Case No. 2:14-cv-14899-BAF-RSW

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

On appeal from the
United States Bankruptcy Court
Eastern District of Michigan
Southern Division

In re

CITY OF DETROIT, MICHIGAN,

Debtor.
_____/

Bankr. No. 13-53846
Chapter 9
Hon. Steven W. Rhodes

John P. Quinn,

Appellant,

v.

City of Detroit, Michigan,

Appellee.
_____/

Dist. Ct. Case No.
14-CV-14899

District Judge:
Hon. Bernard A. Friedman

Magistrate Judge:
Hon. R. Steven Whalen

APPELLANT QUINN'S BRIEF ON APPEAL

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CORPORATE DISCLOSURE STATEMENT

I am not a nongovernmental corporate party.

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JURISDICTIONAL STATEMENT

A. BANKRUPTCY COURT'S SUBJECT-MATTER JURISDICTION.

The bankruptcy court's jurisdiction is based on 28 U.S.C. § 1334 and this Court's Local Rule 83.50(a). The order from which I appeal is a final order confirming a plan of adjustment, a core proceeding under 28 U.S.C. § 157(b)(2)(L).

B. DISTRICT COURT'S JURISDICTION.

This Court has jurisdiction to decide this appeal. The United States District Court for the Eastern District of Michigan has not authorized appeals to the Bankruptcy Appellate Panel (see 28 U.S.C. § 158(a)(6)). Final order of the bankruptcy court may be appealed to this Court by right under 28 U.S.C. § 158(a)(1). An order is final for the purpose of an appeal if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). The order from which I appeal, the Order Confirming Eighth Amended Plan of Adjustment of Debts of the City of Detroit ("Confirmation Order"), R 30, D 8272,[1] is a final order. *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th

[1] In this Brief I will use the following format to reference items in Appellant John P. Quinn's Designation of the Contents of the Record ("Record Designation"): "RN_1, DN_2 ," where N_1 is the Item No. in the Record Designation and N_2 is the Bankruptcy court's docket number. For ease of reference, a copy of the Record Designation is included in the Appendix.

Cir.1992).

C. FILING DATES ESTABLISHING TIMELINESS OF APPEAL.

The bankruptcy court entered the Confirmation Order, from which I appeal, on November 12, 2014. R 30, D 8272. I filed my Notice of Appeal on November 21, 2014. R 31, D 8369. The appeal is therefore timely under Fed.R.Bnkr.P. 8002(a) [effective until December 1, 2014].

D. APPEAL FROM FINAL JUDGMENT.

This appeal is from a final judgment. See part B, *supra*.

STATEMENT OF ISSUES PRESENTED

I. DID THE BANKRUPTCY COURT ERR AS A MATTER OF LAW BY CONFIRMING THE EIGHTH AMENDED PLAN FOR THE ADJUSTMENT OF THE DEBTS OF THE CITY OF DETROIT ("POA") EVEN THOUGH, BY ATTEMPTING TO IMPOSE THE "ASF RECOUPMENT" ON CLAIMS WHOSE RETIREE HOLDERS HAVE NOT INDIVIDUALLY AGREED TO ITS APPLICATION TO THEIR CLAIMS, THE POA IMPOSES NON-CONSENSUAL LESS FAVORABLE TREATMENT ON THOSE CLAIMS THAN ON OTHER CLAIMS IN CLASS 11, IN VIOLATION OF 11 U.S.C. § 1123(A)(4)?

STANDARD OF APPELLATE REVIEW: *De novo.*

II. DID THE BANKRUPTCY COURT ERR AS A MATTER OF LAW BY CONFIRMING THE POA EVEN THOUGH IT PURPORTS TO ADJUST NOT ONLY THE DEBTOR'S LIABILITY, IF ANY, ON THE CLAIMS INCLUDED IN CLASS 11, BUT ALSO THE LIABILITY OF THE GENERAL RETIREMENT SYSTEM ("GRS"), WHICH IS NOT A DEBTOR IN THIS CASE, ON THOSE CLAIMS, IN VIOLATION OF 11 U.S.C. § 941?

STANDARD OF APPELLATE REVIEW: *De novo.*

III. DID THE BANKRUPTCY COURT ERR AS A MATTER OF LAW BY ENJOINING ALL INDIVIDUALS AFFECTED BY ASF RECOUPMENT FROM COMMENCING ANY PROCEEDINGS AGAINST THE GRS AND ITS TRUSTEES, OFFICERS, EMPLOYEES OR PROFESSIONALS, NONE OF WHOM ARE DEBTORS IN THIS CASE, ARISING FROM GRS'S COMPLIANCE WITH THE PLAN OR THE ORDER CONFIRMING EIGHTH AMENDED PLAN FOR THE ADJUSTMENT OF DEBTS OF THE DEBTOR?

STANDARD OF APPELLATE REVIEW: *De novo.*

CONCISE STATEMENT OF THE CASE

FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW:

Detroit, the Debtor in this bankruptcy, is a Michigan home-rule city. R13, D4391 at 85.[2] Long before commencement of this bankruptcy, Detroit had, by ordinance, created two retirement systems: the General Retirement System ("GRS") and the Police and Fire Retirement System ("PFRS"). *Id.* at 105. This appeal deals only with GRS. The ordinances creating GRS are codified in Chapter 47 of the Detroit City Code, §§ 47-1-1 *et seq*.[3] GRS is governed, subject to state and local law, by its Board of Trustees, which includes representatives of the Mayor, the City Council, current employees who are members of GRS and GRS retirees, as well as a community representative. *Id.* § 47-1-4; R13, D4391 at 104.

GRS manages two retirement plans that are relevant to this appeal: the Defined Benefit Plan and the Annuity Savings Plan.[4] Detroit City Code, *supra* §§ 47-1-21, 47-2-1 *et seq*. The plans' assets are held in a trust, of which the Board of

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[2] Regarding the format I use for citations to the record, see note 1, *supra*.

[3] The Detroit City Code is available online at https://www.municode.com/library/mi/detroit/codes/code_of_ordinances.

[4] "Annuity Savings Plan" is the term used by the Debtor in the Bankruptcy court. See, *e.g.*, R13, D4391 at 11, 106. In the Detroit City Code, the same plan is called the "1973 Defined Contribution Plan." See, *e.g.*, §§ 47-2-1, 47-2-8. In this Brief I will use the term used in the bankruptcy court.

Trustees serves is the trustee. *Id*. § 47-2-20. The Defined Benefit Plan is funded entirely by employer contributions and investment returns. It is used to pay pensions for retired employees and their designated surviving beneficiaries, if any. *Id*. § 47-2-18(c); R 13, D 4391 at 105. The Annuity Savings Plan is funded entirely by contributions from those GRS members, including me until I retired in 2008, who individually choose to contribute through payroll deductions, and by interest on those contributions. *Id*. At 106; Detroit City Code § 47-2-18(a). The GRS trustees determine the rate of interest to be credited each year. *Id*.[5] Upon retirement, a GRS member who has contributed to the Annuity Savings Plan can: (a) withdraw the money she has contributed along with accumulated interest, (b) use that money and interest to purchase an annuity that will be paid by GRS or (c) elect a combination of those options, withdrawing some of the money and using the rest to purchase an annuity. *Id*. § 47-2-8(a) Even before retirement, a GRS member who has participated in the Annuity Savings Plan can, under some circumstances, borrow from GRS against the money she has contributed to the Annuity Savings Plan; and after 25 years of service she can withdraw all or some of that money

[5] The cited Code provision includes limitations on the trustees' discretion to credit interest. Those limitations became effective in 2011 and were not in effect during most of the period when the Debtor maintains that the trustees credited excess interest.

without retiring. *Id*. § 47-2-8(b) and (d), 47-2-22.

Each plan includes several accounting entities called "funds," but the assets in all the funds are part of the same trust and are commingled for investment purposes. Of particular interest in this appeal is the Annuity Savings Fund ("ASF"). This fund consists of individual accounts holding contributions to the Annuity Savings Plan by current Detroit employees and the interest earned on those contributions. R 13, D 4391 at 23 *et seq*.

On July 18, 2013 Detroit filed a Voluntary Petition in the bankruptcy court. R 1, D 0001. Over the course of several months it submitted ten versions of the plan for the adjustment of its debts required by 11 U.S.C. § 941. R 3, D 2708; R 4, D 2709; R 5, D 3380; R 6, D 3382; R 9, D 4140; R 10, D 4141; R 11, D 4271; R 12, D 4272; R 13, D 4391; R 14, D 4392; R 19, D 6257; R 20, D 6379; R 22, D 6908; R 24, D 7502; R 27, D 8045. The final version, the Eighth Amended Plan for the Adjustment of Debts of the City of Detroit ("POA"), was filed on October 22, 2014 and confirmed in an order dated November 12, 2014. R 30, D 8072.

The POA includes a classification of claims. I hold a Class 11 claim. Class 11 consists of GRS Pension Claims and is one of the classes that voted to accept the POA. R 13, D 4391 at 38; R 30, D 8272 at 19, ¶ s). The definition of a GRS Pension Claim (R 13, D 4391 at 13, ¶ 155) is rather convoluted but can be fairly

summarized for present purposes as follows:

> "GRS Pension Claim" means any Claim . . . against the City or any fund managed by the City (including . . . the pension funds[6]) based upon, arising under or related to any agreement, commitment or other obligation . . . for (a) any pension, disability or other post-retirement payment or distribution in respect of the employment of current or former employees or (b) the payment by the GRS to persons who at any time participated in, were beneficiaries of or accrued post-retirement pension or financial benefits under the GRS.

Although the Debtor and the retirement systems disagreed about the degree, they all maintained in the bankruptcy court that GRS and PFRS were underfunded when Detroit sought bankruptcy protection. R 13, D 4391 at 105. Detroit's liabilities for the under-funding of both systems were therefore treated as a debts subject to adjustment in the bankruptcy. The underfunding left GRS and PFRS with insufficient assets fully to comply with their expected future obligations to retirees, although they have sufficient assets to cover liabilities to retirees for several years.

The resulting potential plight of retirees became a major concern in the bankruptcy. Another major concern was the fate of the collection and other assets of the Detroit Institute of Arts ("DIA"), a Detroit-owned art museum which is widely regarded as a cultural treasure essential to the well-being not only of

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[6] As will become apparent, the POA's characterization of pension funds as funds managed by the City (*i.e.*, the Debtor) is inaccurate as a matter of law. Nonetheless, the quoted definition makes it clear that a GRS retiree's claim for pension payments is a Class 11 claim.

Detroit, but of the entire State of Michigan. Ultimately, both concerns were addressed in a complex, multiparty arrangement that came to be known as the Grand Bargain.

The Grand Bargain resulted in the creation of a perpetual charitable trust to which Detroit transfers all its rights, title, and interest in the assets of the DIA for the benefit of the people of Detroit and Michigan, thus putting those assets beyond the reach of Detroit's present and future creditors. In return, the State, the DIA, several philanthropic organizations and others undertake to make substantial payments to PFRS and GRS to help the systems meet their obligations to retirees.[7]

The Debtor maintains that, even with the Grand Bargain and other funding for the pension systems described in the POA, the systems remain underfunded. The POA therefore adjusts the amounts to be paid to retirees to satisfy pension obligations. In the case of GRS, these adjustments include 4.5% reductions in monthly pension payments to all retirees and the elimination of cost-of-living adjustments, at least for a substantial period. R 36, D 8993 at 36.

[7] This summary of the Grand Bargain omits many details that are not germane to this appeal. A more complete description can be found in the Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing, R 36, D 8993 at 18 *et seq*.

For most GRS retirees, the 4.5% reduction and elimination of cost of living are the only adjustments to their pensions. However, the POA provides for additional reductions for some retirees, including me. The Debtor attributed the under-funding of GRS, in part, to certain long-standing practices of the GRS Board of Trustees that it said had the effect of decreasing the assets available to the Defined Benefit Plan and thereby increasing the amount it was required to pay GRS to fund that plan. In particular, the Debtor pointed to two such practices that it claimed violated the Board's fiduciary duties: the "13th check" and excess interest credited to ASF.

The "13th check" refers to a practice, in years when GRS's actual investment return exceeded its assumed rate of return, of paying out a portion of the excess to retirees, in addition to their prescribed twelve monthly pension payments. R 13, D 5391 at 106. In addition, in some years the GRS trustees credited ASF with interest greater than the actual returns earned on GRS's investments. There was at least one year in which GRS's investments suffered a significant loss, but the trustees credited ASF with interest at the assumed rate of return, 7.9%. For any fiscal year between 2003 and 2013, the Debtor characterizes interest credited to ASF in excess of GRS's actual rate of investment return as "excess interest" and maintains that both the "13th check" and the excess interest depleted funds available for the

Defined Benefit Plan, thus increasing GRS's underfunding and Detroit's indebtedness to GRS. According to a report submitted in 2011, The 13th check program and the ASF excess interest credits had, by 2008, cost the Debtor $1.92 billion. R 6, D 3382 at 82. From 2003 through 2013, ASF excess interest alone cost $387 million. R 30, D 8272, at 61.

In its POA, the Debtor made no effort to remedy the under-funding it attributes to the 13th check. However, the POA does include provisions, characterized as the "ASF Recoupment," designed to recover part of the excess interest credited to ASF accounts. The mechanism by which this recovery is accomplished varies depending on whether there exists a current ASF account from which the money can be deducted and , if so, whether the balance in that account is sufficient to cover the sought-for recovery. Because I retired 2008, I have not had an ASF account since then. (As noted above, only current employees generally have ASF accounts.) This appeal therefore addresses the recovery mechanism used in the case of a retiree with no ASF account.

Here is a description of that mechanism (R 27, D 8045 at 41):

1. The maximum recoupment amount for each retiree is that retiree's "Annuity Savings Fund Excess Amount," defined in ¶ 22 at p. 3 of the POA, R 27, D 8045. That amount is calculated to include the excess

interest credited to the retiree's ASF account, including compound interest, between July 2, 2003 and June 20, 2013.

2. That maximum is converted into a monthly amount, amortized over the life expectancy(ies) of the retiree and any designated beneficiary who might survive the retiree using a 6.75% discount rate. POA, R 27, D 8045, at 41.

3. That monthly amount is deducted from the already reduced pension payment the retiree or surviving beneficiary receives each month from GRS until the retiree and any surviving beneficiary die or until the entire Annuity Savings Fund Excess Amount plus interest at 6.75% per annum has been deducted, subject to ¶¶ 4 and 5, below. *Id.*

4. The total amount deducted from a retiree's and her beneficiary's pension checks (in addition to the 4.5% reduction for all retirees and beneficiaries) cannot exceed 20% of the highest value of the retiree's ASF account during the period July 1, 2003 to June 30, 2013, plus 6.75% interest.

5. The total deduction from a retiree's or beneficiaries monthly pension check, including the 4.5% deduction for all retirees, cannot exceed 20%.

In summary, all GRS retirees will experience 4.5% reductions in their pensions; and retirees subject to ASF Recoupment will experience reductions greater than 4.5% but not greater than 20%.

The POA provides an option by which some retirees affected by ASF recoupment can partially or fully avoid the rather high 6.75% interest rate used to amortize the recoupment. If such a retiree has or can raise the necessary funds early in 2015, she can make a cash payment to GRS covering all or part of the present value of her ASF Recoupment, and the amount of that payment will be deducted from the amount to be amortized and taken from pension payments. However, the total of such cash payments cannot exceed $30 million. According to the Debtor, the total present value of the amount to be recovered via ASF Recoupment is about $190 million, (R 30, D 8272 at 61) and most of that is to be recovered from retirees; so it is certain that most of the money to be obtained from retirees by means of ASF Recoupment will be deducted from their monthly pension checks.

The POA includes provisions for partial or full restoration of some pension benefits in 2023 or later if certain contingencies are met. It also provides for greater pension reductions, including greater additional reductions for retirees affected by ASF Recoupment, if certain receipts expected under the Grand Bargain are not received timely and fully.

I filed in the Bankruptcy court a timely motion for stay. R 33, D 8489. The Bankruptcy court denied that motion. R 35, D 8533.

RELEVANT PROCEDURAL HISTORY:

The relevant procedural history is included in the Filing Dates Establishing Timeliness of Appeal and the Facts Relevant to Issues Presented for Review, *supra*.

RULINGS PRESENTED FOR REVIEW:

I seek review of:

(1) the bankruptcy court's ruling that the POA does not violate 11 U.S.C. § 1123(a)(4) by imposing greater proportional reductions on the monthly pension payments of retirees in Class 11 affected by ASF Recoupment than on the monthly pension payments of other retirees in Class 11;

(2) the bankruptcy court's ruling that the POA does not violate 11 U..S.C. 941 be adjusting debts of GRS; and

(3) The bankruptcy court's injunction preventing persons affected by ASF Recoupment from pursuing claims against GRS, which is not a debtor in this case.

I pointed out the error in these rulings in my Objections to Fourth Amended Plan of Adjustment, R 17, D 5723.

SUMMARY OF ARGUMENT

11 U.S.C. § 1123(a)(4) applies to this case. It requires that the POA provide the same treatment for each GRS pension claim in Class 11 unless the holder of a particular claim agrees to less favorable treatment. The POA violates § 1123(a)(4). Without the individual consent of retirees whose GRS pension claims are affected by ASF Recoupment, it provides smaller proportional recoveries on those claims than on the GRS pension claims of other retirees in Class 11. The bankruptcy court's confirmation of the POA therefore was erroneous.

The bankruptcy court attempted to justify ASF Recoupment by treating it as the settlement of a claim by the Debtor against Class 11 members affected by ASF Recoupment. But ASF Recoupment is not a settlement of any such claim. The holders of claims affected by ASF Recoupment have not agreed to the purported settlement. Class 11 agreed to a settlement that includes ASF Recoupment; but, because of 11 U.S.C. § 1123(a)(4), Class 11 had no authority to make that agreement on behalf of the holders of claims affected by ASF Recoupment. Moreover, the provisions regarding ASF Recoupment in the POA do not provide the finality that is an essential element of any settlement of a claim under applicable law. The purported settlement does not protect persons affected by ASF Recoupment from litigation based on the purported claims against them.

