IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONCERNED PASTORS FOR SOCIAL ACTION, et al.,

Plaintiffs,

v.

NICK A. KHOURI, et al.,

Defendants.
_____/

Case No. 16-10277

Hon. Mark A. Goldsmith

Mag. J. Stephanie Dawkins Davis

DEFENDANT CITY OF FLINT'S RESPONSE TO
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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CONCISE STATEMENT OF ISSUES PRESENTED

Is the preliminary injunctive relief sought by Plaintiffs warranted where:

(1) the relief is moot;

(2) Plaintiffs have failed to provide facts, as opposed to speculation, as to their alleged actual and imminent irreparable harm or as to the practicality and efficacy of the relief sought; and

(3) the requested relief is disruptive and contrary to the public interest because it will interfere with the efforts of the City, State and the EPA to most effectively remediate the underlying water quality problem?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Question 1:

First Am. Title Co. v. DeVaugh, No. 05-70718, 2008 WL 4386770 (E.D. Mich. Sept. 25, 2008)

Troiano v. Supervisor of Elections in Palm Beach Cty., Fla., 382 F.3d 1276 (11th Cir. 2004)

Question 2:

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Rules

INTRODUCTION

Plaintiffs' Motion for Preliminary Injunction should be denied because it is not supported by the facts or pertinent law and is now moot. It is moot because, as discussed further below, a private institution, working in conjunction with the City of Flint (the "City"), will shortly begin a substantial home delivery program. It is contrary to the facts because, among other failings, Plaintiffs have failed to offer facts, as opposed to speculation, as to the existence or extent of the alleged problem as to the accessibility of bottled water and water filters, and it fails to recognize the extensive public and private resources that are already in place to address Plaintiffs' concerns. It is contrary to the law because, among other things, it asks this Court to interfere with and endanger the carefully structured plan that the City, the State of Michigan (the "State") and the EPA, have put in place to respond most effectively to the Flint water crisis. In sum, Plaintiffs have failed to carry their burden of satisfying any element required for a preliminary injunction.

FACTUAL BACKGROUND

Plaintiffs devote much of their Brief in Support of Motion for a Preliminary Injunction ("Plaintiffs' Brief") to a review of the events leading up to the current situation, in which Flint residents are, for the time being, advised not to drink unfiltered tap water and instead are advised to consume bottled water or install a

water filter.[1] For purposes of the relief Plaintiffs seek here, those historical events are not central to the Court's analysis. Accordingly, although the City does not accept all of Plaintiffs' assertions, it does not address them here. Instead, the City will focus on the facts relevant to Plaintiffs' alleged entitlement to their requested relief. As set forth below, these facts undermine Plaintiffs' central assertions, namely that Flint residents lack reliable access to safe drinking water and that the proposed preliminary injunction is an appropriate response.

The City, working with the State and private organizations, has implemented a carefully tailored plan, discussed below, to provide City residents most effectively with safe drinking water. That plan includes distribution assistance for residents who require it.

Plaintiffs acknowledge some of the extensive efforts the City, the State and other governmental and non-governmental agencies have made to supply residents with reliable access to safe drinking water, including providing free bottled water, water filters and test kits,[2] but they significantly understate the City's efforts and the resources that are now available to Flint residents.

Most importantly, the City, working with the Community Foundation of Greater Flint, Mott Community College and a private donor, is implementing a new program under which approximately 40 unemployed teens and young adults

[1] *See, e.g.*, Plaintiffs' Brief, Background, Sections I-III and Argument.
[2] *See, e.g.*, Plaintiffs' Brief, p. 26.

will be hired for the purpose of delivering water to residents who require delivery assistance.[3] This new program is expected to be implemented within thirty days.[4] As such, Plaintiffs' requested relief is moot, even if it were otherwise warranted (which it is not).

