well as TTHM violations as follows:

a. Acute Coliform MCL violation in August 2014
b. Monthly Coliform MCL violation in August 2014
c. Monthly Coliform MCL violation in September 2014
d. Average TTHM MCL violation in December 2014
e. Average TTHM MCL violation in June 2015

84. That upon information and belief, the City has not been properly testing for high levels of lead and copper in the water, which exposes Plaintiffs to further health hazards.

85. That upon information and belief, the Plaintiffs are further concerned about the public health as a result of the City's failure to practice any corrosion control treatment, which has caused the City's process of adding ferric chloride to treat the river water to accelerate the deterioration of the aged infrastructure and lead service lines.

86. That studies have shown that an increase in the chloride-to-sulfate mass ratio in the water can adversely affect lead levels by increasing the galvanic corrosion of lead in the plumbing network.

87. That many of the Plaintiffs and their members live in homes with lead service lines or partial lead service lines, which is common throughout the City of Flint.

88. That plaintiffs seeks relief to cease the City of Flint's current methods, acts, and/or practices of utilizing the Flint River as the primary source for drinking water as unlawful due to the proven deleterious health effects on the residents of the City and to require the City to return to using water from the Detroit system, at least temporarily, until such time as they can show compliance with all state and federal safety requirements.

COUNT 1-CLAIM FOR DECLARATORY RELIEF

89. That the Coalition incorporates by reference allegations 1 through 88 as though fully set forth herein.

90. That a dispute has arisen between the Plaintiffs and Defendants regarding the condition of the City of Flint's water, the City's ability to properly and effectively run the City of Flint Water Plant, whether the water plant operators and personnel are properly trained and certified, the City's ability to treat River water and/or Lake water and whether the City continues to be in violation the Michigan Safe Drinking Water Act, MCL 325.1006.

91. That Plaintiffs maintain the City of Flint's usage of the Flint River as a primary source of drinking water has and continues to pose a major and serious threat to the health, safety and welfare of the residents of the City of Flint, that the City has not made the necessary investment in the water plant that has been recommended by two experts, that the water plant operators and personnel have not received the recommended and necessary training and certifications to run the plant effectively, that until the City satisfies the EPA standard of passing the four quarterly LRAA tests, it has not proven its ability to effectively treat River and/or Lake water, and that the City is in violation the Michigan Safe Drinking Water Act.

92. That the Michigan Safe Drinking Water Act mandates that states have programs to certify water system operators and make sure that new water systems have the technical, financial, and managerial capacity to provide safe drinking water.

93. That by underestimating the challenges of treating River water, the City of Flint misled the State and failed to have the technical, financial and managerial capacity to provide safe drinking water when they switched from DWSD's lake treated water.

94. That the City of Flint has also failed to demonstrate their ability to properly treat lake water once the transition is made to the KWA.

95. That the decision to switch to the KWA, which led to the termination of the contract with DWSD was never subject to input from the citizens of Flint and they were effectively disenfranchised from any input in such a major decision.

96. That Plaintiffs and the residents of the City of Flint have suffered at the hands of the City of Flint, Mayor Dayne Walling and the City Administrator, all of whom are not acting in the best interest of the residents and citizens of Flint.

97. That the residents and citizens of Flint have a basic and human right to clean drinking water – free of contamination.

98. That an actual and existing controversy exists between the Plaintiffs and the Defendants as to their legal relations in respect to the above identified matters and a declaratory judgment is necessary to guide the Plaintiffs and Defendant's future conduct and in order to preserve and protect the Plaintiffs legal rights.

99. For the reasons set forth above, Plaintiffs seek a declaratory judgment that

    a. The City of Flint's usage of the Flint River as a primary source of drinking water has and continues to pose a major and serious threat to the health, safety and welfare of the residents of the City of Flint;

    b. That the City has not made the necessary investment in the water plant that has been recommended by two experts;

    c. That the water plant operators and personnel have not received the recommended and necessary training and certifications to run the plant effectively;

d. That until the City satisfies the EPA standard of passing the four consecutive quarterly LRAA tests, it has not proven its ability to effectively treat River and/or Lake water;

e. That the City has violated the Michigan Safe Drinking Water Act;

f. Such other relief as the Court deems just and appropriate.

