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

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiff,

v.

CITY OF FLINT, a Michigan municipal corporation,

Defendant.

and

FLINT CITY COUNCIL,

Intervening Defendant.

Case No. 17-12107

Judge David M. Lawson

Magistrate Judge Stephanie Dawkins Davis

INTERVENING DEFENDANT FLINT CITY COUNCIL'S EMERGENCY MOTION: (1) FOR RECONSIDERATION, (2) TO ALTER OR AMEND JUDGMENT, (3) FOR RELIEF FROM JUDGMENT, AND (4) FOR STAY OF JUDGMENT PENDING DISPOSITION OF MOTION

Intervening Defendant, Flint City Council (the "Council"), through its attorneys, moves pursuant to Local Rule 7.1(h), Fed. R. Civ. P. 59(e), Fed. R. Civ. P. 60(b)(1), Fed. R. Civ. P. 60(b)(6), Fed. R. Civ. P. 62(b), for reconsideration, to alter or amend judgment, for relief from judgment, and to stay enforcement of the

Court's Judgment (Dkt. 38, "Judgment") and corresponding Opinion and Order (Dkt. 37, "Opinion") (Judgment and Opinion collectively as "Decision").

On October 22, 2017, the Council's attorneys sent an email and left voice mail messages for Plaintiff's counsel and City of Flint's counsel. Plaintiff's counsel responded via email that he did not concur.

WHEREFORE, the Council respectfully requests that the Court enter an order that: (1) reconsiders, alters or amends, and/or provides relief from the Decision by: (a) dismissing the case; or (b) reversing the Decision, and allowing the Council's expert at least 75 days from the date of the City of Flint's approval of his retainer agreement to complete his analysis, keeping discovery open, and setting an evidentiary hearing before the Court enters any judgment and/or permanent injunction; and (2) stays any obligations imposed by, and enforcement of, the Decision during the pendency of the Motion.

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Date: October 22, 2017

Respectfully submitted,

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BRIEF IN SUPPORT OF INTERVENING DEFENDANT FLINT CITY COUNCIL'S EMERGENCY MOTION: (1) FOR RECONSIDERATION, (2) TO ALTER OR AMEND JUDGMENT, (3) FOR RELIEF FROM JUDGMENT, AND (4) FOR STAY OF JUDGMENT PENDING DISPOSITION OF MOTION

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Should Plaintiff's lawsuit be dismissed because Plaintiff failed to properly invoke the citizen suit provision in 42 U.S.C. § 300j-8 by sending the mandatory, pre-lawsuit notice?

Plaintiff answers "no."

Defendant City of Flint answers "no".

The Council answers "yes."

This Court should answer "yes."

2. If the Court does not dismiss the lawsuit, should the Court reinstate the case (a) to allow the Council's expert to complete his analysis; (b) permit additional discovery; and (c) to schedule an evidentiary hearing -- as the law requires for permanent injunctions -- to resolve the numerous disputed material facts?

Plaintiff answers "no."

Defendant City of Flint answers "no".

The Council answers "yes."

This Court should answer "yes."

3. Has Plaintiff proven that the insolvency of Flint's water fund is inevitable such that the case is ripe for judicial review?

Plaintiff answers "yes."

Defendant City of Flint answers "yes".

The Council answers "no."

This Court should answer "no."

4. Should the Court stay the enforcement of the Judgment while this Motion is pending?

Plaintiff answers "no."

Defendant City of Flint answers "no."

The Council answers "yes."

