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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DETROIT, MICHIGAN

Chapter 9 Case no.: 13-53846
Hon. Steven W. Rhodes

Debtor,

Dist Ct. Appeal Case. No. 14-cv-14920
Hon. Bernard A. Friedman
Magistrate Judge R. Steven Whalen

/

WILLIAM M. DAVIS and DETROIT ACTIVE and RETIRED EMPLOYEE ASSOCIATION as listed,

Appellants,

v

CITY OF DETROIT, MICHIGAN

Appellee.

/

-OPENING BRIEF-

-REQUEST FOR ORAL ARGUMENT-

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STATEMENT OF JURISDICTION

This is an appeal of a final order in the City of Detroit chapter 9 bankruptcy case, Case No. 13-53846. The Court's order confirming the 8th Amended Plan for the Adjustment of Debts of the City of Detroit was entered on November 12, 2014. [Docket 8272] The Notice of Appeal was timely filed on November 26, 2014. [Docket 8473]. This appeal is authorized pursuant to 28 USC 158(a).

STATEMENT OF ISSUES PRESENTED

1. Did the lower court err by holding that the Michigan Pensions Clause prohibiting the diminishing or impairment of accrued pension benefits did not impose a constraint on the bankruptcy process?

2. Did the Michigan statute authorizing this Chapter 9 bankruptcy filing incorporate the Michigan Pensions Clause prohibiting diminishment or impairment of pensions as a contingency of the filing?

3. Did the Michigan rules of strict statutory construction mandate that the constitutional ban on impairing ban on impairing or diminishing pensions be incorporated into the plan of adjustment in the present case?

4. Did the lower court err in holding that because Article IX Section 24 refers to pensions as contractual benefits they were subject to reduction in bankruptcy?

5. Does the Michigan Pensions Clause extend greater protection to pensions than the contract clause bar on impairing the obligation of contract?

5. Did the lower court err in holding that the Michigan Pensions Clause was preempted by federal law in the instant case?

6. Does the doctrine of equitable mootness bar Appellants' relief in the present case?

STATEMENT OF THE CASE

This is an appeal of the confirmation of the City of Detroit Plan of Adjustment in the Chapter 9 Bankruptcy case, 13-53846. Docket 8272.

Appellant William M. Davis, in his individual capacity and as representative of the Detroit Active and Retired Employee Association (DAREA), filed his Statement of Issues of Appeal on December 10, 2014. [Docket 8693]. Mr. Davis listed ten issues which are summarized as follows: (1) The confirmation of the plan of adjustment included a diminishment and impairment of pension benefits in violation of the Michigan constitution, Article IX, Section 24; (2) The plan of adjustment disproportionately discriminates against African Americans, in that the claw back annuity recoupment period, 2004-2013, encompasses a period when 70% of retirees were African American; (3) The plan of adjustment erred by confirming the annuity claw back recoupment for a host of reasons, including unequal treatment of members within the class, the fact the annuities were agreed to individually by retirees by contributing their own funds and these retirees should not be held responsible for any potential wrongdoing by the General Retirement

Service (GRS) in connection with annuities; and that the plan of adjustment drastically reduced and eliminated health benefits that were contractually agreed upon.

For purposes of this appeal brief, Mr. Davis is focusing primarily on the first issue, that Judge Rhodes erred in ruling that the retiree pension benefits were subject to being impaired or diminished in the Chapter 9 bankruptcy, despite the Michigan constitutional ban on doing so encompassed in Article IX Section 24 of the Michigan constitution, and despite the fact this constitutional ban on diminishing and/or impairing pensions is explicitly incorporated into MCL 141.1541 et. seq., the Michigan Local Financial Stability and Choice Act of 2012, the statute the Emergency Financial Manager relied on for the specific authority to file for bankruptcy pursuant to 11 USCS 109(2) and 11 USCS 901.

This erroneous ruling was made as a matter of law by Judge Rhodes on December 5, 2013, in the context of the opinion he issued affirming the City of Detroit's eligibility to file the Chapter 9 bankruptcy. [Docket 1945]

In the interest of judicial economy, Mr. Davis relies and incorporates the arguments of fellow appellants in opposition to the annuity claw-back recoupment, and reserves further argument on that issue and the equal protection issue for my reply brief.

STATEMENT OF FACTS

City of Detroit retirees suffered the brunt of the cutbacks and debt reduction in the Detroit bankruptcy. A reading of the Plan of Adjustment reflects that of $7.1 billion in debt reduction accomplished through the bankruptcy, $3.85 billion was accomplished by the virtual gutting of retiree health benefits, with expenditures reduced from $4.3 billion to $450 million. An additional $1.7 billion in debt relief came through cuts in pension payments, with the city not even contributing directly to the pension fund for the next 10 years. Thus, a total of $5.5 billion, or 78% of the total bankruptcy relief, comes off the backs of the city's retirees.

Aside from the gutting of their health benefits, General city retirees get a 4.5% cut in base benefits and 15.5% additional pension reduction if they are subject to the annuity recoupment. In addition, cost of living annual increases are eliminated, adding another approximately 18% to the real reduction in pension payments.