11 U.S.C. § 941 applies to this case. It permits adjustment of the debts only of the Debtor. The POA adjusts GRS's debts to retirees, even though GRS is not a debtor in this case. The bankruptcy court's confirmation of the POA therefore was erroneous.

The Confirmation Order includes an injunction that prevents Class 11 members with claims affected by ASF Recoupment from prosecuting claims against GRS for their unadjusted pensions. However, GRS is not a debtor in this bankruptcy, and a bankruptcy court has no authority to enjoin the prosecution of claims against a party other than a debtor unless all the following conditions, among others, are met: (1) the non-debtor has contributed substantial assets to the re-organization; (2) the injunction is essential to implementation of the POA; (3) the POA provides a mechanism to pay for all or substantially all the claims affected by the injunction; (4) the POA provides an opportunity for those claimants who choose not to settle to recover in full; and (5) the bankruptcy court made no record of specific factual findings that support its conclusions justifying the injunction. In this case, none of the listed conditions was met.

The "equitable mootness" doctrine is in conflict with federal courts' duty to exercise the jurisdiction, including appellant jurisdiction, entrusted to them by Congress. The doctrine is inapplicable in Chapter 9 cases. Even if it were

applicable in this case, it would not prevent review and correction of the bankruptcy court's errors pointed out in this appeal. Relevant portions of the POA have not been substantially consummated, and the relief I seek would not affect the rights of parties not before the court or the success of the POA.

ARGUMENT

I. STANDARD OF REVIEW.

In this appeal I challenge certain of the bankruptcy court's conclusions of law. This Court reviews those conclusions *de novo*. *In re Made in Detroit, Inc.*, 414 F.3d 576, 580 (6th Cir. 2005).

II. SUMMARY OF RELEVANT MICHIGAN LAW ON PUBLIC-EMPLOYEE PENSIONS.

All the issues raised in this appeal deal with public-employee pensions, specifically, pensions paid to retired employees of Detroit, a Michigan municipal corporation. It will, therefore, be helpful to begin with a brief discussion of Michigan law governing such pensions.

The security of public-employee pensions is so important to the people of Michigan that they have included protection for those pensions in their fundamental law:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.
>
> Mich. Const., Art. IX, § 24

Both parts of this provision impose obligations having to do with "financial benefits." The first applies only to accrued benefits and tells us that the obligation it imposes is contractual in nature and that the accrued benefits are not to be diminished or impaired. The obligation imposed by the second part is not characterized as contractual, and it has to do with the funding of benefits, not their accrual. It directs that the benefits be funded some time before they accrue, that is, before they must be paid: even though the first sentence indicates that the benefits are pension benefits, payable after retirement, according to the second sentence they must be funded annually while the future retiree is still rendering services.

The record of the Constitutional Convention explains one distinction between the duty to fund and the duty to pay accrued benefits: the duty to pay accrued benefits corresponds to an individual right of each retiree to receive the benefits, and that right is enforceable by litigation. However, an individual

employee has no power to enforce the duty to fund pensions during her service.[8]

The constitutional provision raises questions that neither the provision itself nor the convention record answers. It refers to pension plans and retirement systems that have some sort of relationship to the state and its political subdivisions, but it provides no clear explanation as to the nature of these plans and systems or that relationship. It does not describe the mechanism by which benefits

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[8] MR. VAN DUSEN: Mr. Chairman, if I may elaborate briefly on Mr. Brakes answer to Mr. Downs' question, I would like to indicate that the words 'accrued financial benefits' were used designedly, so that the contractual right of the employee would be limited to the deferred compensation embodied in any pension plan, and that we hope to avoid thereby a proliferation of litigation by individual participants in retirement systems talking about the general benefits structure, or something other than his specific right to receive benefits. It is not intended that an individual employee should, as a result of this language, be given the right to sue the employing unit to require the actuarial funding of past service benefits, or anything of that nature. What it is designed to do is to say that when his benefits come due, he's got a contractual right to receive them. And, in answer to your second question, he has the contractual right to sue for them. So that he has no particular interest in the funding of somebody else's benefits as long as he has the contractual right to sue for his.

"MR. DOWNS: I appreciate Mr. Van Dusen's comments. Again, I want to see if I understand this. Then he would not have a remedy of legally forcing the legislative body each year to set aside the appropriate amount, but when the money did come due this would be a contractual right for which he could sue a ministerial officer that could be mandamused or enjoined; is that correct?

"MR. VAN DUSEN: That's my understanding, Mr. Downs." 1 Official Record, Constitutional Convention 1961, pp. 773-774, quoted in *Kosa v. Treasurer of State of Mich.*, 408 Mich. 356, 370, n. 21 (1980).

are to be funded, nor does it explain how we can determine whether the funding provided each year, for benefits that will not accrue for years to come, is sufficient to pay those benefits when they become due.

The answers to these questions and others are clarified in the Public Employees Retirement Investment Act, ("PERSIA"), codified at Mich.C.L. §§ 38.1132 *et seq*. There we learn that a public employee retirement system (referred to in the statute simply as a "system") is created or established by the State or one of its political subdivisions as a "separate and distinct trust fund" that holds its assets "for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the system." Mich.C.L. §§ 38.1132e(5), 381133(8). Each year (or every two years for a smaller system) the governing body of a system must obtain an actuarial evaluation of the system's assets and the present value of projected benefits payable to the members or beneficiaries of the system. Mich.C.L. § 38.1140h(4). This evaluation provides the basis for computing the annual required employer contribution. Mich.C.L. § 38.1140m. The system's governing body must prepare an annual report that contains, among other things, confirmation that the system received the required employer contribution for the fiscal year covered by the report. *Id.* If the employer fails to make the required annual contribution timely and in full, the system can

enforce the duty to do so by means of a civil action in a Michigan court. See, *e.g.*, *Shelby Twp. Police & Fire Retirement Bd. v. Shelby Twp.*, 438 Mich. 247 (1991); *Bd. of Trustees of the Policemen & Firemen Retirement Sys. of Detroit v. Detroit*, 270 Mich.App. 74 (2006).

III. THE METHOD PRESCRIBED IN THE POA AND ADOPTED IN THE CONFIRMATION ORDER FOR RECOUPING EXCESS INTEREST FROM RETIREES VIA ASF RECOUPMENT VIOLATES 11 U.S.C. § 1123(a)(4). THE BANKRUPTCY COURT ERRED AS A MATTER OF LAW BY MISINTERPRETING AND MISAPPLYING § 1123(a)(4) TO PERMIT INCLUSION OF THAT METHOD IN THE POA.

A. § 1123(a)(4) Requires that the POA Provide the Same Treatment for Each GRS Pension Claim in Class 11 Unless the Holder of a Particular Claim Agrees to Less Favorable Treatment. The POA Violates § 1123(a)(4). Without the Individual Consent of Retirees whose GRS Pension Claims Are Affected by ASF Recoupment, it Provides Smaller Proportional Recoveries on those Claims than on the GRS Pension Claims of Other Retirees in Class 11.

1. The GRS Pension Claims in Class 11 are liquidated. No post-confirmation procedure is needed or prescribed to determine the recovery on each claim in the class. In these circumstances, § 1123(a)(4) requires the same percentage recovery for each claim in the class, absent agreement by one or more claimants to a lesser percentage recovery. The POA imposes lower percentage recoveries on claims affected by ASF Recoupment without the individual agreement of the holders of those claims.

11 U.S.C. § 1123(a)(4) applies to this case. 11 U.S.C. § 901. It requires that the POA "provide the same treatment for each claim or interest of a particular class,

unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." This requirement can be difficult to apply to claims that are unliquidated or when the Plan establishes post-confirmation procedures for determining the amount to be paid to each claimant; so it is not surprising that most cases construing §1123(a)(4) arise in those contexts.[9]

However, the claims in Class 11 are easily and precisely liquidated by the application of mortality tables and a discount rate to each claimant's particular circumstances (ages of claimant and beneficiary, if any; amount of pension; *etc.*); and the POA sets forth rules and algorithms for precise calculation of each claimant's future pension benefits without making use of any post-confirmation procedures. Here the application of §1123(a)(4) is straightforward. It "restates a cardinal principle of bankruptcy law, namely that creditors of the same class have a right to equality of treatment." [10] Indeed, "the theme of the Bankruptcy Act is

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[9] See, *e.g., In re W.R. Grace & Co.*, 729 F.3d 311, text accompanying notes 22 to but not including 26 (3rd Cir. 2013), and cases cited therein. It bears noting that, even in these circumstances, the Sixth Circuit appears to give §1123(a)(4)'s requirement of the same treatment a stricter reading than other circuits. *Class Five Nev. Claimants v. Dow Corning Corp.* (*In re Dow Corning Corp.*), 280 F.3d 648, 660 (6th Cir. 2002), cited in *Grace*.

[10] 7 Collier on Bankruptcy ¶ 1123.01[4][a] (Resnick and Sommer, eds, 16th ed., 2014).

equality of distribution." [11] "Even though neither the Code nor the legislative history precisely defines the standards of equal treatment, the most conspicuous inequality that Sec. 1123(a)(4) prohibits is payment of different percentage settlements to co-class members." [12]

That is precisely what the Plan does by applying ASF Recoupment, in varying percentages, to some but not all claims in Class 11. Under the Plan, each claim for monthly pension benefits is reduced by 4.5% and COLA does not apply to the reduced pension. For most Class 11 claims, those are the only reductions to monthly pension benefits. However, class claims affected by ASF Recoupment will suffer an additional proportional reduction in monthly pension payments. For some claims, including mine, the additional reduction will be as much as 15.5%, for a total reduction of 20%. The difference between 20% and 4.5% cannot reasonably

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[11] *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941) (Douglas, J., for a unanimous Court), citing *Moore v. Bay*, 284 U.S. 4, 5 (1931) (Holmes, J., for a unanimous Court).

[12] *In re AOV Industries, Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986). The *AOV* majority went on to hold that requiring unequal consideration for the same proportional distribution within a class also necessarily violates §1123(a)(4). That holding has proved controversial. See *In re Dow Corning Corp.*, 255 B.R. 445, 497-98 (E.D.Mich. 2000), aff'd in part and remanded in part, 280 F.3d 648 (6th Cir.2002). However, the underlying principle, that payment of different percentage settlements to co-class members with liquidated claims violates §1123(a)(4), is uncontroversial.

be characterized as "approximate equality." See *In re W.R. Grace & Co.*, *supra*, at 121. It is substantially different treatment of claims.

In the Confirmation Order the bankruptcy court reasoned that § 1123(a)(4) had no application to ASF Recoupment "[b]ecause ASF Recoupment is a settlement mechanism designed to (a) implement a critical component of the City's comprehensive settlement of pension-related issues and (b) enable the trustees of the GRS (collectively, the 'GRS Trustees') to recover a portion of excess interest allocated to members' Annuity Savings Fund accounts from the GRS's traditional defined benefit pension plan (the 'GRS Traditional Pension Plan'), ASF Recoupment may be deemed (x) separate and distinct from the calculation of recoveries provided to holders of GRS Pension Claims and, thus, (y) disregarded for purposes of determining whether the Plan complies with section 1123(a)(4) of the Bankruptcy Code." That reasoning does not withstand scrutiny.

Nothing in the Bankruptcy Code nor in any case law I have found that construes the Code suggests that § 1123(a)(4) does not require individual agreement to less favorable treatment of a class claim if the less favorable treatment is regarded as critical to the class settlement. The very purpose of § 1123(a)(4) is to prevent a class from entering into a settlement that imposes less favorable treatment on some class members' claims without the individual agreement of those class

members. Nor is there anything in the Code or the cases suggesting that § 1123(a)(4) is inapplicable if the purpose of the less favorable treatment is to recover on account of previous favorable treatment of some class claimants. Such a recovery may be justified, but § 1123(a)(4) tells us that including less favorable treatment of some claims in a class settlement is not the way to do it. Less favorable treatment cannot be justified by any purpose at all – only by the consent of each class member whose claim receives less favorable treatment. None of this justifies a conclusion that less favorable treatment of some class claims is "separate and distinct" from the more favorable treatment of other class claims so as to make § 1123(a)(4) somehow inapplicable. The bankruptcy court's reasoning quoted above is nothing more than a transparent effort to reach a desired result by disregarding the clear dictate of the Bankruptcy Code.

2. The POA imposes non-consensual less favorable treatment on Class 11 claims affected by ASF Recoupment, not just on the holders of those claims.

In applying § 1123(a)(4) it is important to distinguish between claims and claimants. Claims must receive the same treatment absent agreement by each holder of a claim that receives less favorable treatment. There is no such requirement as to claimants. *In re Heron, Burchette, Ruckett & Rothwell*, 148 B.R. 660 (Bankr. D.D.C. 1992) provides a helpful example of the distinction.

Heron, was a Chapter 11 case. The debtor was a partnership. In the Plan of Reorganization, Class IV(A) consisted of the claims of partners who had left the firm before February 1990. Some of those former partners had agreed to make contributions to fund the plan, and others had not. The plan provided disparate treatment on the basis of whether or not a former partner had so agreed. It also incorporated settlements by which some contributing former partners had obtained substantial discounts in their contributions. In addition, contributing, but not non-contributing, former partners benefitted from a permanent injunction (along with related releases and a covenant not to sue) protecting them from suits by other partners and creditors of the firm.

The court held that protecting contributing former partners from future litigation while providing no such protection for non-contributors did not implicate § 1123(a)(4). It had no impact on the claims in Class IV(A): it only protected some holders of such claims, not the claims themselves. Similarly, the discounts provided some contributing partners did not violate § 1123(a)(4) because the discounts affected their contributions, not their Class IV(A) claims.

The plan also provided for distributions to Class IV(A) members if certain contingencies were met. The contingencies applicable to non-contributing class members and members who defaulted on their contributions were less likely to be

satisfied than those for contributing members. The difference was merely theoretical because everyone agreed there was no realistic chance either set of contingencies would ever be satisfied. Nonetheless, the court held that this provision violated § 1123(a)(4): the distributions, in the unlikely event they might ever happen, would amount to recoveries on Class IV(A) claims, so the different sets of contingencies were differential treatment of those claims. The court therefore conditioned plan confirmation on the debtor obtaining agreement to amend the plan to provide that all members of Class IV(A) would receive distributions simultaneously on a pro rata basis.

It is noteworthy that the *Heron* court did not concern itself with the reasons for differential treatment. One could easily argue that non-contributing former partners deserved less favorable treatment than contributing former partners, but no such argument was considered. The question whether some members of a class deserve less favorable treatment than others is distinct from the question whether that less favorable treatment is applied to class claims or merely to the holders of those claims, and only the latter question is relevant under § 1123(a)(4).

In this case, with reference to retirees in Class 11, it cannot be seriously disputed that claims affected by ASF Recoupment, not merely the holders of those claims, receive less favorable treatment. The definition of "GRS Pension Claim,"

the only type of claim in Class 11, makes it explicit that Class 11 claims are for pension payments; and the pension payments affected by ASF Recoupment are subjected to greater proportional reductions than other pension payments in the class. No retiree in Class 11 who is affected by ASF Recoupment can be required to accept this less favorable treatment. Rather, ASF Recoupment can be applied only to the claims of those particular retirees who agree to accept less favorable treatment.

Any attempt to justify this non-consensual less favorable treatment by recounting a history of excessive interest allocations by GRS to the ASF is unavailing. §1123(a)(4) makes no exception allowing differential treatment for which the Debtor can articulate, or even prove, some justification: its prohibition of non-consensual less favorable treatment of claims is absolute. If the alleged excessive allocations actually occurred and can serve as justification for penalizing the affected class members, then presumably someone has a claim against those favored by the allocations. If that is the case, then whoever has such a claim is free to prosecute it. But §1123(a)(4) tells us the POA cannot be used as a shortcut to skip the niceties of pleading and proof and simply take the money from the putative defendants to give it to the presumed victim(s).

Moreover, according to the Debtor the claimants affected by ASF Recoupment are not the only members of Class 11 who have benefitted from GRS's alleged misallocation of funds. The Debtor says the recipients of "thirteenth checks" have been similarly unfairly enriched. Yet the POA makes no provision for special reduction in the claims of thirteenth-check recipients. Thus, even if §1123(a)(4) permitted discrimination among class claims when it can somehow be justified, imposing extra reductions on the claims of class members affected by ASF Recoupment, but not on the claims of recipients of thirteenth checks, would still violate the statute because the POA fails to provide the same treatment for the claims of class members affected by ASF Recoupment and the claims of members who received thirteenth checks.

B. ASF Recoupment Cannot Be Justified as a Settlement Because it is Not a Settlement.

In the Confirmation Order, the bankruptcy court characterized ASF Recoupment as a "settlement mechanism" apparently a mechanism to help implement the settlement of Class 11 claims. R 30, D 8272 at 8 - 9. I have discussed above the failure of this characterization to avoid the mandate of § 1123(a)(4). *Supra* at 24. Seven weeks later, when the court released its Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and

Approving Exit Financing (R 36, D 8993), ASF Recoupment had become the "Annuity Savings Fund Recoupment Settlement," or "ASF Settlement." *Id.* at 41 - 45. This ASF Settlement is characterized as the settlement of claims the Debtor had against persons enriched by excess interest credits to their ASF accounts, which excess credits had the effect of increasing the under-funding of the GRS Defined Benefit Plan and thus increasing Debtor's liability to that plan. *Id.* at 41 - 42. Apparently the idea is that, by agreeing to the ASF settlement, all Class 11 members have waived any objection to ASF Recoupment.

But there is no "ASF Settlement." The Debtor could not settle its claims against the recipients of excess interest credits except by entering into an agreement with each of those recipients or someone with authority to bind all of them. The only agreement concerning those excess credits is the settlement with Class 11; and we have already established that, because of 11 U.S.C. § 1123(a)(4), Class 11 lacked authority to agree to ASF Recoupment on behalf of the affected retirees.

