

**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

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, by counsel, hereby submit this Motion for a Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65. Flint's drinking water is contaminated with lead because of Defendants' ongoing violations of the Safe Drinking Water Act. For the reasons set forth in the accompanying Brief, Plaintiffs respectfully request that the Court order Defendants to provide all residents served by the Flint Water System with reliable access to safe drinking water, because their failure to do so is causing and will continue to cause irreparable harm to Plaintiffs and other residents of the City of Flint. Undersigned counsel Dimple Chaudhary certifies that she communicated in writing with opposing counsel, in accordance with Local Rule 7.1(a), explaining the nature of the relief to be sought by way of this motion and seeking concurrence in the relief; opposing counsel for all Defendants expressly declined concurrence.

Plaintiffs respectfully request a hearing on this motion.

Dated: March 24, 2016

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**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY
INJUNCTION**

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CONCISE STATEMENT OF ISSUE PRESENTED

Is preliminary injunctive relief warranted to provide safe drinking water to Plaintiffs and Flint residents when tap water in Flint is unsafe to drink and current efforts to provide alternative sources of safe drinking water are inadequate?

CONTROLLING AUTHORITY

Six Clinics Holding Corp., II v. Cafcomp Sys., Inc., 119 F.3d 393 (6th Cir. 1997)

40 C.F.R. § 141.82(g)

40 C.F.R. § 141.86

INTRODUCTION

Tap water in Flint remains unsafe to drink. Current data show that lead contamination in Flint's drinking water will not be controlled for several months or longer. Although federal, state, and local governments have taken some steps to provide interim assistance to Flint residents, many people in the community still lack reliable access to safe drinking water.

This is a paradigmatic case for preliminary relief.

First, Plaintiffs are likely to succeed on their claims. Flint's drinking water is contaminated with lead because of Defendants' continuing violations of the Safe Drinking Water Act. Defendants are not maintaining adequate water treatment to prevent the corrosion of lead pipes and solder. Defendants also are not complying with the Act's requirements for sampling tap water in residents' homes to monitor for lead. Despite public pressure and media attention, Defendants have failed to remedy these violations.

Second, absent preliminary relief, Plaintiffs and other Flint residents will continue to be irreparably harmed by their lack of reliable access to safe drinking water. Although the City and State have made bottled water and faucet filters available for pick up at a handful of distribution centers, these efforts are inadequate. Some residents do not have cars or access to adequate transportation, and cannot easily travel to water distribution centers. Others are elderly,

homebound, or are simply not strong enough to carry cases of water on buses back to their homes and families. Still others have been unable to install and maintain faucet filters effectively without help from city or state officials. The result is that many Flint residents still lack access to safe water.

Court intervention is urgently needed, and the preliminary relief Plaintiffs seek is tailored and reasonable. Until Defendants comply with the requirements of the Safe Drinking Water Act, they should be required to provide every household served by Flint's water system with consistent access to safe drinking water by delivering bottled water door to door. They also should ensure that all Flint residents receive comprehensive information, in multiple languages, to help them understand and respond to this crisis.

Because of Defendants' actions, the residents of Flint are facing a situation that should be unthinkable in the United States: they cannot reliably obtain safe drinking water. Plaintiffs respectfully urge the Court to grant preliminary relief.

BACKGROUND

I. Michigan state officials have controlled all aspects of Flint's operations since November 2011

For more than four years, the City of Flint has been managed and controlled by Michigan state officials. In November 2011, Governor Rick Snyder declared a financial emergency in Flint and placed the City in a state-controlled receivership.

PA 2, 6, 10.¹ The Governor appointed an Emergency Manager to govern Flint's finances and operations in the place of the City's democratically elected officials. *Id.* at 10; Mich. Comp. Laws §§ 141.1542(q), .1549(2), .1552(1)(ee).

In April 2015, the Emergency Manager determined that Flint's financial emergency had been "sufficiently addressed." PA 13; Mich. Comp. Laws § 141.1562(1). Governor Snyder removed the Emergency Manager and, in his place, appointed the Receivership Transition Advisory Board (RTAB or the Board) to manage the City's affairs for the duration of the receivership. PA 18-19; Mich. Comp. Laws § 141.1563(1). The Board must approve new ordinances and resolutions adopted by the City Council before they can take effect, and must approve all purchases and contracts over \$75,000. PA 23-24, 28-29, 44-48. Similarly, the Mayor and City Council cannot amend the budget adopted by the Emergency Manager without approval of both the Board and the State Treasurer. PA 23; Mich. Comp. Laws § 141.1561. Flint remains in receivership today.

II. The Water System distributed water from the Flint River to residents without treatment to reduce lead contamination

Under Flint's receivership, the Emergency Manager targeted water-supply contracts for cost cutting. Flint's water system (Water System or the System) is a

¹ Plaintiffs' Appendix (PA) is a compilation of the exhibits attached to the Declaration of Dimple Chaudhary. The appendix has been paginated as a single document for the Court's convenience. All declarations are hereinafter referred to using the convention "[Last Name] Decl."

governmental entity that provides drinking water to nearly 100,000 people. PA 56. For decades prior to April 2014, Flint purchased drinking water from the Detroit Water & Sewerage Department (Detroit). *See id.* at 58, 64. Detroit provided the Water System with pretreated or “finished” water that was ready for distribution to residents without further treatment. *Id.* at 87; *see* 40 C.F.R. § 141.2.

As part of this process, Detroit treated its water with chemicals to protect against the corrosion of metallic pipes and solder and reduce the release of lead into drinking water, in accordance with federal guidelines. PA 87; *see* 40 C.F.R. § 141.80(d); Giammar Decl. ¶¶ 11-15, 23-26. Lead is a powerful toxin that is devastating to human health. It is particularly harmful to children. PA 108-13; Lanphear Decl. ¶¶ 9-27. Because there is no safe level of lead in drinking water, Lanphear Decl. ¶ 21; *infra* p. 25, the Safe Drinking Water Act’s Lead and Copper Rule requires public water systems to treat drinking water to control the release of lead from pipes and solder. *See* 40 C.F.R. § 141.80(b), (d); Giammar Decl. ¶¶ 9-12.

In March 2013, Flint’s City Council voted to join a new water supply system, the Karegnondi Water Authority (KWA). PA 115-16. The KWA plans to distribute water from Lake Huron to the Flint area through a new pipeline. *Id.* at 118, 124-25. The City Council’s vote to join the KWA did not take effect until authorized by the Emergency Manager and State Treasurer. *Id.* at 127-28, 130. Flint’s existing water contract with Detroit was then terminated, with the

termination to take effect in April 2014 – at least eighteen months before the KWA pipeline was expected to be ready. *Id.* at 58. Although Detroit offered to negotiate a short-term contract with Flint for the interim period, the Emergency Manager declined the proposal. *See id.* at 132-33. The KWA pipeline is still under construction. *Id.* at 124-25.

