UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BEATRICE BOLER, et al.,

Plaintiffs,

v

DARNELL EARLEY, et al.,

Defendants.
_____/

No. 5:16-cv-10323-JCO-MKM

HON. JOHN C. O'MEARA

MAG. MONA K. MAJZOUB

STATE DEFENDANTS' MOTION TO DISMISS

Defendants State of Michigan, Governor Rick Snyder, Michigan Department of Environmental Quality, and Michigan Department of Health and Human Services (State Defendants) move to dismiss Plaintiffs' claims as asserted against them under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). As set forth more fully in the accompanying brief, Plaintiffs' complaint suffers from many flaws, including the fact that they lump all Defendants together in all twelve counts of the complaint. In addition to the reasons stated in State Defendants' jurisdictional arguments submitted as requested by the Court during the March 23, 2016 status conference (Dkt. 41), Plaintiffs' claims should be dismissed for the following reasons:

1. Michigan law accords absolute immunity to the Governor and immunity to the State and its agencies against Plaintiffs' state tort-law claims.

2. The Governor in his individual capacity is entitled to qualified immunity on the federal claims asserted here because Plaintiffs do not allege a violation of a clearly established constitutional right. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

3. Plaintiffs' Counts I through V under 42 U.S.C. § 1983 fail to state a claim for relief because they have not and cannot allege a constitutional violation:

a. Plaintiffs' Contract Clause claim fails because 2012 P.A. 436 does not impair Plaintiffs' contract, and this Court has already rejected constitutional challenges to 2012 P.A. 436.

b. Plaintiffs' Due Process Clause claim fails to allege inadequacy of state process, or an interest afforded protection by the substantive component of the Due Process Clause.

c. Plaintiffs fail to allege the necessary factors to support a claim for state-created danger, including an act of violence by a private, third party.

d. Plaintiffs' equal protection claim fails to allege discrimination by State Defendants, much less intentional discrimination.

e. Plaintiffs' takings claim fails and is not ripe for review because they have not alleged denial of just compensation.

4. Plaintiffs' conspiracy claim (Count VI) fails because 42 U.S.C. § 1985(3) reaches *private* conspiracies and, further, Plaintiffs do not allege discriminatory animus based on their membership in a protected class or their assertion of a fundamental right.

5. Plaintiffs' counts for breach of contract and warranty of merchantability (Counts VII and IX) fail because no contract exists with State Defendants, and the unjust enrichment count (Count VIII) fails because no benefit has inured to State Defendants.

6. In addition to immunity, Plaintiffs' tort claims (Counts X, XI, and XII) fail because the Michigan Consumer Protection Act applies only to business conduct not present here; there is no conversion because State Defendants have not converted Plaintiffs' property, nor converted Plaintiffs' property to their own use; and State Defendants are not viable defendants in a gross-negligence claim.

Pursuant to E.D. Mich. LR 7.1(a), counsel for State Defendants and Plaintiffs' counsel held a conference in which State Defendants explained the nature of the motion and its legal basis and requested, but did not obtain, concurrence in dismissal of the claims against State Defendants.

Respectfully submitted,

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BRIEF IN SUPPORT OF
STATE DEFENDANTS' MOTION TO DISMISS

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2. Is the Governor entitled to qualified immunity where Plaintiffs fail to allege a violation of a constitutional right so clearly established that the constitutional question is "beyond debate"?

3. Have Plaintiffs failed to state a claim under 42 U.S.C. § 1983 where they have not alleged a constitutional violation?

   a. Can the Contract Clause be violated even though 2012 P.A. 436, which is presumed constitutional and has not been held to be unconstitutional by this Court or any other court, does not alter contractual rights and obligations?

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   d. Must Plaintiffs' equal protection claim be dismissed where they fail to allege discrimination by State Defendants, much less intentional discrimination?

e. Is a takings claim ripe for review despite Plaintiffs' failure to allege a denial of just compensation?

4. Have Plaintiffs failed to state a claim for conspiracy under 42 U.S.C § 1985(3) where they do not identify a private conspiracy, they are not members of a protected class, and no fundamental right is at issue?

5. Have Plaintiffs failed to state a claim for breach of contract and warranty of merchantability where no contract with State Defendants exists? And does their unjust enrichment claim fail absent a benefit inuring to State Defendants?

