**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

In re

CITY OF DETROIT, MICHIGAN,

Debtor.
_____/

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

Dennis Taubitz, Irma Industrious,

Appellants,
v.
City of Detroit, Michigan

Appellee.
_____/

Dist. Ct. Case No.
2:14-CV-14917-BAF-RSW

District Judge:
Hon. Bernard A. Friedman

Magistrate Judge:
Hon. R. Steven Whalen

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**APPEAL FROM THE UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF MICHIGAN**
**Case No. 13-53846**

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# JOINT BRIEF OF APPELLANTS DENNIS TAUBITZ AND IRMA INDUSTRIOUS

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Respectfully Submitted,

Dennis Taubitz
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In Pro Per
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## STATEMENT OF JURISDICTION

The United States District Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. §158. The United States Bankruptcy Court exercised jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334.

## STATEMENT OF THE ISSUES

I. Did the Bankruptcy Court err as a matter of law by deeming the Debtor eligible for Chapter 9 Bankruptcy?

II. Did the Bankruptcy Court err as matter of law by confirming the Eight Amended Plan for the Adjustment of Debts of the City of Detroit (Plan) even though by attempting to impose the Annuity Savings Fund (ASF) Recoupment on claims whose retiree holders have not individually agreed to its application to their claims, the plan imposes non-consensual less favorable treatment on these claims in Class 11, in violation of 11 U.S.C. § 1123(a)(4)?

III. Did the Bankruptcy Court err as a matter of law by confirming the Plan even though it purports to adjust not only the Debtor's liability if any on the claims included in Class 11 but also the liability of the General Retirement System (GRS) which is not a debtor in this case on these claims, in violation of 11 U.S.C. § 941?

IV. Did the Bankruptcy Court err as a matter of law by directing GRS to act as an agent of the City in deducting the Annuity Savings Fund Excess Amount from the Annuity Savings Fund account of each ASF current participant?

V. Did the Bankruptcy Court err as a matter of law by relieving GRS, which is not a debtor in this case, from liability for deducting the Annuity Savings Fund Excess Amount from the Annuity Savings Fund Account of each ASF Current Participant?

VI. Did the Bankruptcy Court err as a matter of law by relieving GRS, which is not a debtor in this case , from liability for deducting monthly annuity amounts from certain ASF Distribution Recipients' monthly pension checks?

VII. Did the Bankruptcy Court err as a matter of law by enjoining all individuals affected by the ASF recoupment from commencing any proceedings against the GRS and its trustees, officers, employees or professionals, none of whom are debtors in this case, arising from GRS's compliance with the Plan or Order Confirming Eight Amended Plan for the Adjustment of Debts of the City of Detroit?

VIII. Did the Bankruptcy Court err as a matter of law by allowing Class II to be composed of parties with separate and different competitive interests?

IX. Did the Bankruptcy Court err as a matter of law by confirming the 8th Amended Plan of Adjustment of the Debts of the City of Detroit, in violation of the Michigan Constitution, 11 U.S.C. § 943(4) and 11 U.S.C § 943 (b)(3).

X. Did the Bankruptcy Court err as a matter of law by allowing Debtor to present to Creditors a Plan that failed to disclose that Debtor sought to impose an arbitrary 6 .75% interest on the monthly ASF Recoupment that Debtor sought?

XI. Did the Bankruptcy Court err as a matter of law by refusing pro se creditors the ability to participate in the eligibility trial, settlements, negotiations and the Confirmation Hearing?

XII. Does each of the aforementioned errors one through 11 committed by the Bankruptcy Court constitute reversible error?

## STATEMENT OF THE FACTS

Appellee filed an action in the United States Bankruptcy Court for the Eastern District of Michigan Southern Division in case number 13-53846 in July of 2013. From the beginning of the proceedings, the Bankruptcy Court denied the constitutional due process rights of the Appellants by refusing to allow them to participate of participate in a meaningful way. The Bankruptcy Court also in error allowed creditors to vote on the Fourth Amended Plan of Adjustment of the Debts of the City of Detroit. This occurred despite the fact that material facts were concealed from the creditors, and that the creditors with differing and competing interests were improperly placed in Class 11.