In early 2014, the Emergency Manager, with the approval of the State Treasurer, decided that the Water System would use the Flint River as its primary drinking water source until the KWA pipeline was complete. *Id.* at 135-39. The Water System did not, however, prepare for how it would treat the corrosive Flint River water to prevent the release of lead from the City's thousands of lead service lines. *See id.* at 141. When the Water System began pumping Flint River water through its pipes on April 25, 2014, it did not treat the water to prevent the corrosion of lead pipes and the subsequent contamination of the City's drinking water. *Id.* at 144; *see infra* pp. 12-15.

III. Flint's tap water is unsafe to drink

Since the Water System's switch to the Flint River, problems have plagued Flint's drinking water. Soon after the switch, residents complained that their water was discolored and foul-smelling. PA 149, 151. Residents also reported health problems from drinking and bathing in the water, including skin rashes, hair loss, and vomiting. *Id.* at 151, 155, 158-59. In summer 2014, the Water System issued a

“boil water” advisory to some customers due to bacterial contamination of the water. *See id.* at 168. The City’s water also became contaminated with total trihalomethanes – carcinogenic byproducts of disinfectants – at levels exceeding those allowed by the Safe Drinking Water Act. *Id.* at 171.

After the Water System’s switch to the Flint River as a water source, the Michigan Department of Environmental Quality (MDEQ) instructed the System to conduct tap water monitoring for lead during two six-month periods. *Id.* at 342-43; 40 C.F.R. §§ 141.81(b)(2)(iv), .86(d)(4)(vii), .86(d)(3). The System initiated the first six-month period in July 2014, and the second in January 2015. PA 176, 184, 277. In collecting samples, the System used procedures designed to systematically underestimate the occurrence of lead – including directing residents to “pre-flush” their taps by running the water for five minutes the night before drawing a water sample. *Id.* at 87, 190. Nonetheless, some samples still showed high levels of lead. *Id.* at 323-26. By February 2015, the System was aware of elevated lead levels in some residents’ tap water. *Id.* at 325-26. Despite this knowledge, the System took no meaningful action to address these signs of lead contamination.

In March 2015, in response to continued community complaints, the City Council voted to do “all things necessary” to end the use of the Flint River as a water source. *Id.* at 192, 195. The Emergency Manager, however, refused to approve the vote, insisting that Flint’s tap water was safe to drink. *Id.* at 195.

In summer 2015, two independent studies helped reveal the extent of the lead crisis in Flint. Researchers from Virginia Tech found that more than 10% of over 250 tap water samples contained lead levels over 25 parts per billion (ppb), well above the Lead and Copper Rule's action level of 15 ppb.² *Id.* at 199; *see* 40 C.F.R. § 141.80(c)(1). On September 24, 2015, a local pediatrician released findings from a study showing that the percentage of Flint children with elevated blood lead levels had nearly doubled since the Water System's switch to Flint River water. PA 208-30; *see also id.* at 232-39.

On September 25, 2015, at least seven months after learning of potential lead contamination in residents' drinking water, the City issued its first Lead Advisory. *Id.* at 241. While the Advisory described precautions residents could take to reduce lead exposure and City efforts to address the contamination, it did not tell residents that Flint's water was unsafe to drink. *Id.* at 241-43. Several days later, the Genesee County Board of Commissioners declared a Public Health Emergency, advising Flint residents not to drink unfiltered tap water unless it first had been tested to confirm it did not contain elevated lead levels. *Id.* at 245-46.

On October 12, 2015, following a request from the City Administrator, the

² U.S. EPA has found that lead levels of 15 ppb or less are representative of effective corrosion control treatment. 56 Fed. Reg. 26,460, 26,490 (June 7, 1991). When more than 10% of tap water samples collected by a water system exceed this 15 ppb threshold, known as the "lead action level," additional treatment of drinking water is "appropriate to protect public health." *Id.* at 26,491.

RTAB decided the City could amend its budget to allow the Water System to return to Detroit water; that same day, the RTAB also decided that the City Administrator could enter into agreements necessary to make the switch. *Id.* at 249, 251. On October 16, 2015, the System resumed distributing Detroit's pretreated water to Flint residents. *Id.* at 253.

Flint's drinking water, however, remains unsafe. *Id.* at 257. Defendants' extended failure to treat the Flint River water with corrosion-inhibiting chemicals damaged the System's pipes. Giammar Decl. ¶¶ 28-35. As a result, even though the System is receiving pretreated water from Detroit and supplementing that treatment with additional chemicals, Flint's pipes continue to release high levels of lead into residents' tap water. *Id.* ¶¶ 38-47.

IV. Flint residents currently lack reliable access to safe drinking water

In late 2015, government officials at all levels finally began to publically recognize the extent of the crisis in Flint. On December 14, 2015, Flint Mayor Karen Weaver declared a State of Emergency. PA 260. In early January 2016, Governor Snyder declared a State of Emergency in Genesee County, activated the National Guard, and requested federal assistance to address the crisis. *Id.* at 262-68. And on January 16, President Obama declared a federal emergency. *Id.* at 272. Five days later, EPA issued an Administrative Order finding that the lead crisis in Flint posed an endangerment to human health and directed the City, MDEQ, and

other state officials to take certain actions.³ *Id.* at 275-92.

In recent months, city and state officials have made some efforts to provide alternative sources of safe drinking water to Flint residents. Free bottled water and faucet water filters certified for lead removal are available for pickup at certain locations around the City, and a United Way helpline is available for residents to call if they need help obtaining water or information. *Id.* at 318. City and state officials are also relying on non-profit organizations and volunteers to supplement government efforts. *See infra* pp. 31-32.

However, as Plaintiffs show below, these relief efforts are inadequate and leave many Flint residents without reliable access to safe drinking water. Distribution centers are insufficient for Plaintiffs and other residents who lack the means or physical ability to travel to the centers to pick up water. Filter distribution is inadequate because some residents cannot install, maintain, and monitor filters on their own. And the efforts and resources contributed by other organizations and volunteers do not fill existing gaps in government services and cannot be sustained indefinitely. Accordingly, Plaintiffs seek preliminary injunctive relief to ensure that Plaintiffs and all Flint residents are assured access to safe drinking water.

³ Plaintiffs had petitioned EPA months earlier to take this same action using its emergency authority under the Safe Drinking Water Act, to no avail. PA 294-316; 42 U.S.C. § 300i.

STANDARD OF REVIEW

Courts balance four factors when reviewing a request for a preliminary injunction: “(1) whether the plaintiff has established a substantial likelihood of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief.” *Entm’t Prods., Inc. v. Shelby Cnty.*, 588 F.3d 372, 377 (6th Cir. 2009).

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their Safe Drinking Water Act claims

Plaintiffs can show a likelihood of success on the merits by “rais[ing] questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997). Although Plaintiffs must show more than a mere possibility of success, they need not “prove [their] case in full” to obtain preliminary relief. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

A. Plaintiffs have standing to bring their claims

Organizational plaintiffs Concerned Pastors for Social Action, Natural Resources Defense Council (NRDC), and American Civil Liberties Union of Michigan have associational standing to bring this case on behalf of their members,

and plaintiff Melissa Mays has standing on her own behalf. Ms. Mays and many of the organizational plaintiffs' members (collectively, Plaintiffs) are served by the Water System and are concerned about the effect that lead-contaminated water has already had and will continue to have on their health and the health of their families, congregations, and community. They are burdened physically, emotionally, and financially by the struggle to secure alternative sources of safe water.⁴ Their exposure to lead-contaminated water and the related uncertainty and burdens associated with finding alternative sources of safe water are concrete injuries, traceable to Defendants' Safe Drinking Water Act violations, and redressable by the relief Plaintiffs seek.⁵ *See Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 541-43 (6th Cir. 2004) (citations omitted).