6. Do Plaintiffs' tort claims fail where: the Michigan Consumer Protection Act applies only to business conduct not present here; State Defendants have neither converted Plaintiffs' property nor converted Plaintiffs' property to their own use; and State Defendants are not viable defendants to a gross-negligence claim?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Federal Cases:

Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011)

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Bowers v. City of Flint, 325 F.3d 758 (6th Cir. 2003)

City of Pontiac Retired Employees Ass'n, 751 F.3d 427 (6th Cir. 2014)

Ctr. for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365 (6th Cir. 2011)

Jones v. Reynolds, 438 F.3d 685 (6th Cir. 2006)

Mansfield Apartment Owners Ass'n v. City of Mansfield, 988 F.2d 1469 (6th Cir. 1993)

Mascio v. Pub. Emps. Ret. Sys. of Ohio, 160 F.3d 310 (6th Cir. 1998)

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)

State Cases:

American Transmissions v. Attorney Gen., 560 N.W. 2d 50 (Mich. 1997)

Belle Isle Grill Corp. v. City of Detroit, 666 N.W.2d 271 (Mich. App. 2003)

Dunn v. Bennett, 846 N.W.2d 75 (Mich. App. 2013)

Nawrocki v. Macomb Cty. Rd. Comm'n, 625 N.W.2d 702 (Mich. 2000)

Federal Constitution and Statutes:

U.S. Const. art. I, § 10.

U.S. Const. amend. XIV

42 U.S.C § 1983

42 U.S.C. § 1985(3)

Michigan Constitution and Statutes:

Mich. Const. art. X, § 2

2012 P.A. 436, Mich. Comp. Laws § 141.1541 *et seq.*

Mich. Comp. Laws § 440.2314(1)

Mich. Comp. Laws § 691.1407(1)-(2), (5)

INTRODUCTION

No one disputes that the Flint drinking water situation has detrimentally affected Flint residents, businesses, and public entities, and sparked significant health and safety concerns. The State of Michigan, Governor Snyder, the Michigan Department of Environmental Quality (MDEQ), and the Michigan Department of Health and Human Services (MDHHS) (collectively, State Defendants) recognize the seriousness of these issues, and their massive, ongoing efforts demonstrate their commitment to resolving them.

Notwithstanding the magnitude of the crisis in Flint, it does not displace the requirements of our federal judicial system. Plaintiffs have filed what courts refer to as a "shotgun" pleading—*i.e.,* a pleading that presents a host of allegations and incorporates them by reference into all counts indiscriminately. In shotgun pleadings, the task of determining which allegations are intended to support each claim is left to the reader. Even so, a discerning review of Plaintiffs' complaint reveals that the claims against State Defendants must be dismissed for the following reasons:

First, under state law the Governor is entitled to absolute immunity and the State and its agencies are entitled to immunity on Plaintiffs' state tort-law claims.

Second, the Governor is entitled to qualified immunity for the federal law claims because Plaintiffs do not allege a violation of a constitutional right so clearly established that the constitutional question is "beyond debate."

Third, Plaintiffs' 42 U.S.C. § 1983 claims fail because: 1) 2012 P.A. 436 does not impair Plaintiffs' contract, and this Court has already rejected constitutional challenges to 2012 P.A. 436; 2) they do not allege inadequate state process or a substantive due process protected interest; 3) they fail to allege facts to support a claim for state-created danger, including an act of violence by a private, third party; 4) they fail to allege discrimination by State Defendants, much less intentional discrimination; and 5) their takings claim is not ripe for review because they have not alleged denial of just compensation.

Fourth, Plaintiffs' 42 U.S.C § 1985(3) conspiracy claim fails because Plaintiffs do not identify a *private* conspiracy and do not allege

discriminatory animus based on their membership in a protected class or their assertion of a fundamental right.

Fifth, Plaintiffs' counts for breach of contract and warranty of merchantability fail because no contract exists with State Defendants, and their unjust enrichment count fails because no benefit has inured to State Defendants.

Sixth, beyond immunity, Plaintiffs' tort claims fail because the Michigan Consumer Protection Act applies only to business conduct not present here; there is no conversion because State Defendants have not converted Plaintiffs' property or converted Plaintiffs' property to their own use; and State Defendants are not proper defendants to a gross-negligence claim.

Dismissal of the claims against State Defendants does not signal the end of the State's efforts to resolve the Flint water crisis in a meaningful and satisfactory way for all concerned. It signals only that this federal lawsuit is the wrong vehicle to resolve these issues.

STANDARD OF REVIEW

Dismissal is proper under Federal Rules of Civil Procedure 12(b)(6) when a party's complaint fails to state a claim upon which relief

can be granted. Federal Rules of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Thus, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While a court must accept all well-pleaded factual allegations in the complaint as true, it need not "accept as true a legal conclusion couched as a factual allegation," mere labels and conclusions, or "formulaic recitation[s] of the elements of a cause of action." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (internal citations omitted).

