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

Lawrence Washington, Jr., et al, Plaintiffs, v. Governor Richard Dale Snyder, et al., Defendants.	Case No 5:16-cv-11247-JCO-MKM Hon. John Corbett O'Meara **INDIVIDUAL CITY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**

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INDIVIDUAL CITY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

Defendants Mike Brown, Darnell Earley, and Gerald Ambrose ("EMs"), and Dayne Walling, Howard Croft, and Michael Glasgow ("City Officials" of the City of Flint ("City")) respectfully move to dismiss Plaintiffs' Second Amended Class Action Complaint ("Complaint"). Under Fed. R. Civ. P. 12(b)(1), the Court should dismiss the Complaint for lack of subject-matter jurisdiction because:

1. Plaintiffs' official-capacity claims are barred by sovereign immunity under the Eleventh Amendment because EMs are State officers and City Officials were employees of the City, which served as an "arm of the State."
2. Alternatively, the federal Safe Water Drinking Act provides a comprehensive remedial scheme, which precludes all claims under §1983. This would require dismissal of Counts 1, 3-4, and 6-7 against the EMs and City Officials;

3. Alternatively, adequate State-law remedies exist for breach of contract, which precludes any § 1983 claims alleging contract-based infringements on constitutionally protected interests. This would require dismissal of Counts 3, 6 and 7;
4. Alternatively, to the extent that Count 3 asserts a takings claim, the claim should be dismissed as unripe because Plaintiffs have failed to avail themselves of Michigan's inverse condemnation procedure or allege why that procedure is inadequate.

Alternatively, under Fed. R. Civ. P. 12(b)(6), the Court should dismiss all of Plaintiffs' claims as improperly and implausibly pleaded because:

1. Plaintiffs fail to plausibly plead a race-based equal protection claim, a bodily-integrity due process claim, and substantive and procedural due process claims for deprivation of property interests for the reasons stated in the City's Memorandum in support of the City's Motion to Dismiss (City Mem. at 19-24);
2. Alternatively, the EMs and City Officials are otherwise entitled to qualified immunity on all § 1983 claims;
3. Plaintiffs fail to allege that they have standing to pursue a RICO claim, and the fail to allege facts establishing each element of a RICO claim against the EMs and City Officials;

4. Plaintiffs fail to allege a viable contract claim against the EMs because there is no privity of contract;
5. Plaintiffs negligence claim is preempted under the Michigan Safe Drinking Water Act.
6. Alternatively, the EMs, Walling, and Croft are entitled to absolute immunity under State law as to Plaintiffs' State-law negligence claim; and
7. Glasgow is entitled to qualified immunity under State law as to Plaintiffs' State-law negligence claim.

Under E.D. Mich. L. Civ. R. 7.1(a), the Movants sought concurrence in the relief requested, at which time they explained the nature of the Motion and its legal bases. Plaintiff declined to concur.

Respectfully submitted,

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Dated: October 13, 2016

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BRIEF IN SUPPORT OF INDIVIDUAL CITY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

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QUESTION NO. 3: Alternatively, does the availability of State-law contract and tort claims preclude Plaintiffs' contract-based § 1983 claims against the EMs and City Officials?

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QUESTION NO. 5: Does Count 2 fail to state a RICO claim because Plaintiffs have not adequately pleaded RICO standing, the existence of each element of a § 1962(c) claim, or the existence of a conspiratorial agreement for a § 1962(d) claim?

QUESTION NO. 6: Does Count 3 fail to state a State-law contract claim against the EMs because Plaintiffs fail to allege privity of contract between Plaintiffs and the EMs?

QUESTION NO. 7: Does Count 12 fail to state a State-law negligence claim against the EMs and City Officials because they are entitled to immunity against tort claims under State law?

QUESTION NO. 8: Do Counts 1, 4, and 6-7 also fail to state claims against the EMs and City Officials for the reasons argued in the City's Memorandum in support of the City's Motion to Dismiss?

CONTROLLING AUTHORITY SUPPORTING MOTION

Immunity
Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989)
People v. Freedland, 308 Mich. 449 (1944)

RICO
Beck v. Prupis, 529 U.S. 494 (2000)
Boyle v. United States, 556 U.S. 938 (2009)
Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393 (6th Cir. 2012)
In re ClassicStar Mare Lease Litig., 727 F.3d 473 (6th Cir. 2013);
Kerrigan v. ViSalus, Inc., 112 F. Supp. 3d 580 (E.D. Mich. 2015)
McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985)
Reves v. Ernst & Young, 507 U.S. 170 (1993)

Contract
National Sand, Inc. v. Nagel Const., Inc., 182 Mich. App. 327 (1990).

Tort Preemption
Millross v. Plum Hollow Golf Club, 429 Mich. 178 (1987)

Tort Immunity
Kendricks v. Rehfield, 270 Mich. App. 679 (2006)
M.C.L. §141.1560
M.C.L. § 691.1407

Qualified Immunity
Ashcroft v. al-Kidd, 563 U.S. 731 (2011)
Daily Servs., LLC v. Valentino, 756 F.3d 893 (6th Cir. 2014)
Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996)
Harlow v. Fitzgerald, 457 U.S. 800 (1982)
Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189 (2001);
Mansfield Apt. Owners Ass'n v. City of Mansfield, 988 F.2d 1469 (6th Cir. 1993)
Pearson v. Callahan, 555 U.S. 223 (2009)
Ramsey v. Board of Educ. of Whitley County, 844 F.3d 1268 (6th Cir. 1988)
Reeners v. Bandy, Civil No. 16-01868, 2016 U.S. Dist. LEXIS 100991 (M.D. Tenn. Aug. 2, 2016)
Reichle v. Howards, 132 S. Ct. 2088 (2012)

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Under E.D. Mich. L. Civ. R. 7.1(d)(1)(A), Defendants Mike Brown, Darnell Earley, and Gerald Ambrose ("EMs"), and Dayne Walling, Howard Croft, and Michael Glasgow ("City Officials") submit this Memorandum in support of their Motion to Dismiss the Complaint.

I. INTRODUCTION

This is another in a series of Flint Water Crisis class actions. Beyond asserting claims under Section 1983 and claims for breach-of-contract and negligence, this case uniquely and implausibly casts the Flint Water Crisis as the intentional objective of a vast RICO conspiracy. The Court should dismiss this case, as it has the others. The Court lacks subject-matter jurisdiction over the Section 1983 claims, none of the federal claims are properly or plausibly pleaded, and the EMs and City Officials are entitled to qualified immunity. In addition, the State-law claims should also be dismissed for failure to state a claim.

II. SUMMARY OF ARGUMENT

Plaintiffs assert § 1983 claims against the EMs and City Officials in their official and personal capacities. The Court lacks subject-matter jurisdiction over both kinds of claims.

For official-capacity claims, EMs are State officers who enjoy sovereign immunity from official-capacity claims. The City is an "arm of the State" under the Eleventh Amendment for purposes of Flint Water Crisis litigation, such that City Officials also enjoy immunity from official-capacity claims.

For personal-capacity claims, the federal Safe Drinking Water Act's comprehensive remedial scheme preempts Plaintiffs' § 1983 claims. Also, Plaintiffs' contract-based § 1983 claims are precluded by the availability of a State-law breach-of-contract action. In addition, their "takings" claim is not ripe for adjudication.

Even if the Court could exercise jurisdiction, Plaintiffs fail to plausibly state claims upon which relief can be granted.

In Count 2, Plaintiffs not only fail to allege fact sufficient to establish standing to pursue a RICO claim, but they also fail to allege any of the elements of a violation of § 1962(c) claim as to any of the EMs or City Officials. By extension, they fail to adequately allege the existence of a § 1962(d) conspiracy for want of a § 1962(c) violation and for want of a conspiratorial agreement.

In Count 3, Plaintiffs assert a contract claim against the EMs, but fail to plead privity of contract between Plaintiffs and the EMs. This is fatal to any contract claim.

In Count 12, Plaintiffs assert negligence claims against the EMs and City Officials. The claims are preempted under the Michigan Safe Drinking Water Act. Alternatively, the EMs, Walling, and Croft enjoy absolute executive governmental immunity, and Glasgow enjoys qualified executive governmental immunity. Plaintiffs have failed to plead facts in avoidance of such immunity. Accordingly, they have failed to state a negligence claim upon which relief can be granted.

The EMs and City Officials adopt as their own the City's arguments for Counts 1, 4, and 6-7, which explain why Plaintiffs fail to plausibly state claims for violations of substantive and procedural due process.

III. ARGUMENT

1. RULE 12(B)(1): THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER PLAINTIFFS' § 1983 CLAIMS.

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction." *Id.* The burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* Thus, Plaintiffs, not the EMs or City Officials, carry the burden of proving that the Court has jurisdiction over its claims.

