

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

ROBBIE FLOWERS, MICHAEL WELLS
and JANET WHITSON,

Plaintiffs,

vs.

Case No. CZ
Hon.

RICK SNYDER, as the Governor of the State
of Michigan; ANDY DILLON, as the Treasurer of
the State of Michigan; and the STATE OF MICHIGAN,

Defendants.

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**PLAINTIFFS' BRIEF IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION**

FACTS

The operative facts are a matter of public record and not in dispute.

Plaintiffs are two City of Detroit retirees currently receiving pension benefits and
a City of Detroit employee with vested pension benefits who allege that their rights under

Article 9, Section 24 of the Michigan Constitution are being violated in the emergency financial management proceedings that the State has implemented in response to Detroit's fiscal crisis and whose rights under Article 9, Section 24 will be threatened with abrogation if Governor Snyder authorizes the Detroit Emergency Manager to proceed under Chapter 9 in bankruptcy.

The *Local Financial Stability and Choice Act*, Public Act 436 of 2012, MCL 141.1541, *et seq.* (Public Act 436) permits Governor Snyder to authorize a Chapter 9 bankruptcy. MCL 141.1558. The Detroit Emergency Manager has, as part of his restructuring planning, publicly announced that he intends to significantly cut vested pension amounts of the city's retirees and employees in violation of Article 9, Section 24 and threatened to seek to extinguish their Article 9, Section 24 rights in bankruptcy if they fail to agree which they have not.

On 14 June 2013 the Detroit Emergency Manager issued an "Executive Summary" of a "Proposal for Creditors," which stated under "Claims for Unfunded Pension Liabilities": "Because the amounts realized on the underfunding claims will be substantially less than the underfunding amount, there must be **significant** cuts, in accrued, vested pension amounts for **both active and currently retired persons.**" (Emphasis in original.) The same day the Detroit Emergency Manager spoke to the Detroit Free Press Editorial Board. The relevant questions and answers read as follows:

- Q. You said in this report that you don't believe there is an obligation under our state constitution to pay pensions if the city can't afford it?
- A. The reason we said it that way is to quantify the bankruptcy question. We think federal supremacy trumps state law.
- Q. Which the Ninth Circuit agrees for now.
- A. It is what it is – so we said that in a soft way of saying, "Don't make us go into bankruptcy." **If you think your state-vested**

pension rights, either as an employee or a retiree – that’s not going to protect you. If we don’t reach an agreement one way or the other, we feel fairly confident that the state federal law will trump state law or negotiate. The irony of the situation is we might reach a deal with creditors quicker because employees and retirees think there is some benefit and that might force our hand. That might force a bankruptcy. (Emphasis added.)

Plaintiffs seek an order precluding Governor Snyder or the State Treasurer from authorizing Detroit’s Emergency Manager to proceed under Chapter 9 of the federal Bankruptcy Code because to do so would threaten to abrogate their rights under Article 9, Section 24 of the Michigan Constitution.

LAW

Article 9, Section 24 of the 1963 Michigan Constitution provides: “The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation whereof which shall not be diminished or impaired thereby.” The words could hardly be any clearer.

And Michigan courts have repeatedly held that Article 9, Section 24 means what it says -- the pension benefits of state and municipal retirees are accrued financial benefits that may not be impaired. *AFT Michigan v. State of Michigan*, 297 Mich App 597, 610; 825 NW2d 595 (2012); *Mt. Clemens Firefighters Union, Local 838, IAFF v. City of Mt. Clemens*, 58 Mich App 635, 644; 228 NW2d 500 (1975).

And it is clear that Governor Snyder cannot by his actions serve to diminish or impair pension benefits. The address to the people accompanying the 1963 Constitution so states:

This is a new section [Article 9, Section 24] that requires that accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions be a contractual obligation which **cannot be**

diminished or impaired by the action of its officials or governing body.

2 Official Record, Constitutional Convention 1961, p. 3402 (emphasis added).

The debates concerning what is now Article 9, Section 24 also make clear that municipal retirees are entitled to have the entire assets of their employer at their disposal in order to realize these vested benefits. “MR. VAN DUSEN: An employee who continued in the service of the public employer in reliance upon the benefits which the plan says he would receive would have the contractual right to receive those benefits, and **would have the entire assets of the employer at his disposal from which to realize those benefits.**” 1 Official Record, Constitutional Convention 1961, p. 774 (emphasis added).

It is just as clear based on the words of the Detroit Emergency Manager quoted above that unless plaintiffs and other City of Detroit retirees and employees with vested pension benefits accede to his threats he will recommend to the Governor and the State Treasurer that the City of Detroit be authorized to proceed under Chapter 9 per MCL 141.1558. And if Governor Snyder authorizes a Chapter 9 filing the Detroit Emergency Manager based on his own words will not uphold but rather seek to abrogate the rights of plaintiffs and others to their accrued pension benefits in violation of Article 9, Section 24 of the Michigan Constitution.¹

¹ Arguably, in bankruptcy federal bankruptcy law would trump state law, even constitutional provisions such as Article 9, Section 24. See *In re City of Stockton, California*, 478 BR 8 (Bankr ED Cal 2012); *In re City of Vallejo*, 403 BR 72 (Bankr ED Cal 2009). The Emergency Manager will rely on such authority should Governor Snyder authorize him to file a chapter 9 bankruptcy proceeding. He has stated as much. Plaintiffs, of course, reserve the right to contest this authority.

A common law four-part test is used in deciding whether or not to issue a preliminary injunction. A court must evaluate:

Whether (1) the moving party made [a] required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is not issued.

Detroit Firefighters Association, IAFF Local 344 v. City of Detroit, 482 Mich 18, 34; 753 NW2d 579 (2008). See also, *Michigan Coalition of State Employee Unions v Michigan Civil Service Commission*, 465 Mich 212; 634 NW2d 692 (2001). Here each of these parts is met.

First, plaintiffs will be irreparably harmed if their pensions are reduced or eliminated as their Article 9, Section 24 rights will have been abrogated. And the Detroit Emergency Manager will seek to abrogate those rights if Governor Snyder authorizes a Chapter 9 filing. This is not a case in which money damages after the fact will suffice. See for example, *Pontiac Fire Fighters Local 376 v City of Pontiac*, 482 Mich 1, 10; 753 NW2d 595 (2008). For if the plaintiffs' constitutionally mandated benefits are diminished or impaired in a bankruptcy that option may be foreclosed. Second, the Governor will not be harmed if he is enjoined from authorizing the Detroit Emergency Manager to file a Chapter 9 bankruptcy proceeding that would violate the rights of thousands of citizens of this state. Third, plaintiffs are likely to succeed on the merits. Article 9, Section 24 means what it says. Fourth, the public interest will be served if the vested pension rights of plaintiffs and the other City of Detroit retirees and employees are protected from an unconstitutional reduction or elimination.

CONCLUSION

Plaintiffs respectfully request that this Court grant it preliminary injunctive relief. There is good reason for this Court to act -- this Court's action is the only thing that will prevent plaintiffs and others from having their constitutional rights violated. And there is no good reason for this Court not to act.

Respectfully submitted,

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Dated: 3 July 2013