For a Rule 12(b)(1) motion, the plaintiff carries the burden of proving that the court has subject-matter jurisdiction. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1135 (6th Cir. 1996). Such a motion can present a facial or factual attack. In a facial attack, the court considers the sufficiency of the complaint, accepting all factual allegations as true unless clearly erroneous. *Id.* at 1134. But with a factual attack the court can resolve factual disputes. *Id.*

ARGUMENT

I. Under Michigan law, State Defendants are entitled to immunity from Plaintiffs' state tort-law claims.

Plaintiffs assert three state tort-law claims—conversion, gross negligence, and violation of the Michigan Consumer Protection Act.[1] Federal courts apply state substantive law—including state immunity law—to state-law claims. *Range v. Douglas*, 763 F.3d 573, 581 (6th Cir. 2014). The State, its agencies, and officials and employees are immune from tort liability unless one of the specific exceptions set forth in Michigan's Governmental Tort Liability Act (GTLA) applies. Mich. Comp. Laws §§ 691.1401 *et seq*.; *Mack v. City of Detroit*, 649 N.W.2d 47, 52 (Mich. 2002); *Nawrocki v. Macomb Cty. Rd. Comm'n*, 625 N.W.2d 702, 710 (Mich. 2000) (recognizing that governmental agencies' immunity extends to "*all* tort liability"). The plaintiff must plead in avoidance of governmental immunity by either claiming one of the statutory exceptions or "by pleading facts that demonstrate that the

[1] Michigan courts define Michigan Consumer Protection Act claims as torts because a plaintiff need not rely upon a contract to make such a claim. *See In re Bradley Estate*, 835 N.W.2d 545, 553 (Mich. 2013); Mich. Comp. Laws §§ 445.903(1), 445.911(1)-(3) (a contract is not a necessary element of a Consumer Protection Act claim).

alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack*, 649 N.W.2d at 57. In this case, the Governor's immunity is absolute, and none of the statutory exceptions apply to the State or its agencies.

A. The Governor has absolute immunity from state tort-law claims under Michigan law.

The GTLA provides for absolute immunity from tort-law claims for "the elective or highest executive official of all levels of government . . . if he or she is acting within the scope of his or her . . . executive authority." Mich. Comp. Laws § 691.1407(5). As the highest elective executive official in the State, Mich. Const. art. V, § 1, the Governor is absolutely immune from tort liability when acting in the scope of his executive authority. This immunity extends to intentional torts, as well as negligence and gross negligence. Mich. Comp. Laws § 691.1407(5); *American Transmissions v. Attorney Gen.*, 560 N.W.2d 50, 53 (Mich. 1997); *Odom v. Wayne Cty.*, 760 N.W.2d 217, 228 (Mich. 2008); *Petipren v. Jaskowski*, 833 N.W.2d 247, 257 (Mich. 2013). In this context, executive authority means "all authority vested in the highest

executive official by virtue of his or her position in the executive branch." *Petipren*, 833 N.W.2d at 257.

Absolute immunity shields the Governor from Plaintiffs' tort-law claims because the acts complained of, including the appointment of emergency managers, fall under the scope of his executive authority. (Dkt. 1, Compl. ¶¶ 14, 16, and 35.)

B. The State and its agencies are entitled to immunity from state tort-law claims.

A governmental agency "engaged in the exercise or discharge of a governmental function" is immune, except when the claim falls within one of the narrow statutory exceptions. Mich. Comp. Laws § 691.1407(1); § 691.1402 (defective public highway); § 691.1405 (negligent operation of a government vehicle); § 691.1406 (defective public building); § 691.1407(4) (government hospital); and § 691.1413 (proprietary function). Plaintiffs do not allege facts that support the application of a statutory exception. For example, State Defendants do not realize any pecuniary gain for analyzing water sampling results.

Nor do Plaintiffs allege that the State, the MDEQ, or the MDHHS were engaged in anything other than a governmental function at any

time relevant to this complaint. A "governmental function" is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." Mich. Comp. Laws § 691.1401(b). In determining whether an alleged activity is a governmental function, the focus is on the general activity at issue, not the specific allegedly tortious conduct. *Tate v. City of Grand Rapids*, 671 N.W.2d 84, 87 (Mich. App. 2003). Plaintiffs' allegations are largely conclusory (generally alleging that the defendants "abrogated the Class' right to contract" (Dkt. 1, Compl. ¶¶ 14-17)), which are insufficient to avoid immunity. *Mack*, 649 N.W.2d at 57. Plaintiffs also allege that they were harmed by the passage of the Local Government and School District Fiscal Accountability Act in 2011, (Dkt. 1, Compl. 21), but the passage of a law is a governmental function. *See* Mich. Const. art. IV; Mich. Comp. Laws, § 691.1401(f). Similarly, MDEQ's analysis of water sampling results (Dkt. 1, Compl. ¶ 30), is a governmental function as it is required under the federal Lead and Copper Rule and Michigan's administrative rules. *See* 40 C.F.R. §§ 141.80 *et seq.*; Mich. Admin. Code R. 325.10710d. And Plaintiffs fail altogether to allege any act by MDHHS. Accordingly, the State, the

MDEQ, and the MDHHS are entitled to immunity on Plaintiffs' tort-law claims.