A. Sovereign Immunity: The Eleventh Amendment bars official-capacity claims against the EMs and City Officials.

Sovereign immunity bars § 1983 actions against State officers in their official capacity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

EMs are State officers. Under PA 436, EMs are public servants and public officers. M.C.L. § 141.1549(9)(a)-(b). They are also held to the same standard as State officers, including constitutional officeholders. M.C.L § 141.1549(9)(c). In addition, EMs fit the definition of public official in *People v. Freedland*, 308 Mich. 449, 455 (1944):

> A public office is the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, [a person] is invested with some portion of the sovereign functions of the government, to be exercised

> by him for the benefit of the public. The individual so invested is a public officer.[1]

The office of EM is created by law, M.C.L. § 141.1549, is invested with powers and duties defined by the Legislature, M.C.L § 141.1552, which represent a portion of the sovereign functions of government, M.C.L. § 141.1549, M.C.L. § 141.1550, M.C.L. § 141.1552, and are to be exercised for the benefit of the public health, safety, and welfare, M.C.L § 141.1543; M.C.L. § 141.1549(2), at the pleasure of the Governor or until impeachment and conviction by the Legislature, M.C.L. § 141.1549(3). EMs are, therefore, State public officials.[2]

The same is true for City Officials for purposes of this lawsuit. The City explains why it is an arm of the State for purposes of the Eleventh Amendment in its Memorandum supporting the City's Motion to Dismiss. The City Officials agree with and join the City's arguments. (City Mem. at 9-15.) From 2011-2015, Walling was the City's mayor and therefore its chief executive officer. M.C.L. § 117.3(a);

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[1] The *Freedland* Court restates this test later in its opinion. *Freedland*, 308 Mich at 457-58. As restated, the temporal element is phrased as having "some permanency and continuity, and not [being] only temporary or occasional." *Id.* at 458. Because the two formulae express the same "correct" and "accurate" test, *compare id.* at 455 ("correct rule") *with id.* at 457 ("accurately stated" rule), the two must be read in harmony. Thus, a position has sufficient permanency and continuity, and is not temporary or occasional, if it is for a fixed time or if endures at the pleasure of the creating power.

[2] If they are not State public officials, then EMs are at least officials of the municipality over which they govern and would be immune from official-capacity suits for the same reason as the City Officials.

FLINT, MICH. CHARTER § 4-101. Similarly, Croft was the former director of the City's Department of Public Works ("DPW") and therefore a City officer or employee. *See* FLINT, MICH. CHARTER § 4-203. Glasgow was the City's water treatment plant operator. (Compl. ¶ 77.) Because the City is an arm of the State, the City Officials are entitled to the City's immunity in their official capacities.

B. Other Bars to Jurisdiction: Plaintiffs' § 1983 claims are preempted by the SDWA's remedial scheme, Plaintiffs' contract-based § 1983 claims are precluded by the availability of a State-law breach-of-contract action, and their "takings" claim is not ripe.

In its Memorandum supporting its Motion to Dismiss, the City raises four additional bars to jurisdiction to this action, in whole or in part: (1) Plaintiffs' § 1983 claims are preempted by the comprehensive remedial scheme provided in the federal Safe Drinking Water Act; (2) Plaintiffs' contract-based § 1983 claims are precluded by the availability of a State-law action for breach of contract; and (3) Plaintiffs' takings claim is not ripe for adjudication because Plaintiffs have not used Michigan's inverse-condemnation procedure and have not alleged that the procedure is inadequate. (City Mem. at 15-17.) For judicial economy, the EM and City Officials will not restate those arguments here. Instead, they expressly agree with and adopt those arguments as their own.

2. RULE 12(B)(6): PLAINTIFFS' FEDERAL CLAIMS FAIL TO PROPERTY STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A Rule 12(b)(6) motion to dismiss tests whether the well-pleaded allegations in the complaint, taken as true and viewed in the light most favorable to the plaintiff,

assert a plausible right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the non-conclusory facts allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausibility requires more than the sheer possibility that a defendant has acted unlawfully. *Id*. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id*. (internal quotations omitted).

A. Count 2: Plaintiffs do not plausibly allege a RICO claim.

Plaintiffs have failed to plead sufficient facts to establish that they have standing to bring a RICO claim under §§ 1962(c) or (d). They have also failed to plead sufficient facts to plausibly establish each element of these claims against each defendant. Accordingly, the Court should dismiss Count 2 under Rule 12(b)(6).

(1). Official Capacity: Plaintiffs cannot sue the EMs and the City Officials in their official capacity.

Plaintiffs have sued the EMs and City Officials in their official and personal capacities. (Compl. ¶¶ 69, 74, 76, 78.) Official-capacity lawsuits are really actions against the governmental entity of which an officer is an agent. *Brandon v. Holt*, 469 U.S. 464, 469-70 (1985) (quoting *Monell v. New York Dep't of Soc. Servs.*, 436 U.S. 658, 690, n.55 (1978)). At any level—from municipalities to the federal government—governmental agencies are not proper RICO defendants. *Call v. Watts*,

142 F.3d 432 (6th Cir. 1998) (Table); 1998 U.S. App. LEXIS 6875, *5 (6th Cir. Apr. 2, 1998) (counties are not proper RICO defendants) (citing *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (collecting cases and holding that government agencies, including municipal corporations, cannot form criminal intent)). For the reasons argued in Part 1(A), EMs are State officers and the City Officials are officers and agents of the City. Accordingly, the official-capacity RICO claim against the EMs is really a claim against the State, and the official-capacity RICO claims against the City Officials are really claims against the City. Such actions are impermissible and must be dismissed under *Call*. The EMs and the City Officials can only be sued for RICO violations in their personal capacities, which means that Plaintiffs must prove personal involvement. *Harrington v. Grayson*, 764 F. Supp. 464, 476 (E.D. Mich. 1991) (Cook, J.)

(2). Plaintiffs fail to plausibly allege a RICO claim under § 1962(c).

Plaintiffs lack standing to sue the EMs or the City Officials under § 1962(c) because they have not plausibly pleaded an injury to their business or property proximately caused by a defendant's pattern of racketeering activity. They have also failed to plead the elements of a RICO claim.

(a) No Standing: Plaintiffs have failed to adequately plead statutory standing to bring a RICO claim.[3]

Statutory standing is analytically distinct from the question of Article III standing. *Roberts v. Hamer*, 655 F.3d 578, 580 (6th Cir. 2011). RICO sets a higher bar for standing than Article III. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). A RICO "plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Id.* Thus, to establish RICO standing, a plaintiff must plausibly plead four elements: (1) that the plaintiff is a "person" within the meaning of the statute; (2) that the plaintiff suffered an injury; (3) to his business or property; (4) "by reason of" a defendant's violation of § 1962. *Kerrigan v. ViSalus, Inc.*, 112 F. Supp. 3d 580, 602 (E.D. Mich. 2015) (Leitman, J.) A plaintiff must plausibly plead these elements with respect to *each* defendant. *Id.* Plaintiffs satisfy the person element, but the Complaint otherwise fails to plausibly plead the statutory standing elements as to each defendant.

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[3] In analyzing standing, the Movants assume *arguendo* that Plaintiffs have adequately pleaded a plausible claim under § 1962(c), including the alleged predicate acts of bankruptcy, mail, and wire fraud. The assumption is made only to underscore that standing is a separate analysis; one can properly plead the elements of RICO claim but still lack standing to bring one. Thus, the assumption is not a concession. Indeed, Plaintiffs have not adequately pleaded a claim under § 1962(c) for the reasons argued in Part 2(B)(2)(b), *infra*.

(i) No Injuries to Business or Property: Plaintiffs have not individually pleaded cognizable injuries to business or property plausibly.

Absent damage to business or property, a RICO claim cannot be maintained. *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 562, n.2 (6th Cir. 2013); *Berg v. First Interstate Ins. Co.*, 915 F.2d 460 (9th Cir. 1990). The Complaint alleges five kinds of injury: (1) the cost to repair the City's water distribution system; (2) $50 million paid by property owners for water utility bills; (3); lost business; (4) lost property value; and (5) being "forced" to use or purchase bottled water because there is no safe water supply. (Compl. ¶ 607.) None of these are cognizable injuries. And, even if they were, Plaintiffs fail to plausibly plead that each of them suffered one or more of these injuries.

The Complaint does not plausibly plead that any minor-child plaintiff owned real property within the City, paid utility bills, paid property or municipal income taxes in their own name, owned a business dependent upon the supply of potable water, or used money they earned to pay for bottled water. Without these allegations, the minor-child plaintiffs lack standing and are not proper parties to the RICO claim. Even if one or more minor-child plaintiffs could make such rare allegations, their RICO claim would fail for the same reasons that the adults' RICO claim fails.

The adults' RICO claim fails because the Complaint does not plausibly plead cognizable injuries to any of their business or property interests.

First, adult Plaintiffs do not allege that they hold business interests or interests in real property located within Flint. They allege only that they reside in Flint. (Compl. ¶ 58.) Without a business or property interest, Plaintiffs lack standing. *Jackson*, 731 F.3d at 562, n.2.

Second, adult Plaintiffs lack standing to seek recovery for the cost of repairing the City's water distribution system. Even if such costs qualify as injury to property, the property belongs to the City from the treatment plant through the curbstop, not to the Plaintiffs. Indirect injuries are not cognizable. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458-461 (2006). This includes taxpayer actions alleging an injury to the property of a governmental authority to which a plaintiff pays taxes. *Carter v. Berger*, 777 F.2d 1173, 1174 (7th Cir. 1985).

Third, adult Plaintiffs lack standing to seek recovery of the $50 million that they and other putative class members allegedly paid for water service. Absent a right to be charged a lower rate for utilities, utility payments are not a compensable injury to business or property under RICO. *See Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir.) (en banc), *cert. denied*, 506 U.S. 1021 (1992); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 27 (2d Cir. 1994). The Complaint fails to allege any right to a lower rate for utilities. Moreover, Plaintiffs' allegations amount to a public wrong, which cannot be pursued as a personal cause of action unless they can show they were hurt in a manner differently than the citizenry at large. *Alexander v. Norton Shores*, 106

Mich. App. 287 (1981). This would stand in direct conflict with their class allegations that all Flint residents suffered the same injury. (Compl. ¶¶ 507-10.)

