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. MARK A. GOLDSMITH

MAG. STEPHANIE DAWKINS DAVIS

DEFENDANTS STATE TREASURER AND MEMBERS OF THE FLINT RECEIVERSHIP TRANSITION ADVISORY BOARD'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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CONCISE STATEMENT OF ISSUE PRESENTED

Should this Court issue a preliminary injunction where Plaintiffs' claims against the Treasurer and the Flint Receivership Transition Advisory Board have no likelihood of success on the merits, the requested relief is unavailable and overbroad, and the Safe Drinking Water Act issues presented by Plaintiffs are already being addressed by the United States Environmental Protection Agency?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

McPherson v. Michigan High School Athletic Ass'n, Inc.,
119 F.3d 453, 459 (6th Cir. 1997)

Gonzalez v. National Bd. of Med. Exam'rs,
225 F.3d 620, 625 (6th Cir. 2000)

Edelman v. Jordan,
415 U.S. 651 (1974)

Quern v. Jordan,
440 U.S. 332, 337 (1979)

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711 N.W.2d 462, 466 (Mich. App. 2005)

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136 F.3d 1055, 1068 (6th Cir. 1998)

Alltel Tennessee, Inc. v. Tennessee Public Service Comm'n,
913 F.2d 305, 309 (6th Cir. 1990)

United States v. Bestfoods,
524 U.S. 51, 66 (1998)

INTRODUCTION

Plaintiffs are requesting the Court to enter preliminary injunctive relief that would require the State Defendants to take affirmative actions that can be taken only by the owner and operator of the Flint Water System—the City of Flint. The requested relief against the State Defendants is therefore unavailable and is also, in any event, inappropriate and unwarranted.

Under their statutory authority, the State Treasurer and the Flint Receivership Transition Advisory Board (RTAB) review and approve City budgets, indebtedness, contracts and labor agreements. Their review covers all city operations, not just those of the Flint Water System. And their role is simply to review and approve; they have no role in the day-to-day operation of the water system. They do not direct, manage, or in any other manner make decisions on water treatment, plant operations, hiring and firing staff, setting qualifications and standards or determining what, if any, actions the City should undertake going forward.

There is no question that the Flint drinking-water situation is a public health crisis. It has detrimentally affected Flint residents,

businesses, and public services. The State, through the Governor and the Department of Environmental Quality, has recognized the seriousness of these issues and has demonstrated the State's commitment to resolving the crisis by:

- declaring a state of emergency, activating the State's emergency operations center, and calling up the National Guard to redouble those efforts, including going door-to-door across the City to provide bottled water, water filters and replacement cartridges, and water-testing kits;

- asking the President for federal emergency and disaster declarations, resulting in federal resources being deployed, along with at least $5 million in federal funds to assist the people of Flint;

- facilitating Flint's return to the Detroit water system by providing $9.35 million in state funds for that purpose, and implementing other responses including lead-testing to City residents;

- appropriating an additional $28 million overwhelmingly supported by the Michigan Legislature to aid Flint in its efforts to combat the water crisis, with a focus on providing services for children with lead poisoning;

- proposing an additional $165 million in the state budget toward the crisis in Flint;

- providing money and other assistance toward replacing lead service lines; and

- most recently, enacting and signing into law a supplemental appropriation of $30 million to reimburse Flint residents for their paid water bills and to forgive unpaid bills.

In short, the Flint water crisis is a significant and serious public health issue. Yet, a preliminary injunction of the type sought here is an extraordinary form of relief and not an appropriate response in this case. The affirmative relief sought here would disrupt the status quo, allow Plaintiffs' proposed resolutions to supplant the judgment of the United States Environmental Protection Agency (EPA), City of Flint, the Governor and the Michigan Department of Environmental Quality (MDEQ), and substitute this Court's decisions for the State Treasurer's and RTAB's statutory oversight and review functions. It would also charge an authority that is neither an "owner" nor an "operator" of a water system with compliance with federal Safe Drinking Water Act (SDWA) regulatory provisions.

The extraordinary relief sought here is unwarranted and unnecessary. The water crisis is being continually addressed by the appropriate government institutions charged with that responsibility. Any injunctive relief against the State Treasurer or the RTAB will do nothing to further the relief being delivered to Flint's citizens. Accordingly, Plaintiffs' motion should be denied.