II. The Governor is entitled to qualified immunity on the individual-capacity federal law claims.

Qualified immunity protects government officials from suit unless they are "plainly incompetent or . . . knowingly violate the law," and "gives ample room for mistaken judgments." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986). The Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (citations omitted). A plaintiff has the burden of establishing that a defendant is not entitled to qualified immunity. *Cartwright v. Marine City*, 336 F.3d 487, 490-91 (6th Cir. 2003) (citation omitted).

To overcome the Governor's assertion of qualified immunity, Plaintiffs must allege facts that, if proven, would show that the Governor: 1) violated a constitutional right; and 2) that the right was clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Governor is immune from suit under both prongs of the qualified immunity test.

A. The Governor did not violate a constitutional right.

Regarding the first prong, Plaintiffs' 42 U.S.C. § 1983 constitutional claims (Counts I through V) fail to establish the violation of a constitutional right, as explained below in Argument III.

Additionally, the Sixth Circuit has explained that § 1983 claims "cannot be founded upon conclusory, vague or general allegations, but must instead, allege facts that show the existence of the asserted constitutional rights violation recited in the complaint and what each defendant did to violate the asserted right." *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 842 (6th Cir. 2002).

Here, Plaintiffs fail to allege what the Governor did to violate their asserted constitutional rights. For example, they repeatedly make conclusory allegations that their constitutional right to contract has been violated (Dkt. 1 Compl. ¶¶ 53-56, 59-62), but fail to allege specific acts by the Governor that violated this asserted right. Instead, Plaintiffs attempt to hold the Governor liable because he is "singularly responsible for the performance of agencies." (Dkt. 1, Compl. ¶ 14.) But liability under § 1983 cannot be based on *respondeat superior*. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 n. 58 (1978) (holding that

supervisory liability "must be based on more than the right to control employees"); *see also Shee v. Luttrell,* 199 F.3d 295, 300 (6th Cir. 1999); *Doe v. Clairborne Co., Tenn.,* 103 F.3d 495, 507 (6th Cir. 1996).

B. The right was not clearly established.

The Governor is also entitled to qualified immunity because even if Plaintiffs could establish the violation of a constitutional right, it was not clearly established. A controlling case directly on point is not necessary, "but existing precedent must have placed the statutory or constitutional question *beyond debate*." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (citation omitted) (emphasis added). At the time of the challenged conduct, the contours of the right must be sufficiently clear "that *every* reasonable official would have understood that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added)). This standard is important because it would be unfair to hold a public agent liable for money damages if judges would disagree on the constitutional question at issue. *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

Plaintiffs' complaint centers on the Governor's appointment of emergency managers and one of the emergency managers' decision to

switch Flint's water from the Detroit water system to the Flint River. (Dkt. 1, Compl. ¶¶ 10 and 14.) The law at that time would not have placed it "beyond debate" that appointment of an emergency manager violated a constitutional right. To the contrary, the Governor appointed Emergency Manager Earley pursuant to the Local Financial Stability and Choice Act, P.A. 436 of 2012, Mich. Comp. Laws §§ 141.1541 *et seq*. Not only are state statutes presumed constitutional, *Heller v. Doe*, 509 U.S. 312, 319-20 (1993), but when the validity of P.A. 436, including its provisions related to appointment of emergency managers, was challenged in this Court, all counts were dismissed except one as-applied equal protection claim based on race, (*Phillips v. Snyder*, Case No. 2:13-cv-11370, Dkt. 49, Pg. ID ## 888, 924-25), which was later dismissed without prejudice on the parties' stipulation. (*Id.*, Dkt. 73, Pg. ID # 1368.)

Plaintiffs also allege that the Governor's "fail[ure] to take action until October 8, 2015" impaired their constitutional right to contract. (Dkt. 1, Compl. ¶ 14.) Such a claim is unprecedented. An executive act of a governor cannot impair a contract because a legislative act is the

necessary basis for a Contract Clause claim. *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 431 (6th Cir. 2014).