Fourth, adult Plaintiffs lack standing to allege injury from loss of business. Each is a person, not a business. As to their identity, Plaintiffs allege only that they were Flint residents during the period in question. (Compl. ¶ 58.) They do not allege that they are sole proprietors conducting business within the City and that their business lost revenue because of non-potable water. But, even if each Plaintiff owned an interest in one or more corporate entities that allegedly suffered loss to business or property, Plaintiffs would still lack standing to sue for those losses. RICO requires a plaintiff to have suffered a direct injury, Plaintiffs could not bring a shareholder derivative action for injury to businesses in which they hold an ownership interest; the claim would belong to the corporate entity. *Warren v. Manufacturers Nat'l Bank of Det.*, 759 F.2d 542, 544 (6th Cir. 1985) (dismissing shareholder derivative RICO action because injury was to a corporate asset).

Fifth, adult Plaintiffs' alleged loss in property value has not ripened into a RICO injury for purposes of standing. RICO injuries must be concrete financial losses, not speculative losses. *Saro v. Brown*, 11 F. App'x 387, 398 (6th Cir. 2001) (citing *Imagineering, Inc. v. Kiweit Pac. Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992), and *Oscar v. University Students Coop. Ass'n*, 965 F.2d 783, 785-87 (9th Cir. 1992) (en banc)). *See also Evans v. City of Chicago*, 434 F.3d 916, 932 (7th Cir. 2006) ("every court that has addressed this issue has held that injuries proffered by

plaintiffs in order to confer RICO standing must be 'concrete and actual,' as opposed to speculative and amorphous"). A reduction in the value of property is "purely speculative" unless actually realized. *Oscar*, 965 F.2d at 787 (renter did not allege RICO injury by alleging a reduction in the value of the leased premises); *First Nationwide Bank v. Gelt Funding*, 27 F.3d 763, 766-68 (2d Cir. 1994) (bank that made non-recourse loans could not allege RICO injury unless and until the loans went into default or the bank had to foreclose on insufficient collateral); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1090-96 (S.D. Ind. 2001) (replacement cost for recalled tires was not a RICO injury because the plaintiffs' tires had not yet manifested the defect giving rise to the recall); *Pelfresne v. Village of Rosemont*, 22 F. Supp. 2d 756, 765 (N.D. Ill. 1998) (real property owner's future loss of fair market value is insufficient to allege a RICO injury until a decreased value is suffered in a sale). None of the Plaintiffs allege that they have sold or attempted to sell their property. Their generalized claim of diminished property values is not an injury ripe for RICO standing.

Sixth, adult Plaintiffs lack standing to seek recovery for being "forced" to "use" bottled water. If "use" differs from "purchase" and means "free," the free use of bottled water does not state a compensable injury.[4]

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[4] The Court can and should take judicial notice that City residents have received free bottled water and filters. FED. R. EVID. 201(b)(1), (c)(2), (d).

Finally, adult Plaintiffs have not plausibly pleaded an injury from being "forced" to "purchase" bottled water. Plaintiffs fail to allege that they paid more for bottled water than they would have paid using tap water. While one might assume bottled water costs more than tap water, the Complaint is devoid of any allegations regarding Plaintiffs' historical water usage, or their historical patterns of purchasing of bottled water when tap water was potable, vis-à-vis the actual costs incurred with purchasing bottled water when tap water was not potable. How many units of water did Plaintiffs historically use in an average billing cycle? What were the principle uses of such water? Did they purchase water for a day, a week, a month, or longer? In what quantities did they purchase water, and what was the cost per unit of purchase? Did they receive free bottled water from the City's relief efforts? Such allegations are necessary for the Court to determine whether this alleged injury plausibly asserts real damages to establish RICO standing, or whether Plaintiffs conserved water to such an extent that the cost of bottled water actually represented a cost savings for any one or more of these Plaintiffs.

(ii) Not "By Reason Of": Plaintiffs do not allege proximate cause.

A plaintiff must also plead that the injury to his business or property was by reason of a defendant's violation of the Act's criminal prohibitions to adequately plead RICO standing. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 641 (2008). This is another way of saying that the alleged criminal violation forming the

basis for the action must be the proximate cause of the plaintiff's injury. *Id.* at 654; *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612-15 (6th Cir. 2004). This requires a plaintiff to show a direct injury (not a derivative one), and a causal link between the injury and the defendant's conduct must be substantial, foreseeable, concrete, and logical, without any intervening causes. *Trollinger*, 370 F.3d at 614.

The alleged criminal violations are bankruptcy, mail, and wire fraud. (Compl. ¶¶ 579-81.) Plaintiffs fail to adequately plead proximate causation between their alleged injuries and the fraudulent activity alleged.

The purported bankruptcy fraud is predicated upon allege false entries knowingly made in recorded information in contemplation of bankruptcy. (*Id.* at ¶ 579.) The allegedly false information was "recorded" in press releases, emails and correspondence to EPA and others, and in "books, records, and papers," relating to the structural integrity of the City's water delivery system and the safety of water drawn from the Flint River. (*Id.*) Notably, the allegedly false information was purportedly "recorded" in 2014-2015 *after* the Governor and EM Brown allegedly contemplated bankruptcy in 2012 and decided to switch to the Flint River in 2013.[5]

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[5] (*Compare* Compl. ¶¶ 154, 161-166 (dating the 2012 enactment of PA 436 and the terms of office for EMs) *with* ¶579a (dating the first alleged predicate act of bankruptcy fraud in 2012 when the Governor allegedly "contemplated" bankruptcy), ¶ 579c (dating the second alleged predicate act in 2012 when EM Brown allegedly "contemplated" bankruptcy; no other predicate acts of contemplation are alleged), ¶¶ 193-95 (dating the decision to switch to the Flint

Plaintiffs therefore fail to plead a causal link between the *earlier* contemplation of bankruptcy, the *earlier* injury-causing decision to switch to the Flint River, and the *later* false statements made after the decision and after the switch pleaded in the Complaint. And, in any event, the nature and timing of the alleged bankruptcy fraud precludes it from being a RICO violation for purposes of the RICO claims against EMs Kurtz, Earley, and Ambrose or the City Officials. None of them are alleged to have made a false statement in contemplation of bankruptcy. Indeed, under PA 436, Croft and Walling would never have contemplated bankruptcy for the City.[6]

The purported mail and wire fraud allegedly occurred over a series of 12 acts. (Compl. ¶¶ 580a, 580c-k, 581a-c.) Of these, Plaintiffs allege predicate acts only as to Walling, Croft, and Glasgow. (*Id.* at ¶¶ 580c, 580e, and 581b.) They do not allege any mail or wire fraud activity by the EMs, and therefore the activity alleged does not plead proximate cause between Plaintiffs and the EMs. (*See id.* at ¶¶ 580-581.)

River in April 2013), *and* ¶¶ 207-09, 211-15, 252-54, 257-59, 261, 270-71, 274-76, 279, 297-98, 339, 353, 361, 369, and 382 (providing examples of allegedly false statements from 2014-2015).

[6] As in Note 4, *supra*, it is similarly assumed for argument's sake that Plaintiffs' factual averments about actions taken or contemplated under PA 436 are true. This is not a concession. As discussed more fully in Part 2(B)(2)(b)(iii), *infra*, PA 436's "contemplation of bankruptcy" requirement does not apply in this case because PA 436 grandfathered existing EMs and previous declarations of financial emergency under PA 4 without needing to employ the new procedures in PA 436. Thus, Defendant Walling also never had occasion to contemplate bankruptcy for the City under PA 436.

Although Plaintiff allege predicate mail and wire fraud acts against Walling, Croft, and Glasgow, they only allege *one* predicate act each against Walling and Croft.[7] (*Id.* at ¶¶ 580c and 580e.) To plead a RICO violation under § 1962(c), Plaintiffs must prove two predicate acts *per defendant*. *Kerrigan*, 112 F. Supp. 3d at 602 (citing *Gross v. Waywell*, 628 F. Supp. 2d 475, 495 (S.D.N.Y. 2009) (collecting cases requiring individualized proof of a RICO violation per defendant), *Ouwinga v. Benistar*, 694 F.3d 783, 791 (6th Cir. 2012) (a § 1962(c) violation requires proof that a defendant engaged in a pattern of racketeering activity), and *Moon v. Harrison Piping Supply*, 465 F.3d 719, 723 (6th Cir. 2006) (a pattern of racketeering activity requires two or more predicate acts)). Thus, because Plaintiffs do not plead a pattern of racketeering activity against Walling and Croft, they have failed to plead that the proximate cause of their injuries was a violation of § 1962(c).

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[7] Undoubtedly, Plaintiffs will argue that they allege more than one predicate act because they allege that the false statements constituting mail fraud were also transmitted by wire by way of radio and television. (Compl. ¶ 581a.) This generic accusation, however, fails to meet the Rule 9(b) particularity requirements, which are "rigorously enforced" in RICO cases predicated upon mail and wire fraud. *American Biocare, Inc. v. Howard & Howard Attys, PLC*, Civil No. 14-14464; 2016 U.S. Dist. LEXIS 135879, *25 (E.D. Mich., Sept. 30, 2016) (Rosen, J.). Rule 9(b) requires plaintiffs to plead the "who, what, when, where, and how" when alleging fraud. *Bondali v. YumA Brands, Inc.*, 620 F. App'x 483, 488-89 (6th Cir. 2015) (citing *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006)). To have the same statements pull double duty as both mail and wire fraud, Rule 9(b) requires that Plaintiffs plead the who, what, when, where, and how of the radio or television broadcast.

Finally, while Plaintiffs purport to allege two predicate acts of mail fraud against Glasgow, (Compl. ¶ 580c),[8] they do not plead how Glasgow's request for monitoring standards and his follow-up expression of concern about operating the City's waterworks after receiving them are a proximate cause of their alleged injuries—*i.e.*, that his emails were a substantial, foreseeable, concrete, and logical cause of their alleged loss of property, loss of business, cost to repair infrastructure, cost of purchasing bottled water, etc.—without any intervening causes. *Trollinger*, 370 F.3d at 614.