STATEMENT OF FACTS

In March 2013, the Flint City Council approved a resolution to obtain its drinking water from the Karegnondi Water Authority (KWA) beginning in 2016. This change from Detroit's water system was approved by the then Emergency Manager of the City of Flint. Mich. Comp. Laws §§ 141.1542; 1549; 1552. In the interim, Flint City Council and the Emergency Manager decided to activate Flint's own water treatment plant and obtain drinking water from the Flint River.

The SDWA, 42 U.S.C. § 300 *et seq*., sets material standards that must be met by owners and operators of drinking water systems. 42 U.S.C. § 300g-1(b). States may obtain primary enforcement responsibility under the SDWA by adopting regulations that are no less stringent than the federal standards, known as primacy. 42 U.S.C. § 300g-2. The State gained primacy by enacting the Michigan Safe Drinking Water Act, 1976 Mich. Pub. Acts 399 (Act 399). MDEQ's Office of Drinking Water and Municipal Assistance has regulatory enforcement responsibilities under the SDWA for all public water supplies, including approximately 1,400 community water supplies and 10,000 non-community water supplies.

Effects of switching Flint water supply.

Switching the drinking water source by the City of Flint was a massive undertaking that involved a multitude of issues, including complex water chemistry analysis, adding new treatment processes and infrastructure, and understanding more than 600 miles of distribution pipes within the City. As the owner and operator of the public water supply, Flint is responsible under the SDWA for knowing and following all requirements under Act 399, including ensuring proper design, construction, operations and maintenance so that contaminants in tap water do not exceed the standards established by law. *See* Mich. Comp. Laws § 325.1007(4).

The SDWA requires *owners* and *operators* of public water systems to take certain actions to prevent harmful substances, such as lead, from contaminating the water supply. (Compl., Doc #1, Pg ID 16, ¶¶ 44-46.) Those actions include complying with various monitoring, testing, and reporting requirements. (*Id.*)

As an additional layer of protection, the EPA has the authority to take any action needed to address emergency situations where noncompliance poses a substantial endangerment to public health.

(Compl. Doc #1, Pg ID 17, 37, 39, ¶¶ 47, 111, 121); see also 42 U.S.C. § 300i.

In the months following the switch to the Flint River, customers reported discolored, foul-smelling water, as well as rashes and illness that they attributed to using the water. (*Id.* at ¶ 92.) Subsequent testing of the water in the fall/winter of 2014-2015 revealed, among other things, elevated levels of lead in some drinking water taps. (*Id.* at ¶ 99.) The increased lead content was believed by some parties to be due to the corrosive nature of the Flint River water and the post-switch failure to treat the water to mitigate lead leaching from distribution pipes and soldered pipe connections. (*Id.* at ¶¶ 91, 99, 100.)

Remediating the effects of the switch

Due to increased concerns regarding water quality, in October 2015, the City switched back to the Detroit Water and Sewerage Department (DWSD) as the source of its water supply. (*Id.* at ¶ 115.[1]) The water provided by DWSD is pretreated with corrosion-inhibiting chemicals, and the City's treatment plant (facility) adds even more

[1] The State Treasurer approved the City's budget appropriation to return to DWSD. (Compl., Doc #1, ¶ 114.)

phosphates to supplement DWSD's treatment and further reduce the corrosivity of the water. (*Id*. at ¶¶ 116-117.) In December 2015, the Mayor declared a state of emergency, and in January 2016, both the Governor and the President did as well. (*Id*. at ¶¶ 118-120.)

In addition to the ongoing efforts by the State and City, the EPA has also become involved. In January 2016, the agency issued an emergency order requiring the City, the State and MDEQ to take certain remedial measures to ensure that the Flint water supply complies with SDWA requirements. (Compl. Doc #1, ¶121, Pg ID 39.)

Ongoing efforts to address the crisis.

The Introduction to this brief sets forth the efforts undertaken and the resources dedicated to dealing with this public health crisis. Additional efforts are being undertaken daily. A summary of purchases, events, future plans to address the situation, and public outreach and information is outlined in the affidavit of Captain Kelenske, which is attached as Exhibit A. The affidavit attests to and verifies what has and is taking place on the ground.

Much of the relief Plaintiffs seek in this motion is already occurring:

- Bottled water is being purchased and distributed;
- filters are being purchased and distributed;
- water is being tested in homes;
- residences have been and continue to be visited;
- lead service lines are being identified and replaced; and
- the public is being notified of developments in other languages.

