UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Number: Case No.: 15-2379

Case Name: WILLIAM DAVIS, APPELLANT V CITY OF DETROIT, ET. AL. APPELLEE

Name: William Davis, INDIVIDUALLY AND ON BEHALF OF DAREA

Address: 8557 Appoline

City: Detroit State: MI Zip Code: 48228

PRO SE APPELLANT'S BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary, not to exceed 30 pages. Please print or write legibly, or type your answers double-spaced. You need not limit your brief solely to this form, but you should be certain that the document you file contains answers to the questions below. The Court prefers short and direct statements.

Within the date specified in the briefing letter, you should return one signed original brief to:

United States Court of Appeals For The Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

1. Did the District Court incorrectly decide the facts? ☑ Yes ☐ No

   If so, what facts?

   The District Court mistakenly held that the bankruptcy order and plan of adjustment could not be altered without subtantially affecting other creditors. (See brief)

2. Do you think the District Court applied the wrong law? ☑ Yes ☐ No

   If so, what law do you want applied?

   The District Court misapplied constitutional mootness and equitable mootness in dismissing the Appellant's appeal of the Bankruptcy Court order approving the City of Detroit Plan of Adjustment, wherein the Bankruptcy court incorrectly ruled that the Michigan Constitutional ban on impairing or diminishing public pensions was inapplicable to a Chapter 9 proceeding brought under PA 436. Constitutional mootness was inapplicable where at least some relief could be afforded to appellant, even if the status quo ante was not affected. (See brief). In addition, equitable mootness is not applicable to a Chapter 9 appeal, especially where important constitutional issues are at play as in the instant case.

3. Do you feel that there are any others reasons why the District Court's judgment was wrong?
[✓] Yes [ ] No
If so, what are they?

All issues thoroughly outlined in brief.

4. What specific issues do you wish to raise on appeal?

I. Was Constitutional Mootness incorrectly applied to dismiss Appellant's case where the Court could grant some form of meaningful relief?

II. Is equitable mootness inapplicable to this Chapter 9 proceeding where constitutional issues are implicated in the proceeding, specifically whether the Michigan Constitutional Bar on impairing or diminishing pensions is applicable to a Chapter 9 bankruptcy?

III. Was equitable mootness applicable based on the facts of this particular case?

IV. Did the lower court err in failing to reach the pension clause issues that are at the core of this appeal.

5. What action do you want the Court of Appeals to take in this case?

Reverse the Dismissal of Appellant's appeal and Remand the case to the District Court for a proper review of the underlying issue of whether the Michigan Constitutional ban on impairing or diminishing public pensions was inapplicable to a Chapter 9 proceeding brought under Michigan PA 436.

I certify that a copy of this brief was sent to opposing counsel via U.S. Mail on the 23 day of December, 2015.

Signature (Notary not required)

William M. Davis

Case No.: 15-2379

In the
United States Court of Appeals
for the Sixth Circuit

IN RE: CITY OF DETROIT,

DEBTOR

WILLIAM DAVIS,

APPELLANT, pro se

V.

CITY OF DETROIT, MI; RETIREE COMMITTEE OF THE CITY OF DETROIT; GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT; DETROIT RETIRED CITY EMPLOYEES ASSOCIATION; STATE OF MICHIGAN

APPELLEES

On Appeal from the United States District Court
for the Eastern District of Michigan, Southern Division
Case No.: 14-cv-14920, Hon. Bernard A. Friedman
Magistrate Judge R. Steven Whalen
Bankruptcy Case No.: 13-53846

APPELLANT'S BRIEF ON APPEAL

- Oral Argument Requested -

By: William Davis, Individually and on behalf of Detroit Active and Retired Employees Association, pro se
8557 Appoline
Detroit, MI 48228
313-622-6430
montybill86@yahoo.com

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The issue underlying this case is whether the Michigan Constitutional Bar on Impairing or Diminishing Public pensions is enforceable in a Chapter 9 Bankruptcy. This important constitutional question merits review by appellate courts because of its implication for thousands of retirees in Detroit, Michigan, and across the United States, where municipalities have examined and eyed the City of Detroit bankruptcy as demonstrating a potential way forward to avoid pension obligations, and to get around constitutional bans on impairing or diminishing pensions similar to Michigan's Article IX, Section 24.

Judge Friedman misapplied the doctrine of constitutional mootness in dismissing Appellant's appeal of the Bankruptcy Court's order holding that Michigan's bar on impairing and diminishing pensions is not applicable to a Chapter 9 bankruptcy proceeding, particularly where City of Detroit retirees potentially face even further pension reductions under the Plan of Adjustment if the financial underpinnings on which it is based fall short. He also erred in applying the doctrine of equitable mootness, which Appellant argues is inapplicable to a Chapter 9 appeal where constitutional issues are implicated. These critical issues merit the fullest review including oral argument in particular case.

APPELLANT'S BRIEF ON APPEAL

STATEMENT OF JURISDICTION

This Court has jurisdiction over Appellant's Claim of Appeal pursuant to 28 USC 158(d) and Fed. Rule Civ. P 6b.

STATEMENT OF ISSUES

I. Was Constitutional Mootness incorrectly applied to dismiss Appellant's case where the Court could grant some form of meaningful relief?
II. Is equitable mootness inapplicable to this Chapter 9 proceeding where constitutional issues are implicated in the proceeding, specifically whether the Michigan Constitutional Bar on impairing or diminishing pensions is applicable to a Chapter 9 bankruptcy?
III. Was equitable mootness applicable based on the facts of this particular case?
IV. Did the lower court err in failing to reach the pension clause issues that are at the core of this appeal.

