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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: . Case No. 13-53846-tjt
. Chapter 9
CITY OF DETROIT, MICHIGAN, .
. Debtor. .
.

**TRANSCRIPT OF TELEPHONIC HEARING ON MOTION TO ENFORCE CITY OF
DETROIT'S MOTION FOR THE ENTRY OF AN ORDER ENFORCING THE BAR
DATE ORDER AND CONFIRMATION ORDER AGAINST KENNETH NIXON**

BEFORE THE HONORABLE THOMAS J. TUCKER
UNITED STATES BANKRUPTCY JUDGE

WEDNESDAY, DECEMBER 13, 2023
DETROIT, MICHIGAN



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25 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 (Time Noted: 1:00 p.m.)

2 THE COURT CLERK: Please be advised that this
3 Court is back in session, with the Honorable Thomas J. Tucker
4 presiding.

5 THE COURT: Good afternoon to everyone. This is
6 Judge Tucker on the phone, by the way. Let's call our case
7 that's scheduled for 1:00 p.m.

8 THE COURT CLERK: We'll call the case number 13-
9 53846, in the matter of the City of Detroit, Michigan.

10 THE COURT: All right. Good afternoon. Let's
11 begin by having entries of appearance for this hearing.
12 First, is the attorney for the City of Detroit on the line?

13 MR. SWANSON: Yes, Your Honor. Good afternoon.
14 Marc Swanson on behalf of the City of Detroit, from Miller
15 Canfield Paddock & Stone.

16 THE COURT: All right, good afternoon. And is the
17 attorney for Kenneth Nixon on the phone?

18 MS. JAMES: Good afternoon, Your Honor. I'm
19 attorney Kathryn Bruner James representing Kenneth Nixon.
20 I'll be arguing the motion today, but I may have other
21 colleagues on the line if you want their complete
22 appearances.

23 THE COURT: It's up to you whether they enter an
24 appearance or not. If you're going to speak, it's not
25 necessary. But if they want to, that's fine with me, too.

1 So do they?

2 MS. HURWITZ: Well, Your Honor, if I may, I am on
3 the phone as co-counsel with Ms. James. My name is Julie
4 Hurwitz on behalf of Plaintiff Kenneth Nixon. But Ms. James
5 will be doing the arguing.

6 THE COURT: All right. Good afternoon to you.
7 Anyone else?

8 (No response)

9 THE COURT: I don't hear anything else. So for
10 the record, is there anyone else on the phone who wants to
11 enter an appearance in this case?

12 (No response)

13 THE COURT: I hear nothing. So good afternoon.
14 This, of course, is a hearing on the motion filed by the City
15 of Detroit seeking relief against Kenneth Nixon.

16 For the record, the motion was filed August 24,
17 2023. It's docket 13722 on the Court's docket.

18 I have reviewed the motion, the corrected response
19 to the motion filed by Kenneth Nixon. That's docket 13745.
20 The City's reply brief at docket 13804. And also, of course,
21 the exhibits that were filed with the motion and with the
22 corrected response and with the reply brief.

23 So that's what I've reviewed. I've also reviewed
24 other parts of the record in this case.

25 So let me hear argument from the parties. I'll

1 start with the City of Detroit, the moving party. Mr.
2 Swanson, what do you want to say?

3 MR. SWANSON: Thank you, Your Honor. Marc Swanson
4 on behalf of the City of Detroit.

5 Your Honor, Mr. Nixon argues that he could not
6 fairly contemplate that he had a claim until at least 2018
7 when the Staples memo was provided to him, or perhaps even
8 later in January of 2022, when January he stated that he
9 falsely implicated Nixon in the arson-murder.

10 However, the question under the fair contemplation
11 test is not whether Nixon knew exactly how the City might
12 have funded, or which City employees allegedly did so, but
13 simply whether it was in his fair contemplation that the City
14 might have done so.

15 And in this case, there is the same type of
16 evidence that this Court has pointed to in the *Ricks* and
17 *Chancellor* decisions, copies of which we attached to our
18 reply, the transcripts of those rulings, and that three
19 different court judges in the Eastern District of Michigan
20 recently pointed to in the *Sanford*, *Burton*, and *Munson*
21 decisions, to demonstrate that the claim was within Nixon's
22 fair contemplation.

23 Further, even when looking at the Staples memo and
24 the January affidavit, prior to the City's bankruptcy, Nixon
25 had been making substantially similar claims to those set

1 forth in the Staples memo and the January affidavit.

2 Nixon asserted at trial and in the habeas petition
3 that Vaughn, one of the eyewitnesses, story was coached by
4 family members, which, of course, is the same claim that was
5 made in the Staples memo, or similar claims of what was made
6 in the Staples memo.

7 And that January was a jailhouse informant who
8 fabricated his testimony in exchange for an early release,
9 which, again, is the same claim made in January's new
10 affidavit.

11 So let's start with what Nixon said during trial
12 and the appeal, and his habeas petition.

13 THE COURT CLERK: Excuse me, Mr. Swanson?

14 MR. SWANSON: Yes?

15 THE COURT CLERK: Judge Tucker wanted me to let
16 you know that he has lost connection and will be patching in
17 again.

18 MR. SWANSON: Thank you. Appreciate it.

19 THE COURT CLERK: You're welcome. It will be just
20 a moment. Thank you.

21 (Pause)

22 THE COURT: Mr. Swanson, are you there?

23 MR. SWANSON: Yes, Your Honor.

24 THE COURT: I'm very sorry. I lost my phone
25 connection. I don't know why or how that happened, but when

1 you were speaking. And I just got back on the line.

2 When I lost you, you had just mentioned the three
3 District Court decisions, in addition to the *Ricks* and
4 *Chancellor* decisions of mine, and were arguing just after
5 that, and you were cut off.

6 So just to let you know where I lost you, and you
7 can pick up where you were when I lost you so that I don't
8 miss anything that you want to say. Okay?

9 MR. SWANSON: Thank you, Your Honor. Yes.

10 THE COURT: All right. Sorry about that. Go
11 ahead.

12 MR. SWANSON: No problem. And after I talked
13 about how three District Court Judges in this District
14 pointed to the same type of evidence that is in this case,
15 define that in *Sanford, Burton, and Munson*, each of those
16 plaintiffs' claim against the City was within their fair
17 contemplation.

18 I began to discuss the Staples memo and the
19 January affidavit. And with respect to both of those pieces
20 of evidence, Nixon had been making substantially similar
21 claims to those set forth in the Staples memo and the January
22 affidavit prior to the City's bankruptcy filing, at his
23 trial, and in his habeas petition.

24 Nixon asserted at trial and in the habeas petition
25 that Vaughn, the subject of the Staples memo, that his story

1 was coached by family members, which, of course, is the same
2 claim that was made in the Staples memo, and that January was
3 a jailhouse informant who fabricated his testimony in
4 exchange for an early release, which, again, is the same
5 claim made in January's new affidavit.

6 But let's start with what Nixon said during his
7 trial and appeal and his habeas petition. Let's start with
8 the same type of evidence that this Court and the District
9 Court have all pointed to in holding that Plaintiff's claims
10 and substantially similar circumstances were within their
11 fair contemplation.

12 And so here there certainly is no dispute that
13 Nixon has proclaimed his innocence from day one. And I think
14 the simplest, or the most succinct place to point to, is the
15 response filed by Mr. Nixon in this Court, which plainly
16 admits "there is no dispute that Nixon proclaimed his
17 innocence from day one."

18 And a few other things that we can point to, that
19 we can look to. The report and recommendation, which denied
20 Mr. Nixon's habeas petition. We can also look to Mr. Nixon's
21 habeas petition and the exhibits that were attached to the
22 City's motion, which demonstrate that Nixon exhausted his
23 post-trial remedies through appeals to the Michigan Court of
24 Appeals, the Michigan Supreme Court.

25 He also filed a motion for relief from judgment in

1 the trial court, and an appeal from that motion.

2 And the proclamation of innocence that Nixon made
3 in those pleadings and those appeals and that habeas petition
4 are similar to the proclamations of innocence that were made
5 by Chancellor and Ricks in this Court, which the Court found
6 sufficient to hold that those plaintiffs fairly contemplated
7 their claims against the City. And also in Burton, Sanford,
8 and Munson.

9 It is especially similar to the Burton case,
10 because in both of those cases, both of those cases were
11 built on witness statements, some of which were recanted
12 after the City filed for bankruptcy.

13 And as the Burton Court said, plaintiff
14 "maintained his innocence and filed several post-judgment
15 motions and appeals following his conviction in 1987, and he
16 consulted with various attorneys regarding post-conviction
17 relief to overturn his conviction." I'm omitting some
18 citations.

19 "Thus, plaintiff did not neglect his claims and
20 the eventual invalidation of his conviction, and his claims
21 against the City were within his 'fair contemplation' before
22 the City declared bankruptcy, and, therefore, are barred by
23 the City's bankruptcy."

24 THE COURT: Excuse me, Mr. Swanson. Question.

25 MR. SWANSON: Yes.

1 THE COURT: The mere fact that a -- I mean, let's
2 assume Mr. Nixon, from day one in proclaiming his innocence,
3 had actual knowledge that he was actually innocent of this
4 arson-related crime that he was accused of and convicted of,
5 the mere fact that he was innocent and knew he was innocent
6 in and of itself does not give him any notice at all that he
7 has a claim, or may have a claim, against the City of Detroit
8 or its police officers. Does it?

9 MR. SWANSON: Well, I mean, he certainly knew from
10 day one that he was innocent, and he certainly made arguments
11 during his trial and in his habeas petition, that certain
12 things that the City did, you know, were not appropriate.

13 I mean, we can look with respect to Mr. Vaughn,
14 Nixon asserted during his habeas petition several things
15 about Mr. Vaughn's testimony that his story was coached, that
16 family members had coached, and that it was highly improbable
17 and could not reasonably be relied on as accurate.

18 With respect to Mr. January, in his habeas
19 petition Mr. Nixon asserted "petitioner contends that there
20 was specific facts present from which it is reasonably
21 inferred that either the investigating officers and/or the
22 prosecutor knew Stanley January was lying to the jury." This
23 is doc number 1722-3, page 10-11, and 103.

24 So Nixon pointed to the investigating officers,
25 which were, of course, City of Detroit employees, and he

1 asserted that they knew that Stanley January was lying. So
2 not only did he know he was innocent, but he asserted claims
3 against the City in his habeas petition.

4 So I think when looking at the Burton Court's
5 decision, --

6 THE COURT: Excuse me. The habeas petition that
7 was filed in 2010 is what you're referring to there?

8 MR. SWANSON: Correct.

9 THE COURT: Well, okay. First of all, I don't
10 think you answered the question that I asked you, so let me
11 go back to that for a second.