In addition, health information is being disseminated to the public.

In sum, it is readily apparent that the issues Plaintiffs raise in their complaint are being addressed by all levels of government, both under the SDWA requirements and as a result of government's overall role in protecting the public health.

To date, the State has dedicated tens of millions of dollars to remedy the problem, including reconnecting to Detroit water, testing, delivering bottled water and filters, providing in-home health services and blood testing, performing engineering studies, and embarking on water-infrastructure replacement. The State and City's efforts to address the crisis are ongoing. And these efforts demonstrate that the

extraordinary relief of an injunction is not necessary to get required action.

ARGUMENT

I. The injunctive relief requested by Plaintiffs is inappropriate and unwarranted.

Injunctive relief "is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). Such relief should be granted "only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington–Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). "[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." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000).

A district court must generally balance four factors in determining whether to issue a preliminary injunction: (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a

preliminary injunction. *McPherson v. Michigan High School Athletic Ass'n, Inc.,* 119 F.3d 453, 459 (6th Cir. 1997). No single factor will be determinative. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (internal citation omitted). But "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).

Granting the requested relief would, in essence, supplant the City, State, and EPA's judgment as to how to best address the water crisis with Plaintiffs' opinion as to what is needed. Presently the City and State are providing water, filters, cartridges, and test kits; they have switched back to DWSD water; they have provided health and wellness information; they have begun identifying and replacing lead service lines; and they are making information available in different languages by media, web site and telephone. (See Exhibit A.) But, even if there was a "strong" likelihood of success on Plaintiffs' claims (which, as will be discussed, there is not), the specific injunctive relief requested by Plaintiffs should not be granted.

Plaintiffs request an order that would apply to "all Flint residents" and "every household served by the System." (Motion for Prelim. Inj.,

Doc #27, Pg ID 405-406.) This order would require, among other things, a "robust system of door-to-door deliveries of bottled water," or professionally installed, monitored and maintained water filters. (*Id*. at 405.) But the injunction requested is not only unavailable as to the State Defendants, it is far too broad and, given the governments' response to the crisis, unnecessary.

A. The relief is unavailable as it amounts to an unlawful access to the State Treasury in violation of the Eleventh Amendment.

The Eleventh Amendment bars an action for damages that seeks a retroactive payment of funds from the state treasury, *Edelman v. Jordan*, 415 U.S. 651 (1974), but does not bar suits "seeking to enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury," *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Here, the injunction sought by Plaintiffs is akin to a retroactive payment and the effect on the State Treasury is hardly ancillary.

Plaintiffs are seeking much more than to enjoin the Treasurer and the RTAB to conform their future conduct to the requirements of federal law, as the SDWA does not require door-to-door delivery of bottled

water or professional installation and maintenance of water filters to every Flint resident and household member. In essence, Plaintiffs are seeking a remedy for past violations of the SDWA. The requested relief is by its very nature retroactive.

Neither the Treasurer nor the RTAB have access to, or control over, the vast amount of money that would be necessary to comply with the injunction. Instead, those funds would have to be appropriated by the Legislature from the Treasury. The injunctive relief requested is not available against the Treasurer or the RTAB and must therefore be denied. The Eleventh Amendment itself bars the type of relief sought here.

B. The requested relief is unavailable since the Flint Receivership Transition Advisory Board is a non-juridical entity.

Nothing in the Local Financial Stability and Choice Act, P.A. 436, Mich. Comp. Laws § 141.1541 *et seq.*,the Act that created the RTAB, even remotely suggests that the Legislature intended to subject the entity to suit. *See* Mich. Comp. Laws § 141.1563; *Cf. Manuel v. Gill*, 753 N.W.2d 48, 54 (Mich. 2008) (citing Mich. Comp. Laws § 124.507(2) (finding a municipal narcotics squad to be a juridical entity because the

legislation allowing the creation of the entity specifically provided, "[t]he entity may sue and be sued in its own name."). Further, neither the legislation creating the RTAB, nor any other authority, provides the entity with the ability to raise its own funds. *See* Mich. Comp. Laws § 141.1563 (setting forth the RTAB's scope and duties); *see generally O'Leary v. Bd. of Fire & Water Comm'rs of Marquette*, 44 N.W. 608, 610 (Mich. 1890); *Davis v. Detroit*, 711 N.W.2d 462, 466 (Mich. App. 2005). Accordingly, the RTAB is a non-juridical entity and may not be sued.