(b) Elements: Plaintiffs have not adequately pleaded each element of a § 1962(c) claim against each defendant.

In addition to adequately pleading RICO standing, a plaintiff must plead the following elements to state a RICO claim under § 1962(c): (1) that the defendant conducted; (2) an enterprise; (3) through a pattern; (4) of racketeering activity. *Ouwinga*, 694 F.3d at 791. As noted earlier, these elements must be pleaded as to each defendant. *Kerrigan*, 112 F. Supp. 3d at 602. Plaintiffs fail to plausibly plead the existence of an association-in-fact enterprise. They also fail to plausibly plead that each EM and each City Official engaged in a pattern of racketeering activity, much less that they each conducted the alleged enterprise through such a pattern.

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[8] *See*, Note 6, *supra*.

(i) No Enterprise: Plaintiffs fail to plead a plausible association-in-fact enterprise distinct from the named defendants.

Plaintiffs allege an association-in-fact enterprise consisting of the governmental entities (the State, MDEQ, MDHHS, and the City) and elected and appointed officials and employees of those entities. (Compl. ¶ 545; R. 33-1, RICO Case Stmt. ¶ 6a, PageID# 684.) Such enterprises must have three structural features: (1) a common purpose; (2) relationships among those associated with the enterprise; and (3) longevity to permit those associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009). The Complaint fails to plausibly allege any of these requirements.

First, Plaintiffs fail to adequately allege a common purpose. The Complaint alleges that the purpose was to carry out the "emergency fiscal scheme" to balance the City's budget by fraudulently selling and profiteering from unsafe Flint River water and concealing unsafe conditions. (Compl. ¶ 553.) Yet, Plaintiffs allege that Glasgow *opposed* using the City's water. (*Id.* at ¶ 580c.) They also allege that the City Officials lacked power to act on behalf of the City. (*Id.* at ¶¶ 27, 169.) There are no allegations that any of the City Officials knew of, or played a role in, the City's budget. Nor are there any allegations that they knew of, or played a role in, how water rates were set or billed. Yet, without any plausible factual allegations, Plaintiffs aver that Walling's television interview and Croft's press release was for the purpose of implementing the fiscal scheme.

The pleadings are similarly deficient with respect to the EMs. Plainly, the EMs acted to rectify the City's financial emergency, as they were required to do under PA 436. Despite all of the noise around them in the Complaint, there are no allegations that any of the EMs knew the water was unsafe.

Second, the Complaint fails to plausibly plead relationships among those alleged to be associated with the enterprise. There must be some mechanism by which the group conducted its affairs or made decisions. *VanDenBroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 700 (6th Cir. 2000), *abrogated on other grounds*, *Bridge*, 553 U.S. at 646. None is alleged in the Complaint. Plaintiffs allege that municipal authorities were powerless to act. (Compl. ¶¶ 44-45, 169.) They also allege that the EMs were puppets of the Governor and the Treasurer. (*Id.* at ¶¶ 54-56.) At the same time, however, they do not allege that the EMs knew about water quality concerns. And they allege that the Governor and the Treasurer were briefed only occasionally about the situation in Flint. (*Id.* at ¶¶ 260, 285, 346.)

Even if the Complaint is a clumsy attempt to plead a hub-and-spoke kind of enterprise, there is no concretely pleaded hub, especially if the EMs are part of the hub, since four EMs held the job five times during the period alleged in Complaint. Likewise, the Complaint does not identify the spokes, other than to conclusorily assert that the City Officials "knew" about the falsity of their alleged statements. And, in any event, there is no factual basis from which to reasonably infer that any of putative spokes knew that there were other spokes. "Rimless wheel" conspiracies

lack the relationships necessary to satisfy this relational component of the structure requirement. *New York Auto. Ins. Plan v. All Purpose Agency & Brokerage, Inc.*, Civil No. 97-3164; 1998 U.S. Dist. LEXIS 15645, *15 (S.D.N.Y. Oct. 6, 1998); *Cullin v. Paine Webber Group, Inc.*, 689 F. Supp. 269, 273 (S.D.N.Y. 1988). *See also, cf., Kotteakos v. United States*, 328 U.S. 750, 755 (1946) ("without the rim of the wheel to enclose the spokes, a single, wheel conspiracy cannot exist but instead is a series of multiple conspiracies between the common defendant and each of the other defendants" (internal quotation omitted)); *United States v. Haynes*, 582 F.3d 686, 698-99 (7th Cir. 2009) (The "rim is an agreement to further a single design or purpose. For a single conspiracy to exist, the conspirators who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise.")

Third, the Complaint violates the distinctiveness requirement. A RICO defendants and the RICO enterprise cannot be the same person simply referred to by a different name; they must be distinct. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161-164 (2001). While a corporation can serve as a RICO enterprise that a RICO defendant operates, a RICO enterprise cannot be an association of both the corporation *and* its employees. *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 490 (6th Cir. 2013); *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985) (Posner, J.) (a corporation acts through its employees; "you cannot associate with yourself"). Plaintiffs allege an association-in-fact enterprise consisting of

governmental units and their elected and appointed officials. Although they acknowledge that governments cannot be sued as RICO defendants, Plaintiffs still name the State, MDEQ, MDHHS, and the City as members of the association-in-fact enterprise, calling them "enterprise actors." (Compl. ¶ 545.) Stated differently, Plaintiffs do not allege that the State, MDEQ, MDHHS, or the City constitutes an enterprise run by government officials, as might be permissible under *Cedric Kushner*. Instead, they allege that the governmental agencies *and* their officials are jointly the association-in-fact enterprise, which is prohibited under *ClassicStar*. (*Id.*) This is confirmed in Plaintiffs' RICO case statement, under a heading calling for a detailed description of the alleged enterprise: "See Section 2, setting forth the individual [] defendants and [S]ection 3 [] naming the Enterprise Actors . . . *that jointly formed an association in fact enterprise* . . . ." (R. 33-1, RICO Case Stmt. ¶ 6a, PageID# 684.)

(ii) <u>No Racketeering Activity</u>: Plaintiffs do not adequately allege predicate acts of racketeering activity.

Plaintiffs allege three types of predicate acts: (1) bankruptcy fraud, 18 U.S.C. § 152(8); (2) mail fraud, 18 U.S.C. § 1341; and (3) wire fraud, 18 U.S.C. § 1343. Because these predicates sound in fraud, Plaintiffs must satisfy the heightened particularity requirements of Rule 9(b). *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 403 (6th Cir. 2012) (quoting *Sedima*, 473 U.S. at 496). Rule 9(b) requires "at a minimum, the 'time, place, and content' of the fraudulent acts, the

existence of a fraudulent scheme, the intent of the participants in the scheme, and 'the injury resulting from the fraud.'" *Heinrich*, 668 F.3d at 403 (quoting *United States ex rel. Bledsoe v. Community Health Sys., Inc.*, 342 F.3d 634, 643 (6th Cir. 2003)). The Complaint fails to plausibly plead the elements of the alleged predicate acts with the requisite particularity.

(A) No Bankruptcy Fraud

Any offense involving fraud connected with a case under Title 11 can serve as a predicate act. 18 U.S.C. § 1961(1)(D). Plaintiffs allege bankruptcy fraud under 18 U.S.C. § 152(8), which prohibits a person from knowingly and fraudulently concealing, destroying, mutilating, falsifying, or making a false entry in any recorded information relating to the property or financial affairs of a debtor after filing for bankruptcy or in contemplation of doing so. This predicate act is inadequately pleaded for four reasons.

First, there is no "debtor" as required under the terms of § 152(8). The term "debtor" means "a debtor concerning whom a petition *has been filed under Title 11*." 18 U.S.C. § 151. Plaintiffs acknowledge that "bankruptcy petitions for Flint were not filed." (Compl. ¶ 549). Plaintiffs also fail to aver that any other person or entity ever filed a petition under title 11. Without an alleged "debtor," there can be no violation of § 152(8).

Plaintiffs' emphasis on the "in contemplation" clause of § 152(8) does not save this predicate act. The clause only applies after a bankruptcy filing has been

filed. It increases the period in which bankruptcy fraud can be committed, so long as a bankruptcy petition is ultimately filed. *See e.g., United States v. Tashjian*, 660 F.2d 829, 842 (1st Cir. 1981) (certain transfers of property outside the scope of "contemplation of bankruptcy" in case that included a bankruptcy filing); *United States v. Willey*, 57 F.3d 1374, 1380 (5th Cir. 1995) (statement in divorce affidavit that defendant considered bankruptcy years before actually filing for bankruptcy showed that his acts in the interim were in contemplation of bankruptcy). Since the City never filed for bankruptcy, § 152(8) cannot serve as a predicate act.

Second, even if § 152(8) could theoretically serve as a predicate act, it is factually impossible for it apply in this case. Plaintiffs allege "on information and belief" that PA 436 required the Governor and the EMs to contemplate bankruptcy. (Compl. ¶ 579b.) In this context, "on information and belief" really means "on Plaintiffs' interpretation of PA 436." They overlook, however, that the Governor first appointed an EM for Flint in 2011 under PA 4, not under PA 436, which was enacted in 2012. (*See* Compl. ¶¶ 150, 162). PA 436 explicitly grandfathers EMs who were appointed and serving under PA 4, without having to start the receivership process over again. M.C.L. § 141.1571. While PA 436 requires consideration of multiple choices—consent agreements, neutral evaluation, emergency management, and bankruptcy—PA 4 did not. It allowed EMs to recommend bankruptcy if "no reasonable alternative to rectifying the financial emergency of the local government . . . exists," but it did not *require* EMs to contemplate bankruptcy until that point.

