UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONCERNED PASTORS FOR SOCIAL ACTION; MELISSA MAYS; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; and NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Plaintiffs,

v

NICK A. KHOURI, in his official capacity as Secretary of Treasury of the State of Michigan; FREDERICK HEADEN, in his official capacity as Chairperson of the Flint Receivership Transition Advisory Board; MICHAEL A. TOWNSEND, in his official capacity as Member of the Flint Receivership Transition Advisory Board; DAVID MCGHEE, in his official capacity as Member of the Flint Receivership Transition Advisory Board; MICHAEL A. FINNEY, in his official capacity as Member of the Flint Receivership Transition Advisory Board; BEVERLY WALKER-GRIFFEA, in her official capacity as Member of the Flint Receivership Transition Advisory Board; NATASHA HENDERSON, in her official capacity as City Administrator; and CITY OF FLINT;

Defendants.
_____/

No. 16-cv-10277

HON. DAVID M. LAWSON

MAG. STEPHANIE DAWKINS DAVIS

STATE DEFENDANTS' CLOSING BRIEF ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Should this Court issue a preliminary injunction where Plaintiffs have failed to demonstrate irreparable harm, a likelihood of success on the merits and it is not in the public interest?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Gonzalez v. National Bd. of Med. Exam'rs, 225 F.3d 620 (6th Cir. 2000)

McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453 (6th Cir. 1997)

Southern Milk Sales, Inc. v. Martin, 924 F.2d 98 (6th Cir. 1991)

40 C.F.R. § 141.80

40 C.F.R. § 141.81

40 C.F.R. § 141.82

ARGUMENT

I. Plaintiffs have failed to satisfy their heavy burden of clearly demonstrating the need for the extraordinary relief they seek.

Plaintiffs have the burden to show that "circumstances clearly demand" the extraordinary injunctive relief they seek. *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). Here, that relief is door-to-door delivery of bottled water by Defendants to all Flint water customers and/or a system of filter installation, maintenance and monitoring. (Pls' Brief in Support, Doc #27, Pg ID 369, 405.) But since Plaintiffs have not suffered irreparable harm, have no likelihood of success against the State Defendants, and an injunction would harm Flint's water system and is not in the public interest, they have failed to meet their burden. See generally, *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997).

A. Plaintiffs have not demonstrated irreparable harm.

The absence of irreparable harm is a stand-alone basis on which to deny injunctive relief. See e.g., *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 (6th Cir. 1991). For several reasons, Plaintiffs cannot establish the existence of such harm.

1. Plaintiffs' delay evidences the absence of irreparable harm.

Plaintiffs claim that a preliminary injunction is necessary to prevent irreparable harm caused by an alleged inability of residents to get access to safe drinking water. But this contention is belied by Plaintiffs' own delays: they filed their preliminary injunction motion two months after the complaint, and filed their reply brief after the parties, at Plaintiffs' insistence, conducted discovery—a total delay of 177 days. Such intentional delay nullifies any showing of irreparable harm. See e.g., *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975); *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014).

2. The State is diligently and proactively providing relief.

In contrast to Plaintiffs' delay, the State has affirmatively and proactively undertaken a comprehensive and massive response to the Flint crisis: It has declared a state of emergency, activated the State's emergency operations center (SEOC), is engaging in a multi-pronged effort to provide clean water, is working to resolve the problems with the Flint water system, and has appropriated money for alternative water supplies and medical care. To date, the State has appropriated approximately $242,200,000 to resolve Flint's water problems, including $31,000,000 to provide the bottled water and faucet filters to the residents of Flint. (9/14/16 Hr'g Tr. at 276–283, 316.) Those efforts have been carefully crafted by

trained professionals within the SEOC (with advice and input from other state and federal agencies) to not only ensure that residents have access to safe water, but to also restore the water system as quickly as possible so residents can resume direct, unfiltered use of the drinking water. Plaintiffs are asking this Court to upset the plan being implemented by the State as outlined below.

a. The State is providing and installing filters to all residents.