12 And that is: The mere facts standing alone, with
13 nothing more, that Mr. Nixon knew, thought, that he was
14 actually innocent of this crime that he had been accused and
15 convicted of, does not in and of itself show that he had
16 reason to think or know that he had any claims against the
17 City of Detroit or any of its police officers. Isn't that
18 right?

19 MR. SWANSON: Yes. I mean, I think if a plaintiff
20 knew that he or she was innocent, and divorcing the question
21 from the facts in this case, without any other proof,
22 allegations, statements at trial, proclamations of innocence,
23 that they were innocent, they wouldn't necessarily know that
24 had a claim against the City or the City's police officers.

25 THE COURT: Okay. And in the answer you first

1 gave to that question of mine, of course, you pointed to
2 other things. You pointed to a couple of things in the
3 habeas petition that was filed in 2010, well before this
4 bankruptcy was filed.

5 And you're arguing that based on those things,
6 that Mr. Nixon knew or should have known that he had or may
7 have a claim against the City of Detroit or its police
8 officers. Right?

9 MR. SWANSON: That is correct.

10 THE COURT: Okay. Well, let's talk about those
11 two things for a minute, then.

12 MR. SWANSON: Sure.

13 THE COURT: First, what you said about Mr. Vaughn,
14 who at the time of the crime was 13 years old, apparently,
15 that his testimony, his statements to the police, were
16 coached by his family.

17 Now, in arguing that, Mr. Nixon was not -- that
18 doesn't show, does it, that Mr. Nixon had any reason to
19 believe or know that any of the City police officers, or the
20 City, or anyone on behalf of the City, had coached Mr.
21 Vaughn's testimony or statements, or even that they knew that
22 the family had coached him. Does it?

23 MR. SWANSON: I don't think it shows knowledge,
24 but Nixon, in his habeas petition, basically says it's highly
25 improbable that Brandon Vaughn's statements could reasonably

1 be relied upon as accurate.

2 And that he asserts also that consistently Vaughn
3 and Simmons consistently changed their stories to the police,
4 and that Vaughn gave one version at trial, which differed
5 from the preliminary examination, and for which -- you know,
6 this is a quote: "And for which to be true, then his mother
7 Naomi Vaughn lied and her boyfriend Ron Rico Simmons must be
8 blind."

9 So they're certainly asserting that in no universe
10 could these statements be believable to anyone, including the
11 judge, the police, the prosecutor, and thus not be relied
12 upon.

13 THE COURT: How does that suggest to Nixon at that
14 time that he might have a claim against the City of Detroit
15 or any of its police officers?

16 MR. SWANSON: It suggests that because he's
17 asserting that the City, the police officers, the prosecutor,
18 were relying on statements which were lies and false, and
19 that no one could have possibly believed this. And if the
20 City believed it, then it was not acting properly, and that
21 it wasn't believable, and no one could believe it, and the
22 City should not have believed it, and if it did, I don't know
23 if they used the word negligent, but something along those
24 lines in allowing this person to testify, and bringing these
25 claims, and allowing the prosecution to go forward.

1 THE COURT: Of course, the City, through its
2 police, of course, investigated the crime that occurred, and
3 they arrested Mr. Nixon. They are the ones that arrested
4 him. They referred the matter to the prosecutor's office,
5 the Wayne County Prosecutor prosecuted this criminal case,
6 right?

7 MR. SWANSON: Right.

8 THE COURT: Okay. So then the Wayne County
9 Prosecutor chose to go forward, use this evidence as part of
10 the trial, evidence against Mr. Nixon, and prosecute him.
11 And that was a decision of the Wayne County Prosecutor, not
12 the City of Detroit in any way, right?

13 MR. SWANSON: Well, you know, I don't know exactly
14 how it worked, but I certainly think the Wayne County
15 Prosecutor was relying on the City of Detroit police
16 officers, at least in part in terms of evidence, you know,
17 collection of evidence, reliability of the evidence, and
18 likely a recommendation in terms of whether to go forward
19 with the case or not.

20 THE COURT: Okay. So then when you -- sticking
21 for a minute -- let me stick with it for a minute with
22 questioning of you about this Mr. Vaughn's statement and
23 testimony being coached by family members.

24 The Staples memo, the so-called Staples memo,
25 which is dated May 23, 2005, and a copy of which is --

1 unredacted copy of which, I guess, is exhibit number 1 to the
2 corrected response filed by Nixon at docket 13745. That's
3 what I'm referring to when I refer to the Staples memo. So.

4 That memo was unknown to Nixon until -- apparently
5 until after the -- not only after the City filed its
6 bankruptcy case, but even after the City's Plan was confirmed
7 in 2014. Isn't that right?

8 MR. SWANSON: That's what Mr. Nixon alleges.

9 THE COURT: Okay. So the City doesn't necessarily
10 acknowledge or admit that that's a fact?

11 MR. SWANSON: True.

12 THE COURT: All right.

13 MR. SWANSON: And we just haven't gone through any
14 sort of, you know, process to confirm or deny that. So I
15 can't say that's right or that's wrong.

16 THE COURT: Well, you know, I think it's fair to
17 point out that I believe Mr. Nixon has not filed any
18 affidavit of himself or other actual evidence other than what
19 they asserted in their corrected response by the lawyers,
20 that Nixon had no knowledge of the Staples memo until after
21 confirmation of the Plan in this case.

22 But with respect to the Staples memo, if Nixon had
23 known of that Staples memo before the City filed its
24 bankruptcy case, let's just assume that's true for a moment,
25 how would that knowledge have tended to show that Mr. Nixon

1 had a reason to believe that he had or might have a claim
2 against the City of Detroit or any of its police officers?

3 MR. SWANSON: Well, for one, and I know I've said
4 this before, but Nixon asserted the entire time at trial and
5 his habeas petition the exact same thing which is in the
6 Staples memo, that Nixon's testimony -- or that Vaughn's
7 testimony was coached by family members.

8 So it's not like that's a new revelation to the
9 extent that Nixon didn't have this memo before the City filed
10 bankruptcy. That was his consistent position at trial and in
11 the habeas petition.

12 I guess the only slight difference could be that,
13 and to Nixon it was plainly obvious to everyone that the
14 testimony was coached, and he pointed to examples in the
15 habeas petition and at trial, the Staples memo obviously
16 contained an acknowledgement from the City that it appeared
17 to be coached, as well.

18 But there's nothing -- it's not like this is a new
19 position.

20 THE COURT: In other words, it's evidence that one
21 of the City's police officers, Curtis Staples, thought that
22 back in May of 2005, before the trial in this case, this
23 criminal case, thought that the statement of -- this new
24 statement that's referred to in the Staples memo by Mr.
25 Brandon Vaughn, was obviously coached by family members.

1 But you're saying that Nixon was arguing all along
2 that it was obvious that this statement was coached by family
3 members, obvious to everyone, including the City. You're
4 saying he thought that and believed that and was alleging
5 that all along way back from the beginning, basically,
6 including many years before the City filed its bankruptcy
7 case. Right?

8 MR. SWANSON: Right. Right. I'm sorry, go ahead.

9 THE COURT: No, go ahead. You were going to say?

10 MR. SWANSON: Yeah, I was going to say he made the
11 claim prior to the City filing bankruptcy. This could have
12 been additional evidence, but to the -- you know, the claim
13 was made prior to the City filing bankruptcy, and thus, you
14 know, he certainly fairly contemplated the claim because he
15 made the claim.

16 So, you know, that's the test here. The test is
17 not whether he had every single piece of evidence he might
18 need to prove that claim. It's whether he fairly
19 contemplated the claim.

20 And by telling the judge, the prosecutor, City
21 police officers in attendance, that this was coached, he was
22 making the claim.

23 So in the City's view, nothing -- there's nothing
24 really new or necessary through the addition of the Staples
25 memo to, you know, -- the basic test here is whether he

1 fairly contemplated that he had a claim, and he did.

2 THE COURT: What about the fact that the Staples
3 memo was not disclosed to Nixon until many years after the
4 conviction, many years after -- and apparently years after
5 the City filed its bankruptcy case, the fact that it was
6 never disclosed? Does that in and of itself give Nixon any
7 claim, or suggest that he might have a claim against the
8 City, that failure to disclose?

9 MR. SWANSON: First, I guess I'll just start by
10 saying it's an alleged failure to disclose. The City is not
11 admitting that it wasn't disclosed.

12 But to the extent that under applicable law
13 there's a claim for failure to disclose a memo which contains
14 the type of information that the Staples memo contains, and
15 he didn't know of its existence until after the City filed
16 bankruptcy, perhaps there is a claim there.

17 But that's an entirely different type of claim
18 than the claim that's being asserted in the complaint. So
19 we're talking about apples and oranges here. Whether there
20 is a claim for potentially failing to disclose a memo versus
21 a claim for, you know, essentially a wrongful conviction.

22 So as best as I can tell, Nixon's complaint
23 doesn't have a specific claim for failing to disclose a memo.
24 That's not the issue here. The issue here are the claims
25 that are actually asserted in the complaint.

1 THE COURT: Let me -- if I can, I want to move now
2 to ask you a question or two about the January -- affidavit
3 of Mr. January.

4 MR. SWANSON: Yes, Your Honor.

5 THE COURT: Hold on a minute.

6 (Pause)

7 THE COURT: You have pointed out in your papers,
8 and I think earlier in this hearing today, that Mr. Nixon was
9 claiming from day one, basically, or all along, well before
10 the City filed its bankruptcy case, that Mr. January, who
11 testified at the criminal trial of Mr. Nixon, was someone who
12 had testified falsely. Made up a story and gave false
13 evidence against Mr. Nixon in order to try to obtain a
14 benefit for himself, and that his testimony was false. I'm
15 paraphrasing what the argument is.

16 Now, that just by itself, does that suggest by
17 itself without more that Mr. Nixon may have had a claim
18 against the City or its police officers, as opposed to the
19 facts alleged by Mr. January in his affidavit dated March 7,
20 2022, with this exhibit 4 to the Nixon corrected response,
21 docket 13745, the facts alleged in there, which are that a
22 City of Detroit police detective, Jimenez, caused -- induced
23 and caused January, and actively participated with January
24 and facilitated January giving this false evidence against
25 Mr. Nixon.

1 That, of course is quite a different and a much
2 stronger indication there might be a valid claim against Mr.
3 Jimenez, the City police officer, and the City, than the mere
4 fact that the City gave the prosecutor, and the prosecutor
5 used, testimony from January that's false at the trial.