Even without this new program, extraordinary and effective actions have been undertaken to ensure that Flint's residents have access to safe water. Many of these efforts are described in the Affidavit of Chris A. Kelenske, attached as Exhibit A to the State's opposition brief,[5] which is incorporated by reference. Further, free water is currently distributed through five distribution centers, which are respectively located in every active Flint fire station. The City recently announced the opening of nine new distribution centers, which will replace the fire stations.[6] In addition, water is available from approximately 20 local churches and other private organizations.[7] Residents requiring assistance to obtain water are directed to the United Way, which provides a dedicated driver for daily distribution of water,[8] as well as a private organization called "h2oflint."[9]

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[3] *See* Declaration of Steven Branch (**Exhibit A**).
[4] In fairness to Plaintiffs, they were likely unaware of this new program when they filed their brief.
[5] Doc # 40-2.
[6] Gary Ridley, *Changes Coming to Flint Water Distribution*, MLive, updated on April 5, 2016 http://www.mlive.com/news/flint/index.ssf/2016/04/changes_coming_to_flint_water.html (**Exhibit B**).
[7] *See* http://www.h2oflint.com/ (**Exhibit C**).
[8] *See* http://www.unitedwaygenesee.org/flintwaterfund (**Exhibit D**).

Contrary to Plaintiffs' assertion that residents are limited to one case of water per day,[10] there is no limit as to the number of cases an individual is able to take from the fire stations.[11] Moreover, notwithstanding Plaintiffs' assertions about the legal concerns that certain members of Flint's immigrant community may have about appearing at the fire stations,[12] residents are not asked any questions or required to present identification.[13]

In addition to bottled water, the City offers residents free PUR faucet filters which have been certified by NSF for filtration of 100 gallons of water before needing replacement. Residents are able to obtain these filters from the fire stations and five additional locations: two Michigan Department of Health and Human Services offices, two Genesee County Community Action Resource Department offices, and Flint City Hall.[14] Residents with questions about installing the filters are directed to call "211" or City Hall. In addition, residents

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[9] *See* http://www.h2oflint.com/request_delivery (**Exhibit E**). The City's "State of Emergency" website directs residents to h2oflint to enter their information to request home delivery of bottled water.

[10] Plaintiffs' Brief, p. 26.

[11] Matt Helms, *Groups seek home-delivered water to all Flint homes amid lead crisis*, Detroit Free Press, March 24, 2016, http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/03/24/flint-water-crisis-aclu-flint-home-delivered-water/82223266/ (**Exhibit F**).

[12] Plaintiffs' Brief, p. 27.

[13] *Id. See also* Amanda Emery, *ID not required for residents to get free resources during Flint water crisis*, mlive, January 22, 2016, http://www.mlive.com/news/flint/index.ssf/2016/01/id_not_required_for_residents.html (**Exhibit G**).

[14] *See* https://www.cityofflint.com/state-of-emergency/ (**Exhibit H**).

have access to an instructional video online and to the PUR filters support site.[15] Likewise, the State provides extensive instructional materials regarding filter installation.[16] Finally, Plumbers Local 370 is making volunteer plumbers available to install filters.[17]

The City has also informed residents of additional precautionary measures in an effort to help alleviate concerns about lingering lead particulate. These measures can be taken in conjunction with residents' use of bottled water and/or filters. Officials have instructed residents to flush their water faucets, which will help remove the fragments and clean aerators in their water filters. Within a few days, all Flint residents will be receiving by mail a written explanation of how to flush their lines.[18]

The City has also begun the process of replacing all of its lead service lines. Mayor Weaver has implemented a "Fast Start" plan to replace the lead services lines.[19] Despite the City's financial burdens and significant lack of resources, over 36 services lines have been replaced. The City is also applying for a loan from the Drinking Water Revolving Fund ("DWRF") of the State of Michigan. This loan

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[15] *Resources and News for Flint Residents*, https://www.pur.com/flint (**Exhibit I**).
[16] *See, e.g.*, http://www.michigan.gov/documents/flintwater/Flint_PUR_FilterFactSheet_513183_7.pdf and http://www.michigan.gov/flintwater/0,6092,7-345-75251_75315---,00.html (**Exhibit J**).
[17] *See* http://flintplumber.org/ and http://www.michigan.gov/flintwater/ (**Exhibit K**).
[18] *See* **Exhibit L**.
[19] Declaration of Michael Glasgow (**Exhibit M**), ¶ 4.

will provide the resources the City needs to significantly expand its service line replacement efforts.[20] These efforts will allow Flint to implement an advanced water infrastructure and to achieve compliance with the EPA's administrative order.[21] Further, as an additional form of interim relief for Flint's residents, the State has also approved a water bill credit.[22]