STATEMENT OF THE CASE

William Davis and DAREA filed a timely appeal as of right of the Bankruptcy Court's Order Confirming the Eighth Amended Plan of Adjustment. Bankruptcy [Bk) Docket 8473]. The Bankruptcy Court's order [Bk Docket 8272] incorporates Judge Rhodes prior eligibility opinion in which he held that the City of Detroit retiree pensions are simply contractual rights subject to impairment or diminishment in a Chapter 9 bankruptcy, and that Article IX Section 24 of the Michigan constitution, the Pensions Clause, does not afford pensions any special protections in the Chapter 9 bankruptcy relative to any other contract. [Bk Docket

1945, pp 73-82]

Appellants appeal asserted that the impairment of pensions in the 8th Amended Plan of Adjustment violated Article IX Section 24 of the Michigan constitution which bars the impairment or diminishment of accrued public pensions, especially in light of the explicit incorporation of the Pensions Clause into PA 2012 No. 436, which provided for the appointment of the Emergency Manager and for his authority to file the Chapter 9 bankruptcy in the instant case. [Dist. Ct. Docket 20, Docket 44 (reply brief)].

On September 29, 2015, Appellants' appeal was dismissed by U.S. District Court Judge Bernard Friedman, on Motion of Appellee, as constitutionally and equitably moot [Dist Ct Docket 33, Motion to Dismiss; Docket 37. Appellant Response to Motion; Docket 46, granting of Motion to Dismiss]. Appellants filed a Motion for Reconsideration of Judge Friedman's Order of Dismissal on October 13, 2015 [Dist Ct Docket 47], but the Motion for Reconsideration was denied on October 16, 2015 [Dist Ct Docket 48].

SUMMARY OF THE ARGUMENT

Appellants assert that Judge Friedman's Order of Dismissal was mistaken. First of all, even if equitable mootness could be asserted to limit the relief granted, because the Court could issue some relief to Appellants short of overturning the

entire plan of adjustment, the dismissal of the appeal on constitutional mootness grounds was in error and Appellants had standing for their appeal to proceed and be adjudicated.

Second, Judge Friedman erred because equitable mootness is not applicable to a Chapter 9 bankruptcy order, especially where a constitutional question as to the bankruptcy order is at play as in the present case, where Appellants are challenging the bankruptcy's court holding alleging that the Michigan constitutional ban on diminishing or impairing pensions is not applicable to a Chapter 9 filing brought pursuant to Michigan PA 436.

INTRODUCTION

While Appellee City of Detroit, as well as Judge Friedman in his opinion and order, attempt to diminish the impact of the plan on adjustment on City of Detroit retirees, in fact, retirees suffered the brunt of the cutbacks and debt reduction in the Detroit bankruptcy.

A reading of the Plan of Adjustment reflects that of $7.1 billion in debt reduction accomplished through the bankruptcy, $3.85 billion was accomplished by the virtual gutting of retiree health benefits, with expenditures reduced from $4.3 billion to $450 million. An additional $1.7 billion came through cuts in pension payments, with the city not even contributing directly to the pension fund

for the next 10 years. Thus, a total of $5.5 billion, or 78% of the total bankruptcy relief, comes off the backs of the city's retirees.

Aside, from the gutting of their health benefits, General city retirees get a 4.5% cut in base benefits and 15.5% additional pension reduction if they are subject to the annuity recoupment. In addition, cost of living annual increases are eliminated, adding another approximately 20% to the real reduction in pension payments. [Bk Docket 8272]

But numbers don't tell the real story. It is reflected in the genuine suffering and despair experienced by Detroit retirees who gave their lives to serving the city of Detroit, in contrast to the Jones Day lawyers and their consultants who pocketed $170 million in fees and then left town and returned to their palatial estates. These retirees made innumerable sacrifices and accepted repeated wage cuts and takebacks, on the assumption that at least they would be entitled to a decent pension when they retired, a pension that was guaranteed against impairment or diminishment by the Michigan State Constitution. The retirees' stories are too numerous to recount, though many are reflected in the 600 objections that were filed to the plan of adjustment during the bankruptcy proceedings.

Appellant is asking this honorable court to overturn Judge Friedman's dismissal of his appeal of Judge Rhodes opinion and order implementing the 8th

amended plan of adjustment, so the applicability of the Michigan constitutional bar against impairing or diminishing accrued pensions to a Chapter 9 bankruptcy, which was specifically incorporated into MCL 141.1541 et. seq., the statute that granted the authority for the Chapter 9 filing, can be properly reviewed by higher courts, with appropriate relief granted.

I. CONSTITUTIONAL MOOTNESS IS INAPPLICABLE WHERE THE COURT CAN GRANT SOME FORM OF MEANINGFUL RELIEF

A. Standard of Review

Constitutional mootness deprives a federal court of jurisdiction to hear an appeal. See *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001) (citing *Church of Scientology v. United States*, 506 U.S. 9, 12, 121 L. Ed. 2d 313, 113 S. Ct. 447 (1992)). Accordingly, the inquiry is *de* novo and must be made at every stage of a case. See *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (internal quotation marks and citation omitted).

B. Analysis

In his ruling granting Appellee City of Detroit's Motion to Dismiss on the basis of equitable and constitutional mootness, Judge Friedman spent seventeen pages delineating the basis for his granting the motion on equitable mootness

grounds, while completely ignoring Appellant's argument that even if the court was to find equitable mootness applicable to not reversing the pension cuts in this case, that does not preclude Appellant's appeal from having constitutional standing to move forward to a ruling on the merits of the case. Judge Friedman ignored the difference in the applicable standards for deciding the question of constitutional mootness versus the standard for applying equitable mootness in dismissing the appeal, holding:

> Having concluded that this appeal is equitably moot, the Court finds it unnecessary to address the City's secondary argument that the appeal is also constitutionally moot.
>
> [Dist. Ct. Docket 46, Opinion and Order dated September 29, 2015.]