⁴ *See* Collins Decl. ¶¶ 1-2, 6-28, 31-33, 38-40; Fordham Decl. ¶¶ 1-2, 5-17; Harris Decl. ¶¶ 6-10, 13-19, 21; Hasan Decl. ¶¶ 4-32; Mays Decl. ¶¶ 1-3, 9-28, 39-42, 44, 72; McClanahan Decl. ¶¶ 2, 4-13, 16; Rasool Decl. ¶¶ 4-39, 42-43.

⁵ The organizational plaintiffs satisfy the remaining requirements for associational standing. Ensuring access to safe drinking water for Flint residents is germane to the interests of the organizational plaintiffs, *see* Harris Decl. ¶¶ 4-5, 11-12; Trujillo Decl. ¶¶ 5-11; Moss Decl. ¶¶ 5-9, and the declaratory and injunctive relief requested does not require participation of their members. Concerned Pastors also has organizational standing. Its mission is "to unify against injustices and to provide a voice for those without resources." Harris Decl. ¶ 4. In response to the water crisis, the organization has had to divert significant time and resources to water-related advocacy, education, and relief efforts. *Id.* ¶¶ 12-20. Such an "all-consuming," *id.* ¶ 21, "drain on an organization's resources . . . constitutes a concrete and demonstrable injury for standing purposes," *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013).

B. Defendants are failing to maintain “optimal” treatment to control corrosion of lead pipes and solder

1. The Lead and Copper Rule required the Water System to maintain treatment that minimized lead levels in tap water when it distributed water from the Flint River

In 1991, pursuant to the Safe Drinking Water Act, EPA promulgated the Lead and Copper Rule (the Rule). *See* 56 Fed. Reg. 26,460, 26,462 (June 7, 1991). The Rule established requirements for monitoring and controlling lead in drinking water. *See id.* at 26,478. Lead contamination in drinking water results primarily from corrosion of components of water infrastructure. These include lead service lines (pipes connecting homes to distribution pipes under the street) and lead-containing materials in home plumbing, such as lead solder and brass. Giammar Decl. ¶¶ 9-12. To prevent lead contamination, the Rule requires water systems to implement treatment measures to reduce corrosion. 40 C.F.R. § 141.80(d).

The Rule required all large public water systems to have “optimal” corrosion control treatment programs in place by 1997. *Id.* § 141.81(d)(4). Corrosion control treatment is “optimal” if it minimizes lead levels in household tap water. *Id.* § 141.2. Once a water system has optimized its corrosion control treatment, it must “continue to operate and maintain” optimal treatment. *Id.* § 141.82(g).

During the 1990s, the Water System coordinated with Detroit to identify an optimal treatment to control corrosion. After conducting a multi-year study, Detroit concluded that adding a corrosion-inhibiting chemical called orthophosphate to

drinking water at Detroit's water treatment plant was the most effective way to minimize lead levels in tap water. PA 62-64, 70-71. MDEQ agreed. *Id.* at 328. Orthophosphate promotes the formation of a protective layer (scale) on the interior surface of lead pipes. Giammar Decl. ¶¶ 15, 19. This scale reduces the amount of lead released from the pipe's surface into water. *Id.* In the 2000s, MDEQ allowed the Water System to reduce the frequency of its tap water monitoring to once every three years, which the Lead and Copper Rule permits only for water systems that have optimized corrosion control. 40 C.F.R. § 141.86(d)(4)(iii); *see* PA 332, 335. For years, orthophosphate-treated water flowed through Flint's lead pipes, forming a stable protective scale that reduced the amount of lead entering the City's drinking water and optimized the System's corrosion control. Giammar Decl. ¶ 25.

2. The Water System is not maintaining optimal corrosion control treatment

After implementing optimal corrosion control treatment, the Water System was required to "operate and maintain" that treatment. 40 C.F.R. § 141.82(g). The Water System is violating the Safe Drinking Water Act by failing to maintain optimal corrosion control treatment.

The Water System's decision not to add orthophosphate to the Flint River water it distributed to residents significantly damaged the protective scale that had built up inside the System's lead pipes. Giammar Decl. ¶ 29. The absence of orthophosphate in the river water caused the scale to deteriorate, which is exposing

portions of the pipes more prone to releasing lead when in contact with water. *Id.* ¶¶ 29-30. Sampling by Virginia Tech in August 2015 revealed dangerously high lead levels in the City's tap water, confirming damage to the System's pipes, and indicating that the System was not effectively controlling corrosion. *Id.* ¶¶ 33-34.

Tap water monitoring data collected since the Water System resumed its use of pretreated water from Detroit confirms that the System is not maintaining optimized corrosion control. While orthophosphate treatment eventually will help rebuild a protective scale inside the System's lead pipes, a stable scale does not form immediately. *Id.* ¶¶ 37-39. Rather, it could take at least six months for the scale to become sufficiently stable and thick to minimize the release of lead from pipes in the System. *Id.*

According to treatment experts, to conclude a stable protective scale has formed, the System should collect six months of data showing consistently low lead levels at the 90th percentile⁶ that are decreasing over time. *Id.* ¶ 41. Samples collected by Flint residents from October 16 through November 2015, and in December 2015, January 2016, and February 2016 show 90th percentile lead levels of 8 ppb, 11 ppb, 9 ppb, and 11 ppb, respectively. *Id.* ¶ 43 & tbl.1. These 90th

⁶ The 90th percentile lead level in a group of tap water samples means the lead level higher than 90% of the samples in the group. In other words, if the 90th percentile lead level is 15 ppb, then 90% of the samples in the group have lead levels less than 15 ppb.

percentile values do not show a downward trend as would be expected of a system beginning to optimize its corrosion control treatment. *Id.* ¶ 44. They are also well above the levels that the System was able to maintain consistently prior to 2014. *Id.* ¶¶ 25, 44. Further, the 90th percentile values may be biased low because the samples may not have been collected from homes with lead service lines or lead-containing interior plumbing, as required by the Safe Drinking Water Act. *Id.* ¶ 46; 40 C.F.R. § 141.86(a)(8).

These elevated 90th percentile values indicate that lead is still being released from the interior surfaces of the System's pipes, and that a stable protective scale has not yet re-formed. That nearly 200 of these samples show lead levels at or above 100 ppb likewise indicates that a protective scale is not yet stable. *Id.* ¶ 45.⁷ Because the Water System's treatment is not yet minimizing lead levels in tap water, the Water System is not maintaining optimal corrosion control treatment, and remains in violation of the Safe Drinking Water Act.⁸

⁷ Data collected by MDEQ as part of its "sentinel site" monitoring similarly does not indicate that the System is effectively controlling corrosion. *Id.* ¶¶ 48-50. MDEQ selected sentinel sites as a means of conducting repeated sampling at the same homes to determine the effectiveness of the System's corrosion control treatment over time. PA 337, 339-40.