Based on the consent of creditors, the bankruptcy Court has approved Appellee's Eight Amended Plan of Adjustment of the Debts of the City of Detroit. Appellants have therefore appealed to this Honorable Court.

## STANDARD OF REVIEW

The standard of review involved in this Court's interpretation of statutes is plenary. *United States v. Pelullo, 964 F. 2d 193, 1999 (3rd Cir., 1992)*. This Court must also determine de novo if the United States Bankruptcy Court erred in confirming the Eight Amended Plan of Adjustment of the Debts of the City of Detroit.

## STATEMENT OF RELARTED CASES AND PROCEEDINGS

This case has not been before this Court previously. The Appellants, however, are aware that there may be other cases or proceedings presently pending before the Court or about to be presented in the near future which may be related to this appeal.

## ARGUMENT

### I. THE UNITED STATES BANKRUPTCY COURT ERRED AS A MATTER OF LAW BY REFUSING APPELLANTS DENNIS TAUBITZ AND IRMA INDUSTRIOUS THE ABILITY TO TRULY PARTICIPATE IN THE ELIGIBILITY TRIAL, SETTLEMENT NEGOTIATIONS AND CONFIRMATION HEARING

Appellants Dennis Taubitz and Irma Industrious submit that the Bankruptcy Court erred as a matter of law when it refused to allow Appellants to truly participate in the eligibility trial, and confirmation hearing. Appellant Dennis Taubitz filed a Motion to Participate in the eligibility trial, and the Bankruptcy Court summarily denied the Motion, without even granting Appellant Dennis Taubitz a hearing on the Motion. Appellant Dennis Taubitz filed a Motion to Participate in the settlement negotiations, and the Bankruptcy Court summarily denied that Motion without granting Dennis Taubitz a hearing on the Motion. Appellants Dennis Taubitz and Irma Industrious filed similar motions to participate in the Confirmation Hearing. Appellant Dennis Taubitz's Motion again was summarily denied by the Bankruptcy Court without granting a hearing on the Motion. Appellant Dennis Taubitz filed a Motion for Reconsideration, and again the Bankruptcy Court summarily and in error denied the Motion for Reconsideration. Appellant Irma Industrious requested to participate in the Confirmation Hearing, and for all practical purposes, was denied by the Bankruptcy Court. Appellant Industrious was granted twenty (20) minutes to participate and one (1) witness from Industrious' list of numerous witnesses. Appellants submit that Industrious was indeed denied any meaningful participation in the Confirmation Hearing. Appellee, however, was allowed weeks and an unlimited number of witnesses by the Bankruptcy Court to present its case.

Indeed, Appellants submit that the Bankruptcy Court's denial of meaningful participation in the bankruptcy process was a denial of due process. Due process constitutes fair notice, and a fair hearing before a competent tribunal. In the case at bar, the Appellants were not afforded due process. Appellants submit that the Bankruptcy Court's denial of participation or denial of meaningful participation violated the Appellant's constitutional rights.

In Helminsky v. Ayerst Laboratories, 766 F 2d. 208(6th Cir. 1985), the Court of Appeals opined:

> The fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such trial except deliberation of the jury. Such right is basic to due process of law. *Id* at 216

In the case at bar, Appellants who were listed as creditors were litigants in the Bankruptcy case. The Bankruptcy Court's denial of the Appellants' constitutional right to participate or to participate in a meaningful way was a denial of due process. The Sixth Circuit Court of Appeals reiterated this concept in *Preferred Props. V. Indian River Estates, 276 F. 3rd 790 (6th Cir. 2002).* Moreover, in *Fillippon v. Albion Vein State Co., 250 U.S. 76 (1919),* the Supreme Court recognized the right of civil litigants to be present and participate during all phases of the trial of their case. Under *Helminski* and *Fillippon,* there is no doubt that civil litigants such as the Appellants in the case at bar had a constitutional right to be present and participate during all of the bankruptcy proceedings. The Appellants requested to be present. However, the Bankruptcy Court denied the Appellants their constitutional due process rights.