For standing, and to withstand a challenge of constitutional mootness, Appellant simply has to establish that it is not impossible for the court to grant some kind of meaningful relief. That is the case even if the court is unable to completely restore the parties to the status quo ante.

In *Knox v SEIU, Local 1000*, 132 S Ct 2277; 183 L Ed 2d 281 (2012), the court held:

> A case becomes moot only when it is impossible for a court to grant " ' "any effectual relief whatever" to the prevailing party.' *Erie v. Pap's A. M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992), in turn quoting *Mills v.*

> *Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Railway Clerks*, 466 U.S. 435, 442, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984).

In *Church of Scientology v. United States*, 506 U.S. 9, 12-13 (U.S. 1992), the court held that even if a court may not be able to return the parties to the status quo ante, as long as the court can fashion some form of meaningful relief, that is sufficient to convey standing and survive a motion for dismissal based on constitutional mootness.

In *Hilal v. Williams (In re Hilal)*, 534 F.3d 498, 500-501 (5th Cir. Tex. 2008), the court noted:

> Equitable mootness is a prudential, not a constitutional, doctrine that evolved in response to the particular necessities surrounding consummation of confirmed bankruptcy reorganization plans. *In re Grimland, Inc.*, 243 F.3d 228, 231 (5th Cir. 2001). An appeal is equitably moot when a plan of reorganization has been so substantially consummated that a court cannot order effective relief even though a live dispute remains among some parties to the bankruptcy case. *Id.* *Manges* articulated a three-part test for determining equitable mootness, two of whose factors are undisputed in this case: Hilal did not seek a stay of the plan confirmation order, and the plan has been substantially consummated. The remaining *Manges* factor is whether the relief requested on appeal would affect the rights of parties not before the court or the success of the plan. 29 F.3d at 1039.

These are the same factors adopted by the 6th Circuit which relies on 5th Circuit precedent in evaluating equitable mootness and which were applied by Judge Friedman in this case.

However, *Hillal,* supra, makes clear that even if these factors may preclude overturning the entire bankruptcy plan in a given case based on equitable mootness, they do not preclude a review of aspects of the plan confirmation. *Id.* at 501.

This is especially important in light of the U.S. Supreme Court decision in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347, 189 L. Ed. 2d 246, 261 (U.S. 2014), an appeal from the Sixth Circuit, where the Supreme Court held:

> In concluding that petitioners' claims were not justiciable, the Sixth Circuit separately considered two other factors: whether the factual record was sufficiently developed, and whether hardship to the parties would result if judicial relief is denied at this stage in the proceedings. 525 Fed. Appx., at 419. Respondents contend that these "prudential ripeness" factors confirm that the claims at issue are nonjusticiable. Brief for Respondents 17. But we have already concluded that petitioners have alleged a sufficient Article III injury. **To the extent respondents would have us deem petitioners' claims nonjusticiable "on grounds that are 'prudential,' rather than constitutional," "[t]hat request is in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.** [emphasis added]

Thus, the law is clear that the standard to be applied in declaring a case moot based on constitutional grounds is much higher than applying mootness based on prudential or equitable grounds, and that the constitutional right to have claims adjudicated serves as a limitation on the extent to which equitable mootness can be invoked.

In Appellant's Response to Appellees Motion for Dismissal on the Basis of Constitutional and Equitable Mootness, Appellant raised several examples of relief that could be granted by the court even if it was to rule that the pensions could not be restored on equitable mootness grounds. Appellant stated:

> For one thing, the 8th and final Amended Plan of Adjustment, leaves open the prospect of further reductions in pension payments, both for police and firefighter pension benefits and general retirement pension benefits. Article II B.2q.ii.C and Article II.B2riiC of the 8th Amended Plan of Adjustment specifically provide that the "[a]djusted Pension Amount shall be (1) automatically reduced by the DIA Proceeds Default Amount in the event of a DIA Proceeds Payment Default." Exhibit 4, Doc. 30 pp 237, 239. The potential for such a default exists through 2023, as DIA payments to the funds are to be made yearly through that year.
>
> **If this honorable court ruled in favor of Plaintiff's appeal as to the applicability of the State of Michigan constitutional bar on impairment of pensions in a chapter 9 bankruptcy, it could order that the plan of adjustment be modified to remove any further potential impairment of accrued pension benefits from the plan.**
>
> It should also be noted that the bankruptcy court still retains jurisdiction over the Chapter 9 bankruptcy. Already, there are questions as to whether the financial assumptions upon which the plan of adjustment and subsequent order were filed are feasible, and

> whether the City of Detroit will have to revisit its plan of adjustment or reenter Chapter 9 bankruptcy. **[Dist. Ct. Docket 37]**

In *Bennett v. Jefferson County*, 518 B.R. 613, 638-639 (N.D. Ala. 2014), the court invoked a similar remedy as being the basis for denying Appellee's Motion to Dismiss, holding,

> 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 [*639] court order adversely affecting him." *Id. Davis v. Shepard,* 2014 U.S. Dist. LEXIS 82804, 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 the present case, Appellees filed their Motion for Dismissal on the Basis of Constitutional and Equitable Mootness only after Appellants filed their Brief on Appeal. Thus for the District Court to hold that the limited relief described above, that the court could strike any language from the plan of adjustment or insert language into the plan of adjustment barring any further impairment or diminishing of pension benefits, was waived by not requesting such relief in Appellant's opening brief is disingenuous when the issue of mootness was not in front of the court at that time. Moreover, because that relief would be available even if the overall plan of adjustment was not disturbed to the extent of immediately restoring

the pension benefits, it would be sufficient to merit a challenge based on constitutional mootness.