But numbers don't tell the real story. It is reflected in the genuine suffering and despair experienced by Detroit retirees who gave their lives to serving the city of Detroit, in contrast to the Jones Day lawyers and their consultants who pocketed $170 million in fees and then left town and returned to their palatial estates.

The stories are too numerous to recount, though many are reflected in the 600 objections that were filed to the plan of adjustment. For example, Octavius Sapp described how he now the cost of the 12 medications he needs to treat his end stage renal disease how gone up for $10 to $20 per medication, to $160 to $200. The cuts are a matter of life or death. [Docket 2882]

Jesse Florence described how after driving a bus for 36 years, the health care costs for his wife, Belinda Florence Meyers, also a city retiree and himself, have risen from $152 per month to $1062 per month with a $3000 yearly deductible and higher co-pays. They worked all their lives to help put their children through school, but now can barely pay the bills and even face potential relocation from their home. [Docket 3706]

Mr. Davis is asking this honorable court to grant this appeal, end the annuity recoupment, and restore the illegal pension benefits that were allowed by Judge Rhodes in violation of the Michigan constitutional ban in impairment or diminishment of pensions, which was specifically incorporated into MCL 141-1541, the statute that granted the authority for the chapter 9 filing.

SUMMARY OF ARGUMENT

In confirming the City of Detroit's Plan of Adjustment, the Bankruptcy Court made several substantial legal errors justifying relief on appeal. First, the

Bankruptcy Court erred when it authorized the City of Detroit to file a Plan of Adjustment treating pension rights secured by the State of Michigan's constitutional Pensions Clause as unsecured debt subject to impairment, diminution and discharge. In so doing, the lower court ignored the plain language of the statute authorizing the Chapter 9 filing, which incorporates the restrictions of the Pensions Clause.

Second, the lower court erred when it rendered the protections of the Pensions Clause superfluous by treating it as a reiteration of the state and federal Contracts Clause. By ignoring the paramount law of the State of Michigan, the lower court sidestepped the Michigan constitution and disrupted the delicate balance of state and federal interests of Chapter 9.

Third, the lower court erred by ruling that federal law precluded any state imposed limitations on the power of discharge once a City was authorized to file for bankruptcy under Chapter 9 and deemed eligible.

ARGUMENT

I. THE MICHIGAN STATUTE AUTHORIZING THIS CHAPTER 9 BANKRUPTCY FILING INCORPORATES THE MICHIGAN CONSTITUTIONAL PROHIBITION AGAINST DIMINISHING OR IMPAIRING PENSIONS AS A CONTINGENCY ON THE FILING.

Trial Judge Rhodes committed error when he held that the Michigan

constitutional provision prohibiting the diminishing or impairment of accrued pension benefits did not impose a constraint on the bankruptcy process. Opinion on Eligibility dated December 5, 2013, [Docket 1945, p 81]

A. STATE LAW DETERMINES WHETHER A MUNICIPALITY CAN FILE A CHAPTER 9 BANKRUPTCY AND WHAT CONDITIONS CAN BE PLACED ON THE FILING

11 USCS 109(2) states that a local municipality must be specifically authorized by state law to file a Chapter 9 bankruptcy. It states:

> (c) An entity may be a debtor under chapter 9 of this title [11 USCS §§ 901 et seq.] if and only if such entity--
> (1) is a municipality;
> (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter [11 USCS §§ 901 et seq.] by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter [11 USCS §§ 901 et seq.].

In *United States v Bekins*, 304 U.S. 27, 49 (1938), the United States Supreme Court held that the phrase "authorized by law" with regard to a municipal bankruptcy "manifestly refers to the law of the state."

In *In RE: City of Harrisburg, PA*, 465 B.R. 744, 754 (Middle Dist of PA 2011), the court noted that pursuant to the most recent Chapter 9 enactments, "states act gatekeepers to their municipalities access to relief under the Bankruptcy Code. Therefore, when the authority to file under state law is questioned, bankruptcy courts

exercise jurisdiction carefully in light of the interplay between Congress' bankruptcy power and the limitations on federal power under the Tenth Amendment." (internal citations omitted).

B. THE MICHIGAN STATUTE AUTHORIZING THE BANKRUPTCY FILING SPECIFICALLY INCORPORATES MICHIGAN'S CONSTITUTIONAL BAR TO IMPAIRING OR DIMINISHING ACCRUED PENSIONS

The cited authority for the Emergency Manager to file this Chapter 9 bankruptcy on "behalf" of the City of Detroit derives from MCL 141.1541 et. seq, the Michigan Local Financial Stability and Choice Act of 2012 ("PA 436"). This Act outlaws specifies powers delegated to the Emergency Manager by Michigan State law.

Several sections of the statute provide the Emergency manager with the authority to modify or reject contracts, despite the United States and Michigan constitutional 10th amendment prohibitions on the passage of laws impairing the obligation of contract.

For example, MCLS § 141.1551 provides the Emergency Manager with the following powers:

> (c) The modification, rejection, termination, and renegotiation of contracts pursuant to section 12;
>
> (d)The timely deposit of required payments to the pension fund for the local government or in which the local government participates; . .