M.C.L. § 141.1523 (2011). The Complaint is devoid of any allegation that there was *no* reasonable alternative to fixing the City's financial emergency than bankruptcy. Instead, Plaintiffs only allege that bankruptcy was a *viable* alternative. (Compl. ¶¶ 547, 549.) Because existing EMs were not required to start over under PA 436, and because they were not required to contemplate bankruptcy under PA 4, Plaintiffs' conclusory allegation "on information and belief" that the Governor and EM Brown contemplated and rejected bankruptcy is implausible.

Third, Plaintiffs fail to adequately allege that any defendant made an entry in recorded information relating to the property or financial affairs of the City (the alleged putative debtor). (Compl. ¶ 579(b).) The statute was enacted "to ensure the integrity of financial recordkeeping related to debtors." *United States v. McDaniel*, Civil No. 05-171 ; 2006 U.S. Dist. LEXIS 21434, *18 (W.D. Mich. Mar. 28, 2006) (quoting COLLIER ON BANKRUPTCY ¶ 7.02[8], at 7-83 (15th ed. 2005)). "Recorded information" must include documents about a debtor's financial condition. *Id.*[9] Yet, Plaintiffs allege that the recorded information—"press releases, emails and

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[9] *See also, e.g., United States v. Brown*, 943 F.2d 1246, 1252-53 (10th Cir. 1991) (defendant convicted under § 152(8) for destroying financial records relating to the debtor); *United States v. Center*, 853 F.2d 568, 571 (7th Cir. 1998) (defendant convicted under § 152(8) for fraudulently executing documents and book entries that concealed the asset of a debtor in bankruptcy); *Fine v. United States*, 55 F.2d 9 (7th Cir. 1932) (defendant convicted under § 152(8) for executing false corporate minutes and a fictitious bill of sale, thereby concealing, destroying, mutilating, and falsifying books of account relating to the property of a bankrupt).

correspondence"—was about "the structural integrity of the infrastructure of the water delivery system, and the safety of the free Flint water," (Compl. ¶ 579(b)), not the City's financial condition or even the value of the City's assets.

Finally, Plaintiffs fail to adequately allege a knowingly false and fraudulent entry. Rule 9(b) requires plaintiffs to "(1) specify the statements that the plaintiff[s] contend[] were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Frank v. Dana Corp.*, 547 F.3d 564, 570 (6th Cir. 2008). While the Complaint specifies the Governor and EM Brown, it does not identify the statements, when they made the statements, in what recorded information the statements were entered, how the statements were false, or how the statements relate to the City's property or financial affairs. (Compl. ¶ 579a-e.) Thus, even if this kind of bankruptcy fraud could apply in the absence of an actual bankruptcy, the Complaint lack sufficient information to plausibly plead that it occurred.

(B) No Mail and Wire Fraud

Mail fraud is proven by showing "(1) a scheme to defraud, and (2) use of the mails in furtherance of the scheme." *Heinrich*, 668 F.3d at 404 (quoting *United States v. Jamieson*, 427 F.3d 394, 402 (6th Cir. 2005)). Wire fraud is proven by the same elements, except one must use wire, radio, or television instead of the mails,

to further the fraud. *Heinrich*, 668 F.3d at 404.[10] A scheme to defraud "includes any plan or course of action by which someone uses false, deceptive, or fraudulent pretenses, representations, or promises to deprive someone else of money." *Id.* Rule 9(b) requires a plaintiff to plead, at a minimum: (1) the false statement; (2) the identity of the speaker: (3) the time and place of the statements; and (4) the reason why the statement is false. *Frank*, 547 F.3d at 569-70.

"A plaintiff must also demonstrate *scienter* to establish a scheme to defraud, which is satisfied by showing the defendant acted either with a specific intent to defraud or with recklessness with respect to potentially misleading information." *In re ClassicStar*, 727 F.3d at 484 (quoting *Heinrich*, 668 F.3d at 404). Plaintiffs must "not only specify[] the false statements and by whom they were made but also identify[] the basis for inferring scienter." *Heinrich*, 668 F.3d at 406 (quoting *North Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009)). It is not enough to generally aver knowledge of a material falsity; the complaint must "set[] forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading." *Heinrich*, 668 F.3d at 406 (quoting *Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992)).

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[10] Because the two statutes are so similar, cases construing one can be used to analyze the other. *United States v. Daniel*, 329 F.3d 480, 486, n. 1 (6th Cir. 2003).

(1). Inadequately pleaded conduct.

The Complaint generally identifies speakers, their statements, and the reasons why those statements are allegedly false. The Complaint fails, however, to allege the existence of mailings or the dates and locations of wire transmissions, and some of the "speakers" are not RICO defendants.

For example, the primary predicate acts of mail fraud are the City's posting of quarterly of water bills and a trihalomethane notice to residents through the U.S. Postal Service, which are alleged to contain false statements. (Compl. ¶¶ 580a, 580g.) The City is not, however, a RICO defendant. There is no allegation that an EM or a City Official caused the bills or the notice to be mailed to residents. Accordingly, these mailings cannot serve as predicate acts against the EMs or the City Officials.

Likewise, the Complaint alleges that Glasgow wrote to MDEQ on two occasions in April 2014 seeking advice regarding monitoring requirements and expressly concern about the City's readiness to proceed. (Compl. ¶ 580c.) Notably absent is any allegation that these writings were mailed. Thus, these writings cannot serve as a predicate act against Glasgow. And, since Plaintiffs do not implicate the EMs or the other City Officials as parties to these writings or any mailings of them, these writings cannot serve as a predicate act against them, either.

Similarly, the Complaint alleges that Croft issued a false press release. (Compl. ¶ 580e.) It does not allege that the press release was mailed. Thus, it cannot

serve as a predicate act against Croft. And, since Plaintiffs do not implicate the EMs or the other City Officials as parties to the press release or any mailing of it, the press release cannot serve as a predicate act against them, either.

These same acts are alleged as predicate acts for wire fraud because they were "also transmitted by way of [wire,] radio and television-based media sources." (Compl. ¶¶ 581a, 581c.) This fails to meet the requirements of Rule 9(b). No factual allegations about these radio and television-based transmissions are offered. It also fails to meet the requirements of Rule 8(a). Plaintiffs do not allege which defendant transmitted or, alternatively, how they caused to be transmitted the allegedly false statements. This is impermissible group pleading. *Marcilis v. Township of Redford*, 693 F.3d 589, 596-97 (6th Cir. 2012).

The only wire fraud where the *actus reus* is specifically alleged is that Walling was interviewed on television about the switch from DWSD to the Flint River. (Compl. ¶ 581b.) But, for the reasons argued, *infra*, Plaintiffs fail to adequately allege the *mens rea* element for this predicate act.[11]

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[11] And, as explained *supra* at 15-18, this single act of wire fraud alleged against Walling is inadequate to establish a pattern of racketeering activity as to him As noted earlier, each RICO element must be satisfactorily pleaded as to each defendant to state a claim under § 1962(c). *Kerrigan*, 112 F. Supp. 3d at 602 (citing *Gross*, 628 F. Supp. 2d at 495 (collecting cases that individualize proof per defendant is required), and *Ouwinga*, 694 F.3d at 791 (requiring proof that a defendant engaged in a pattern of racketeering activity)).

(2). Inadequate mens rea.

The Complaint does not aver specific facts from which the Court can infer that the City Officials knew their statements were materially false or misleading. Indeed, the Complaint does just the opposite, alleging that the City (and therefore its officials) lacked decision-making power and control. In describing the fraudulent scheme, Plaintiffs allege that "the City of Flint, under the State's control, was *forced* to commit predicate acts of both mail and wire fraud." (Compl. ¶ 54 (emphasis supplied).) "Any powers of government held by the City of Flint were entirely illusory." (*Id.* at ¶ 169.) Consistent with these allegations, Plaintiffs do not aver that the City Officials were made aware of water-quality concerns; instead, they aver that others were made aware of such concerns through studies, email, or other communications. (*See, e.g.*, Compl. ¶¶ 177-80, 197, 201-02, 205, 224, 261-262, 271-72, 297-99, 307-08 .)

For example, the only predicate act alleged against Mr. Walling is a television interview at the time of the switch. (*Id.* at ¶ 581(b).) Other than the conclusory allegation that he knew his on-air statement that the Flint River provided pure drinking water was false, there are no factual allegations from which one could infer that Mr. Walling disbelieved what he said.

Somewhat similarly, the Complaint alleges that Mr. Glasgow, "made false and repeated statements and misrepresentations that the Flint River water being sold to the City of Flint was safe," (*id.* at ¶ 23), and "knowingly failed to satisfy the

[Federal and State] regulations that were required to verify that the water provided to the Flint residents, property and business owners was safe," (*id.* at ¶ 572). Yet, the only alleged statements Plaintiffs offer in support of these accusations contradict their assertions. They allege that Glasgow provided "clear warning" to MDEQ and other named defendants that there may be issues with Flint's water and the Flint Treatment Plant prior to transition. (*Id.* at ¶¶ 207-08, 580c, 602.) Stated differently, not only does the Complaint fail to offer a basis for inferring Glasgow's intent to defraud or misrepresent, it actually pleads a basis from which to infer that he did *not* intend to defraud anyone and tried to *prevent* use of the Flint River as a water source. Accordingly, Plaintiffs fail to sufficiently plead that Glasgow knowingly made a false statement.