The State's over-arching goal is to restore the drinking water system for use by Flint residents. In order to re-coat the service lines and interior piping with a corrosion-inhibiting barrier and to remove lead particulate from the system, water containing added orthophosphates must be drawn through the pipes. (*Id*. at 214, 227-229). To ensure that the water keeps flowing through the pipes, the State has focused on providing and installing water filters in residents' homes. Significantly, testing conducted by the U.S. Environmental Protection Agency (EPA), and the Center for Disease Control (CDC) has determined that filtered drinking water is safe for use by all Flint residents. (*Id.* at 224-227.)

Immediately after the declaration of emergency, the State instituted a door-to-door mission to provide and install filters in all 34,000 homes in Flint. (*Id.* at 311.) The State subsequently followed-up with a second visit to 96.1% of those homes to ensure that each residence has a filter. (*Id*. at 312.) At this point, the

State has distributed 136,000 filters and over 297,000 replacement cartridges, and continues to offer filter and replacement cartridges at its point of delivery (POD) stations in each city ward and through dozens of faith-based and other organizations located throughout the city, and provides delivery and installation services to any homebound residents. (*Id*. at 308-309, 311, 316, 319.)

Additionally, a program initially implemented by the Michigan Department of Environmental Quality (MDEQ), but now referred to as the CORE Program, hires and trains Flint residents to go door-to-door assisting other residents in the proper use of filters. (*Id*. at 309.) Currently two teams are operational. The goal is to have two teams functioning in each of the 9 city wards. (*Id*. at 310.) The program is fully funded through March 2018. (*Id*.)

b. The State is distributing bottled water to all residents.

Recognizing many residents' concerns about the water system, in addition to providing and installing water filters, the State also distributes bottled water. Water is distributed from PODs set up in each of the nine city wards and 42-43 community organizations scattered throughout the city. (*Id*. at 311, 319.) Water deliveries are made on roughly a weekly basis to 1250 residents that are homebound or require regular assistance. (*Id*. at 306.) The SEOC assumed responsibility from the Red Cross for responding to residents' 211 calls for water in July 2016, and now makes approximately 30-40 individual deliveries per day

based upon those calls and if necessary adds those residents to its weekly delivery service. (*Id.* at 304, 307.) To date, the State has distributed over 32,000,000 liters of water in the city. (*Id*. at 316.)

3. The State's efforts to encourage use of the water is restoring the water system.

The State's strategy of encouraging use of filtered water is showing positive results. The orthophosphates being distributed throughout the system are coating the pipes and dropping lead levels from 46 parts per billion (ppb) in February 2016 to 14 ppb in August 2016. *(Id*. at 217–219.) The 90th percentile sampling from May, June, July, and August 2016, taken pursuant to the Lead and Copper Rule (LCR) of the Safe Drinking Water Act (SDWA), 40 C.F.R. § 141.80(c) and § 141.86, all came back under the 15 ppb action level. (9/14/16 Hr'g Tr. at 219.) Should the sampling results continue to be under the 15 ppb action level for the period running from July to December 2016, the Flint drinking water system will remain in compliance with the LCR requirements. (*Id*. at 223.) Until that six-month sampling period is completed on December 31, 2016, however, MDEQ is recommending that residents only consume filtered tap water. (*Id*. at 233)

4. Plaintiffs have not been able to demonstrate lack of access to a reliable source of drinking water.

As Captain Kelenske acknowledged, many Flint residents still do not trust the government. But that lack of trust in the government does not equate to a lack of access to safe drinking water. See *Bradley v. Detroit Bd. of Ed.*, 577 F.2d 1032, 1036 (6th Cir. 1978) ("No court of equity should ever grant an injunction merely because of the fears or apprehensions of the party applying for it."). The CDC and EPA have confirmed that properly maintained faucet filters remove lead even at levels up to 4,080 ppb, and produce drinking water safe for even pregnant women and children. (State Ex. 3.) Few samples taken in Flint have exceeded the tested levels, and none have been detected in months. (9/14/16 Hr'g Tr. at 225–226.)[1]