In *Chafin v. Chafin*, 133 S. Ct. 1017, 1023, *185 L. Ed. 2d 1*, 12 (U.S. 2013), the Supreme Court held that even where a particular form of relief has not specifically been addressed on appeal, if the relief was potentially available to the appellant, constitutional mootness was inappropriate.

Chafin, supra, is a case where the appellee defied a custody order and took the child to a foreign country. Because there was no legal basis under international law for restoring the child, appellee argued the case was moot and the appeal should be dismissed since relief could not be granted. But the court rejected that claim, holding that as long as some relief could be potentially granted the case was live and could proceed.

The court noted that the lower court ordered the appellant to pay travel expenses and attorney fees, and that even though the appellant had not specifically appealed that award, because it was relief that could potentially be available to the appellant if the appeal was granted, the case satisfied standing sufficient to withstand a constitutional mootness challenge. Id. at 1026.

II. A CHAPTER 9 PLAN IS SUBJECT TO MODIFICATION AND REVIEW POST-CONFIRMATION

Courts retain jurisdiction to implement the plan of adjustment post-confirmation, including the authority to correct mistakes. In fact, in the present case, the Bankruptcy Court still retains jurisdiction over the instant Chapter 9 proceeding.

In *In re Wolf Creek Valley Metro. Dist. No. IV*, 138 B.R. 610, 619 (D. Colo. 1992), the court explained how in a bankruptcy case confirmation is only the beginning, holding:

> In a bankruptcy case . . . the confirming of a plan of reorganization is in some ways only the beginning of the case. The bankruptcy court generally retains broad jurisdiction over a case even after a plan has been confirmed . . . This jurisdiction is necessary to settle disputes concerning the administration of the plan as they arise, and to ensure that changes in the reorganized debtor's financial condition are handled equitably. (*quoting Bill Roderick Distrib., Inc. v. A.J Mackay Co.(In re A.J. Mackay Co.)*, 50 Bankr. 756, 759 (D.Utah. 1985)).

The court held that after a plan is confirmed, there is a need for judicial review of potential mistakes, and that this equitable power is derived from Section 105(a) of the bankruptcy code which applies to Chapter 9 by virtue of Section 103(3). *In re: Wolf Creek*, 138 BR at 618, and n.5.

In *In re: Barnwell County Hospital, Debtor, 491 BR 408, 415 (*Bankruptcy Court, District Ct of South Carolina, 2013), a chapter 9 bankruptcy case, the court held:

> After careful consideration, the Court will allow a modification under the facts before it. Aside from the fact that Congress did not explicitly state that a chapter 9 plan can be modified after confirmation, the Court sees no reason why modifications should be allowed in the chapter 11 context but not in chapter 9 cases. Simply stated, the Court is unwilling the [sic] place the plan before in "straight jacket" and agrees it is necessary to provide "some leeway for . . . adjustments."

In the instant case, there are already questions as to whether the financial assumptions upon which the plan of adjustment and subsequent order were filed are feasible, and whether the City of Detroit will have to revisit its plan of adjustment or reenter Chapter 9 bankruptcy. A Detroit Free Press article dated November 15, 2015, estimates based on current economic projections, the City of Detroit will be responsible for a $195 million payment to the pension funds in 2024, 71% above the $114 million projected in the 8th amended plan of adjustment. Under the current law of the case, nothing would prevent the City of Detroit from approaching the bankruptcy court to order further pension benefit reductions to meet this shortfall. [Matthew Dolan, "$195M pension payment might derail Detroit's recovery," Detroit Free Press, November 14, 2015 (available at

http://www.freep.com/story/news/local/detroit-bankruptcy/2015/11/14/detroit-pension-balloon-payment-estimated-195m/75657200/) [last accessed Dec. 21, 2015])

In *Kentucky, Educ. & Workforce Dev. Cabinet, Office for the Blind v. United States*, 759 F.3d 588, 596 (6th Cir. Ky. 2014), the Sixth Circuit Court of Appeals noted that a federal court's obligation to hear and decide cases within its jurisdiction is "virtually unflagging" and that the Supreme Court has placed the continuing vitality of prudential standing and ripeness doctrines that "are closely related to mootness, in doubt." *Id* (internal citations and quotations omitted). The Court held that if a claim is "capable of repetition, yet evading review," that weighs in favor of standing and against the invoking of constitutional mootness. In the present case, because there is at least some possibility that the City of Detroit retirees could be facing demands for more pension cuts in the future, Appellants have standing to challenge the constitutionality of the pension cuts in the present case.

II. EQUITABLE MOOTNESS IS INAPPLICABLE TO CHAPTER 9 BANKRUPCY PROCEEDINGS WHERE IMPORTANT CONSTITUTIONAL ISSUES ARE IMPLICATED

A. Standard of Review

The lower court's application of equitable mootness is reviewed *de novo*.

See *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942 (6th Cir. 2008).