Against this backdrop, the City remains stretched to its financial breaking point. The City projects that the Water Department will incur a deficit of $9 million for the current fiscal year (ending June 30, 2016).[23] The budget for the upcoming fiscal year (beginning July 1, 2016) projects that the City Water Department will incur a deficit of $26 million and will run out of funds by December.[24] Any additional financial burdens will materially delay the City's ability to perform its other remediation efforts and to comply with the EPA's final order.[25]

In juxtaposition to the above facts, Plaintiffs' assertion that the City's current system fails to provide Flint residents with safe drinking water is supported by little more than speculation and anecdote. Plaintiffs speculate that certain segments of the population may, for a variety of physical, legal, or logistical

[20] *Id.*
[21] *See* **Exhibit M** at ¶ 5.
[22] *See Help for Flint*, http://www.helpforflint.com/ (**Exhibit N**).
[23] Declaration of Jody Lundquist (**Exhibit O**), ¶ 5.
[24] *Id.*
[25] *See* **Exhibit M**, ¶ 14

reasons, have difficulty obtaining bottled water from the City's facilities or properly installing water filters at their home, but they offer little to no evidence about such vital questions as how many individuals have actually encountered these alleged challenges, who those individuals are, and, perhaps most importantly, the extent to which individuals who have been unable to retrieve bottled water or water filters from the City's facilities have nonetheless obtained safe water from other sources (*e.g.*, churches, charities, family members, friends, neighbors, etc.). Likewise, as to Plaintiffs' concerns about the effectiveness of water filters, Plaintiffs offer a similar lack of detail as to the number, identity and location of those residents whose filters are not properly installed or maintained or are otherwise ineffective.

PRELIMINARY INJUNCTION STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right."[26] "'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'"[27] "Although the factors are to be balanced, a finding that there is no likelihood of irreparable harm, . . . or no likelihood of

[26] *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008) (citation omitted).
[27] *Caspar v. Snyder*, 77 F. Supp. 3d 616, 623 (E.D. Mich. 2015) (Goldsmith, J.) (quoting *Winter*, *supra* note 26).

success on the merits, . . . is usually fatal."[28]

"Plaintiff bears the burden of demonstrating his entitlement to a preliminary injunction, and his burden is a heavy one. 'A preliminary injunction . . . should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.'"[29] "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion."[30] "Thus, plaintiff may not merely point to genuine issues of material fact which exist, but must affirmatively demonstrate his entitlement to injunctive relief."[31]

Moreover, "[w]hen a plaintiff seeks to enjoin the activity of a government agency . . . , his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs . . . ."[32] Accordingly, "[b]efore a preliminary injunction may issue against a public instrumentality, the movant must demonstrate a higher

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[28] *CLT Logistics v. River West Brands*, 777 F. Supp. 2d 1052, 1064 (E.D. Mich. 2011) (internal citations omitted).
[29] *Cox v. Jackson*, 579 F.Supp.2d 831, 853 (E.D. Mich. 2008) (Rosen, J.) (quoting *Overstreet v. Lexington–Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)).
[30] *Id.* (quoting *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (internal quotation marks omitted)).
[31] *Id.*
[32] *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) (internal citations and quotation marks omitted).

probability of success and danger of irreparable harm than would be required against a private party."[33]

Finally, even in those limited cases in which the movant demonstrates that "the circumstances clearly demand" the "extraordinary remedy" of a preliminary injunction,[34] the resulting order "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[35]

ARGUMENT

I. Plaintiffs Have Not Established a Likelihood of Success on the Merits.

Plaintiffs cannot carry their burden of demonstrating a likelihood of success on the merits for the reasons set forth in the City's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).[36] For brevity's sake, the City incorporates that brief by reference and does not repeat those arguments here.