III. Plaintiffs have failed to state a claim upon which relief can be granted under § 1983 in Counts I through V.

Plaintiffs allege five constitutional violations under § 1983 in Counts I through V. All five claims are against each defendant, and, in shotgun-style, incorporate all of the allegations in the entire complaint into every count. This type of pleading has been condemned by this and other courts. *See, e.g.*, *Krusinski v. U.S. Dep't of Agric.*, No. 92-4026, 1993 WL 346858, at *11 (6th Cir. Sept. 20. 1993) (Suhrheinrich, J., concurring in part and dissenting in part); *ABO Petroleum, Inc. v. Colony Ins. Co.*, No. 04-CV-72090-DT, 2005 WL 1050220, at *6 (E.D. Mich. Apr. 19, 2005) (indicating that it had ordered the parties to avoid filing shotgun pleadings); *Lasson v. Brannon & Assocs.*, No. 07-0271, 2008 WL 471537, at *4 (S.D. Ohio Feb. 15, 2008) (describing the harmful impact of shotgun pleadings, stating that they cause problems for the judicial system and harm the parties by disguising the merit of the parties' claims). Despite this approach, Plaintiffs' pleading fails to allege facts to support *each* claim against *each* defendant. For example,

the only reference to the MDHHS alleges in conclusory fashion that the agency has abrogated Plaintiffs' contract rights. (Dkt. 1, Compl. ¶ 17.) This is insufficient to support the five separate constitutional violations asserted against MDHHS. Replete with such shortcomings, Plaintiffs' § 1983 claims fail to "state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678 (citation omitted).

A. Plaintiffs have failed to state a claim under the Contract Clause (Count I).

Plaintiffs fail to state a claim under the Contract Clause and appear to be using Count I to improperly attempt to place the facial constitutionality of P.A. 436 before this Court—despite this Court's decision in *Phillips v. Snyder*, (Case No. 2:13-cv-11370, Dkt. 49, Pg. ID ## 888, 924-25).

The Contract Clause states in the relevant portion, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. To succeed under the Contract Clause, a plaintiff "must demonstrate that a change in state law has 'operated as a substantial impairment of a contractual relationship.'" *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 313 (6th Cir. 1998) (quoting *Gen.*

Motors Corp. v. Romein, 503 U.S. 181, 186 (1992)). Some deference is afforded to state laws addressing social or economic problems, even where such laws alter the rights and responsibilities of the contracting parties, *i.e.*, impair a contractual relationship. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). Thus, even a substantial impairment of contract will not violate the Contract Clause if a state law "was reasonable and appropriate in the service of a legitimate and important public purpose." *Mascio*, 160 F.3d at 313.

Plaintiffs base their claim on the "adoption" and "implementation" of the Local Financial Stability and Choice Act, 2012 P.A. 436 (P.A. 436), and its predecessors, (Dkt. 1, Compl. ¶ 50). They fail to allege, however, that P.A. 436 substantially impaired a contractual relationship by changing the rights and responsibilities of the contracting parties. Instead, they allege that the emergency manager's order that switched the water supply to the Flint River, issued under P.A. 436, impaired their contract. (Dkt. 1, Compl. ¶¶ 23-26). In other words, Plaintiffs' allegations do not focus on the law itself but on its application by the emergency manager. A Contract Clause violation, however, must be based on a legislative act, not its application. *City of*

Pontiac Retired Employees Ass'n, 751 F.3d 427, 431 (6th Cir. 2014) (quoting *New Orleans Water-Works Co. v. La. Sugar Ref. Co.*, 125 U.S. 18, 30 (1888)).

That Plaintiffs' claim does not fit within the basic requirements of a Contract Clause claim demonstrates that they are improperly attempting to challenge the facial constitutionality of P.A. 436 instead of arguing that it impairs their contract rights. Moreover, P.A. 436 is entitled to a strong presumption of constitutionality, *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 806 N.W.2d 683, 692 (Mich. 2011), and neither this Court nor any other court has struck down any portion of P.A. 436. (*Phillips v. Snyder*, Case No. 2:13-cv-11370, Dkt. 49, Pg. ID ## 888, 924-25).

In addition, P.A. 436 serves a legitimate public purpose—financial stability of local governments (municipalities and school districts) in order to provide necessary services and protect local and state credit ratings. Mich. Comp. Laws § 141.1543. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444-48 (1934); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 374 (2d Cir. 2006). In fact, this Court has recognized that P.A. 436 has a legitimate public purpose of "preventing

or rectifying the insolvency of its political subdivisions." (*Phillips v. Snyder*, Case No. 2:13-cv-11370, Dkt. 49, Pg. ID # 906).

B. Plaintiffs fail to state a claim for violations of procedural or substantive due process (Count II).

Plaintiffs have brought Fourteenth Amendment procedural- and substantive-due-process claims. *See* U.S. Const. amend. XIV. Each fails to state a claim for relief.

1. Plaintiffs fail to allege inadequacy of the available state process, and have not availed themselves of the available procedures.