(f) Any other actions considered necessary by the emergency manager in the emergency manager's discretion to achieve the objectives of the financial and operating plan, alleviate the financial emergency, and remove the local government from receivership.

MCL 141.1552 provides for other statutory powers handed to an Emergency Manager. It states:

Sec. 12. **(1)** An emergency manager may take 1 or more of the following additional actions with respect to a local government that is in receivership, notwithstanding any charter provision to the contrary:

(j) Reject, modify, or terminate 1 or more terms and conditions of an existing contract.

(k) Subject to section 19, after meeting and conferring with the appropriate bargaining representative and, if in the emergency manager's sole discretion and judgment, a prompt and satisfactory resolution is unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement. The rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a legitimate exercise of the state's sovereign powers if the emergency manager and state treasurer determine that all of the following conditions are satisfied.

MCL 141.1552(m) also outlines the powers and limitations of an Emergency Manager relative to municipal pension funds. Significantly, Section 141.1552(m)(ii) specifically incorporating the Michigan constitutional limitation on impairing or diminishing accrued pensions.

It states:

> **(ii) The emergency manager shall fully comply with the public employee retirement system investment act, 1965 PA 314, MCL 38.1132 to 38.1140m, and section 24 of article IX of the state constitution of 1963**, and any actions taken shall be consistent with the pension fund's qualified plan status under the federal internal revenue code. (emphasis added).

In addition, MCL 141.1553 states:

> Sec. 13. Upon appointment of an emergency manager and during the pendency of the receivership, the salary, wages or other compensation, including the accrual of postemployment benefits, and other benefits of the chief administrative officer and members of the governing body of the local government shall be eliminated. **This section does not authorize the impairment of vested pension benefits.**

Thus two sections of PA 436, the statute that the Emergency Manager utilized for the specific authorization to file the Chapter 9 bankruptcy, reference and incorporate Article IX Section 24 of the Michigan Constitution (hereinafter "Pensions Clause") which guarantees the payment of accrued pension benefits. Article IX Section 24 states:

> **§ 24. Public pension plans and retirement systems, obligation.**
> Sec. 24. The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.

While MCL 141.1551 (b) also mandates payment of debt service requirements, MCL 141.1552(w) gives the Emergency Manager authority to renegotiate, restructure and settle the creditor claims.

MCL 141.1558 is the section of the Local Financial Stability and Choice Act of 2012 that provides the authority for the Emergency Manager and the Governor to file a Chapter 9 Bankruptcy. It states:

> Sec. 18. **(1)** If, in the judgment of the emergency manager, no reasonable alternative to rectifying the financial emergency of the local government which is in receivership exists, then the emergency manager may recommend to the governor and the state treasurer that the local government be authorized to proceed under chapter 9. If the governor approves of the recommendation, the governor shall inform the state treasurer and the emergency manager in writing of the decision, with a copy to the superintendent of public instruction if the local government is a school district. The governor may place contingencies on a local government in order to proceed under chapter 9. Upon receipt of the written approval, the emergency manager is authorized to proceed under chapter 9. This section empowers the local government for which an emergency manager has been appointed to become a debtor under title 11 of the United States Code, 11 USC 101 to 1532, as required by section 109 of title 11 of the United States Code, 11 USC 109, and empowers the emergency manager to act exclusively on the local government's behalf in any such case under chapter 9.

Thus, a clear reading of the Local Financial Stability and Choice Act of 2012 that provides the authority for the Emergency Manager and the Governor to file a Chapter 9 Bankruptcy, demonstrates that the one item not subject to diminishment, impairment, or even renegotiation under the act are the accrued pension benefits of

municipal retirees.

II. MICHIGAN RULES OF STRICT STATUTORY CONSTRUCTION MANDATE THAT THE CONSTITUTIONAL BAN ON IMPAIRING OR DIMINISHING PENSIONS BE INCORPORATED INTO THE PLAN OF ADJUSTMENT IN THE PRESENT CASE

Under Chapter 9 of the Bankruptcy code and cases interpreting Chapter 9, state law is determinative on how the state authorizing statute for this Chapter 9 bankruptcy is to be interpreted.

Michigan law applies the principles of strict statutory construction to interpreting the law. For example, in *Pohutski v City of Allen Park*, 465 Mich 675, 683-684 (2002), the Michigan Supreme Court held:

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. *DiBenedetto v West Shore Hosp*, 461 Mich. 394, 402; 605 N.W.2d 300 (2000); *Massey v Mandell*, 462 Mich. 375, 379-380; 614 N.W.2d 70 (2000). We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. *Turner v Auto Club Ins Ass'n*, 448 Mich. 22, 27, 528 N.W.2d 681 (1995). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed---no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto*, 461 Mich. at 402. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. See *Lansing v Lansing Twp*, 356 Mich. 641, 649-650; 97 N.W.2d 804 (1959).
>
> **When parsing a statute, we presume every word is used for a**

> **purpose. As far as possible, we give effect to every clause and sentence. "The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v Detroit*, 462 Mich. 439, 459; 613 N.W.2d 307 (2000). Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory**. In re MCI, 460 Mich. at 414. (emphasis added)

In *Smitter v. Thornapple Twp.*, 494 Mich. 121 (Mich. 2013), the Michigan Supreme Court restated the application of the doctrine of expressio unius est exclusio alterius (the expression of one thing is the exclusion of another) to Michigan law on statutory construction.