B. Analysis

Although Appellees are liberal with their citation to Sixth Circuit case law on equitable mootness in other contexts, they fail to cite a single Sixth Circuit case of the doctrine being applied within the Chapter 9 context. In his opinion and order, Judge Friedman cites to two cases which applied equitable mootness in the Chapter 9 context. One of the cases, *Alexander v. Barnwell County Hosp., 498 B.R. 550, 560 (D.S.C. 2013)*, is distinguished from the present case. In *Alexander, supra*, the court held that equitable mootness was applicable because Appellant sought to undo the plan completely, as opposed to a less extreme measure, such as undoing one component of the Plan. In the present case, Appellant has presented several forms of alternative relief which the Court could order short of undoing the plan of adjustment completely, including removing language from the plan of adjustment that calls for further impairment pension plans in the future if contributions by foundations or other financial expectations are not met. The second case cited by Judge Friedman, *In re City of Vallejo, CA,* 551 F App'x 339 (9th Cir), is a one page opinion with no real legal reasoning or analysis applied.

First of all, as argued above, the continuing validity of "equitable mootness" is questionable, given 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.'" *Susan B. Anthony List, supra.*

However, this Court need not decide whether equitable mootness continues to apply in the context of Chapter 11. Instead, the Court need only decide whether or not the doctrine of equitable mootness should be extended to proceedings under Chapter 9 that present constitutional questions for a reviewing court, which is a question of first impression for this Circuit.[1]

There are important reasons to adopt the holding in *Bennett v Jefferson County, Alabama*, 518 BR 613, 629, 630 (No Dist. Ala, Southern Division 2014)., which refused to recognize the doctrine of equitable doctrine within the context of Chapter 9, and which Judge Friedman summarily dismisses.

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[1]The Eastern District did not extend equitable mootness to Chapter 7 proceedings in the case of *Corcoran v. McDonald (In re McDonald)*, 165 B.R. 60, 82 (E.D. Mich. 2012). Although the Court did conduct an equitable mootness analysis, it is unclear if the issue of its extension was addressed and briefed by the parties and, in any event, the court concluded that equitable mootness did not apply.

Judge Friedman refuses to give any weight to the *Bennett* court's appropriate distinction between the very different policy concerns in Chapter 11 and Chapter 9 proceedings. He ignores the core concern of state sovereignty altogether where, as the *Bennett* court noted, the appeal concerns constitutional interpretation and important and difficult questions of state law.

In *Bennett*, 518 BR at 637, the Court held:

> 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.

Similarly, significant public interests are at stake in this appeal, including the cursory and shallow analysis of the State of Michigan's constitutional Pensions Clause provision by the lower court. This elevated, constitutional status for public pensions was described as a "paramount law of the state" by the Michigan Supreme Court in the case of *Detroit Police Officers Asso. v. Detroit*, 391 Mich. 44; 214 N.W.2d 803 (1974). While the court agreed that the City of Detroit had an obligation to bargain over prospective changes to retirement benefits that were part of a collective bargaining agreement, the Court emphasized that the constitutional provision assured "those already covered by a pension plan…that their benefits will not be diminished by future collective bargaining agreements." *Id* at 69. Read

in light of *Campbell* and the text of the constitutional provision, the Michigan Supreme Court's decision leaves no room for the bankruptcy court's cursory analysis, as there would be no impediment to the future modification of pension rights secured by a collective bargaining agreement if the Pensions Clause did nothing more than create a simple contractual obligation.

Similarly, several sections of the Michigan Local Financial Stability and Choice Act of 2012 make it clear than an Emergency Manager is subject to the Pensions Clause provisions. *See, i.e.,* Mich. Comp. Law §§ 141.1551(1)(d), 141.1552(m)(ii). It is also clear that state law is incorporated by Chapter 9, and limits the kinds of plans that can be confirmed. *See, i.e.,* 11 U.S.C. § 943(b)(4) (providing that the plan can be approved if "the debtor is not prohibited by law from taking any action necessary to carry out the plan.").

Equitable mootness must also be sensitive to the constitutional concerns that have been incorporated into the Chapter 9 statutory framework. The current framework is the result of a delicate balance. After Congress created an avenue for municipal bankruptcy in 1934, the Supreme Court found that the arrangement was unconstitutional with the case of *Ashton v. Cameron County Water Improvement District, No 1*, 298 US 513, 80 L Ed 1309, 56 S Ct 892, rehg denied, 299 US 619, 81 L Ed 457, 57 S Ct 5 (1936). Congress responded to *Ashton* with new legislation

that attempted to cure some of the defects of the 1934 amendments, a more limited species of municipal bankruptcy that was ultimately upheld in the case of *United States v. Bekins*, 304 US 27, 82 L Ed 1137, 58 S Ct 811, rehg denied, 304 US 589, 82 L Ed 1549, 58 S Ct 1043 (1938).

These are precisely the concerns that the *Bennett* court was addressing when it ruled that, "[i]n 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." *Bennett, supra*, 518 B.R. at 638.

Especially in light of the fact that the precise issue in this case is whether the Michigan constitutional bar on impairing and diminishing pensions is applicable to a Chapter 9 bankruptcy filed pursuant to Michigan law, as in *Bennett, supra*, this court must now allow Defendant's attempt to invoke equitable mootness to prevent review of the important constitutional issues in this case.

IV. JUDGE RHODES' HOLDINGS ACTUALLY SUPPORT APPELLANT'S POSITION THAT PENSIONS ARE EXTENDED SPECIAL PROTECTION UNDER MICHIGAN LAW, AND THAT STATES CAN LIMIT THEIR IMPAIRMENT EVEN IN A BANKRUPTCY PROCEEDING

Judge Rhodes' own contradictory opinions in this matter lend credence to Appellant's arguments that pensions are afforded special protection under the

Michigan constitution, and that protection could and must be a contingency of a Chapter 9 bankruptcy filing.