Plaintiffs must allege inadequacy of state process, including inadequate state damages remedies, to support a § 1983 claim for violation of procedural due process. *Sproul v. City of Wooster*, 840 F.2d 1267, 1270 (6th Cir. 1988); *see also Bowers v. City of Flint*, 325 F.3d 758, 762 (6th Cir. 2003). Flint Ordinance 46-17(a) allows "[a]ny consumer" to request a hearing to dispute their water bill, which may thereafter be adjusted. *Id.* (a), (b). Instead of availing themselves of Flint's dispute procedures, Plaintiffs filed this lawsuit. Consequently, their procedural-due-process claim fails because they have not alleged inadequacy of state process and the claim is not ripe. *Parratt v. Taylor*,

451 U.S. 527, 540-42 (1981) (overruled on other grounds); *Bowers*, 325 F.3d at 762.

2. Plaintiffs do not allege an interest protected under substantive due process.

Substantive due process protects individuals from deprivation of certain life, liberty, and property interests regardless of the procedures provided. *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012). Plaintiffs claim a violation of substantive due process based on a deprivation of their "property interest," (Dkt. 1, Compl. ¶ 4), emanating from their "rights to contract for purchase of safe and potable water." *(Id.* at ¶ 54.) In other words, Plaintiffs do not assert a constitutionally created life or liberty interest, but rather a contractually-based property interest in safe and potable water.

Though contractual rights are sometimes considered property rights protected by substantive due process, courts have held that most state-created contract rights are not afforded such protection. *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990). This is because substantive due process, even with respect to contract claims, "affords only those protections 'so rooted in the traditions and conscience of our

people as to be ranked as fundamental.'" *Id.* (quoting *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion)). And "[m]ost, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process." *Id. at* 353; *see also Bowers*, 325 F.3d at 763 (no substantive due process protection for state contract right to discount on water bills). The Sixth Circuit has held that a contractual right to water service under state law does not create a protectable property interest for purposes of substantive due process. *See Mansfield Apartment Owners Ass'n v. City of Mansfield,* 988 F.2d 1469, 1476-77 (6th Cir. 1993). Such claims, if valid, should be addressed in a breach-of-contract claim. *Bowers*, 325 F.3d at 764. Thus, Plaintiffs' claim should be dismissed because they have not alleged a protectable substantive-due-process interest.

C. Plaintiffs have failed to state a claim for state-created danger (Count III).

The "state-created danger" theory of due-process liability recognizes a state actor's limited obligation to protect an individual against *private* violence. This duty arises if 1) the plaintiff and the state actor have a sufficiently direct relationship giving rise to a duty

not to subject plaintiff to danger from a private, third party; and 2) the state actors were sufficiently culpable to be liable under a substantive-due-process theory. *Sperle v. Michigan Dept. of Corr.,* 297 F.3d 483, 491 (6th Cir. 2002). So a "state-created danger" claim requires a plaintiff to establish: (1) an *affirmative* act by the State, which either created or increased the risk that the plaintiff would be exposed to an act of violence by a *third* party; (2) a special danger to the plaintiff where the State's actions placed the plaintiff specifically at risk, as distinguished from a risk affecting the public at large; and (3) that the State knew or should have known that its actions specifically endangered the plaintiff. *Jones v. Reynolds,* 438 F.3d 685, 690 (6th Cir. 2006).

Plaintiffs fail to establish these requirements. First, Plaintiffs do not allege the State created or increased the risk of harm from a *third, private* party. Rather, they argue generally that the defendants' acts *directly* resulted in harm as a result of exposure to toxic water. (Dkt. 1, Compl. ¶ 59: defendants "knowingly, recklessly and callously exposed Plaintiffs to toxic and contaminated water"; ¶60: "Defendants further placed Plaintiffs in continuous and ongoing danger by misrepresenting that the toxic water was safe and fit for human use and consumption";

¶ 61: Plaintiffs were damaged by "the inherently dangerous activity of the aforesaid State personnel.")

Moreover, Plaintiffs allege it was Flint's emergency manager, Defendant Earley—not State Defendants—who "unilaterally" ordered Flint to withdraw water from the Flint River in April 2014. (*Id.* ¶ 24.) Michigan courts have established that decisions of emergency managers are those of the local government, not of the Governor or the State. *Kincaid v. City of Flint*, 874 N.W.2d 193, 201 (Mich. App. 2015) (rejecting argument that an act of the emergency manager is an act of the governor); Ex. 1, *Russell Pillar v. State of Michigan*, No. 13-000164-MZ, at *4 (Mich. Ct. Cl. September 22, 2015) ("[A]ctions taken by an emergency manager are not imputed to the State.").

