No. 15-2337

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

In re: CITY OF DETROIT,

Debtor

JOHN P. QUINN

Appellant

v.

CITY OF DETROIT; DETROIT RETIRED CITY EMPLOYEES ASSOCIATION; STATE OF MICHIGAN

Appellees.

_____/

Nature of Proceeding: Appeal from district court's dismissal of an appeal to the district court from a final order of the bankruptcy court

Court Below: United States District Court for the Eastern District of Michigan

BRIEF OF APPELLANT JOHN P. QUINN

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Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-2337 Case Name: John P. Quinn v. City of Detroit et al.

Name of counsel: John P. Quinn

Pursuant to 6th Cir. R. 26.1, John Quinn makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Response: No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   Response: No.

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Dated: December 29, 2015

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument would be helpful. This appeal presents an issue of first impression, namely, whether the doctrine of equitable mootness should be expanded to apply to cases of municipal bankruptcy arising under Chapter 9 of the Bankruptcy Code. This Court last had occasion to address equitable mootness in 2008. Since then there have been significant developments in the law, both in other circuits and in the Supreme Court, that call into the question the continuing viability of the doctrine and ought to be considered in deciding whether the doctrine should be applied in Chapter 9 cases generally and in this case in particular. I have attempted to address those developments in the brief. That discussion may raise as many questions as it answers. Oral argument would provide an opportunity for members of the panel to raise the questions that seem most important to them and allow counsel to address those questions in dialogue with the panel.

STATEMENT OF JURISDICTION

This is an appeal from a final order of the United States District Court, Eastern District of Michigan ruling in an appeal from the United States Bankruptcy Court. The order appealed from was entered on September 29. 2015. RE 52, PAGE ID # 56518-56536. I filed my Notice of Appeal on October 28, 2015. RE 53, PAGE ID # 56537-56538.

The District Court's jurisdiction is provided by 28 U.S.C. § 158(a)(1). This Court has jurisdiction under 28 U..S.C. § 158(d)(1).

This appeal is from a final order that disposes of all parties' claims.

STATEMENT OF ISSUES

I. Should the equitable-mootness doctrine be expanded to apply to municipal bankruptcy arising under Chapter 9 of the Bankruptcy Code?

A. Is the equitable-mootness doctrine compatible with the duty of Article III courts to hear and decide appeals from final judgments of bankruptcy courts?

B. Would extension of the equitable-mootness doctrine to apply Chapter 9 cases be inconsistent with federalism principles, since it would enable the plan proponent, a state actor, to restrict the exercise of a federal court's appellate jurisdiction by engineering the plan and its implementation to create mootness?

C. Since the Bankruptcy Code specifies what relief is unavailable on appeal and under what circumstances, is application of equitable mootness to deny different relief under different circumstances inconsistent with the Code?

D. By preventing appellate review on the merits, does equitable mootness insulate errors by bankruptcy judges and district courts and stunt the development of uniformity in the law of bankruptcy?

E. Are the catastrophic consequences that can follow from the overturning of a Chapter 11 plan of reorganization (loss of the debtor's ability to govern itself, loss of the debtor's ability to control its property or revenues, loss of income from its property and liquidation) possible in a Chapter 9 bankruptcy?

F. Is the "substantial consummation" concept, which is necessary to determine whether equitable mootness should be applied in a particular case, applicable in cases arising under Chapter 9?

G. Can the objectives the equitable-mootness doctrine is designed to serve be achieved more effectively and at less cost by considering the merits of an appeal and then, if the appeal has merit, determining what relief, if any, can be granted without upsetting the plan or adversely affecting the interests of third parties?

II. Assuming equitable mootness is applicable to this case, did the District Court apply it correctly?

A. Did the District Court fail to scrutinize each claim of error to determine whether any relief is feasible on that claim?

B. Has any provision of the Plan been consummated in such a way that it is no longer feasible to grant any relief on any claim of error presented in my appeal to the District Court?

C. Is it possible to grant relief without adversely affecting rights of parties not before the district court or dooming the Plan to failure?

STATEMENT OF THE CASE

Detroit ("City"), the debtor in this bankruptcy, is a Michigan municipality. Fourth Amended Disclosure Statement, in Appendix to City Merits Brief, RE 48-1, PAGE ID # 54512. Long before commencement of this bankruptcy, the City had created two retirement systems: the General Retirement System ("GRS") and the Police and Fire Retirement System ("PFRS"). *Id.* PAGE ID # 54532. This appeal deals only with GRS. GRS is governed by its Board of Trustees. *Id.*, PAGE ID # 54532.

GRS manages two retirement plans that are relevant to this appeal: the Defined Benefit Plan and the Annuity Savings Plan. Fourth Amended Disclosure Statement, RE 48-1, PAGE ID # 54532-54533. The plans' assets are held in a trust, of which the Board of Trustees serves as trustee. The Defined Benefit Plan is funded entirely by employer contributions and investment returns. It is used to pay pensions for retired employees and any designated surviving beneficiaries. The Annuity Savings Plan is funded entirely by contributions from those GRS members, including me until I retired in 2008, who choose to contribute through payroll deductions, and by interest on those contributions. The GRS trustees determine the rate of interest to be credited each year. 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. Fourth Amended Disclosure Statement, RE 48-1, PAGE ID # 54532-545333.

Each plan includes several accounting entities called "funds," but the assets in all the funds are commingled for investment purposes. Of particular interest in this appeal is the Annuity Savings Fund ("ASF"). This fund consists of individual accounts holding Annuity Savings Plan contributions made by current City employees and the interest earned on those contributions. Fourth Amended Disclosure Statement, RE 48-1, PAGE ID # 54450 *et seq*.

On July 18, 2013 the City filed a Voluntary Petition in the bankruptcy court. Opinion Regarding Eligibility, in Appendix to City Merits Brief, RE 48-1, PAGE ID # 53718. 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. Quinn Merits Brief, RE 21, PAGE ID # 52487. The final version, the Eighth Amended Plan for the Adjustment of Debts of the City of Detroit ("Plan"), was filed on October 22, 2014 and confirmed in an order dated November 12, 2014. Confirmation Order, in Appendix to City Merits Brief, RE 48-3, PAGE ID # 55815-55946.

The Plan 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 Plan. *Id.*, PAGE ID # 55837; Fourth Amended Disclosure Statement, RE 48-1, PAGE ID # 54465.

The City and the retirement systems agree about the fact, but not the extent, of the systems' underfunding. Fourth Amended Disclosure Statement, RE 48-1, PAGE ID # 54532. Although the systems have sufficient assets to cover liabilities to retirees fully for several years, the underfunding has left them with insufficient funds to comply with all their expected future obligations. The City's liabilities for the underfunding of both systems were therefore treated as debts subject to adjustment in the bankruptcy.

The potential long-term 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 City-owned art museum. 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 the City transferred all its interest in the DIA's assets for the benefit of the people of the City and Michigan, thus putting those assets beyond the reach of the City's present and future creditors. In return, the State, the DIA, several philanthropic organizations and others undertook to make substantial payments to PFRS and GRS to help the systems meet their obligations to retirees. Supplemental Confirmation Opinion, in Appendix to City Merits Brief, RE 48-3, PAGE ID # 56077 *et seq.*

The Plan also 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. *Id.*, PAGE ID # 56095.

For most GRS retirees, the 4.5% reduction and elimination of cost of living are the only adjustments to their pensions. However, the Plan provides for additional reductions for some retirees, including me. The City attributed the under-funding of GRS, in part, to certain long-standing practices of the Trustees that it said had decreased the assets available to the Defined Benefit Plan, thereby increasing the amount it was required to pay GRS to fund that plan. In particular, the City pointed to two 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. Fourth Amended Disclosure Statement, RE 48-1, Page ID # 54533. In some years the GRS trustees also credited ASF with interest greater than the actual returns earned on GRS's investments. For any fiscal year between 2003 and 2013, the City characterizes interest credited to ASF in excess of GRS's actual rate of investment return as "excess interest." The City maintains that both the 13th check and the excess interest depleted

funds available for the Defined Benefit Plan, thus increasing GRS's underfunding.

In its Plan, the City made no effort to remedy the under-funding it attributes to the 13th check. However, the Plan does include provisions, characterized as "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 account balance is sufficient to cover the sought-for recovery. Because, as noted above, only current employees generally have ASF accounts, I have not had such an account since I retired in 2008. My appeal to the District Court therefore addressed the recovery mechanism used in the case of a retiree with no ASF account. That mechanism is described in the Plan, RE 48-3. PAGE ID # 55780). Its result is that, while all GRS retirees experience 4.5% reductions in their pensions, retirees subject to ASF Recoupment experience reductions greater than 4.5% but not greater than 20%.

The Plan 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.

