

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

CONCERNED PASTORS FOR SOCIAL
ACTION, et al.,

Plaintiffs,

v.

NICK A. KHOURI, et al.,

Defendants.

Case No. 16-10277

Hon. David M. Lawson

Mag. J. Stephanie Dawkins Davis

**CITY DEFENDANTS' POST-HEARING BRIEF IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INDEX OF AUTHORITIES i

INTRODUCTION 1

PRELIMINARY INJUNCTION STANDARD..... 1

PLAINTIFFS’ REQUESTED RELIEF 3

FINANCIAL IMPACT OF THE REQUESTED RELIEF ON THE CITY .. 4

THE CURRENT EMERGENCY WATER PROVISION SYSTEM..... 5

ARGUMENT..... 9

 1. Plaintiffs Have Not Demonstrated Irreparable Harm 9

 2. Even if Plaintiffs Had Demonstrated Irreparable Harm,
 it is Outweighed by the Financial Harm the City Will Suffer12

 3. The Requested Relief is Contrary to the Public Interest.....13

CONCLUSION13

INDEX OF AUTHORITIES**Cases**

<i>Amoco Prod. Co. v. Vill. of Gambell</i> , 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987)	12
<i>CLT Logistics v. River West Brands</i> , 777 F. Supp. 2d 1052 (E.D. Mich. 2011)	2
<i>Colorado Wild Horse v. Jewell</i> , 130 F. Supp. 3d 205 (D.D.C. 2015)	2
<i>Cox v. Jackson</i> , 579 F.Supp.2d 831 (E.D. Mich. 2008)	2
<i>Gilley v. United States</i> , 649 F.2d 449 (6th Cir. 1981)	11
<i>Lucero v. Detroit Pub. Sch.</i> , 160 F. Supp. 2d 767, 801 (E.D. Mich. 2001)	2
<i>Lyda v. City of Detroit (In re City of Detroit)</i> , No. 13-53846, 2014 WL 6474081, at *12 (Bankr. E.D. Mich. Nov. 19, 2014), <i>aff'd sub nom. In re City of Detroit</i> , No. 15-CV-10038, 2015 WL 5461463 (E.D. Mich. Sept. 16, 2015)	11, 12
<i>Mungia v. Judson Indep. Sch. Dist.</i> , No. CIV.A SA-09-CV-395-X, 2009 WL 3431397, at *2 (W.D. Tex. Oct. 19, 2009)	11
<i>Overstreet v. Lexington–Fayette Urban County Gov't</i> , 305 F.3d 566 (6th Cir. 2002)	2
<i>Penn Cent. Co. v. Public Utilities Commission of State of Connecticut</i> , 296 F. Supp. 893 (D. Conn. 1969)	3
<i>Rizzo v. Goode</i> , 423 U.S. 362 (1976)	3
<i>Sierra Club, Inc. v. Bostick</i> , 539 F. App'x 885 (10th Cir. 2013)	12
<i>Smallwood v. Jefferson Cty., Ky.</i> , 95 F.3d 1153 (6th Cir. 1996)	11
<i>Winter v. Natural Res. Def. Council</i> , 555 U.S. 7, 20 (2008)	1
<i>Yakus v. United States</i> , 321 U.S. 414 (1944)	3

INTRODUCTION

Plaintiffs' Motion for Preliminary Injunction should be denied for two principal reasons. First, Plaintiffs have failed to demonstrate irreparable harm sufficient to warrant their requested relief. Second, the evidence overwhelmingly establishes that the cost of the proposed relief will financially devastate the City of Flint ("City") and its residents, so that the balance of equities and the public interest militates against granting Plaintiffs relief against the City.