This Court should answer "yes."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

42 U.S.C. § 300j-8(b)(1)(A)

Hallstrom v. Tillamook County, 493 U.S. 20 (1989)

U.S. v. Owens, 54 F.3d 271 (6th Cir. 1995)

INTRODUCTION

The Court lacks jurisdiction. Even assuming Plaintiff could invoke the citizen suit provision of the Safe Drinking Water Act ("SDWA") while seeking summary judgment on a complaint not based on the citizen suit provision (which violates Due Process), Plaintiff never complied with the mandatory notice requirement. The statute requires (1) sixty-days' notice; (2) of SDWA violation; (3) sent the the alleged violator of the SDWA requirement. That never happened. A general demand letter from the EPA, not Plaintiff, that did not identify any violation does not satisfy the notice requirement. According to the United States Supreme Court, the notice requirement provision must be strictly honored and dismissal is mandatory when it is not. Here, Plaintiff never attempted to comply with—and certainly did not strictly honor—the notice provision. For this reason alone, the lawsuit should be dismissed.

If the Court does not dismiss the lawsuit, the Council respectfully asks the Court to reinstate the case so the Council's expert, Gary Cline, can be formally hired to complete his analysis of three different water supply options. The Court indicated that the Council did not approve a contract for Mr. Cline until October 9, 2017, but that is incorrect because (1) the Council does not have the ultimate authority to approve his contract, the City's administration does; and (2) the City has not yet

approved his proposed agreement, despite 4 versions of Gary Cline's proposed retainer agreement being submitted to the City.

After Mr. Cline completes his analysis, which he believes will take 75 days after he is hired, the Council respectfully submits the Court should schedule an evidentiary hearing to the extent Plaintiff seeks a permanent injunction. The law requires evidentiary hearings when a plaintiff seeks a permanent injunction, especially when a case involves complex disputed factual issues, which here, there are many, including whether Flint's water fund will become insolvent at the end of 2018.

If the Court does not dismiss or reinstate the case, and the City is forced under duress to decide on a long-term water contract without having the benefit of Mr. Cline's analysis, that decision could take away the Council's vested authority to freely choose a water source. Injunctions should be narrowly tailored and, here, it is difficult to imagine a more severe or permanent ruling, for an alleged violation that is not even clear. As many citizens of Flint believe, the proposed contract with the Great Lakes Water Association ("GLWA Contract") is not just a 30-year contract, it is a forever contract. Because during those 30 years, Flint may lose any ability or opportunity to upgrade its water plant or find another source of water, even if the Council's expert identifies one in the near future. Thus, one of the most

important decisions affecting Flint's future should not be forced on the City. The Council respectfully asks that the Court reconsider its decision.

STATEMENT OF FACTS

The Council will recount the facts of this case, including disputed issues of material facts, in the argument section below.

STANDARD OF REVIEW

Per the Court's Practice Guidelines, Flint City Council will refrain from employing elaborate boilerplate recitations of motion standards.

ARGUMENT

A. The Court Lacks Jurisdiction.

Plaintiff brought this action relying on 42 U.S.C. § 300j-8(b)(1)(B) for federal jurisdiction. *See* Complaint, ¶3. But as this Court correctly stated, "[t]his section does not authorize anyone to bring a lawsuit." Opinion, p. 15. The Court also observed that the SDWA contains a citizen suit provision, 42 U.S.C. § 300j-8(a)(1), but Plaintiff did not allege that it was proceeding under this section in its Complaint. In fact, Plaintiff unequivocally ***denied*** that it was relying on the citizen suit provision at oral argument. *See* **Ex. 1**, Transcript, p. 6 (emphasis added) (THE COURT: You're looking – you're relying on subsection (a) [42 U.S.C. § 300j-8(a)] and not subsection (b), is that fair to say? MR. KUHL: ***No, we're relying on (b)***." Only after the Court's questions regarding jurisdiction did Plaintiff suddenly reverse

course, claiming for the first time that it "could proceed" on the citizen suit provision, not that it was proceeding. *See id*. at p. 9. Plaintiff also suggested, but did not affirmatively assert, a September 2016 letter sent by the EPA could satisfy Plaintiff's notice requirements under 42 U.S.C. § 300j-8(b)(1)(A). *See id*. at 9 ("Right, the 60-day notice provisions. And I would assert that this goes back to September of 2016 when the EPA issued a demand letter that the City take action."). But Plaintiff did not point to any notice that ***Plaintiff sent*** to Flint identifying a SDWA violation. Even assuming Plaintiff's statement at oral argument somehow constituted an oral amendment to Plaintiff's Complaint, and assuming parties can amend a complaint while simultaneously seeking summary judgment on it (which it cannot, that would fly in the face of Due Process[1]), Plaintiff's cause of action must still be dismissed.