After entry of the Confirmation Order I filed in the Bankruptcy court a timely motion for stay. City Corrected Motion to Dismiss, RE 36, PAGE ID # 53114. The Bankruptcy court denied that motion. *Id.* I filed a timely Notice of Appeal from the Confirmation Order. Notice of Appeal, in Appendix to City Merits Brief, RE 48-3, PAGE ID # 56050-56041. In the District Court I raised the same issues I had raised as objections to the Plan in the bankruptcy court. Specifically, I argued that:

(1) the Plan violates 11 U.S.C. § 941 by adjusting the liability of GRS, which is an entity distinct from the City and not a debtor in this bankruptcy proceeding, to pay pension benefits ("§ 941 Claim"), Quinn Merits Brief, RE 21, PAGE ID # 52480, 52508-52514;

(2) the Plan violates 11 U.S.C. § 1123(a)(4) by imposing non-consensual less favorable treatment on certain Class 11 claims affected by ASF Recoupment than on other claims in the class ("§ 1123(a)(4) Claim"), *Id.*, PAGE ID # 52480, 52497-52508; and

(3) the injunction that prevents prosecution of certain claims by individuals affected by ASF Recoupment against GRS, which is not a debtor in the case, violates the rule this Court announced in *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658, (6th Cir. 2002) ("Injunction Claim"), *Id.*, PAGE ID # 52480, 52514-52517.[1]

The merits of the appeal were fully briefed (Quinn Merits Brief, RE 21, PAGE ID #

[1] No version of the Plan, including the final version, proposed the injunction to which I objected. The bankruptcy court inserted the injunction into the Confirmation Order on its own motion. RE 48-3, PAGE ID # 55909. In my Objections to Fourth Amended Plan of Adjustment (Bankruptcy Ct. RE 5724 at 14-15, listed in Statement of Issues and Designation of Records for 6th Circuit Appeal, RE 55, PAGE ID # 56543), in support of my argument that GRS's debts to retirees could not be adjusted, I argued that such an injunction would violate the *Dow Corning* standards.

52468-52549; City Merits Brief, RE 47, PAGE ID # 53606-53660; GRS Merits Brief, RE # 50, PAGE ID # 56413-56429; State Merits Brief, RE 44, PAGE ID # 53562-53596), but the District Court declined to reach the merits. Instead, on September 29, 2015 it dismissed the appeal on equitable-mootness grounds. Opinion and Order Granting Motion to Dismiss. RE 52, PAGE ID # 56518-56536. This appeal is from that dismissal.

Additional facts relevant to specific issues are included in the discussion of those issues in the Argument.

SUMMARY OF THE ARGUMENT

This is an appeal from the District Court's dismissal, on the ground of equitable mootness, of an appeal from the bankruptcy court's confirmation of a plan of adjustment, a final order. Equitable mootness has been characterized as a form of "prudential mootness." Dismissal of an appeal on this ground is not based on a lack of jurisdiction. Rather it is a choice not to exercise jurisdiction. The District Court erred in this case by: (1) applying the equitable-mootness doctrine in a case arising under Chapter 9 of the Bankruptcy Code; and (2) misapplying the criteria for determining whether a case is equitably moot.

This Court last considered equitable mootness in 2008. Developments since then make it clear that the doctrine is legally untenable and imprudent, even in the Chapter 11 context; and its shortcomings would be magnified if the doctrine were

expanded to encompass cases arising under Chapter 9.

The Supreme Court has, with increasing frequency, expressed disapproval of any refusal by an Article III court to exercise its jurisdiction on prudential grounds, repeatedly reminded us that federal courts have a virtually unflagging obligation to hear and decide cases within their jurisdiction. This obligation applies with equal force to the district courts' "jurisdiction to hear appeals . . . from final judgments, orders and decrees" of the bankruptcy courts. 28 U.S.C. § 158(a)(1). Indeed, the Supreme Court has recently reiterated the personal, constitutionally guaranteed right of a litigant aggrieved by a final decision of a bankruptcy judge to review by an Article III court applying traditional appellate standards. Equitable mootness is the very sort of prudential rationale for refusing to hear the merits of an appeal that the Supreme Court so emphatically disfavors.

Moreover, bankruptcy courts and plan proponents frequently make strategic use of equitable mootness to limit appellate review. A Chapter 9 municipal debtor, who has the exclusive power to propose a plan of adjustment, is uniquely positioned to design and implement the plan so as to trigger equitable mootness in the event of an appeal. Making equitable mootness available in Chapter 9 cases would thus offend federalism by empowering a state actor to prevent or limit the exercise of jurisdiction by a federal court.

Equitable mootness is inconsistent with the structure and language of the Bankruptcy Code. Congress has included in the Code provisions specifying what sorts of relief are unavailable in bankruptcy appeals and under what circumstances. But the Code includes no provision authorizing the withholding of appellate relief, much less appellate review, on the grounds used in equitable-mootness analysis. Applying the canon *inclusio unius est exclusio alterius* leads to the conclusion that equitable mootness is contrary to congressional intent. The conflict would be intensified if equitable mootness were applied in Chapter 9 cases. To determine whether a claim of error is equitably moot a court must determine whether the plan has been substantially consummated. But, according to the Code, the concept of substantial consummation is does not apply in Chapter 9.

Although intended to promote finality, equitable mootness in fact adds complexity, expense and delay to bankruptcy appeals. Our experience in this case supports this general observation. More than a year after filing of the Notice of Appeal to the District court and nine months after briefing on the merits was completed in that Court, no Article III court has yet begun to consider the merits of the appeal, much less resolve any of the issues raised. We can look forward to several more months of litigation in this Court, to be followed, in the event of reversal, by yet more delay in the District Court before a resolution of the appeal.

Appellate review serves both to correct error and injustice in individual cases and to develop and clarify the law and assure its uniform interpretation and application. By discouraging appellate merits review, equitable mootness frustrates both objectives in bankruptcy cases. The need for appellate review is particularly pronounced in bankruptcy, both because it provides the only opportunity for consideration of cases with the neutrality guarantees of Article III and because of the unusual lack of binding appellate precedent and clarity in the law of bankruptcy.

The equitable-mootness doctrine encourages Article III courts to adopt a head-in-the-sand approach to the review of the decisions of bankruptcy courts. Its underlying premise is that, in some cases, even thinking about whether a bankruptcy court has erred is too dangerous because it might lead to the conclusion that it has, in fact, erred; and the appellate court might not know how to deal with that conclusion without upsetting the carefully arranged apple cart that is the plan of reorganization or of adjustment. But courts, especially when exercising equitable powers, are fully capable determining how to proceed, once it is determined that an error has occurred, without spilling apples. An Article III court considering an appeal from a final order of a bankruptcy court generally should first consider the merits of the appeal and then, if the appeal is found to have merit, either consider what relief, if any, is appropriate or remand to the bankruptcy court for that determination.

Even if it were proper to apply equitable mootness in Chapter 9 cases, the

District Court misapplied it in this case. A court must proceed with great caution before declining to address the merits of an appeal on this ground. In this circuit, three factors are examined: whether a stay has been obtained; whether the plan has been substantially consummated; and whether there is a plausible argument that relief can be granted without affecting the rights of parties not before the court or dooming the plan. These factors are considered with reference to individual claims of error, not the entire appeal.

The District Court erred in the application of these factors by: (1) failing to scrutinize each claim of error to test the feasibility of granting relief on that particular claim; (2) misapplying the "substantial compliance" criterion by failing to address the questions whether the Plan's specific treatment of Class 11 pension claims has been substantially consummated and whether any other parts of the Plan that have been substantially consummated would need to be undone if one of more of the claims of error in the appeal were determined to have merit; (3) failing to consider whether any relief, including alternative relieve, would be feasible if one or more of my claims of error were found meritorious; (4) failing to take into account the fact that all parties whose interests could be affected by relief that might granted in my appeal to the District Court are actually before that court and able to protect their interests; and failing to examine the actual effects that might follow from granting relief when deciding whether that relief would necessarily doom the Plan as a whole.

ARGUMENT

I. All the issues raised in this appeal are subject to review *de novo*.

This Court reviews *de novo* a lower court's dismissal of a bankruptcy appeal on the ground of equitable mootness. *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 946-947 (6th Cir. 2008).

II. The District Court Erred by Extending the Equitable-Mootness Doctrine to Apply in This Case, Which Arises Under Chapter 9 of the Bankruptcy Code.

In the District Court, the City, joined by the State, moved to dismiss the appeal as "equitably and constitutionally moot." City Corrected Motion to Dismiss, RE 36, PAGE ID # 53099; State Concurrence in Motion to Dismiss, RE 34, PAGE ID # 56094. The District Court declined to consider whether the appeal was constitutionally moot but dismissed on the ground of equitable mootness. Order Dismissing Appeal, RE 52, PAGE ID # 52, PAGE ID # 56536.

The two sorts of "mootness" differ in at least three respects. First, constitutional mootness, as the name implies, finds support in the Constitution. Equitable mootness does not. It is a judge-made doctrine not based on the Constitution or any statute. *In re Mortgs. Ltd.*, 771 F.3d 1211, 1214 (9th Cir. 2014). Second, constitutional mootness actually is a form of mootness. Equitable mootness, despite its name, is not. Rather, it

is "a kind of appellate abstention"[2] that courts have developed during the past twenty-five years or so[3] to privilege the finality of reorganizations developed in bankruptcy proceedings and protect expectations based on that finality. *In re Pacific Lumber*, 584 F.3d 229, 240 (5th Cir. 2009). Third, a court cannot rule on the merits of a constitutionally moot appeal: it lacks the jurisdiction. A court that dismisses an appeal on the ground of equitable mootness **chooses** not to exercise its jurisdiction. *Matter of UNR Industries, Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) ["There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness')."](Emphasis in original.)

Equitable mootness has been adopted by several circuit courts, including the Sixth, but never endorsed by the Supreme Court. The Second, Fourth and Seventh Circuits have altered the doctrine beyond recognition. See Part II.D.6., below.

A. The District Court's holding that equitable mootness applies in cases arising under Chapter 9 lacks precedential support in the Supreme Court, this Court and all other United States Courts of Appeal.