In addition, in light of the facts recited above, and in particular the impending implementation of a water delivery program, Plaintiffs' requested relief is moot. As explained in *First Am. Title Co. v. DeVaugh*:[37]

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[33] *Penn Cent. Co. v. Public Utilities Commission of State of Connecticut*, 296 F. Supp. 893, 897 (D. Conn. 1969) (citing *Yakus v. United States*, 321 U.S. 414, 440-41 (1944)).
[34] *Cox*, 579 F. Supp. 2d at 853.
[35] *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003).
[36] *See* City's Motion to Dismiss [Doc # 22].
[37] No. 05-70718, 2008 WL 4386770, at *3 (E.D. Mich. Sept. 25, 2008) (**Exhibit P**) (quoting *Chicago United Indus. Inc. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006)).

> Comity, moreover—the respect or *politesse* that one government owes another, and thus that the federal government owes state and local governments-requires us to give some credence to the solemn undertakings of local officials. '[W]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will *not* recur' if the injunction is lifted.

Indeed:

> When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit. *See, e.g., Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474, 110 S. Ct. 1249, 1252, 108 L. Ed. 2d 400 (1990); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103, 102 S. Ct. 867, 869, 70 L. Ed. 2d 855 (1982) (*per curiam*); *Kremens v. Bartley*, 431 U.S. 119, 128–29, 97 S.Ct. 1709, 1715, 52 L. Ed. 2d 184 (1977); *Diffenderfer v. Cent. Baptist Church, Inc.*, 404 U.S. 412, 415, 92 S. Ct. 574, 576, 30 L. Ed. 2d 567 (1972). The Court has rejected an assertion of mootness in this kind of challenge *only* when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated.[38]

Here, there is no basis to rebut the presumption that the delivery program will go forward (and, of course, Plaintiffs may again seek relief if it does not). Thus, Plaintiffs' Motion should be denied as moot.

II. Plaintiffs Have Not Established Irreparable Harm.

Plaintiffs' also have not met their burden of showing that their requested relief is necessary to prevent "irreparable harm." "In evaluating the harm facing

[38] *Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1283-84 (11th Cir. 2004) (emphasis in original); *see also* Section II.B. below, which addresses and distinguishes several cases that Plaintiffs cite for the proposition that "voluntary cessation" of conduct does not render preliminary injunctive relief moot.

the plaintiffs, the Court must evaluate three factors: '(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided.'"[39] Here, Plaintiffs have failed to demonstrate irreparable harm in multiple respects.

A. Plaintiffs Have Not Established the Existence, Extent, or Likelihood of the Alleged Harm—Lack of Access to Safe Water.

Plaintiffs have failed to provide sufficient evidence regarding the existence and magnitude of the alleged harm. This is Plaintiffs' burden – the City is not required to prove a negative – and Plaintiffs have failed to meet it.

Plaintiffs assert that "[p]eople who lack access to safe drinking water will 'likely . . . suffer irreparable harm . . . includ[ing] a host of serious and even life threatening medical conditions.'"[40] However, Plaintiffs have failed to provide critical details to establish that Flint residents in fact "lack access" to safe drinking water.

"[A] preliminary injunction [should be granted] only if the plaintiff will suffer actual and imminent harm rather than harm that is speculative or

[39] *Cox v. Jackson*, 579 F. Supp. 2d 831, 854 (E.D. Mich. 2008) (quoting *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987)).
[40] Plaintiffs' Brief, p. 34 (quoting *Lyda v. City of Detroit (In re City of Detroit)*, No. 13-53846, Adv. No. 14-044732, 2014 WL 6474081, at *12 (Bankr. E.D. Mich. Nov. 19, 2014) (**Exhibit Q**)).

unsubstantiated."[41] Here, Plaintiffs' claimed injury remains particularly speculative and unsubstantiated because (a) Plaintiffs have failed to provide specific evidence as to the actual extent to which residents are unable to obtain bottled water and filters through Defendants' distribution network, and additionally, (b) Plaintiffs have failed to demonstrate that any individuals who allegedly lack access to water and filters from *Defendants'* distribution network also "lack access" to safe water from the numerous private sources described in the Factual Background section above, or from family, friends or similar sources. Absent these facts, Plaintiffs cannot meet their burden of showing that the individuals they purport to represent in fact lack access to a safe water supply, and Plaintiffs similarly cannot establish that they are entitled to the extraordinary remedy of a preliminary injunction.