In *General Motors Acceptance Corporation v Citizens Commercial & Savings Bank*, 2001 Mich App LEXIS 295, the Michigan Court of Appeals noted that the *Pohutski* interpretation on statutory construction even extends to separate statutes that relate to the same subject matter. The Court held:

> Generally, statutes that 'relate to the same subject or share a common purpose are in pari materia and must be read together as one law. Reviewing courts should also avoid any statutory construction that would render a statute, or merely part of it, surplusage or nugatory. [internal citations omitted]

In this case, the court interpreted the two statutes in a manner consistent with both in rendering its decision.

Exhibit 1, attached.

In the present case, the fact that PA 436. incorporates the Michigan constitutional non-impairment of pensions bar into two sections of the statute, including the section that specifically delineates the powers of the emergency manager relative to pension funds, demonstrates the legislative intent to insure that this constitutional protection of pensions is to be respected and upheld, even in the context of a Chapter 9 bankruptcy filing.

In construing the sections of the Local Financial Stability and Choice Act as a whole, and so as not to render any part of the statute surplussage or nugatory, the statute should have been construed in the following manner: "The Emergency Manager is authorized to proceed under Chapter 9 subject to the following contingency – The Chapter 9 bankruptcy shall not in any way undertake to diminish or impair the payment of accrued pension benefits."

III. JUDGE RHODES ERRED IN HOLDING THAT BECAUSE ARTICLE IX SECTION 24 REFERS TO PENSIONS AS CONTRACTUAL BENEFITS THEY WERE SUBJECT TO REDUCTION IN BANKRUPTCY

The basis Judge Rhodes articulated in his opinion that Detroit's bankruptcy filing was not subject to Michigan's constitutional ban on impairing or diminishing pensions, was that because the Michigan constitution refers to pension benefits as contractual obligation which shall not be diminished or impaired, and "impairing

contacts is what the bankruptcy process does," the pensions were subject to being reduced through the bankruptcy process. [Docket 1945, p 74]

However, as noted above, this holding ignores the fact that while the authorizing statute in this case specifically provided for modifying or canceling contracts, and was justified in doing so because the constitutional bar on impairing contract obligations is subject to limitation during period of emergency, the statute specifically excluded pensions from such diminishment by specifically incorporating Michigan's prohibition on impairing or diminishing accrued pensions into the statute.

A. THE MICHIGAN PENSIONS CLAUSE EXTENDS GREATER PROTECTIONS TO PUBLIC PENSIONS THAN OTHER CONTRACTS SUBJECT TO THE STATE AND FEDERAL CONTRACTS CLAUSE

Although the Pension Clause unambiguously renders public pensions a solemn contractual obligation protected by the paramount law of the State of Michigan, the lower court determined that the diminishment and impairment prohibitions were identical to the impairment provisions of the state and federal Contracts Clause, and did not extend any greater protection to pension benefits than any other contractual obligation. In effect, the lower court found that the use of the disjunctive "diminished or impaired" language was superfluous because all diminishments were impairments and all impairments were diminishments, and because Michigan courts referred to pensions as a "contractual obligation," the impairment of which was remedied by an action for breach of contract.

The Pensions Clause must be harmonized with the state constitutional protections, mirroring the language of the Contracts Clause, which extends to all contractual obligations. *See* Mich. Const. 1963, Art. 1, Sec. 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.")(emphasis added)(hereinafter "Contracts Clause"). Notably, the language of the Contracts Clause does not prohibit diminishment, only impairment. Although the language appears to be absolute, both the Michigan and federal versions of the Contracts Clause follow the same analytical approach to alleged Contracts Clause violations, which allows a "substantial impairment" of vested contractual rights if the impairment is reasonable and necessary to remedy a broad social or economic problem. *See Blue Cross Blue Shield of Mich. v. Milliken*, 367 N.W.2d 1, 22-23 (Mich. 1985). Neither version of the Contracts Clause expressly references the diminishment of contractual obligations.

The Pensions Clause use of "diminished" was rendered superfluous by the lower court's opinion on eligibility. Notwithstanding the lower court's strained construction of the Michigan Pensions Clause, the use of the disjunctive language "diminished or impaired" is significant. As Michigan courts have long recognized, the use of disjunctive prohibitions encompasses distinct conduct. *See, i.e., Spectrum Health Hosps. v. Farm Bureau Mut. Ins. Co.*, 492 Mich. 503, 517 n. 24; 821 N.W.2d

117 (2012). *See also Nat'l Pride at Work, Inc. v. Governor of Mich.*, 481 Mich. 56, 748 N.W.2d 524 (2008)(use of disjunctive language prohibited recognition of domestic partnerships as marriage or as unions similar to marriage). In order to understand the relevance of this language, however, it is necessary to revisit the common law doctrine the lower court claimed was being displaced by the adoption of the pension provision.