6 So there's a big difference between those two
7 things. But are you saying that it's enough to show that
8 Nixon should have known he had a claim against the City and
9 its police officers, merely the fact that he had argued
10 before the City's bankruptcy petition sort of from day one
11 that January was lying in order to obtain benefit for
12 himself?

13 MR. SWANSON: Well, yeah. I mean, I think we can
14 point to a few things, one of which is the habeas petition,
15 which the City attached to its motion. And there's a
16 statement in there, which is on page 10 and 11, "petitioner
17 contends that there were specific facts present from which it
18 is reasonably inferred that either the investigating officers
19 and/or the prosecutor knew Stanley January was lying to the
20 jury."

21 So right there that's a claim against the
22 investigating officers and/or the prosecutor. And the
23 investigating officers were City of Detroit police officers.

24 So right there, Mr. Nixon is saying City police
25 officers reasonably should have known that Mr. January was

1 lying to the jury. And that's a big piece of the puzzle.

2 But there are other pieces to the puzzle which,
3 when you put them together, I think certainly show that Mr.
4 Nixon could have fairly contemplated he had a claim, one of
5 which is, you know, he repeatedly refers to January
6 throughout the papers and the habeas petition as a jailhouse
7 informant. And he repeatedly says that he fabricated his
8 testimony and had planned on fabricating his testimony so he
9 could obtain release to attend his daughter's graduation.

10 And so, again, those are claims, potential claims,
11 against the City that the City provided him with early
12 release in exchange for testimony that the City, when he says
13 the investigating officers knew was untrue.

14 So he says the testimony wasn't true. The City
15 gave Mr. January early release. And the whole thing was
16 essentially a scheme and a fraud to convict Mr. Nixon.

17 Is there anything in the habeas petition which
18 says that the officer fed him a story as it's contained in
19 the new January affidavit? I haven't seen that.

20 But, again, that's just kind of like the icing on
21 the cake. I mean, you have the claims. They were clearly
22 stated in the habeas petition that January was lying, the
23 City knew he was lying, and that the whole thing was part of
24 a scheme to get Mr. January out of jail early so that he
25 could attend his daughter's graduation.

1 So the claim is clearly articulated in the habeas
2 petition. Whether he fulfilled all of the -- whether they
3 had all of the pieces of information that they currently
4 have, that might be true that they weren't all there.

5 That doesn't mean, though, that he didn't fairly
6 contemplated that he had a claim against the City. That just
7 means he didn't have every single piece of evidence before
8 the City filed bankruptcy that he has now. But that doesn't
9 mean he didn't fairly contemplate his claim.

10 THE COURT: Well, the claim that Mr. Nixon has
11 made, or claims against the City and the police officers,
12 that's embodied in the complaint filed in the District Court
13 action that's pending. And the operative complaint is the
14 one that I assume that's been attached to your motion as
15 exhibit 6A, right?

16 MR. SWANSON: That's correct, Your Honor.

17 THE COURT: Okay. So is the claim in there that
18 Nixon is asserting against the City that the City, or at
19 least as part of the claim, that the City, through its police
20 officers, knowingly presented and used, gave to the
21 prosecutor, evidence from Mr. January that the City knew or
22 had reason to believe was false, and that they obtained that
23 evidence by giving Mr. January early release?

24 Is that the claim, or part of the claim, that's
25 asserted in this complaint, or is it something more -- I'll

1 say sinister that the City, based on what's in the January
2 affidavit from March of 2022, that the City did more than
3 that. The City, through its police officers, Jimenez
4 chiefly, or maybe only Jimenez, doctored up, caused, was the
5 driving force to induce, caused the making up of false
6 testimony by January? The City, through its police officer,
7 caused, cooked up that whole thing itself and didn't just
8 make a deal to give January something in exchange for
9 testimony that the City knew or should have known was false.

10 The City actually caused the false testimony to be
11 given. Is that more what the claim is in the complaint in
12 the District Court case by Nixon, or is it the latter -- the
13 former that I've described?

14 MR. SWANSON: Well, you know, I'm looking at count
15 six of the complaint, which is City of Detroit Municipal
16 Liability under *Monel*. It's a policy and practice claim that
17 incorporates each of the 123 preceding paragraphs as if fully
18 restated here word-for-word.

19 So, you know, it's a bit difficult for me to
20 answer that question completely.

21 But, you know, it's a claim that, you know, an
22 allegation that the type of behavior asserted in the
23 complaint that the City did allegedly, specifically did in
24 this case, was a part of a pattern and practice of the City's
25 behavior at the time before the City filed for bankruptcy,

1 and thus, due to those patterns and practices, the City
2 should be held liable.

3 And, of course, all of these patterns and
4 practices, by definition, had to be in place before the City
5 filed bankruptcy because that was when the relevant actions
6 occurred.

7 So I'm sorry if I'm not answering your question
8 completely, but I think it's hard for me to specifically say
9 based on the way the complaint is pled.

10 THE COURT: Well, for example, just hypothetically
11 for sake of discussion at the moment, let me pose
12 hypothetically if the Court were to -- this Court were to
13 conclude that Nixon knew and had within fair contemplation
14 before the City's bankruptcy was filed, that he might or did
15 have a claim against the City for essentially recklessly
16 causing prosecution of Nixon, recklessly because the City,
17 through its police officers, knew or should have known that
18 January's testimony was false, and January was giving the
19 testimony just to benefit himself, and the City knew or
20 should have known, through its police officers, that the
21 Vaughn testimony and statements were coached by family
22 members, that that's -- assume the Court were to conclude
23 that Nixon knew that he -- of these things well before the
24 City's bankruptcy, and knew that he had a potential claim
25 against the City based on that.

1 And then assume also that the Court finds, and,
2 again, this is hypothetical at this point, but assume the
3 Court finds also that only after the City's bankruptcy
4 filing, and even after the 2014 confirmation of the Plan in
5 the City's bankruptcy case, Nixon first learned and had first
6 had reason to believe that he also had a claim against the
7 City based on the actions of Detective Jimenez that are
8 alleged in the January affidavit of March 7, 2022,
9 essentially that the City didn't recklessly cause
10 prosecution, knowing that the evidence was essentially false
11 or unreliable, but also the City, through its police
12 officers, intentionally caused prosecution based on false
13 evidence, evidence that had been obtained by the City police
14 officers knowing that it was false, the January affidavit.

15 So you've got two claims that are a bit different.
16 One I would think much more serious and sinister than the
17 other, but you've got a claim, at least in this hypothesis,
18 if the Court finds Nixon had reason to know of and had fair
19 contemplation of before bankruptcy, the reckless prosecution,
20 et cetera, and you've got a claim that Nixon did not have
21 reason to know he had against the City something more
22 serious, the claim that the City, through its police
23 officers, fabricated evidence. The officers themselves
24 caused the fabrication of evidence to prosecute Nixon with,
25 which he learned only after the confirmation of the City's

1 Plan.

2 So if that is the situation, and I'm not finding
3 that it is at this stage, but if that is the situation, what
4 does the Court do with that in terms of the fair
5 contemplation test in figuring out what claims -- claim or
6 claims of Nixon are discharged in the City's bankruptcy, and
7 barred because they arose pre-Petition?

8 Do you see what I'm asking? It's a very long-
9 winded question, but do you see what I'm asking?

10 MR. SWANSON: Your Honor, I do see what you're
11 asking, you know, trying to kind of differentiate these
12 claims.

13 I would say, you know, for one, I don't think
14 given the facts of this case that they can really be cleanly
15 or neatly differentiated like the Court just posed in its
16 hypothetical.

17 You know, Nixon certainly asserted that, you know,
18 that the City's police officers knew that there was a lie.
19 He didn't say that they fed him the information, but he
20 called him a jailhouse informant. And I think there is kind
21 of the implication is that there was some sort of, you know,
22 relationship between the City and January, which caused his
23 testimony to come about that was, you know, completely -- in
24 Nixon's view, completely untrue.

25 So while he might not have used the exact words,

1 or said "Officer Jimenez likely or did concoct a story," when
2 you put kind of all of the various facts that we have
3 together here, I think that's a fair implication from what
4 Nixon alleged in the habeas petition, that there was a *quid*
5 *pro quo* that they knew he was lying, that this was
6 unbelievable, and that there had to have been some sort of
7 relationship which caused his inaccurate testimony to come
8 about.

9 So going back to it, I think based on what Nixon
10 said, I think he fairly contemplated that there was a claim
11 against the City in relation to what he viewed as inaccurate
12 and untruthful testimony by January.

13 He called him a liar. He said the City knew he
14 was a liar, and he said the City, you know, gave him pre-
15 release or early release in exchange for this untruthful
16 testimony.

17 So did he also have a specific claim for -- or
18 specifically say that the City fed him the untruthful
19 testimony? Not in those exact words, but kind of reading
20 between the lines and taking all of the various statements
21 that he made, you know, it's -- I think he fairly
22 contemplated that there was a claim against the City.

23 And so, you know, I don't think that you can
24 separate, you know, given the specific facts of this case,
25 you could separate those two factual scenarios.

1 THE COURT: Well, if you can't separate them,
2 which way does the Court go in terms of ruling that the claim
3 is discharge, or it was not? In other words, ruling that
4 either it arose pre-Petition, or it did not arise until post-
5 Petition under the fair contemplation test?

6 MR. SWANSON: In the City's view, since Nixon, in
7 his habeas petition, made assertions and claims against the
8 City with respect to January's testimony, those claims were
9 not only within his fair contemplation, but, you know, he
10 actually made them.

11 And although he might not have known each, you
12 know, piece of evidence and the precise parameters of his
13 claims against the City at that time, he certainly knew he
14 had a claim because he wrote it in his habeas petition.

15 And did he have every single fact which may have
16 buttressed his claim? No. But, or perhaps not, but he
17 certainly was making the same types of claims in 2010-2012
18 that he is currently making now.

19 And, again, this is not the -- you know, it's not
20 the accrual test, it's not, you know, when did the claim
21 become actionable. This is, you know, was it within his fair
22 contemplation? And I think there's a lot of evidence in the
23 habeas petition and in the trial transcripts that he viewed
24 the City's participation in this case as highly questionable
25 and improper, and he said so.

1 THE COURT: Another question relating to the
2 January testimony. Now, obviously this affidavit of Stanley
3 January of March 7, 2022, that's the date of that, that's
4 attached as exhibit 4, again, to the corrected response filed
5 by Nixon here in this case.

6 That affidavit itself, of course, is dated March
7 2022, it was long after the City filed its bankruptcy
8 Petition and long after the City got a confirmation of its
9 Plan in 2014.

10 But does the City admit or acknowledge that Mr.
11 Nixon did not have any knowledge of the facts alleged in the
12 January affidavit until after the filing of the bankruptcy
13 case? Or is that something where you just don't know at this
14 stage?