Courts have declined to enjoin governmental conduct where, like here, the plaintiff has alternative means of averting their alleged harm, including through private resources.[42] For this reason too, Plaintiffs have failed to show that they will

[41] *Lowe v. Vadlamudi*, No. 08–10269, 2009 WL 736798, *12 (E.D. Mich. Mar.16, 2009) (**Exhibit R**) (quoting *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006)).

[42] *See Lyda v. City of Detroit* (*In re City of Detroit*), No. 13-53846, Adv. No. 14-044732, 2014 WL 6474081, *11 (Bankr. E.D. Mich. Nov. 19, 2014) (denying request for preliminary injunction by residential water customers facing shutoffs for failure to pay bills, in part because City, through a "patchwork combination of charity and public funds," had already devised reasonable plan that had been

suffer "actual and imminent harm . . ." without home water delivery and professional filter installation assistance *by Defendants*.[43]

Plaintiffs dispute that these alternative resources overcome their claim of irreparable harm. Specifically, Plaintiffs contend that merely because "some . . . Flint residents may be able to obtain 'alternative sources' of water, 'including purchasing containers of water at local stores,' does not eliminate irreparable harm when, as in this case, those alternative sources 'are much more expensive, and many of the affected people are already in poverty,' or when 'it is challenging to commit the time and energy necessary to purchase and transport sufficient quantities of water.'"[44] Plaintiffs' argument fails for two reasons.

"generally successful in providing necessary assistance to customers that suffered temporary income reductions . . .").

[43] *Lowe*, 2009 WL 736798, at *12 (internal quotation marks and citation omitted).

[44] *See* Plaintiffs Brief, p. 35 (quoting *Lyda*, 2014 WL 6474081, at *12). Plaintiffs also cite *United States v. City of N. Adams*, No. CIV. A. 89-30048-F, 1992 WL 391318, *5 (D. Mass. May 18, 1992) (**Exhibit S**), for the proposition that people who lack access to safe drinking water "likely . . . suffer irreparable harm . . . includ[ing] a host of serious and even life threatening medical conditions." Plaintiffs' Brief, p. 34. That case, however, also is not controlling here. Prompting the court's issuance of a *permanent* injunction in that case was the finding that the city was not sufficiently treating its water, coupled with the fact that there was no apparent alternate water supply network already in place. The case did not involve a mandatory preliminary injunction requiring a governmental unit that was already providing safe water to its residents to supplement its program with home water delivery and professional filter installation. Moreover, even as to the court's finding that injunctive relief was warranted, the court did not unilaterally impose a substantial set of obligations on the city like those requested here, as it instead afforded both parties the opportunity to return to court on a later date to address the proper scope of the injunction.

First, as a factual matter, Plaintiffs have failed to demonstrate that water from sources other than Defendants (*e.g.*, water donated from charities or churches) is in fact "much more expensive" or that the residents in question (as opposed to the private organizations and individuals mentioned above) are the ones forced to "commit the time and energy necessary to purchase and transport sufficient quantities of water."[45]

Second, and more fundamentally, while Plaintiffs cite *Lyda* in support of their position, that case supports *Defendants*, not Plaintiffs. In *Lyda*, the plaintiffs sought a preliminary injunction to enjoin Detroit from shutting off customers with unpaid water bills. The Court *denied* the plaintiffs' preliminary injunction request because, among other things, (a) the City had already devised a reasonable plan involving a "patchwork combination of charity and public funds" that had been "generally successful in providing necessary assistance to customers that suffered temporary income reductions . . ." notwithstanding that the plan was of questionable long-term effectiveness for low-income residents; and (b) the injunction was not warranted in light of the significant impact it would have had on the City.[46]

Here, like in *Lyda*, a preliminary injunction is not warranted. Along with a "patchwork combination of charity and public funds", the City has implemented a

[45] *See id.*
[46] *Lyda*, 2014 WL 6474081, at *11-*13.

system to make water and water filters available for free to Flint residents. To the extent that any residents elect also to use their own resources to purchase water, this is merely an additional option available to them; it is not an exclusive means of access. Moreover, as discussed in Sections III.B. and IV below, Plaintiffs' proposed relief would have a detrimental impact on the City.