More fundamentally, ASF Recoupment cannot be treated as a settlement because it lacks the finality that is an essential component of the settlement of any claim. An agreement is not a settlement of a claim unless it moots the claim, preventing any future effort to enforce the claim. *Affholder, Inc. v. Preston Carroll*

Co., Inc., 866 F.2d 881, 885 (6th Cir, 1989). The question whether a settlement has been reached is decided by applying state law. *In re Rhoads Industries, Inc.* 162 B.R. 485, 489 (Bnkr, N.D. Ohio, 1993). Like other jurisdictions, Michigan insists that a settlement must provide finality: the settling defendant must be assured that the claim is fully resolved. *Miller v Riverwood Recreation Center*, 215 Mich. App. 561, 568 - 569 (1996), *lv. denied*, 454 Mich. 852 (1997).

The Debtor claims that the Defined Benefit Plan lost $387 million on account of ASF excess interest, R 30, D 8272, at 60, and that this caused the Debtor to incur a $387 million increase in liability to GRS. But it says the present value of GRS's recovery as a result of ASF Recoupment will be only $190 million. R 30, D 8272 at 61. Unless persons affected by ASF Recoupment receive some assurance against future litigation based on the alleged excess interest credits, they face the risk that, after having $190 million plus 6.75% deducted from their pensions, they will still be liable for the remaining $197 million. But search as one might through the POA (R 27, D 8045) and the Confirmation Order (R 30, D 8272), no such assurance is to be found. On the contrary, with exceptions not applicable to ASF Recoupment, "the City shall retain and may enforce any claims, demands, rights,

defenses and Causes of Action that it may hold against any Entity,[13] including but not limited to . . . any and all Causes of Action against any party relating to the past practices of the Retirement Systems . . .” R 27, D 8045 at 49; R 30, D 8272 at 11. ASF excess interest credits were a past practice of GRS, and the Debtor claims that the recipients of those credits (including Class 11 members affected by ASF Recoupment) are liable for the amount of the excess credits. R 15, D 5034 at 170 - 179; R 23, D 7303 at 5 - 7, 10 - 12. It follows that Class 11 members subjected to ASF Recoupment are among the parties against whom the Debtor retains and may enforce claims, despite the money being taken from us under ASF Recoupment.

ASF Recoupment is not a settlement. Pretending that it is does not avoid the requirements of 11 U.S.C. §§ 941 and 1123(a)(4).

IV. THE POA VIOLATES 11 U.S.C. § 941 BECAUSE IT ADJUSTS THE LIABILITY OF GRS, WHICH IS NOT A DEBTOR IN THIS CASE, TO RETIREES AFFECTED BY ASF RECOUPMENT.

A. The POA Must Adjust the Debtor’s Debts, that is, its Liability on Claims, not the Liabilities of Any Other Party.

The Debtor filed the POA pursuant to 11 U.S.C. §941, which requires that “[t]he debtor shall file a plan for the adjustment of the debtor’s debts.” The debtor is the “... municipality concerning which a case under [Title XI, U.S.C.] has been

[13] The term “Entity” includes persons. 11 U.S.C. § 101(15); R 27, D 8045 at 14, ¶ 175.

commenced," [11 U.S.C. §101(13), made applicable in this case by 11 U.S.C. §103(f)] in this case, the City of Detroit. A debtor's debt is its liability on a claim. 11 U.S.C. §101(12), made applicable in this case by 11 U.S.C. §103(f). If the debtor and another party are both liable on a claim, only the debtor's liability, not the other party's, is a "debtor's debt" for purposes of §941.

Application of the maxim "*Inclusio unius est exclusio alterius,*"[14] to §941 makes its requirement of a plan of adjustment different from the analogous requirement in Chapter 11 in two important respects. First, no one but the debtor may file a Chapter 9 plan of adjustment.[15] Second, and of particular concern here, the plan of adjustment can adjust only the debtor's debts, not anyone else's debts. There is no such explicit limitation on which debts can be adjusted in a Chapter 11 plan of reorganization. Thus, in a Chapter 11 case, the provision in §1123(b)(6) that the plan of reorganization may "include any other appropriate provision not inconsistent with the applicable provisions of this title" can, in unusual circumstances, permit adjustment of the debts of someone other than the debtor,

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[14] *Cf. In re Hyatt*, 479 B.R. 880, 897 (Bkrtcy.D.N.M., 2012), (maxim invoked to interpret 11 U.S.C. §1112(b)(4); 14. *In re Mu'Min*, 374 B.R. 149, 374 B.R. 149, 169, nt. 36 (Bkrtcy.E.D.Pa. 2007) (interpreting 11 U.S.C. §362(k)).

[15] *In re City of Stockton*, 478 B.R. 8, 20 (Bkrtcy.E.D.Cal., 2012). Compare 11 U.S.C. §1121(c) (In a reorganization under Chapter 11 any party in interest may file a plan if certain conditions are met.);

because §941 is not an "applicable provision" in a Chapter 11 case. However, even though §1123(b)(6) applies to a Chapter 9 case, 11 U.S.C. §901, it does not permit adjustment of a debt of someone other than the debtor in such a case because that would be "inconsistent with [an] applicable [provision] of this title," namely § 941.

B. Under Michigan law, the Debtor and GRS are Distinct Entities.

It follows that, unless GRS is identical with or part of the Debtor, the POA cannot adjust any liability GRS may have to retirees, even if GRS and the Debtor are co-debtors. Michigan's PERSIA establishes that the Debtor and GRS are distinct entities.

Since GRS is a pension system created by the Debtor, which is a political subdivision of the State of Michigan, GRS is a "separate and distinct trust fund" that holds its assets "for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the system." Mich.C.L. §§ 38.1132e(5), 38.1133(8), *supra*. The GRS Board of Trustees, not the Debtor, is the trustee of that separate and distinct trust fund. Detroit City Code § 47-2-20, *supra*. The Bankruptcy court's holding that GRS and PFRS are separate entities from the Debtor (Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing R 36, D 8993, at 203) is, therefore, correct.

C. GRS is Liable to Retirees for Their Full Monthly Pension Payments.

The Debtor does not make monthly pension payments to GRS retirees. GRS does. This is consistent with the legal structure created by Mich. Const. Art. IX, §24 and PERSIA. Michigan law does not clearly and explicitly impose upon the Debtor a duty to make pension payments to retirees. By its explicit terms, the second sentence in Mich. Const, Art. IX, §24 requires only that the Debtor fully fund employees' accrued pension benefits each fiscal year during the term of each employee's service. Similarly, PERSIA requires that the Debtor make contributions to GRS and governs the calculation of those contributions, Mich.C.L. §38.1140m, but leaves to GRS the task of making disbursements to retirees, since GRS holds the funds contributed by the Debtor and the earnings on those funds "for the exclusive benefit of the participants and their beneficiaries and of defraying reasonable expenses of investing the assets of the system." Mich.C.L. § 38.1133(8), *supra*.

To justify its holding that the duty to pay pensions is owed solely by the Debtor and that GRS has no legal duty to make the payments it in fact does make to retirees, the bankruptcy court merged the duty to fund the pension system, imposed by the second sentence in Mich. Const. Art. IX, §24, and the duty to pay pensions,

imposed by the first sentence of that provision, into a single duty owed exclusively by the Debtor, not GRS. R 36, D 8993, *supra*, at 203. This is clearly wrong.

The Record of the Constitutional Convention, quoted as authoritative by the Michigan Supreme Court in *Kosa*, *supra*, and by the Bankruptcy court in its Opinion Regarding Eligibility, R 2, D 1945, at 76, makes it clear that the duty to fund pensions and the duty to pay pensions from the fund thus created are distinct obligations, one of which (the duty to pay) is enforceable by retirees, and the other (the duty to fund) not enforceable by retirees.[16] Logically, the duty to fund can only be owed by the plan sponsor: the retirement system cannot fund itself. The duty to pay may or may not be a duty of the sponsor,[17] but it clearly is a fiduciary duty of

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[16] See note 8, *supra*.

[17] A dialogue in the record of the Constitutional Convention suggests (quite logically) that, if the system is unable to pay pensions because the sponsor has failed to fund them, then the duty to pay is enforceable directly against the sponsor:

MR. VAN DUSEN: The answer, Mr. Chairman to Mr. Shackeltons's first question is no, they would not have to immediately fund past service benefits. They would have to put in enough to currently fund current service benefits.....The only constitutional requirement would be the current funding of current service benefits.

"MR. SHACKLETON: If they did not properly take care of the past service then, where would your contractual obligation come out?

"MR. VAN DUSEN: An employee who continued in service of the public

the pension system, which holds in trust, for the purpose of paying pensions, the funds from which pension payments are made.

If the Bankruptcy court's holding – that GRS is not liable to retirees for payment of their pensions from the funds it holds for that purpose – were correct, it would lead to absurd results. Consider the case of a pension system that fails to make monthly pension payments even though it is fully funded and so has adequate funds to make the payments. If only the system sponsor, not the pension system, has a duty to pay the pension, then a retiree's remedy for non-payment is only against the plan sponsor, which has already paid to the system the funds from which the payments should be made, and not against the system, which holds the money in trust for the benefit of retirees.

D. The POA and the Confirmation Order Adjust GRS's Liability for Monthly Pension Payments to Retirees.

The POA mandates reductions in the monthly pension checks GRS retirees.. The Confirmation Order instructs GRS to make the required deductions in monthly pension checks for ASF Recoupment "without any liability accruing to the GRS." R 30, D 8272 at 96 - 97. The POA and Confirmation Order thus adjust GRS's

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employer in reliance upon the benefits the plan says he would receive would have the contractual right to receive those benefits and, would have the entire assets of the employer at his disposal from which to realize those benefits." 1 Official Record, Constitutional Convention 1961, at 774.

liability for monthly pension payments to GRS retirees, at least those affected by ASF Recoupment, in violation of 11 U.S.C. § 941.

V. THE INJUNCTION IN THE CONFIRMATION ORDER THAT PURPORTS TO PREVENT RETIREES WITH CLAIMS AFFECTED BY ASF RECOUPMENT FROM PROSECUTING CLAIMS AGAINST GRS FOR THEIR UNADJUSTED PENSIONS IS UNLAWFUL.

In this Circuit, even in a Chapter 11 case, where adjustment of the liabilities of parties other than the debtor is sometimes permitted, a non-consenting creditor can be enjoined from prosecuting her claim against a non-debtor only in "unusual circumstances" when each of the following seven factors is present: "(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the re-organization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7)

The bankruptcy court made a record of specific factual findings that support its conclusions." *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658, (6th Cir. 2002).

The Confirmation Order provides that "all individuals affected by the ASF Recoupment are enjoined from commencing any proceeding against the GRS and its trustees, officers, employees or professionals arising from GRS's compliance with the Plan or this Order." R 30, D 8272 at 91. As explained above (Section IV.B.), and as the bankruptcy court held (R 36, D 8993, at 203), GRS is distinct from the Debtor, so this injunction is lawful only if the mandatory *Dow Corning* factors are shown to be present. In fact, several of them are absent.

A. GRS Has Not Contributed Substantial Assets to the Reorganization.

GRS contributes nothing to the resolution of the Debtor's bankruptcy. It does forego contributions it would receive from the Debtor but for the bankruptcy, but those losses are entirely passed on to GRS's beneficiaries.

B. The Injunction Is Not Essential to Implementation of the POA.

It is obvious from the record in the bankruptcy court that this injunction is not needed. Although the POA and all previous versions of the Plan of Adjustment called for various injunctions, none of them sought an injunction against the

prosecution of claims against GRS by persons affected by ASF Recoupment, nor did any Disclosure Statement, nor did either of the proposed confirmation orders submitted by the Debtor.[18] Clearly, the Debtor saw no need for this injunction.

Moreover, the Confirmation Order itself does not enjoin Class 11 members who are not affected by ASF Recoupment from prosecuting claims against GRS for non-payment of COLA nor for the 4.5% reductions in their pensions. Nor does it enjoin the prosecution of claims against PFRS for reduced COLA payments. No explanation for this difference in treatment has been proffered. Some explanation is needed if one is to maintain that the prosecution of claims against GRS by Class 11 members affected by ASF Recoupment would doom the POA, but the prosecution of claims against GRS by other members of Class 11 or against PFRS by members of Class 10 would not.

C. The POA Provides No Mechanism to Pay for All or Substantially All the Claims in Class 11 Affected by the Injunction.

On the contrary, the recovery on the claims affected by the injunction is smaller than the recovery on the claims that are not so affected.

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[18] R 3, D 2708; R 4, D 2709; R 5, D 3380; R 6, D 3382; R 9, D 4140; R 10, D 4141; R 11, D 4271; R 12, D 4272; R 13, D 4391; R 14, D 4392; R 19, D 6257; R 20, D 6379; R 22, D 6908; R 24, D 7502; R 27, D 8045; R 28, D 8154; R 29, D 8244.

D. The POA Provides No Opportunity for Those Claimants Who Choose Not to Settle to Recover in Full.

Nothing in the POA provides any opportunity for Class 11 members affected by ASF Recoupment to recover even part of the money being deducted from their pensions, much less a full recovery.

E. The Bankruptcy Court Made No Record of Specific Factual Findings that Support Its Conclusions Justifying the Injunction.

The record is devoid even of a statement of conclusions justifying this injunction, much less factual findings supporting those conclusions, if such conclusions exist.[19]

[19] The bankruptcy court did analyze the seven *Dow Corning* factors to allow an injunction protecting the State of Michigan from litigation. R 36, D 8993 at 23 *et seq.* In that analysis it relied upon cases in the Fourth Circuit and a bankruptcy court in the Eleventh Circuit which had cited *Dow Corning* as persuasive authority but departed from the Sixth Circuit's requirement that all seven factors be present to justify an injunction protecting a party other than the debtor. *Id.* at 25 - 29. With respect, this was error. *Dow Corning* is binding here. Neither the bankruptcy court not this Court can choose to follow it only in part.

VI. THE JUDICIALLY CREATED DOCTRINE OF EQUITABLE MOOTNESS IS NO BARRIER TO CORRECTION OF THE ERRORS OF LAW DESCRIBED IN THIS BRIEF.

The novel[20] doctrine of equitable mootness has been adopted, despite the reservations of influential jurists,[21] by several circuit courts, including the Sixth, but never, so far as my research discloses, endorsed by the Supreme Court. Indeed, its continuing viability is in some doubt in light of the Supreme Court's "recent reaffirmation of the principle that 'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is "virtually unflagging."' *Lexmark International, Inc. v. Static Control Components, Inc.*, __ U.S. __, 134 S.Ct. 1377, 1386, 188 L.Ed.2d 392, 82 U.S.L.W. 4195 (2014), citing *Sprint Communications, Inc. v. Jacobs*, 571 U.S. __, __, 134 S.Ct. 584, 591, 187 L.Ed.2d 505, 513 (2013) and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)). It is not to be confused with Art. III mootness. Indeed, it has no basis in the Constitution, the Bankruptcy Code or any other statute but is "a kind of appellate abstention that favors the finality of [Chapter 11] reorganizations and

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[20] "[T]he equitable mootness doctrine has only been formally recognized within the last twenty years." *In re United Producers, Inc.,* 526 F.3d 942, 947 (6th Cir. 2008)

[21] See., *e.g.*, *In re Continental Airlines*, 91 F.3d 553, 567 *et seq.*, (Alito, J., dissenting) (3rd Cir. 1996).

protects the interrelated multi-party expectations on which they rest." *In re Pac. Lumber*, 584 F.3d 229, 240 (5th Cir. 2009).

The Sixth Circuit follows the Fifth in applying equitable mootness, *In re American HomePatient, Inc.*, 420 F.3d 559, 563 - 564 (6th Cir. 2005), examining the three factors listed in *In re Manges*, 29 F.3d 1034, 1039 (5th Cir.1994): "(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan."

A. Equitable Mootness Is Not Applicable in a Chapter 9 Case.

The equitable mootness doctrine has been developed in Chapter 11 reorganization cases. I have found only one decision applying equitable mootness in a Chapter 9 case, and in that case the court applied it without discussing the question whether it is properly applies in a Chapter 9 case. *Alexander v. Barnwell County Hosp.*, 498 B.R. 550, 559 - 560 (D.S.C. 2013). In *Bennett v. Royal* (*In re Jefferson County, Alabama*), N.D.Ala. No. 2:14-CV-0213-SLB (9/30/14) at 11 - 13 (Page numbers refer to the copy included in the Appendix.), the district court did consider at length the question whether equitable mootness should be applied in a Chapter 9 case. The court considered the significant differences between the private enterprises and investors dealt with in Chapter 11 and the governmental

entities at the center of Chapter 9 cases, as well as the federalism and other constitutional issues unique to Chapter 9, and concluded that equitable mootness should not be applied in such a case.

Use of the concept of "substantial consummation" in the second factor considered by the Sixth Circuit in applying equitable mootness adds weight to the argument that the doctrine is inapplicable in a Chapter 9 case. "Substantial consummation" is defined in 11 U.S.C. § 1101(2). By its terms, the definition applies only in Chapter 11. § 1101(2) is not one of the provisions made applicable in Chapter 9 by 11 U.S.C. § 901(a), nor is its application in a Chapter 9 case permitted by 11 U.S.C. § 109(f) or (g). Thus, attempting to implement equitable mootness in a Chapter 9 case would require the Court to consider a factor that, according to the Bankruptcy Code, should not apply in a Chapter 9 case.

B. Even If Equitable Mootness Were Applicable to Chapter 9 Cases, it Would Not Prevent This Court from Correcting the Errors of Law Discussed in this Brief.

Of the three *Manges* factors, only the first is present in this case: my motion for stay was denied by the bankruptcy court. R 35, D 8533. Both the other factors weigh heavily in favor of this Court's considering the issues I have raised.