15 MR. SWANSON: You know, I don't know. I don't
16 know. But, again, I would just say based on the allegations
17 in the habeas petition, and reading through the transcripts,
18 that certainly the inferential implication was that this
19 testimony was made up, was falsified, and the City kind of
20 turned its head, and "we'll give you early release," even
21 though it knew that the testimony was untruthful.

22 You know, that is what he said. Whether he had
23 specific knowledge about some of the other statements in
24 January's affidavit, I don't know. I don't know how -- when
25 this came about or what was said to Nixon or his attorneys.

1 You know, I just don't have any knowledge of that.

2 THE COURT: You know, what is said in the January
3 affidavit of March 7, 2022, about Detective Jimenez and his
4 actions with January, that stuff is certainly nothing that is
5 alleged or even hinted at -- well, it's not alleged at all in
6 the habeas petition that Nixon filed in 2010. Right?

7 MR. SWANSON: Well, I mean, he does say that, you
8 know, that the -- he doesn't say that -- in the habeas
9 petition that Officer Jimenez specifically said January
10 information. He does, you know, certainly say that the
11 investigating officers knew Stanley January was lying.

12 So that -- he says Officer Jimenez knew he was
13 lying, but he doesn't say that he -- that Jimenez fed him or
14 fed January the information, although I think it's certainly
15 implied that the City, by allowing Mr. January to lie, was --
16 and providing him with free release or early release, was
17 part of some sort of scheme to falsely imprison Mr. January,
18 which, again, is kind of the genesis of his claims against
19 the City.

20 So did he know every single thing in the
21 affidavit? No. But did he certainly make allegations
22 regarding the sum and substance of the affidavit? Yes, he
23 did.

24 THE COURT: All right. So I've interrupted you
25 with lots of questions. Let me ask you to go ahead and say

1 whatever else you wanted to say here before we hear from Ms.
2 James.

3 MR. SWANSON: Thank you, Your Honor. I don't
4 really have much more to say with respect to the first part
5 of the response filed by Nixon, other than, you know, this
6 case seems very similar to the other cases that this Court
7 has decided, and the District Court had decided. None of
8 those cases have a plaintiff knew the exact parameters of
9 their -- of the facts that were alleged in the complaint.

10 But they -- you know, again, that's not the test.
11 The test is whether the claims against the City were within
12 their fair contemplation.

13 And in the Burton case, you know, it was based on
14 witness statements of individuals. And after the City filed
15 bankruptcy, those witness statements were -- at least some of
16 them were recanted.

17 And so in my view, it's a very similar factual
18 scenario and should be relied upon by this Court, as in the
19 past, to find that the claims asserted in the complaint were
20 within Mr. Nixon's fair contemplation.

21 The other part of the Nixon response is a request
22 to file a late claim. And I'll briefly address that, and
23 again, I'm happy to answer any questions the Court may have.

24 But the deadline to file claims was February of
25 2014. The Court dealt with this issue in the Collins matter.

1 We cited that case in our reply.

2 And in that case, the Court found that two years
3 was an extraordinary delay with respect to Collins. You
4 know, we're not at two years. We're at nine plus years now.
5 And certainly it's a much more extraordinary delay now, and
6 that's one factor which points again to Nixon being allowed
7 to file a claim.

8 With respect to the danger of prejudice, again, we
9 cited to the Collins case, cited to the Court's discussion of
10 prejudice to the City in the Collins case. I think certainly
11 that still holds true today.

12 And, as the Court knows, based on the filing of
13 the City's last status report, we're very close to final
14 distributions to class 14 creditors, and allowing another
15 claim at this point would delay those distributions likely
16 for, you know, a fair amount of time.

17 And so it's not only prejudicial to the City's
18 case for the reasons stated in Collins, but also -- and I
19 think the Court made mention of final distributions in
20 Collins, but would certainly further delay those final
21 distributions.

22 The remaining factors, good faith and the reason
23 for the delay, I think those essentially tie in to the
24 discussion on fair contemplation. In the City's view,
25 because the claim was within his fair contemplation, there's

1 really no excuse to file untimely proof of claim, and suing
2 immediately after being released is not justification for
3 filing a claim nine years after the bar date.

4 So in conclusion, Your Honor, like the District
5 Court plaintiffs in Sanders, Munson, and Burton, and the two
6 opinions that this Court issued, or two rulings that this
7 Court made in Chancellor and Ricks, any claim that Nixon has
8 now was within his fair contemplation as of the Petition
9 date. The claim is barred by the confirmation order and the
10 bar date order, and there's no excusable neglect here for the
11 reasons that I've just stated.

12 Thus, the City would respectfully request that the
13 Court enter an order, substantially the same form as the one
14 that was appended to its motion, and also deny the request to
15 file a late claim in that order.

16 Thank you, Your Honor.

17 THE COURT: Well, a couple of questions on this
18 filing of a late claim issue, Mr. Swanson.

19 MR. SWANSON: Sure.

20 THE COURT: First of all, of course, if the Court
21 were to find that the claim -- Nixon's claim, or claims
22 against the City, all arose post-Petition, not within his
23 fair contemplation pre-Petition, and arose even post-
24 confirmation, then Nixon would not be barred from pursuing
25 the claim in the District Court case against the City, but he

1 would not have any ability to have an allowed claim in the
2 bankruptcy case because the claim was -- is a claim that
3 arose post-Petition. Isn't that correct?

4 MR. SWANSON: I believe that's correct, Your
5 Honor. Yes.

6 THE COURT: And with respect to -- to the extent
7 the Court, or if the Court finds, that the claim arose pre-
8 Petition so that it's discharged, then the Court has to, I
9 think, get to the issue of Nixon's request to file a late
10 claim, which you've been discussing just now.

11 And I don't think either side really talks about
12 this. But what is the way in which Nixon received notice of
13 the City's bankruptcy case? Was it by publication as an
14 unknown creditor, or did he actually -- was he actually sent
15 notice?

16 MR. SWANSON: He certainly received notice by
17 publication. I have not personally checked whether he also
18 received notice by mail.

19 But to the extent he didn't receive notice by
20 mail, there were affidavits of publication, of the bar date
21 order, which this Court found in the bar date order to
22 constitute sufficient notice. I believe the *Wall Street*
23 *Journal*, *USA Today*, and I think *The Free Press* and the news,
24 there was similar notice of the effective date of the Plan,
25 and I believe in those same publications.

1 And so in the confirmation order that this Court
2 entered, it found that notice to be sufficient. And so, you
3 know, to the extent Mr. Nixon did not receive specific
4 notice, he was -- and this Court has found that the notice by
5 publication was sufficient.

6 And this Court had subsequently found in the
7 Chancellor case, and I believe the District Court found in at
8 least a few of the opinions I cited earlier, that the notice
9 by publication was sufficient notice with respect to the case
10 for an unknown creditor.

11 THE COURT: Well, in other words, and just I think
12 an opinion of mine where I talked about the unknown creditor,
13 found that particular claimants were -- fell into the
14 category of unknown creditors, and so notice by publication
15 was sufficient, was the case I decided August 26, 2022, just
16 for the record it's reported at 642 B.R. 807.

17 And that was the motion involving Debra Metris-
18 Shamoon and others, which I decided in that matter. And in
19 that opinion is where I talked about the unknown creditor
20 rule and notice by publication, and what was an unknown
21 creditor, and all of that. And you would say -- you would
22 argue that here Nixon was an unknown creditor within that
23 concept? Is that what you're saying?

24 MR. SWANSON: Yes, Your Honor.

25 THE COURT: All right. So --

1 MS. HURWITZ: Your Honor?

2 THE COURT: What do you want to say about the --
3 what else did you want to say, Mr. Swanson, about the motion?
4 Anything further before we hear from the other side?

5 MR. SWANSON: No, Your Honor, nothing further.

6 MS. HURWITZ: Your Honor, if I may, this is Julie
7 Hurwitz. I am not going to be making the argument, but I
8 just wanted to notify the Court I have a 2:00 o'clock status
9 conference by Zoom in front of Judge Parker. So I'm going to
10 be hanging up, but then I'm going to be re-joining when I'm
11 done with the status conference.

12 THE COURT: That's fine. That's entirely up to
13 you to come in and come out, and you don't have to tell me.

14 MS. HURWITZ: Oh, okay.

15 THE COURT: Or when you come back in, you'll hear
16 what you hear. But you're --

17 MS. HURWITZ: Thank you.

18 THE COURT: Counsel that's going to represent Mr.
19 Nixon in this hearing and argue for him is Ms. James, and so
20 that's fine.

21 MS. HURWITZ: Yes. Okay, thanks so much. I was
22 advised I should let you know, but thank you for telling me
23 that.

24 THE COURT: That's fine.

25 MS. HURWITZ: Okay, thanks very much. Bye bye.

1 THE COURT: Sure. That's fine. All right. So,
2 Ms. James, -- actually, you know what, before I have you
3 start, Ms. James, I did have another question for Mr.
4 Swanson, which you can address, too, when you speak.

5 Mr. Swanson, what's going on in the District Court
6 case at the moment? I saw the reference to there being a
7 hearing scheduled on motions to dismiss. I took a very quick
8 look at those motions that are filed in the District Court
9 case.

10 I noted that the City is arguing, among other
11 things, that the District Court should stay the case against
12 -- at least against the City until this Court decides --
13 enters a final order on this current pending motion.

14 What is going on in the District Court case as it
15 may have any bearing on this motion, Mr. Swanson?

16 MR. SWANSON: Yes, Your Honor. So there is a
17 hearing scheduled for the 21st of next week. I believe
18 within the last few days, one of Plaintiff's -- maybe it was
19 last week. One of Plaintiff's attorneys requested that the
20 Defendants agree to an adjournment of that hearing on the
21 21st.

22 And within the last few days, I believe one of
23 Plaintiff's attorneys wrote to the District Court Clerk and
24 provided some available dates for the adjournment of that
25 hearing that the City and the other Defendants had approved

1 in advance.

2 And I don't believe we've seen any order or
3 further correspondence on that point in terms of an
4 adjournment hearing.

5 But from my perspective, that's really the only
6 relevant happening in the District Court case.

7 The City filed a motion to dismiss. It's based on
8 substantially similar arguments to those made here, and a few
9 additional arguments that are not premised upon the City's
10 bankruptcy Plan and bar date order, and all of those.

11 And the City also did request that the Court stay
12 the matter -- District Court stay the matter until the
13 Bankruptcy Court hears and finally decides the motion that's
14 being argued today.