B. The City's Unwillingness to Stipulate to Plaintiffs' Motion Does Not Establish Irreparable Harm.

Lastly, Plaintiffs contend that a preliminary injunction in this case is necessary because Defendants declined to stipulate to Plaintiffs' requested relief. This is pure boot-strapping, arguing that irreparable harm must exist because Defendants do not agree that it exists or that Plaintiffs' requested relief is warranted. Plaintiffs assert that "[v]oluntary cessation of allegedly illegal conduct does not render a case moot unless the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'"[47] But even if voluntary

[47] Plaintiffs Brief, p. 35 (quoting *Farnam v. Walker*, 593 F. Supp. 2d 1000, 1014 (C.D. Ill. 2009), and citing also *S.D. v. St. Johns Cnty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1100 (M.D. Fla. 2009)).

Farnam is inapposite because it involved a prison's life-threatening denial of medical care to a prisoner suffering from cystic fibrosis. Further, it does not acknowledge, and arguably is inconsistent with, the controlling Seventh Circuit authority of *Chicago United Indus. Inc. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006)), discussed in Section I.B. above.

S.D. is also off point. In *S.D.*, the court recognized that the government is ordinarily entitled to a rebuttable presumption that conduct will not recur, but held that an exception existed "when school districts are a party to controversies involving the First Amendment." *S.D.*, 632 F. Supp. 2d at 1099-1100.

cessation does not always moot a party's entitlement to preliminary injunctive relief (and, as explained in Section I above, it does moot Plaintiffs' request here), Plaintiffs still must prove that the underlying conduct they challenge warrants injunctive relief. If it does not, the "voluntary cessation" doctrine is wholly immaterial. That is exactly the circumstance in this case.

III. The Balance of Hardships Does Not Favor the Issuance of a Preliminary Injunction.

A. The Harm to Plaintiffs in the Absence of an Injunction is Uncertain, and the Benefits of Plaintiffs' Proposed Relief Would Be Limited.

Even if the City were not about to launch a home delivery program, given the multitude of both public and private efforts to ensure that *all* of Flint's residents have access to safe drinking water, the number of individuals, if any, who currently lack access to safe drinking water is uncertain at best. For that reason, the same is true of the alleged need for Plaintiffs' proposed relief.

Also uncertain is the value of Plaintiffs' proposed relief even if the Court were to order it. From a timing perspective, it is entirely unclear how long the set-up and implementation would take before the City, already working without adequate resources, would be in a position to start yet another water delivery and filter installation program.

Plaintiffs' proposed program also would not avert certain of the harms that Plaintiffs cite in their Brief. For instance, regarding some residents' worry "that

their children 'may mistakenly forget about the contamination and drink the water[,]'"[48] a home water delivery program would not address that risk. Similarly, Plaintiffs' program would be of little help to "[o]ther residents, particularly members of Flint's immigrant community, [who] are deterred from picking up water at the fire stations, given the presence of National Guard and law-enforcement officials at the sites."[49] Simply put, if these individuals seek to avoid being in a public building with governmental officials, they are likely to be even less comfortable providing their contact information to governmental officials for scheduling purposes and then having governmental employees enter their home. Finally, for many residents, Plaintiffs' proposed program may prove even less convenient than the distribution model that is in place now. Individuals seeking to avail themselves of the new program would presumably be forced to schedule delivery or installation appointments with the City, only then to be forced to remain at home for extended periods while waiting for their appointments.

[48] Plaintiffs Brief, p. 33.
[49] *Id.* at p. 27.

B. The Harm to the City if the Court Were to Issue an Injunction is Substantial.

In contrast to the limited and speculative benefits associated with Plaintiffs' proposed plan, the financial hardship that such a plan would impose on the City would be significant. To that end, it would also impair the City's progress on its most pressing objective—remediating Flint's water system. Not surprisingly, Plaintiffs cite no precedent for such drastic and costly relief, particularly in cases involving cities facing financial pressures like Flint. To the contrary, case law makes clear that injunctions of such a burdensome and disruptive magnitude are highly disfavored.[50]

In summary, the balance of harms in this case weighs strongly against the issuance of a preliminary injunction. At best, the relief would provide nominal