PRELIMINARY INJUNCTION STANDARD

The factors to be considered by the Court in deciding whether to grant a preliminary injunction are familiar. The movant "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter supra*, 555 U.S. at 22 (internal quotation and citation omitted). "Although the factors are to be balanced, a finding that there is no likelihood of irreparable harm . . . is usually fatal." *CLT Logistics v. River West*

Brands, 777 F. Supp. 2d 1052, 1064 (E.D. Mich. 2011) (Roberts, J.) (internal citations omitted). Because of the centrality of irreparable harm, a court need not reach the balance of equities and the harm to non-movant and third parties unless the movant first demonstrates irreparable harm. *Lettuce Entertain You Enterprises, Inc. v. Leila Sophia AR, LLC*, 703 F. Supp. 2d 777, 783 (N.D. Ill. 2010). Only harm that is “certain, great, and actual” warrants preliminary injunctive relief. *Lucero v. Detroit Pub. Sch.*, 160 F. Supp. 2d 767, 801 (E.D. Mich. 2001); see also, *Colorado Wild Horse v. Jewell*, (“The party seeking injunctive relief must demonstrate that the claimed injury is both certain and great.”) 130 F. Supp. 3d 205, 218 (D.D.C. 2015)(internal quotation and citation omitted).

“Plaintiff bears the burden of demonstrating his entitlement to a preliminary injunction, and his burden is a heavy one. ‘A preliminary injunction . . . should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.’” *Cox v. Jackson*, 579 F.Supp.2d 831, 853 (E.D. Mich. 2008) (Rosen, J.) (quoting *Overstreet v. Lexington–Fayette Urban County Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002)). Moreover, “[w]hen a plaintiff seeks to enjoin the activity of a government agency . . . , his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs” *Rizzo v. Goode*, 423 U.S.

362, 378-79 (1976) (internal citations and quotation marks omitted). Accordingly, “[b]efore a preliminary injunction may issue against a public instrumentality, the movant must demonstrate a higher probability of success and danger of irreparable harm than would be required against a private party.” *Penn Cent. Co. v. Public Utilities Commission of State of Connecticut*, 296 F. Supp. 893, 897 (D. Conn. 1969) (citing *Yakus v. United States*, 321 U.S. 414, 440-41 (1944)).

PLAINTIFFS’ REQUESTED RELIEF

Plaintiffs’ requested injunction is breathtaking in scope. They are not asking this Court to address a limited number of persons facing special obstacles. Instead, they ask this Court to order the City to either provide “door-to door delivery of bottled water to every household served by the Flint Water System” (Ex. 99, ¶1) or, for “good cause shown,” instead provide door to door delivery of faucet filters and “arrange for professional installation of the home filters, conduct regular (at least monthly) maintenance of the home filters and perform regular (at least monthly) monitoring to ensure that the home filters are effective at removing lead from drinking water to the minimum standards of the Lead and Copper Rule.” (Id, ¶2). In other words, they ask this court to find that a user, whether or not they own a car or have a physical disability or have a working filter, is suffering irreparable harm and is entitled to relief. In their opening argument, Plaintiffs cosmetically

narrowed the scope of their injunction by suggesting that users could, but need not, “opt out” of door to door services (TR. 11:6 – 11:13), but this does not meaningfully reduce the burden on the City, because it would remain responsible for universal door-to-door services unless and until a user opted out.

FINANCIAL IMPACT OF THE REQUESTED RELIEF ON THE CITY

The undisputed evidence demonstrated that the requested relief would cost the State between \$9.4 and \$11.4 million per *month*. (Kalenske TR 325:8-14). The City notes that it would plainly cost more for the City to provide the requested relief, because it lacks any infrastructure for or experience in the mass distribution of bottled water.

In any case, the undisputed evidence offered by David Sabuda, the City’s Interim CFO, established that providing the requested relief would have a “devastating” financial impact on the City, even if the ultimate cost was a small fraction of the State’s estimate. (Sabuda TR. 192:22 – 194:12). This conclusion is supported by the facts regarding the City’s financial circumstances. Mr. Sabuda explained that in the current fiscal year (ending 6/30/17), the City projects that its Water Fund will incur negative cash flow of \$18.9 million, reducing the fund balance from \$28.6 million at the start of the year to \$9.7 million at the end. (City Ex. MM; Sabuda TR. 173:2 – 173:16). Further, almost \$28 million dollars, or