B. THE PENSIONS CLAUSE UNAMBIGUOUSLY CREATES A SOLEMN OBLIGATION THAT PROHIBITS ANY FUTURE DIMINUTION OF VESTED PENSION RIGHTS

As the Michigan Supreme Court explained in the case of *Kosa v. State Treasurer*, 408 Mich. 356; 292 N.W.2d 452 (1980), "the constitutional provision adopted by the people of [Michigan] is indeed a solemn contractual obligation between public employees and the Legislature guaranteeing that pension benefit payments cannot be constitutionally impaired." *Id* at 382 (emphasis added). Reflecting on the drafting and debate history of the Pensions Clause, the court noted that the legislature clearly intended to create a contractual right to receive pension payments for every member of a public retirement system, a point that is not disputed on appeal. However, the lower court's interpretation not only renders the disjunctive language superfluous, it also ignores the limitations imposed by the Michigan courts that have interpreted the Pensions Clause.

While the lower court characterized the provision as altering a common law

doctrine that rendered pensions gratuities, it did not explore the cited cases with any depth. In each case, the pensioners had relied upon a statute or ordinance that did little more than create an expectancy that was not supported by contract. For example, the Michigan Supreme Court simply found that municipal retirees simply did not have a contractual right to pensions when the City of Highland Park adopted a charter amendment that reduced pension payments to retirees. *See Brown v. Highland Park*, 320 Mich. 108, 114; 30 N.W.2d 798 (1948) ("We are convinced that the majority of cases in other jurisdictions establishes the rule that a pension granted by public authorities is not a contractual obligation, that the pensioner has no vested right, and that a pension is terminable at the will of a municipality, at least while acting within reasonable limits."). The lower court erred by treating this decision as an inflexible common law rule that was supplanted by the adoption of the Pensions Clause. In fact, Michigan courts examined the existence of a contractual pension right on a case-by-case basis, and some public employees did have vested contractual rights to receive pension payments before the adoption of the 1963 constitutional provision. *See Campbell v. Michigan Judges Retirement Board*, 378 Mich. 169; 143 N.W.2d 755 (1966). Distinguishing the cases relied upon by the lower court in these proceedings, the Michigan Supreme Court explained that "a contract for retirement benefits had not been made or consummated between the public employing unit of government and the employees" in the earlier cases, "and so, no question of impairment of contracts could

be deemed to be presented by a diminishing of benefits under the pension plan." Id at 179. The *Campbell* court found that the retired employees had a contractual right to their pension benefits, and analyzed the alleged impairment of this obligation under the general prohibition found in the Contracts Clause.

In light of *Campbell*, it is clear that the adoption of the constitutional provision did not simply modify a common law rule that rendered all pension benefits gratuitous. Instead, the constitutional provision rendered all pension benefits a contractual obligation subject to both the impairment limitations of the Contracts Clause as well as the impairment or diminishment provisions of the Pensions Clause.

This elevated, constitutional status for public pensions was described as a "paramount law of the state" by the Michigan Supreme Court in the case of *Detroit Police Officers Asso. v. Detroit*, 391 Mich. 44; 214 N.W.2d 803 (1974). While the court agreed that the City of Detroit had an obligation to bargain over prospective changes to retirement benefits that were part of a collective bargaining agreement, the Court emphasized that the constitutional provision assured "those already covered by a pension plan...that their benefits will not be diminished by future collective bargaining agreements." *Id* at 69. Read in light of *Campbell* and the text of the constitutional provision, the Michigan Supreme Court's decision leaves no room for the lower court's analysis, as there would be no impediment to the modification of pension rights secured by a collective bargaining agreement if the Pensions Clause did

nothing more than create a simple contractual obligation.

C. THE EXCEPTIONS TO THE CONTRACTS CLAUSE HAVE NEVER BEEN APPLIED TO THE ABSOLUTE GUARANTEE OF THE PENSIONS CLAUSE

Moreover, Michigan courts have never applied Contracts Clause exceptions to the Pensions Clause. In the case of *Ass'n of Prof'l & Technical Emps. v. City of Detroit*, 398 N.W.2d 436 (Mich. Ct. App. 1986), the Michigan Court of Appeals held that a "direct diminution and impairment of plaintiffs' vested pension benefits related to work already performed" entitled the plaintiff retiree to judgment as a matter of law. Similarly, the Michigan Court of Appeals did not apply the Contracts Clause analysis to a law of general application that was cited in support of reducing pension payments in the case of *Murphy v. Wayne Cnty. Emps. Ret. Bd. of Trustees*, 192 N.W.2d 568, 571-72 (Mich. Ct. App. 1971). In both cases, the Michigan courts refused to consider whether or not the impairment was substantial or reasonable and necessary to remedy a broader socioeconomic problem, because the prohibition on diminishment of pension benefits is absolute, unambiguous and unqualified. Similarly, Michigan courts have distinguished the Contracts Clause analysis from the Pensions Clause analysis by applying the latter as a residual protection in the event the Pensions Clause is not implicated. *See Studier v. Mich. Pub. Sch. Emples. Ret. Bd.*, 260 Mich. App. 460, 679 N.W.2d 88 (Mich. Ct. App. 2004), *aff'd in part and rev'd in part*, 472 Mich. 642, 698 N.W.2d 350 (Mich. 2005).