Second, Plaintiffs cannot establish that State Defendants' actions placed them in "special danger"—*i.e.*, that they were singled out to the extent "the government could have specified whom it was putting at risk, nearly to the point of naming the possible victim or victims." *Jones*, 438 F.3d at 696. Plaintiffs do not allege State Defendants' actions singled out these Plaintiffs to place them at a risk of special danger.

Third, Plaintiffs have not demonstrated that State Defendants knew, or should have known, their actions specifically endangered these Plaintiffs. There is no suggestion that State Defendants knew, or should have known, of a special impact of the water decision that is unique to *these Plaintiffs*—and such knowledge is central to the third requirement.

D. Plaintiffs fail to state a claim for equal protection (Count IV).

A cause of action under the Equal Protection Clause, U.S. Const. amend. XIV, requires that plaintiffs allege the defendant treated them disparately as compared to similarly situated individuals and that the disparate treatment "burdens a fundamental interest, targets a suspect class, or has no rational basis." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (internal quotations omitted). A plaintiff must also allege that the disparate treatment was the product of purposeful or intentional discrimination. *Robinson v. Jackson*, 615 F. App'x 310, 314-15 (6th Cir. 2015).

Plaintiffs allege that they received disparate and differing treatment as compared to the other citizens of Michigan because they

"exclusively" received a "supply of toxic water." (Dkt. 1, Compl. ¶ 65.) Yet, Plaintiffs acknowledge that Flint—not State Defendants—supplies them with water. (*Id.* ¶ 18.) The provision of water by Flint to Flint residents cannot be a basis for an equal protection claim against State Defendants. Plaintiffs also make no allegation that State Defendants intentionally discriminated against them; nor could they since it is Flint and not State Defendants that supply Flint residents with water.

E. Plaintiffs' taking of property without due process or just compensation claim (Count V) is not ripe.

The federal Takings Clause provides that private property shall not be taken for "public use, without just compensation." *Prater v. City of Burnside*, 289 F.3d 417, 424 (6th Cir. 2002) (Takings Clause of Fifth Amendment applicable to states through Fourteenth Amendment). A taking requires that a state deny a plaintiff just compensation. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). But, as previously noted, Plaintiffs have not pursued or been denied compensation through Flint's water-bill-dispute procedures or otherwise. Absent a denial of just compensation, Plaintiffs' takings claim is not ripe and must be dismissed.

IV. Plaintiffs fail to state a claim for conspiracy (Count VI).

Plaintiffs allege a claim under 42 U.S.C. § 1985(3), which the Supreme Court concluded reaches "*private* conspiracies" and is "not intended to apply to all tortious, conspiratorial interferences with the rights of others" but rather to those based on some racial or other class-based, "invidiously discriminatory animus." *Griffen v. Breckenridge,* 403 U.S. 88, 98-99, 101-102 (1971) (emphasis added). In implementing *Griffen* and its progeny, the Sixth Circuit held that § 1985(3) involves only conspiracies against classes that "receive heightened protection under the Equal Protection Clause" or "'individuals who join together as a class for the purpose of asserting certain fundamental rights.'" *Bartell v. Lohiser*, 215 F.3d 550, 560 (6th Cir. 2000) (quoting *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980)).

Plaintiffs do not identify a private conspiracy; do not—and cannot—allege invidious discriminatory animus based on their membership in a protected class, (Dkt. 1, Compl. ¶ 76.c.: defining the relevant class as citizens of Flint), and do not allege invidious discriminatory animus based on their assertion of a fundamental right. Still more, no court has recognized this type of right to support such a

claim. *See, e.g*, *Coshow v. City of Escondido*, 34 Cal. Rptr. 3d 19, 31 (2005) (no constitutional right to pure drinking water); *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) (constitutional protection for the environment not established); *Pinkney v. Ohio Envtl. Prot. Agency*, 375 F. Supp. 305, 310 (N.D. Ohio 1974) (no constitutional right to a healthful environment); *In re Agent Orange Prod. Liab. Litig*., 475 F. Supp. 928, 934 (E.D.N.Y. 1979) (same); *Tanner v. Armco Steel Corp*., 340 F. Supp. 532, 537 (S.D. Tex. 1972) (same). Thus, Plaintiffs have not stated a claim under § 1985(3), and the claim should be dismissed.

V. Plaintiffs fail to state a claim for breach of contract, unjust enrichment and breach of implied warranty of merchantability (Counts VII, VIII & IX).

Plaintiffs admit that they contract with and make payments to the City of Flint—not State Defendants—for water. Thus, Plaintiffs' contract-law claims against State Defendants must fail.