⁸ The Water System's ongoing violation of the requirement to maintain optimal corrosion control is reasonably likely to continue in the future. Although the Water System plans to switch water sources to the KWA when the new pipeline is complete, *see supra* pp. 4-5, the System has not yet completed the steps necessary to ensure that optimal corrosion control treatment is maintained during and after

C. Defendants are not complying with the Safe Drinking Water Act's monitoring requirements

1. The Lead and Copper Rule requires the Water System to systematically sample residents' tap water for lead

The Lead and Copper Rule requires water systems to conduct comprehensive tap water sampling for lead at residents' homes. 40 C.F.R. § 141.86; 56 Fed. Reg. at 26,514. Water systems must collect samples from "high-risk" homes that are served by a lead service line or contain interior lead pipes or copper pipes with lead solder. 56 Fed. Reg. at 26,514-15; 40 C.F.R. § 141.86(a)(3).

The Rule's monitoring protocol requires a water system first to establish a sampling pool of high-risk homes. 40 C.F.R. § 141.86(a)(1), (a)(3). The sampling pool must be large enough to ensure that a water system can collect a required number of tap water samples.⁹ *Id.* § 141.86(a)(1). For systems like Flint's, the sampling pool must consist entirely of homes that are served by a lead service line or contain interior lead plumbing. *Id.* § 141.86(a)(3). If the system contains lead service lines, half of its samples must come from homes serviced by those lines

the switch. For instance, the System has not yet collected at least a year of data from a pipe-loop test to determine whether its planned corrosion control treatment is effective. Giammar Decl. ¶¶ 54-56.

⁹ The Rule requires water systems serving more than 100,000 people to collect a set of at least 100 tap water samples twice each year, unless the system qualifies for reduced monitoring. 40 C.F.R. § 141.86(c), (d)(1). Systems serving between 10,001 and 100,000 people must collect at least 60 samples twice each year. *Id.*

and the other half from homes with lead solder or interior lead plumbing. *Id.* §§ 141.86(a)(8), 141.80(c). A water system must collect tap water samples every six months if it does not qualify for monitoring on a reduced schedule. *Id.*

§ 141.86(d)(3).¹⁰ The state may require a water system to resume six-month sampling when it introduces a new drinking water source. *Id.* § 141.86(d)(4)(vii).¹¹

The Rule requires water systems to collect a set of samples from homes within a pre-established pool. *Id.* § 141.86(a)(1). The pool is pre-established so that credible comparisons can be made across monitoring periods and results cannot be diluted by adding new homes likely to have lower lead levels, or by dropping homes with previously high levels. Therefore, the system may collect a sample from another home that was not part of the initial sampling set only if the system can no longer gain entry into a previously sampled home, or if that home no longer fits the Rule's high-risk criteria. *Id.* § 141.86(b)(4). The replacement sampling site must be part of the system's sampling pool, located near the previously sampled home, and must meet the same high-risk criteria. *Id.*

Taken together, these requirements prevent water systems from

¹⁰ A water system may reduce the frequency of monitoring only if less than 10% of samples exceed the lead action level for two consecutive monitoring periods (in other words, for a full year) and the system demonstrates that it is maintaining optimal corrosion control treatment. *Id.* §§ 141.86(d)(4)(ii), 141.82(f).

¹¹ A water system also must resume sampling every six months if its sampling results exceed the lead action level, or if water-quality data reveal problems with corrosion control treatment. *Id.* § 141.86(d)(4)(vi)(B).

manipulating their sampling pools to report inaccurately that lead levels have been controlled in tap water.

2. Since April 2014, the Water System has not complied with the Lead and Copper Rule's monitoring requirements

The Water System is violating the Lead and Copper Rule's monitoring requirements. After the Water System began using the Flint River as a water source, MDEQ required the System to collect tap water samples for two six-month monitoring periods, July to December 2014 and January to June 2015. PA 141, 342-43, 347. During both monitoring periods, the System failed to establish and maintain an adequate sampling pool of high-risk homes, draw its samples from those homes, and sample the same homes from one monitoring period to the next.

Indeed, during these monitoring periods, the System's Utilities Administrator requested that city employees submit tap water samples from their own homes or even solicit samples on Twitter – without regard to whether those employees or volunteers lived in homes that were part of the System's sampling pool or were served by a lead service line or contained lead plumbing. *Id.* at 353-56, 362. The Utilities Manager later observed that the System “throw[s] bottles out everywhere” to collect the required number of samples, *id.* at 364, instead of following the protocol mandated by the Lead and Copper Rule.

The System also failed to collect samples from the same homes across monitoring periods. For the 2015 period, the System collected tap water samples

from only 14 of the 100 homes used during the previous six-month monitoring period. *Id.* at 366-68. Each of these fourteen sampling sites had lead levels below the lead action level during the previous period. *Id.* Similarly, for the 2014 period, the System sampled from only eleven homes it had previously sampled, again all with reported lead levels below 15 ppb. *Id.* at 366-67. By consistently failing to sample the same sites in consecutive monitoring periods, the System has distorted its sampling results by essentially creating a new sampling pool for each monitoring period.

For example, five days before the end of the 2015 monitoring period, MDEQ told the System that the 90th percentile value of the samples it had collected to date exceeded the Rule's lead action level, and that MDEQ hoped that the System had "more lead/copper samples collected and sent to the lab by 6/30/15." *Id.* at 371. The System then collected fifteen more samples, none drawn from a pre-established sampling pool, and all with lead levels below 15 ppb. *Id.* at 185-88, 366-69. MDEQ accepted these samples as valid. *Id.* at 184-88; 373-74.

Compounding these problems, during both the 2014 and 2015 monitoring periods, the Water System falsely certified to the State that it drew the required number of samples from homes with lead service lines. *Id.* at 176-81, 184-88. The Water System could not confirm that it drew samples from homes with lead service lines – and thus could not establish and maintain an adequate sampling pool –

because it lacked accurate information on the locations of its lead service lines. Of the 324 monitoring sites used by the System for Lead and Copper Rule compliance from 1992 to 2015, only 6 homes were confirmed to have lead service lines as of November 9, 2015. *Id.* at 376. Even now, after an attempted inventory, there are more than 10,000 homes and businesses in Flint with service lines of unknown composition. *Id.* at 379.

At around the same time that testing from independent researchers found 90th percentile lead concentrations of 25 ppb – nearly double the federal lead action level – the Water System was reporting 90th percentile concentrations of only 11 ppb. *Id.* at 199, 373. The System’s disregard for the Rule’s monitoring protocol prevents the prompt detection of elevated levels of lead in Flint’s drinking water and delays notification to residents of the health risks they face. *Id.* at 382-83; 40 C.F.R. § 141.85; *see supra* p. 18.