Those decisions are binding here. *See Meridian Mut. Ins. Co. v Kellman*, 197 F.3d 1178, 1181 (6th Cir. 1999) (this Court "must apply state law in accordance with the controlling decisions of the highest court of the state"); *Ruth v. Bituminous Cas. Corp.*, 427 F.2d 290, 292 (6th Cir. 1970) (same for intermediate state appellate decisions unless this Court is "convinced" that the state high court would disagree). In addition, there are persuasive opinions in jurisdictions with analogous constitutional protections for public pensioners that provide persuasive authority that the benefits must be treated differently.

D. OTHER STATES HAVE ADOPTED SIMILAR PROVISIONS THAT ARE NOT SUBJECT TO DIMINUTION

For example, the State of Illinois adopted a pension provision which states that "[m]embership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Illinois Const., Art. XIII, § 5. While the plain language of this provision is not limited to accrued financial benefits, it does contains the disjunctive language prohibiting diminishment or impairment of any benefit provided by a pension or retirement system. Indeed, the Illinois courts have rejected claims that the legislature reserved the power to make reasonable modifications of the benefits protected by this provision. *See Kraus v. Board of Trustees*, 72 Ill. App. 3d 833, 851; 390 N.E.2d 1281 (Ill. App. Ct. 1979)("The Board and amici curiae nevertheless assert that the

legislature should retain a reasonable power of modification, even to diminish the benefits to be received by prior members of the pension system...While it might have been wise to provide for such a power...there is no suggestion in the wording of the provision or in the debates to support the existence of one.").

The constitution of the State of Alaska similarly states that the accrued benefits of a retirement system "shall not be diminished or impaired." Alaska Const. art. XII, § 7. When analyzing modifications to retirement systems, the Supreme Court of Alaska does not employ a traditional Contracts Clause analysis. Instead, Alaskan courts examine modifications to a retirement system on a case-by-case basis, and will uphold changes that disadvantage vested rights only if the disadvantage to a particular employee is offset by comparable new advantages to that employee. *See Hammond v. Hoffbeck*, 627 P.2d 1052 (Alaska 1981).

Even the threat of bankruptcy does not trigger a Contracts Clause analysis for states with pension clauses, as the New York Court of Appeals explained in the case of *Birnbaum v. New York State Teachers Retirement System*, 5 N.Y.2d 1; 152 N.E.2d 241 (1958). "If bankruptcy now threatens to overtake the Teachers Retirement System, the system must turn to the Legislature for financial assistance." The system was not in a position to ask the New York Court of Appeals "to ignore the will of the people as expressed in their Constitution." *Id* at 12.

E. JURISDICTIONS WITHOUT A UNIQUE PENSIONS CLAUSE APPLY THE CONTRACTS CLAUSE TO LEGISLATIVE IMPAIRMENT OF VESTED PENSION RIGHTS

By contrast, federal courts have applied the Contracts Clause analysis to state legislation that impairs pension rights in jurisdictions that do not have the constitutional protections of Michigan's Pensions Clause. *See Mascio v. Public Emples. Retirement Sys.*, 160 F.3d 310 (6th Cir. 1998)(Contracts Clause applied to prevent substantial impairment of vested pension rights secured by statute creating contractual rights); *Andrews v. Anne Arundel County*, 931 F. Supp. 1255 (D. Md. 1996)(applying Contracts Clause analysis to retroactive reduction of vested pension rights). Similarly, the states that have applied the traditional Contracts Clause analysis to modification of pension benefits lack the state constitutional guarantee found in Michigan's Pensions Clause. *See Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (N.C. 1998); *Oregon State Police Officers' Ass'n v. State*, 323 Ore. 356, 918 P.2d 765 (Ore. 1996); *Booth v. Sims*, 193 W. Va. 323, 456 S.E.2d 167 (W. Va. 1994); *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (Neb. 1982). As these cases demonstrate, the inclusion of the Pensions Clause in the Michigan constitution is significant: The contractual right to a pension could have been just as easily established by statute, and in the absence of the Pensions Clause the residual, more limited protections of the federal and state Contracts Clause would have protected any vested rights that were altered or repealed by subsequent legislation. If the use of the disjunctive diminishment and impairment language found

in the Pensions Clause is no different from the language found in the Contracts Clause, the failure to apply the Contracts Clause analysis to Pensions Clause claims in Michigan courts is also inexplicable.

There is little doubt that the paramount law of the State of Michigan unambiguously prohibits the City of Detroit from diminishing or impairing pension payments without running afoul of the Pension Clause. Because the paramount law of the State of Michigan prohibits the impairment or diminishment of pensions, the debtor City of Detroit cannot circumvent this limitation by judicial fiat under Chapter 9, and the lower court was obligated to respect the state's control over its municipalities in the confirmation process as well as in the administration of the chapter 9 case.

IV. UNDER SIXTH CIRCUIT PRECEDENT, EXCLUDING PENSION BENEFITS FROM THE CHAPTER 9 BANKRUPTCY IS NOT PREEMPTED BY FEDERAL LAW

Judge Rhodes further held that once the Chapter 9 filing is authorized, any state limitations on the scope of the relief available by the filing are preempted by federal law. That seems to be basis for the holding in *In re City of Vallejo*, 403 BR 72 (2009).