Judge Rhodes predicated his eligibility opinion, in which he took the position that public pensions were subject to impairment in a Chapter 9 bankruptcy filing, by holding that under the Michigan constitution pensions are treated as contracts not subject to any extraordinary protection from any other contracts pursuant to Michigan law. [Bk. Docket 1945, p 78]

However, while on the one hand Judge Rhodes incorporated his eligibility opinion into his order approving the City of Detroit's 8th amended plan of adjustment, in that order he changed his position to one more consistent with Appellant's argument in this case. In that opinion, justifying the "differential" treatment of pension claims, he stated:

> The Plan's differential treatment is further justified because the fulfillment of the City municipal services mission is informed by, and subject to, the provisions of the constitution and laws of the State of Michigan and City's status as an agency of the state. Article IX Section 24 of the Michigan Constitution (the "Pensions Clause") (a) singles out municipal pension claims for special protection and (b) in so doing, specifically expresses the considered judgment of the people of the State of Michigan, which is entitled to substantial deference in connection with determining the fairness of the Plan's discrimination against the Impaired Rejecting Classes."

[Bk. Docket 8272, p 26]

In addition, in his eligibility opinion, Judge Rhodes acknowledged that under Chapter 9, the state has the power to exclude particular benefits from impairment in bankruptcy. [Bk. Docket 1945 p 80]

Unfortunately, because of his predilection for fashioning his opinions in a manner which would move the Detroit bankruptcy forward regardless of the legal consequences, Judge Rhodes ignored the reality, which he ultimately acknowledged, that the Michigan constitution in fact had precisely fashioned the legal basis for excluding the impairment of accrued public pensions from a Chapter 9 bankruptcy. The constitution singles out pensions for special protection over and apart from any other contracts in Michigan. Judge Rhodes's opinions, in which the constitutional principle was sacrificed for expediency in resolving the bankruptcy, must be subject to review by the higher courts. Failure to do so, in practice, allows the Detroit bankruptcy case to set a precedent for ignoring constitutional bans on impairing or diminishing pensions which currently exist in approximately 25 states across the U.S.

V. EQUITABLE MOOTNESS IS NOT APPLICABLE BASED ON THE FACTS OF THIS CASE

The doctrine of equitable mootness, (which as outlined in detail above Plaintiff asserts is inapplicable to this Chapter 9 case), can be only invoked if

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. *In re Semcrude*, L.P. 728 F3rd 313, 320 (3rd Cir 2013).

In this case, Appellants concurred in a request to obtain a stay pending appeal, which was denied. *See* Docket Entry Doc 8533 Filed 12/01/14. The lower court concluded that if the stay was granted and the settlements were not implemented, the plan would likely fall apart. However, the lower court did not make any factual findings suggesting that the plan, including the Grand Bargain and other settlement agreements, would be unraveled if the retirees prevailed on the underlying issues and that part of the Confirmation Order could no longer be enforced. Without an evidentiary hearing, it is inappropriate for an appellate court to make any findings on this issue.

Moreover, a finding of substantial consummation is not dispositive and, in the context of this case, not very relevant. In *Curreys of Neb., Inc. v. United Producers, Inc.*, *supra*, a case in which the court addressed the equitable mootness doctrine, the court held:

> Even when a plan has been substantially consummated, it is "not necessarily . . . impossible or inequitable for an appellate court to grant effective relief." *Manges*, 29 F.3d at 1042-43. The most important factor this Court must consider is "whether the relief

> requested would affect either the rights of parties not before the court or the success of the plan." *In re American Home Patient*, 420 F.3d at 564. "Determinations of mootness . . . require a case-by-case judgment regarding, the feasibility or futility of effective relief should a litigant prevail." *In re AOV Indus., Inc.*, 253 U.S. App. D.C. 186, 792 F.2d 1140, 1147-48 (DC Cir. 1986).

In the present case, as noted above, this court can easily grant relief in the form of removing language in the plan of adjustment that allows for further pension benefits cuts in the future, and prohibiting amendments of the plan that would further result in future pension cuts based on changed conditions.[2] This relief would have no impact on any other creditors and would allow the plan to move forward subject to this revision.

Plaintiff also asserts that the pension payment cuts in the plan of adjustment can be similarly be restored in whole or part without substantial disruption to carrying out the plan of adjustment and without impacting other creditors.

Appellee argues that if Appellant's appeal is granted, it would make the "Grand Bargain" null and void. The "Grand Bargain" is the deal which inserted state and foundation and funding for pensions into the City of Detroit and which

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[2]Alternatively, the Court could simply prohibit the lower court from enforcing any unconstitutional provisions of the Confirmation Order, and allowing any retiree claims against the City of Detroit to proceed as necessary.

Appellee asserts became the anchor for settlement of other claims in the current case.

However, there is nothing in the language of the 8th amendment to the Plan of Adjustment, nor the statute which provided for the state funding, that would nullify the "Grand Bargain" if Appellant's appeal is granted. In fact, in the present case, the State of Michigan, has already disbursed the $194.8 million to the pension fund.

Appellant acknowledges that there were **conditions precedent** for releasing the $194,800,000 in state funding, including the cessation of any litigation challenging PA 436 or any actions taken pursuant to PA 436. Bk. Docket 8045, p 63. Appellant also concedes that pursuant to MCL 141.1608, the state authority in charge of distributing the funds to the retirement systems was only to do so after the bankruptcy court entered an order approving the plan for adjustment, and the terms and conditions of the contribution agreement have been satisfied.