3. The Water System continues to violate the Lead and Copper Rule’s monitoring requirements

Flint’s Water System is obligated to conduct tap water sampling now, for the six-month monitoring period of January to June 2016. PA 386-88. The monitoring activities presently under way in Flint still do not comply with the Rule. The sampling pool used by MDEQ for its sentinel site monitoring does not consist entirely of homes that meet the Rule’s high-risk criteria. *Id.* at 403-04 (showing that 35 of over 600 homes tested have lead service lines); 40 C.F.R. §141.86(a)(3).

Similarly, resident-initiated testing does not comply with the Rule because it is voluntary and not based on a pre-established pool of high-risk homes. PA 412.

However, even if the sentinel site testing currently complied with the Rule, the Water System remains in violation of the Safe Drinking Water Act because noncompliance is likely to recur. *See Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988). MDEQ – and not the Water System – is conducting the sentinel site testing. PA 339-40, 412. According to EPA, “the City has not yet demonstrated it has an adequate number of qualified personnel to perform the duties and obligations required to ensure the City’s public water system complies with” the Lead and Copper Rule. *Id.* at 416. In view of the System’s long-standing noncompliance, and its failure to demonstrate operational ability to comply, the Water System has not come close to “completely eradicat[ing]” the risk of recurrent violations. *Gwaltney*, 844 F.2d at 172.

D. Defendants are liable for violations of the Safe Drinking Water Act as owners and operators of the Water System

The “owners and operators” of a public water system are responsible for ensuring that the system complies with the Safe Drinking Water Act. *See United States v. Ritz*, 772 F. Supp. 2d 1017, 1021 (S.D. Ind. 2011); *United States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 937-38 (N.D. Cal. 2000). Although the Act does not define the term “operator,” the Supreme Court, construing another federal environmental statute, has held that the ordinary meaning of “operator” is

“someone who directs the workings of, manages, or conducts the affairs of a facility” relating to environmental contamination or “decisions about compliance with environmental regulations.” *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998) (construing 42 U.S.C. § 9607(a)(2)). Courts apply the same ordinary meaning of “operator” in the Safe Drinking Water Act context. *See, e.g., United States v. Cnty. of Westchester*, No. 13-CV-5475 NSR, 2014 WL 1759798, at *6 (S.D.N.Y. Apr. 28, 2014); *Ritz*, 772 F. Supp. 2d at 1022; *Alisal Water Corp.*, 114 F. Supp. 2d at 937-38. Under the *Bestfoods* standard, Defendants are owners and operators of the Water System and are liable for the System’s violations of the Safe Drinking Water Act.

1. Defendants City of Flint and the City Administrator are owners and operators of the Water System

The City owns and operates the Water System. PA 431. The City’s Utilities Division within the Department of Public Works is responsible for the “operation, maintenance and management” of Flint’s water supply. Flint, Mich., Code § 46-7. City employees monitor water quality at Flint’s Water Treatment Plant, PA 440, 442, 444, 446, and work with MDEQ to address Safe Water Drinking Act compliance concerns, *e.g., id.* at 465-67. The City Administrator is also an operator because she is actively involved in managing the Water System. *See Bestfoods*, 524 U.S. at 66-67; PA 471-73 (City Administrator “direct[s] and supervis[es] the day-to-day operations of the City”); *id.* at 477 (City Administrator developed a

“comprehensive plan” to “show[] the City’s commitment to deliver high quality water, address its aging infrastructure, and maintain a qualified staff”).

2. State Defendants are operators of the Water System because they exercise substantial control over the System’s finances and operations

Defendant Board Members are operators of the Water System because they conduct its financial affairs and exercise “substantial control” over major decisions relating to drinking water quality. *See United States v. Twp. of Brighton*, 153 F.3d 307, 325-27 (6th Cir. 1998) (Moore, J., concurring in the result). The Board exercises decision-making power over the System’s purchases of treatment chemicals, repair parts for water distribution pipes, and engineering services for upgrades to the System. PA 481, 485, 490, 493. No resolution, ordinance, or budget amendment adopted by the City Council can take effect without Board approval. *See supra* p. 3. Therefore, the System could not resume distributing water from Detroit until the Board provided the City with the necessary authorization. PA 249, 251. Because the Board’s “approval [i]s necessary for any decisions involving large expenditures” or major operational decisions, the Board Members are operators for purposes of the Safe Drinking Water Act. *K.C. 1986 Ltd. P’ship v. Reade Mfg.*, 472 F.3d 1009, 1020 (8th Cir. 2007); *see Exxon Mobil Corp. v. United States*, 108 F. Supp. 3d 486, 531 (S.D. Tex. 2015).

Likewise, Defendant State Treasurer is an operator of the System because he

makes critical decisions about the source of Flint's drinking water and exercises ultimate decision-making power over the System's large expenditures. *See, e.g., K.C. 1986 Ltd. P'ship.*, 472 F.3d at 1020. Because the City remains in receivership, the State Treasurer ultimately decides whether the City can amend its budget to allow for significant unplanned expenditures. *See supra* p. 3. The Treasurer, for example, authorized the City to enter a contract to join the KWA in 2013. PA 130. The Treasurer was further involved in the City's decision to join the KWA by hiring a consulting firm to evaluate water-supply options and consulting with MDEQ about the impact of Flint River water on drinking water quality. *Id.* at 496, 499, 546-48, 550-53; *cf. Litgo N.J. Inc. v. Comm'r N.J. Dep't of Env'tl. Prot.*, 725 F.3d 369, 381 (3d Cir. 2013) (fact that party hired and oversaw work of environmental consultants was relevant to finding of operator liability).

The Treasurer also authorized a \$3 million upgrade to Flint's Water Treatment Plant in 2014, which was necessary to allow the Water System to begin distributing Flint River water. PA 139. And in 2015, the Water System could not resume distributing water from Detroit until the Treasurer approved a budget amendment allowing the switch. *See id.* at 23, 249. The Treasurer's management of the Water System supports the finding that he is an operator. *See GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 449 (6th Cir. 2004) (finding defendant's participation

alongside other decision-makers in approving the design plans, capital appropriations, and budgets of a facility relevant to operator liability).

For the foregoing reasons, Plaintiffs are likely to succeed on the merits of their Safe Drinking Water Act claims against Defendants.

II. Plaintiffs are suffering irreparable harm and will continue to suffer irreparable harm absent preliminary injunctive relief

A. Tap water in Flint is not safe to drink and will not be safe to drink for the immediate future

There is no safe level of lead in drinking water. Lanphear Decl. ¶ 21; *see also* PA 241, 323. Even low levels of exposure to lead can have harmful effects on numerous organ systems in both adults and children. Lanphear Decl. ¶¶ 9, 21, 27; *see also* 56 Fed. Reg. at 26,467-68. Infants and children are particularly vulnerable to lead. Lanphear Decl. ¶¶ 21, 23; *see also id.* ¶¶ 16-17. Childhood lead exposure is associated with irreversible developmental harm, including lower IQs and academic achievement and increased risk of behavioral problems related to criminality. *Id.* ¶¶ 24-25. Children with elevated blood lead levels may never reach the same peak cognitive ability as children who have less lead exposure. *Id.* ¶ 26.

The release of lead from Flint's pipes cannot be controlled for at least a period of months. Giammar Decl. ¶¶ 38-41. The City and State have conceded that lead contamination renders Flint's water unsafe to drink. *See* PA 241, 562.