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[2] "Abdication" might be a better word. "[W]here there is no other forum and no later exercise of jurisdiction . . . relinquishing jurisdiction is not abstention; it's abdication." *In re: One2One Communications, LLC*, No. 13-3410, ___ F.3d ___, 2015 WL 4430302, 2015 U.S. App. LEXIS 12544 at *9 (3d Cir. July 21, 2015) (Krause, J., concurring).

[3] "[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)

This Court has discussed equitable mootness in three published cases and two unpublished cases, all involving reorganizations under Chapter 11 of the Bankruptcy Code. *City of Covington v. Covington Landing L.P.*,71 F.3d 1221 (6th Cir. 1995);[4] *Unofficial Committee of Co-Defendants v. Eagle-Picher Indus., Inc. (In re Eagle Picher Indus., Inc.)*, 172 F.3d 48, 1998 WL 939869 (6th Cir., 1998) (unpublished); *Matter of Arbors of Houston Associates Ltd. Partnership*,172 F.3d 47, 1999 WL 17649 (6th Cir. 1999)(unpublished); *Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American HomePatient, Inc.)*, 420 F.3d 559 (6th Cir. 2005); *Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942 (6th Cir. 2008).[5] In *Merriweather v. Official Comm. of Unsecured Creditors (In re Made in Detroit, Inc.)*, 414 F.3d 576, 583 (6th Cir. 2005), also a Chapter 11 reorganization, the debtor raised issues of statutory and equitable mootness. The Court determined that the appeal was statutorily moot and therefore declined to consider equitable mootness. This Court has not suggested, even in dicta, that equitable mootness might apply in cases arising under Chapter 9.

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[4] The *Covington* panel used the term "equitable estoppel," not "equitable mootness." However, it is clear the doctrine it applied was at least an embryonic form of what we have come to call "equitable mootness." This Court has cited *Covington* as an equitable-mootness case. *American Home Patient*, 420 F.3d at 563; *United Home Producers*, 526 F.3d at 947.

[5] *In City of Covington*, *Arbors of Houston*, and *American Home Patient United Producers* the Court held that equitable mootness did not prevent consideration of the merits. In *Eagle Picher* and *United Producers* equitable mootness was held to apply.

The overwhelming majority of cases in which equitable mootness has been considered in other circuits also have been Chapter 11 reorganizations. See *Desert Fire Prot. v. Fontainebleau Las Vegas Holdings, LLC (In re Fontainebleau Las Vegas Holdings, LLC)*, 434 B.R. 716, 742-43 (S.D. Fla. 2010) ("[E]quitable mootness is most commonly applied to avoid disturbing [Chapter 11] plans of reorganization. . ."). This is not surprising, since courts developed the doctrine "in response to the particular problems presented by the consummation of plans of reorganization under Chapter 11." *TNB Fin., Inc. v. James F. Parker Interests (In re Grimland, Inc.)*, 243 F.3d 228, 231 (5th Cir. 2001).

Some circuits have applied, or at least considered, equitable mootness in contexts beyond Chapter 11 reorganizations. Recently, the Second Circuit extended equitable mootness to a Chapter 11 liquidation. *Beeman v. BGI Creditors' Liquidating Trust (In re BGI, Inc.)*, 772 F.3d 102, 109-11 (2d Cir. 2014). In unpublished opinions, panels of the Eighth and Tenth Circuits seem to assume, without analysis, that equitable mootness applies in Chapter 11 liquidations, as well as reorganizations. *Zegeer v. President Casinos, Inc. (In re President Casinos, Inc.)*, 409 F. App'x 31, 31-32 (8th Cir. 2010)(unpublished); *Sutton v. Weinman (In re Centrix Fin. LLC)*, 355 F. App'x 199, 201-02 (10th Cir. 2009)(unpublished).[6] While the First Circuit has considered the possibility

[6] In *In re Superior Offshore Int'l, Inc.*, 591 F.3d 350 (5th Cir. 2009), the Chapter 11 plan or reorganization included a "liquidation waterfall." Before affirming plan

that equitable mootness could prevent merits review in a Chapter 7 liquidation, it declined to apply the doctrine to prevent review of the merits in the case before it. *Hicks, Muse & Co. v. Brandt (In re Healthco Int'l, Inc.)*, 136 F.3d 45, 48-49 (1st Cir. 1998). The Fifth Circuit has twice declined to apply equitable mootness in Chapter 7 liquidations and has questioned whether it could ever be applied in such a case. *In re San Patricio Cnty. Cmty. Action Agency*, 575 F.3d 553, 558 (5th Cir. 2009); *In re Bodenheimer, Jones, Szwak, & Winchell L.L.P.*, 592 F.3d 664, 668-69 (5th Cir.2009). See also *In Re: Christian Anthanassious, Debtor. Carol Palmer, Appellant*, 418 Fed. Appx. 91, nt. 3 (3d Cir. 2011) (unpublished). Recently, in an unpublished opinion, the Eleventh Circuit applied equitable-mootness analysis to affirm the dismissal of an appeal in a Chapter 7 liquidation where there had been no effort to obtain a stay and the estate had been entirely liquidated more than two years before the dismissal. *In re Strickland & Davis Int'l, Inc.*, 612 F. App'x 971, 978-79 (11th Cir. 2015) (unpublished). In *Drawbridge Special Opportunities Fund, L.P. v. Shawnee Hills, Inc. (In re Shawnee Hills, Inc.)*, 125 F. App'x 466, 469-70 (4th Cir. 2005)(unpublished), a Chapter 7 liquidation, the court affirmed an equitable-mootness dismissal where a bank appealed from an order requiring it to honor pre-petition payroll checks drawn on an account with adequate funds, no stay was sought and several checks had already been honored.

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confirmation the court concluded that equitable mootness did not prevent consideration of the merits. Id. At 353-354.

In *Russo v. Seidler (In re Seidler)*, 44 F.3d. 945 (11th Cir. 1995) the district court had held that an appeal from the bankruptcy court's final order in an adversary proceeding was moot under 11 U.S.C. § 1327, a provision found in Chapter 13 of the Bankruptcy Code. The Eleventh Circuit reversed. 44 F.3d at 948-49. Although the court of appeals made no explicit reference to equitable mootness, in its consideration of statutory mootness it discussed factors we commonly associate with equitable mootness, including whether the plan has been substantially consummated. 44 F.3d 947, nt. 3. The court ultimately declined to apply the substantial-consummation factor to the Chapter 13 case before it because " '[s]ubstantial consummation' is a Chapter 11 concept, see [11 U.S.C.] Sec. 1101(2), which is inapplicable to this case, see [11 U.S.C.] Sec. 103(f)."

Lionel v. City of Vallejo, 551 F. App'x 339 (9th Cir. 2013)(unpublished)[7] is a memorandum opinion containing two paragraphs of analysis. In those two paragraphs the panel assumed, without discussion,[8] that equitable mootness is available as a ground for dismissal of an appeal in a Chapter 9 case and affirmed such a dismissal. A

[7] "Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Ninth Circuit Rule 36-3(a).

[8] No party in *City of Vallejo* raised the question whether equitable mootness applies in Chapter 9 cases. See *Lionell v. City of Vallejo*, 9th Case No. 12-60042: Appellant's Informal Brief, DktEntry 6, 9/24/12; Appellees' Brief, DktEntry 3, 10/22/12; Appellant's Informal Reply Brief, DktEntry 17, 11/30/12.

district court in the Fourth Circuit reached the same conclusion, without analysis, in *Alexander v. Barnwell Cnty. Hosp.*, 498 B.R. 550 (D.S.C. 2013).

B. The one court, aside from the District Court in this case, that has carefully considered whether equitable mootness applies in cases arising under Chapter 9 concluded that it does not.

Bennett v. Jefferson County, 518 B.R. 613 (N.D.Ala. 2014), was a Chapter 9 bankruptcy. After incurring unsustainable debt to maintain and operate its sewer system, Jefferson County, Alabama sought Chapter 9 protection. The bankruptcy court approved a plan of adjustment that foreseeably would result in large rate increases for sewer-system users. A group of ratepayers appealed from confirmation of the plan of adjustment, and the county moved to dismiss the appeal on several grounds, including equitable mootness.

The district court held that the equitable mootness doctrine does not apply in cases arising under Chapter 9 and that the case did not, in any event, meet the criteria for equitable mootness in the Eleventh Circuit. The court based its holding that equitable mootness cannot stand in the way of considering the merits of a Chapter 9 appeal on two broad considerations that it went on to develop in detail: "(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,' and (2) it is based on Chapter 11 concepts that may be inapplicable to or inappropriate for this Chapter 9 case" 518 B.R. at 613 (citations and

notes omitted). These considerations are no less compelling in this case. I discuss them in Parts II.C.2. and II.D. of this Brief.

C. The unique structure and purpose of Chapter 9 make application of the equitable-mootness doctrine inappropriate in cases arising under that chapter.

Equitable mootness finds no warrant in the Bankruptcy Code – it is entirely judge made. Moreover, with specific reference to Chapter 9, a careful reading of the Code makes it clear that the equitable-mootness doctrine cannot be used to prevent appellate consideration of the merits in a Chapter 9 case.

1. Equitable mootness is intended to protect against the catastrophic consequences that can follow from the overturning of a plan of reorganization, consequences that are different in kind from anything that is possible in a Chapter 9 bankruptcy.