There has been practically no "consummation" of the POA with reference to Class 11. GRS has announced that the POA will have no impact on pension

payments until March, 2015. Once serious implementation of the POA with reference to pensions begins, its "consummation" will be a gradual process extending over decades, as pension payments are altered over the lifetimes of Class 11 members. That "consummation" will not become "substantial" during the time it will take this Court to decide this appeal. If GRS pension payments actually are reduced before the appeal is decided, the Court can consider whether full or partial restoration of pensions should be prospective only to avoid the need to undo what by then might already have been done. Courts favor partial or alternative relief as a way avoid the problems equitable mootness is intended to address without denying review of a bankruptcy court's errors. *Pacific Lumber*, *supra*, at 241; *In re Scopac*, 624 F.3d 274, 281 - 282 (5th Cir. 2010); *In re Scopac*, 649 F.3d 320, 322 (5th Cir. 2011); *In re Texas Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 328 - 329 (5th Cir. 2013).

The availability of alternative relief is particularly noteworthy with reference to ASF Recoupment. Compliance with 11 U.S.C. § 1123(a)(4) would itself provide the alternative relief. As noted earlier (Section III.B.), the POA offers Class 11 members affected by ASF Recoupment no protection against the future assertion and prosecution of claims based on excess interest credits. But the Debtor has never claimed that preservation of its ability (and perhaps GRS's ability) to seek

recovery on account of excess interest credits, beyond the $190 million to be recovered by means of ASF Recoupment, is necessary to the success of the POA. The Debtor or GRS can comply with § 1123(a)(4) by making an offer to each retiree affected by ASF Recoupment to hold the retiree harmless against claims based on excess interest credits in return for the retiree's agreement to the extra pension reductions called for by ASF Recoupment and waiver of any claim that ASF Recoupment violates 11 U.S.C. § 941.

Accepting the Debtor's argument that it has legally meritorious claims against those retirees (R 15, D 5034 at 170 - 179; R 23, D 7303 at 5 - 7, 10 - 12) and the bankruptcy court's finding that those claims have a 60 to 70% chance of success (R 36, D 8993 at 45), this would be an attractive offer: it would provide an opportunity to avoid liability for a bit less than fifty cents on the dollar [($190 million) / ($387 million) ≈ .49]. If some affected retirees were to reject the offer, the Debtor or GRS could proceed against those retirees with the object of recovering the full amounts of excess interest credited to their ASF accounts.

CONCLUSION

Neither the bankruptcy court nor this Court can amend the POA. Under 11 U.S.C. § 941 only the Debtor can do that. However, the erroneous inclusion of an injunction against claims against GRS by Class 11 members affected by ASF

Recoupment is not part of the POA: it appears only in the Confirmation Order. Therefore, this Court should: (1) reverse the inclusion of that injunction in the Confirmation Order; and (2) remand the case to the bankruptcy court to give the Debtor an opportunity to file another amended plan of adjustment and the bankruptcy court an opportunity to review the amended plan to determine whether it complies with 11 U.S.C. §§ 941 and 11232(a)(4) with reference to Class 11.

STATEMENT WITH RESPECT TO ORAL ARGUMENT

I request oral argument.

/s John P. Quinn
John P. Quinn
Appellant *in Propria Persona*
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Dated: January 29, 2015

CERTIFICATE OF COMPLIANCE

I certify that on January 29, 2015, I used the *file>properties>information* utility in WordPerfect 11 to obtain a word-count for this document, excluding the Corporate Disclosure Statement, the Table of Contents, the Table of Citations, the Statement with Respect to Oral Argument, this Certificate of Compliance, the Certificate of Service and the Appendix. That utility yielded a word-count of 10,892.

/s John P. Quinn
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Dated: January 29, 2015

APPENDIX

This Appendix includes:

Exhibit A: Designation of Record on Appeal

Exhibit B: *Bennett v. Royal* (*In re Jefferson County, Alabama*), N.D.Ala. No. 2:14-CV-0213-SLB (9/30/14)

Exhibit A

DESIGNATION OF RECORD ON APPEAL.

Item No.	Date Filed	Docket No.	Description
1	7/18/13	0001	Voluntary Petition for City of Detroit, Michigan
2	12/5/13	1945	Opinion Regarding Eligibility
3	2/21/14	2708	Plan for the Adjustment of Debts of the City of Detroit
4	2/21/14	2709	Disclosure Statement with Respect to Plan for the Adjustment of the Debts of the City of Detroit
5	3/31/14	3380	Amended Plan for the Adjustment of Debts of the City of Detroit
6	3/31/14	3382	Amended Disclosure with Respect to Amended Plan for the Adjustment of Debts of the City of Detroit
7	3/31/14	3390	John P. Quinn's Objections to Disclosure Statement
8	3/31/14	3392	Appearance of John P. Quinn on his Own Behalf and Consent to Electronic Service
9	4/15/14	4140	Second Amended Plan for the Adjustment of Debts of the City of Detroit
10	4/16/14	4141	Second Amended Disclosure Statement with Respect to Second Amended Plan for the Adjustment of Debts of the City of Detroit
11	4/25/14	4271	Third Amended Plan for the Adjustment of Debts of the City of Detroit
12	4/25/14	4272	Third Amended Disclosure Statement with Respect to Second Amended Plan for the Adjustment of Debts of the City of Detroit
13	5/5/14	4391	Fourth Amended Disclosure Statement with Respect to Fourth Amended Plan for the Adjustment if the Debts of the City of Detroit
14	5/5/14	4392	Fourth Amended Plan for the Adjustment if the Debts of the City of Detroit

Item No.	Date Filed	Docket No.	Description
15	5/26/14	5034	Consolidated Reply to Certain Objections to Confirmation of Fourth Amended Plan for the Adjustment of Debts of the City of Detroit
16	5/27/14	5049	John P. Quinn's Attempted Compliance with Order Regarding Identifying Legal Issues Relating to Confirmation
17	7/1/14	5723	John P. Quinn's Objections to Fourth Amended Plan of Adjustment
18	7/22/14	6197	Joint Motion of Objecting Creditors Michael J. Karwoski and John P. Quinn for Briefing Schedule and Hearing on Certain of Movants' Objections to Fourth Amended Plan of Adjustment
19	7/25/14	6257	Fifth Amended Plan for the Adjustment if the Debts of the City of Detroit
20	7/28/14	6379	Corrected Fifth Amended Plan for the Adjustment of the Debts of the City of Detroit
21	8/4/14	6508	Official Committee of Retirees' Memorandum of Law in Support of Confirmation of Fifth Amended Plan for Adjustment of Debts Filed by the City of Detroit, Michigan
22	8/20/14	6908	Sixth Amended Plan for the Adjustment of Debts of the City of Detroit
23	9/5/14	7303	Consolidated Response to Certain *Pro Se* Objections to Confirmation of the Sixth Amended Plan for the Adjustment of Debts of the City of Detroit
24	9/16/14	7502	Seventh Amended Chapter 9 Plan for the Adjustment of Debts of the City of Detroit
25	10/17/14	7995	Third Order Admitting Exhibits
26	10/21/14	8029	Notice of Filing of Draft Eight Amended Plan for the Adjustment of the Debts of the City of Detroit,
27	10/22/14	8045	Eighth Amended Plan for the Adjustment of the Debts of the City of Detroit

Item No.	Date Filed	Docket No.	Description
28	10/31/14	8154	Notice of Filing Proposed Order Confirming Eighth Amended Plan for the Adjustment of Debts of the City of Detroit, including attached proposed order
29	11/11/14	8249	Notice of Filing Revised Proposed Order Confirming Eighth Amended Plan for the Adjustment of Debts of the City of Detroit, including attached proposed order
30	11/12/14	8272	Order Confirming Eighth Amended Plan of Adjustment of Debts of the City of Detroit
31	11/21/14	8369	John P. Quinn's Notice of Appeal from Order Confirming Eighth Amended Plan of Adjustment
32	11/24/14	8413	John P. Quinn's Motion for Partial Stay Pending Appeal
33	11/26/14	8489	State of Michigan's Consolidated Response in Opposition to Motions to Stay Confirmation Order Pending Appeal
34	11/26/14	8496	City of Detroit's Consolidated Objection to Appellants' Motions for Stay Pending Appeal
35	12/1/14	8533	Order Denying Motions for Stay Pending Appeal
36	Not yet entered.	Not yet docketed	Opinion on Confirmation of Eighth Amended Plan for the Adjustment of Debts of the City of Detroit

Exhibit B

ANDREW BENNETT; RODERICK

v.

ROYAL; MARY MOORE; JOHN W. ROGERS; WILLIAMR. MUHAMMAD; CARLYNR. CULPEPPER; FREDDIE H. JONES, II; SHARON OWENS; REGINALD THREADGILL; RICKEY DAVIS, JR.; ANGELINA BLACKMON; SHARON RICE; DAVID RUSSELL, Appellants,

v.

JEFFERSON COUNTY, ALABAMA, Appellee.

No. 2:14-CV-0213-SLB

Bankruptcy No. 11-05736-TBB9

United States District Court, N.D. Alabama, Southern Division.

September 30, 2014

MEMORANDUM OPINION

SHARON LOVELACE BLACKBURN, District Judge.

This case is before the court on the Motion for Partial Dismissal filed by appellee Jefferson County, Alabama, (doc. 4), [1] and Motion to Consolidate, (doc. 14), and Motion to Strike, (doc. 15), filed by appellants - Andrew Bennett; Roderick V. Royal; Mary Moore; John W. Rogers; William R. Muhammad; Carlyn R. Culpepper; Freddie H. Jones, II; Sharon Owens; Reginald Threadgill; Rickey Davis, Jr.; Angelina Blackmon; Sharon Rice; and David Russell (hereinafter "the Ratepayers"). The Ratepayers have appealed the bankruptcy court's confirmation of the County's Chapter 9 Plan, as well as certain other orders in related adversary proceedings. For the reasons below, the court finds that the County's Motion for Partial Dismissal, (doc. 4), is due to be granted in part and denied in part, and the Ratepayers' Motion to Strike, (doc. 15), and their Motion to Consolidate, (doc. 14), are due to be denied.

I. MOTION TO STRIKE

The Ratepayers, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and Rule 7012 of the Federal Rules of Bankruptcy Procedure, ask the court to strike the County's Motion for Partial Dismissal. (Doc. 15 at 2.) Rule 12(f) allows a court to strike "from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). Rule 7012 is inapplicable because the Rules of Part VII of the Federal Rules of Bankruptcy Procedure govern only adversary proceedings, and an appeal from the bankruptcy court is not an adversary proceeding. *See* Fed.R.Bankr.P. 7001. The Ratepayers do not contend that the County's Motion for Partial Dismissal is "a pleading, " or that it is "redundant, immaterial, impertinent, or scandalous." Rather, they assert that the Motion is premature and "legally unsupportable, " and that the "Bankruptcy Rules do not allow a preemptive strike on appellants' opening brief." (Doc. 15 at 3-4.)

The court disagrees. Indeed, the Eleventh Circuit has affirmed the practice of deciding a motion to dismiss an appeal on mootness grounds before addressing the merits. *See, e.g., In re Seidler,* 44 F.3d 945, 947 (11th Cir. 1995). Therefore, the Ratepayers' Motion to Strike, (doc. 15), will be denied.

II. MOTION FOR PARTIAL DISMISSAL

A. FACTS AND CLAIMS OF THE RATEPAYERS[2]

In a Memorandum Opinion entered in 2012, the bankruptcy court set forth the following facts:

The origins of Jefferson County, Alabama's bankruptcy case are both recent in vintage and far removed from the filing date of its chapter 9 case on November 9, 2011. Two major factors precipitating its bankruptcy are crushing debt and the loss of a large part of its tax revenues that were not earmarked for specific purposes.

...

The far removed precipitating factor is also partly one of recent vintage. It is a debt load well in excess of $4, 000, 000, 000.00. The majority of this debt is directly attributable to massive borrowing in the form of warrants issued from 1997 to 2003 to finance the construction and repair of a sewer system owned by the County.... The aggregate of the warrants issued between 1997 and 2003 is $3, 685, 150, 000.00 and the unpaid principal balance is

around $3, 200, 000, 000.00.

Part of the sewer related debt involves a complex and failed combination of swap and interest rate stabilization agreements. Simplistically and at the behest of former county commissioners, the County believed it could lower the interest on warrants by shifting from fixed rates to adjusting ones.

...

Superficially, the indebtedness caused by the sewer system construction and repair might appear to be only a relatively recent set of events. It is not. Why it is not is that sewer systems in the state of disrepair of those the County had and added to did not get to their level of disrepair over just the course of a few years or a few decades. Absent some catastrophic event, it took upwards of a century of neglect by the County and the other municipal governments from which the County acquired twenty some sewer systems. The many decades of failing to properly maintain these sewer systems is the farther in time factor.

...

Ironically, it is the structure of the debt incurred to finance the sewer system upgrades and repairs that has prevented its costs from being spread onto all of the individuals and businesses located in the County. It is also this structure that makes it highly unlikely that the value - not the gross amount - of what was loaned can ever be fully repaid.

The structure is warrants. Not warrants that are general obligations, repayment of which could come from general revenues of the County. Rather, the County utilized special revenue warrants making the revenues of the sewer system the sole source of repayment of the warrant debt. Conceptually, it is this limited source of repayment that keeps the inhabitants of the local governments paying for the failures of their localities to maintain their sewer systems.... Why these costs cannot be directly imposed on all of the inhabitants of the County is the limited source of repayment of the sewer system debt.

...

Under the security documents, the warrant holders possess a lien that is first in priority and the ability of the County to borrow more monies is subject to rights accorded the warrant holders under the lending documents.

Over time, special revenue warrants have been utilized for project financing on a greater and greater scale and have become for some municipalities the exclusive means of borrowing for projects such as water systems, sewer systems and other wants and needs. Why this has occurred will vary from location and time of projects. However, all have certain characteristics that make them attractive to municipalities. In many states, special revenue warrants do not require a vote by the citizens of the municipality, while bonds frequently do. This is the case for Jefferson County.[3] Another commonality is that special revenue warrants are not counted as debt for indebtedness limits imposed by states on its municipalities.[4] This, too, is the case in Alabama. A third is that many states do not allow municipalities to encumber their properties with liens that could be enforced by foreclosure or repossession of the properties. Yet again, this is a feature Alabama shares with other states.

Notwithstanding lawyers, judges, politicians and those in the business of selling the means of financing for municipalities - who see these three common characteristics through a lens clouded by legal niceties, private preferences, and money making - the reality is that two are not true from an economic perspective. When one understands that for any capital project its value over a useful life span equates to the revenues it generates, the granting of a lien on the revenue stream for decades is not from an economist's view much different than having a lien on the capital good. Accentuating this economic viewpoint is the appointment of the Receiver for the County's sewer system with the sole authority to operate and control it for potentially decades, if not its useful life.[5] This is not much different than a foreclosure or repossession. It effectively strips the County from control of its property and, if it lasts long enough, from the aggregate value of what is the sewer system.

In a similar vein, the concept that special revenue warrant financing is not a debt of the County may be accurate from a certain legal perspective.[6] It is misguided and wrong in the realm of financial matters. This case is an example of why. When sewer usage charges increase beyond a point, the ability of the County to obtain revenue from other sources for other purposes is constrained. Despite the fact that the County has not pledged its full faith and credit for the payment of these warrants, this form of debt still indirectly impairs its ability to borrow and tax. At the point now reached by the County, the payment of increasing sewer charges takes monies from its residents that might otherwise have been available via taxes, assessments, fees, or other means. It also has caused the County to use non-sewer revenues and County properties to subsidize some costs and expenses attributable to the sewer system which

have not been fully reimbursed from sewer system revenues.[7] These indirect effects are some of what states wanted their municipalities to avoid when they imposed debt limits on them: excessive borrowing that impairs municipal governments from getting monies via taxes, fees, or otherwise for other purposes and dedicating properties and monies to debt service that might be better used elsewhere.

The one correct common factor is that the special revenue warrant financing has reduced, if not avoided, input from all of the inhabitants of the County. No vote by the inhabitants of the County was required for the special revenue warrant financing. For those in the business of selling such financing and those desirous of building projects, this may be good, but for those who have to pay, it is not such a good thing when done in excess.

Excess is clearly what occurred with the County's special revenue warrant financing for the sewer system. Many causes for this excess have been presented to the Court. They include graft and fraud by former county commissioners and county employees; in particular, former county commissioners who headed the department overseeing the sewer system and certain of the department's top personnel.[8] All of them have been found or plead guilty on federal bribery and related charges for obtaining monies and other benefits from contractors hired to build parts of the sewer system.

Not to be outdone by the public sector is the business sector. Here, numerous businesses and individuals who were officers, owners, or employees of businesses doing the construction work for the sewer system were charged with crimes including fraud and bribery associated with their work for the County. Just as with the former county commissioners and county employees, some plead guilty and others were convicted. So far, the total of public and private persons and entities determined to have committed crimes related to the County's sewer system is somewhere in the low twenties.[9]

Those involved in investment banking and municipal finance were not out of the loop when it came to dishonest or inappropriate conduct. Some of those involved in the development and sales of the types of financial instruments used in part by the County for its sewer system's needs have committed crimes related to what was sold to the County. Others have not been charged with crimes, but have entered settlements with the United States Securities and Exchange Commission where there is no admission of wrongdoing, but payments in the tens of millions of dollars have been made.

...

Starting with the first indenture (the Indenture) dated as of February 1, 1997, by and between the County and the Indenture Trustee, and through the course of eleven supplemental indentures, the County agreed to payment terms and secured payment of the warrants issued by it. Initially, the warrants bore fixed rates. By 2001, though, and continuing into 2003, the County issued variable rate and auction rate warrants. Both put the County at risk of interest rate fluctuations. [Footnote omitted.]

...