B. Plaintiffs and other Flint residents lack consistent, reliable access to alternative sources of safe drinking water

1. Current relief efforts leave parts of the Flint community without reliable access to safe drinking water

State officials, in coordination with the City, federal agencies, and non-profit organizations, currently offer several services in an attempt to provide safe drinking water to Flint residents. The State provides free bottled water and faucet filters certified for lead removal for pick up at the City's five fire stations from 9 a.m. to 9 p.m. daily. PA 318. Each family may take home one case of bottled water per day. Lancaster Decl. ¶ 9; Fordham Decl. ¶ 7. The City also offers free bus fare for individuals going to and returning from the fire stations. PA 565. Filters but not bottled water are also available from other governmental offices in Flint from 9 a.m. to 4 p.m. on weekdays. *Id.* at 318. The City's and State's websites direct residents who need assistance accessing these resources to call a 211 helpline run by the United Way. *Id.* at 318; *see also id.* at 568, 572-73.

i. Plaintiffs and other residents who lack the means and physical ability to obtain water from fire stations do not have reliable access to safe drinking water

Defendants' services do not provide all Flint residents with consistent access to safe drinking water.

Many members of the Flint community, including Plaintiffs, cannot easily obtain transportation to Flint's fire stations. Hasan Decl. ¶ 30; Williams Decl. ¶ 8;

Newsom Decl. ¶ 6; Lancaster Decl. ¶ 6. About 19% of Flint residents do not have access to a vehicle. PA 577. Although free public bus service is available, it can be challenging and inconvenient to use. Buses run infrequently (sometimes only once every 30 minutes), and bus stations may not be close to either the fire stations or individuals' homes. Williams Decl. ¶ 11. Other residents, particularly members of Flint's immigrant community, are deterred from picking up water at the fire stations, given the presence of National Guard and law-enforcement officials at the sites. Overton Decl. ¶ 6.¹²

For residents who are able to travel to the fire stations, picking up bottled water can be time-consuming, incompatible with work schedules, and physically demanding. The lines can be "incredibly long." Fordham Decl. ¶ 7. Some residents have waited up to an hour to receive water, or have waited in line only to find that the fire station had run out of supplies. Rasool Decl. ¶ 28. In addition, a case of bottled water is too heavy for many residents, including the elderly, disabled, and even some who consider themselves able-bodied, to carry from the fire stations to the bus stop, and from the bus stop to their homes. Lancaster Decl. ¶ 7;

McClanahan ¶ 11; Overton Decl. ¶ 7; Roper Decl. ¶ 10; Williams Decl. ¶ 11.

Accordingly, picking up water from a fire station "really isn't an option" for some

¹² These residents' fear of immigration-enforcement consequences may be fueled by the government's earlier practice of requiring identification from residents to obtain water, Duell Decl. ¶ 30, and current practice of requesting identification to obtain filters at fire stations, Mays Decl. ¶ 57.

residents. Lancaster Decl. ¶ 7; *see* Duell Decl. ¶ 26.

In addition, each fire station's limit of one case of water per household per day means residents with large families lack access to sufficient amounts of water to meet their daily needs. Fordham Decl. ¶¶ 7-8; Hasan Decl. ¶ 27. "When you're using the water for everything, one case of water goes very quickly." Lancaster Decl. ¶ 9. Some residents are forced to spend significant time to "drive back and forth" to multiple fire stations "just to ensure that everyone has water." *Id.*; *see also* Fordham Decl. ¶ 7; Hasan Decl. ¶ 27.

For residents facing these circumstances, water distribution at the City's fire stations is insufficient to provide adequate amounts of safe drinking water.

ii. Existing government efforts to coordinate home delivery of water are inadequate to provide Plaintiffs and other Flint residents with the water they need

Home delivery of bottled water in Flint is not fast, reliable, or widely available. The State instructs residents who cannot pick up water at fire stations to call United Way's 211 helpline for assistance. *See* PA 318, Roper Decl. ¶ 12. However, the helpline does not dependably provide residents with home delivery of bottled water. Indeed, as of March 16, 2016, United Way stated that it "is not aware of a mechanism at this time to provide deliveries to . . . residential homes" in Flint. PA 584.

When Flint residents call 211 seeking water deliveries, it can take days or

weeks to obtain water in response to their requests, if those requests are honored at all. *See, e.g.*, Duell Decl. ¶¶ 14-15. Residents have sometimes had trouble reaching an operator due to the high volume of calls. Fordham Decl. ¶ 12; Duell Decl. ¶ 15; *see* Hasan Decl. ¶ 23. Operators have told some residents to go to their local churches to get free water, PA 584; Fordham Decl. ¶ 12, and have told others that “going to one of the [fire] stations is the only option available.” Williams Decl. ¶ 9; *see also* Duell Decl. ¶ 14; Newsom Decl. ¶ 11. Other residents have never received the delivery they requested. Mays Decl. ¶ 63. Still others have been referred to the Sheriff’s Department to arrange for water delivery. Roper Decl. ¶ 12. Some who called the Sheriff’s Department were unable to reach anyone, had to wait a week or more before the water arrived, or did not receive a delivery in response to their request. Roper Decl. ¶ 13; Williams Decl. ¶ 10; Newsom Decl. ¶ 10.

The 211 helpline is not adequate to ensure home delivery of water for those who need it to meet their daily needs.

iii. Filters provided by the City and State are inadequate to ensure reliable access to safe drinking water

Faucet filters distributed by the City and State do not provide Flint residents with access to safe drinking water because some residents cannot properly install, maintain, and monitor these filters on their own. These filters do not fit on all residents’ faucets, Collins Decl. ¶ 15; Mays Decl. ¶ 11; *see* PA 590, and instructions on how to install filters may be “difficult to understand,” Williams

Decl. ¶ 13; *see* Mays Decl. ¶ 55. Indeed, the local plumbers' union has installed filters for residents who were unable to install filters on their own and has replaced faucets for residents with incompatible faucets. PA 590-91.

Other residents' filters have clogged, cracked, or broken after just one to two weeks. Fordham Decl. ¶ 10; Newsom Decl. ¶ 22; Duell Decl. ¶ 29. Given that homeowners "are generally not trained in the operation or maintenance of treatment devices" like filters, PA 616, residents may be uncertain about whether filters are installed and working properly, for example when "the light never came on to show that it was working," Collins Decl. ¶ 15, or there is still water "dribbl[ing]" from the faucet, Williams Decl. ¶ 13; *see* Lancaster Decl. ¶ 10.

If not installed and maintained properly, faucet filters may become ineffective. PA 616-18, 625. In fact, they can sometimes make contamination worse by leaching contaminants back into the filtered water. *Id.* at 616-18. Even a properly installed filter may not remove all of the lead in Flint's drinking water. The faucet filters being distributed in Flint are certified to remove up to 150 ppb of lead, *id.* at 631, but more than 140 tap water samples from October 2015 through February 2016 have had lead levels greater than 150 ppb. Giammar Decl. ¶ 65.