As this Court observed, the citizen suit provision contains a mandatory 60-day notice requirement. *See* Opinion, p. 19 (citing 42 U.S.C. § 300j-8(b)(1)(A)). This requirement is not a matter of insignificant form or procedure; it is a matter of significant substance. In *Hallstrom v. Tillamook County*, 493 U.S. 20, 32-33 (1989), the United States Supreme Court analyzed "whether compliance with the 60–day

[1] *See*, *e.g.*, *Tracy v. Parker*, 62 F.3d 1418, *1 (6th Cir. 1995) (citations omitted) (Observing "this court has held that it is improper to enter summary judgment where a motion to amend the complaint was pending.").

notice provision is a mandatory precondition to suit or can be disregarded by the district court at its discretion." *Id*. at 23. Although the Supreme Court analyzed a case under Resource Conservation and Recovery Act ("RCRA"), it noted that "[s]ince 1970, a number of other federal statutes have incorporated notice provisions patterned after [subject statute]." *Id*. In the first footnote, the Supreme Court cited 42 U.S.C. § 300j-8, among other statutes.

In its analysis, the Supreme Court discussed various arguments, such as: "[notice provisions] should be given a flexible or pragmatic construction," "a literal interpretation of the notice provision would defeat Congress' intent in enacting RCRA," and "giving effect to the literal meaning of the notice provisions would compel 'absurd or futile results.'" *Id*. at 26-29. But the Supreme Court rejected the arguments, finding courts must enforce the statute as written:

> "[I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." Therefore, we hold that the notice and 60–day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion….As a general rule, if an action is barred by the terms of a statute, it must be dismissed.
>
> ….
>
> Accordingly, we hold that where a party suing under the citizen suit provisions of RCRA fails to meet the notice

> and 60–day delay requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute.

Id. at 31-33.

Relying on *Hallstrom*, this Court recently dismissed claims against the Governor due to a failure to comply with the notice requirements:

> This sixty-day notice provision was modeled after § 304 of the Clean Air Amendments of 1970. *See Hallstrom v. Tillamook Cty*., 493 U.S. 20, 23 & n.1 (1989). A number of other federal statues contain notice provisions also patterned after § 304, including the Resource Conservation and Recovery Act of 1976 ("RCRA"). *Id*. at 22-23. In interpreting RCRA's notice provision, which is virtually identical to the SDWA's notice provision, the Supreme Court concluded that the "language of this provision could not be clearer.... Under a literal reading of the statute compliance with the 60-day notice provision is mandatory, not optional, condition precedent for suit." *Id*. at 26. The Court directed that when a plaintiff fails to comply with notice provision, "the district court must dismiss the action as barred by the terms of the statute." Id. at 33.
>
> Plaintiffs here have not complied with the SDWA's notice requirement. They argue, however, that the plaintiffs in a separate action, Concerned Pastors for *Social Action v. Khouri*, No. 16-10277, provided notice regarding the same violations and that duplicate notice should not be required. Plaintiffs provide no authority for the proposition that notice provided by separate plaintiffs in a separate suit serves to excuse the statutory requirement. In the cases cited by Plaintiffs, at least one plaintiff named in the action provided notice. *See, e.g., Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344, 1352-53 (E.D.N.C. 1992).

> None of the Plaintiffs named in this case have provided notice. Consistent with the statute and *Hallstrom*, the court must dismiss Plaintiffs' SDWA claims.