By February 2008, various defaults under the Indenture and the warrants had occurred and continued. In April 2008, the County was unable to make principal payments due on certain of the warrants. Between April of 2008 and August of that year, forbearance agreements were entered involving the County and representatives of warrant holders, among others. Unable to resolve matters with the County, the Indenture Trustee and others filed suit in September 2008, in the United States District Court for the Northern District of Alabama against the County and its then commissioners. The case is styled *The Bank of New York Mellon, et al. v. Jefferson County, Alabama, et al.,* Case No. 2:08-CV-01703-RDP. Since the remedies sought in this federal case are substantially the same as those of a subsequent Alabama state court case, a detailed rendition of them is not given. It is sufficient to point out that one was the appointment of a receiver for the County's sewer system which was opposed by the County.

...

Although the District Court Judge determined in June 2009, that there was justification for appointment of a receiver, he abstained from this request based on the Johnson Act, 28 U.S.C. §? 1342, [10] not allowing federal appointment of a receiver with rate setting authority. [*See Bank of N.Y. Mellon v. Jefferson County,* 2009 U.S. Dist. LEXIS 122093 (N.D. Ala. June 12, 2009).] This was one of the Indenture Trustee's most desired functions for the sought after receiver. The abstention order was entered on June 12, 2009, for the receivership portion of the complaint and the residual portions of the requested relief were not decided.

...

In order to obtain a receiver with rate setting power for the sewer system, the Indenture Trustee initiated suit in the

Circuit Court of Jefferson County, Alabama on August 3, 2009, in the case captioned *The Bank of New York Mellon, as Indenture Trustee v. Jefferson County, Alabama, et al.,* case number CV 2009-02318. Also named defendants in this suit were the then Jefferson County Commissioners. In this state court proceeding, the Indenture Trustee again sought appointment of a receiver for the County's sewer system, an accounting for the sewer system's revenues, *mandamus* against the county commissioners and prohibition against the county commissioners and the County regarding certain aspects of the operations of the sewer system, and a judgment for unpaid monies owed warrant holders.

Partially due to the absence of any dispute that the County had breached the terms of the Indenture and the warrants by both non-monetary and monetary defaults, the Alabama court judge granted partial summary judgment in favor of the Indenture Trustee by an order entered on September 22, 2010 (hereinafter "the Receiver Order"). By this order, John S. Young, Jr., LLC, a Delaware limited liability company, was appointed receiver for the County's sewer system and the Indenture Trustee was awarded a judgment of $515, 942, 500.11 against the County. Collection of the judgment is expressly limited to revenues available under the Indenture's terms to pay the sewer system indebtedness.

...

Specific findings by the Alabama receivership court regarding the County and its sewer system are that the warrant holders have been harmed by the loss of sewer system revenues that resulted in lowering the amount of monies available for payment of the warrants by (i) not increasing sewer system usage rates as required by the Indenture, and (ii) not operating the sewer system in an "economical, efficient and proper manner." More pointedly, the County did not timely and sufficiently increase customer sewer rates and failed to collect monies from sewer customers some of whom/which the County did not even know were using the sewer system. Other issues were excessive staffing and the County diverting sewer system monies for unauthorized purposes such as paying other, non-sewer related County expenses. The repercussion of all of these and other failures by the County was to decrease monies available to pay the warrants.

...

Important for consideration now are those [portions of the Receiver Order] that demonstrate what was done by the Receiver Order and what was not done. There is no doubt that the only purpose of the receivership is to force compliance with the terms of the Indenture as was requested by the Indenture Trustee.... It is an order giving a private creditor a contracted for and statutory remedy to enforce portions of the indentures and warrants designed to protect interests of the warrant holders because the County had failed to do what was required of it under the terms of the loan documents.

Exclusive possession, custody and control of the sewer system along with certain non-sewer system properties and the exclusive authority to operate the sewer system was given to the Receiver. The Receiver was also granted the authority to fix and charge sewer rates, collect the system's revenues, pay its bills, implement operational efficiencies and other revenue increasing measures, and a cadre of other rights and abilities designed to increase the revenues payable to the warrant holders be it from increased sewer rates, obtaining monies from other sources, or decreasing costs.

The Receiver was denied authority without some future "express order of [the Alabama receivership court] to sell or otherwise dispose" of the sewer system or any part of it. Likewise, the Receiver Order does not alter the ownership and title to the sewer system properties. All remain owned by and titled in the County.... [A]nother paragraph of the Receiver Order delineat[es] that the Receiver owes duties to the sewer system and the Court, not to the County, the Indenture Trustee, or others.

...

The evidence indicates that the Receiver has done a much better job during his tenure than was done by the County during the tenures of its former county commissioners.

...

The one thing the Receiver has not accomplished is one of the most important to the Indenture Trustee: further increases in sewer usage rates.

...

During the receivership period of a little over a year before the chapter 9 [proceeding was filed], the Receiver acted as a go between in the efforts by the County, the Indenture Trustee, insurers of payments of certain of the warrants, banks providing liquidity to the parties, and others to resolve the sewer system related debts of the County. To that end, it appeared in mid 2011 that a compromise had been reached that would have reduced the warrant

indebtedness to somewhere around $2, 200, 000, 000.00 and involved the refinancing of the remaining debt.

On September 16, 2011, the Jefferson County Commission approved a term sheet with the Receiver establishing the framework for a settlement with its sewer system related creditors. The perceived settlement was never finalized.

...

There is evidence that the new commissioners are willing to take unpopular stances and undertake certain actions that might be contrary to their best political interests when it comes to re-election. One is that as part of the term sheet framework they agreed to rate increases of 8.2% per year for three years commencing on November 1, 2011, followed by up to 3.25% per year increases for what is an untold number of years. This is despite the fact that the average sewer rates increased over 300% since 1997 and would increase by a further 527% based on rates desired by the Indenture Trustee. These sorts of increases would take the average monthly residential sewer bill of $63.00 per month up to above $360.00 per month under the Indenture Trustee's wishes. Recognizing the economic and legal limits on what rate increases could be made, the Receiver studied both the structure of the rates and the ability of users to pay increased rates. Its conclusion was an immediate 25% rate increase was justifiable with another 25% in a year achievable along with other yearly increases for the future. As is evident, none of the scenarios regarding rate increases is pleasant for those who must pay them, or for those who must thereafter face the voters.[11]

...

Perhaps the most controversial action the new county commissioners have taken is to file the County's chapter 9 bankruptcy case - an action which has been resisted by large segments of the political and business leadership of Alabama.

...

The fights over the sewer system and its revenues have played out over the course of more than three years in two court systems, one federal and one state, without resolution of the sewer related obligations and, now more importantly, resolution of all of its various debts and obligations unrelated to its sewer system. If nothing more is known, it is that pre-bankruptcy the agreement of all creditors was necessary to restructure the County's financial affairs. Obviously, agreement by all was not obtained. If there is any bright side to the County's municipal bankruptcy, the consent of all creditors is not a requirement for, nor necessarily an impediment to, the County's ability to adjust its debts.

In re Jefferson Cnty., Alabama, 474 B.R. 228, 236-245 (Bankr. N.D. Ala. 2012).

In its Memorandum of Law in Support of Motion for Partial Dismissal, (doc. 5), the County adds the following facts:

After multiple rounds of intense litigation and negotiations over the course of eighteen months, the County announced in June 2013 that it had reached agreements in principle with almost all of its major creditors and therefore would soon be ready to propose a plan of adjustment that would allow it to exit bankruptcy.... [T]he County and its creditors arrived at a final settlement and proposed plan in November 2013. [(B. Doc. 2182 [the Plan].)] Most significantly... the County's Plan proposed that the County would issue and sell in the public markets new sewer warrants ("New Sewer Warrants") in the amount of approximately $1.785 billion, the net proceeds of which would be used (along with other funds on hand) to redeem and retire the Retired Sewer Warrants and related obligations in a reduced, compromised amount of approximately $1.8 billion. [(B. Doc. 1977 at 153-55.)]

(Doc. 5 at 15-16.)

In arguing for the Plan's confirmation, the County had stated that the "Plan slashes the outstanding sewer debt from approximately $3.2 billion to approximately $1.7 billion - a consensual reduction of nearly *half* of the outstanding principal." (B. Doc. 2203 [Omnibus Reply Brief in Support of Plan Confirmation] at 14 [emphasis in original].) The County argued that the Plan was "built on three basic principles":

1. Cost-Cutting by the County. The County asserted that it -

has cut over $100 million in General Fund expenditures by, *inter alia,* closing satellite courthouses, cutting staff and expenses in essentially every department, and drastically reducing services.... These measures fulfill a basic purpose of debt adjustment under chapter 9 - matching expenses to revenue. The County had to cut these costs because the County cannot generate additional revenue from new sources, given the lack of home rule and the State of Alabama's refusal to replace lost occupational tax revenue.

(*Id.*)

2. Concessions from the Creditors. The County asserted that its creditors -

have agreed to write off nearly $1.5 billion in outstanding debt, ... [including] the largest sewer creditor (JPMorgan Chase Bank, N.A.) writing off a significant amount of its investment.... In addition, the Plan restructures [the non-sewer debt from being risky to being less risky, and] provides for repayment in full of all non-sewer warrants on terms favorable to the County, which ultimately will help the County regain access to the capital markets.

(*Id.* at 15.)

3. Sustainable Sewer Rates. The County asserted that -

the Plan depends on a series of single-digit sewer rate increases that the County Commission - the only body constitutionally charged with the responsibility and obligation to fix sewer rates and charges - [which were determined to be determined were reasonable and feasible].

(*Id.*)

The "single-digit sewer rate increases" to which the County refers in its third basic principle manifest themselves in the Plan's Approved Rate Structure, and the Confirmation Order required the County Commission to "adopt and maintain the Approved Rate Structure in accordance with the Rate Resolution." (Doc. 1-2 at 57.) The Approved Rate Structure is a schedule that, unless a specified alternative method is employed, requires the County Commission to increase sewer rates by at least[12] 7.89% per year for the first four years (a total increase of at least 35.47%), [13] and at least 3.49% per year for "each remaining fiscal year that the New Sewer Warrants remain outstanding...." (B. Doc. 2182 at 109-110.) Assuming a forty-year implementation, as discussed below, the minimum total increase will be approximately 365%.[14]

If the County Commission does not make the required rate increases, the bankruptcy court can order compliance with the Approved Rate Structure, because the bankruptcy court "pursuant to Bankruptcy Code section 945(a)... retain[ed] jurisdiction over the Case and as provided in Section 6.4 of the Plan." (Doc. 1-2 at 77.) Section 945(a) allows the bankruptcy court to "retain jurisdiction over the case for such period of time as is necessary for the successful implementation of the plan." 11 U.S.C. §? 945(e). Section 6.4 of the Plan reserves "exclusive jurisdiction" to the bankruptcy court to adjudicate disputes over the "enforcement of the Approved Rate Structure." (B. Doc. 2182 at 91-92 ¶? 4(l).) The Plan contemplates that its implementation - that is, the retiring of the New Sewer Warrants - will take forty years. (B. Doc. 2203 at 14.)

The County Commission's alternative to making the "Required Percentage Increases" is to enact a specified "Adjusting Resolution." (B. Doc. 2182 at 109.) The Adjusting Resolution alternative does not give the County Commission discretion to decide for itself how it will handle sewer rates because any Adjusting Resolution must "fully comply with the New Sewer Warrant Indenture, including the rate and revenue covenants therein." (*Id.* at 111.) Those rate and revenue covenants require the County to take certain measures to remedy any failure to comply with the "Required Coverage Ratios, " one of which requires that "Net Revenues [of the sewer system] for the Fiscal Year in question must be not less than 110% of Debt Service Requirements on all Secured Obligations payable during such Fiscal Year." (B. Doc. 2245-1 [Trust Indenture, or New Sewer Warrant Indenture dated Dec. 1, 2013] at 15, 63.) This provision precludes the County from enacting an Adjusting Resolution that decreases rates unless it can somehow offset the decrease in *that fiscal year,* for instance by increasing its customer base.[15]

The County publicly offered New Sewer Warrants totaling $1, 785, 486, 521.65. (Doc. 5 at 15; doc. 7-1 at 2.) One credit rating agency, Fitch, Inc., gave these warrants a "junk bond" rating. Fitch, Inc., rated the warrants BB+ and BB, respectively. (Doc. 8-10.) "BB" investments are "speculative, " and "indicate an elevated vulnerability to default risk...." Fitch Ratings, Definitions of Ratings and Other Forms of Opinion at 15, available at https://www.fitchratings.com/web_content/ratings/fitch_ratings_definitions_and_scales.pdf. A November 13, 2013, Moody's report noted that "the bond trustee could... ask the court to compel the county to enforce its bankruptcy plan, " if the County rescinded the rate increases; Moody's noted that it was "not aware of a precedent for a federal court to compel public utility rates of this nature, given the federalism issues involved in this bankruptcy." (Undocketed submission sent by the County's counsel to the court); *see also* Mary Williams Walsh, A *Municipal Bankruptcy May Create a Template,* N.Y. TIMES, Nov. 20, 2013, at B1, available at http://nyti.ms/1hMafOf. Standard and Poor's rated the Senior New Sewer Warrants BBB and the junior warrants BBB-. (Doc. 8-10.) According to its rating system, "BBB" and "BBB-" represent investment-grade bonds, with "BBB-" being the lowest investment grade. Standard & Poor's, Guide to Credit Rating Essentials at 12, available at

http://img.en25.com/Web/StandardandPoors/SP_CreditRatingsGuide.pdf.

Of the proceeds from the sale of the New Sewer Warrants, $1, 698, 082, 801.24 went toward "retiring" the existing sewer warrants (or the "Retired Sewer Warrants"), (doc. 5 at 33; doc. 6-1 at 8 (Tablack decl. ¶? 6)), which had an "aggregate principal amount of $3.08 billion as of the date on which the Plan was confirmed, " (doc. 6-1 at 3). The vast majority of the remaining amount went toward funding an insurance policy backing the new warrants. (Doc. 5 at 33; doc. 6-1 at 8 ¶? 7.)

While the County's other debts were affected by the Plan, those effects appear much less significant in comparison to the restructuring of the debt related to the sewer system. (*See* doc. 5 at 19-23.) As the County has stated, "The Plan provides for repayment in full of all non-sewer warrants on terms favorable to the County...." (B. Doc. 2203 at 3.) The Plan effectuates this by exchanging existing General Obligation warrants and school warrants for new ones. (Doc. 5 at 19-21.)

On November 20 and 21, 2013, the bankruptcy court held a confirmation hearing. (*See* Transcripts of Hearings held Nov. 20, 2013 and Nov. 21, 2013.) During the hearing, the bankruptcy court went through the County's proposed Plan line by line, and it heard and responded to arguments from the Ratepayers' counsel on why the Plan should not be confirmed. At one point, the Ratepayers' counsel summarized his clients' problems with the Plan into "three simple points":

[1.] The plan validates the corrupt activity that procured the execution [of the Sewer Warrants Series 2002-C, 2003-B and 2003-C-1, warrants that the Ratepayers have called the "Swap Warrants" in their brief on this Motion, (doc. 23 at 7)].

[2.] The plan validates the infringement on the constitutional rights of the citizens of the county, both to vote on their commissioners who set the rates, because it takes [the ability to set rates] out of the commissioners' hands, and to be free from overly burdensome debt without due process.

[3.] [The Plan is not feasible] because the plan is superimposed over a service area that has declining population and declining income levels, ... [and] increas[es] costs for four years without any consideration of the exact ability of those folks to pay....

(Transcript of Nov. 21, 2013 hearing at 704.)

The Confirmation Order was entered the next day, November 22, 2013. (B. Doc. 2248.) Two weeks before the bankruptcy court entered the Confirmation Order, the County had asked the court to waive the automatic stay of the Confirmation Order. (B. Doc. 2183 at 40.) Bankruptcy Rule 3020(e) ordinarily imposes an automatic fourteen-day stay on the operation of a confirmation order. The Ratepayers did not object to waiving the automatic stay at the hearing. (Transcript of Nov. 21, 2013 hearing at 1013.)

When the bankruptcy court entered the Confirmation Order on November 22, 2013, it exercised its discretion under the rule to waive the automatic stay. (Doc. 1-2 at 1, 78.) The Ratepayers filed a Notice of Appeal on December 1, 2013, (doc. 1-3), and a Protective Motion for Leave to Appeal, (doc. 1-4). They did not ask the bankruptcy court for a stay of its Confirmation Order pending this appeal.

The Plan's Effective Date was December 3, 2013. On that day, the County issued the New Sewer Warrants, the proceeds of which went in part toward retiring the "Retired Sewer Warrants." (Doc. 6-1 at 7-8.) The Depository Trust Company, "a clearinghouse system for institutional and individual investors who hold publicly traded securities, " received "more than $1.454 billion" of those proceeds. (Doc. 5 at 34; doc. 10-1 at 7.) Many of the cases that made up the pre-bankruptcy "litigation erupt[ion]" were dismissed with prejudice. (Doc. 5 at 13, 37.) Some of these cases involved issues that the Ratepayers have raised; the County has maintained that, to the extent the Ratepayers' claims have "any validity at all, " their claims are the County's to pursue. (B. Doc. 1977 [Disclosure Statement dated July 29, 2013] at 127.) The Ratepayers contend a conflict of interest between the County and its sewer ratepayers enables them to pursue what otherwise might be County causes of action. (*See, e.g.,* B. Doc. 2237 at 59-62;[16] doc. 23 at 19.) The Confirmation Order bars "any and all Persons from commencing or continuing any action, directly or indirectly... to assert... any Ratepayer Claims." (Doc. 1-2 at 27, 74; *see also* doc. 7-29 at 90-91 ["[A]ny Person seeking to exercise the rights of the County (including in respect of the County's Causes of Action purportedly asserted in the Bennett Action[])]... are permanently and completely enjoined from commencing or continuing any action...."].) When discussing these provisions during the confirmation hearing, the bankruptcy court explained that these provisions prevented a "double recovery against the same defendants." (Transcript of Nov. 21, 2013 at 1005.)