The problems Plaintiffs and others have had installing and using filters are unsurprising given the recognized challenges of relying on filters for medium- or long-term drinking water protection. *Id.* ¶¶ 62-64. When water systems seek to use

filters to address certain contaminants in drinking water, EPA requires that the water systems themselves (not consumers) “operate and maintain” the filters, 40 C.F.R. § 142.62(h)(1), and ensure that filters are “installed . . . and monitored such that all consumers will be protected,” *id.* § 142.62(h)(6). Defendants, while primarily relying on filters to serve the Water System’s customers, *see* PA 568-69, 636, are not providing any services to install, maintain, or monitor the filters to ensure the protection of public health.

iv. Non-profit and volunteer relief efforts are inadequate to fill the gaps in the government’s response and are unsustainable

Because of the inadequacy of the city- and state-provided services, many Flint residents rely on non-profit organizations and volunteers for bottled water, filters, and information. *See* Duell Decl. ¶¶ 12, 30; Fordham Decl. ¶ 8; Newsom Decl. ¶¶ 12-14; Williams Decl. ¶ 15. These third-party relief efforts are valuable to countless Flint residents. But the groups leading these efforts have limited resources and are simply unable to completely fill the gaps in government-provided services. Duell Decl. ¶ 39; Harris Decl. ¶¶ 19, 22. Nor should they have to, given that city and state government officials are violating the law.

The level of non-profit and volunteer relief efforts is also likely unsustainable. Many organizers are working the equivalent of full-time jobs for no pay to serve Flint residents. *See* Duell Decl. ¶¶ 31-32; Roper Decl. ¶ 21. Donations

of bottled water and filters also may become more difficult to secure at any time. Mays Decl. ¶ 51; *see* Duell Decl. ¶ 10. With no end to the water crisis in sight, organizers and Flint residents reasonably fear that current levels of third-party relief cannot be maintained, and that without these efforts, many more people will be left without safe water to drink. Collins Decl. ¶ 35; Duell Decl. ¶ 36; Fordham Decl. ¶ 8; Hasan Decl. ¶ 32; Mays Decl. ¶¶ 49-51; Rasool Decl. ¶ 38; Roper Decl. ¶ 21-22; Williams Decl. ¶ 15.

v. Some residents lack access to information on drinking water sources

The City and State have also failed to effectively communicate information on how to access safe drinking water resources. Not every household in Flint has received comprehensive information about the crisis or relief efforts, *see* Mays Decl. ¶ 64; McClanahan Decl. ¶ 15, and not all Flint residents have internet access to view, or know to search for, the City and State response webpages, *see* McClanahan Decl. ¶ 15; Newsom Decl. ¶ 17. As a result, organizers and volunteers still meet residents in low-income and immigrant communities who do not know about the water crisis and are drinking unfiltered tap water. Duell Decl. ¶ 12. In addition, the lack of clear, widely available information leaves many residents uncertain about the safe uses for their tap water and how to access safe drinking water. *See* Mays Decl. ¶¶ 54-55, 58; Williams Decl. ¶ 19. Non-English speakers in immigrant communities face an additional hurdle because some sources of

information either have been offered solely in English, have been translated poorly, or have not been effectively disseminated into non-English speaking communities.

Mays Decl. ¶ 56; Duell Decl. ¶ 30.

2. The lack of safe drinking water is creating stress, fear, and financial hardship for Plaintiffs and Flint residents

The challenge of obtaining enough safe water to drink and cook with each day is adding worry, frustration, and financial burden to the lives of many members of the Flint community, including Plaintiffs. *See, e.g.*, Hasan Decl. ¶ 23, 36; Newsom Decl. ¶¶ 5, 16, 25; Mays Decl. ¶10. After unsuccessfully trying to access government-provided resources, residents have reached out to community activists in a “panic” for help obtaining water. Mays Decl. ¶ 38. They have taken steps to ration water, for instance by purchasing “small cups to limit [their] water use for rinsing [their] mouths after brushing [their] teeth,” Collins Decl. ¶ 13, or allowing family members with the most urgent need for water, such as those who are pregnant, to drink larger shares of the family’s limited supply of bottled water, Newsom Decl. ¶¶ 21-22.

Residents who rely on sporadic donations of water from friends and volunteers worry that if this generosity wanes, they will not have enough water for themselves and their families. *E.g.*, Newsom Decl. ¶¶ 12,16; Fordham Decl. ¶ 8; Williams Decl. ¶ 15. Residents worry that their children “may mistakenly forget about the contamination and drink the water.” Lancaster Decl. ¶ 5.

It has been “tiring and draining to rely on bottled water day in and day out.” Harris Decl. ¶ 20. Even for those who are able to buy water or pick up bottled water from fire stations or local churches, the challenges of obtaining water daily have made life “difficult,” “hectic,” and a “struggle financially.” Collins Decl. ¶ 11; *see* McClanahan Decl. ¶ 5; Rasool Decl. ¶ 34. Some residents spend hundreds of dollars buying bottled water on top of their monthly water bills, resulting in a serious financial burden. McClanahan Decl. ¶¶ 5, 12; Hasan Decl. ¶ 29; Mays Decl. ¶ 10; Fordham Decl. ¶ 9; Rasool Decl. ¶¶ 34, 36-37. Residents fear that they will not be able to afford to continue buying bottled water to meet all of their needs. Rasool Decl. ¶¶ 36-37. The anxiety and financial strain caused by a lack of consistent access to safe drinking water are further damaging a community that has been emotionally and physically harmed by Flint’s water crisis. *See* Fordham Decl. ¶ 16; Harris Decl. ¶ 20; Mays Decl. ¶ 20; Rasool Decl. ¶ 9-14, 24.

3. Plaintiffs and other Flint residents are irreparably harmed by their lack of reliable access to safe drinking water

Having safe water to drink is one of the “fundamental elements of life.” H.R. Rep. No. 93-1185 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6457. People who lack access to safe drinking water “likely . . . suffer irreparable harm . . . includ[ing] a host of serious and even life threatening medical conditions.” *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); *see also United States v.*

City of N. Adams, No. CIV. A. 89-30048-F, 1992 WL 391318, at *5 (D. Mass. May 18, 1992). Such irreparable harm is based on not only the potential exposure to unsafe water, but also the “uncertainty, anxiety, [and] financial hardship” of repeatedly seeking out alternative safe drinking water sources. *Cole v. ArvinMeritor, Inc.*, 516 F. Supp. 2d 850, 876-77 (E.D. Mich. 2005); *see, e.g., Verville v. Int’l Ass’n of Machinists & Aerospace Workers*, 520 F.2d 615, 620 (6th Cir. 1975) (“anxiety” and “fear” are irreparable injuries). That some Plaintiffs and 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.” *Lyda*, 2014 WL 6474081 at *12. Injunctive relief is necessary to prevent these ongoing harms.