## II. THE BANKRUPTCY COURT ERRED AS A MATTER OF LAW BY ALLOWING THE APPELLEE TO PRESENT TO ITS CRDITORS A FOURTH AMENDED PLAN OF ADJUSTMENT THAT FAILED TO DISCLOSE THAT APPELLEE SOUGHT TO IMPOSE AN ARBITRAY 6.75% INTEREST CHARGE ON THE MONTHLY ANNUITY SAVINGS FUND RECOUPMENT (CLAWBACK) THAT APPELLE SOUGHT

Employees of the Appellee could voluntarily contribute either 3%, 5% or 7% of their wages to the General Employees Retirement Fund (GRS). The voluntary contributions were granted by the General Employees Retirement Fund, not the Appellee, to earn a minimum of 7.9 % interest.

The Appellee claims that the payment by this third party, the General Employees Retirement Fund, constituted excess interest and Appellee sought to recoup or clawback what Appellee claimed was excess interest for ten (10) years from 2003 to 2013, despite the fact that the General Employees Retirement Fund earned greater than 7.9% on its investments in some of those years. The voluntary contributions were also intermingled with the General Employee Retirement and invested with other funds.

The Appellee in its Fourth Amended Plan of Adjustment (the Plan that the creditors voted on) announced a clawback of these voluntary contributions and the interest that had been earned and credited to the accounts by the General Employees Retirement Fund.

The Fourth Amended Plan of Adjustment and the accompanying materials that were presented by the Appellee and Appellee's Counsel to the individuals entitled to vote in Class 11 provided for a specific dollar amount of the Annuity Savings Fund (ASF) clawback that the Appellee sought from each individual.

Appellee and Appellee's Counsel, however, fraudulently did not disclose to the individuals that in addition to the specific dollar amount disclosed in the voting materials, interest would also be imposed in the amount of 6.7%. This arbitrary interest rate was never

disclosed to the individuals entitled to vote, and was only disclosed by the Appellee after the Fourth Amended Plan of Adjustment was voted upon.

Appellant Dennis Taubitz's Motion to the United States Bankruptcy Court to require the Appellee to issue new ballots that disclosed the Appellee's intention to impose a 6.75% interest charge was denied by the Bankruptcy Court. The Court provided no rational basis for the denial of the Motion. The Bankruptcy Court, having denied the Motion, the creditors whose claim were listed Class 11 voted on the Fourth Amended Plan of Adjustment without ever realizing that the clawback provision required the payment of interest at a rate of 6.75% be imposed. Moreover, the imposition of this interest charge will certainly result in payments being made to the General Employees Retirement Fund, and not to the Appellee, of monies that would increase the amount paid by the creditors by 40% or 50%.

Appellants submit that the imposition of the 6.75% interest charge on the ASF clawback is a material fact that should have been disclosed by the Appellee to the individuals prior to voting on the Fourth Amended Plan of Adjustment. Appellants submit that Appellee's failure to disclose this material fact to the creditors prior to the voting ballots being issued constitute fraud, and this Court should not allow Appellee to prevail. The Bankruptcy Court's decision to allow Appellee to engage in this fraud constitutes reversible error in light of the fact that the Bankruptcy Court cited the consent of the creditors as the basis for its decision to confirm Appellee's Plan.

Appellee, as mentioned previously, has an ASF recoupment or clawback in the Plan of Adjustment that creditors voted on. Appellant submits that the ASF clawback is improper for several reasons.