Plaintiffs cannot avoid the non-juridical nature of the RTAB by merely naming the individual members in their official capacities. This is particularly true where Plaintiffs are not challenging any specific, individual, independent, actions taken by any member of the RTAB, but only the actions taken by the individual members as a collective, i.e., actions taken by the "Board." (Compl., Doc #1, Pg ID 12, 26-27.)

Plaintiffs' claims against the individual members of the RTAB—including those against the State Treasurer—are, in actuality, claims

against the non-juridical RTAB entity itself. Therefore, relief is unavailable.[2]

C. The scope of the requested relief is overbroad.

In addition, even if the relief was available, Plaintiffs' request, as posed, is overbroad. Injunctive relief "should be no broader than necessary to remedy the harm at issue." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1068 (6th Cir. 1998). Here, even Plaintiffs have acknowledged that not *every* Flint resident or household served by the system is without reliable access to safe drinking water. (Motion for Prelim. Inj., Doc #27, Pg ID 376.) Consequently, ordering injunctive relief that would apply to *every* Flint resident and household is much broader than necessary to remedy any current harm from a lack of access to safe drinking water.

Relatedly, "because injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," injunctive relief benefitting an entire class is rarely appropriate where there is no class certification. *Sharpe v. Cureton*,

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[2] State Treasurer is a member of the RTAB by statute. Mich. Comp. Laws § 141.1563 (2).

319 F.3d 259, 273 (6th Cir. 2003). Here, not every Flint resident and every Flint household member is a plaintiff in this action, and no class has been certified. Yet, requiring door-to-door delivery of bottled water to, or water filter installation and maintenance in, *every* Flint household would appreciably add to any burden imposed on defendants. It would provide the same relief to anyone even those who currently have access to safe drinking water. To provide such relief would waste valuable resources that could be better used elsewhere to mitigate the water crisis. Accordingly, such broad relief to non-parties is not appropriate here.

D. The requested relief is unwarranted because the harm is not irreparable.

When analyzing the irreparable harm component for granting injunctive relief, the court must determine the existence of irreparable harm not reparable harm. This portion of the injunctive relief analysis fails as an overbroad assertion for the type of relief sought here. This action and the motion here is not about injuries received from consuming Flint water but about access to water or distributing clean water in the manner Plaintiffs want. There are remedies available to

all Flint residents. (See Exhibit A.) Water is available for free; filters are available for free; a 211 phone system can be accessed to order water deliveries to those who need it. The problem complained of is not irreparable and as a matter of law cannot be deemed irreparable because it is being addressed, facilitated and repaired daily. Any inquiry into the need for injunctive relief can and should end here.

Should the irreparable harm component not forestall further inquiry, the public interest is best served by allowing the agencies charged with implementing the SDWA to perform their statutory functions.

II. This Court should in the public interest refrain from issuing injunctive relief in deference to the United States Environmental Protection Agency.

The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976).[3] It is particularly appropriate "when enforcement of a claim in court would

[3] This same primary jurisdiction argument has been raised in the pending motion to dismiss filed by the Treasurer and the members of the RTAB. (Motion to Dismiss, Doc # 23, Pg ID 280-284.)

require resolution of issues that have already been placed within the special competence of an administrative body." *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681, 683 (E.D. Mich. 1999). "The principal reasons for the doctrine of primary jurisdiction are to obtain the benefit of the expertise and experience of the administrative agencies and the desirable uniformity which occurs when a specialized agency decides certain administrative questions." *Alltel Tennessee, Inc. v. Tennessee Public Service Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990). A court must apply the doctrine on a case-by-case basis, deferring to an administrative agency when the reasons for the existence of the doctrine are present. *Id.* When the doctrine does apply, the court may dismiss the case without prejudice to await a decision of the agency, *see e.g.*, *Alltel Tennessee*, 913 F.3d at 307, or stay proceedings "so that the agency may bring its special competence to bear on the issue," *United States v. Any and All Radio Station Transmission Equip.*, 204 F.3d 658, 664 (6th Cir. 2000).