COUNT II – GROSS NEGLIGENCE AS TO DEFENDANT MAYOR DAYNE WALLING AND DEFENDANT CITY ADMINISTRATOR NATASHA HENDERSON

100. That the Coalition incorporates by reference allegations 1 through 99 as though fully set forth herein.

101. That the City of Flint has a legal obligation to provide municipal water service to its residents.

102. That the Michigan Safe Drinking Water Act requires that the water provided meet certain safety standards.

103. That safe drinking water is a necessity to live.

104. That Plaintiffs and the residents of the City were provided with safe drinking water prior to Defendant Dayne Walling pushing the button to stop the flow of water from DWSD.

105. That the termination of the Detroit contract and signing of partnership on the KWA by the EM did not end the water supply from DWSD to the City as DWSD continued to provide treated water after the expiration of the one year notice of termination.

106. That Defendant Mayor Dayne Walling owed Plaintiffs a common law duty of reasonable care to ensure the City could continue to meet its obligation to provide clean safe water to its residents *prior* to stopping the flow of safe drinking water to Plaintiffs and the residents of the City and he owed a common law duty of reasonable care to notify and protect Plaintiffs and residents from dangerous contaminants in the drinking water in

a timely manner *after* he stopped the flow of safe drinking water to Plaintiffs and the residents of the City.

107. That Defendant Mayor Dayne Walling breached his duty of reasonable care and his actions amounted to gross negligence.

108. That Defendant Mayor Dayne Walling's actions were so reckless as to demonstrate a substantial lack of concern for whether an injury resulted, more specifically described as follows:

a. Failing to prepare to properly treat river water;
b. Failure to properly train Water Plant employees on treating river water;
c. Failure to ensure the Water Plant possessed the necessary and proper equipment and filters to treat river water;
d. Underestimating the challenges of treating river water;
e. Exposing residents to contaminants that have caused serious negative health effects;
f. Failure to notify residents in a timely manner of violation of water safety standards;
g. Failure to ensure proper lead and copper testing has been done;
h. Failure to practice corrosion control treatment for lead and copper;

109. That Defendant Mayor Dayne Walling's actions amounted to a willful disregard of any precautions or measures to attend to safety and a disregard for substantial risks.

110. That Plaintiffs were disenfranchised from the decision to terminate the contract with DWSD by the City's Emergency Manager Ed Kurtz in consultation with Defendant Mayor Dayne Walling and there was no procedure that accompanied that unilateral decision that allowed input, protests, hearings, concerns or questions by the people that were directly impacted.

111. Said decision resulted in Plaintiffs, residents and citizens of the City being deprived of safe drinking water for a substantial period of time, suffering physical health injuries with continued exposure to contaminants.

112. That neither Defendant City nor Defendant Mayor Dayne Walling sent any "Notices" to the Plaintiffs or residents of Flint explaining the different type of water source, any

preparation for the transition, the proposed treatment process or the capability of the plant and the personnel to treat any water, let alone River water.

113. That an objective observer could reasonably conclude that Defendant Mayor Dayne Walling simply did not care about the safety or welfare of the residents that were directly impacted and that elected him to look out for their health, safety and welfare.

114. That Defendant Mayor Dayne Walling's actions of consulting in talks and physically stopping the flow of treated, safe drinking water was discretionary and the proximate cause of Plaintiff's and the residents injuries.

115. That Defendant Mayor Dayne Walling's actions were the one most immediate, efficient and direct cause preceding Plaintiff's and resident's current and future threatened health injuries from exposure to the contaminated river water.

116. That the practice of supplying water to municipal residents is not primarily supported by taxes or fees, but is primarily for pecuniary profit with rates that are almost eight times the national average.

117. That Defendant Mayor Dayne Walling is not immune for his grossly negligent acts described above.

118. That Defendant City Administrator Natasha Henderson likewise owed Plaintiffs and residents of the City of Flint a duty of reasonable care in implementing the properly passed resolutions of the City of Flint's Legislative Body, Flint City Council.