When a non-municipal corporation seeks bankruptcy protection it does so at great risk. If the process does not result in a workable plan of reorganization, or if the plan fails, the debtor can lose the ability to control its property, to derive income from that property and even to govern itself. It may even be forced into liquidation, with truly catastrophic results, not only for the debtor, but also for perhaps tens or hundreds of thousands of its shareholders and employees, for the communities where those employees live and work and even for the national economy. The equitable-mootness doctrine serves to forestall a result on appeal from confirmation of a plan of reorganization that could make these catastrophic outcomes unavoidable.

But Chapter 9 is different. In Chapter 9, liquidation simply is not an option. A municipality "by its nature, is not subject to liquidation." *In re Hardeman Cty. Hosp. Dist.*, 540 B.R. 229, 237 (Bankr. N.D. Tex. 2015), citing COLLIER ON BANKRUPTCY ¶ 941.02 (16th ed.) Accordingly, "Chapter 9 makes no provision for conversion of the case to another chapter or for an involuntary liquidation of any of the debtor's assets." *In re Richmond Unified Sch. Dist.*, 133 B.R. 221, 225 (Bankr. N.D. Cal. 1991). Even short of liquidation, the bankruptcy court cannot, without the debtor's consent, "interfere with . . . any of the political or governmental powers of the debtor; . . . any of the property or revenues of the debtor; or . . . the debtor's use or enjoyment of any income-producing property." 11 U.S.C. § 904. A creditor who successfully challenges a plan on appeal " 'cannot propose a plan; cannot convert to Chapter 7; cannot have a trustee appointed; and cannot force sale of municipal assets under state law, [so its] only alternative to a debtor's plan is dismissal.' " *In re City of Detroit*, 524 B.R. 147, 213 (Bankr. E.D. Mich. 2014), quoting *In re Mount Carbon*, 242 B.R. 18, 34 (Bankr. D. Colo. 1999).

Thus, although the consequences of some forms of appellate relief in a Chapter 9 case could be severe (albeit not in this case, see Part III.E., below) they are different in kind from the cataclysmic results that can follow from such relief in a Chapter 11 reorganization case. As we will see (Part II.D., below), equitable mootness imposes substantial costs on litigants and on the judicial system. Even if those costs can be

justified in a Chapter 11 case, it does not follow that they can be justified in a Chapter 9 case.

2. Application of the "substantial consummation" concept is necessary to determine whether equitable mootness should be applied in a particular case, but that concept is, by the terms of the Bankruptcy Code, not applicable in cases arising under Chapter 9.

To apply the doctrine of equitable mootness a court must determine whether "substantial consummation" of the plan has occurred. *American HomePatient*, 420 F.3d at 563-564. As the courts in *Seidler* and *Jefferson County* noted, "substantial consummation" is defined in Chapter 11 of the Code, specifically in 11 U.S.C. § 1101(2). By its terms, the definition applies only in Chapter 11: "In this Chapter ... 'substantial consummation' means ...". § 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. § 103(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. *Jefferson County*, 518 B.R. 635-36, citing *Seidler*, 44 F.3d. 947 n. 3.

Since the Code, including § 1101(2), makes no reference to equitable mootness one might argue that "substantial consummation" is not defined in § 1101(2) for purposes of equitable mootness but rather for other purposes that are addressed in the Code, such as determining cause for conversion or dismissal of a case [11 U.S.C. §

1112(b)(4)(M)] or terminating the period within which a plan of reorganization may be modified [11 U.S.C. § 1127(b), (e)]. But that argument fails because this Court has explicitly held that § 1101(2)'s definition of substantial consummation does apply in equitable-mootness analysis:

> 'Substantial consummation' is a statutory term used to determine whether a bankruptcy court may modify or amend a reorganization plan. 11 U.S.C.A. § 1127 [quoting § 1127]. The Bankruptcy Code defines substantial consummation as:
>
> > (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.
>
> 11 U.S.C. 1101(2)]. This standard has been adopted in the equitable mootness analysis to determine the extent to which the plan has progressed.

United Producers, 526 F.3d at 948. This is consistent with the Court's unwavering practice of applying equitable mootness only in cases arising under Chapter 11.

D. Since this Court last considered equitable mootness in 2008 it has become clear that the doctrine is both legally untenable and imprudent. Expansion of this discredited doctrine to encompass cases arising under Chapter 9 is unwarranted.

This Court last addressed the equitable-mootness doctrine in *United Producers*, 526 F.3d 942 (6th Cir. 2008). So far as its opinions disclose, the Court has never considered whether equitable mootness raises constitutional concerns or whether it is inconsistent with provisions of the Bankruptcy Code. A lot has happened since 2008,

leading the *Jefferson County* court to remark on the tension between equitable mootness and recent holdings of the Supreme Court, 518 B.R. at 613.

1. The equitable-mootness doctrine is incompatible with the duty of Article III courts to hear and decide appeals from final judgments of bankruptcy courts.

In *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. ___, 134 S.Ct. 1377 (2014) the district court had dismissed Static Control's Lanham Act counterclaim for lack of standing. This Court reversed, *Static Controls Components, Inc. v. Lexmark Intern., Inc.*, 697 F.3d 387, 411 (6th Cir. 2012), and the Supreme Court affirmed the reversal. In the Supreme Court, Lexmart relied on "prudential standing," a doctrine that, like equitable mootness, prevents a court, in certain circumstances, from exercising its jurisdiction on prudential grounds. In rejecting the argument "that we should decline to adjudicate Static Control's claim on grounds that are 'prudential,' rather than constitutional" the Court adverted to its "recent reaffirmation of the principle that 'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is "virtually unflagging." ' " 134 S.Ct. 1377, 1386, citing *Sprint Communications, Inc. v. Jacobs*, 571 U.S. __, 134 S.Ct. 584, 591 (2013) and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The failures to exercise jurisdiction that the Court rejected in *Sprint Communications* and *Colorado River Water Conservation Dist.* had been based on Younger abstention.

Shortly after the *Lexmark* decision, the Supreme Court again expressed its suspicion of any refusal to exercise federal jurisdiction " 'on grounds that are "prudential," rather than constitutional' " and reminded us of federal courts' virtually unflagging obligation to hear and decide cases within their jurisdiction. *Susan B. Anthony List v. Driehaus*, __ U.S. __, 134 S.Ct. 2334, 2347 (2014). In that case, the Court declined to consider the continuing vitality of "prudential ripeness," having concluded that the claim before it was justiciable under Article III and that consideration of the prudential-ripeness factors would not change the outcome. *Id.* See also *Zivotofsky v. Clinton*, ___ U.S. ___, 132 S.Ct. 1421, 1427 (2012) (declining to expand the political-question doctrine and noting that "the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.") (Internal quotation marks and citation omitted.); *Mata v. Lynch*, __ U.S. __, 135 S.Ct. 2150, 2156 (2015).

Neither *Lexmark*, *Sprint Communications*, *Colorado River Water Conservation Dist.*, *Susan B. Anthony List*, *Zivotofsky* nor *Mata* is a bankruptcy case, but the obvious implications for equitable mootness have not escaped notice in sibling circuits. *See In re Continental Airlines*, 91 F.3d 553, 568 (3rd Cir. 1996) (Alito, J., dissenting); *In re Zenith Electronics Corp.*, 329 F.3d 338, 347 (3rd Cir. 2003); *In re Pacific Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009); *In re: One2One Communications, LLC*, No. 13-3410, ___ F.3d ___, 2015 WL 4430302, 2015 U.S. App. LEXIS 12544 at *27-*28 (3d Cir. July 21, 2015) (Krause, J., concurring). The point that a congressional assignment of jurisdiction to

an Article III court (as distinct from a grant of jurisdiction to be exercised by leave) is not a mere suggestion or invitation to hear certain types of matters – that it is, rather, a mandate – applies with equal force to the assignment to district courts of "jurisdiction to hear appeals . . . from final judgments, orders and decrees" of the bankruptcy courts. 28 U.S.C. § 158(a)(1). Equitable mootness is the very sort of prudential rationale for refusing to hear the merits of an appeal that is so clearly disfavored by the Supreme Court.

Stern v. Marshall, ___ U.S. ___, 131 S.Ct. 2594 (2011) is a bankruptcy case and merits careful attention here. Fortunately, we can garner what we need from the case without getting mired in its facts and procedural history, which Chief Justice Roberts has likened to the fictional *Jarndyce and Jarndyce*, a multi-generational and grotesquely pointless chancery action that serves as the backdrop for Charles Dickens's *Bleak House*. 131 S.Ct. at 2600.

The Court's chief preoccupation in *Stern* was the power of bankruptcy judges to enter final judgments. *See* 28 U.S.C. § 157(b)(1). This is a matter of concern because bankruptcy judges are not Article III judges and, therefore, are not vested with the "judicial power of the United States," granted tenure during good behavior, or protected from diminution of their compensation. Const. Art. III, § 1; 131 S.Ct. at 2601-2602. When a non-Article-III judge enters a final judgment, two closely related constitutional objectives are impacted: maintenance of the independent judiciary, and

protection of the right of every litigant to be heard by a judge whose impartiality is not threatened by fear of dismissal or diminished compensation:

> In establishing the system of divided power in the Constitution, the Framers considered it essential that 'the judiciary remain[] truly distinct from both the legislature and the executive.' The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton put it, quoting Montesquieu, ' "there is no liberty if the power of judging be not separated from the legislative and executive powers." *Ibid.* (quoting 1 Montesquieu, Spirit of Laws 181).
> . . .
> Article III imposes some basic limitations that the other branches may not transgress. Those limitations serve two related purposes. 'Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.' [Citation omitted.]
>
> Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.' The Declaration of Independence ¶ 11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the '[c]lear heads . . . and honest hearts' deemed 'essential to good judges.' 1 Works of James Wilson 363 (J. Andrews ed. 1896).