15 THE COURT: All right. Thank you, Mr. Swanson.

16 Ms. James, now let me come back to you and ask
17 you. Go ahead. What would you like to say here now?

18 MS. JAMES: Sure. Your Honor, one, I would just
19 like to clarify that the reason that we're rescheduling the
20 hearing in front of Judge Levy that was scheduled for --
21 technically is still scheduled for the 21st, is that one of
22 my law partners passed away unexpectedly three weeks ago. We
23 decided to proceed with this hearing because it's a fairly
24 narrow issue, whereas the one sought in the pending motions
25 to dismiss are quite global and expansive, and we needed some

1 extra time given the personal grief, as well as logistics
2 within the office.

3 So I did want to answer that question.

4 THE COURT: All right. Ms. James, I'm very sorry
5 about your partner's passing.

6 MS. JAMES: Thank you.

7 THE COURT: And I'll give you my sympathy on that.

8 So anyway, you think it's likely, though, that the
9 December 21 hearing is going to be adjourned?

10 MS. JAMES: Most likely to a date in January that
11 we provided to the Court, as Mr. Swanson said.

12 THE COURT: Okay. All right. So, thank you for
13 that. Go ahead.

14 MS. JAMES: Well, I'd like to start by clarifying
15 some of Mr. Nixon's claims, then discuss the fair
16 contemplation standard, and then I'll briefly touch on the
17 facts that the City argues, provided awareness to fairly
18 contemplate his claims.

19 First, Mr. Nixon's claims are not premised merely
20 on false witness testimony. These are civil rights claims
21 for police misconduct that violated his Constitutional
22 rights. They are not negligence claims.

23 And Mr. Nixon alleges intentional conduct by the
24 individual Defendants.

25 Specifically, I'd like to direct the Court's

1 attention to count 1, which is violation of due process,
2 including fabricating inculpatory evidence and withholding
3 exculpatory and/or impeachment evidence.

4 You can see paragraph 35 of the complaint, that
5 it's alleged that Staples and Tolbert withheld the memo that
6 we've been -- that we have been discussing today, which was
7 exculpatory, or at least very strong impeachment evidence.

8 And you can also see paragraphs 52 through 56 in
9 the complaint, alleged Jimenez's, as you called it, more
10 sinister role in fabricating evidence as alleged in the
11 complaint.

12 It is also important at the outset to note that
13 evidence, much less speculation of police misconduct, does
14 not give rise to municipal liability. There is no vicarious
15 liability for the City arising from the misconduct of its
16 employees.

17 Un-Constitutional conduct by an officer is a
18 necessary predicate, but it does not in and of itself
19 establish liability.

20 A claim for municipal liability requires a causal
21 connection between actions of the City itself, through its
22 policies, practices, to the individual plaintiff's injuries.

23 So in other words, a plaintiff must establish not
24 negligence, but deliberate indifference by the City itself,
25 through a policymaker custom or practice.

1 And to suggest that all wrongfully convicted
2 people should assume that they could have a civil rights
3 claim against the city that employed the officers involved in
4 their case, is contrary to civil rights law and contrary to
5 the facts of most civil rights cases.

6 So it is very important to parse through the facts
7 of this case and put them into that proper context.

8 Moving to the legal standard.

9 THE COURT: Excuse me, Ms. James.

10 MS. JAMES: Go ahead, yes. Yes.

11 THE COURT: You just mentioned a deliberate
12 indifference standard, however.

13 MS. JAMES: Yes. In order to establish municipal
14 liability, you must demonstrate deliberate indifference by
15 the City itself. So intentional conduct for the individual
16 officers for these claims that we've alleged, and deliberate
17 indifference on the part of the City itself.

18 THE COURT: Well, deliberate indifference to what?

19 MS. JAMES: For the Constitutional rights of the
20 Plaintiff.

21 THE COURT: All right. So, you know, if you're --
22 is part of what you're saying, or leading up to, that the
23 City does not have liability under applicable law for merely
24 participating in or causing prosecution -- criminal
25 prosecution of someone, even recklessly or -- well,

1 recklessly or negligently, when the City should have known
2 that the individual was innocent.

3 MS. JAMES: Yeah. What I'm saying is that some
4 hint of negligence or accident or, you know, something in
5 that sort of lower echelon of culpability doesn't necessarily
6 give fair notice of intentional conduct or deliberate
7 indifference.

8 So I'll turn to the legal standard, which is that
9 we agree that the fair contemplation test is the proper
10 standard. We agree that it doesn't require certainty or
11 require a right of payment.

12 We agree with the City's citation of *Signature*
13 *Combs, Inc. v. U.S.*, that also calls it the foreseeability
14 test.

15 And both parties cited the same language from this
16 Court describing fair contemplation where the creditor could
17 have ascertained through the exercise of reasonable due
18 diligence that it had a claim.

19 Where the parties disagree is precisely how the
20 standard applies. The City's argument suggests that most, if
21 not all, people who were wrongfully convicted found some
22 participation by the Detroit Police prior to the bankruptcy
23 bar date should have fairly contemplated or foreseen that
24 they had a claim against the City of Detroit.

25 And, Your Honor, that standard would be akin to

1 the debtor-creditor relationship test where liability is
2 discharged if the creditor and debtor began a relationship
3 before the debtor filed for bankruptcy, so long as the
4 underlying act occurred before the bankruptcy petition was
5 filed. But the parties all agree that that standard doesn't
6 apply.

7 And it probably goes without saying that applying
8 a standard that strict would require that notices be filed
9 for wildly speculative claims, indeed frivolous claims that
10 would have overburdened this bankruptcy process and future
11 municipal bankruptcies.

12 Every innocent criminal defendant or post-
13 conviction prisoner whose case was touched by a petitioning
14 municipality of police would have to submit a claim whether
15 or not they had any actual awareness of exculpatory evidence
16 being withheld, fabricated evidence by police, or other
17 misconduct that had been concealed up to that point.

18 So I'd like to turn our attention back to
19 *Signature Combs*, which is cited several times in the City's
20 reply. It was actually very helpful in describing the nuance
21 of the standard, and I urge the Court to consider it in
22 deciding this motion.

23 It acknowledged the complexity of the standard and
24 the balance of the fresh start goals of bankruptcy that the
25 federal rights asserted by the Debtor.

1 As noted in the Defendant's reply, the Court
2 undertakes a review of potential standards, rejecting
3 several, and settling on the fair contemplation or
4 foreseeability standard.

5 The Court cites *In re Chicago* for its holding that
6 for discharge purposes, in that case the claim was called a
7 "surplus claim," a Comprehensive Environmental Response
8 Compensation and Liability Acts claim, some reference is as
9 CERCLA claims, are the Debtor's claims in that case.

10 So the *In re Chicago* case says that a CERCLA claim
11 arises when the claimant can tie the bankruptcy debtor to a
12 known release of hazardous substance, which this potential
13 claimant knows will lead to CERCLA response costs.

14 So to frame it more generally, it's saying that
15 for discharge purposes the creditor's claim arises when the
16 claimant can tie the bankruptcy debtor to a known act to
17 which the potential claimant knows will lead to their injury.

18 The Court goes on to acknowledge the standards
19 imperfections as applied to situations where liability of
20 multiple potentially responsible parties whose roles or even
21 identities, might not be discovered until litigation of the
22 action has commenced.

23 And, finally, it acknowledges that the situations
24 where the debtor itself does not know of its potential
25 liability until well after the close of the bankruptcy

1 proceeding, because the debtor's liability stems from
2 wrongful conduct of a third party, applying the fair
3 contemplation standard requiring contemplation by the debtor
4 -- rather the creditor of the debtor's potential liability
5 makes it highly unlikely that debtors will ever be able to
6 discharge their liability through bankruptcy.

7 But none of this deters the Court from applying
8 the fair contemplation standard, nor do we suggest that it
9 should. But it sets the framework for how to apply it.

10 The Court cites *In re Hexcel Corp.*, which for the
11 record is 239 B.R. 564, and the pin cite is 572, and it says:
12 "[T]he existence of due process and Code concerns about
13 meaningful notice bolsters the conclusion that a future claim
14 cannot be contemplated by the parties is not discharged under
15 the Bankruptcy Code even if the claim stems from pre-petition
16 conduct of the debtor."

17 The Court notes that while the fair contemplation
18 standard may diminish the number of claims a debtor can
19 discharge through bankruptcy, the debtor has no
20 Constitutional or fundamental right to a discharge in
21 bankruptcy.

22 And in evaluating whether to favor slightly the
23 interests of the creditor or the debtor, the fact that
24 debtors may abuse bankruptcy discharges to hide from
25 liability presents more of a concern than the likelihood that

1 a creditor will have used their power under the fair
2 contemplation standard to claim ignorance of debtor's
3 involvement in order to preserve claims post-bankruptcy.

4 So the Court concludes in that case that without
5 additional facts, the Court cannot conclude that the EPA in
6 that case had a contingent claim against the debtor at the
7 time it discharged its claim in the bankruptcy
8 reorganization.

9 And the same is true here, Your Honor. The City
10 has not presented facts demonstrating that Mr. Nixon could
11 fairly contemplate a claim against the City itself prior to
12 the bar.

13 Turning to the facts that the City has alleged in
14 regard to fair contemplation.

15 The fact of his innocence. Let's start with that.
16 Is awareness of a person's own innocence enough? Absolutely
17 not. Far too speculative. Again, this would be the debtor-
18 creditor relationship standard.

19 Another fact that the City points to is Brandon
20 Vaughn's false testimony at trial that was influenced by his
21 family. Awareness of that fact alone has nothing to do with
22 the City of Detroit. It wasn't until the Staples memo
23 revealed in 2018 that Mr. Nixon learned that DPD officers
24 knew that their star witness was giving false testimony that
25 was coached by family members.

1 And as I stated at the outset, one of Mr. Nixon's
2 claims is that withholding this memo from him was the basis
3 of his Constitutional violations. How could he have
4 contemplated this claim against the officers, much less the
5 City, until the memo itself was actually revealed?

6 Similar, Stanley January's false testimony at
7 trial, and even the fact that he was motivated in exchange
8 for reduction of his sentence, that fact alone might be
9 distasteful and give rise to State law claims against Mr.
10 January, but it's not a Constitutional violation and does not
11 suggest liability against police officers, much less the
12 City.

13 It wasn't until Mr. January revealed that a DPD
14 officer fed him information and prompted him to fabricate
15 evidence that raised awareness of Mr. Nixon's claim against
16 the officer. And then it was that officer's similar conduct
17 in fabricating evidence and withholding exculpatory evidence
18 in other cases that revealed or brought awareness to a
19 potential claim against the City based on that fact.

20 And finally, the City argues that Mr. Nixon's
21 defense at trial points out inaccuracies in DPD reports and
22 inconsistencies in witness accounts, shows that he was aware
23 of his claims against police and against the City.