Although no fixed formula for applying the doctrine exists, courts may consider several factors, including: (1) whether the court is being called upon to consider factual issues outside the conventional

experience of judges; (2) whether agency proceedings have already begun; (3) whether the agency has shown due diligence in resolving the issue; (4) whether Defendant could be subject to conflicting orders; and (5) the type of relief requested. *See e.g.*, *B.H. v. Gold Fields Mining Corp.*, 506 F. Supp. 2d 792, 803 (N.D. Okla. 2007) (applying the doctrine in deference to EPA proceedings). Here, these factors counsel in favor of applying the doctrine.

First, this case involves complex factual and scientific questions that are outside the Court's conventional experience—particularly when it comes to granting any type of injunctive relief. For example, the Court may be called upon to determine, among other things, the most appropriate manner in which to abate any violations of the SDWA and ensure compliance with the SDWA moving forward. This question—and many others—raise complicated environmental, biological, logistical, municipal, financial, and practical issues of great significance and impact, and they are best resolved with the expertise and experience of the EPA.

Additionally, the EPA is exercising due diligence to resolve these issues, and agency proceedings have already begun. More specifically,

the EPA has issued an emergency administrative order requiring detailed actions to be taken to ensure compliance with the SDWA. (See January 21, 2016, Emergency Administrative Order of the United States Environmental Protection Agency, p 2, ¶ 3; Compl., Doc #1, Pg ID 39, ¶ 121.) This circumstance, standing alone, weighs in favor of deference, but also creates the possibility of conflicting orders being issued and conflicting actions being taken, further justifying the Court deferring to the EPA.[4] As noted in Exhibit B, the challenging aspect of lead service lines as part of the EPA emergency order is being addressed as thoroughly as possible by the State and City. Any injunction entered by this Court would potentially interfere with the administrative process.

Finally, the ultimate relief Plaintiffs seek in their complaint weighs strongly in favor of deference. "Primary jurisdiction will often be invoked when a plaintiff seeks injunctive relief, because there is the greatest likelihood that a court's order will interfere with administrative agency's proceedings." *B.H.*, 506 F. Supp. 2d at 805.

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[4] Plaintiffs specifically acknowledge that the City has stated it will comply with the EPA's order. (Compl., Doc #1, Pg ID 39, ¶ 121.)

Here, as mentioned, the EPA has already initiated emergency proceedings concerning the alleged SDWA violations, and the Act grants the agency significant authority to ensure compliance. 42 U.S.C. § 300i. Plaintiffs' request that this Court enjoin future violations of the SDWA and order Defendants to take all action necessary to remedy violations of, and comply with, the SDWA falls squarely within the scope of the EPA's authority—authority the EPA is exercising. (See Exhibit B.) This potential for interference and inconsistency weighs heavily in favor of deference to the EPA. The public interest is best served by allowing the EPA to conduct its regulatory functions unhindered by any court action. The test for injunctive relief regarding serving the public interest strongly supports this Court's exercising its discretion and declining Plaintiffs' invitation to issue any type of injunctive relief.

III. A preliminary injunction should not enter against the Treasurer or the RTAB because Plaintiffs have no likelihood of success on the merits of their claims against those Defendants.

Here, Plaintiffs have no likelihood of success on their SDWA claims against the Treasurer or the RTAB because none of those parties

is an "operator" of the Flint water system. Plaintiffs' claims against the individual members of the RTAB in their official capacities are claims in effect against the RTAB itself—which is not an operator of a public water facility or system.

A. Neither the Treasurer nor the RTAB is an "operator" of the Flint water system for purposes of the SDWA.

The SDWA applies to "owners" and "operators" of a public water system. According to Plaintiffs, the Treasurer and the individual members of the RTAB are "operators" of the Flint water system (Motion for Prelim. Inj., Doc # 27, Pg ID 390). They are not. The City of Flint is the sole owner and operator of its water system.

Neither the Treasurer nor the RTAB has "actual control" of the Flint water supply facilities or has taken, or even has the authority to take, the type of "affirmative action" in regard to the operation of the water facilities that is necessary to impose liability under the SDWA. More specifically, none of them have affirmatively directed the workings, managed, or conducted the affairs of the facilities specifically related to compliance with, or violations of, the SDWA.