Yet despite the relief efforts of the State, the success of those efforts, and trustworthiness of that success, Plaintiffs assert that certain individuals still do not have access to a reliable source of drinking water. State Defendants do not deny the difficulties certain residents face, but as outlined above, a thoughtfully designed, trustworthy plan is in place to alleviate those difficulties. Importantly, the State's plan is not rigid and excludes no one from obtaining assistance. If

[1] Plaintiffs attempt to discredit the CDC and EPA's conclusion by focusing on a study performed on pour-through filters in 2010. (Pls' Ex. 371.) But the 2010 study did not examine the type of pour-through filters the SEOC makes available in Flint (Pl's Ex. 371, p. 93) (State's Ex. 2C).

anybody needs assistance, the State has the necessary resources to provide it. (Tr. at 322–323.)

Ms. Roper and Mr. Hood testified about third parties that had difficulty obtaining bottled water or using filters. Although the State appreciates the efforts of all volunteers working in Flint, the identified problems could have been solved if either individual had provided the SEOC with the addresses of those needy individuals –something never done. (*Id*. at 56, 109, 113, 308.)

Ms. Childress testified about her struggles to obtain bottled water because she did not have a car, and her inability to use a filter because of a broken faucet. Ms. Childress initially submitted a declaration on July 22, 2016, describing her struggles, and State Defendants attempted to identify her address, but were unable to do so. State Defendants asked Plaintiffs' counsel for the address so services could be provided to Ms. Childress, but Plaintiffs' counsel refused to provide that information. As a result, State Defendants' first learned Ms. Childress's address during her cross-examination. (*Id*. at 133.) By the time Captain Kelenske testified later that day, the SEOC had contacted Ms. Childress's son to provide services to that family. (*Id*. at 308.) And, after finally obtaining Ms. Childress's address, SEOC was able to confirm that it had previously delivered water to Ms. Childress in response to 211 calls in March and August 2016. It may be that Ms. Childress did not realize that the deliveries were in response to her 211 calls.

Finally, Pastor Blake testified not only about the efforts of his church to distribute water, but also about Flint residents' difficulties caused by this crisis. The State does not deny that the problems with Flint's water system have caused hardships within the Flint community. But this lawsuit is about the adequacy of the State's response to resolve those problems. As outlined above, the State's response to this emergency has been thoughtful, well-executed, and responsive to the needs of all Flint residents.

The State recognizes that no emergency response plan will be without error. The State has a plan in place—designed and implemented by emergency response professionals—that provides assistance to all individuals in Flint, whether it be providing bottled water, installing and maintaining filters, or even fixing broken fixtures. That plan requires the assistance and cooperation of the entire community. Through State and community action, the State's plan is delivering and will continue to deliver resources to those in need. Therefore, Plaintiffs cannot show irreparable harm, and their motion must be denied.

B. Plaintiffs have failed to demonstrate a likelihood of success on the merits.

When it comes to a request for preliminary injunctive relief, "a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzalez v. National Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000). Therefore,

another independent basis on which to deny Plaintiffs' relief is that they are not likely to succeed on their claims against State Defendants.

The State of Michigan, the Michigan State Police, and the MDEQ are not parties to this action or subject to a Court order granting Plaintiffs' requested relief. This Court's jurisdiction over the State Treasurer and the members of the Flint RTAB – the State Defendants – is conditioned on the possibility that those Defendants are "operators" of the Flint water system and that there is an ongoing violation of the SDWA. But Plaintiffs are unlikely to succeed on either of those arguments.

1. Plaintiffs submitted no evidence to show that State Defendants are operators of the Flint water system.

State Defendants first raised the "operator" issue in their Motion to Dismiss. (Doc #23.) Although the Court acknowledged that the meaning of "operator" requires more than financial control, under *United States v. Bestfoods*, 524 U.S. 51, 66 (1998), the Court ruled that sufficient allegations against State Defendants existed to survive a motion to dismiss, but that the issue would be revisited if raised in a motion for summary judgment. (Opinion and Order Denying Defs.' Mot. to Dismiss, Doc #62, Pg ID 2707).