119. That Defendant City Administrator Natasha Henderson breached her duty of reasonable care by refusing to implement or respect the properly passed resolution of the Flint City Council on March 23, 2015 to do all things necessary to end the use of the Flint River as a primary drinking source and her actions amounted to gross negligence.

120. That Defendant City Administrator Natasha Henderson's actions were so reckless as to demonstrate a substantial lack of concern for whether an injury resulted, more

specifically she has caused the Plaintiffs and residents of the City to continue to be exposed to contaminants and unhealthy drinking water from the Flint River and further as the "Super Power" of the City, has failed to follow and/or implement the recommendations of the experts regarding the water plant, water treatment and personnel training.

121. That said decisions resulted in Plaintiffs, residents and citizens of the City being deprived of safe drinking water for a substantial period of time, suffering physical health injuries with continued exposure to contaminants.

122. That an objective observer could reasonably conclude that Defendant City Administrator Natasha Henderson simply did not care about the safety or welfare of the residents that were directly impacted.

123. That Defendant City Administrator Natasha Henderson's actions of failing to execute the duly adopted resolution as well as her failure to follow and/or implement the recommendations of the experts regarding the water plant, water treatment and personnel training to ensure Plaintiffs and residents have safe drinking water was discretionary and the proximate cause of Plaintiff's and the residents injuries.

124. That likewise Defendant City Administrator Natasha Henderson's actions are the one most immediate, efficient and direct cause preceding Plaintiff's and resident's continued and future threatened health injuries from exposure to the contaminated river water.

125. That Defendant City Administrator Natasha Henderson is not immune for her grossly negligent acts described above.

WHEREFORE , Plaintiffs, by and through their attorney, respectfully requests that this Honorable Court find that Defendant Mayor Dayne Walling and Defendant City Administrator Natasha Henderson were grossly negligent and the proximate causes of Plaintiff's injuries and enter judgment in Plaintiffs favor and against Defendants in an amount greater than Twenty-Five

Thousand ($25,000.00) Dollars, plus costs, including reasonable attorney fees and grant them such other relief as the Court deems warranted under the circumstances.

COUNT III - VIOLATION OF THE MICHIGAN ELLIOTT-LARSEN CIVIL RIGHTS ACT, M.C.L. §§ 37.2201-37.2202.

126. That the Coalition incorporates by reference allegations 1 through 125 as though fully set forth herein.

127. That Michigan's Elliott-Larsen Civil Rights Act ("ELCRA") prohibits, amongst other things, discrimination on the basis of age and familial status. M.C.L. §§ 37.2102.

128. That ELCRA defines "Familial status" as 1 or more individuals under the age of 18 residing with a parent or other person having custody or in the process of securing legal custody of the individual or individuals or residing with the designee of the parent or other person having or securing custody, with the written permission of the parent or other person.

129. That the Notice sent to Plaintiffs and all residents by the City advised that People who drink water containing trihalomethanes in excess of the MCL over many years may experience problems with their liver, kidneys, or central nervous system, and may have an increased risk of getting cancer.

130. That the Notice further advised those that are elderly, infant or have a severely compromised immune system may be at increased risk of these health problems and should seek advice about drinking water from their health care providers.

131. That Defendants violated ELCRA by subjecting elderly water servicecustomers to different requirements than non-elderly water service customers solely on the basis of age.

132. That Defendants violated ELCRA by subjecting water service customers who live in familial units that include infants to different requirements than water service customers who live in families without infants.

133. That by failing to provide safe drinking water to the elderly and infants, Defendants have violated the ELCRA.

134. That Plaintiffs include persons who are elderly and who live in familial units that include at least one infant.

135. That Defendants are jointly and severally liable.

WHEREFORE , Plaintiffs, by and through their attorney, respectfully requests that this Honorable Court enter an order declaring that Defendants violated Plaintiff's rights to be free from discrimination on the basis of age and familial status in violation of Michigan's Elliott-Larsen Civil Rights Act, enter an order awarding Plaintiff's economic, punitive, and emotional damages, past and future, against Defendants for their unlawful conduct, in an amount they are found to be entitled to; enter an order awarding Plaintiff's interest, costs, attorneys' fees and litigation expenses as provided for under the Elliot-Larsen Civil Rights Act; and grant them such other relief as the Court deems warranted under the circumstances.