B. PARTIES' ARGUMENTS ON APPEAL

1. The County

The County argues that this appeal has three parts: the Confirmation Order, the two adversary proceedings involving the Ratepayers, and the Ratepayers' proof of claim. (Doc. 5 at 9.) It argues that the first two parts should be dismissed because the first part is moot and the second part is the subject of separate appeals. (*Id.*)

The County argues that the appeal of the Confirmation Order is moot constitutionally, equitably, and statutorily.[17] Its constitutional argument attacks the court's subject matter jurisdiction, asserting that the appeal is not a live Article III case or controversy because events have occurred subsequent to the appeal (namely, the Plan's consummation) that make it impossible for the court to grant the appellants "meaningful relief." (*Id.* at 39 [quoting *Al Najjar v. Ashcroft,* 273 F.3d 1330, 1336 (11th Cir. 2001)].) Since the Plan's terms are all "inextricably interwoven, " the Ratepayers' requested relief - that some of the creditors pay back some of the money and that the County not be tied to the Approved Rate Structure - would "require the entire Plan to be unwound, " and this court lacks authority to compel the County to unwind the Plan. (*Id.* at 40-41.)

The County also argues that a "broader concept than constitutional mootness" exists called "equitable" mootness. (*Id.* at 49.) Equitable mootness, it claims, is a doctrine rooted in the concern for finality, and occurs when the court "cannot grant effective judicial relief." (*Id.* [quoting *In re Club Assocs.,* 956 F.2d 1065, 1069 (11th Cir. 1992)].) The County argues that "the primary question" in determining whether an appeal is equitably moot is whether the "reorganization plan has been so substantially consummated that effective relief is no longer available." (*Id.* at 52 [quoting *Miami Ctr. Ltd. P'ship v. Bank of N.Y.,* 820 F.2d 376, 379 (11th Cir. 1987)(hereinafter *Miami Center I*)].)[18] Because the Plan has been "substantially consummated" in this case, the County argues that a "strong presumption" should arise that no "equitable and effective remedy" is available even for meritorious arguments or, at least, that the Plan "should be disturbed only for compelling reasons." (*Id.* at 55 [citations omitted].)

Besides it being impossible to unravel the Plan or return the parties to the status quo, the County argues, doing so would be inequitable because it would adversely affect third parties that received distributions from the Plan and third parties who purchased New Sewer Warrants in reliance on the Plan. (*Id.* at 58-61.) Also, the relief the Ratepayers seek would "destroy the entire Plan and propel the County back to square one in bankruptcy, " apparently no matter what the relief is, because "changing even one part of such a complex confirmed plan is tantamount to destroying all of it" when it is, as the bankruptcy court found, "comprised of a complex series of interrelated compromises and settlements.'" (*Id.* at 61-63 [quoting doc. 1-2 at 10].) The Plan should not be destroyed for "the benefit of a single, non-consenting party, " especially when that party failed to seek a stay pending appeal and the Plan was substantially consummated. (*Id.* at 64-65 [citations and internal quotation marks omitted].)

Also, the County argues that the appeal of the Confirmation Order is "statutorily" moot because 11 U.S.C. §? 364(e) "precludes this Court from unwinding the New Sewer Warrants... or any other aspect of the Plan." (*Id.* at 68.) The County argues that "postpetition financing under section 364 may be incurred, as here, for purposes of refinancing prepetition indebtedness, " and that the protection of section 364(e) extends to all the material terms of such financing. (*Id.* at 69 [citations omitted].) Because the Ratepayers did not obtain a stay of the Confirmation Order and the purchasers of the New Sewer Warrants acted in good faith in extending the credit, section 364(e) renders the court unable to disturb the Plan and, therefore, any appeal is moot. (*Id.*)

The County argues that portions of this appeal related to orders in Adversary Proceedings Nos. 12-120 and 12-16 should be dismissed because they are the subject of separate appeals, (*see* Case Nos. 2:14-CV-0214-SLB and 2:14-CV-0215-SLB), and, thus, are duplicates in this case.

2. The Ratepayers

The Ratepayers argue that they are creditors of Jefferson County because they overpaid for sewer services insomuch as the rates they paid incorporated the cost of $1.63 billion in Retired Sewer Warrants that they argue were void (or voidable) because they were obtained through bribery and corruption. (Doc. 23 at 7-8.) In the alternative, they argue that they are interested parties or special taxpayers entitled to intervention. (*Id.* at 12; *see also* doc. 16 at 28-29 [arguing that they have standing to appeal as "person[s] aggrieved" by the Confirmation Order and have pecuniary interest in the outcome of the appeal].) They wish to represent a class of future (and/or past) Jefferson County sewer ratepayers. (*See* doc. 23 at 7 ["Ratepayers... extended credit in the form of... overcharges' of *current and prospective* sewer bills"]; *id.* at 8 ["Ratepayers are creditors

who have extended credit in the form of *past and prospective* monthly sewer fees of $3.2 billion"](emphasis added).) Instead of the bankruptcy court enforcing the collection of sewer fees for the next forty years (*i.e.,* "act[ing] as a receiver, " *id.* at 20), the Ratepayers propose that the County comply with the demands of Amendment 73 to the Alabama Constitution and secure voter approval of new sewer warrants that would replace the old ones. (*Id.* at 8, 10-11.)

They assert that this appeal presents a live case or controversy by pointing out that the County will be under a continuing obligation to collect ever-increasing sewer rates from them to pay the New Sewer Warrant holders, and that the bankruptcy court has agreed to "enforce sewer rate increases" outside of applicable state law mechanisms. (Doc. 21 at 9; doc. 16 at 26.) They also argue that any appeal is still live since all legal issues decided by the bankruptcy court are subject to de novo review by this court. (Doc. 16 at 24.) The Ratepayers argue that they are the victims of "a legal strategy to use... equitable mootness... to deprive Ratepayers of a hearing on the merits of their claims." (*Id.* at 14.) They invoke Federal Rule of Bankruptcy Procedure 7001, reading it to require a hearing on the merits of their claims asserted in Adversary Proceedings 16 and 120. (Doc. 23 at 15.) According the the Ratepayers, equitable mootness cannot override state constitutional rights and powers. (*See* doc. 21 at 33; doc. 23 at 18-19.) Plus, equity is in their favor because they "are the only group affected in their pocketbooks by the indebtedness restructured by the confirmed Plan of Adjustment, " and "the only creditor group subject to ongoing [liability] from rate increases." (Doc. 21 at 10-11.) They argue that the County's representations in supporting confirmation of the Plan have been fraudulent, and that the County's "circumvention of the adversary rules was in bad faith and defeats any" request to invoke equity to its favor. (Doc. 23 at 16; doc. 21 at 16.) As for statutory mootness, they note that "[t]he new warrants provided no funding for the County[,] only money for the [prepetition] warrant holders[,] and were used to pay off [prepetition] warrants at increased cost to the County." (Doc. 23 at 31.) They argue that 11 U.S.C. §? 364(e) does not provide protection to that sort of transaction. (*See* doc. 21 at 18 [quoting *In re Kmart Corp.,* 359 F.3d 866, 870 (7th Cir. 2004)].) Finally, they imply that to the extent new investors "are relying on the agreement of the bankruptcy court to enforce rate increases on the Ratepayers, " such reliance cannot overcome appellate review of whether a plan violates the Tenth Amendment. (*See* Doc. 21 at 35 [referencing "Article X"].)

C. DISCUSSION

1. Constitutional Mootness

The County contends that the Ratepayers' appeal of the Confirmation Order is constitutionally moot.[19] According to the County:

In an appeal from a confirmation order in a chapter 9 bankruptcy case, when the relief that an appellant seeks "would require undoing the Plan in its entirety" and undoing the Plan "would be impossible, " the appeal must be dismissed as constitutionally moot because effective relief cannot be awarded. *Alexander v. Barnwell Cnty. Hosp.,* 498 B.R. 550, 559 (D.S.C. 2013). That is the case here. This Court cannot grant any meaningful relief with regard to the Bennett Ratepayers' appeal of the Confirmation Order because, even if this Court were to vacate the Confirmation Order, the relief that the Bennett Ratepayers seek simply cannot be granted without ultimately unwinding the entire Plan, which is legally and practically impossible.

Although the Bennett Ratepayers' description of the relief they seek in challenging the Confirmation Order has been a moving target in the bankruptcy court (and may remain unclear in this Court), distilled to its essence, the relief they seek would require (a) certain creditors associated with the Retired Sewer Warrants to make payments to the County or the Bennett Ratepayers even though the claims on which such payments would be based have been settled and released under the Plan; or (b) the County to set sewer rates below the level that the County agreed to maintain under the Plan and in the indenture for the New Sewer Warrants. Accomplishing either of those results would disrupt key elements of the Plan - requiring creditors to make payments could be accomplished only if the comprehensive global releases that were a foundation of the Plan were rescinded, and revising sewer rates would also disrupt the carefully-crafted deal made by the County in issuing the New Sewer Warrants. Because all the terms of the Plan are inextricably interwoven and were part of an overarching restructuring, unwinding any of these key parts would require the entire Plan to be unwound.

(Doc. 4 at 40-41.)

The Supreme Court recently explained the origins and contours of what the County has called "constitutional" mootness:

Article III of the Constitution restricts the power of federal courts to "Cases" and "Controversies." Accordingly, "[t]o

invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477 (1990).

...

There is thus no case or controversy, and a suit becomes moot, "when the issues presented are no longer live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.,* 568 U.S. ___, ___, 133 S.Ct. 721, 726 (2013)(quoting *Murphy v. Hunt,* 455 U.S. 478, 481 (1982))(per curiam); some internal quotation marks omitted). But a case "becomes moot only when it is *impossible* for a court to grant *any* effectual relief whatever to the prevailing party." *Knox v. Service Employees,* 567 U.S. ___, ___, 132 S.Ct. 2277, 2287 (2012)(internal quotation marks omitted); *see also Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12 (1992)("if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever' to a prevailing party, the appeal must be dismissed" (quoting *Mills v. Green,* 159 U.S. 651, 653 (1895))). " *As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.* " *Knox, supra,* at 1019, 132 S.Ct., at 2287 (internal quotation marks and brackets omitted).

Chafin v. Chafin, 133 S.Ct. 1017, 1023 (2013)(emphasis added). "A case does not become moot simply because an appellate court is unable completely to restore the parties to the status quo ante." *SunAm. Corp. v. Sun Life Assurance Co. of Can.,* 77 F.3d 1325, 1333 (11th Cir. 1996)(citing *Church of Scientology,* 506 U.S. at 12-14). "However small that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and is enough to save [a] case from mootness." *Chafin,* 133 S.Ct. at 1026 (quoting *Knox,* 132 S.Ct. at 2287)(internal quotations omitted).

The Ratepayers seek "typical appellate relief" from the Confirmation Order - they ask this court to reverse the bankruptcy court's Confirmation Order and that the bankruptcy court "undo what it has done." *Id.* at 1024. The fact that the Confirmation Order has taken effect - the New Sewer Warrants have issued and the Old Sewer Warrants have been retired - does not extinguish the controversy, although it may limit the scope of relief available. If, as the Ratepayers contend, the Confirmation Order's rate-structure provision is unconstitutional, the court may strike it.[20] Indeed, the bond rating company Fitch noted this problem with the New Sewer Warrants and rated the creditworthiness of those warrants accordingly. The Ratepayers have a legally cognizable interest in not paying rates ordered by the bankruptcy court that is acting pursuant to an unconstitutional (the court must assume for now) Confirmation Order, and, thus, they are not precluded from pursuing their appeal. Stated differently, the court could "fashion *some* form of meaningful relief, " *Church of Scientology,* 506 U.S. at 12 (emphasis in original), by vacating the portion of the Confirmation Order that retains jurisdiction in the bankruptcy court to order rate increases according to the Approved Rate Schedule.[21]

The court finds that there is still a live controversy between the parties and, therefore, this appeal is not constitutionally moot. The County's Motion for Partial Dismissal, (doc. 4), based on constitutional mootness will be denied.

2. Statutory Mootness

Citing 11 U.S.C. §? 364(e), the County argues that this "appeal of the Confirmation Order should also be dismissed for the separate and independent reason that it is statutorily moot." (Doc. 5 at 68.)

Section §? 901(a) makes 11 U.S.C. §? 364(c)-(f) applicable in Chapter 9 cases. 11 U.S.C. 901(a). The relevant provisions of §? 364, entitled "Obtaining Credit, " provide:

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt -

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if -

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

...

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. §? 364(c)-(e). "The purpose of [§? 364(e)] is to encourage the extension of credit to debtors in bankruptcy by eliminating the risk that any lien securing the loan will be modified on appeal." *Matter of Saybrook Mfg. Co.,* 963 F.2d 1490, 1493 (11th Cir. 1992).

The County contends that "[p]ostpetition financing under section 364 may be incurred... for purposes of refinancing prepetition indebtedness." (Doc. 5 at 69 [citing *In re AMC Corp.,* 485 B.R. 279, 287-88 (Bankr. S.D.N.Y.) *aff'd,* 730 F.3d 88 (2d Cir. 2013) and *In re Texaco, Inc.,* 92 B.R. 38, 42-43 (S.D.N.Y. 1988)].) According to the County:

[B]ecause the County issued the New Sewer Warrants to satisfy prepetition debt and the bankruptcy court approved the financing under section 364(e), [22] that section plainly prevents any court from unwinding the County's issuance of the New Sewer Warrants under the Plan. But the section 364(e) protection extends beyond that to all aspects of the Plan-because the issuance of those warrants depended upon the implementation of the remainder of the County's Plan, including the implementation of a new structure of sewer rates and the global settlement of legacy sewer debt issues. Thus, *all* of the County's Plan falls within the ambit of section 364(e).

(*Id.* at 70 [emphasis in original; footnote added].)

According to the Eleventh Circuit, "bankruptcy courts are indeed courts of equity, and they have the power to adjust claims to avoid injustice or unfairness. However, ... this equitable power is not unlimited. A bankruptcy court's equitable power must and can only be exercised within the confines of the Bankruptcy Code." *In re Empire for Him, Inc.,* 1 F.3d 1156, 1160 (11th Cir. 1993)(quoting *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988), and *Matter of Saybrook Mfg.,* 963 F.2d 1490, 1495 (11th Cir. 1992))(internal citations and quotations omitted). Therefore, only transactions authorized by §? 364(c) or (d) are protected by §? 364(e). *See Matter of Saybrook Mfg. Co.,* 963 F.2d at 1493 (By its own terms, section 364(e) is only applicable if the challenged lien or priority was authorized under section 364.)

Whether issuance of the New Sewer Warrants, together with the Approved Rate Structure, to pay off the Old Sewer Warrants was a transaction authorized by section 364(c) and/or (d) is an issue of first impression in this Circuit. "By their express terms, sections 364(c) [and] (d) apply only to future - i.e., post-petition - extensions of credit. They do not authorize the granting of liens to secure pre-petition loans." *Matter of Saybrook Mfg. Co.,* 963 F.2d at 1495; *see also In re Fontainebleau Las Vegas Holdings, LLC,* 434 B.R. 716, 746 (S.D. Fla. 2010)(citing Collier on Bankruptcy ¶? 364.06[2], at 364-25); *Bland v. Farmworker Creditors,* 308 B.R. 109, 116 ("[C]ross-collateralize is to get prepetition loans secured by postpetition assets" and "a lender cannot cross-collateralize or "refinance and re-collateralize" a prepetition secured debt by substantially all of the debtor's assets.'").

Section 364(c) and (d) authorize only particular types of actions or concessions to obtain postpetition credit or financing, and §? 364(e) only protects the validity of the postpetition lender's debt and/or certain priorities and liens. Therefore, before this court can decide that §? 364(e) bars an appeal of the refinancing plan, it must decide whether the terms of the refinancing plan were authorized pursuant to §? 364(c) and/or (d). *Matter of Saybrook Mfg.,* 963 F.2d at 1493("By its own terms, section 364(e) is only applicable if the challenged lien or priority was authorized under section 364.")

Subsection (c) authorizes the court to allow "the obtaining of credit or the incurring of debt" by the County[23] if it is unable to obtain unsecured credit. 11 U.S.C. §? 364(c). This subsection authorizes the County to obtain credit or incur debt with one of three conditions: (1) the postpetition credit or debt has priority over other administrative expenses; (2) the postpetition credit or debt is secured by a lien on unencumbered property; or (3) the postpetition credit or debt is secured by a junior lien on encumbered property. *Id.* If the County is unable to secure credit under (c), the bankruptcy court may authorize it to obtain credit or incur debt that has a senior or equal lien on encumbered property if the holder of the lien on the property is adequately protected. 11 U.S.C. §? 364(d)(1). Neither subsection (c) nor subsection (d) authorizes the

bankruptcy court to allow the County to obtain credit or incur debt by giving the lender or the bankruptcy court unlawful or unconstitutional rate-making authority.

Moreover, subsection (e) by its terms protects the specific forms of postpetition lending authorized by §? 364. 11 U.S.C. §? 364(e). Its protection is limited to the validity of the debt and the priority of the lien; these elements of postpetition debt may not be modified on appeal if a stay of the postpetition lending is not granted. *Id.*

To the extent the County seeks to shield all terms of the sale of the New Sewer Warrant on review by invoking §? 364(e), the court will deny its Motion for Partial Dismissal based on statutory mootness.

3. Equitable Mootness

The County contends that the appeal of the Confirmation Order is due to be dismissed as "equitably moot" because Ratepayers did not obtain a stay of the Order pending appeal and the Plan has been "substantially consummated." It contends:

[T]his appeal presents the quintessential case for dismissal based on equitable mootness. An exceedingly complex Plan that was overwhelmingly supported by the County's creditors has been substantially consummated. Over $1.7 billion has changed hands in payments exchanged between hundreds, if not thousands, of persons and entities. The Retired Sewer Warrants and the associated Indenture have been canceled, and there is no legal or practical ability to revive them. Likewise, the Court has no ability to cancel the New Sewer Warrants and to order the County to repay the proceeds from the sale of those warrants. Third parties have relied on the bankruptcy court's Confirmation Order in purchasing the New Sewer Warrants, and the proceeds of the sales of the New Sewer Warrants allowed the holders of the Retired Sewer Warrants to receive distributions under the Plan. The County's non-sewer debt has also been restructured, and numerous lawsuits have been dismissed with prejudice as a result of the Plan.