50%, of the Water Fund's projected outlays (cash expenses) are for lead pipe replacement, water purchase and bond payments; none of that cash can lawfully be used for other purposes, even if the City shared the Plaintiffs' apparent belief that the City should abandon pipe replacement and clean water purchases and default on its bonds in order to provide universal door to door water delivery. (City Ex. MM; Sabuda TR 173:14 – 175:20). The Water Fund's financial circumstances are compounded by the fact that Flint water users are not using their usual volume of water or paying their bills – the City's current collection rate is 44%, less than half its normal 90-92%. (Sabuda TR 180:5 – 11). As a result, water bills, which are normally sufficient to pay the water system's operating expenses, are instead more than \$10 million short of doing so, requiring the City to dig deeply into its declining fund balance. (City Ex. II; Sabuda TR 182:10 – 19).

THE CURRENT EMERGENCY WATER PROVISION SYSTEM

As Plaintiffs acknowledge, the Defendants have “mobilized significant resources to respond to this crisis.” (TR 12:5 – 6). The testimony at trial demonstrated that the approximately 32,000 Flint water customers (Kalenske TR 306:4 – 9) are receiving safe drinking water, largely through the efforts of the State, supplemented by the efforts of a large number of churches, social service organizations, other formal and informal community organizations and individuals.

The State has distributed more than 32 million liters of water, 136,000 water filters and 297,000 replacement cartridges. (Kalenske TR. 316:6 – 13). Indeed, the State has distributed water filters to approximately 96% of households. (Kalenske TR 312:1 – 2). Plaintiffs’ own witnesses acknowledged the filters are effective to remove lead, if used properly. (Hood TR 65: 5 – 65: 11; Roper TR 115:16 – 116: 1).

The state meets the needs of the people of Flint through three primary channels. First, it distributes water and filters for pick up by users through nine “Points of Distribution” (“PODS”), one in each City Ward. Second, it delivers water door to door to approximately 1,250 residences on the State’s “Access and Functional Needs” list and to additional people on the “211” list. Third, it delivers water to more than 40 churches and other community organizations, which in turn supply water to users. (Kalenske TR 319:7 – 22). In addition to the State, water and filters are supplied by church organizations, such as Pastor Blake’s own denomination, and other private sources. (Blake TR 142:8 –12; 143:6 – 19).

The State learns of users requiring door to door deliveries through two primary means. First, it maintains an Access and Functional Needs delivery list for users requiring long term support, based on information provided to the state by a variety of governmental and nongovernmental social service organizations.

(Kalenske TR 303:18-304:6). Second, it maintains a second “211” list, comprised of individuals requiring emergency or short term assistance, as identified to the State multiple times a day by the United Way’s 211 social service hotline. (Kalenske TR 304:13 – 308:25).¹ Unfortunately, from the testimony it appears that the State’s efforts to provide door to door services to those in need are being hindered by the perverse refusal of private organizations such as Crossing Waters and Flint Rising, the organizations from which Plaintiffs offered witnesses, to notify the State of users in need. For example, for reasons known only to Ms. Roper, “[i]t never occurred to [me] to give the urgent, desperate cases to the State Emergency Operations Center.” (Roper TR 113:10 – 113: 12; see also, Kalenske TR. 308: 8 – 308:10).

Door to door deliveries are also provided by many of the City’s churches and community organizations, including Mr. Hood’s Crossing Waters organization and Pastor Blake’s church. (Blake TR 145:14 – 146:9; Hood TR 51:22 – 52:3).² Finally, and probably most importantly, users who seek assistance obtain it from

¹ The 211 line was known by each of Plaintiffs’ witnesses and is widely promoted by the City and others. See e.g., City Ex. H (City of Flint website containing 211 information).

² See also, City Exhibits E (“H2O Flint” Website, used for submission of home delivery requests);

friends, family, neighbors, church members and other wholly de-centralized private sources.