COUNT IV – VIOLATION OF MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT (PDCRA)

136. That the Coalition incorporates by reference allegations 1 through 135 as though fully set forth herein.

137. That the opportunity to obtain full and equal utilization of public accommodations and public services, without discrimination because of a disability is guaranteed by the PDCRA and is a civil right. MCL 37.1102

138. That the Defendants provide a public service of providing water for pecuniary purposes to residents of the City and are defined as a political subdivision in the PDCRA.

139. That a compromised immune system renders a person highly susceptible to diseases that might be communicable and lessens their ability to fight off contaminants that can cause liver, kidney, central nervous system or cancer problems.

140. That a severely compromised immune system, which could be associated with AIDS or other conditions, is a determinable physical characteristic of an individual that may result from disease and that is unrelated to an individual's ability to perform certain duties and is a handicap within the meaning of the Michigan's Handicapper's Civil Rights Act. MCL 37.1101.

141. That in telling residents with a compromised immune system to seek advice from their health care provider about drinking the river water, thereby imposing additional hurdles on these residents' ability to access clean, safe drinking water that are not imposed on non-disabled individuals and/or depriving them of the availability and accessibility of clean, safe drinking water, Defendants have failed to provide public accommodations to said persons with disabilities.

142. Plaintiffs include numerous persons with compromised immune systems due to a multitude of reasons. (See attached Affidavits to original Complaint)

143. That these Plaintiffs are persons with disabilities as defined in the PDCRA Michigan Act because they have physical impairments, including but not limited to Lupus, Connective Tissue Disease, Osteoarthritis and Multiple Sclerosis.

144. That despite their disabilities, Plaintiffs are otherwise qualified to the use and benefit from the City's provision of water service.

145. That Plaintiffs' have requested the City to accommodate their disability and provide them with safe, drinking water that does not require the pre-approval of their healthcare provider but have been denied.

146. That Defendants refusal to provide Plaintiffs with access to safe, drinking water discriminated against Plaintiffs as individuals with disabilities by denying them equal access and otherwise limiting their access to Defendant's facilities, programs and services as compared to nondisabled Flint residents while still charging all residents the same exorbitant water rates.

WHEREFORE , Plaintiffs, by and through their attorney, respectfully requests that this Honorable Court find that Defendants have violated the Michigan PDCRA and are the proximate causes of Plaintiff's injuries and enter judgment in Plaintiffs favor and against Defendants in an amount greater than Twenty-Five Thousand ($25,000.00) Dollars, plus costs, including reasonable attorney fees and grant them such other relief as the Court deems warranted under the circumstances.

COUNT V – BREACH OF IMPLIED WARRANTY OF HABITABILITY

147. That the Coalition incorporates by reference allegations 1 through 146 as though fully set forth herein.

148. That the Coalition includes members who have contracts with the City of Flint for the provision of water.

149. That these members purchased water for the primary purposes of drinking, bathing, cooking and cleaning.

150. That the sale of water is subject to requirements outlined in the Uniform Commercial Code (UCC).

151. That by selling water for a monetary fee only, the City of Flint is a seller of goods under the UCC.

152. That by providing defective, contaminated water that is unsafe for drinking, bathing, cooking and/or cleaning, the City of Flint has sold a good that is not fit for the ordinary purposes for which water is used.

153. That by providing defective, contaminated water that is unsafe for drinking, bathing, cooking and/or cleaning, the City of Flint has breached the implied warranties of fitness and/or merchantability.

154. That the provisions of defective contaminated water by the City of Flint is the proximate cause of Plaintiff's injuries.

WHEREFORE , Plaintiffs, by and through their attorney, respectfully requests that this Honorable Court find that Defendants have breached their implied warranty of habitability and are the proximate causes of Plaintiff's injuries and enter judgment in Plaintiffs favor and against Defendants in an amount greater than Twenty-Five Thousand ($25,000.00) Dollars, plus costs, including reasonable attorney fees and grant them such other relief as the Court deems warranted under the circumstances.