See McMillian v. Snyder, 2017 WL 492077, *1-2 (E.D. Mich. 2017) (all unpublished opinions are attached as **Ex. 2**); *see also Jenkins v. Pacific Gas and Electric Company*, 2016 WL 3129611, 3 (C.D. Cal. 2016) ("Here, Plaintiff neither alleges she provided Defendant notice of her claim … Thus, Plaintiff's SDWA claims must be dismissed."); *Hussey v. Total Environmental Solutions, Inc*., 2015 WL 7282073, *3 (W.D. La. 2015) (remanding a case to state court where "Plaintiff's Petition makes no mention of a citizens' suit under either the SDWA or the CWA. Nor is there any evidence that Plaintiff has timely performed the jurisprudential statutory notice provisions. There is no private right of action under the SDWA applicable here, and the Petition does not implicate a substantial question of federal law.").

Here, Plaintiff alleged it sent a notice no sooner than June 15, 2017. *See* Complaint (Dkt. 1), ¶47 ("On June 15, 2017, MDEQ sent a letter to the City Council and Mayor Weaver requesting that the City Council take action to either approve the agreement or to make a new proposal….."). Plaintiff then filed its Complaint ***13 days later, not 60***.

In its Opinion, the Court concluded that "[n]o party in this case has suggested that the MDEQ did not comply with this [notice] provision," Opinion, p. 19, but the

Council immediately objected during oral argument when Plaintiff attempted to invoke the citizen suit provision for the first time. *See* **Ex. 1**, Transcript, p. 21 ("I didn't get the – in the complaint that they were relying on the section that Mr. Kuhl talked about, at least I didn't see it in the complaint."). In any case, objections to jurisdiction cannot be waived. *See*, *e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434-35 (2011) ("Objections to subject-matter jurisdiction … may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction.").

The Court also stated that the EPA "issued a warning" nine months before the Plaintiff commenced the lawsuit (Opinion, p. 19), however, that does not satisfy the statute. Indeed, under 42 U.S.C. § 300j-8(b)(1), "***the plaintiff***" must give notice to the EPA and "any alleged violator." Plaintiff is, of course, not the EPA, and the statute does not provide that the EPA can give the notice for the Plaintiff, to itself, and to the alleged violator. As this Court held in *McMillian*, there is "no authority for the proposition that notice provided by separate plaintiffs in a separate suit serves to excuse the statutory requirement." *McMillian*, *supra* at *2. Moreover, even assuming parties could rely on third-party notices, Plaintiff never alleged that it was relying on any EPA warning as its notice in its complaint. In fact, Plaintiff never attached or mentioned any EPA letter in its complaint, much less explain how the

letter satisfies the content requirement of the notice. *See* 42 U.S.C. § 300j-8(b)(1) (requiring the plaintiff identify a "***violation***" of the SDWA "to any alleged violator of such requirement"). But even if it did identify the letter, it would still be insufficient because the letter did not identify any violation. Rather, the EPA sent the letter to remind the City about the EPA Order and certain requirements had to be met before switching water sources. *See* Exhibit 10 to Plaintiff's Motion (Dkt. 26-10), p. 1 (Stating the "EPA is sending this letter to make sure the City and State understand their obligations under the EPA's enforcement Order issued in January 2016 and to note that decision must be made that will allow for adequate demonstration of treatment before any change in water source occurs."). There is no mention or claim of a SDWA violation.

The notice provisions must be strictly honored; close enough or a general warning from another party does not count. And if the notice provisions are not honored, dismissal is mandatory. *Hallstrom*, 493 U.S. at 33 ("Accordingly, we hold that where a party suing under the citizen suit provisions [] fails to meet the notice and 60–day delay requirements [], the district court must dismiss the action as barred by the terms of the statute."). Therefore, even assuming Plaintiff was proceeding under the citizen suit provision, Plaintiff's lawsuit should still be dismissed because it failed to satisfy the notice requirements under 42 U.S.C. § 300j-8(b)(1).

B. Even Assuming The Court Has Jurisdiction, The Court Should Permit The Council's Expert To Complete His Analysis, Keep Discovery Open, And Hold An Evidentiary Hearing Before Issuing Any Ruling.