[50] *See Erard v. Johnson*, 905 F. Supp. 2d 782 (E.D. Mich. 2012) (declining to grant revised motion for preliminary injunction arising from alleged constitutional violations based on Michigan election procedures where motion was not filed until just before statutory ballot certification deadline and statement of facts was not filed until days after ballot certification and after printing of 7 million ballots had begun); *Lyda v. City of Detroit* (*In re City of Detroit*), No. 13-53846, Adv. No. 14-044732, 2014 WL 6474081, at *13 (Bankr. E.D. Mich. Nov. 19, 2014) ("The context here is extremely important. Detroit cannot afford any revenue slippage as it begins to implement its Eighth Amended Plan of Adjustment. . . . On balance and in the Court's discretion, the Court concludes that the requested injunction would not be justified in the circumstances, assuming that the Court did have the authority to consider it. It would simply be inappropriate to invoke such a significant remedy as an injunction when the likelihood of ultimate success is so remote, even if the harm to the plaintiffs is otherwise irreparable, especially when the harm to the defendant may also be so substantial."); *see also* cases cited *infra* at Section IV (addressing public interest).

assistance on a delayed basis for an unknown subset of Flint's residents. On the other hand, the financial and administrative burdens such a program would impose on the City would be detrimental to *all* of Flint's residents. Not only would it worsen Flint's financial crisis, but it would interfere with the City's urgent efforts to bring safe and drinkable water back to all of Flint's taps once and for all.

IV. Plaintiffs' Requested Relief Will Not Advance the Public Interest.

The final preliminary injunction factor, the public interest, also weighs strongly against Plaintiffs' requested relief. The reasons are consistent with those set forth in Section III.B above, because, as Plaintiffs correctly point out in their Motion, "[w]here, as here, Defendants are governmental entities, the effects of an injunction on others and on the public 'substantially merge.'"[51]

As explained above, the sweeping relief Plaintiffs have proposed would require considerable resources, both administratively and financially. Consequently, the City would be forced to reallocate both personnel and money away from its most critical priority—restoring its water system. In turn, the City's overall progress on that objective would decline, thus prolonging the challenges that the *entire* Flint community would continue to endure. As relevant case law confirms, such a result would be squarely at odds with the public interest.

[51] Plaintiffs' Brief, p. 37 (citing *Miron v. Minominee Cnty*., 795 F. Supp. 840, 847 (W.D. Mich. 1992)).

A. Courts Generally Are Reluctant to Enjoin Governmental Bodies and Defer to the Government on Environmental Issues.

As a general matter, courts are reluctant to enjoin governmental bodies.[52] Moreover, in environmental cases specifically, courts are substantially deferential to the government—particularly the EPA.[53]

Courts are also reluctant to issue injunctions that would frustrate the government's efforts in environmental remediation cases, as the public interest is for the remediation to proceed both quickly and effectively.[54] In such cases, "[a]t

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[52] *See Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) ("When a plaintiff seeks to enjoin the activity of a government agency, . . . his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs . . . ." (internal citations and quotation marks omitted)).

[53] *See Trinity Am. Corp. v. U.S. EPA*, 150 F.3d 389, 398-99 (4th Cir. 1998) ("In reviewing EPA's action, we recognize that the Act, like most environmental statutes, is complex and requires sophisticated evaluation of complicated data. Accordingly, we do[ ] not sit as a scientific body, meticulously reviewing all data under a laboratory microscope. . . . Rather, if EPA fully and ably explain[s] its course of inquiry, its analysis, and its reasoning sufficiently enough for us to discern a rational connection between its decision-making process and its ultimate decision, we will not disturb EPA's action." (internal citations and quotation marks omitted)).