Mrs. Childress's testimony illustrated the many avenues through which water is obtained by those who do not use a water filter or personally drive to a POD. She typically obtained rides to PODs and other distribution sites from "different people," including her son and grandchild. (Childress TR 126:5 – 11; 127:1 – 5; 137:4 – 10). Not surprisingly for a person with physical limitations, no car and responsibilities for caring for a mentally disabled child, the water crisis is not the first or only time that she has had to ask others for assistance with tasks that require a car. (Id. 134:6 – 10). She has received several deliveries from unknown sources (Id. TR 127:19 – 22; 129:9-10). She has had to borrow water from a neighbor "a couple of times" (Id. TR 130:24 – 131:3) and on occasion has paid someone \$10-20 for rides to POD sites. (Id. TR 126:24 – 25).³ Most importantly, she has never had to drink unfiltered tap water. (Id. TR 131:9 – 10).

³ There was other anecdotal hearsay testimony regarding individuals paying drivers smaller amounts for assistance, but no evidence as to how often that has occurred. (Roper TR. 119:19 – 24)

ARGUMENT

1. Plaintiffs Have Not Demonstrated Irreparable Harm

The City does not question that the inability to use unfiltered tap water is an inconvenience for Flint water system users and a greater inconvenience for some users than others. But Plaintiffs have not offered evidence that a single user lacks access to safe drinking water, nor that a single user has been forced to consume unsafe water. Instead, they apparently claim that irreparable harm because: (1) the current system is inconvenient for some; (2) the current system is embarrassing for some; or (3) it is, for some reason, inappropriate that some user's needs are being met by people or organizations other than the government. None of these supports a claim of irreparable harm.

The evidence demonstrated that there are many ways for users to obtain safe water and that different people for various combinations of preference and need, have used different ways for doing so. Seemingly the most convenient way is using the free filters and cartridges supplied by the State.⁴ Plaintiffs offered anecdotal hearsay evidence of some people being unable to install and maintain a

⁴ Using filters also serves the public interest, because it facilitates the long term recovery of the City's water distribution system. As explained by Mr. Feighner, additional phosphates are being added to Flint's water to stop the leaching of lead from pipes. But that chemical treatment will work only if water is flowing through pipes, and the use of bottled water reduces that flow and thus the speed at which the system will recover. (Feighner TR 227:5 – 229:4).

filter and other people with a broken or non-standard faucet that would not accept a filter, but it is an insult to the people of Flint to suggest that vast numbers of them are unable, either by themselves or with the assistance of friends, family or others, to learn how to install, maintain and use a filter. It borders on frivolous to suggest that filter users have suffered irreparable harm and are entitled to relief.

Those who choose to not or cannot use a filter can, of course, use free bottled water. Those who can drive to a POD or other distribution site to pick up water may be inconvenienced, but plainly they have suffered no irreparable harm and are entitled to no relief. Those who lack a car, but can obtain a ride, or arrange for delivery, from friends, family, churches, social service agencies community organizations or others, have likewise suffered no irreparable harm and are entitled to no relief. Irreparable harm is lacking even for the unknown number of people who sometimes pay a small fee for assistance in obtaining bottled water. Even assuming that some of those people may be of limited means, they do not suffer irreparable harm by having to pay a small amount for water.⁵ See, *Lyda v. City of Detroit (In re City of Detroit)*, No. 13-53846, 2014 WL 6474081, at *12 (Bankr. E.D. Mich. Nov. 19, 2014), *aff'd sub nom. In re City of Detroit*, No. 15-CV-10038,

⁵ Indeed, it is likely that some or all of the fee is offset by the fact that users are using and paying for little or no tap water.