Stern, 131 S.Ct. 2608-2609. This does not imply that bankruptcy judges have no authority to enter final judgments. The *Stern* Court did not question the bankruptcy

court's general authority to enter final judgments in core proceedings **subject to parties' right to appeal those judgments to the district court "which reviews them under traditional appellate standards."** 131 S.Ct. 2603-2604, citing 28 U.S.C. § 158(a) and Fed. Rule Bkrptcy. Proc. 8013 (emphasis added); The Court's narrow holding was that Congress may not vest in a bankruptcy court power to issue binding orders in a traditional contract or tort action arising under state law ("*Stern* claims"), without consent of the litigants, even when the bankruptcy court's ruling is subject to appellate review by an Article III court. 131 S.Ct. at 2615; see also *Wellness International Network, Ltd. v. Sharif*, __ U.S. __, 135 S.Ct. 1932, 1944 (2015)(A bankruptcy court may adjudicate *Stern* claims with the knowing and voluntary consent of the parties, "so long as Article III courts retain supervisory authority over the process.")

Nonetheless, when *Stern* is read alongside *Susan B. Anthony List*, *Lexmark*, *Sprint Communications*, *Colorado River Water Conservation Dist., Zivotofsky* and *Mata* the implication is clear: the process that is due a party aggrieved by a final order of a bankruptcy court includes a right to appeal the order to an Article III court and to have that court review the judgment under traditional appellate standards. That right "may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it," *Stern*, 131 S.Ct. At 2608 (internal quotations and citations omitted). However, when the right to Article III review of a bankruptcy court's final decision is properly asserted, a court is almost always bound

to honor it. If the court withholds the review that is the aggrieved party's due "on grounds that are 'prudential,' rather than constitutional," (*e.g.*, on the ground of equitable mootness) it violates its virtually unflagging obligation to hear and decide cases within its jurisdiction. *Lexmark*, 134 S.Ct. at 1386. This is a particular application of the principle that Chief Justice Marshall, writing for the Court nearly 200 years ago, articulated in the most emphatic terms: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

2. The equitable-mootness doctrine enables the plan proponent(s) and the bankruptcy court to prevent appellate merits review by engineering the plan and its implementation to create mootness. In the Chapter 9 context, this becomes a federalism problem.

a. Bankruptcy courts and plan proponents can and do make strategic use of equitable mootness to limit appellate review.

Third Circuit Judge Cheryl Ann Krause, urging her court to reconsider and perhaps abandon the equitable-mootness doctrine, notes that equitable mootness

> not only prevents appellate review of a non-Article III judge's decision; it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue. Although Article III judges decide whether an appeal is equitably moot, bankruptcy courts control nearly all of the variables in the equation, including whether a reorganization plan is initially approved, whether a stay of plan

> implementation is granted, whether settlements or releases crucial to a plan are approved and executed, whether property is transferred, whether new entities (in which third parties may invest) are formed, and whether distributions (including to third parties) under the plan begin – all before plan challengers reach an Article III court.

One2One, 2015 U.S. App. LEXIS 12544 at *39-*40, (Krause, J. concurring). Judge Krause goes on to quote then-Judge Alito concurring in *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001): "our court's equitable mootness doctrine can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges."

But it is not only the bankruptcy judge who can manipulate equitable mootness to prevent appellate review of a plan and its confirmation. As Judge Krause notes, the proponents of the plan can and frequently do take steps, before consideration of the case by an Article III court, to prevent appellate review of the plan's merits by assuring application of equitable mootness. These steps may include: (1) engineering the plan so as to incorporate "poison pills" designed to assure its destruction in the event of a stay or successful appeal, even if the appeal addresses only a small part of the plan; and (2) rushing to achieve substantial consummation very quickly after plan confirmation.

"[S]ophisticated parties have learned that a 'pre-packaged' reorganization plan that is designed to be consummated over a weekend may be insulated from review by an Article III court even though the plan contains terms that would be determined to

be unlawful if the plan were subjected to judicial review, and those parties are increasingly exploiting that opportunity." Brief of Bankruptcy Law Professors in Support of Granting the Petition for Certiorari at 5, *Law Debenture Trust Co. of N.Y. v. Charter Commc'ns, Inc.*, 133 S. Ct. 2021, 185 L. Ed. 2d 905 (2013) (No. 12-847), 2013 WL 543337. "[T]he importance of substantial consummation in rendering a claim equitably moot raises concerns that a debtor can 'stack the deck' in its favor to expedite implementation of its plan and foreclose review of questionable plan components." Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 J. Bankr. L. & Prac. 1 Art. 2 (2010). It is not unheard of for plan proponent and the bankruptcy court to work together to use equitable mootness to frustrate appellate review: "Because the bankruptcy court denied a stay pending appeal, this court faced a fait accompli, a plan that was substantially consummated within weeks of confirmation." *In re Pacific Lumber Co.*, 584 F.3d 229, 242 (5th Cir. 2009).

In *Nordhoff* then-Judge Alito found it "disturbing that Zenith, in a seeming attempt to moot any appeal prior to filing, succeeded in implementing most of the plan before the appellants even received notice that the plan had been confirmed." 258 F.3d at 192 (3d Cir. 2001). In *One2One* the plan proponents informed the district court two days before the effective date of the plan that they intended to seek dismissal of any appeal on the ground of equitable mootness and then, on the effective date itself,

closed the transactions called for in the plan and began distributions. 2015 U.S. App. LEXIS 12544 at *42. In *In re Paige*, 584 F.3d 1327 (10th Cir. 2009) the court of appeals noted that "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 . . ." 584 F.3d at 1343.

b. If equitable mootness were applied in a Chapter 9 case, the structure of Chapter 9, which deprives federal courts of the power to impose or modify a plan of adjustment, would enable the municipal debtor to prevent an Article III court from exercising its jurisdiction to review a final order of the bankruptcy court.

In a Chapter 9 bankruptcy the plan proponent is necessarily a municipality, an agency of a state, and 11 U.S.C. § 941 and 942 permit only that municipality to propose or modify a plan of adjustment. This case provides a stark example of what can result if the equitable-mootness doctrine is applied in such a case.

The City argued in the District Court that "neither the Bankruptcy Court nor this Court possesses authority to modify the City's Plan. Accordingly, the only relief that the Court is authorized to grant the appellants [sic] is to reverse confirmation of the Plan. In that event, the entire structure of the Plan would fall apart with the failure of the settlements upon which it is based, including but not limited to the various settlements that comprise the Grand Bargain." City Corrected Motion to Dismiss, RE 36, PAGE ID # 53145. In other words, the City is unwilling to consider modification

of the Plan even if informed by an Article III court that the Plan violates the Bankruptcy Code and even if it could be brought into conformity with the Code by means of a feasible modification that would not compromise the Plan as a whole. On the basis of 11 U.S.C. §§ 941 and 942 the City claims the authority to decide what sort of appellate relief to permit, and it will permit nothing short of complete reversal of Plan confirmation. But that would cause chaos, so equitable mootness comes into play to prevent appellate merits review altogether. If this is the result of applying equitable mootness in a Chapter 9 case, then equitable mootness has no place in such a case. A federal court simply cannot allow a litigant, especially one who is an agency of a state, to set the limits within which the court is permitted to exercise its jurisdiction. "In determining its own jurisdiction, a District Court of the United States must look to the sources of its power and not to acts of states which have no power to enlarge or to contract the federal jurisdiction." *Superior Beverage Co. v. Schiefflin & Co.*, 448 F.3d 910, 917 (6th Cir. 2006) (Internal quotes and citations omitted).

c. Even if the municipal debtor lacked exclusive authority to propose or modify a plan of adjustment, its control over plan implementation would enable it to make strategic use of equitable mootness to prevent appellate review.

Municipalities seeking bankruptcy protection under Chapter 9 are at least as prone as Chapter 11 plan proponents to make strategic use of equitable mootness to prevent Article III review of confirmations of plans of adjustment. In *Jefferson County*

the county informed the bankruptcy court that "it 'intend[ed] to close [the deal on the sewer warrants], if the court confirms . . . and to moot out any appeal.' " 518 B.R. 613, 639. And in this case, the City clearly strove to design a Plan that could not survive a stay or successful appeal and to rush implementation so as to assure substantial consummation to invoke equitable mootness. The Plan attempts to frustrate the exercise of appellate jurisdiction by including a provision, disingenuously titled "Severability of Plan Provisions" that actually provides severability only until the Plan is confirmed and requires that the Confirmation Order determine that each term and provision of the Plan is "integral to the Plan and may not be deleted or modified without the City's consent; and . . . non-severable and mutually dependent." Plan, Art. VIII, ¶ D at p. 71, Appendix to City Merits Brief, RE 48-3, PAGE ID # 55810.