COUNT VI - INJUNCTIVE RELIEF

155. That the Coalition incorporates by reference allegations 1 through 154 as though fully set forth herein.

156. That the University of Michigan – Flint (UofM-Flint) has taken the extra precaution for its students and faculty to protect them from the unsafe drinking water by hiring an independent environmental consultant to test the Flint River water that has been treated by the Flint Water Treatment Plant and delivered to their Flint Campuses despite the City's claims that the water is safe for consumption and well below the allowable levels for TTHM contamination.

157. That on June 25, 2015, the UofM-Flint sent out a campus-wide email that stated the consultant's analytical results demonstrated that the City of Flint water showed elevated TTHM levels on campus during the most recent tests entering portions of their campus water distribution system and impacting some of the buildings, including North Bank

Center, William S. White Building, French Hall, the recreation center and the library. (See *Exhibit I*)

158. That the tests showed TTHM levels higher than 80 parts per billion, the type of readings that put the city in violation of the Safe Drinking Water Act since the start of this year.

159. That the notice further stated that even though the aforementioned risks are usually associated with long term exposure, "you may want to limit your exposure for the short term" and included a few recommendations, including but not limited to using bottled water, using filtration systems and utilizing a point of use treatment system.

160. That these recent tests are another demonstration of the City's inability to properly treat the Flint River water as well as their failure to timely and effectively warn the residents of the ongoing high fluctuations of the levels of TTHM in water being treated at the Flint Water Plant.

161. That had the UofM-Flint not hired its own independent water quality consultant, they would not have known of the high levels of TTHM being delivered to its campuses.

162. That during this same timeframe, the City maintained its position that the water is safe for consumption inspite of the independent test results.

163. That the actions or inactions of the City in notifying and warning the residents of the true levels of TTHM and other contaminants in the river water continue to cause the community's distrust and lack of confidence in the City's ability to effectively treat the Flint River Water and/or their ability to have transparency in disclosing the true water quality.

164. That based on Defendant's acts that continue to deprive Plaintiffs of access to clean, safe drinking water and their liability under Counts I-V, Plaintiffs seek a Temporary and/or Permanent Injunction restraining the Defendants from:

a. Continuing to utilize the City of Flint Water Plant to treat the Flint River as the City's primary source of drinking water until it can satisfactorily show compliance with either of the expert recommendations by Veolia or Bob Bowcock;

b. Taking or continuing any action contrary to the declaration of rights sought by Plaintiffs.

165. That Plaintiffs further seek a Temporary and/or Permanent Injunction requiring the City of Flint to utilize the DWSD as its primary source of drinking water, consistent with every other entity in the county of Genesee (and also General Motors within the City of Flint) until such time as it can demonstrate total compliance with the EPA's quarterly LRAA tests and the Michigan Safe Drinking Water Act.

166. That Plaintiffs' further seek a Temporary and/or Permanent Injunction appointing a Receiver to run and operate the City water plant until further Order of the Court.

167. That if the Court finds that the City can continue run the water plant without the necessary and proper training, equipment and personnel and attempt to treat the River water at the expense and against the will of the residents and the duly elected legislative body, Plaintiffs will suffer immediate and irreparable harm to their health, safety and welfare, particularly the most vulnerable individuals (those with compromised immune systems, the elderly and the infants).

168. That in order to ensure that complete and effective relief is afforded to the Plaintiffs, and should the Court grant Plaintiffs request for declaratory judgment, the

public interest would be best served by issuance of a temporary and/or permanent injunction granting such relief as the Court deems just and necessary to effectuate the declaratory relief granted.

WHEREFORE, Plaintiff pray that this Honorable Court will declare the rights and responsibilities of the parties hereto, issue a declaratory judgment and Order Temporary and/or Permanent Injunctive Relief as requested.

REQUEST FOR REMAND

WHEREFORE, Plaintiff prays that as Plaintiff's 1st Amended Complaint does not involve any claims that arise under the laws, treaties, or Constitution of the United States, as all of the claims arise under state law and this Court lacking subject-matter jurisdiction, that the matter be remanded to state court.

I have read the foregoing complaint and I declare that statements contained therein are true to the best of my knowledge, information and belief. MCR 2.114(B)(2)(B).