During oral argument, the Council's attorney explained that the Council was seeking an independent expert to analyze the proposed GLWA Contract and/or suggest potential alternatives. *See* **Ex. 1**, Transcript at pp. 28-29. The Council also explained that it did not have the ability to hire an expert on its own. *Id*. Rather, much like the process of hiring an independent attorney (which took some time), the Council needs to go through the City of Flint's administration to retain an expert and have his or her contract approved. *Id*. In other words, the City's administration, and not the Council, has the ultimate authority to hire attorneys and experts for the Council.

At the time of oral argument, the Council believed that the City was close to approving a contract with Gary Cline of AE2S. Indeed, prior to the hearing on September 26, 2017, Gary Cline's second version of his proposed retainer letter was submitted for approval by the City's Administration. *See* **Ex. 3**, Gary Cline's Declaration, ¶12. Therefore, at oral argument, the Council's attorney opined that Mr. Cline might be able to provide an opinion to the Council by mid-October. *See* **Ex. 1**, Transcript at p. 29. To date, however, Gary Cline has submitted for approval by the Flint City Administration 4 versions of his proposed retainer, and the City has

still not approved. *See* **Ex. 3**, Cline Declaration, ¶13; **Ex. 4**, Kindcaid Declaration, ¶34. Without an approved contract, Mr. Cline has been unable to provide a complete analysis or advice, although he has kindly not walked away and is awaiting to be formally hired. Once he is retained, Mr. Cline is prepared to review 3 water supply options: (a) the Great Lakes Water Authority option recommended by the Mayor and the State; (b) an option based on the Flint Water Treatment Plant as the primary supply; and (c) an option based upon the Genesee County Drain Commission as the primary supply. *See* **Ex. 3**, Cline Declaration, ¶¶9-11. Mr. Cline estimates this may take 75 days. *Id*. at ¶11.

In the Opinion, the Court twice indicated that the *Council* did not approve a contract for Cline until October 9, 2017. *See* Opinion, p. 13 ("But the Council did not approve a contract for Cline until October 9); p. 25 ("But [the Council] did not approve a contract for its consultant until October 9, 2017, well after several deadlines had pass and agreements had expired."). But the Council does not have the ultimate authority to approve his contract, the City does. In any case, Cline's contract was not approved by the City on October 9, 2017, and there is nothing in the record to the contrary.

C. The Insolvency of Flint's Water Fund Is Not Inevitable.

In holding that Plaintiff's claim is ripe, the Court found that Flint is on "the inevitable route to insolvency that the MDEQ has charted if Flint fails to present a long-term, affordable agreement for safe drinking water," and that the "City Council has not pointed to a single 'development' that 'may' occur between now and next September that would forestall the probably insolvency of Flint's water fund." *See* Opinion, pp. 20, 23.

Prior to the decision by the state appointed Emergency Manager to switch the water source from the Detroit Water Department to the Flint River, the collection rate from Flint's water and sewer account users was 90%. After the switch to the Flint River, the collection rate fell to 49%. *See* **Ex. 4**, Kincaid Declaration, ¶¶9-16.

In addition, Flint's ability to increase its collection rate is further hampered by the unlawful water and sewer rate increase of 22% on January 15, 2011, and a 35% increase on September 16, 2011, which were implemented by the state appointed emergency manager in 2011. *See id*. at ¶18. These increases have been the subject of 2 separate lawsuits and despite a holding by the Michigan Court of Appeals that the rate increase of September 16, 2011 was unlawful. *See Kincaid v. City of Flint*, 311 Mich. App. 76, 91; 874 N.W.2d 193 76 (2015) ("[W]e conclude that former finance director Townsend violated defendants Ordinances 46-52.1 and 46-57.1 by

increasing water and sewer rates without first providing notice and publication to its residents thirty days before the increases took effect, and by not waiting to implement those rates until July 1 of the next fiscal year. We also conclude that EM Brown's Order No. 31 did not rectify the violations."). As a result, the collection of sewer and water user accounts remains artificially low at 49% due to the lack of trust, even though Flint's primary drinking water source was returned to the Detroit Water and Sewer Department/Great Lakes Water Authority in October 2015. *See* **Ex. 4**, Kincaid Declaration, ¶26.