C. Defendants refuse to supplement relief efforts

Prior to seeking preliminary relief, Plaintiffs asked Defendants to stipulate to the remedy sought here, to ensure Plaintiffs and all Flint residents have consistent access to safe drinking water. *See* Chaudhary Decl. ¶ 3. Defendants refused. *Id.* Defendants’ “refus[al] to make an enforceable commitment” shows that the “risk of irreparable harm” will “remain[] salient” throughout the case. *See Farnam v.*

Walker, 593 F. Supp. 2d 1000, 1014 (C.D. Ill. 2009). Irreparable harm to Plaintiffs and other Flint residents is thus likely to continue absent a Court order directing the requested relief. *See S.D. v. St. Johns Cnty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1100 (M.D. Fla. 2009).

III. Ensuring Flint residents have consistent access to safe drinking water serves the public interest

Access to safe drinking water is a “fundamental” and “unusually compelling public interest.” *United States v. Alisal Water Corp.*, 431 F.3d 643, 656 (9th Cir. 2005); *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 112 (2d Cir. 2013). The Safe Drinking Water Act’s “minimum national standards for protection of public health,” H.R. Rep. No. 93-1185, 1974 U.S.C.C.A.N. at 6454, and the Lead and Copper Rule’s aim to “protect populations from exposure to lead . . . in drinking water,” 72 Fed. Reg. 57,782, 57,784 (Oct. 10, 2007), reflect this fundamental public interest in ensuring access to potable water supplies.

The Rule’s corrosion control requirements aim to protect populations served by water systems – like Flint’s – that contain lead pipes and solder. 56 Fed. Reg. at 26,434-66. Likewise, the Rule’s monitoring requirements are meant to ensure that the public knows about health risks from the water supply, *see* H.R. Rep. No. 93-1185, 1974 U.S.C.C.A.N. at 6476-77, particularly those residents most at risk of exposure to lead-contaminated drinking water, *see* 56 Fed. Reg. at 26,514.

Defendants’ persistent violations undermine these important public purposes

by not only exposing Flint residents to lead-contaminated water, but also hiding the risks of exposure. Plaintiffs' requested relief, as described below, is narrowly tailored to effectuate the Safe Drinking Water Act's core purposes until tap water in Flint is safe to drink. The relief will ensure Flint residents have access to safe and sufficient drinking water, without requiring Defendants to make the large-scale changes to the water supply system that may be required if Plaintiffs prevail on the merits. Plaintiffs' requested relief therefore serves the public interest.

IV. The requested relief will not harm others

Where, as here, Defendants are governmental entities, the effects of an injunction on others and on the public "substantially merge." *Miron v. Minominee Cnty.*, 795 F. Supp. 840, 847 (W.D. Mich. 1992). Because the requested relief will serve the public interest, it will not cause substantial harm to others.

Even if Defendants were to argue that the costs of the injunction sought here constitute "harm," such costs are self-inflicted. *See United States v. Edward Rose & Sons*, 384 F.3d 258, 264 (6th Cir. 2004). Flint residents lack a safe water supply because of Defendants' persistent disregard for their obligations under the Safe Drinking Water Act. Any such harm is therefore "substantially outweighed by the profound public interest at stake here." *Alisal Water Corp.*, 431 F.3d at 656.

RELIEF REQUESTED

"District courts have broad latitude in fashioning equitable relief when

necessary to remedy an established wrong.” *NRDC v. Sw. Marine, Inc.*, 236 F.3d 985, 999 (9th Cir. 2000) (internal quotation marks omitted); *accord Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015). Plaintiffs request an order requiring Defendants to take steps necessary to ensure all Flint residents have reliable access to safe drinking water until the Water System demonstrates compliance with the Safe Drinking Water Act.¹³ *See* PA 652-55.

This requested relief has two components. First, Defendants must submit to the Court for review and approval a plan to provide every household served by the System with reliable access to safe drinking water. *Id.* at 652. A robust system of door-to-door deliveries of bottled water by Defendants is the most effective way to ensure complete resident access to safe water. Mays Decl. ¶¶ 68-69; Roper Decl. ¶ 25; *see* PA 652-53. In the alternative, Defendants may distribute free faucet water filters, but only if they also ensure that the filters are professionally installed, regularly maintained (at least monthly), and regularly monitored (at least monthly) for effectiveness for all households. PA 653.¹⁴ Upon approval by the Court,

¹³ EPA’s January 21, 2016 Administrative Order requires none of the relief requested by Plaintiffs. *See* PA 284-89.

¹⁴ Professionally installed and maintained filters are a less effective remedy for several reasons. First, as noted above, more than 140 tap water samples collected from October 2015 through February 2016 have lead levels higher than 150 ppb. *See supra* p. 30. The filters being distributed in Flint are only certified to remove lead up to 150 ppb. PA 630-31. Second, EPA has stated that bottled water is the

Defendants should promptly implement the delivery plan. *Id.*

Second, Defendants must ensure Flint residents have easy access to adequate information about lead contamination in their drinking water, the safe and unsafe uses of unfiltered tap water, and contact information (phone number, e-mail address, and website) residents can use if they need additional water delivered or filter installation or maintenance. *Id.* at 653-55. Defendants must distribute this information directly to all households served by the Water System on a monthly basis. *Id.* at 653-54. The information must be translated into the languages most commonly spoken in Flint, including English, Spanish, Arabic, Mandarin, and Hmong.¹⁵ *Id.* Defendants must also ensure that helplines and websites provide current, accurate information in those languages, and that helplines are adequately staffed to respond to residents who need help acquiring safe water. *Id.* at 654-55.

Plaintiffs' requested relief is reasonable in view of the ongoing irreparable harm to Flint residents. EPA requires similar guarantees from public water systems that seek variances or exemptions from the Lead and Copper Rule's corrosion control requirements. 40 C.F.R. § 142.62(f)-(h). Specifically, a water system that

“safest choice” for certain sensitive groups, including pregnant and breastfeeding women and young children. *See id.* at 257.

¹⁵ Spanish, Arabic, Mandarin, and Hmong are, according to U.S. Census data, the most common non-English languages spoken at home by Flint residents who do not speak English “very well.” PA 638-40; *see also* Mays Decl. ¶ 67.

relies on bottled water for an exemption is “fully responsible for the provision of sufficient quantities of bottled water to every person supplied by the public water system via door-to-door bottled delivery.” *Id.* § 142.62(g)(3). Similarly, a water system that that relies on faucet filters has the “responsibility” to “operate and maintain” the filters, including ensuring that all filters are “properly installed, maintained, and monitored.” *Id.* § 142.62(h)(1), (6). It is unreasonable for residents to bear the responsibility for installing, maintaining, and monitoring filters.

Consumer confusion and error renders filters an inadequate alternative source of safe drinking water unless the Water System takes responsibility for installation, maintenance, and monitoring. In both cases, it is the responsibility of the public water system to ensure that every resident served by the system has access to safe drinking water. *Id.* § 142.62(g)-(h). Plaintiffs seek nothing more than an order that, like EPA’s regulations, requires Defendants to fulfill their responsibility to provide adequate, safe drinking water to the Flint residents they are supposed to serve.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a preliminary injunction requiring Defendants to provide all Flint residents served by the Water System with reliable access to safe drinking water.

Dated: March 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2016, I electronically filed Plaintiffs' Motion for a Preliminary Injunction and Brief in Support of Motion for a Preliminary Injunction with the Clerk of the Court using the ECF system.

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