24 But this is basic criminal defense. To plant the
25 seed of doubt in the jurors. Inaccuracies and

1 inconsistencies are often due to basic human error, and any
2 criminal defense worth their salt would poke holes in
3 prosecutor's witnesses testimony, impeach them, and try to
4 get the jury to disregard any harmful testimony. It does not
5 establish awareness of Constitutional claims against the
6 City.

7 And lastly, if this Court agrees in any way that
8 this claim is -- that the claims against the City for
9 monetary relief are subject to the bar date, then any order
10 enforcing the bar should be limited to monetary relief, and
11 allow Mr. Nixon to proceed on his claims against the City for
12 declaratory relief to be decided by Judge Levy on the merits.

13 THE COURT: Why is that?

14 MS. JAMES: Well, I can give a citation to the
15 Bankruptcy Code, 11 U.S.C.A. 101(5)(b). There is also a case
16 called *Kennedy v. Medicap Pharmacies*, 267 F. 3d 493, pin cite
17 at 496. That's a Sixth Circuit case from 2001 that says:
18 "[U]nder the Bankruptcy Code, a claim for purely declaratory
19 relief is not dischargeable when, as here, it does not
20 necessarily require the expenditure of money."

21 THE COURT: Well, hold on. The Code section
22 you've cited is 101 what?

23 MS. JAMES: (5)(b).

24 THE COURT: All right. And the Sixth Circuit
25 case, you said it's 267 F. 3d 493, at 496. Right?

1 MS. JAMES: That's right. Yes.

2 THE COURT: All right. So this is an argument you
3 didn't make in your written response to the motion, isn't it?

4 MS. JAMES: I agree. It's an argument that we
5 made in front of Judge Levy in response to the motion to
6 dismiss. Somehow it did not make it in our brief to this
7 Court.

8 I believe that was, in part, because we did not
9 perceive the City's motion to bar declaratory relief, that
10 its request was ultimately for relief from monetary judgment.

11 THE COURT: What is the point of getting
12 declaratory relief without any monetary relief?

13 MS. JAMES: Well, we did argue this in our motion
14 in front of Judge Levy, which I don't have right in front of
15 me at the moment.

16 But largely it's for civil rights plaintiffs.
17 There is significance in holding the tortfeasor accountable
18 in some way, even if there's not damages awarded as a result
19 of the declaratory action.

20 THE COURT: Is that just to lay a basis for
21 getting attorneys' fees?

22 MS. JAMES: No. No. Under civil rights
23 jurisprudence, the claims are joint and several. And the
24 attorneys' fees are going to be based on, you know, time and
25 work that actually, you know, advanced the -- I don't have it

1 in front of me again. But advanced the action itself. It's
2 not simply a basis for attorneys' fees. It really provides
3 more ease of access to the actual record holder, where most
4 of the relevant records in this case are going to be coming
5 from the City of Detroit, not through the officers
6 themselves. Other witnesses who are not defendants are going
7 to be coming from the City of Detroit, not through the
8 individual officers themselves.

9 But, you know, more importantly, there is
10 significance to holding the municipality itself accountable
11 and putting it on notice that it may need to change these
12 practices if they're continuing to do them, which we have
13 alleged in this complaint, and have alleged with citations to
14 plausible facts that it is continuing to occur.

15 THE COURT: Well, but you're not -- you've
16 referenced declaratory relief, not injunctive relief, against
17 the City in this argument. Right?

18 MS. JAMES: Yes. But in a sense, the declaratory
19 relief gives the City notice that these actions violated the
20 Constitution, and one would hope that through risk management
21 they would change those policies.

22 But let me double check our request for relief.
23 We may have requested injunctive relief, as well.

24 (Pause)

25 MS. JAMES: Declaratory relief in the form of an

1 order relating to the City of Detroit's liability.

2 THE COURT: In other words, you're saying in the
3 State Court complaint you've not requested injunctive relief
4 against the City?

5 MS. JAMES: In the Federal complaint pending in
6 front of Judge Levy, we've requested declaratory relief and
7 any other relief the Court deems just and appropriate.

8 THE COURT: But not a specific prayer for --

9 MS. JAMES: Not specific. Not specific to
10 injunctive.

11 THE COURT: All right. So anyway, go on. What
12 did you want to say further?

13 MS. JAMES: Otherwise we'll rely on our brief.

14 THE COURT: Well, so let me ask a question or two
15 of you.

16 MS. JAMES: Yes.

17 THE COURT: The Staples memo and the January
18 affidavit dated March 7, 2022.

19 MS. JAMES: Yes.

20 THE COURT: I don't think there's any evidence in
21 the record in this case of when Mr. Nixon learned of these
22 things; that is, of the facts that are stated in the March
23 2022 January affidavit about Detective Jimenez, and so forth,
24 and about the Staples memo.

25 MS. JAMES: Your Honor, there is. With respect to

1 the Staples memo, there's a description in footnote 1.

2 Now, as you know, as a prisoner, Mr. Nixon himself
3 could not send FOIA requests. Prisoners are not -- rather, I
4 should say public entities are not required to respond to
5 FOIA requests by prisoners.

6 So this item was actually received from the Magill
7 Justice Project who sent a FOIA request, which is outlined in
8 footnote 1 of our response. So that was the first time it
9 was discovered by anyone outside of DPD.

10 THE COURT: What's the evidence of that fact, that
11 that is the first time it was discovered by anyone? In other
12 words, what's the evidence? It's really kind of a basic
13 point, you know. You've said these things about, you know,
14 when these were obtained, and so forth, and there's no --
15 those are statements of counsel. They are not evidence yet
16 in the record.

17 And unless I'm missing it somewhere, if there is
18 such evidence, where is it?

19 MS. JAMES: That's a fair question, Your Honor.
20 We cited this article that was published by Magill, and
21 outlined their efforts in obtaining the memo, because it is
22 our understanding that that was when it was first discovered
23 by anyone outside of DPD.

24 If the Court is requesting an affidavit
25 specifically from our client, we can supplement the record

1 with such an affidavit.

2 But I'll also note that, you know, the allegation
3 is also in our complaint, which typically, you know,
4 allegations in complaints are construed as true for the
5 purposes of dispositive motions, which this is, in a sense.

6 But I take the Court's point that Bankruptcy
7 Courts operate a little bit differently, and may require an
8 affidavit.

9 THE COURT: Excuse me. You're mixing up motions
10 to dismiss a complaint, on the one hand, with evidence that a
11 Bankruptcy Court needs to determine whether a claim was in
12 the fair contemplation of a creditor pre-petition in a
13 bankruptcy case. Those are two very different things.

14 And the latter is what we're dealing with here,
15 and it's not enough, in my view, for the Court, unless the
16 City admits the facts, which they have not done, it's not
17 enough to simply assert a fact in your brief -- an important
18 fact in your brief, and provide no evidence.

19 You know, it seems to me evidence is necessary, at
20 least in the form of an affidavit from one or more persons,
21 or some other material of evidentiary quality.

22 And I guess I don't see it there yet, and, you
23 know, there's kind of a -- sort of a gap at the moment, in my
24 view, in the evidence about when Mr. Nixon knew, or his
25 agents, attorneys or agents, knew or first learned of the

1 Staples memo.

2 And also first learned of the factual allegations
3 that are contained in the January March 2022 affidavit, not
4 just the affidavit itself, but of those facts that are
5 alleged by January in there that January was saying these
6 things.

7 You know, when did Mr. Nixon -- Mr. Nixon, through
8 his attorneys, or his attorneys learned these things before
9 the bankruptcy case was filed in 2013? That's a very
10 different case than if they only learned them after.

11 MS. JAMES: I take your point, Your Honor. And if
12 we're permitted to supplement the record with such an
13 affidavit, we'd be happy to do so. I can tell you from my
14 own personal knowledge that he learned of the substance of
15 the Stanley January affidavit when I described it to him over
16 the phone after the affidavit was made.

17 THE COURT: Well, there is no evidence in the
18 record yet that establishes that -- that says that.

19 You know, assertions of counsel in a brief is not
20 evidence unless it's used as an admission against the party
21 whose attorney made the statement, which is not what we're
22 talking about here.

23 So, you know, I guess, you know, I mean, you tell
24 me. But if you want the opportunity to supplement the record
25 with evidence, I'm willing to give you that.

1 MS. JAMES: Yes. If the Court permits us to do
2 so, we would happily supplement the record with a affidavit
3 from our client.

4 I will also note that there is no evidence in the
5 record from the City suggesting the inverse, that Mr. Nixon
6 had knowledge of any of this prior to the dates represented
7 in our brief.

8 THE COURT: I think you're right about that. And,
9 you know, the City, of course, is pointing primarily to the
10 2010 habeas petition and its exhibits, and to assertions made
11 by Mr. Nixon prior to that, primarily.

12 But, you know, I understand that point, too. But,
13 you know, it seems to me there is a hole here and in the
14 Court's -- the evidence needed by the Court to make a ruling
15 about the fair contemplation test and its application in this
16 particular case.

17 And so the question is: What evidence is there to
18 and fro by either side that Nixon knew of or did not know of,
19 either directly or through his agents/attorneys, of these
20 particular things, which certainly I took your brief and your
21 response to the City's motion to be saying that Nixon and his
22 agents didn't learn any of these things until well after the
23 City's Plan was confirmed in 2014 in the bankruptcy case.

24 But it wasn't backed up with evidence, really.

25 So, we'll come back to this. But if you want the

1 opportunity to supplement the record on those issues, I'm
2 willing to give that to you, and I'll set a -- we'll come
3 back to it and I'll set a deadline for that.

4 MS. JAMES: Thank you.

5 THE COURT: But your position, your client's
6 position, I gather to be presumably what you would intend to
7 back up or try to back up with evidence to be filed is that
8 Nixon and his agents and attorneys did not know about the
9 Staples memo and did not know of the facts that January was
10 ultimately alleged in his March '22 affidavit about Detective
11 Jimenez until well after 2014 when the City's Plan was
12 confirmed in this case. Right?

13 MS. JAMES: Yes.

14 THE COURT: Okay.

15 MS. JAMES: Yes.

16 THE COURT: So, go on. What else did you want to
17 say about the fair contemplation issues? Anything?

18 MS. JAMES: No, Your Honor. I think I've made the
19 points that I wanted to add after reading the City's reply.
20 Candidly, I struck out a little bit of my outline because the
21 Court's handle on some of these issues was better than I
22 anticipated.

23 THE COURT: Well, I'm glad you expect a lot of me.
24 Well, okay. So, you know, you heard this sort of lengthy
25 hypothetical question that I put to Mr. Swanson, very lengthy

1 question, about essentially is there a separation to be made
2 out of the claims -- two different kinds of claims; one that
3 arose pre-petition, potentially, one that arose post-
4 petition, potentially, and say that the one -- the pre-
5 petition one is a discharge and the post-petition one is not.