Appellee claims that the General Employees Retirement System (GRS) trustees abused their discretion by awarding "excess interest" to ASF participants' accounts in certain years as the basis for requiring a clawback. Apparently, Appellee seeks to utilize the ordinance passed by the Detroit City Council that placed certain restrictions on the GRS trustees. This ordinance, however, did not become effective until November 29, 2011, and therefore cannot serve as the legal basis to clawback payments that were made prior to that date.

Moreover, Appellee failed to present evidence that the GRS trustees abused their discretion in awarding bonus interest on ASF accounts in high earning years or in awarding the 7.9% assumed actuarial rate of return in the years when the GRS funds earned less. Apparently, there was only one year out of ten where the 7.9% ASF interest rate plus an ASF interest bonus of 15.0857% actually exceeded the fiscal year market rate of return of 18.938%. Within the ten (10 year clawback period, there are years where the ASF interest rate , plus interest bonus, if any, were less than the market rate of return. Appellee's allegation of "excess interest" fails to give credit to the ASF payments subject to the clawback for those return years where ASF participants earned less that the market rate of return.

It must be remembered that the ASF was structured as an annuity account. Annuities frequently offer a guaranteed rate of return and an opportunity to earn bonus interest should investment return exceed targets. The ASF program in order to be competitive in the marketplace for the voluntary investment dollars of the employees offered a guaranteed rate of return. It was in the interest of the GRS to attract more funds for investment purposes. Offering a rate of return of 7.9% was not a breach of the trustees' duties as there was a benefit to the GRS.

Additionally, Appellee's clawback period of ten (10 years far exceeds the statute of limitation for such claim. Appellants submit that the appropriate statute of limitation would be

three (3) years for a claim of unjust enrichment. Even if the claim was based on contract, which it is not, the statute of limitation would be six (6) years, and not ten (10) years. *See Joint trial Brief of Creditors Dennis Taubitz and Irma Industrious, Docket Number 7222*.

## III. Debtor's Plan of Adjustment Is Not Confirmable As It Is Prohibited by Law

11 U.S.C. § 943 (b)(4) mandates that:

> The Court shall confirm the Plan …(4) the debtor is not prohibited by law from taking any action necessary to carry out the plan.

Clearly, Appellee's multiple Plans of Adjustment fail to meet this basic and simple requirement. Appellee's Eight Plan of Adjustment seeks to impair accrued financial benefits of the pension plan of the Appellee. The amount of impairment varies from each retiree or employee, but all suffer some degree of impairment under the Appellee's Plan. Appellee's Plan therefore violates Section 24 of the State of Michigan Constitution which states:

> 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.

Section 24 of the State of Michigan Constitution is clear and unambiguous. The accrued financial benefits of Appellee's pension plan cannot be impaired or diminished. Appellee seeks to do exactly that. Indeed, Appellee's Counsels clearly articulated their intent to impair and diminish pension payments through bankruptcy proceedings in their Law Review article published prior to the Appellee filing of this Bankruptcy action.

Moreover, Appellee without waiting for the confirmation of the Plan of Adjustment, eliminated medical benefits for retirees receiving a pension payment. The medical care benefits

were an accrued financial benefit. Appellants submit that the elimination of the medical benefits is an impairment prohibited by Section 24 of the State of Michigan Constitution.

Additionally, Appellee Plan of Adjustment seeks to impair the pension of its retirees and employees. Indeed, this impairment is a key part of Appellee Plan. Appellee's Plan clearly and unambiguously seeks to violate Section 24 of the State of Michigan Constitution. Therefore Appellee Plan is not confirmable due to Section 943(4) of the United States Bankruptcy Code.

Appellee's Plan of Adjustment also violated federal law. Specifically 11 U.S.C. 547(b)(4)(A) which states:

made on or within 90 days before the date of the filing of the petition.

Appellee in its Plan seeks to recoup from some creditors annuity savings account and seeks to go back ten (10) years. Appellants submits that a ten (10 year window violates 11 U.S.C. 547(b) (4)(A) which mandates a ninety (90) day period for a look back on a recoupment of monies paid.