Plaintiffs allege that Croft made false statements to the press and other public officials about the safety and testing of the City's water. (*Id.* at ¶¶ 215, 382-384, 580(e)). As with Walling and Glasgow, Plaintiffs fail to aver any facts to establish a basis for inferring that Croft intended to defraud and misrepresent. They allege, in general terms, that Croft "knew" or "was aware" that the water was not safe or ready for distribution, but this does not satisfy the requirement to provide "the basis for inferring scienter." *Heinrich*, 668 F.3d at 406. Unlike other RICO defendants, who allegedly received emails or studies informing them about the perils of Flint's water, no such allegations are made against Croft. Without more than general claims of

knowledge, Plaintiffs fail to meet Rule 9(b)'s specificity requirements. Accordingly, they fail to sufficiently plead that Croft knowingly made a false statement.

Finally, Plaintiffs likewise fail to plead with specificity that EMs Brown, Earley, and Ambrose had the intent to deceive.[12] The Complaint alleges that the EMs acted purely on financial considerations to cure the City's financial crisis; it does not allege that they actually knew the water was unsafe and acted with the intent to defraud. Plaintiffs make many allegations about the interaction of the MDEQ with the EPA, about the MDEQ's approval of the Flint River as a viable, treatable water source, and the MDEQ's failure to properly study the river to set quality standards. (Compl. ¶¶ 278-82, 289). None of these allegations involve the EMs. Plaintiffs also allege that third parties studied water safety and misrepresented that the water complied with federal and State regulations. (*Id.* at 306.) They do not allege that the EMs knew that these third parties misrepresented the City's regulatory compliance or any facts from which the Court could infer that the EMs knew that they did. Plaintiffs' conclusory allegations about the EMs' purportedly fraudulent intent do not meet Rule 9(b)'s specificity requirements. Accordingly, they fail to sufficiently plead that the EMs knowingly made a false statement.

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[12] It is respectfully submitted that the Complaint also fails to plead that EM Kurtz acted with an intent to deceive. EM Kurtz is, however, separately represented in this action. Therefore, this Memorandum does not address the allegations against him.

(iii) No Pattern: Plaintiffs do not allege a sufficient pattern, even if they adequately allege predicate acts.

As noted earlier, each RICO element must be pleaded as to each defendant. *Kerrigan*, 112 F. Supp. 3d at 602. Thus, Plaintiffs must allege that each defendant individually committed a pattern of racketeering activity. *Ouwinga*, 694 F.3d at 791 (establishing elements). A pattern of racketeering activity requires at least two predicate acts within 10 years of each other. 18 U.S.C. § 1961(5). While two acts are required, they are rarely sufficient; "in common parlance two of anything do not generally form a 'pattern.'" *Sedima*, 473 U.S. at 496. The distinguishing characteristic of pattern "is th[e] factor of *continuity plus relationship*." *Id.* at 496, n.14 (original emphasis). Continuity can be open or closed-ended. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 (1989). Closed-ended continuity, alleged here (Compl. ¶ 586), is demonstrated with proof of "a series of related predicates extending over a substantial period of time." *Id.* at 242. Plaintiffs do not allege a pattern of racketeering as to the EMs or the City Officials.

Plaintiffs have not alleged to a pattern of bankruptcy fraud against the EMs or the City Officials. They allege that the Governor committed one of those acts and that EM Brown committed the other. (Compl. ¶¶ 579a, 579c.) One act by EM Brown simply is not a pattern of racketeering activity.

Likewise, Plaintiffs have not alleged a pattern of mail or wire fraud against the EMs or the City Officials. As noted earlier, the Complaint does not allege

any acts of mail or wire fraud against the EMs. (*See* Part 2(A)(2)(b)(ii)(B)(1), *supra* at 28-30.) The mailings of water bills and the notice of exceeding trihalomethane limits are not alleged to have been performed or caused by any of the EMs or the City Defendants. (Compl. ¶¶ 580a, 580g.) Plaintiffs do not allege any acts of mail or wire fraud against the EMs. They allege only one act each by Walling (a single television appearance) and Croft (a single press release). (*Id.* at ¶¶ 580e, 581b.) Although they do allege two predicate acts against Glasgow, (*id.* at ¶ 580c), two acts alone do not create a pattern. *Sedima*, 473 U.S. at 496. Plaintiffs allege a closed-ended pattern of 23 months, but base it upon the mailing of water bills, not Glasgow's letters to MDEQ. (Compl. ¶ 586.)

These failings notwithstanding, Plaintiffs also fail to adequately plead "continuity." The Complaint alleges a closed-ended scheme running from April 25, 2014 (the date of the switch to the Flint River) through March 9, 2016 (when the City no longer required payment for water service), a period of 22 months. (Compl. ¶ 586.) This incorrectly assumes, however, that the Court should look at the "pattern" of the enterprise and not the individual defendants. As *Kerrigan* confirms, Plaintiffs must prove a pattern at the level of the individual defendant, not the enterprise. *Kerrigan*, 112 F. Supp. 3d at 605.

But, even if the Court looked to the pattern of the enterprise, the duration of the scheme is inadequate for closed-ended continuity. As an initial matter, Plaintiffs' 22-month period is the wrong measurement because they do not

allege that the water billings during that period actually contained false statements. While "innocent mailings" can support mail fraud, *Schmuck v. United States*, 489 U.S. 705, 715 (1989), courts have held that "the relevant criminal conduct is the defendant's deceptive or fraudulent activity, rather than otherwise innocent mailings that may continue for a long period of time," when determining the duration of a mail-fraud scheme. *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1418 (3rd Cir. 1991). Applying *Kehr*, Plaintiffs only allege deceptive or fraudulent statements by various members of the enterprise from April 25, 2014 through September 25, 2015—a period of 17 months. (Compl. ¶¶ 580e-k.) The Sixth Circuit rejected an identical period of time for insufficient continuity. *Vemco, Inc. v. Camardella*, 23 F.3d 129, 133-134 (6th Cir. 1994).

(iv) No Conduct: Plaintiffs do allege that the EMs or the City Defendants "conducted" the affairs of the alleged enterprise.

To be liable under § 1962(c), a defendant must "participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). This requires the defendant to have "some part in directing" the enterprise's affairs. *Id.* at 179. A defendant plays "some part" in directing an enterprise's affairs if he "mak[es] decisions on behalf of the enterprise" or "knowing carr[ies] them out." *Kerrigan*, 112 F. Supp. 3d at 602-03 (quoting *United States v. Fowler*, 535 F.3d 408, 418 (6th Cir. 2008)). This must be distinct from carrying on the defendant's *own* affairs. *Reves*, 507 U.S. at 185. Thus, a defendant must do more than simply provide,

through its regular course of business, goods, and services that benefit the enterprise. *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1101-02 (10th Cir. 1999); *Hendrix v. Akin*, Civil No. 15-12364; 2015 U.S. Dist. LEXIS 157031, *12-13 (E.D. Mich. Nov. 20, 2105).

The Complaint is devoid of any allegations that the City Officials made any decisions on behalf of the enterprise or knowingly carried them out. Plaintiffs allege that City Officials lacked power under PA 436, which logically eliminates the possibility that they made any decisions. (Compl. ¶¶ 54, 169.) Even so, the sole allegation against Walling is that he made statements on television announcing the switch to the Flint River and commenting on its quality. (*Id.* at ¶ 581b.) Likewise, the sole allegation against Croft is that he issued a press release announcing the switch to the Flint River and commenting on its quality. (*Id.* at ¶ 580e.) Neither of these allegations ties Walling and Croft's interactions with the media to decisions made for the alleged enterprise. Nor do they explain how those interactions knowingly implemented a decision made on behalf of the enterprise by others. Similarly, the sole allegation against Glasgow is that he warned *against* using the Flint River. Plaintiffs make no effort to tie his warning to a decision Glasgow made for the alleged enterprise or explain how it knowingly implemented a decision made on behalf of the enterprise.

In addition, the Complaint fails to allege that the City Officials had "any financial interest in the success of the alleged RICO enterprise other than their

compensation for performing the discrete tasks for which they were hired." *Kerrigan*, 112 F. Supp. 3d at 603–04 (citing *Guaranteed Rate, Inc. v. Barr*, 912 F. Supp. 2d 671, 687 (N.D. Ill. 2012) (allegations of participation in a RICO scheme are insufficient where plaintiff fails to plead that defendants had a financial stake in the ultimate outcome of the enterprise—i.e., "shar[ing] in the profits of the alleged enterprise as opposed to merely taking their own respective profits from their respective actions related to the scheme")).

The Complaint is equally deficient for the EMs. All of the allegations against the EMs relate to their financial decisions for the City—something they were hired to do. Plaintiffs have failed to allege how these actions constitute conducting or participating in the conduct of the *enterprise's* affairs, as opposed to conducting their *own* affairs. *Kerrigan*, 112 F. Supp. 3d at 603–04.

(3). Plaintiffs fail to plausibly allege a RICO claim under § 1962(d).

To plausibly state a claim under 18 U.S.C. § 1962(d), a plaintiff must successfully allege all the elements of a RICO violation, as well as "the existence of an illicit agreement to violate the substantive RICO provision." *Grubbs v. Sheakley Group, Inc.*, 807 F.3d 785, 805-06 (6th Cir. 2015). "An agreement can be shown if the defendant objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes." *Heinrich*, 668 F.3d at 411.

Because the Complaint fails to state a violation of § 1962(c), it necessarily fails to state a violation of § 1962(d). Yet, even if Plaintiffs had successfully pleaded a claim under § 1962(c), their § 1962(d) claim would still fail because there are no allegations that the City Officials or any EM, other than EM Kurtz (who is not a party to this Motion), entered into an agreement to participate in the affairs of the enterprise. (*See* Compl. ¶¶ 193-195.)