6 Now, that's a -- do you recall the question I was
7 asking him? Did you want to comment on that?

8 MS. JAMES: I think I recall the question. And if
9 I understand it correctly, I tend to agree that if the claim
10 arose post-petition, then we continue litigation in front of
11 Judge Levy, and there are no implications of the bankruptcy
12 plan of adjustment.

13 Now, in a belts and suspenders fashion, we have
14 also argued that, you know, should this Court decide that it
15 does fall within the Bankruptcy Court's jurisdiction, that we
16 would be permitted to submit a late claim, but that
17 ultimately the merits of that claim be adjudicated by Judge
18 Levy, you know, for the efficient administration of the
19 judicial system, basically, rather than have two different
20 actions pending in two different courts with substantially --

21 THE COURT: Well, I appreciate your comments here,
22 but that doesn't really answer or respond to the question I
23 asked you, I don't think. But that's fine, and I'll come
24 back to it in a minute.

25 But while I'm thinking of it, do you agree with

1 Mr. Swanson that in his answer to my question on this that if
2 and to the extent the Court finds that Nixon's claims arose
3 post-petition, after the filing of the bankruptcy case, under
4 the fair contemplation test, and, therefore, were not
5 discharged; let's make it cleaner and just say if the Court
6 finds that the claims arose under the fair contemplation test
7 only after confirmation of the City's Plan, even in 2014 in
8 this bankruptcy case, that the claims aren't discharged or
9 barred by the City's Plan of Adjustment, or the Bankruptcy
10 Code, or in any other way relating to the bankruptcy, the bar
11 order claims.

12 But at the same time, in that event, Nixon cannot
13 have an allowed claim in the bankruptcy case, which would
14 entitle him to any sort of distribution in the case, because
15 the claim arose post-petition. Do you agree with that
16 proposition?

17 MS. JAMES: That is my understanding, is that this
18 is an either/or proposition. Am I understanding the question
19 correctly?

20 THE COURT: Well, all right. So, I mean, I think
21 -- I start by thinking that it is correct to say that to the
22 extent a claim is not discharged because it arose after the
23 petition date and after the date of confirmation of the Plan,
24 that it's -- while it's not barred or discharged in the
25 bankruptcy case, it's also not a claim that can be the

1 subject of an allowed claim in the bankruptcy case because it
2 arose post-petition.

3 And just the question is whether you agree with
4 that or not. And so it sounds like you do agree with that.
5 Right?

6 MS. JAMES: Yes. I agree that if the claim arose
7 and is not subject to discharge in bankruptcy, then it
8 proceeds and is not implicated by the bankruptcy.

9 THE COURT: Getting back to this sort of long and
10 tortured hypothetical question I asked Mr. Swanson, what I
11 was struggling with there is that, you know, and I was
12 listening carefully to what you said earlier that may relate
13 to this, but the -- does Nixon have really two kinds of
14 claims here, at least, against the City and its police
15 officers in his District Court case?

16 One kind of claim says -- is based on the mere
17 facts -- the mere proposition that the City and its police
18 officers presented to the prosecutor and participated in the
19 use at Nixon's criminal trial of evidence that the police
20 officers and the City knew, or should have known, was false
21 evidence. That's one kind of claim. Let me just refer to
22 that as the -- just for shorthand, as a recklessness claim,
23 okay, without trying to give any significant legal label to
24 it. Just to kind of distinguish it.

25 And the other kind of claim is the more sinister

1 one, as I've called it. That is that the City did more than
2 that. The City wasn't just negligent or reckless in -- the
3 City, through its police officers, knowingly caused the
4 fabrication of false evidence, which led to the wrongful
5 conviction of Mr. Nixon. The sinister type of claim.

6 Now, in your complaint and in your claims in the
7 case, the District Court case, is Nixon alleging both types
8 of claims, or only one or the other?

9 MS. JAMES: I need --

10 THE COURT: Or something different?

11 MS. JAMES: I need to make a slight correction on
12 your description of the first claim. It's not simply that
13 Detroit Police officers knew that this witness was lying.
14 It's that they reduced that knowledge to writing in a memo,
15 and withheld that memo from Mr. Nixon and his defense team,
16 which they could have used to more strictly impeach this
17 witness.

18 It was evidence that Detroit Police knew that the
19 witness was lying, that he was deprived -- evidence that the
20 Detroit Police knew that Vaughn was lying, that was withheld
21 from Mr. Nixon during the course of his criminal trial, so
22 that he was not able to use it to undermine Vaughn's
23 testimony.

24 He was able to undermine it in other ways, but
25 having evidence that the Detroit Police shared his opinion of

1 that witness would have been powerful. And that evidence was
2 withheld from him. That forms the basis of that claim.

3 THE COURT: All right. So it's not just -- it is
4 not that the City knew or should have known that Vaughn's
5 testimony was coached and unreliable and false.

6 MS. JAMES: Correct.

7 THE COURT: But rather that they knowingly
8 withheld from Nixon's defense counsel a written statement by
9 one of their officers suggesting that.

10 MS. JAMES: Exactly.

11 THE COURT: All right. So that is something more
12 than the kind of recklessness that I was -- or negligence I
13 was referring to in my hypothetical question. Right?

14 MS. JAMES: Exactly. Yes.

15 THE COURT: Okay. So we have that. And then, of
16 course, you've got this stuff about Detective Jimenez and Mr.
17 January.

18 MS. JAMES: Yes.

19 THE COURT: But is the -- so Nixon's claim in the
20 District Court case is based on this withholding of the memo,
21 the Staples memo, and also the things that are alleged in the
22 January affidavit about Detective Jimenez.

23 But is there also a claim in there, in the City's
24 -- or in Nixon's complaint in the District Court action that
25 more of the -- I'll call it more innocent type of negligence

1 or recklessness claim against the City and its officers, that
2 is just that they -- it's enough to make a claim against them
3 that they knew, or should have known, that this evidence they
4 were using and gathering and giving the prosecutor, and that
5 was being used against Nixon, was false.

6 MS. JAMES: No, there is not. Federal civil
7 rights claims aren't premised on negligence. They must be
8 elevated beyond simply that standard.

9 THE COURT: To what standard?

10 MS. JAMES: These particular claims. Now, there
11 are some other Fourth Amendment claims that look at sort of
12 objectively unreasonable conduct.

13 But these particular claims in this case have to
14 do with intentional conduct. And we have alleged some type
15 of intentional conduct in all of our counts, with the
16 exception, I think, of supervisory liability and municipal
17 liability, which are typically couched in terms of deliberate
18 indifference, where there's deliberate indifference to the
19 Constitutional rights of the plaintiff.

20 Where there is some -- it's higher than negligence
21 where there is a known risk of the Constitutional violations,
22 and a deliberate decision to ignore that risk, be indifferent
23 to it, and undergo the conduct anyway.

24 THE COURT: All right. So how would you answer my
25 question, then, about is there a -- maybe you've answered it.

1 Maybe what you're saying is there's only the sinister type of
2 claim against the City and its police officers, not a mere
3 negligence or recklessness type claim that's based on simply
4 saying the City and its police officers knew that this
5 evidence being used against Nixon was false, and they let it
6 happen anyway.

7 MS. JAMES: In this case, you are correct. That
8 might not be true of every single civil rights case, but in
9 this case that is correct.

10 THE COURT: And do you think your complaint filed
11 in the District Court is capable of being read -- so it was
12 limited in that way?

13 MS. JAMES: Yes. I believe that's correct. Like
14 I said, even the count that invokes the Fourth Amendment
15 still alleges intentional or deliberate conduct.

16 THE COURT: All right. So what else would you
17 like to say, then, Ms. James? Anything?

18 MS. JAMES: I have exhausted my notes. Thank you,
19 Your Honor.

20 THE COURT: All right. Thank you. Mr. Swanson,
21 as I normally do in motion hearings, I'll let you reply
22 briefly in support of the City's motion, since you represent
23 the moving party. Go ahead.

24 MR. SWANSON: Thank you, Your Honor. First, as
25 more of a housekeeping matter, to the extent this Court

1 grants Nixon leave to supplement with an affidavit, the City
2 would request an opportunity to respond to any such affidavit
3 with evidence of its own to contradict whatever claims are
4 made in the affidavit, if there is one that's filed.

5 THE COURT: And that will be granted. That's fair
6 and reasonable, and that will be part of it. Yes. Go on.

7 MR. SWANSON: Okay. Nixon's counsel said during
8 her presentation that based on the Staples memo the City of
9 Detroit "knew that Vaughn's testimony was coached." And
10 that's certainly not what the Staples memo says.

11 There is an allegation in there that it was
12 coached by family members, but there's nothing in there which
13 indicates Staples knew that it was coached. There's not a
14 statement that says that he spoke to other family members,
15 who told him that they coached Vaughn. There is not an
16 admission in there by Vaughn that he was coached.

17 So there's nothing which would mean that Staples
18 had actual knowledge of any sort of coaching.

19 And in that regard, --

20 THE COURT: Well, what he said in the memo is:
21 "This new statement," and he's referring to the statement by
22 Vaughn, "this new statement was obviously coached by family
23 members." Right?

24 MR. SWANSON: True.

25 THE COURT: Okay. So what you're saying is that

1 should be rather Staples saying basically his opinion, but
2 not something based on any extrinsic evidence.

3 MR. SWANSON: Yes, Your Honor, that's what I'm
4 saying.

5 THE COURT: All right. Go ahead.

6 MR. SWANSON: Okay. With respect to the request
7 for declaratory relief, I think the City's motion was quite
8 clear that it sought dismissal of the City from the lawsuit.
9 I believe that's an exact line in the proposed order.

10 So to the extent there was any confusion, I don't
11 believe there should have been, because the City quite
12 clearly asked to be dismissed with prejudice from the
13 lawsuit.

14 Now, going back to the complaint, there are
15 certainly allegations regarding the Staples memo and the
16 January affidavit. And the complaint also contains numerous
17 allegations which are very similar to the allegations which
18 were made during trial and in the habeas petition, that
19 Staples relied on Vaughn's statements to arrest and charge
20 Plaintiff, despite knowing that they were false, you know,
21 that the City essentially didn't complete a full
22 investigation of the crime, and that it improperly
23 interviewed people, and all of these allegations, or many of
24 these allegations, were also raised during the trial and in
25 the habeas petition, and I think the City pointed many of

1 these out in its reply.

2 So part of the core nucleus of facts which form
3 the basis for the complaint, those facts were alleged well
4 prior to the City filing for bankruptcy.