In summary, Appellee's Plan of Adjustment seeks to impair the pension of creditors and seeks to clawback monies paid to some creditors. The impairment of the pension portion of the Plan of Adjustment is prohibited by State law, to wit, Section 24 of the State of Michigan Constitution. The clawback listed in Appellee's Plan of Adjustment also seeks to go back to monies paid in 2003 (a ten year period). This is prohibited by federal statute, that is, Section 11 U.S.C. 547(b)(4)(A) which mandates a ninety (90) day time limit for such recovery.

## IV. THE BANKRUPTCY COURT ERRED AS A MATTER OF LAW BY ALLOWING CLASS 11 TO BE COMPOSED OF CREDITORS WITH SEPARTE AND DIFFERENT COMPETING INTEREST IN VIOLATION OF 11 U.S.C. 1123(a)(4) and 11 U.S.C. § 1122

11 U.S.C. § 1123(a)(4) states:

> Notwithstanding any otherwise applicable bankruptcy law a plan shall… provide the same treatment for each claim or interest of a particular class unless the holder of particular claim or interest agrees to less favorable treatment of such particular claim or interest

Moreover, 11 U.S.C. § 1122 provides that a plan may not place dissimilar claims or interests in the same class. See *In re Dow Corning Corp., 244 B.R. 634 (Mich 1999); In re GAC Storage Lansing, LLC, 489 B.R. 747 (Ill. 2013); and In re Jersey City Medical Center, 817 F.2d 1055 (3rd Cir. 1987).*

Appellee constituted Class 11 as all creditors with a claim to the General Employees Retirement System pension. However, this category contained two (2) separate and distinct groups of participants with competing interests. Appellee did this deliberately, with the connivance of the Bankruptcy Court, in violation of 11 U.S.C. § 1123(a)(4) and 11 U.S.C. § 1122. Class 11 was clearly improperly constituted in a manner to ensure the voting and confirmation of the Bankruptcy Plan.

Appellee combined into Class 11 two (2) distinct retiree groups, those subjected to the ASF clawback and those not subject to it. The Appellee also arbitrarily chose a ten (10) year period to seek the clawback, beginning July 1, 2003 and ending June 30, 2013. Combining those two (2) groups who are treated significantly different to the detriment of one group and to the advantage of the other group in the same voting class is in violation of 11 U.S.C. § 1123 (a)(4) mandate that the Plan "provide the same treatment to each claim or interest of a particular class unless the holder of a particular claim or interest agrees to less favorable treatment." In the case

at bar, Appellants did not agree to the less favorable treatment which was imposed on them by the vote of the class which the Bankruptcy Court wrongfully condoned.

This approach by the Appellee improperly allowed certain participants in the Class 11, that is non-ASF clawback participants, to vote in favor of the Plan to the detriment of the subset of participants in Class 11 who are subject to the ASF clawback. Because of the improperly constituted Class 11, the ASF clawback impermissibly places the burden of repaying approximately $190 million of alleged "excess interest" on a small subset of Class 11 members by reducing their pensions by varying amounts.

Because Class 11 was comprised of two (2) competing interest groups, the participants subjected to the ASF clawback and the participants who were not, the class and the Plan are in violation of 11 U.S.C. § 1123 and 11 U.S.C. § 1122. The class members who were subject to the ASF clawback should have been allowed to vote in a separate class from Genereal Retirement System retirees who were not subject to the ASF clawback.

Moreover, Appellee also arbitrarily and capriciously chose not to recoup payments made in the form of a 13th check to certain participants in the class. This 13th check arose from the same basis as the alleged "excess interest". However, Appellee chose to treat these participants more favorably even though they are also grouped into the same Class 11.

This approach by the Appellee and condoned and allowed by the Bankruptcy Court allowed certain participants in Class 111 (non-ASF participants) to vote in favor of the Bankruptcy Plan as more of the pain of financing the Plan was carried by a subset that could easily be outvoted. Appellee established Class 11 in this manner to ensure the confirmation of the Bankruptcy Plan, in violation of 11 U.S.C. § 1123(a)(4) and 11 U.S.C. § 1122.