In *Knox v. Knox*, 337 Mich. 109, 118 (1953), the court held:

> A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. *McIsaac v. Hale*, 104 Conn 374, 379 (132 A 916); McFarland v. Sikes, 54 Conn 250, 251 (7 A 408, 1 Am St Rep 111); 3 Corbin, Contracts, § 628 at p 515, § 629; 5 Page, Contracts (2d ed), § 2586; 1 Restatement, Contracts, § 250. A condition is distinguished from a promise in that it

> creates no right or duty in and of itself but is merely a limiting or modifying factor. 3 Corbin, Contracts, § 633. If the condition is not fulfilled, the right to enforce the contract does not come into existence.

In the present case, where the State of Michigan, having determined that the conditions precedent for distributing the $194.8 million to the pension had been met, and having already distributed the funds, cannot suddenly say the conditions precedent were not met and it wants its money back. There is nothing left for the state to enforce. The State of Michigan's obligation under the Grand Bargain has already been met. Even if the statute provided a mechanism for the authority to recoup the money which was disbursed, which it does not, the authority responsible for distributing the funds was to be dissolved effective May 2, 2015, and after that date there would not be any statutory mechanism for returning any of the funds to the countercyclical budget and economic stabilization fund. *See* Mich. Comp. Law § 141.1608 (5).

As far as the foundations go, the relevant condition precedent for the foundations participation in the DIA Settlement (the Grand Bargain) was "(j) the agreement of the State to provide the State Contribution." Docket 8045, p 64. Because that condition precedent has been met, the DIA Funding Parties are now obligated to make their contributions to the pension funds, totaling $466 million

($366 from the foundations and $100 million from DIA direct funders). Their contribution is not contingent on the retirees accepting any pension cuts. In addition, they received a direct benefit from the deal in that the DIA art was not sold off and is being held in trust.

Based on the above, it is clear that the "Grand Bargain" will not be affected if Appellant's appeal is granted, and thus the foundation for the chapter 9 bankruptcy will remain in effect.

In addition, no other creditor will be impacted by this honorable court granting Appellant's appeal. Appellees do not suggest that the settlement agreements with other creditors are in any way contingent on violations of the State of Michigan's Pensions Clause, and in any event provide no record evidence in support of this proposition. In any event, even if the retiree cuts were deemed unconstitutional, the city of Detroit will still enjoy its $3.85 billion reduction in health care costs for retirees as these benefits are not protected by Article IX Section 24. The few other creditors who experienced a reduction in their return on debt will still get paid. In fact, unlike the retirees or its board, some of them were offered lucrative riverfront city properties in exchange for accepting a lesser payments on debts owed. And the secured creditors will still receive full payment on their loans and bond deals, even when they were tainted by corruption as in the

case of interest rate swaps associated with the water bonds (as well as the pension obligation certificates).

The City of Detroit may have to find some alternative funds to make up the difference in the funding necessary to restore pensioners to their full payments. But that funding will be relatively small and can be provided without disrupting the plan of adjustment. The city can seek alternative sources of funding for blight removal. As has been done in cities, states and the federal government, the City of Detroit could go after the major banks, whose predatory lending policies led to the destruction of neighborhoods throughout Detroit, to fund blight removal, rather than taking funds out of the general fund.

The City also contends that a number of third parties will be injured by this Court's consideration of the underlying issues raised in Appellant's opening brief. But the implications of failing to review the lower court's treatment of the Pensions Clause are just as significant: The New York Times recently referred to the lower court's decision in this case as "groundbreaking." [Dist. Ct. Docket 37-1., pp 6-7] Similarly, the State of Illinois is attempting to use the bankruptcy court's treatment of the Michigan Pensions Clause to argue that virtually identical language in the Illinois state constitution is no barrier to the diminishment or impairment of public pension plans in that state. [Dist. Ct. Docket 37-1, pp 10-14]

In essence, the decision of a federal Article III court is shaping policy on public pensions across the country, without the benefit of federal or state appellate review.

VI. THE LOWER COURT ERRED IN FAILING TO REACH THE PENSION CLAUSE ISSUES

Because the lower court found this matter both constitutionally and equitably moot, it failed to provide any analysis of the underlying Pension Clause issues that form the basis of this appeal. Consistent with the unique nature of the Pensions Clause, the only Illinois Supreme Court decision to consider this issue concluded that the Illinois analog of the Michigan Pensions Clause did not allow for a Contracts Clause analysis, and this was also the conclusion reached by the Arizona Court of Appeals, interpreting language identical to the relevant provision of the Michigan Pensions Clause. See *Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214; 320 P.3d 1160 (2014); *Heaton v. Quinn (In re Pension Reform Litig.)*, 2015 IL 118585; 32 N.E.3d 1 (2015).

The Michigan Pension Clause is unambiguous. *See* Mich. Const. 1963, Art. 9, Sec. 24. The major difficulty with the bankruptcy court's treatment in this case is the text of the relevant constitutional provisions. Both the federal and Michigan prohibition on impairment of contracts, for example, prohibits a law impairing a

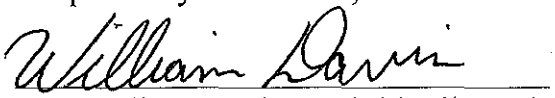
contractual obligation from passage or enactment. *See* Mich. Const. 1963, Art. 1, Sec 10; U.S. Const. Art. I, § 10, Cl 1. By contrast, the Michigan Pension Clause does not reference any particular legislative enactment, and its breach does not require legislative enactments. Moreover, the Contracts Clause does not contain any language creating a contractual relationship, while the Pensions Clause creates a contractual relationship enforceable by any beneficiary of the accrued financial benefits of a retirement system. It is clear, however, that the language of the Pensions Clause accomplishes much more than that.