Dated: July 6, 2015 /s/Allen C. Overton
Pastor Allen C. Overton, Coalition For Clean Water, Plaintiff

Dated: July 6, 2015 /s/Alfred L. Harris
Pastor Alfred L. Harris, Concerned Pastors For Social Action, Plaintiff

Dated: July 6, 2015 /s/Melissa Mays
Melissa Mays, Water You Fighting For, Plaintiffs

Dated: July 6, 2015 /s/Clair McClinton
Clair McClinton, Democracy Defense League Water Task Force, Plaintiff

Dated: July 6, 2015 /s/Florlisa Fowler
Florlisa Fowler, Flint Water Class Action Group, Plaintiff

Dated: July 6, 2015 /s/Laura Sullivan
Laura Sullivan, PhD, Plaintiff

Dated: July 6, 2015 /s/Eric Mays
Eric Mays, 1st Ward Flint City Councilman, Plaintiff

Respectfully Submitted,

TRACHELLE C. YOUNG & Assoc., PLLC

Dated: July 6, 2015

/s/ Trachelle C. Young
By: Trachelle C. Young (P63330)
Attorney for Plaintiffs
2501 N. Saginaw Street
Flint, MI 48505

EXHIBIT I

--- Original message ---
From: "Bigelow, Terry" <tbaryo@umfiint.edu>
Date: 06/25/2015 11:33 AM (GMT-05:00)
To: AllUsers <AllUsers@umilint. edu>
Subject: Campus Water Quality Update

This message is being sent on behalf of Environment, Health and Safety

Dear Campus Community

Environment, Health, and Safety (EHS completed another round of campus-wide water quality testing. The analytical results provided by the University's independent environmental consultant demonstrated that the City of Flint water entering portions of our campus water distribution system and impacting some of the buildings is above the regulatory Maximum Contaminant Levels (MC Ls) for total trihalomethanes or TTHMs.

TTHMs are a byproduct of the chlorination process related to treating the water supply to ensure that the water is safe from pathogens and bacterial contaminants that could have an immediate and severe health effect. As the Genesee County Health Department (GCHD) and other environmental regulatory agencies have indicated, studies suggest that elevated levels of total Trihalomethanes are not an immediate health concern to most people, but those with a severely compromised immune system, pregnant women, infants or elderly may have increased risks. It is important to note that these studies and related risk assessments associated with TTHMs are linked to continued exposure for decades of use/consumption and not necessarily short term exposure.

Even though the risks are associated with long term exposure, you may wish to limit your exposure for the short term. There are a few recommendations that one might follow if concerned about total trihalomethanes (TTHMs):

1. Use bottled water and refill using one of the water bottle refill stations that are also equipped with water filtration unit. There are a number of water bottle refill stations that are located on campus that are equipped with filtration units.
2. Consider a point-of-use water treatment system such as a pour through pitcher style unit.
3. Other point-of-use filtration units may be considered, depending upon the specific application and circumstances.
4. It is important to note that when selecting/purchasing any water filter device that it is certified by National Sanitation Foundation (NSF), Underwriters Laboratories (UL) or the Water Quality Aisociation (VVQA) to remove TTHMs (look for the seals on the box).

The City of Flint has been contacted about the recent test results at some of our buildings and has agreed to increase flushing water through local hydrants near the campus to improve general water quality. Additionally, this summer the City is expected to install activated carbon filtration at the water treatment plant outflow which is anticipated to dramatically reduce the TTHM concentrations for the Flint community.

If interested in learning more about water quality testing, TTHMs and other related information, feel free to visit the GCHD, EPA, MDEQ and other websites below.

http://www.achd.usidocs/Trihalomethanes Fact Sheet 2 .pdf
http://www.michigan.govideo/0.4561,7-135-3313 3675 3691---.00.html
http://water.epa.gov/drink/contaminants/basicinformation/disinfectionbybroducts.cfm

EHS will continue to conduct water testing on campus later this summer/fall. As always, if you have further questions please do not hesitate to contact me.

Mike

Michael Lane

Director, Environment, Health, and Safety University of Michigan-Flint

810-766-6763

mjlane@umflint.edu <mailto:mjlane@umflintedu>