The City continued its efforts to cement equitable mootness after plan confirmation. I filed my Notice of Appeal to the District Court on November 21, 2014, Notice of Appeal, in Appendix to City Merits Brief, RE 48-3, PAGE ID # 56050-56041. The Plan's effective date was nineteen days later, on December 10, 2014. City Merits Brief, RE 47, PAGE ID # 53620. The City immediately rushed implementation so as to trigger equitable mootness. On the effective date the City:

Issued $287.5 million in financial recover bonds;

Irrevocably transferred all DIA assets to a perpetual charitable trust;

> Began implementation of the Syncora and FGIC/COP settlements by: (1) executing options giving Syncora rights to purchase certain lands, (2) amending the lease of the Detroit Windsor Tunnel, (3) executing a development agreement for properties covered by the FGIC/COP settlement, (4) transferring settlement credits to a trustee for the benefit of Syncora and FGIC in the amount of $25 million to be applied to the purchase of certain City assets;
>
> Paid approximately $55 million to holders of allowed Class 7 claims;
>
> Issued approximately $17 million in New B Notes for distribution to holders of allowed Limited Tax General Obligation Bond claims;
>
> Issued approximately $280 million in Restructured UTGP bonds to holders of allowed Class 8 claims and approximately $8 million in Unlimited Tax General Obligation Bonds to settling UTGO bond insurers;
>
> Caused the disbursement from escrow of $23 million to the retirement systems and $3,632,857 to the trusts created to partially fund the new retiree health care VEBAs;
>
> Distributed approximately $493 million in New B Notes to the VEBAs in satisfaction of allowed Class 12 claims;
>
> Distributed approximately $3.7 million in New B Notes to holders of Class 13 claims;
>
> Distributed approximately $21 million in New B Notes to the Distribution Agent for transfer to holders of Class 14 claims; and
> Made cash payments in partial or complete satisfaction of Class 17 claims.

Id., PAGE ID # 52831-52834.

Although the problem of strategic use of equitable mootness to avoid appellate merits review exists in Chapter 11 cases, see Part II.D.2.a., above, it is much more worrisome in Chapter 9 cases like this one because the entity attempting to limit the exercise of Article III jurisdiction is a state actor. See Part II.D.2.b., above.

3. Because the Bankruptcy Code explicitly specifies what relief is unavailable on appeal and under what circumstances, application of equitable mootness to deny different relief under different circumstances is inconsistent with the Code.

Congress has included in the Bankruptcy Code provisions specifying what sorts of relief are unavailable on appeal from orders of the bankruptcy court and under what circumstances. These include 11 U.S.C. §§ 363(m) and 364(e). § 363(m) prevents the granting of appellate relief that invalidates certain sales or leases of property in the bankruptcy estate. § 364(e) similarly restricts relief that invalidates debt or security interests incurred in post-petition debtor-in-possession financing. The Code includes no provision authorizing the full or partial withholding of appellate relief, much less withholding appellate review, on the grounds that a stay has not been obtained, the plan has been substantially consummated and any relief would unwind the plan or adversely affect third parties. That is to say, nothing in the Code permits the denial of appellate relief on the ground of equitable mootness.

It is therefore presumed that Congress considered and intentionally omitted including a provision similar to §§ 363(m) and 364(e) and applicable to the sort of appellate relief the District Court refused even to consider in this case. "Because Congress specified certain orders that cannot be disturbed on appeal absent a stay, basic canons of statutory construction compel [the Court] to presume that Congress did *not* intend for other orders to be immune from appeal. While the federal courts

must fill statutory gaps in some exceptional circumstances, [courts] may not stretch a statute to create such gaps, and [they] generally acknowledge gaps to provide relief, not to deny relief which is the consequence of denying appellate review." *One2One*, 2015 U.S. App. LEXIS 12544 at *35-*36, (Krause, J. concurring) (citations omitted). *See also In re Johnson-Allen*, 871 F.2d 421, 428 (3d Cir. 1989) ("[I]t is not the function of this court to cure any perceived "defects" in that legislation. That authority is granted to Congress alone.")

4. The equitable mootness doctrine adds complexity, expense and delay to the appellate process in bankruptcy cases.

Although intended to promote finality, the equitable-mootness doctrine "has proven far more likely to promote uncertainty and delay." *One2One*, 2015 U.S. App. LEXIS 12544 at *41-*42, (Krause, J. concurring). That observation is borne out in this case. As noted above, I filed my Notice of Appeal to the District Court on November 21, 2014, nine days after the bankruptcy court confirmed the Plan and seventeen days before the Plan became effective. Notice of Appeal, in Appendix to City Merits Brief, RE 48-3, PAGE ID # 56050-56041; City's Motion to Dismiss, RE 32, PAGE ID# 52806. Nearly three months later (and three weeks after I had briefed the merits, Quinn Merits Brief, RE 21, PAGE ID # 52468-52549) on February 29, 2015, the City moved for dismissal on the ground of equitable mootness. City's Motion to Dismiss, RE 32, PAGE ID # 52801-53091. Briefing on the motion to dismiss was completed

on March 16, 2015 (City's Reply Brief on Motion to Dismiss, RE 46, PAGE ID #53598-53605), and briefing on the merits on March 29, 2015. Quinn Merits Reply Brief, RE 51, PAGE ID # 56432-56453. The District Court announced its decision to dismiss the appeal without consideration of the merits on September 29, 2015, more than nine months after receiving the appeal and six months after the merits had been fully briefed. Opinion and Order Dismissing Appeal, RE 52, PAGE ID # 56518-56536. Now, more than a year after I commenced my appeal, we are still litigating; and no court has considered the merits of the appeal.

"How, then, does refusing to hear the merits of the appeal achieve finality? Even if [the Court] were [to affirm] the District Court's finding of equitable mootness, there would not have been finality until [that] point, as the possibility of reversal has loomed all along. Without the equitable mootness doctrine, on the other hand, the District Court would have ruled on the merits long ago." *One2One*, 2015 U.S. App. LEXIS 12544 at *44 (Krause, J. concurring).

5. By preventing appellate review on the merits, equitable mootness insulates errors by bankruptcy judges or district courts and stunts the development of uniformity in the law of bankruptcy.

In our system, appellate review of lower-court decisions serves not only to correct error and injustice in individual cases but also to develop and clarify the law and assure its uniform interpretation and application. This latter objective of appellate

review is frustrated when a doctrine like equitable mootness restricts the availability of appellate review on the merits, review that is sorely needed in the law of bankruptcy, a field lacking in "binding appellate precedent . . . whose caselaw has been plagued by indeterminacy." *In re Pac. Lumber Co.*, 584 F.3d 229, 241-242 (5th Cir. 2009), citing H.R. Rep. No. 109-31 pt. I, at 148 (2005), (as reprinted in 2005 U.C.C.C.A.N. 88, 206).

6. The objectives the equitable-mootness doctrine is designed to serve can be achieved more effectively and at less cost by considering the merits of an appeal and then, if the appeal has merit, determining what relief, if any, can be granted without upsetting the plan or adversely affecting the interests of third parties.

Equitable mootness gets things backwards. Appellate courts should first consider whether an error has occurred. If there is no error, there is no need to decide what to do about it and therefore no need to consider whether doing something about it will be harmful. If the appellate court determines there has been an error, then is the time to consider what, if anything, to do about it. Indeed, "[o]ften, an appraisal of the merits is essential to the framing of an equitable remedy." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2nd Cir. 2005). Although federal courts "lack the authority to abstain from the exercise of jurisdiction that has been conferred," they retain "discretion in determining whether to grant certain types of relief . . ." *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989).

Some courts of appeal have begun to move in the direction of addressing the concerns underlying equitable mootness only after considering the merits of an appeal. The Seventh Circuit banned use of the misleading name "equitable mootness" for the doctrine, *UNR Industries*, 20 F.3d at 769, and then observed that "[t]he now nameless doctrine is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties." *Matter of Envirodyne Industries, Inc.*, 29 F.3d 301, 304 (7th Cir. 1994) (Citations omitted.) That being the case, there is no reason to consider the issues addressed by the Doctrine Formerly Known As Equitable Mootness before addressing the merits of an appeal. Accordingly the *Envirodyne* court skipped over those issues, *Id.*, and addressed the merits. That resulted in affirmance, 29 F.3d at 306, so there was no need to apply the nameless doctrine at all. The Second Circuit has kept the name but delayed consideration of equitable mootness until after the merits: "Because equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness." *Metromedia*, 416 F.3d at 144. See also *Behrmann v. Nat'l Heritage Foundation*, 663 F.3d 704, 713 n.3 (4th Cir. 2011); cases gathered at *One2One*, 2015 U.S. App. LEXIS 12544 at *54, n. 21 (Krause, J. concurring).

In the rare case in which an appeal has merit but it is imprudent to grant any relief, it might seem that consideration of the merits is, in hindsight, a waste of time.

Not so. In *Metromedia*, after determining that the appeal was meritorious, the court went on to consider equitable mootness. It concluded that no relief should be granted because the appellant had not sought a stay and completed transactions could not be undone "without violence to the overall arrangements." 416 F.3d at 144-145. But the court's ruling on the merits has provided importance guidance in subsequent cases. *See, e.g., In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1061 (5th Cir. 2012); *In re Genco Shipping & Trading Ltd.*, 513 B.R. 233, 269 (Bankr. S.D.N.Y. 2014). Thus, consideration of the merits before ruling on the availability of a remedy avoids the impediment to the development of bankruptcy law discussed in Part II.D.5., above.