However, Appellants contend that pursuant to the 2012 Sixth Circuit decision in *Richardson v Schafer*, 689 F3d 601 (2012), a narrow state limitation on the scope

of the relief available in a Chapter 9 bankruptcy is not preempted by federal law.

Schafer, supra, dealt with the legitimacy of a homestead exemption the debtor asserted pursuant to MCL 600.5451, which was broader than the exemption allowed under 11 USC 522(b) or Michigan's general homestead exemption. The Court noted that the interpretation to the phrase "uniform laws" by both the Supreme Court and this Court permits states to act in the arena of bankruptcy exemptions even if they do so by making certain exemptions available only to debtors in bankruptcy, and that such exemptions schemes are not invalidated by the Supremacy clause." *Id.* at 603.

The Sixth Circuit cited to its own holding in *Rhodes v Stewart*, 705 F2d 159 (6th Cir 1983) for the proposition that states have concurrent authority to promulgate laws governing exemptions applicable in bankruptcy cases. The Court further noted that "this understanding that the federal power was exclusive eventually gave way to an acceptance that states could, in the absence of federal legislation, pass laws on bankruptcy." *Id.* at 606. The Court stated: "Congress does not exceed its constitutional powers in enacting a bankruptcy law that permits variations based on state law or to solve geographically isolated problems." *Id.* at 611.

The Sixth Circuit held the proper determination of whether a state law conflicted with federal law in the bankruptcy exemption context was conflict preemption, whether "the laws in question conflict such that it is impossible for a party to comply with both laws simultaneously, or where the enforcement of the state

law would hinder or frustrate the full purposes and objectives of the federal law."

The principle of concurrent state and federal authority to determine bankruptcy exemptions is especially apt in the Chapter 9 setting, where Congress has delegated to individual states the specific power as to whether or not to even authorize a Chapter 9 filing, and approximately half of the states have chosen to not do so. A contingency attached to the City of Detroit bankruptcy would not fundamentally conflict with the bankruptcy scheme under Chapter 9. It allows ample room for adjustment of debt, even debt associated with retiree benefits where unaccrued pension benefits are not afforded the constitutional protection and it is questionable whether health benefits for retirees are covered as well.

It should be noted that the legislative purpose behind the Local Financial Stability and Choice Act of 2012 is in part to provide necessary services essential to the public, health, safety and welfare. Certainly, the protection of what amount to pretty meager pension benefits is consistent with that public purpose, where retirees are a significant portion of the population in the City of Detroit.

V. CHAPTER 9 BANKRUPTCY IS SUBJECT TO STATE LIMITATIONS

The Primer on Municipal Debt Adjustment published by Chapman and Cutler LLP in 2012, studied state laws across the U.S. with regard to authorization of chapter 9 bankruptcy filings. It noted that twelve states provide blanket authorization for

municipalities to file chapter 9 bankruptcies, sixteen states place conditions on chapter 9 filings, and 22 states do not allow access to Chapter 9 bankruptcy. (**Exhibit 2, attached**) Significantly, the Iowa statute, Iowa Code Section 76.16A, excludes a valid binding collective bargaining agreement from being subject to the chapter 9 bankruptcy filing.

In *In re City of Vallejo, CA,* 432 BR 262, 270 (2010)(US Dist Ct., Eastern District CA), while the Court held on appeal that the California statute authorizing a Chapter 9 filing did not preclude the modification of labor contracts, the Court's explanation is relevant to the facts of this fact. The Court noted:

> State labor law is not explicitly identified in California Government Code Section 53760 as an exception to the general grant of authority for municipalities to pursue Chapter 9 bankruptcy. **If California had desired to restrict the ability of its municipalities to reject public employee contracts in light of state labor law, it could have done so as a pre-condition to seeking relief under Chapter 9.** (emphasis added)

In the present case, the Chapter 9 authorizing statute, the Local Financial Stability and Choice Act of 2012, specifically incorporates the Michigan constitutional protection of pensions into the law. Because the legislature evidenced its intent to maintain the constitutional protections of public pensions, any Michigan Chapter 9 filing pursuant to the Local Financial Stability and Choice Act of 2012 must

incorporate the non-impairment of pensions as a contingency attached to Chapter 9 filing.

VI. THE BANKRUPTCY CODE INCORPORATES LIMITATIONS ON THE COURT'S POWERS IN CHAPTER 9 FILINGS

11 USC 904 provides limitations on the jurisdiction and powers of the court during Chapter 9 bankruptcy. The court may not 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.

In *In re Addison Community Hospital Authority, 175 B.R. 646 (Bankr. E.D. Mich. 1994)*, the court held:

> The foundation of § 904 is the doctrine that neither Congress nor the courts can change the existing system of government in this country. The powers of the federal government are limited by the Constitution. The powers that are not given to the federal government are reserved to the states. One of the powers reserved to the states is the power to create and govern municipalities. 121 Cong. Rec. H39413-14 (statement of Rep. Badillo). Therefore, chapter 9 was created to give courts only enough jurisdiction to provide meaningful assistance to municipalities that require it, not to address the policy matters that such municipalities control.