The only evidence on the "operator" issue submitted at the hearing by Plaintiffs relates to State Defendants' review and approval of the city's financial

decisions with respect to the water supply. Plaintiffs have not submitted any evidence that State Defendants direct or manage the actual operation of the Flint water department.

State Defendants, however, submitted an affidavit from Fred Headen, chairperson of the Flint RTAB, and a declaration from Larry Steckelberg, Acting Deputy Treasurer, explaining the respective functions of the Flint RTAB and the Treasurer (Affidavits submitted to Court August 29, 2016). Both individuals confirm that neither the Flint RTAB nor the Treasurer took any action to test or monitor the Flint water system, advise the system how to comply with the SDWA, or otherwise ensure the system's compliance with the SDWA. They also confirmed that neither the State Treasurer nor the RTAB have the ability to comply with any court order which may grant plaintiffs the relief sought. Accordingly, the only evidence submitted on the "operator" issue weighs in favor of State Defendants and makes it legally impossible for Plaintiffs to succeed on the merits of their claim against State Defendants.

2. Plaintiffs have not demonstrated an ongoing violation of the Safe Drinking Water Act.

Similarly, in light of the testimony of Bryce Feighner, Chief of MDEQ's Office of Drinking Water and Municipal Assistance, Plaintiffs will not succeed on their claim that the Flint water system is violating the lead and copper rule (LCR) of the

SDWA. (Tr. at 213.) Plaintiffs' Motion for Preliminary Injunction asserted two violations of the SDWA: (1) failure to maintain optimal corrosion control treatment, and (2) failure to comply with monitoring requirements. (Pl's Brief in Support, Doc #27, Pg ID 379-388.) Mr. Feighner testified at length about the current efforts to monitor the system and the test results being submitted to regulators. (Tr. at 215-233 and Ex. 30, 8/15/16 Ltr. from Feighner to Weaver.)[2] Based upon those uncontroverted facts, it appears the only potential remaining issue is whether the water supply is instituting optimal corrosion control treatment.

The LCR does not establish a maximum contaminant level for lead or copper. *See, e.g.*, USEPA, Lead and Copper Rule – Monitoring and Reporting Guidance for Public Water Systems, 4 (2010) (www.epa.gov/dwreginfo/lead-and-copper-rule-compliance-help-public-water-systems). Instead, the regulations "establish a treatment technique that includes requirements for corrosion control treatment . . . ." 40 C.F.R. § 141.80. All water suppliers are required to install and operate "optimal corrosion control treatment as defined in § 141.2." 40 C.F.R. § 141.80(d)(2). "Optimal corrosion control treatment" is defined as "the corrosion control treatment that minimizes the lead and copper concentrations at users' taps . . . ." 40 C.F.R. § 141.2. The applicable treatment steps and corrosion control

[2] The EPA was consulted on the contents of MDEQ's position and has never expressed any disagreement with MDEQ's finding. (*Id.*)

treatment requirements are set forth in 40 C.F.R. § 141.81 and § 141.82. Any water system that complies with the corrosion control requirements set forth in those two rules "shall be deemed to be in compliance with the treatment requirements contained in [40 C.F.R. § 141.81(d)(1)]." 40 C.F.R. § 141.81(d)(2).

Flint's corrosion control treatment program involves purchasing water from the Great Lakes Water Authority that has already been treated with orthophosphates, and then adding supplement orthophosphates at its treatment plant before the water is distributed to residents. (Tr. at 214.) The addition of orthophosphates are identified as one of the permitted optimal corrosion control treatments. 40 C.F.R. § 141.82. Since Flint began utilizing this treatment, samples taken at user's taps have dropped from a high of 46 ppb in February 2016 to 14 ppb in August 2016. (Tr. at 217–219, 267.) Thus, not only has the current corrosion control treatment program minimized the lead being detected in users' taps, but the lead levels currently being detected are under the 15 ppb action level. Flint is therefore implementing optimal corrosion control treatment under the LCR. (Tr. at 214.)