If Flint's collection rate for accounts of water and sewer users is returned to the pre-emergency manager rate of 90%, the insolvency of Flint's water fund is not inevitable. The factors that are in play that will lead to the return of the collection level of 90% by mid-2018 are the following:

A. The replacement of lead and galvanized service lines to users is now 1/3 completed;

B. The replacement of lead and galvanized service lines to users is expected to be 2/3 completed no later than the fall of 2018;

C. The replacement of 100% of lead and galvanized service lines to users is expected to be completed no later than the mid 2019;

D. There have been negotiations regarding the resolution of the lawsuits regarding the unlawful rate increases;

E. It is expected that the unlawful water rate increase lawsuits will be resolved on or before mid-2018;

F. Once water users can safely drink tap water without a filter, and once the cost for the water returns to a legal (and reasonable) level, it is expected that the collection rate will return to 90%.

See **Ex. 4**, Kincaid Declaration, ¶27.

Given all of the factors currently in play that are likely to forestall the probable insolvency of Flint's water fund, there is a factual dispute as to whether Plaintiff can satisfy Article III's standing requirements that: (1) Plaintiff has suffered an injury in fact that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 190 (2000). Accordingly, Plaintiff's claim is premature and not ripe for judicial review. *See*, *e.g.*, *U.S. v Massachusetts Water Resources Authority*, 256 F.3d 36, 58 (1st Cir. 2001) (Holding the district court properly "exercised the flexibility left to it by Congress in the [SDWA], and assumed

the responsibility of monitoring the [the alleged violator's] compliance ***in the event that future violations*** require a reexamination of the decision not to order filtration."); *see also National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807-808 (2003).

D. There Remains Numerous Factual Disputes.

As for other findings of fact, the Court suggested that the Council agreed with the entirety of Plaintiff's statement of facts (Opinion, p. 3); however, that is not the case. The Council was not asked for, and did not provide, a stipulation or waiver concerning facts. Indeed, there are numerous disputed material facts, including but not limited to:

- Whether Plaintiff properly invoked 42 U.S.C. § 300j-8(a)(1).
- Whether Plaintiff satisfied the notice requirements in 42 U.S.C. § 300j-8(b)(1).
- Whether the Council's independent expert -- if he is permitted to be hired and performed the work desired -- disagrees with the State's expert findings and conclusions.
- Whether the Council's independent expert -- if he is permitted to be hired and performed the work desired -- can propose alternatives to the GLWA Contract.

- Whether GLWA would entertain different terms and conditions, including but not limited to a shorter-term contract, if Flint is not being forced to accept the take-it-or-leave it version of the contract.
- What federal or state law did Flint allegedly violate and how and when specifically did the alleged violation occur?
- Whether a 30-year contract is required in order to cure or address the alleged violation?
- Whether a shorter-term solution or something less permanent be implemented to address the alleged violation?
- Whether a short-term solution be implemented while the Council's expert complete his work?
- Whether it will take approximately three-and-a-half years and between $58,800,000 and $67,900,000 for the plant to achieve compliancy with the EPA's conditions?
- Whether the necessary upgrades would not be complete until September 2020 and Flint would not be able to distribute water obtained from KWA until at least December 2020?