Even if such had been pleaded, a proper § 1962(d) claim requires the plaintiff to claim an injury from a *tortious* overt act, that is also a predicate act, in furtherance of the conspiracy. *Beck v. Prupis*, 529 U.S. 494 (2000). An *innocent* overt act—such as an innocent mailing that may qualify for mail fraud but does not actually cause injury—is insufficient to plead a RICO conspiracy claim. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) [13] Here, Plaintiffs do not allege that they were injured by a tortious overt act. While Plaintiffs may point to the City's mailings of water bills, they make no claim that the billings themselves contained fraudulent statements. Thus, they are "innocent mailings," not tortious conduct.

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[13] This is because an innocent overt act would not satisfy the proximate cause standing requirement articulated in *Holmes*, which prohibits plaintiffs from recovering for indirect injuries. GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE § 10, Section 1962(d) Standing, 86 (3d ed. 2010).

B. Count 3: Plaintiffs fail to allege a contract claim against the EMs.[14]

The Complaint fails to properly state a contract claim against the EMs for lack of privity because Plaintiffs do not allege a contract with the EMs.[15] (*See* Compl. ¶¶ 608-23.) A necessary element of a breach of contract claim is the existence of a contract between the plaintiff and defendant. *Dunn v. Bennett*, 303 Mich. App. 767, 774 (2013). A claim cannot be maintained against non-parties; privity remains an essential element of a breach of contract claim. *National Sand, Inc. v. Nagel Const., Inc.*, 182 Mich. App. 327, 331 (1990). Thus, Count

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[14] Count 3 oddly combine substantive contract claims with substantive due process claims for a deprivation of Plaintiffs contractual interests. Contract and due-process claims are analytically distinct. The contract claims are analyzed in this Part. The due-process claims are analyzed in the City's Memorandum. (City Mem. at 28-29.)
The combination of contract and constitutional claims into a single count is in tension with Rule 10(b)'s admonition to avoid combining claims when necessary to avoid confusion. The EMs and City Officials do not seek relief on this ground, but urge the Court to consider exercising its inherent authority to require Plaintiffs to separate their distinct theories into separate counts. *See* Wright & Miller, 5A FED. PRAC. & PROC. CIV. § 1324 (3d ed.).

[15] As noted in the City's Memorandum, the contract claim in Count 3 fails because: (a) the action is against the City as an agent of the State and is not responsible for breaches by its principal, the State; (2) Plaintiffs do not allege mutuality or consideration, essential elements of any contract; (3) Plaintiffs allege that the City provides a service, not goods, and the parties' relationship is therefore not subject to the Uniform Commercial Code; and (4) alternatively, Plaintiffs did not allege that they provided notice of the alleged breach, which is a statutory predicate to bring an action under the UCC. For judicial economy, the EMs and City Officials will not restate those arguments here. Instead, they expressly agree with and adopt those arguments as their own, and substantively address here only the unique argument regarding lack of privity. (City Mem. 29-37.)

3 against the EMs must be dismissed for failure to state a State-law claim upon which relief can be granted.

C. Count 12: Plaintiffs' State-law negligence claims against the EMs and the City Officials are either preempted or barred by State-law tort immunity.

(1). The Michigan Safe Drinking Water Act preempts common-law tort claims under Michigan law.

State statutes can preempt common-law claims. *See, e.g., Hoerstman Gen. Contr., Inc. v. Hahn*, 474 Mich. 67, 75-76 (2006); *Kraft v. Detroit Entm't, LLC*, 261 Mich. App. 534 (2004); *Millross v. Plum Hollow Golf Club*, 429 Mich. 178, 183 (1987); *Anzaldua v. Neogen Corp.*, 292 Mich. App. 626, 631 (2011) (*citing Dudewicz v. Norris-Schmid, Inc.*, 443 Mich. 68, 70, 78-79 (1993)). Determining preemption of common-law claims is a question of legislative intent. *See Millross*, 429 Mich. at 183. As a general rule, "where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Id.* (*citing* 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION §50.05, 440-41(4th ed.)). If legislative intent for exclusivity existed, courts have then examined the scope of that exclusivity. The question of whether state statute preempts common-law claims will thus be determined by whether (1) the Legislature intended the statute to be the exclusive remedy, and (2) whether the common-law

claims are within the exclusion's scope. *See Millross*, 429 Mich. at 187. Both elements are satisfied here.

First, the Michigan Safe Drinking Water Act ("MSDWA") evinces a legislative intent to exclude private rights of action. The Act appoints the MDEQ as the primary regulatory agency responsible for implementing the federal SDWA. The MSDWA charges MDEQ to "provide for supervision and control over public water supplies . . . to provide for continuous, adequate operation of privately owned, public water supplies; to authorize the promulgation of rules to carry out the intent of the act, and to provide penalties." M.C.L. §§ 325.1001-325.1023, pmbl. MDEQ has promulgated numerous detailed and specific MSDWA regulations pursuant to this directive. *See* MICH. ADMIN. CODE R. 325.10101 *et seq*. The Legislature has deemed violations of the statute or the MDEQ's rules to be misdemeanor offenses. M.C.L. § 325.1021. In addition to criminal enforcement actions, the Michigan Attorney General can also bring civil injunctive actions to enforce the MSDWA and the MDEQ's rules. M.C.L. § 325.1022. While the MSDWA is silent as to parallel common-law claims, it facially constitutes "comprehensive legislation" that "prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions." *See Millross*, 429 Mich. at 183. Further, the maxim *expressio unius est exclusius alterius* supports the conclusion that

the Legislature's choice not to include a private right of action implies the exclusion of such actions. *Id.*

Second, Plaintiffs' negligence claims are within the scope of the MSDWA. The MDEQ has promulgated comprehensive regulations, including but not limited to regulations covering public notification requirements, MICH. ADMIN. CODE R. 325.10401 *et seq.*, treatment techniques, MICH. ADMIN. CODE R. 325.10604f, monitoring requirements for lead, MICH. ADMIN. CODE R. 325.10710a, reporting requirements for corrosion control, MICH. ADMIN. CODE R. 325.10710d, treatment systems and pumping facilities, MICH. ADMIN. CODE R. 325.11001 *et seq.*, and distribution systems, MICH. ADMIN. CODE R. 325.11101 *et seq.* Plaintiffs negligence claims are based on the same conduct. (Compl. ¶ 727a-j.) Thus, their negligence claim is really a private right of action brought to enforce the MSDWA. Since the factual bases for the claims fall within the regulatory scope of the MSDWA, they are preempted under the *Millross* line of cases and should be dismissed for failure to state a claim upon which relief can be granted.

(2). Alternatively, the EMs and City Officials are immune under the Michigan Governmental Tort Liability Act.

The Michigan Governmental Tort Liability Act ("GTLA") confers absolute immunity upon the EMs, Walling, and Croft, and qualified immunity upon Glasgow. M.C.L. § 691.1407(2), (5). Plaintiffs have the burden of pleading facts to avoid governmental immunity. *Kendricks v. Rehfield*, 270 Mich. App. 679, 681 (2006).

The applicability of governmental immunity on the pleaded facts is a question of law. *County Road Ass'n of Mich. v. Governor*, 287 Mich. App. 95, 117-118 (2010).

EMs are appointed under PA 436. *See* M.C.L. §141.1549(1). Under PA 436, EMs are immune entitled to absolute executive immunity under M.C.L. § 691.1407(5) from tort liability for injuries to persons or damages to property if he is acting within the scope of his executive authority. M.C.L. §141.1560. The Complaint alleges that the EM made financial decisions to correct the City's fiscal crisis: "[The Flint Water Crisis] occurred because these [EMs], with the approval and authority of the State[, the Govenor, the Treasurer,] and the MDEQ focused, in their Fiscal Emergency Plan, *solely on their duty under [PA 436] to find a financial solution for the City[']s]* financial crisis." (Compl. ¶ 8 (emphasis supplied).) Accordingly, the Complaint alleges that the EMs were acting within the scope of their duties under PA 436. They therefore enjoy absolute immunity from Plaintiffs' negligence claim under the GTLA.

Similarly, mayors enjoy absolute executive immunity as the highest elected executive official of a municipality. M.C.L. § 691.1407(5). Thus, Walling is immunity from Plaintiffs' negligence claim under the GTLA.

The same is true for Croft. As the director of Flint's Department of Public Works ("DPW"), he was the highest appointed executive official of a municipal department. (Compl. ¶ 75.) DPW is an executive department, created under the City's Charter and Code of Ordinances. FLINT, MICH., CHARTER §4-203(A); FLINT,

MICH., ORDINANCES §2-110 *et seq*. DPW directors are appointed by the mayor. FLINT, MICH., CHARTER §4-203(C). The DPW director is authorized to reorganize the divisions within the DPW and to promulgate rules and regulations. FLINT, MICH., ORDINANCES §§ 2-112, 2-114. Furthermore, he has the authority to appoint all subordinates and employees within DPW. FLINT, MICH., ORDINANCES §2-113. Such "department heads" are entitled to absolute immunity as a highest appointed official of a level of government. *See, e.g., Petripen v. Jaskowski*, 494 Mich. 190, 218-19 (2013) (police chief entitled to absolute immunity); *Davis v. City of Detroit*, 269 Mich. App. 376, 381 (2005) (fire chief entitled to absolute immunity); *Bennett v. Detroit Police Chief*, 274 Mich. App. 307 (2006); *Payton v. City of Detroit*, 211 Mich. App. 375 (1995); *Washington v. Starke*, 173 Mich. App. 230 (1988); *Meadows v. City of Detroit*, 164 Mich. App. 418 (1987).