After discussing these cases and others, Judge Krause concludes:

> Considering the equities after the merits, at the remedial stage, offers several advantages over abstaining from hearing the appeal altogether. In many cases, deciding the merits of a bankruptcy appeal may require the same if not less effort than deciding equitable mootness, especially given that a bankruptcy judge's findings of fact are reviewed for clear error. If so, a court can conserve resources by ruling first on the merits, as the court did in *Envirodyne*. *See* 29 F.3d at 304. If not, requiring a ruling on the merits can at least prevent one cycle of appeals (as a ruling by the District Court on the merits of Quad's appeal might have obviated the need for a remand here).

One2One, 2015 U.S. App. LEXIS 12544 at *55 (Krause, J. concurring)

III. Assuming the equitable-mootness doctrine is applicable to this case, the District Court applied it incorrectly.

Shortly after Judge Krause urged the Third Circuit to reconsider and perhaps abandon equitable mootness, one of her colleagues on that court came to the

doctrine's defense, arguing that it should continue to be applied in some appeals from very complex Chapter 11 reorganizations. *In Re: Tribune Media Co.*, 799 F.3d 272, 284-291 (3d Cir. 2015) (Ambro, J. concurring). But Judge Ambro agreed that "equitable mootness should be the rare exception and not the rule," noting that the court "has certainly not been reluctant to reverse ill-advised equitable mootness grants." *Id.*, 799 F.3d at 288.

This is consistent with precedent in the Third Circuit and elsewhere. "Before there is a basis to forgo jurisdiction, granting relief on appeal must be 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*, 728 F.3d 314, 320 (3rd Cir. 2013) (Internal quotes and citations omitted.) "Its judge-made origin, coupled with the responsibility of federal courts to exercise their jurisdictional mandate, obliges us, however, to proceed most carefully before dismissing an appeal as equitably moot." *Id.,* 728 F.3d at 318. Courts, therefore, "generally apply equitable mootness with a scalpel rather than an axe." *In re Pacific Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009).

This Court follows the Fifth Circuit in applying equitable mootness, *American HomePatient*, 420 F.3d at 563-564, 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." These factors are considered with reference to individual claims of error, not the entire appeal. *Pacific Lumber*, 584 F.3d at 241.

A. In considering the equitable-mootness issue, the District Court failed to scrutinize each individual claim of error.

Because the *Manges* factors apply to specific claims, not entire appeals, when considering a motion to dismiss on the ground of equitable mootness "a court cannot avoid its obligation to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole." *Id.* The District Court did not comply with that obligation in this case.

The three claims of error I raised in the District Court are described in the Statement of the Case, above at page 10. In ruling on the City's Motion to Dismiss, the District Court barely mentioned the § 941 Claim, Opinion and Order Dismissing Appeal, RE 52, # 56524, and made no effort to scrutinize that claim to test the feasibility of relief if the claim were found meritorious. The District Court devoted most of its attention to the § 1123(a)(4) claim, but its consideration of the feasibility of relief consisted only of a summary of the parties' arguments and a statement that it agreed with the City. *Id.*, PAGE ID # 56524-56525, 56533-56535. The court's scrutiny of the feasibility of relief on the Injunction Claim consisted of the conclusory statement in a footnote that allowing retirees affected by ASF Recoupment to pursue

claims against GRS "would leave the Global Retiree Settlement in tatters." *Id.*, PAGE ID # 56535, n. 10.

B. The District Court correctly determined that the denial of my motion for a stay did not establish that any claim of error was equitably moot.

Of the three *Manges* factors, only the first is present in this case: my motion for stay was denied by the bankruptcy court. The significance of a stay with reference to equitable mootness is that a plan of reorganization or adjustment is unlikely to be substantially consummated if its implementation has been stayed promptly after confirmation. "If a party obtains a stay, the plan cannot be substantially consummated and thus the appeal cannot be equitably moot." *Tribune Media*, 799 F.3d at 289 (Ambro, J. concurring) "However, neither the Bankruptcy Code nor any other statute predicates the ability to appeal a bankruptcy court's ruling on obtaining a stay." *SemCrude*, 728 F.3d at 322 (footnote omitted).

C. Although the City hurried implementation of the Plan with the apparent aim of creating equitable mootness, it has been unable to achieve substantial consummation of any plan provisions that would be affected by a determination that my claims of error before the District Court had merit.

Substantial consummation, like the other *Manges* factors, must be considered with reference to the specific claims of error asserted in an appeal, *Pacific Lumber*, 584 F.3d at 241. In this appeal, all the claims of error have to do with the pension claims in Class 11. Thus, the issues are: whether the Plan's treatment of Class 11 pension claims

has been substantially consummated; and whether any other parts of the Plan that have been substantially consummated would necessarily have to be undone if one of more of the claims of error in the appeal were determined to have merit.

If the Plan had called for payment to each retiree of a specified portion of the present value of her expected pension benefits, and if those payments had been made, then one could say that the Plan's treatment of Class 11 claims had been substantially consummated. But that is not what happened. The Plan calls for reductions in monthly pension payments over the lifetimes of Class 11 members and their beneficiaries. Thus, the treatment of Class 11 pension claims has not been substantially consummated but will continue to be consummated gradually for several decades to come.

It is true that portions of the Grand Bargain relevant to pensions had been substantially consummated before the District Court dismissed my appeal. Specifically, the State of Michigan had paid the State Contribution and the DIA Funding Parties' had made the initial $23 million payment on their "irrevocable commitments" to the Grand Bargain. Exhibit A to City Corrected Motion to Dismiss at p, 3, ¶ 4, RE 36, PAGE ID # 53156; Plan, ¶ IV.E.1 at p. 57, RE 48-3, PAGE ID # 55796. But neither of those acts would be undone if one of more of the claims of error in the appeal were determined to have merit. The State had certified that the conditions precedent to its payment of the State Contribution had been "satisfied or otherwise addressed."

Exhibit A to Quinn Corrected Response to Corrected Motion to Dismiss, RE 42-2, PAGE ID # 53479. Nothing in that certification suggests that any subsequent event, including any action the District Court might take on appeal, might result in a withdrawal or nullification of the certification or require return of the State Contribution. Similarly, nothing in the record suggests that the Plan's characterization of the DIA Funding Parties' commitments as "irrevocable" would be negated by any relief the District Court might grant on appeal.

D. It is possible to grant relief without adversely affecting rights of parties not before the district court or the success of the Plan.

"The ultimate question to be decided [in an equitable mootness inquiry] is whether the Court can grant relief without undermining the plan and, thereby, affecting third parties." *In re Bodenheimer, Jones, Szwak, & Winchell L.L.P.*, 592 F.3d 664, 669 (5th Cir.2009) (Internal quotes and citations omitted.) "The last, and most important factor, is whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *American HomePatient*, 420 F.3d at 564 (No stay, substantial confirmation, but appellants make "plausible argument," *Id.* at 565, they can have relief on appeal without impairing plan or reorganization, so motion to dismiss denied.) Thus, for example, in *In re Ormet Corp.*, 355 B.R. 37 (S.D. Ohio 2006), the appellant had not sought a stay and the plan had been substantially consummated, but equitable mootness was no bar to the exercise of appellate

jurisdiction because relief could be granted without unraveling the plan of reorganization.

1. The District Court failed to consider whether any relief, including alternative relief, would be available if review on the merits had led to the conclusion that one or more of my claims of error were meritorious.

When applying the third *Manges* factor the reviewing court must consider not only the relief specified by the appellant but also any possible alternative relief. "[A]ppellate review need not be declined when, because a plan has been substantially consummated, a creditor could not obtain full relief. If the appeal succeeds, the courts say, they may fashion whatever relief is practicable. After all, appellants would readily accept some fractional recovery that does not impair feasibility or affect parties not before this Court, rather than suffer the mootness of [their] appeal as a whole." *Pacific Lumber*, 584 F.3d at 241. See also *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); *In re Chateaugay Corp.*, 10 F.3d 944, 954 (2d Cir.1993); *In re Superior Offshore International, Inc.*, 591 F.3d 350, 354 (5th Cir. 2009) ("Remedies can be crafted for [deficiencies in the plan noted by appellant] without completely undoing the Plan. Under these circumstances, equitable mootness does not apply.") (Footnote omitted.); *In re Thorpe Insulation Co.*, 677 F. 3d 869, 883 (9th Cir. 2012) (Appeal not equitably moot because circuit court lists four possible remedies

that would not destroy plan and suggests bankruptcy court might find more on remand.); *UNARCO Bloomington Factory Workers v. UNR Industries, Inc.*, 124 B.R. 268, 280-282 (N.D. Ill. 1990) (Some but not all relief sought by appellant has become impossible. Dismissal granted only as to the relief that has become impossible.).

Nor is it necessary that a reviewing court faced with a motion to dismiss on the ground of equitable mootness identify the appropriate remedy itself:

> [M]ost importantly, we look to whether the bankruptcy court on remand may be able to devise an equitable remedy. Because traditional equitable remedies are extremely broad and vest great discretion in a court devising a remedy, we expect that if there is violation of Appellants' legal rights from the plan, the bankruptcy court should be able to find a remedy that is appropriate. The plan has thus far proceeded to a point where it may not be viable totally to upset the plan . . . Yet, that does not mean that there could not be plan modifications adequate to give remedy for any prior wrong. Where equitable relief, though incomplete, is available, the appeal is not moot.

Paulman v. Gateway Venture Partners III, L.P. (In Re Filtercorp, Inc.), 163 F. 3d 570, 578 (9th Cir.1998).

Not only did the District Court fail to consider alternative or partial relief; it considered only the most drastic relief possible: requiring the City to file an entirely new amended plan of adjustment,[9] thus "sending the City back to square one."