2015 WL 5461463 (E.D. Mich. Sept. 16, 2015)(“There is no enforceable right to free or affordable water . . .”).

The fact that some users suffer varying degrees of inconvenience in obtaining safe drinking water is not irreparable harm. *See, Gilley v. United States*, 649 F.2d 449, 455 (6th Cir. 1981) (“[P]ersonal inconveniences and expenses” are not irreparable harms.). Likewise, irreparable harm is lacking even if some users subjectively find asking for assistance embarrassing or the like. *See, Smallwood v. Jefferson Cty., Ky.*, 95 F.3d 1153 (6th Cir. 1996) (“[E]mbarrassment [is] not sufficient to demonstrate irreparable harm.”); *Mungia v. Judson Indep. Sch. Dist.*, No. CIV.A SA-09-CV-395-X, 2009 WL 3431397, at *2 (W.D. Tex. Oct. 19, 2009)(Plaintiff “has not provided, nor can this Court locate, any authority in which a Court found irreparable harm based on “humiliation” or “embarrassment.”) Finally, the users are not irreparably harmed (indeed, not harmed at all) by the fact that private groups and individuals are involved in providing safe drinking water. *See Lyda, supra*, at *11 (denying request for preliminary injunction by residential water customers facing shutoffs for failure to pay bills, in part because City, through a “patchwork combination of charity and public funds,” had already devised a reasonable plan that had been “generally successful in providing necessary assistance to customers that suffered temporary income reductions . . .”).

Accordingly, Plaintiffs’ have failed to demonstrate irreparable harm. Accordingly, their motion must be denied.

2. Even if Plaintiffs Had Demonstrated Irreparable Harm, it is Outweighed by the Financial Harm the City Will Suffer

The City will not repeat the discussion above regarding the evidence of the devastating financial impact Plaintiffs’ requested relief will cause the City. Plainly, the cost of Plaintiffs’ requested relief is hopelessly beyond the financial resources of the City. Far lesser financial impacts have been found to require the denial of a preliminary injunction. For example, in *Lyda, supra*, at *13, the court denied a preliminary injunction in part because enjoining the City of Detroit from discontinuing water service to delinquent users “would seriously threaten its revenues.” In *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 892 (10th Cir. 2013), the Court explained that:

The Supreme Court has recognized that financial harm can be weighed against environmental harm—and in certain instances outweigh it. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (“And on the other side of the balance of harms was the fact that the oil company petitioners had committed approximately \$70 million to exploration ... which they would have lost without chance of recovery had exploration been enjoined.”).

On that basis, it affirmed the denial of preliminary injunction seeking to enjoin construction of a pipeline because the requested injunction would endanger the

non-movant's \$500 million investment and cost hundreds of thousands of dollars each day. *Id* at 890.

3. The Requested Relief is Contrary to the Public Interest

Plaintiffs' requested relief is contrary to the public interest in at least three respects. First, the financial devastation of the City is contrary to the interests of the City's residents, the very people which Plaintiffs purport to represent. Second, the City, and its residents, are struggling to recover from the harm inflicted by the State imposed Emergency Manager and RTAB regime and to regain local control of its affairs. As Ms. Roper recognized, returning responsibility to elected officials is necessary for City's recovery (Roper TR 114:11 – 14). Plaintiffs' requested relief, in which it asks the Court to dictate how the City expends scarce (indeed, on the facts, non-existent) resources is directly contrary to the interest in restoring local control. And finally, as noted above, the paramount goal of returning to the use of unfiltered tap water requires the regular use of the water system by Flint residents and businesses, which Plaintiff's requested order will impede.

CONCLUSION

For the reasons stated, Plaintiffs' motion should be denied.

Respectfully submitted,

By: /s/ William Y. Kim
Stacy L. Erwin Oakes (P61482)
William Y. Kim (P76411)
City of Flint Department of Law
1101 S. Saginaw, 3rd Floor
Flint, MI 48502
(810)766-7146
wkim@cityofflint.com

*Attorneys for Defendant City of
Flint and Natasha Henderson*

Dated: September 22, 2016

BUTZEL LONG, a professional
corporation

By: /s/ Sheldon H. Klein
Frederick A. Berg, Jr. (P38002)
Sheldon H. Klein (P41062)
150 W. Jefferson, Ste. 100
Detroit, MI 48226
(313) 225-7000
berg@butzel.com
klein@butzel.com
Attorneys for Defendant City of Flint

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

/s/ Sheldon H. Klein
Sheldon H. Klein (P41062)