- Whether Flint lacks or cannot obtain capable and qualified personnel required by the EPA to perform compliance checks and effectively operates its treatment plant?
- Whether Flint can obtain a formal extension (assuming its necessary) of GCDC's pipeline to receive GLWA water for additional time?
- Whether Flint's water sewer collection rate of sewer and water user accounts of 90% fell to 49% because of the illegal water rate increase implemented by the emergency manager and/or because of the ill-advised switch to the Flint River as a water source?
- Whether Flint's current water sewer collection rate of delinquent accounts of 49% remains artificially low due the lack of trust created by government action?
- Whether Flint's rate of collection of accounts for water sewer users can be reasonably expected to return to the pre-crisis level of 90%?
- Whether Flint's water fund will avoid insolvency if the collection rate returns to 90%?
- Whether Flint would have to increase water prices by over 40% in order to keep its water fund solvent or are there are ways to keep the water fund solvent?

- Whether Flint's water fund will be insolvent by the first quarter of 2019 if it does not sign the GLWA Contract or can it find different ways to fund the water fund?
- Whether an investment of $204,220,000 in the next five years will ensure that the water system will not be a danger to public health?
- Whether the Council was involved or consulted when John Young was hired by the City?
- Whether the Council involved or updated regarding John Young's unilateral determination that the plan to switch from obtaining water from GLWA to obtaining raw water from the KWA was not feasible and, if not why?
- Whether the Council excluded from the closed-door negotiations among and between the governor, GLWA and the City administration regarding the GLWA Contract and what occurred during those negotiations?
- Whether Plaintiff and not the City of Flint is the operator of the Flint water system? *See Concerned Pastors for Social Action v. Khouri,* 217 F.Supp.3d 960, 969 (E.D.Mich. 2016) ("As the Court held … the state defendants qualify as operators of the Flint water system.").

In *U.S. v. Owens*, 54 F.3d 271 (6th Cir. 1995), a trial court entered a permanent injunction and subsequently denied the aggrieved party's motion to alter or amend the judgment. In denying the motion, the trial court noted that there was already a hearing on the legal issues, the parties never asked for an evidentiary hearing, and "[i]t was clear to the parties throughout these proceedings that the oral argument and subsequent decision were to be dispositive…[and the aggrieved party could not] claim that there [we]re factual issues to be decided." *Id*. at 276.

The Sixth Circuit reversed, noting that the aggrieved party identified several disputed facts in its motion to alter or amend the judgment and, moreover, an evidentiary is typically required when the moving party seeks a permanent injunction:

> As a result, we must vacate the permanent injunction and remand this case to the district court to allow [the aggrieved party] to conduct additional discovery and present his version of the facts at an evidentiary hearing. Otherwise, we would create a rule that would obligate a party to present his full case at a hearing for a preliminary injunction.

Id. at 277.

Here, Plaintiff never sought a preliminary injunction and, as such, there was no preliminary hearing and no extensive discovery on the applicable issues. Indeed, discovery was only open for 24 days before Plaintiff filed its request for a permanent

injunction through a motion for summary judgment. The Council respectfully submits that there are numerous complex, disputed factual issues of fact, and therefore, the parties should be permitted additional discovery and evidentiary hearing, as required by law. *See also Moltan Co. v. Eagle-Picher Industrics, Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995) (Observing the district court did not "have authority to enter the permanent injunction prior to trial. An evidentiary hearing is ordinarily required prior to the issuance of a permanent injunction."). To hold otherwise would require the Council to present its entire case after only having an attorney for 2 months, 24 days of discovery, and 2 weeks to respond to a 1,000-page dispositive motion, all without any evidentiary (or even preliminary) hearing. If a party is not required to present its entire case at a preliminary injunction, as the Sixth Circuit held in *Owen*, then certainly a party cannot be required to present its entire case in two months in a brief, without an evidentiary hearing or trial.

E. Forcing The Council To Enter Into A Utility Contract Violates Various Laws.

The Opinion provides that, within 6 days, the City of Flint must choose a long-term source of drinking water that satisfies the EPA's Emergency Administrator, as amended, and sign all requisite agreements to implement that choice by October 23, 2017. It is uncontested that the authority to approve any such contract is vested with the Council. It also cannot be disputed that the Council's expert has not been

approved and therefore, his report and recommendation will not be ready by October 23, 2017. Thus, the Judgment may have the effect of forcing the City to approve a contract against its will. This is improper for several reasons.