Presumably because of this optimization, Plaintiffs appear to now argue that Flint is violating the SDWA because it has not "minimized" lead to the levels measured in Flint's water system prior to the switch in 2014 (which samples all parties now acknowledge were invalid and submitted under false pretenses to the

State), or in the City of Detroit's water supply (despite the fact the cities draw their water from different sources – Flint's water comes from Lake Huron and Detroit draws its water from the Detroit River). Not only does Plaintiffs' argument violate the plain language of the LCR, but they have offered no legal basis in support of their proposition.

With respect to the plain language of the LCR, the definition of "optimal corrosion control treatment" only requires that a "corrosion control treatment" be added that "minimizes" the amount of lead. 40 C.F.R. § 141.2. Nowhere does the definition establish a requirement that lead be reduced to a certain amount. It only requires the addition of treatment to minimize lead levels, which is consistent with the expressly stated purpose and design of the LCR ("These regulations establish a treatment technique that includes requirements for corrosion control treatment . . ." 40 C.F.R. § 141.80(b)).

If the rule was intended to require water systems to reduce levels to a certain amount below the 15 ppb action level, as argued by Plaintiffs, the rule would say so and define in detail how to calculate that reduced level. No such standard exists in the LCR. Indeed, in the EPA's most comprehensive guidance documents on the interpretation and application of the LCR, there is no mention of any requirement that lead levels be reduced to a certain amount below the 15 ppb action level.

Finally, Plaintiffs' argument also defies common sense. Lead levels detected by sampling are highly variable – they change in the same tap on a day to day, week to week, and month to month basis. (Tr. at 268.) A legal standard cannot realistically be based on a constantly shifting figure. For example, Detroit had a 90th percentile level of 6 ppb in 2001, but in its next sampling round in 2005, it had a level of 7 ppb. Flint had a level of 5 ppb in 1999 and then it rose to 7 ppb in 2000. Under Plaintiffs' theory, the rise in levels would mean that Detroit and Flint were both violating the LCR. Plaintiffs' interpretation is simply not logical based upon the variable nature of lead sampling results.

C. Plaintiffs' requested relief would harm Flint's water system and is contrary to the public interest.

The State's goal is to return Flint's residents to normal use of their water supply. In order to achieve that goal, it is crucial that Flint's residents actually run water through their taps in order to coat the pipes with orthophosphate scale. Plaintiffs' request for bottled water deliveries to all Flint water users would discourage the use of tap water in homes and, consequently, delay the recovery of this system. This result would obviously not be in the public's interest.

Plaintiffs' requested relief would also be incredibly expensive. Door-to-door delivery of bottle water would cost between $9,400,000 and $11,400,000 per month. (Tr. at 325.) Additionally, it would be necessary to call out the National

Guard in order to implement the door-to-door delivery service demanded by Plaintiffs, which would vastly increase the cost of the requested relief. (*Id*. at 326.) In light of the significant efforts already being made by the State, and the undeniable fact that the plan is leading to the recovery of the Flint water system, it would be contrary to the public interest to require the State Defendants who lack authority and resources to implement the relief sought.

CONCLUSION AND RELIEF REQUESTED

For the reasons state above, State Defendants request that the Court deny the relief requested by Plaintiffs in their March 24, 2016 Motion for a Preliminary Injunction.

Respectfully submitted,

/s/ Michael F. Murphy
Michael Murphy (P29213)
Joshua O. Booth (P53847)
Richard S. Kuhl (P42042)
Nathan A. Gambill (P75506)
Assistant Attorneys General
Attorneys for Defendants Khouri and RTAB members only
Mich. Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162
murphym2@michigan.gov
boothj2@michigan.gov
kuhlr@michigan.gov
gambilln@michigan.gov

Dated: September 22, 2016

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on September 22, 2016, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

A courtesy copy of the aforementioned document was placed in the mail directed to:

Hon. David M. Lawson
U.S. District Court for
Eastern District of Michigan
231 W. Lafayette Blvd., Room 802
Detroit, MI 48226

/s/ Michael F. Murphy
Assistant Attorney General
Attorney for Defendants Khouri and RTAB members only
Mich. Dep't of Attorney General
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162
murphym2@michigan.gov
P29213

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