5 And with respect to the complaint, it does contain
6 eight counts here. But, and I'm sure Mr. Nixon's counsel
7 will correct me if I'm wrong, but to me it only appears that
8 there's one claim against the City of Detroit, and that claim
9 is in count six. And that count specifically names the City
10 of Detroit as a Defendant, while none of the other counts
11 name -- specifically name the City of Detroit as a Defendant.

12 And that count is for municipal liability under
13 *Monel*, a policy and practice claim, and it essentially
14 asserts that the City tolerated, enabled, approved, ratified,
15 actions that constituted improper, flawed, erroneous, and
16 inappropriate police investigative methods, which were a
17 moving force in the violation of the Constitutional rights of
18 citizens, including Plaintiff Kenneth Nixon.

19 So it appears that the real claim against the City
20 is not so much premised on the specific actions which took
21 place in Nixon's case, but it's based on the larger policies
22 and practices that Mr. Nixon alleges were in place, and which
23 due to those policies and practices, led to his eventual
24 conviction, which Plaintiff has alleged to be unlawful.

25 And I just wanted to point that out to the Court

1 because it is a much broader claim which relies on many more
2 potential pieces of evidence than the two very narrow pieces
3 of evidence which Plaintiff asserts were not discovered until
4 after the City filed for bankruptcy, which, again, the City
5 would contend were the sum and substance of what's alleged
6 prior to the City's bankruptcy, and thus were within the fair
7 contemplation of the City.

8 And with that, the City has nothing further.

9 THE COURT: All right. Thank you.

10 MS. JAMES: Your Honor, may I respond to that last
11 point?

12 THE COURT: No. We're done with argument.

13 MS. JAMES: Okay.

14 THE COURT: What I will do now is set a deadline
15 for supplementing the record with evidence that we've been
16 talking about.

17 And I'll prepare and enter an order that reflects
18 these deadlines, and what it is that I'm permitting
19 supplementation regarding.

20 The supplementation of the record by evidence will
21 be permitted by each side, starting with Mr. Nixon, and
22 followed thereafter by the City, and the supplementation
23 opportunity is limited to evidence regarding when Mr. Nixon,
24 either personally or through any of his attorneys or agents,
25 first learned of the Staples memo, and first learned that Mr.

1 January was alleging, or had alleged, any of the facts
2 regarding Detective Jimenez that are alleged in his March '22
3 affidavit.

4 Now, this evidence, supplementary material, this
5 evidence, doesn't have to be limited to, in the case of Mr.
6 Nixon's side, to simply an affidavit from Mr. Nixon. And,
7 you know, I'm not limiting it to that. I think that was the
8 specific thing that was referred to by Ms. James as being
9 something they could file.

10 It's not limited to that. It's limited to any of
11 it. It's permitted for any evidence.

12 And this will be permitted by each side. First,
13 Mr. Nixon must file any such supplementary material that he
14 wants to file, and I'll set a deadline for that. Ms. James,
15 how much time do you want to do this -- to file this, so that
16 I can figure out what deadline to set for you.

17 MS. JAMES: Looking at the calendar, given the
18 holidays and my co-counsel is out of the country next week,
19 as I understand it, I think we can do this relatively
20 quickly. But I think I'd like to have until the 12th of
21 January, but I'm going to try to get it in sooner than that.

22 THE COURT: Well, if I set a deadline of the 12th
23 of January, there is no reason you'll have to get it in
24 sooner. Just no later than that date.

25 And I'm willing to give you that much time if that

1 works. And I understand the holidays are coming up, and so
2 that's fine. If you want a deadline of January 12, that's
3 fine. Is that what you want?

4 MS. JAMES: Yes. January 12th. I appreciate
5 that.

6 THE COURT: All right. And then the City will be
7 permitted to file the same sort of supplementary material.
8 And, Mr. Swanson, how much time after January 12 do you want
9 me to give the City?

10 MR. SWANSON: The City would request February
11 12th.

12 THE COURT: All right. Do the parties want an
13 opportunity to file a brief -- supplemental briefs at the
14 same time they file this supplemental evidence? I'm not
15 going to require it, but I'm wondering if you want leave to
16 do that. Ms. James?

17 MS. JAMES: Your Honor, I think it might be
18 helpful both to place the supplemental evidence in its
19 context, and potentially clarify the municipal liability
20 standard.

21 THE COURT: That's not an issue I've offered to
22 permit further briefing on. That last point.

23 MS. JAMES: I see. You're asking for briefs
24 limited to the evidence that was discussed.

25 THE COURT: Yes. What it shows and why it's

1 significant to the issue of fair contemplation.

2 MS. JAMES: I see.

3 THE COURT: And, you know, it's up to you all
4 whether you want that opportunity or not. You tell me.

5 MS. JAMES: Yes, please.

6 THE COURT: And Mr. Swanson, for the City, same
7 answer, or what?

8 MR. SWANSON: Yes, Your Honor.

9 THE COURT: All right. Supplemental briefs not to
10 exceed 300 pages. I'm kidding, believe me.

11 All right. I won't set page limits, but the idea
12 is, you know, you're going to limit it to the evidence and
13 we'll see what the evidence is that each side is going to
14 file.

15 All right. So that will be permitted, too.
16 Again, but to be filed the same dates, by the same deadlines
17 as with respect to the evidence.

18 I'm going to schedule a further non-evidentiary
19 hearing on this motion to occur soon after these things get
20 filed. If I should decide at that further hearing that we
21 actually need an evidentiary hearing, that is that there are
22 factual disputes that are material and that I need to resolve
23 in order to rule on this motion, that require an evidentiary
24 hearing with testimony, I'll schedule one at that point. But
25 that's not what this further hearing is going to be, and

1 that's why I'm saying it's a non-evidentiary further
2 telephonic hearing.

3 This will be -- just a moment. I can do this,
4 subject to your availabilities, on Wednesday, February 21,
5 2024, at 1:30 p.m. Does that date and time work on your
6 calendars? Mr. Swanson?

7 MR. SWANSON: Unfortunately, Your Honor, I am out
8 of town that week. It's my kids' winter break, so it would
9 be more convenient to do it the following Wednesday, although
10 if the Court deems it necessary, I'm happy to do it.

11 MS. JAMES: No, I join your concern. Same for my
12 family.

13 THE COURT: Is February 28 a good date for each
14 side, then, Mr. Swanson?

15 MR. SWANSON: Yes, Your Honor.

16 THE COURT: February 28, 1:30. Ms. James, same
17 question.

18 MS. JAMES: Yes, that's available for me.

19 THE COURT: All right. So that will be the date
20 and time of the further evidentiary -- non-evidentiary
21 hearing on this motion.

22 Now, I'll put this in the order, but I just want
23 to flag for you that for that further hearing, because it's
24 occurring after January 1, there's going to be a new -- a
25 different telephone number and access code that you'll need

1 to use than what you've used for today.

2 MS. JAMES: Yes.

3 THE COURT: We're switching over to -- basically
4 it's going to involve a new phone number and access code. So
5 I will put that new phone number and code in the -- I'll make
6 sure that's in the order that I prepare and enter. Hopefully
7 that order will get out today, but if not, no later than
8 tomorrow.

9 And so do note that. You'll need to dial in on a
10 different number when this happens.

11 So, all right. Now, is there anything else in
12 this order that I'm doing to do for further proceedings that
13 either of you thinks I should put in there or cover? Mr.
14 Swanson?

15 MR. SWANSON: I don't have anything further, Your
16 Honor.

17 THE COURT: Ms. James?

18 MS. JAMES: Again, I would recommend the further
19 briefing on the municipal liability standard under *Monel*
20 might be helpful. But I understand the Court might not
21 entertain it.

22 THE COURT: Well, tell me what you mean by that.
23 Further briefing, what about it?

24 MS. JAMES: Well, really to put the way that the
25 counts there are articulated into its proper context, based

1 on the conclusion of Mr. Swanson's argument there may be some
2 confusion about how municipal liability works in connection
3 to the individual actions of the officers.

4 THE COURT: Is this to argue something other than
5 what you've argued already orally in this hearing today?

6 MS. JAMES: It is to give further information
7 about how municipal liability claims are analyzed under
8 Section 1983. So it does connect to, you know, the fair
9 contemplation standard of that claim.

10 THE COURT: Mr. Swanson, your response to this
11 request for a further briefing opportunity by Mr. Nixon?

12 MR. SWANSON: Your Honor, the City has no
13 objection to the request, provided that it's allowed to
14 respond to the request.

15 THE COURT: All right. Okay. So I'll allow this.

16 Now, Ms. James, and these briefs will be due at
17 the same time as the other things that I'm going to cover.

18 MS. JAMES: Okay.

19 THE COURT: But how would you describe this
20 further, or this supplemental briefing, the subject matter of
21 the supplemental briefing for me to say in the order, Ms.
22 James? How would you put it?

23 MS. JAMES: I would put it to further brief the
24 standard of municipal liability under Section 1983, as it
25 relates to the fair contemplation of Mr. Nixon's claims.

1 THE COURT: Mr. Swanson, any problem with that
2 description for you?

3 MR. SWANSON: No, Your Honor.

4 THE COURT: All right, I'll go with that, Ms.
5 James.

6 MS. JAMES: Thank you, Your Honor.

7 THE COURT: And I will include that in the order,
8 and hopefully the order will be nice and clear for everyone,
9 and accurately reflect what I've just gone through and said.

10 And we'll have further proceedings from there.
11 And so at this point, we'll conclude today's hearing. I
12 thank you both for your time and your efforts here, both in
13 writing and in oral argument, and your patience in responding
14 to my frequent interruptions and questions in this hearing.

15 But I do very much want to get it right and make
16 sure I understand what the parties arguments are and what the
17 issues are here.

18 So thank you both, and we'll talk again. I'll
19 wish each of you happy holidays.

20 And I'll finish by saying that if the parties do
21 settle anything that would narrow the issues or settle this
22 dispute that's in front of me before the next hearing date,
23 please file a stipulation letting us know that, and submit a
24 proposed order, and that would be just fine.

25 I do hope the parties will, I'll say continue

1 discussing possible resolution by agreement of this dispute,
2 since I'm sure you have already had such discussions before
3 today's hearing.

4 So thank you both, and we'll talk to you next
5 time. Thank you.

6 MS. JAMES: Thank you, Your Honor.

7 MR. SWANSON: Thank you.

8 (Time Noted: 2:58 p.m.)

9 CERTIFICATE

10 I, RANDEL RAISON, certify that the foregoing is a
11 correct transcript from the official electronic sound
12 recording of the proceedings in the above-entitled matter, to
13 the best of my ability.

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16 _____ February 13, 2024

17 Randel Raison
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