The Local Financial Stability and Choice Act of 2012 must be construed so as to incorporate the Michigan constitutional guarantee against diminishing or impairing pensions. The section of the law authorizing the Chapter 9 bankruptcy filing

implicitly incorporates this clause in that it provides that the governor could place contingencies on a local government that chooses to file for Chapter 9. The ban on impairing pensions would by necessity be one of those contingencies.

VII. MICHIGAN STATE LAW DECISIONS HAVE UPHELD THE APPLICABILITY OF ARTICLE IX SECTION 24 TO CHAPTER 9 FILINGS

The only State Court to be heard on this issue, the Circuit Court for the County of Ingham, specifically held that "PA 436 (the public act reference for MCL 141.1541) is unconstitutional and in violation of Article IX Section 24 of the Michigan Constitution to the extent that it permits the Governor to authorize an emergency manager to proceed under Chapter 9 in any manner which threatens to diminish or impair accrued pension benefits." **Exhibit 4, attached.**

In addition, Michigan Attorney General Bill Schuette submitted a brief to the bankruptcy court in which he specifically opined that the Michigan constitutional bar on diminishing or impairing accrued pensions is applicable in a Chapter 9 filing. Docket 481. In *Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen., 142 Mich. App. 294, 300 (1985)*, the court held:

> The Attorney General has the duty under MCL 14.32; MSA 3.185, "to give his opinion upon all questions of law submitted to him by the legislature, or by either branch thereof, or by the governor, or any other state officer". While such opinions do not have the force of law, and are therefore not binding on courts, they have been held to be binding on state agencies and officers.

VIII. THE DOCTRINE OF EQUITABLE MOOTNESS IS NOT A BARRIER TO RELIEF UNDER THE CIRCUMSTANCES OF THIS CASE

The equitable mootness doctrine is applied in appeals from bankruptcy confirmations in order to protect parties relying upon the successful confirmation of a bankruptcy plan from a drastic change after appeal. Under Chapter 11, A plan of reorganization, once implemented, should be disturbed only for compelling reasons. *See Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942 (6th Cir. 2008). The doctrine of equitable mootness is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable.

Unlike mootness in the constitutional sense, equitable mootness does not follow from Article III standing principles but is an equitable doctrine applied to protect parties' settled expectations and the ability of a debtor to emerge from bankruptcy. *See Curreys of Neb., Inc.*, *supra* at 847. The Sixth Circuit has largely adopted the Fifth Circuit's test for determining when the doctrine should be applied. Id at 947-48. However, the only court in the Fifth Circuit to address the issue found that equitable mootness was not applicable in the Chapter 9 context. *See Bennett v. Jefferson County*, 518 B.R. 613 (N.D. Ala. 2014). Given the delicate federal and state balance that must be maintained in the Chapter 9 context, the

court found that finality and reliance interests must yield to legitimate constitutional concerns and matters of public interest. *Id* at 636.

Even if equitable mootness was applicable, however, this Court can also craft relief that does not disturb any reasonable interests in finality and reliance that were secured by the Confirmation Order. For example, the court can "strike any allegedly unconstitutional terms in the Confirmation Order" regarding treatment of pensions. *Bennett v. Jefferson County*, *supra* at 639, or at least prevent the lower court from enforcing those provisions with respect to the objecting pensioners who have prosecuted this appeal.

CONCLUSION

The lower court erred by accepting and confirming a Plan of Adjustment that diminished and impaired the pension rights of retirees. This Court should **REVERSE** the Confirmation of the Plan of Adjustment insofar as it violates Chapter 9 and the Michigan constitution, and fashion appropriate relief.

Respectfully submitted,

Date: 1/27/15 William M. Davis

William M. Davis, individually and on behalf of the DETROIT ACTIVE AND RETIRED EMPLOYEE ASSOCIATION (DAREA) and the Attached Membership

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DETROIT, MICHIGAN
Chapter 9 Case no.: 13-53846
Hon. Steven W. Rhodes

Debtor,Dist Ct. Appeal Case. No. 14-cv-14920
Hon. Bernard A. Friedman
Magistrate Judge R. Steven Whalen

_____/

WILLIAM M. DAVIS and DETROIT ACTIVE and RETIRED EMPLOYEE ASSOCIATION as listed,

Appellants,

v

CITY OF DETROIT, MICHIGAN

Appellee.

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DETROIT ACTIVE AND RETIRED EMPLOYEE ASSOCIATION MEMBERSHIP

We, as undersigned members of the Detroit Active and Retired Employee Association, do hereby sign on to the Opening Brief filed in this matter.

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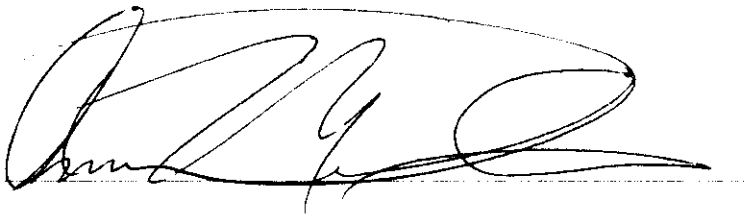
SINGATURE: 

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