There is simply no reasonable textual or interpretative basis for ignoring the plain language of the Pensions Clause as accomplishing a greater degree of protection than the Contracts Clause. Appellants' reading is supported by the plain language of the Pensions Clause as well as the construction of similar provisions in sister jurisdictions. The Michigan Constitution's Pension Clause is applicable to prevent the impairing or diminishing of pensions under a Chapter 9 proceeding brought pursuant to PA 436. This issue was thoroughly briefed in Appellant's Brief on Appeal and Reply Brief to the District Court. [Dist Ct. Docket 20, 44]

CONCLUSION

Appellant respectfully requests that the District Court's granting of Appellee's Motion to Dismiss be denied, and that the case be remanded to the District Court for review and decision on the underlying issue in this appeal, whether the constitutional bar on impairing or diminishing pensions in the Michigan Constitution, Article IX Section 24, is applicable to a Chapter 9 bankruptcy brought under Michigan PA 436.

Respectfully Submitted,



By: William Davis, Individually and on behalf of Detroit Active and Retired Employees Association (DAREA), pro se
8557 Appoline
Detroit, MI 48228
313-622-6430
montybill86@yahoo.com

Dated: December 23, 2015

Case No.: 15-2379

In the
United States Court of Appeals
for the Sixth Circuit

IN RE: CITY OF DETROIT,

DEBTOR

WILLIAM DAVIS,

APPELLANT, pro se

V.

CITY OF DETROIT, MI; RETIREE COMMITTEE OF THE CITY OF DETROIT; GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT; DETROIT RETIRED CITY EMPLOYEES ASSOCIATION; STATE OF MICHIGAN

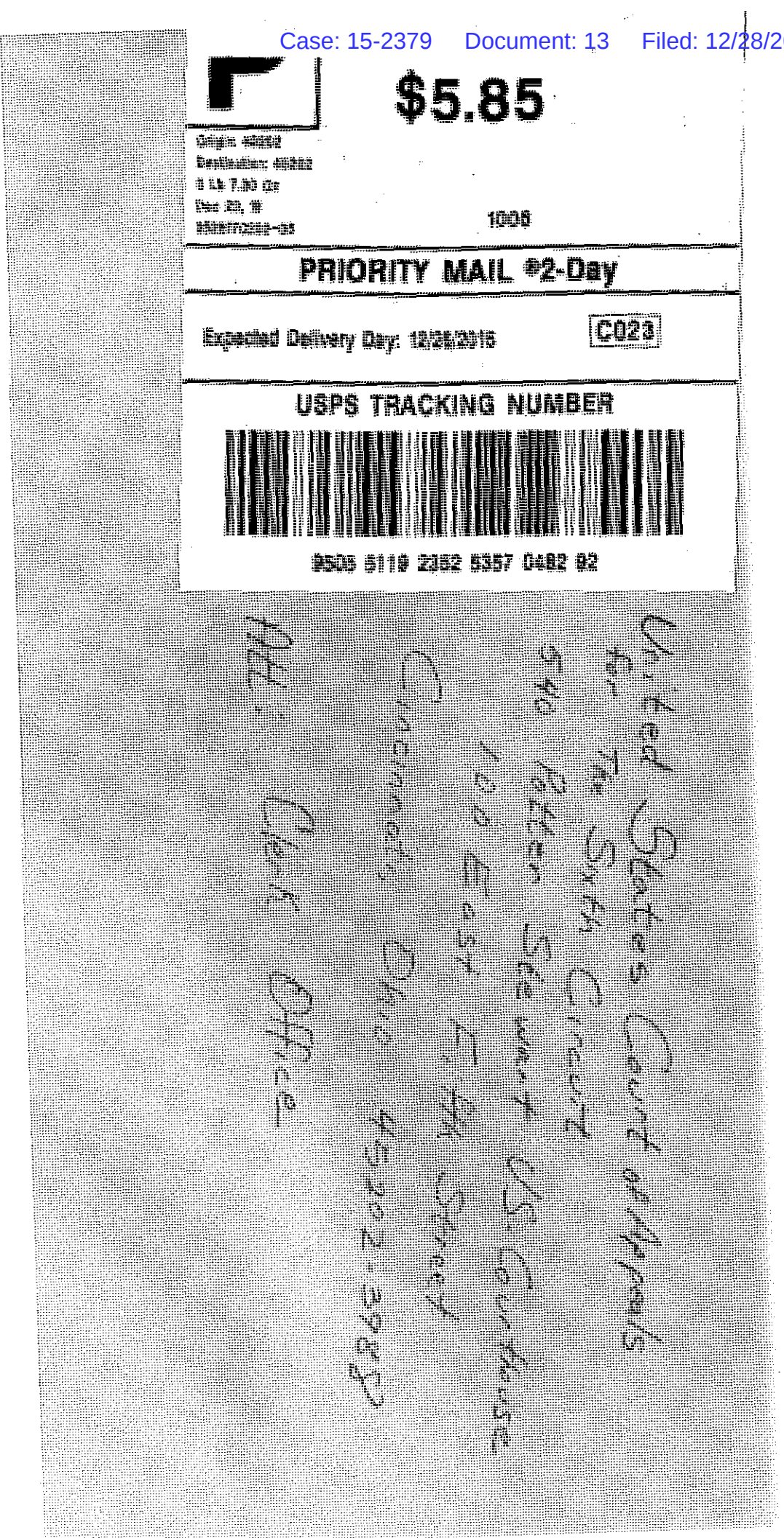
APPELLEES

CERTIFICATE OF SERVICE

The undersigned certifies that Appellant's Brief on Appeal was served on counsel for Appellees by first class mail on December 23, 2015.

William Davis

William Davis



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William M. Davis
8557 Appoline
Detroit Mich. 48228

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