A. No contract exists.

A necessary element of a breach of contract claim is the existence of a contract between the complainant and the defendant. *Dunn v. Bennett*, 846 N.W.2d 75, 79 (Mich. App. 2013). While the Michigan

Uniform Commercial Code implies a warranty of merchantability against the seller of goods, it applies only where a contract exists. Mich. Comp. Laws § 440.2314(1); *Latimer v. William Mueller & Son, Inc.*, 386 N.W.2d 618, 623 (Mich. App. 1986).

Plaintiffs allege that the defendants "breached their contract with Plaintiffs to provide safe drinking water in exchange for payment." (Dkt. 1, Compl. ¶¶ 80 and 90.) But State Defendants do not have a contract with Plaintiffs to provide drinking water. As they admit, "Plaintiffs . . . contract with the City for the purchase of safe and potable water." (*Id.* ¶ 18.) These claims must therefore be dismissed.

B. State Defendants have not been unjustly enriched.

Plaintiffs' unjust enrichment claim against State Defendants fails for a similar reason. A claim for unjust enrichment requires that Plaintiffs prove "(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant." *Belle Isle Grill Corp. v. City of Detroit*, 666 N.W.2d 271, 280 (Mich. App. 2003) (citation omitted).

Plaintiffs allege that "Defendants unjustly received the benefits of payments executed by Plaintiffs for contaminated water . . . and used

those payments for the operation of the City of Flint." (Dkt. 1, Compl. ¶ 86.) Plaintiffs concede that the payments for water were made "to the City of Flint," not State Defendants. (*Id.* ¶ 81, *see* ¶ 18.) Thus, Plaintiffs' unjust enrichment claim against State Defendants must be dismissed.

VI. Plaintiffs fail to state a claim for their state tort-law claims (Counts X, XI & XII).

In addition to the immunity codified by the GTLA, Plaintiffs fail to state a claim for relief for each tort-law claim.

A. Plaintiffs' Michigan Consumer Protection Act violation claim fails because State Defendants are not in the conduct of a business.

The Michigan Consumer Protection Act prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." Mich. Comp. Laws § 445.903(1). "Trade or commerce" is limited to "the *conduct of a business* providing goods, property, or service." Mich. Comp. Laws § 445.902(g) (emphasis added). Plaintiffs' claim against State Defendants relates to their regulatory role regarding public water systems. State Defendants are not engaged in the "conduct of a business," *id.*, and do not provide goods, property, or

services. Nor have Plaintiffs alleged as much. Therefore, Plaintiffs' Michigan Consumer Protection Act claim fails as a matter of law. *See Action Auto Glass v. Auto Glass Specialists*, 134 F. Supp. 2d 897, 901 (W.D. Mich. 2001) ("Certainly, any plaintiff asserting a claim under the MCPA would have to show that the defendant is in the business of providing consumer goods or services.").

B. State Defendants did not convert any property.

Plaintiffs allege that State Defendants converted to their own use Plaintiffs' water and water payments. (Dkt. 1, Compl. ¶¶ 99-100.) Common-law conversion, an intentional tort, "is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 606 (Mich. 1992). Statutory conversion additionally requires that the defendant converted the property to his "own use." Mich. Comp. Laws § 600.2919a(1)(a).

Plaintiffs offer no factual support for their conversion claim. Instead, while alleging State Defendants converted their property, Plaintiffs' complaint also finds fault with State Defendants' failure to intervene and exert *more* control over Plaintiffs' water. (Dkt. 1, Compl.

¶ 35.) In any event, as Plaintiffs concede, it is the City that provides their water and receives their water payments. (Dkt. 1, Compl. ¶¶ 18 and 81.) Plaintiffs do not allege any facts to show that State Defendants intentionally and wrongfully exerted control over their water or water payments, or that State Defendants converted the property to their "own use." Mich. Comp. Laws § 600.2919a(1)(a). Thus, Plaintiffs' allegations do not "plausibly suggest" a claim for relief for conversion. *See Iqbal*, 556 U.S. at 681.

C. State Defendants are not proper defendants under a gross negligence theory.

The State and its agencies are not entities subject to suit for gross negligence under the GTLA and thus, are not proper defendants in such a claim. Mich. Comp. Laws § 691.1407(2)(c); *Gracey v. Wayne Cty. Clerk*, 540 N.W.2d 710, 714 (Mich. App. 1995) (abrogated on other grounds). Nor is the Governor a proper defendant because he has absolute immunity for all state tort-law claims, including gross negligence. Mich. Comp. Laws § 691.1407(5); *Petipren*, 933 N.W.2d. at 251 n. 7, 262.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated above and in State Defendants' jurisdictional arguments submitted as requested by the Court during the March 23, 2016 status conference (Dkt. 41), State Defendants respectfully request this Court dismiss Plaintiffs' claims pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1).

Respectfully submitted,

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Dated April 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2016, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

Respectfully submitted,

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