The RTAB and State Treasurer function as an oversight board for all city functions. (Public safety, library, City Clerk, etc.) The RTAB

requires the City to annually convene a revenue estimating conference; to provide cash flow projections; to review proposed budgets and amendments; to review City requests to issue debt instruments; review proposed collective bargaining agreements; and to review debt elimination plans and judgment levies. Mich. Comp. Laws § 141.1563 (4) (5).

The RTAB does *not*, however, direct functions of the water plant or the water system; set water standards or regulations; direct the operation of the plant or systems; direct any testing or insure compliance with regulations regarding water quality; hire or fire water department personnel; or set qualifications of water department staff. Nor does it direct or develop any responses to the present crisis with the water system. For example, the RTAB does not order, provide or deliver bottled water; provide testing kits or filters; monitor compliance of water regulations; contract for any water plant or system repairs or improvements; or does not design or engineer system or facility upgrades. In short, neither the State Treasurer, any other member of the RTAB, nor the RTAB itself are "operators" of the water system.

In arguing to the contrary, Plaintiffs rely upon case law that, to the extent it is applicable at all, actually counsels against a finding that either the Treasurer or the RTAB falls within the definition of "operator."

Although the SDWA does not define "operator," a definition for that term arose out of an interpretation of the term for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*. But the CERCLA definition has never been applied to interpret the term "operator" in SDWA cases.

The United States Supreme Court in *United States v. Bestfoods*, 524 U.S. 51, 66 (1998), held that "under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility." But in light of "CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id*. at 66-67. In other words, an "operator" manages, directs, or conducts a facility's operations specifically related to compliance with, or violations of, CERCLA.

Significantly, in arriving at this holding, the Supreme Court noted that the "operator provision is concerned primarily with direct liability for one's own actions," as opposed to "indirect" or "derivative liability" that may result from piercing the corporate veil of a parent corporation for the acts of a subsidiary or individual corporate officials. *Id*. at 65-66. According to the Court, the question is not whether the parent corporation operates the subsidiary, but instead, whether the parent corporation participates in the activities of the subsidiary's alleged polluting facility. *Id*. at 68. "[A]ctivities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability." *Id*. at 72.

Plaintiffs' reliance on five cited cases to support an argument that somehow mere budgetary oversight of the entire City of Flint's budget and contract process makes the state defendants an "operator" is misplaced. (Doc #27 Pg ID 390-392) In *K.C. 1986 Ltd. Partnerships v. Reade Mfg.,* 472 F.3d 1009, 1020 (8th Cir. 2007), plaintiffs indicate that

"approval for decisions requiring large expenditures" is sufficient under the *Bestfoods* analysis to make a "person" an operator. The 8th Circuit though also looked at that person in the context of additional needed actions such as responsibility for decisions regarding compliance with environmental laws, approving procedures for rinsing out truck tanks and herbicide disposal. *Id.* at 1020. It was not finances alone that established that "person" as an operator. In *Exxon Mobil v. United States,* 108 F. Supp. 3d 486, 531 (S.D. Tex. 2015), the Government approved expenditures over $1,000. In addition they also directed certain operations at the rubber plant and approved necessary disposal of waste, scrap, byproducts and surplus material and equipment. *Id.* at 531. In *Litgo, N.J. Inc. v. Comm'r N.J. Dept. of Environmental Protection,* 725 F.3d 369, 381 (3d Cir. 2013), the company hired environmental consultants, were actively involved in activities related to contamination, had authority to make decisions about compliance with environmental regulations and oversaw the work of their environmental consultants to "conduct tests and remediation operations." *Id.* at 381. The State Treasurer here did contract with an engineering firm as stated in Brief for Preliminary Injunction, Doc. #27,

Pg ID 391, but not to examine water quality or drinkability, plant standards or a proper distribution system, but for cost analysis and comparison only, regarding various proposed water sources that Flint was then contemplating on using. (Exhibit C, Engineering Report of Tucker Young) In *General Corp Inc., v. Olin Corp.,* 390 F.3d 433, 449 (6th Cir. 2004), the company sat on a committee approving plans, appropriations requests and budgets, but also had control over hazardous waste, construction, operation and management of the plant, approved plans for continued offsite disposal, and managed activities related to pollution. *Id.* at 449.

In each case the "operator" did far more than approve budgets, expenditures and contracts—they took an active role in pollution/hazardous waste activities and disposal.