Glasgow is entitled to qualified governmental immunity for lower-level municipal employees under the GTLA, which applies if: "(a) the individual was acting or reasonably believed that he was acting within the scope of his authority, (b) the governmental agency was engaged in the exercise or discharge of a governmental function, and (c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage." *Odom v. Wayne County*, 482 Mich. 459, 479-80 (2008); M.C.L. § 691.1407(2). Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." M.C.L. §691.1407(8)(a). Plaintiffs fail to plead particularized

allegations to avoid Glasgow's immunity. The only non-conclusory allegation that they plead regarding Glasgow is that he sought guidance and support from MDEQ about how to operate the water plant in conformance with applicable laws and regulations. This is not negligence, let alone gross negligence. *Cf. Maiden v. Rozwood*, 461 Mich. 109, 122 (1999) (evidence of ordinary negligence does not reasonably imply gross negligence). Further, even if it was gross negligence, Plaintiffs have not and cannot allege that Glasgow's conduct was "***the*** proximate cause of the injury or damage," as required to negate immunity. M.C.L. §691.1407(2) (emphasis supplied). Plaintiffs' negligence claims as to Glasgow must therefore be dismissed as well.

It is acknowledged that governmental immunity does not apply if the official was not "acting, or reasonably believed that he was acting, within the scope of his authority." *Odom*, 482 Mich. at 480. Plaintiffs allege that each of the EMs and City Officials were acting outside their authority, (Compl. ¶¶ 68, 73, 75, and 77), but they allege no facts supporting these conclusory allegations. Plaintiffs must plead facts to establish that defendants were acting outside the scope of their authority. *Mack v. City of Detroit*, 467 Mich. 186, 197-203 (2002). Thus, Plaintiffs have failed to plead in avoidance of immunity and governmental immunity applies.

D. <u>Counts 1, 3-4, 6-7</u>: The EMs and City Officials are entitled to qualified immunity on all § 1983 claims.

For Counts 1, 4, and 6-7, the EM and City Officials respectfully submit that Plaintiffs have failed to adequately plead claims under § 1983 for reasons identical to those raised by the City in its Memorandum supporting its Motion to Dismiss. For judicial economy, the EMs and City Officials will not regurgitate those arguments here. Instead, they expressly agree with and adopt those arguments as their own. (City Mem. at 17-28.) If the Court concludes, however, that Plaintiffs have stated the required elements for one or more § 1983 claims, the EMs and City Officials are still protected by qualified immunity.

Section 1983 qualified immunity shields government officials sued in their personal capacities from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine applies even when a government official is mistaken, "regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation omitted).

Plaintiffs bear the burden of showing that the qualified-immunity defense does not apply. *Roth v. Guzman*, 650 F.3d 603, 609 (6th Cir. 2011). To discharge this burden, a plaintiff must allege facts sufficient to state a constitutional claim that was "clearly established at the time of the harm giving rise to the action." *Id.* The alleged claim "must be established, not as a broad general proposition, but in a

particularized sense so that the contours of the right are clear to a reasonable official," *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (internal quotations omitted), so that he "would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, the unlawfulness "must be apparent in light of pre-existing law." *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 900 (6th Cir. 2014).

When distilled to its essence, the Complaint alleges a violation of three interests purportedly protected by procedural and substantive due process: (1) a substantive property interest in water (Count 1);[16] (2) a liberty interest in bodily integrity (Count 4); and (3) substantive and procedural property interests against deprivations of contractual interests (Counts 3, 5-7). The first is not a protected interest. Although the other two are protected, the Complaint fails to allege a violation of those interests.

First, there is no due process right to water, including contaminant-free water. *Mansfield Apt. Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1476 (6th Cir.

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[16] As argued in the City's Memorandum, Count 1 is labeled as asserting this kind of property interest in the context of an equal protection claim. For the reasons argued by the City, which the EMs and City Officials adopt here, Count 1 necessarily fails. (City Mem. at 19-24.) If the Court disagrees, however, Count 1 alternatively fails for the reasons argued in this Part 2(D), as well.

1993) ("There is no fundamental right to water service."); *Coshow v. City of Escondido*, 132 Cal. App. 4th 687, 708 (2005) (No due process right to "public drinking water of a certain quality"). Thus, the EMs and City Officials enjoy qualified immunity for all water-based property claims under § 1983.

Second, while there is a protected liberty interest in bodily integrity, it is not infringed unless there has been a forcible physical intrusion into the person's body against his will, absent a compelling state interest. *See Washington v. Harper*, 494 U.S. 210, 229 (1990) (forced injection of medication); *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (forced stomach pumping); *Planned Parenthood Southwest Ohio Region v. Dewine*, 696 F.3d 490, 506-07 (6th Cir. 2012) (abortion); *United States v. Booker*, 728 F.3d 535, 546 (6th Cir. 2004) (anal cavity search); *Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir. 1996) (statutory rape). Plaintiffs' bodily-integrity claim does not allege forcible physical intrusion analogous to these cases. (Compl. ¶¶ 624-44.) A similar claim premised upon consumption of allegedly toxic water was recently rejected because government officials did not physically force the plaintiff to consume the water. *Reeners v. Bandy*, Civil No. 16-01868, 2016 U.S. Dist. LEXIS 100991, *12-13 (M.D. Tenn. Aug. 2, 2016):

> To the extent that the complaint alleges a violation of the plaintiff's substantive due process right to refuse medical treatment, while the complaint alleges that all residents of City of Gallatin . . . are forced to drink the City's water, there is no allegation that any defendant is ***physically forcing*** the plaintiff or anyone else to ingest or use the water the plaintiff believes is toxic. . . . The court therefore

> finds that the complaint fails to state Fourteenth Amendment claims . . . .

In this case, Plaintiffs' bodily-integrity claim does not allege forcible physical intrusion analogous to these cases. (Compl. ¶¶ 624-44.) Accordingly, the EMs and City Officials are entitled to qualified immunity against this claim.[17]

Third, while procedural due process protects against deprivations of property interests without a notice and opportunity to be heard, it is well established that post-deprivation State-law contract and tort claims are adequate procedural safeguards to protect property interests, except for breaches that deprive a plaintiff of his ability "exercise ownership dominion over real or personal property, or to pursue a gainful occupation." *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195-97 (2001); *Ramsey v. Board of Educ. of Whitley County*, 844 F.3d 1268, 1273 (6th Cir. 1988) (no procedural due process claim for simple breach when State contract action is available); *Wilson v. Beebe*, 770 F.2d 578, 583 (6th Cir. 1985) (State tort actions satisfy due process if a meaningful opportunity for post-deprivation hearing exists.)

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[17] Even if this liberty interest was properly at issue here, Plaintiffs could only state a claim if they pleaded facts to show that the EMs and City Officials were motivated by malice or sadism, "rather than a merely careless or unwise excess of zeal." *Lilard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996) (internal quotation and citation omitted). Plaintiffs allege, however, that financial considerations motivated the switch to Flint River water. (Compl. ¶ 8.) At worst, Plaintiffs might claim that the decision-makers pursued financial goals with "careless or unwise" zeal, but that would not give rise to a substantive due process claim.

This is because "it is neither workable nor within the intent of Section 1983 to convert every breach of contract claim against a state into a federal claim." *Ramsey*, 844 F.3d at 1273. Here, none of Plaintiffs' claims allege that the EMs or City Officials have prevented them Plaintiffs from exercising dominion over their property or from pursuing a gainful occupation. At the same time, Plaintiffs' State-law breach-of-contract and tort claims demonstrate that there are adequate procedural remedies for the alleged deprivation of their remaining property interests.

IV. CONCLUSION

The Court lacks subject-matter jurisdiction over official-capacity claims against EMs and City Officials under § 1983. EMs are State officers. And, because the City is an "arm of the State" under the Eleventh Amendment for purposes of the Flint Water Crisis, the City Officials also enjoy immunity from official-capacity claims. Plaintiffs' personal-capacity claims are preempted by the SDWA's comprehensive remedial scheme. Also, Plaintiffs' contract-based § 1983 claims are precluded by the availability of a State-law breach-of-contract action. In addition, their "takings" claim is not ripe for adjudication.

Even if the Court could exercise jurisdiction, Plaintiffs fail to plausibly state claims upon which relief can be granted.

In Count 2, Plaintiffs not only fail to allege fact sufficient to establish standing to pursue a RICO claim, but they also fail to allege any of the elements of a violation of § 1962(c) claim as to any of the EMs or City Officials. By extension, they fail to

adequately allege the existence of a § 1962(d) conspiracy for want of a § 1962(c) violation and for want of a conspiratorial agreement. In Count 3, Plaintiffs assert a contract claim against the EMs, but fail to plead privity of contract between Plaintiffs and the EMs. This is fatal to any contract claim. In Count 12, Plaintiffs assert negligence claims against the EMs and City Officials, but the EMs, Walling, and Croft enjoy absolute executive governmental immunity, and Glasgow enjoys qualified executive governmental immunity. Plaintiffs have failed to plead facts in avoidance of such immunity. Accordingly, they have failed to state a negligence claim upon which relief can be granted.

The EMs and City Officials adopt as their own the City's arguments for Counts 1, 4, and 6-7, which explain why Plaintiffs fail to plausibly state claims for violations of substantive and procedural due process.

The EMs and City Officials pray that the Court will DISMISS them from the Complaint with prejudice.

Respectfully submitted,

Attorney for Mike Brown, Darnell Earley, Gerald Ambrose, Dayne Walling, Howard Croft, and Michael Glasgow
/s/ William Y. Kim
WILLIAM Y. KIM (P76411)
Dated: October 13, 2016

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

Lawrence Washington, Jr., et al,
Plaintiffs,

v.

Governor Richard Dale Snyder, et al.,
Defendants.

Case No 5:16-cv-11247-JCO-MKM
Hon. John Corbett O'Meara

INDIVIDUAL CITY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2016, I electronically filed the foregoing pleadings using the ECF system which will send notification of such filing to the counsels of record.

Dated: October 13, 2016

/s William Y. Kim_____
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