(Doc. 5 at 50-51.) Therefore, it argues reversing any part of the Confirmation Order would necessitate unwinding the entire Plan, which is legally and practically impossible at this point in time and which would threaten the County's emergence from bankruptcy.

"The doctrine of equitable mootness is a prudential, not a constitutional, doctrine that evolved in response to the particular necessities surrounding consummation of confirmed Chapter 11 bankruptcy reorganization plans." *In re Bodenheimer, Jones, Szwak, & Winchell LLP,* 592 F.3d 664, 668 (5th Cir. 2009)(quoting *In re Hilal,* 534 F.3d 498, 500 (5th Cir. 2008))(internal quotations omitted). This doctrine is called "equitable mootness" because its legitimacy does not rest on a specific provision of the Bankruptcy Code or on Article III of the Constitution, *see In re Pacific Lumber Co.,* 584 F.3d 229, 240 (5th Cir. 2009), but on "equitable considerations of finality and good faith reliance on a judgment, " *In re Lett,* 632 F.3d at 1226 (quoting *In re Club Associates,* 956 F.2d 1065, 1069 (11th Cir.1992)). The problem with the doctrine's extension to this Chapter 9 case is twofold: (1) its application is "in some tension with [the Supreme Court's] recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging, " *see Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S.Ct. 1377, 1386 (2014)(quoting *Sprint Comm., Inc. v. Jacobs,* 134 S.Ct. 584, 591 (2013)(quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976)))(internal quotations omitted);[24] and (2) it is based on Chapter 11 concepts that may be inapplicable to or inappropriate for this Chapter 9 case, *see In re Seidler,* 44 F.3d 945, 947 n.3 (11th Cir. 1995). Although the Supreme Court's recent decisions seem to question the continued viability of prudential concerns as grounds for dismissal, [25] this court need not decide whether equitable mootness remains viable in Chapter 11 proceedings, because it finds equitable mootness does not apply to challenges to a Confirmation Order in Chapter 9 proceedings.

Equitable mootness is a "judicial anomaly" best used as a "scalpel, " *In re Pacific Lumber Co.,* 584 F.3d 229, 240 (5th Cir. 2009); it is the "exception and not the rule, " *In re Semcrude, L.P.,* 728 F.3d 314, 321 (3d Cir. 2013). Courts frequently dealing with appeals of confirmation orders of Chapter 11 corporate reorganization plans have recognized that efficiency is of paramount importance to businesses in distress. Therefore, for private parties, courts are able to "strik[e] the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him." *See In re Club,* 956 F.2d at 1069. Thus, when a Chapter 11 plan has been substantially consummated, no legal or factual error that threatens the entire deal is worth the cost of undoing the deal - it is too inefficient and unfair - and, therefore, the court need not even hear the arguments. When "a successful appeal would be fatal to a plan, prudence may require the appeal be

dismissed because granting relief to the appellant would lead to a perverse outcome." *In re Philadelphia Newspapers, LLC,* 690 F.3d 161, 168 (3d Cir. 2012), *as corrected* (Oct. 25, 2012), *cert. dismissed,* 133 S.Ct. 1001 (2013). *But see Lexmark,* 134 S.Ct. at 1388 ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because prudence' dictates."). The judge-made doctrine of equitable mootness was developed for and should only be used when, "granting relief on appeal [is] almost certain to produce a perverse outcome-chaos in the bankruptcy court from a plan in tatters and/or significant injury to third parties. Only then is equitable mootness a valid consideration." *In re Semcrude, L.P.,* 728 F.3d 314, 320 (3d Cir. 2013)(internal citations omitted).

The County contends that the doctrine of equitable mootness should apply in Chapter 9 appeals exactly as it applies in Chapter 11 appeals.[26] The Eleventh Circuit has held that "substantial consummation' is a chapter 11 concept, " and that the concept was inapplicable to this chapter 13 case." *In re Seidler,* 44 F.3d at 947 n.3 (citing 11 U.S.C. 1101(2) and 103(f)).[27] This court finds that "equitable mootness" is not applicable in a Chapter 9 appeal challenging terms of the Confirmation Order as unconstitutional although all remedies may not be available to the appellants.

In 1977, the House Report on the new Bankruptcy Act identified "two major differences [between Chapter 9, municipal reorganization, and Chapter 11,] general reorganization law: first, the law must be sensitive to the issue of the sovereignty of the States; [and] second, a municipality is generally not a business enterprise operating for profit, and there are no stockholders."[28] H.R. Rep. No. 95-595, at 263 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6221. "The bankruptcy of a public entity, " such as the County, "is different from that of a private person or concern. Unlike any other chapter of the Bankruptcy Code, Chapter 9 places federal law in juxtaposition to the rights of states to create and govern their own subdivisions." *In re City of Colorado Springs Spring Creek Gen. Imp. Dist.,* 177 B.R. 684, 693 (Bankr. D. Colo. 1995). This difference between Chapter 9 and other bankruptcies requires courts to recognize that Congress enacted Chapter 9 in a "constitutional balance" that contemplates "the delicacies of the state-federal relationship." *In re City of Stockton, Cal.,* 478 B.R. 8, 23 (Bankr. E.D. Cal. 2012). Prudential concerns, created in response to complex, but private, corporate reorganizations, cannot insulate a bankruptcy court's decision on constitutional issues involving public governmental entities.

The prudential concerns of a Chapter 9 plan are different from the prudential concerns of a Chapter 11 plan. "[T]wo policies underlying Chapter 11" are "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship,* 526 U.S. 434, 453 (1999). The policy underlying Chapter 9 "is not future profit, but rather continued provision of public services." *In re Mount Carbon Metro. Dist.,* 242 B.R. 18, 34-35 (Bankr. D. Colo. 1999). These major differences in the purposes of Chapter 9 and Chapter 11 reorganizations alter analysis of whether equitable considerations should factor into this court's decision to hear the Ratepayers' appeal. *Cf. In re City of Desert Hot Springs,* 339 F.3d 782, 789 (9th Cir. 2003)("[S]ignificant differences between a chapter 11 bankruptcy and a chapter 9 bankruptcy... change the analysis of the question of finality...."). The County asserts that the "equitable-mootness doctrine exists to promote finality, " (doc. 5 at 64), but it does not acknowledge that the equitable mootness doctrine requires a weighing of "finality and good faith reliance" against "competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him, " *see In re Club,* 956 F.2d at 1069. In the case of a Chapter 9 reorganization plan-finality and reliance may be required to yield to the Constitution and the interest of the public in the provision of governmental services.

In this case, one of the costs of finality is to allow a non-Article III court to decide important constitutional questions that place substantial future financial obligations on the citizens of Jefferson County without representation. The court notes that the County once argued that a predecessor to this case presented "knotty state-law questions, " including "whether a county can validly alienate its ratemaking power in an ordinary contract, without some form of legislative authorization if not a vote of the citizens." *See Bank of New York Mellon v. Jefferson County,* Case No. 08-CV-1703-RDP, doc. 77 at 10-12 (N.D. Ala. Mar. 23, 2009)(Jefferson County's Motion to Stay). The County argued that important issues of federalism, which were enshrined in law in various abstention doctrines, should cause a federal court to decline hearing the very questions that the bankruptcy court seemingly decided, *see id.,* and the district court agreed, *see, e.g., id.,* doc. 100 at 53 (N.D. Ala. June 12, 2009); *see also In re Cottonwood Water & Sanitation Dist., Douglas Cnty., Colo.,* 138 B.R. 973, 979 (Bankr. D. Colo. 1992)("[M]unicipal bankruptcies involve significant problems which are not encountered in the private sector.

Important constitutional issues arise when a municipality enters the bankruptcy arena."); 11 U.S.C. §? 943(b)(6) (requiring "electoral approval necessary under applicable nonbankruptcy law in order to carry out any provision of the plan"). However, applying the doctrine of equitable mootness as the County espouses, would prevent *both* state and federal Article III courts from deciding those "knotty state law" and constitutional issues and would prevent any review of a federal bankruptcy court's assumption of jurisdiction to enforce its unreviewed actions. *See In re Pacific Lumber Co.,* 584 F.3d 229, 243 (5th Cir. 2009)(declining to dismiss appeal as equitably moot and noting that "[f]ederal courts should proceed with caution before declining appellate review of the adjudication of [constitutional] rights under a judge-created abstention doctrine.").

Although this court agrees that some part or parts of the Confirmation Order may be impossible to reverse, the County's ceding of its future authority to set sewer rates to the bankruptcy court as a term of the New Sewer Warrants is not one of those parts. If, as the Ratepayers contend, this part of the Confirmation Order is unconstitutional, this court may so declare and prohibit enforcement of that term. A similar constitutional issue would not arise in private contracts under a Chapter 11 plan.

Because Chapter 11 concerns private business entities, the good faith reliance of private investors on the bargains that bring about voluntary reorganization plans are treated with deference, and courts may refuse to undo these agreements when equity so demands. *See Miami Center II,* 838 F.2d at 1156. In proposing the adoption of a Chapter 11 perspective in this Chapter 9 case, the County points out the inequity to the purchasers of the New Sewer Warrants. However, because the County is a political subdivision of the State of Alabama, significant public interests are at stake.[29] The Ratepayers are not investors or shareholders whose stake in this case is limited to the amount of their investment; they are citizens of the County dependant upon the County for provision of basic sewer service. As such, they are the revenue source for payment of the New Sewer Warrants; however, their interest is not limited to a finite financial amount.[30] Rather, their interest in continuing to receive essential sewer service is not protected by the political system of County governance nor do they have a voice in future rate-making. As the Alabama Attorney General recognized in seeking to intervene on behalf of the then-unrepresented ratepayers in a state court case preceding the bankruptcy, the outcome of this litigation "will have a substantial impact on the rights of ratepayers and their ability to obtain service at just and reasonable rates from a public utility which is a monopoly provider." *Bank of New York Mellon v. Jefferson County, Alabama,* No. CV-2009-2318, Motion to Intervene at ¶? 3; *see also* Press Release, Luther Strange, Alabama Attorney General, AG Seeks to Intervene in Jefferson County Sewer Case (June 15, 2011), *available at* http://www.ago.state.al.us/News-66.

In light of the public and political interests at stake in any Chapter 9 proceedings, the court will deny the County's appeals to equity to allow allegedly unconstitutional provisions of the Confirmation Order to stand without review.

Even if the court considered equitable mootness as appropriate in Chapter 9 proceedings, the court would, nevertheless, deny the County's motion to dismiss.

Equitable mootness, a concept primarily applied in the bankruptcy context, "is a pragmatic principle grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable.'" *AVCO Corp. v. Citation Corp.* (*In re Citation Corp.*), 371 B.R. 518, 522 (N.D. Ala. 2007)(quoting *MAC Panel Co. v. Va. Panel Corp.,* 283 F.3d 622, 625 (4th Cir. 2002)). To decide whether an appeal is equitably moot, a court "must determine whether the reorganization plan has been so substantially consummated that effective relief is no longer available.'" *First Union Realty Estate Equity & Mortgage Investments* (*In re Club Associates*), 956 F.2d 1065, 1069 (11th Cir. 1992)(quoting *Miami Center Ltd. Partnership v. Bank of New York,* 820 F.2d 376, 379 (11th Cir.1987)).

Substantial consummation by itself is not dispositive, however, and a court must consider all relevant circumstances to decide whether it can grant effective relief, including whether a stay pending appeal has been obtained, what type of relief the appellant seeks, and what effect granting that relief would have on third parties not before the court. *In re Club Associates,* 956 F.2d at 1069. The court is charged with "striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him." *Id.*

Davis v. Shepard, 2014 WL 2768808, *6 (N.D. Ala. 2014). As set forth above, the court finds that it can grant some relief to the Ratepayers, if successful on appeal, in the form of striking any allegedly unconstitutional terms in the

Confirmation Order regarding the bankruptcy court's authority to set the rates for sewer service.

In a Chapter 11 reorganization, the appellants' failure to obtain a stay of the confirmation order pending appeal is a significant, but not dispositive, factor in favor of dismissing an appeal as equitably moot.[31] (*See* doc. 5 at 65-67.) In this case, the court finds that seeking a stay was futile and cost-prohibitive.

The County successfully moved the bankruptcy court to waive the automatic fourteen-day stay and now complains that the Ratepayers, who sought an appeal nine days after confirmation, should have opposed their motion. In this case the County has admitted that it "intend[ed] to close [the deal on the sewer warrants], if the court confirms... and to moot out any appeal." (Transcript of Nov. 20, 2013 hearing at 7-8.) The bankruptcy court also expressed its intention that the Plan be consummated quickly; at the confirmation hearing, it stated:

This deal has to be put together quickly. It has to be closed quickly for various reasons, some of which are legal, some of which are tactical. But the one that I am focused on is that the original deal came undone because of market conditions, and I don't want to leave this deal out there very long so that we have interest rate shifts or something else that we may not contemplate that will undo the deal. And that is why I'm doing what is somewhat of an unusual, maybe an extraordinary [way to expedite the deal].

(Transcript of Nov. 21, 2013 hearing at 840-41.) This court is not inclined to dismiss Ratepayers' appeal as "equitably moot" based on the rush to consummation. *See In re Paige,* 584 F.3d 1327, 1343 (10th Cir. 2009) ("[W]here, as here, the parties attempting to convince the court not to reach the merits have accelerated the consummation of the plan despite their knowledge of a pending appeal - in this case, by waiving the requirement that the consummation await the resolution of all pending appeals - we are less inclined to grant their wish that the court abstain from reaching the merits on appeal."). Under the circumstances, no stay would have been granted even if Ratepayers had moved the court and somehow were capable of obtaining an appeal bond.[32]

The Plan, as confirmed, conditioned its Effective Date on the Plan not being subject to any stay. (B. Doc. 2182 at 78.) In fact, any stay would have allowed the purchasers of the New Sewer Warrants to back out of the deal entirely, mooting the confirmation of the Plan. (Doc. 24 at 16.) In the face of the bankruptcy court's stated concerns and the Plan's express provisions, a motion for a stay pending appeal would have been futile. Equity does not require futile gestures. *Munchak Corp. v. Cunningham,* 457 F.2d 721, 725 (4th Cir. 1972) ("Equity does not require the doing of a futile act as a condition to the granting of equitable relief.")(citation omitted); *Stewart v. United States,* 327 F.2d 201, 203 (10th Cir. Wyo. 1964)("But, equity will not require a useless thing, or insist upon an idle formality.").

In short, the fact that "the Bennett Ratepayers did *nothing,* " to stay the consummation of the Plan is not "particularly inexcusable" to this court. (*See* doc. 5 at 66 [emphasis in original].) The equitable considerations for mooting an appeal in a Chapter 11 case are not the same in a Chapter 9 case. Here, the equities lie with the Ratepayers, and the questions they raise about the legality and constitutionality of the Confirmation Order affect public and political interests - not merely private interests - and, thus, counsel for Article III review of the Confirmation Order.

The County's Motion for Partial Dismissal will be denied as to its contention that the Ratepayers' appeal of the Confirmation Order is equitably moot.

4. Motion to Dismiss Appeal of Orders in the Adversary Proceedings and Motion to Consolidate

The County argues that the Ratepayers cannot "include in the present appeal [Case No. 2:14-CV-213-SLB] challenges to the adversary-proceeding orders because this matter, which is an appeal in the County's main bankruptcy case, is not an appeal in the adversary proceedings." (Doc. 5 at 73.) The court notes that the Ratepayers' Statement of the Issues on Appeal filed in the "main" bankruptcy case, (doc. 1-7), contains issues related to orders in two adversary proceedings - AP No. 12-0016-TBB [hereinafter AP 16] and AP No. 12-0120-TBB [hereinafter AP 120]. The Notice of Appeal states the Ratepayers are appealing the following orders:

(1) Order Severing Complaint in Intervention and Motion for Class Certification; signed on 8/15/2012 *Adversary Proceeding 16,* Docket No. 139 (RE: related AP 16 Docket No. 126-Complaint in Intervention Filed by Bennett Ratepayers filed July 13, 2012), together with the following Rulings from AP 16 [-] to the extent construed to be preclusive of Ratepayers claims or causes of action in either Adversary Proceeding 120, the Bankruptcy Case or on appeal:

a. Memorandum Opinion On Net Revenues And Applicability of 11 U.S.C. §? 928(b) [AP 16 Docket No. 119], dated June 29, 2012;

b. Order On Net Revenues And Applicability of 11 U.S.C. §? 928(b) [AP 16 Docket No. 121], dated July 2, 2012;

c. Order On Net Revenues And Applicability of 11 U.S.C. §? 928(b) [Bankr. Docket No. 1101], dated July 2, 2012; [duplicate of subparagraph b, *supra*]

d. Agreed Order (I) Resolving Jefferson County's Motion for Reconsideration; Reserving Certain Issues and Directing Entry of Partial Final Judgment in AP 16; and (III) Establishing a Schedule in AP 67 [AP 16 Docket No. 152], dated October 9, 2012;

e. Agreed Order (I) Resolving Jefferson County's Motion for Reconsideration; Reserving Certain Issues and Directing Entry of Partial Final Judgment in AP 16; and (III) Establishing a Schedule in AP 67 [Bankr. Docket No. 1350], dated October 9, 2012; [duplicate of subparagraph d, *supra*]

f. Amended Memorandum Opinion On Net Revenues And Applicability of 11 U.S.C.§? 928(b) [AP 16 Docket No. 151], dated October 9, 2012; and

g. Partial Final Judgment [AP 16 Docket No. 153], dated October 9, 2012.