The State Treasurer and the RTAB have no such role here and in fact no direct role in water treatment, the water treatment plant, water resources, regulation compliance, distribution lines or any other activity of the Flint Water System and Plant facility. Certainly nothing as extensive as those found as "operators" in the cases cited above.

The *Bestfoods* principles set out in the corporate context have been applied by analogy to determine whether a government entity is an "operator" of a facility for CERCLA purposes. For example, the Sixth Circuit, citing *Bestfoods*, held that a government entity must "have performed some affirmative acts – that they 'operated' the site by 'directing the workings,' 'managing,' or 'conducting the affairs' – before they can be held responsible" as an operator under CERCLA. *United States v. Township of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998). In other words, there must be "some actual control by a putative operator" before they can be held responsible. *Id.* Mere regulation of a facility, in and of itself, does not amount to affirmative action sufficient to render a government entity liable under CERCLA, but "a government entity, by regulating the operation of a facility actively and extensively enough, can itself become an operator." *Id.* at 315-316.

Although the Sixth Circuit has applied *Bestfoods* in CERCLA cases, it has never applied *Bestfoods* to interpret the term "operator" in SDWA cases. Therefore, this Court is not bound to apply it here.

That said, to the extent the analysis of the *Bestfoods* line of cases does apply, it does not lead to the conclusion that either the Treasurer

or the RTAB is an "operator" of the Flint water system. Quite the opposite. Again, for the reasons set forth above, the only conclusion that can be reached is that neither the State Treasurer nor the RTAB are "operators" under the SDWA.

By using the term "operator," the SDWA seeks to impose direct liability for one's own actions, and when it comes to the actual Flint water supply facilities, neither the Treasurer nor the RTAB has directly taken any affirmative action, or has any actual control, in regard to compliance with the SDWA. Rather, the Treasurer and the RTAB merely have financial monitoring responsibility over the City in general. *See generally* Mich. Comp. Laws § 141.1563; April 29, 2015 Letter from Governor Rick Snyder to City of Flint Receivership Transition Advisory Board; City of Flint Emergency Manager Order No. 20 (April 29, 2015); Receivership Transition Advisory Board Resolution 2016-1.[5] In effect, Plaintiffs are attempting to impose indirect or derivative SDWA liability on the Treasurer and the RTAB (and even

[5] The Governor's letter, the emergency manager's order and the RTAB resolution were all attached as exhibits to the motion to dismiss filed by the Treasurer and members of the RTAB (Motion to Dismiss, Doc #23).

more indirectly, the State of Michigan) simply for being involved in the oversight of the finances of the *City*, the true owner and operator of the water system. Even under the authority cited by Plaintiffs, that attempt must fail. Merely monitoring performance and overseeing financial and budget decisions is insufficient to give rise to direct liability. *Bestfoods*, 524 U.S. at 72.

In the absence of any actual control over, or active and extensive regulation of, the actual water facilities, or any other type of affirmative action taken (specifically in regard to the facilities' compliance with the SDWA), the Treasurer and the RTAB are not "operators" of the Flint water plant and system for purposes of the SDWA. Accordingly, Plaintiffs' claims against these defendants will not succeed, and this lack of success on the merits of their claim is fatal to Plaintiffs' request for injunctive relief. [6]

[6] Relatedly, as argued in the pending motion to dismiss and earlier in this brief, under the Eleventh Amendment, in the absence of any causal connection between the violations of the SDWA and any actions taken by the Treasurer or individual members of the RTAB, Plaintiffs are unlikely to succeed on their claims against those Defendants. (Motion to Dismiss, Doc #23, Pg ID 284-290.)

CONCLUSION AND RELIEF REQUESTED

The factors to be considered before the Court should issue injunctive relief as to the State Treasurer and the RTAB have not been met. Plaintiffs' attempt to unlawfully access the State Treasury through federal court action is prohibited by the Eleventh Amendment. They have failed to show the irreparable harm necessary for the relief they seek in this motion, since the harm complained of is being addressed and repaired by all levels of government. The public interest is best served, not by an injunction but, by allowing the government entities that are involved to do what is necessary and as guided by the EPA. Plaintiffs will not prevail on the merits of their claims against the two state Defendants since they are not an operator of a public water system or facility under the SDWA. What they seek is far too broad for the purposes sought and not reasonable in light of what is already being done. Injunctive relief should be denied.

Respectfully submitted,

/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

Dated: April 14, 2016

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on April 14, 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.

/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
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