First, pursuant to Michigan's Constitution, the Flint City Charter, and the Home Rules Cities Act, the Council should have the sole authority and unfettered discretion when approving a water source that is not only safe and reliable, but supported by its citizens. *See*, *e.g.*, *White v. City of Ann Arbor*, 406 Mich. 554, 568; 281 N.W.2d 283 (1979) (citing Michigan's Constitution, Art. 7, §25) ("The municipality should have sound assurance that the utility will be supported by its citizens."). To the extent the Judgment transfers the Council's power to the Mayor and City, the Judgment has restructured essential state operations and denied the Council an ability to protect health, safety, and to assure the people to not pay higher costs than necessary for water rates.

Second, while the Court recognizes that any injunction should be narrowly tailored (Opinion, p. 27), it is difficult to imagine a broader or more severe judgment. Indeed, if the Judgment has the effect of forcing the City to enter into the GLWA Contract against its will, the City will be bound to that water source for 30 years. During those 30 years, Flint may lose any ability or opportunity to upgrade its water plant or find another source of water, even if the Council's expert identifies one in

the near future. Thus, the penalty is broad and severe, while the alleged violation is not specific or even clear. *See* Opinion, p. 16 (Plaintiff "has not identified any section of the SDWA or a regulation enacted thereunder as having been violated by the City of Flint."). The remedy does not fit the alleged violation. The Council respectfully requests that the Court consider—in the event the Court is still inclined to enter a Judgment—less severe penalties, such as allowing the Council's expert to complete his analysis before forcing the City to enter into any long-term water contract. Seventy-five days is not a significant amount of time considering the potentially permanent effects that a water decision will have on the City.

Third, if the Council is forced to enter into a contract against its will, that may violate a basic tenet of contract formation, *i.e.*, free will. Without freedom of choice, a contract may be voidable or otherwise not enforceable. *See*, *e.g.*, *Clement v. Buckley Mercantile Co*., 172 Mich. 243, 253; 137 N.W. 657 (1912) ("That a contract entered into under duress is voidable at the instance of the party so constrained is unquestionable….To constitute [duress], it must appear that the party coerced was so intimidated and moved by the threats made as to cease to be a free moral agent, and became so bereft of those qualities of the mind essential to entering into a contract as to be incapacitated to exercise his free will power in that connection.").

Therefore, if the Council is forced to approve a contract against its will, that may give rise to other issues.

F. A Stay Of The Enforcement Of The Judgment Is Appropriate.

Before the Council retained attorneys and became a party in the case, Plaintiff filed an *ex parte* motion to expedite the initial case conference. *See* Motion (Dkt. 4). Plaintiff based the motion on, among other allegations, its claim that "on October 1, 2017, Flint will no longer have access to the pipeline that it is currently using to obtain finished water from GLWA." *See id*. at p. 2. The Court granted the request, expediting the time for responsive pleadings. *See* Order (Dkt. 16). The Court also expedited the briefing schedule and hearing on Plaintiff's motion for summary judgment. *See Order* (Dkt. 28). Given that the Council has shown that Flint is not at risk of losing its access to the pipeline or its current source of drinking water, the Council respectfully submits that a stay is appropriate.

CONCLUSION

Plaintiff should not be permitted to use this improper lawsuit as way to usurp the Council's vested authority, especially when Plaintiff indisputably failed to honor the very statute under which it seeks relief. The Council asks that the Court dismiss the lawsuit or reinstate it so it can the Council can receive its expert's advice and the disputed issues of material fact can be resolved at an evidentiary hearing or trial.

Respectfully submitted,

Date: October 22, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Margaret A. Bettenhausen; Charles A. Boike; Eugene Driker; Nathan A. Gambill; Michael J. Guss; Richard S. Kuhl; Zachary C. Larsen; Anne V. McArdle; Todd R. Mendel; and Morley Witus.

Dated: October 22, 2017

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