[9] The District Court says this is a description of the relief I sought, referencing "Appellant's Br. at 20-21; Appellant's Resp. at 7." Opinion and Order Dismissing Appeal, RE 52, # 56533. Although these references are not entirely clear, nothing they could reasonably refer to suggests the relief described by the District Court. Quinn Merits Brief, RE 21, PAGE ID # 52487-52488, 52497-52498; Quinn Reply Brief, RE

Opinion and Order Dismissing Appeal, RE 52, PAGE ID # 56533. I was quite clear about the relief I sought: "All I am asking the Court to do is to 'say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and send the case back to the bankruptcy court for application of that law to the extent possible in the current circumstances of the case." Quinn Response to Corrected Motion to Dismiss, RE 42, PAGE ID # 53476.

I also discussed in some detail relief that would be practical with reference to the § 1123(a)(4) claim. Quinn Merits Brief, RE 21, PAGE ID # 52521-52522. The District Court ignored this suggestion. Instead it stuck to its all-or-nothing approach to the availability of relief, thus making it impossible to avoid equitable mootness.

2. The exercise of the District Court's jurisdiction to hear the merits of my appeal would have no adverse effect on the interests of any party not before that court.

GRS is before the District Court in my appeal and has been heard on the merits. GRS Merits Brief, RE 50, PAGE ID # 56413-56431. The same is true of the State of Michigan, State Merits Brief, RE 44, PAGE ID # 53562-53596, and the Detroit Retired City Employees Association, DRCEA Concurrence in State Merits Brief, RE 49. PAGE ID # 56410-53412. The question whether any of them (or any party they represent) would be affected by addressing the merits of my appeal

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51, PAGE ID # 56438, 56443; Quinn Corrected Response to Corrected Motion to Dismiss, RE 42, PAGE ID # 53456, 53462.

therefore is not part of equitable-mootness analysis. Since the Appellee's ability to pay the claims of other creditors would be unaffected by granting me relief on this appeal, See Part III.E.3., below, it is difficult to see how the interests of those creditors could be affected by granting me relief. In any event, the relief I seek is a remand, so all parties to the proceedings in the bankruptcy court can assert in that court any interests they might have relevant to the issues I raise on appeal.

3. It is possible to grant me relief without adversely affecting the success of the Plan as a whole.

It is important to note what the relief I seek in the District Court would not do:

1. It would not affect the amount the City must pay to GRS to fund pensions. Any increased payments to retirees would come from funds already held by GRS, funds it is to receive pursuant to the Plan and investment earnings on those funds.

2. It therefore would not reduce the funds available to the City to satisfy the claims of other creditors, to provide services to its residents and to carry out revitalization projects.

3. It would not affect the City's liability for pension payments. The relief I seek would affect only GRS's liability for those pensions. If it were determined that GRS has no such liability, then I would lose on the merits as to the § 941 issue.

4. It would not undo the Grand Bargain. In the District Court the City asserted in that "the reinstatement of the City's prepetition pension . . . obligations or the loss

of the revenue to be received as a result of ASF Recoupment will . . . eliminate the obligation of the State and the DIA Funding Parties to provide their respective portions of the Outside Funding and to support the Plan because the confirmation of the Plan as presented is a condition of such obligations." Appellee's Brief at 41. In support of this assertion the City cited §§ IV.D.3 and IV.E.3. of the Plan and concluded that "even an attempt to partially reverse the Confirmation Order . . . would destroy the Plan . . ." *Id.*

This reasoning works only if the relief I seek would restore the **City's** pre-petition pension obligations and only if the **City** were to suffer a loss of the revenue expected from ASF Recoupment. As noted above, the relief I seek would have no effect on the City's pension obligations, only on those of GRS, which the parties agree is distinct from the City. Quinn Merits Brief, RE 21, PAGE ID # 52510; City Merits Brief, RE 47, PAGE ID # 53654; GRS Merits Brief, RE 50, PAGE ID # 56418, 56420, 56423. And all the revenue from ASF Recoupment go to GRS, not the City. Plan at pp. 40-41, RE 48-3, PAGE ID # 55994-55995. Even GRS need not forego the revenue from ASF Recoupment if the relief I seek is granted. I have not disputed GRS's claim on the funds to be recovered via ASF Recoupment; rather, I maintain that the method prescribed in the Plan to collect those funds from retirees violates 11 U.S.C. § 1123(a)(4). Quinn Merits Brief, RE 21, PAGE ID # 52497-52508. And I have suggested a method for collection of those funds that would not violate § 1123(a)(4).

Id. PAGE ID # 52521-52525.

Even when there is no stay and a plan has been substantially consummated, all it takes to avoid equitable mootness is "a plausible argument" that it is possible to grant some relief on appeal without destroying the plan. *American HomePatient*, 420 F.3d at 565. Both in the District Court and here I have shown much more than the mere plausibility of appellate relief that need not undo the Plan. The appeal is not equitably moot.

CONCLUSION

The Court should:

1. Reverse the District Court's dismissal of my appeal, RE 52, PAGE ID # 56518-56536; and
2. Remand the matter to the District Court for consideration of the merits of my appeal.

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,982 words, excluding the parts of the brief exempted by Fed. R. Civ. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

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ADDENDUM
DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS
[6 Cir. R 28(b)(1)(A)(i)]

Record Entry No.	Description	PAGE ID #
21	Quinn Merits Brief	52468-52549
32	City Motion to Dismiss	52801-53091
34	State Concurrence in Motion to Dismiss	56094
36	City Corrected Motion to Dismiss	53099 53114 53145
36	Exhibit A to City Corrected Motion to Dismiss at	53156
42	Quinn Corrected Response to Corrected Motion to Dismiss	53450-53477
42-2	Notice Regarding Conditions Precedent to State Contribution, Exhibit A to Quinn Corrected Response to Corrected Motion to Dismiss	53479-53480
44	State Merits Brief	53562-53596
46	City Reply Brief on Motion to Dismiss	53598-53605
47	City Merits Brief	53606-53660
48-1	Opinion Regarding Eligibility, in Appendix to City Merits Brief	53675-53824
48-1	Fourth Amended Disclosure Statement, in Appendix to City Merits Brief	54413-54619
48-3	Eighth Amended Plan, in Appendix to City Merits Brief	55733-55814
48-3	Confirmation Order, in Appendix to City Merits Brief	55815-55946

Record Entry No.	Description	PAGE ID #
48-3	Supplemental Confirmation Opinion, in Appendix to City Merits Brief	56054-56272
48-3	Notice of Appeal to District Court, in Appendix to City Merits Brief	56040-56041
49	DRCEA Concurrence in State Merits Brief	56410-53412
50	GRS Merits Brief	56413-56431
51	Quinn Merits Reply Brief	56432-56453
51-5	Oral Opinion on the Record, Exhibit A to Quinn Merits Reply Brief	56455-56504
52	Opinion and Order Granting Motion to Dismiss	56518-56536
53	Notice of Appeal to Court of Appeals	56537-56538
55	Statement of Issues and Designation of Record	56540-56545

APPENDIX
RELEVANT STATUTES
[Fed. R. App. P. 28(f)]

11 U.S.C.] Sec. 103(f) and (g)

(f) Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.

(g) Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter.

11 U.S.C. § 363(m)

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 364(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. § 901(a)

(a) Sections 301, 333, 344, 347(b), 349, 350(b) 351„[1] 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(2), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 555, 556, 557, 559, 560, 561, 562, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1123(d), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, and 1145 of this title apply in a case under this chapter.

11 U.S.C. § 904

Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—

(1) any of the political or governmental powers of the debtor;

(2) any of the property or revenues of the debtor; or

(3) the debtor's use or enjoyment of any income-producing property.

11 U.S.C. § 941

The debtor shall file a plan for the adjustment of the debtor's debts. If such a plan is not filed with the petition, the debtor shall file such a plan at such later time as the court fixes.

11 U.S.C. § 942

The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of this chapter. After the debtor files a modification, the plan as modified becomes the plan.

11 U.S.C. Sec. 1101(2)

In this chapter—
...
(2) "substantial consummation" means—
(A) transfer of all or substantially all of the property proposed by the plan to be transferred;
(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
(C) commencement of distribution under the plan.
...

11 U.S.C. § 1112

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—

(1) the debtor is not a debtor in possession;

(2) the case originally was commenced as an involuntary case under this chapter; or

(3) the case was converted to a case under this chapter other than on the debtor's request.

(b) (1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term "cause" includes—

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28;

(L) revocation of an order of confirmation under section 1144;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan;

(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

(P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—

(1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

(e) Except as provided in subsections (c) and (f), the court, on request of the United

States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521(a), including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 U.S.C. § 1123(a)(4)

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
...
(4) 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;
...

11 U.S.C. § 1127(b)

The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

11 U.S.C. § 1127(e)

If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided

for by the plan;

(2) extend or reduce the time period for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.

28 U.S.C. § 157(b)(1)

Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 158(a)(1)

The district courts of the United States shall have jurisdiction to hear appeals
(1) from final judgments, orders, and decrees;
...

28 U..S.C. § 158(d)(1)

The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

CERTIFICATE OF SERVICE

On December 29, 2015, I am filing electronically the preceding Brief, Addendum and Appendix with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Counsel for all parties in the case are registered CM/ECF users. Service is being accomplished by the CM/ECF system.

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Dated: December 29, 2015