(2) Order Denying Motion to Reconsider this Court's Order Staying this Adversary Proceeding (Related to Doc #98) Signed on 7/1/2013 (Entered: 07/01/2013) *AP 120* Docket No. 108.

(3) Order that the Request for a Stay is granted and this Adversary Proceeding is stayed in its entirety pending further order of this court. Signed on 6/7/2013 (RE: related document(s) 92 Reply filed by Defendant Jefferson [C]ounty, Alabama). (Entered: 06/07/2013) *AP 120* Docket No. 95.

(4) Order Sustaining Objection of Jefferson County, Alabama to Proofs of Claim filed by Roderick V. Royal and Others (Claims 1292 and 1305) Signed on 11/12/2013 [and related docs. 1945, 2013, 2016-2017, 2141, 2151, 2196].

(5) Order Denying Motion for Clarification or Reconsideration Based On Two Cases Cited as Authority by the Court on Objection of Jefferson County, Alabama to Proofs Of Claim Filed by Roderick V. Royal and Others (Related Doc 2160 and Order Denying Motion to Alter or Amend or for Relief from a Final Judgment (Related Doc 2174), Signed on 11/26/2013. Modified on 11/26/2013 to correct text. (Entered: 11/26/2013). Bankruptcy Case Docket No. 2251.

(6) Findings of Fact, Conclusions of Law and Order Confirming the Chapter 9 Plan of Adjustment for Jefferson County, Alabama Signed on 11/22/2013 (RE: related document(s)1911 Amended Chapter 9 Plan filed by Debtor Jefferson County, Alabama, 2182 Amended Chapter 9 Plan filed by Debtor Jefferson County, Alabama). The Plan, as previously modified and as modified by any modifications made at the Confirmation Hearing, is APPROVED and CONFIRMED. The Plan Settlements Motion 2183 is GRANTED in its entirety. Any resolutions of objections to confirmation of the Plan or to the Plan Settlements Motion explained on the record at the Confirmation Hearing are hereby incorporated by reference. All unresolved objections, statements, joinders, comments, and reservations of rights in opposition to or inconsistent with the Plan or the Plan Settlements Motion have been fully considered by the Court and are hereby OVERRULED with prejudice on the merits and in their entirety. The Administrative Claims Bar Date shall be January 31, 2014. (Entered: 11/22/2013). Bankruptcy Case Docket No. 2248.

(Doc. 1-3 at 1-4 [emphasis added].)

"Adversary proceedings are separate lawsuits from which separate appeals may lie. Accordingly, separate notices of appeal must be filed with regard to each separate adversary proceeding." *In re Robinson,* 196 B.R. 459, 460 n.2 (Bkrtcy. E.D. Ark., 1996), *cited in* doc. 5 at 73. Ratepayers filed three Notices of Appeal in the bankruptcy court and filed three appeals in this court-Case Nos. 2:14-CV-0213-SLB; 2:14-CV-0214-SLB; and 2:14-CV-0215-SLB. The Notice of Appeal in this case, which purports to be the appeal of the Confirmation Order and denial of the Ratepayers' proof of claim, lists documents from the adversary proceedings, each of which is the subject of its own appeal.

In response to the County's Motion to Dismiss, Ratepayers filed a Motion to Consolidate. (Doc. 14.) Consolidating Ratepayers' appeals would not allow them to raise every issue in each of their cases, which appears to be their desire. Indeed given the unfocused nature of their issues and their briefs, the court finds limiting Ratepayers to specific issues in specific appeals may aid the court in their resolution far more than consolidating the cases. Therefore, the Ratepayers' Motion to Consolidate, (doc. 14), will be denied.

The court will grant the County's Motion to dismiss from this case Ratepayers' appeal of the orders entered in the adversary proceedings. Specifically, this court will not consider on appeal in this action:

(1) Order Severing Complaint in Intervention and Motion for Class Certification, AP 16, doc. 139, and/or the related documents a-g;

(2) Order Denying Motion to Reconsider, AP 120, doc. 108, and/or related documents AP 120, doc. 98; and

(3) Order granting request for stay, AP 120, doc. 95, and/or related document AP 120, docs. 92.

CONCLUSION

For the foregoing reasons, the court is of the opinion that the Ratepayers' appeal is not moot; therefore the County's Motion to Dismiss the appeal as moot will be denied. The Motion to Dismiss the Ratepayers appeal of orders entered in the Adversary Proceedings will be granted. The Ratepayers' Motion to Strike and Motion to Consolidate will be denied. An Order denying in part and granting in part the County's Motion for Partial Dismissal, (doc. 4); denying the Ratepayers' Motion to Consolidate, (doc. 14); and denying their Motion to Strike, (doc. 15), will be entered contemporaneously with this Memorandum Opinion.

Notes:

[1] Reference to a document number, ("Doc. ___"), refers to the number assigned to each document as it is filed in the court's record of this case. Reference to a document filed in the bankruptcy record, ("B. doc. ___"), refers to the number assigned to a document as it was filed in the bankruptcy court's record in Case No. 11-05736-TBB9. Page numbers to record citations refer to the page numbers assigned to the documents by the CM/ECF electronic filing system.

[2] The sole function of this fact section is to frame the issue of mootness, not to fact-find. The court has interspersed the claims of the Ratepayers throughout this section in footnotes because they are easier to understand in this context than by summarizing their brief, (doc. 23), and their Statement of the Issues on Appeal, (doc. 1-7).

[3] One of the Ratepayers' claims is that, in fact, this is *not* the case for Jefferson County. (*See* doc. 1-7 at 6 ¶? 2; doc. 23 at 9, 19, 22.) However, in the Confirmation Order, the bankruptcy court found that "ratepayer approval was not required for the issuance of the Sewer Warrants." (Doc. 1-2 [B. Doc. 2248] at 23.)

[4] One of the Ratepayers' issues is, if the warrants are not debt, the County was not "insolvent" at the time it filed bankruptcy. (See doc. 1-7 at 14; doc. 23 at 23-24); *see also Bank of N.Y. Mellon v. Jefferson County,* No. 2:08-cv-01703-RDP, 2009 U.S. Dist. LEXIS 122093, *38 (N.D. Ala. June 12, 2009)("The Warrants at issue are non-recourse debt. Thus, any judgment in this action must be paid from the sewer revenues which are undisputedly inadequate."); *In re Jefferson County,* 469 B.R. 92, 98 n.2 (Bankr. N.D. Ala. 2012) (explaining differences between bonds and warrants, and noting that the County has a "vested interest in maintaining that its warrants are warrants and not some other sort of indebtedness"). Related to this is the Ratepayers' claim that the County presented the Plan in bad faith in violation of 11 U.S.C. §? 1129(a)(3). (Doc. 1-7 at 14 ¶? 11, 18-19 ¶?¶? 37, 42, 43.)

[5] One of the Ratepayers' claims is that the bankruptcy court improperly assumed the duties and authority of the receiver. (Doc. 1-7 at 16 ¶?¶? 24-26; doc. 23 at 20 ¶? 4; Transcript of Nov. 21, 2013 hearing at 982.)

[6] The Ratepayers contest this, insofar as it would allow the County to issue warrants without voter approval or consideration of debt ceilings, or, in the alternative, they claim that this means that the County was not insolvent at the time it filed bankruptcy.

[7] In arguing that the County was not insolvent when it petitioned for bankruptcy, the Ratepayers quoted *In re Hamilton Creek Metro. Dist.,* 143 F.3d 1381, 1387 (10th Cir. 1998): "Chapter 9 does not offer relief to a municipality simply because it is economically distressed. Relief is only available if the debtor was insolvent'...." (Doc. 23 at 22-23) (internal citations omitted).

[8] The Ratepayers allege that the bankruptcy court erred in failing to distinguish warrants tainted by bribes, which the Ratepayers claim total $1.63 billion and are void *ab initio,* from legitimate warrants. (Doc. 1-7 at 12-13 ¶?¶? 1, 5; doc. 23 at 7.)

[9] The Ratepayers allege that the bankruptcy court "did not inquire into the legality of the County's issuance and execution of Swap/Warrants where an allegation of fraud, corruption, or undue influence, effecting a fraudulent transfer of the county's credit for private benefit was made." (Doc. 1-7 at 12 ¶? 2.)

[10] Section 1342 states:

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. §? 1342.

[11] The Ratepayers claim that the rate increases mandated by the Plan are not fair and equitable, and that the bankruptcy court made no findings supported by "economic data showing [that] the rate increases are feasible...." (Doc. 1-7 at ¶?¶? 6, 27, 29, 39.) Essentially, they claim that, considering the median income of Jefferson County sewer ratepayers, the future rate increases are not merely unpleasant, but they are unsustainable.

[12] The Approved Rate Structure allows the County Commissioners to "increase User Charges at any time." (B. Doc. 2182 at 111.)

[13] To put this in perspective, according to a Consumer Price Index (CPI) inflation calculator provided on the website for the Bureau of Labor Statistics, the total inflation from 2010 to 2013 was approximately 7%. *See* CPI Inflation Calculator, available at http://www.bls.gov/data/inflation_calculator.htm.

[14] Inflation in the national economy over the last forty years has totaled 379%.

[15] In arguing in favor of confirming the Plan, the County explained that "[t]he only limitation on the ability of future Commissions to set rates is that the Sewer System must be self-sustaining...." (B. Doc. 2203 at 28.) To realize the power of this limitation, imagine if the "only" limitation on the power of future Congresses to levy taxes was to have a balanced budget at the end of the year. While that might represent a sensible policy, it would take a constitutional amendment, not a statute, to require it. *See Dorsey v. United States,* 132 S.Ct. 2321, 2331 (2012)("[S]tatutes enacted by one Congress cannot bind a later Congress...."). For such an amendment attempt, see *Uhler v. Am. Fed'n of Labor-Cong. of Indus. Organizations,* 468 U.S. 1310, 1310 (1984) (Rehnquist, J., in chambers).

[16] The stamps have been marked over. This document may be doc. 2237-1, and the pages referred to pages 57-60.

[17] During oral argument on the County's Motion for Partial Dismissal, the court asked counsel for the County a hypothetical question; specifically, the court asked if the bankruptcy court's retention of jurisdiction to enforce the Adjusted Rate Schedule was "clearly unconstitutional, " did this court have authority to vacate that portion of the Confirmation Order. Counsel for the County responded that the court did not have such authority. As set forth *infra,* the court disagrees.

[18] The County does not distinguish between *Miami Center I* and *Miami Center Ltd. P'ship v. Bank of New York,* 838 F.2d 1547 (11th Cir. 1988)(hereinafter *Miami Center II*). The County does not list *Miami Center I* in its Table of Authorities, and never uses the opinion's full citation. In the *Miami Center II* opinion, the court went "back to square one." *Id.* at 1548. Therefore, it seems to have overruled or vacated at least some part of *Miami Center I.* Nevertheless, because the Eleventh Circuit cited to both *Miami Center* opinions in *In re Club Assoc.,* 956 F.3d 1065 (11th Cir. 1992), it appears that *Miami Center I* has continuing precendential value.

[19] "The doctrine of constitutional mootness" is "known to attorneys who do not practice bankruptcy law as simply mootness'." *In re Fontainebleau Las Vegas Holdings,* 434 B.R. 716, 738 (S.D. Fla. 2010).

[20] The County seems to believe that the Approved Rate Structure is "antecedent to and *independent of* the Confirmation Order that validated it, " as if the New Sewer Warrant holder's ability to enforce the Approved Rate Structure against *future* County Commissions in the very bankruptcy court that validated it is a mere convenience instead of one of the primary and extraordinary methods of securing the warrants. (*See* doc. 5 at 41 [emphasis added].) Indeed, that security is perhaps the power the new warrant holders required but could not obtain and the assurance the present County could not provide outside of bankruptcy. The live question on appeal is whether they can obtain it in bankruptcy.

[21] The County contends that the Ratepayers "could not compel the Jefferson County Commission to enact new rates even if the Confirmation Order were reversed." (*Id.* at n.12.) True, they must pay whatever rates the Commission imposes. But what the Ratepayers seek to avoid is paying rates set by a Commission who can be taken to the bankruptcy court if it enacts rates in violation of the Approved Rate Structure. Part of the relief they seek is the ability to elect Commissioners who, instead of "tak[ing] unpopular stances" or "actions that [are] not desired by many of their constituents, " *In re Jefferson County,* 474 B.R. at 244, are accountable to them, and not to federal enforcement of the Approved Rate Structure. Vacating the Approved Rate Structure of the Confirmation Order would grant them that relief.

[22] Subsection (e) does not provide the bankruptcy court with any authority to approve postpetition financing; subsection (e) addresses only the effect on such postpetition financing on appeal. *See* 11 U.S.C. §? 364(e). The authority to approve postpetition financing is provided in subsections (c) and (d). *See* 11 U.S.C. §? 364(c), (d).

[23] Under the provisions allowing a Chapter 9 bankruptcy, the County acts as the trustee and there is no bankruptcy estate.

[24] The Supreme Court did not do away with all legal theories "prudential" in nature. *See Lexmark,* 134 S.Ct. at 1387 n.3. Instead, it reframed the matter as one of statutory interpretation. *Id.* at 1387-88 and n.4. In June 2014, the Supreme Court yet again reminded parties seeking dismissal based on prudential grounds, this time in a case on ripeness, of its "virtually unflagging" obligation to hear cases, but the Court declined to "resolve the continuing vitality of the prudential ripeness doctrine" because its factors were "easily satisfied" in that case. *Susan B. Anthony List v. Driehaus,* 134 S.Ct. 2334, 2347 (2014).

[25] The Fifth Circuit has recently noted that "the continued vitality of prudential "standing" is now uncertain in the wake of the Supreme Court's recent decision in *Lexmark International, Inc. ....*" *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat. Ass'n,* 758 F.3d 592, 603 n.34 (5th Cir. 2014)(quoting *Lexmark Int'l,* 134 S.Ct. at 1388 ("[A] court... cannot limit a cause of action... merely because prudence' dictates.")).

[26] The County cites only to *Alexander v. Barnwell County Hospital,* 498 B.R. 550, 559-60 (D.S.C. 2013), in arguing that the equitable mootness doctrine's primary concept - substantial consummation - applies in Chapter 9 cases. (Doc. 5 at 52 n.16 [citing *Alexander,* 498 B.R. at 559-60].) In *Alexander,* the district court cited §? 1101(2) and Chapter 11 caselaw to find that an appeal was equitably moot; it also found the appeal was constitutionally moot. 498 B.R. at 559-60. Apparently, the district court did not question whether Chapter 9 embraces the concept of substantial consummation.

[27] Instead of analyzing mootness using the "subsidiary questions" that "strik[e] the proper balance" in Chapter 11 appeals, the court noted that these questions are not dispositive ones, then asked only "whether effective judicial relief is available to [the appealing creditors] should they prevail on the merits [of the creditors' appeal from the adversary proceeding determining validity of [a competing] lien.'" *In re Seidler,* 44 F.3d at 947, 949. In other words, it needed only to determine that the appeal represented an Article III case, and found that the appeal "continue[d] to be justiciable." *Id.* at 949.

[28] An earlier draft of the Bankruptcy Act from the Senate would have given bankruptcy judges "full and complete responsibility for cases under title 11, " but given responsibility for Chapter 9 and railroad reorganizations to the district courts. *See* S. Rep. No. 95-989, at 154 (1978), *reprinted in* 1978 U.S.S.C.A.N. 5787, 5940.

[29] In a different ratemaking context, Justice Marshall once noted that "given the substantial element of public interest at stake in a case such as this, it is appropriate to recall Mr. Justice Stone's oft-quoted admonition: Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 732 (1973)(quoting *Virginian R. Co. v. Systems Federation No. 40,* 300 U.S. 515, 552 (1937)) (Marshall, J., concurring in part and dissenting in part).

[30] The bankruptcy court was "acutely aware" that "the demographics of Birmingham are such that the unfortunate reality is [that] a large part of [the sewer's] collection system is... in the lower[-]income areas." (Transcript of Hearing on Nov. 21, 2013, at 723.)

[31] *In re Winn-Dixie Store, Inc.,* 286 Fed.App'x 619, 623 (11th Cir. 2008)("Importantly, although not dispositive to the availability of judicial relief, when a party has failed to seek a stay of the confirmation order pending appeal to the district court, for practical reasons it is often difficult for courts to afford relief to the appealing party because the

court is unable to rescind transactions taken in consummation of the reorganization plan and confirmation order enforcing said plan.")(internal citations omitted).

[32] Stays cost money, and in a case, which involved the sale of $1, 785, 000, 000 worth of investment securities, the price of an appeal bond would be cost prohibitive to Ratepayers. *Cf. In re Chemtura Corp.,* 09-11233 REG, 2010 WL 4638898, at *1 n.4 (Bankr. S.D.N.Y. Nov. 8, 2010) ("And on this record... any material stay of the effectiveness of the Confirmation Order would be unthinkable. If the request [was] even considered, the necessary bond, in this case with a [total enterprise value] of $2.05 billion, would have to run in the hundreds of millions of dollars."); *Miami Center Ltd. Partnership v. Bank of New York,* 838 F.2d 1547, 1549 (11th Cir. 1988)(noting that bankruptcy court, in case involving at least $255, 600, 000 changing hands, conditioned granting a stay pending an estimated year-long appeal upon appellant posting a $140, 000, 000 bond). When withdrawing their emergency motion for a stay on December 3, 2013, (*see* B. Doc. 2268), counsel for another group of ratepayers noted that the ratepayers obviously could not file a supersedeas bond adequate for a claim of over a billion dollars. (*See* Transcript of Dec. 3, 2013 hearing at 11.) The court does not fault the Ratepayers for failing to collect the millions of dollars that an appeal bond would require.

CERTIFICATE OF SERVICE

I certify that on January 21, 2015, I am electronically filing the foregoing paper with the Clerk of the Court using the ECF system which will send notification of the filing to the following: Bruce Bennett, Heather Lennox, Johathan S. Green, Matthew J. Schneider, Robert D. Gordon and Ryan C. Plecha.

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