[54] *See, e.g.*, *Miron*, 795 F. Supp. at 846-47 (declining to require government to suspend landfill cleanup work where injunction "would not prevent the alleged harms, but would at least in the short term, exacerbate them. . . . The defendant governmental entities and the local public at large have a substantial interest in having remedial action go forward as quickly as possible."); *see also 3000 E. Imperial, LLC v. Robertshaw Controls Co., et. al.*, No. CV 08-3985 PA, 2010 WL 5464296, *13 (C.D. Cal. Dec. 29, 2010) (**Exhibit T**) (declining to enter injunction requiring defendant to "abate the contamination" where defendant had already agreed to remediate the property pursuant to a settlement with the state environmental agency).

least as important as restoring the integrity of the local environment is respect for the integrity of the longstanding judicial and local governmental processes which have yielded the remedial action plan. Where state and local government, acting on behalf of the public, with continuing judicial oversight, cooperate to rectify an environmental ill, this Court is loath to intervene."[55] To that same end, injunctive relief is disfavored when the challenged activity is "part of the solution, not part of the problem."[56]

Here, the above authorities confirm that the Court should deny Plaintiffs' requested relief. Not only does this case implicate the very facts and environmental issues that typically invite judicial deference (including the presence of an EPA directive governing the remediation of Flint's water system), but by impairing the City's remediation efforts, an injunction would be *adverse* to the "substantial interest" of *all* Flint residents "in having remedial action go forward as quickly as possible."[57] Likewise, injunctive relief also would not be fitting here because the challenged governmental conduct—Defendants' bottled water and water filter distribution program—is not the cause of the contamination of Flint's water supply; thus, it is "part of the solution, not part of the problem."[58]

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[55] *Miron*, 795 F. Supp. at 847.
[56] *Id.*
[57] *Miron*, *supra.*
[58] *Id.*

B. Plaintiffs' Proposed Injunction Would Be Overly Disruptive.

Plaintiffs' requested relief would also be at odds with the public interest given the extent to which it would disrupt significant governmental functions.[59] As a general matter, substantially disruptive remedies are disfavored when less drastic alternatives are available.[60] For example, in *U.S. v. Price*,[61] a water contamination case, the court affirmed the district court's decision not to issue a preliminary injunction requiring a diagnostic study and the provision of an alternate water supply. Notwithstanding the fact that certain residents near the subject landfill still lacked a safe water supply, the cost of the requested relief, coupled with the priority of prompt preventive action, justified the denial of the requested

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[59] *See Lyda v. City of Detroit* (*In re City of Detroit*), No. 13-53846, Adv. No. 14-044732, 2014 WL 6474081, at *12 (Bankr. E.D. Mich. Nov. 19, 2014) ("[T]he City is concerned that a six-month injunction against terminations [of water service for customers who fail to pay] would increase its customer default rate and would seriously threaten its revenues. The Court so finds . . . . Detroit cannot afford any revenue slippage as it begins to implement its Eighth Amended Plan of Adjustment. . . . It would simply be inappropriate to invoke such a significant remedy as an injunction . . . ."); *see also* cases cited *supra* at Section III.B.

[60] Consistent with this rule, Defendants have been unable to find a single case holding that individuals "lack access" to water within the meaning of the SDWA when they do not receive publicly provided home deliveries of bottled water or professional filter installation services. Thus, Defendants similarly have been unable to find any cases in which a court entered an injunction based on the facts at issue here, let alone in a city of 100,000 residents when multiple organizations and programs were already in place to provide the relief requested. *Cf. Trinity*, *supra* (requiring provision of alternate water supply to three-quarter-mile, 100-home area rather than 100,000-resident city); *see Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

[61] 688 F.2d 204 (3d Cir. 1982).

injunction:

> The district court found that an imminent danger existed at the time of the hearing. Nevertheless, it may well be that the public interest counseled against the grant of the requested preliminary relief. Very large sums of money were required . . . , and there may have been some question about the original defendants' financial ability to fund it. In those circumstances, the most practical and effective solution may well have been to refuse the government's request for a preliminary injunction thereby necessitating the study be undertaken by EPA without delay. Prompt preventive action was the most important consideration.[62]

These same considerations apply here. Simply put, even if the Defendants' current bottled water and filter distribution network is imperfect, there remains a significant "question about the [City's] financial ability to fund [Plaintiffs' proposed relief]."[63] Moreover, beyond those financial realities, prompt remedial action of the City's municipal water system remains "the most important consideration."[64] Any injunction that slows the progress on that objective would be counter-productive at best.

[62] *Id.*
[63] *See id.*
[64] *See id.*

CONCLUSION

For the reasons stated above, Plaintiffs' Motion should be denied.

Respectfully submitted,

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Dated: April 14, 2016
1696605

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, I electronically filed the above document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

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