Because Class 11 was composed of two (2) competing interest groups, those subject to the arbitrary ASF clawback and those not; and because Appellants are subject to less favorable treatment than other members of the class which they did not agree to, the class and the plan are in violation of 11 U.S.C. § 1123(a)(4) and 11 U.S.C. § 1122. The class members who were subject to the ASF clawback should have been allowed to vote in a separate class from GRS retirees who are not subject to the ASF clawback. Because there was not a separate vote, the Bankruptcy Court committed reversible error.

## V. THE BANKRUPTCY COURT ERRED AS A MATTER OF LAW IN TREATING THE GENERAL EMPLOYYES RETIREMENT SYSTEM (GRS) AS A DEBTOR

Appellants submit that the Bankruptcy Court erred as a matter of law due to the fact that the entity that makes the pension payments is the General Employees Retirement System (GRS) and not the Appellee. Appellee is the only entity that that filed for bankruptcy. The GRS did not file for bankruptcy. Indeed, Appellee listed the GRS as a creditor in the bankruptcy. The Bankruptcy Court has treated GRS which is a creditor s though it is not. The Bankruptcy Court has therefore erred as a matter of law.

## VI. THE BANKRUPTCY COURT ERRED AS A MATTER OF LAW BY DEEMING THE APPELLEE ELIGIBLE FOR CHAPTER 9 BANKRUPTCY

Appellant submits that the Bankruptcy Court erred as a matter of law when it ruled that Appellee was eligible for Chapter 9 bankruptcy. The Bankruptcy Court misread Section 24 of the State of Michigan Constitution. The Pension Clause of the Constitution holds that the accrued financial benefits cannot be impaired or diminished. The Bankruptcy Court treated the Pension Clause as if it was the same as the Contract Clause in the State of Michigan Constitution.

Appellants submit that this is not the same because if they were the same, the authors of the Constitution would not have bothered to place a Pension Clause in the Constitution.

## VII. EACH OF THE AFOREMENTIONED ERRORS COMMITTED BY THE BANKRUPTCY COURT CONSITUTE REVERSIBLE ERROR

Appellants Dennis Taubitz and Irma Industrious note that they adopt the appellate briefs and arguments of other appellants who are also appealing Appellee's Bankruptcy Plan of Adjustment.

Appellants submit that the Bankruptcy Court errors of law were material and so substantial that they constitute reversible error. The Bankruptcy Court's flagrant disregard of Appellant's due process rights by deliberately and unjustifiably excluding Appellants from participating in the bankruptcy proceedings is sufficient to constitute reversible error.

The Bankruptcy Court also erred in allowing a class in the bankruptcy to be comprised of creditors with differing and competing interests to the severe detriment of one class in violation of 11 U.S.C. § 1122 and 11 U.S.C. §1123(a)(4). This improper action by the Bankruptcy Court also requires reversal.

Moreover, the Bankruptcy Court 's misreading and ignoring Section 24 of the State of Michigan Constitution known as the Pension Clause constitute reversible error.

The Bankruptcy Court also erred as a matter of law when it allowed the Appellee to fraudulently not disclose the material fact of the imposition of 6.75% interest rate on the ASF clawback as part of the Plan. Thus the Bankruptcy Court committed error as a matter of law and requires reversal.

Appellants further submit that looking at the totality of the Bankruptcy Court errors, as a matter of law, reversal is required.

## CONCLUSION/RELIEF REQUESTED

Appellants Dennis Taubitz and Irma Industrious submit that the Bankruptcy Court committed errors as a matter of law and request that this Honorable Court strike the Annuity Savings Fund (ASF) clawback also known as recoupment from the Appellee's Eight Amended Plan of Adjustment of the Debts of the City of Detroit

**CERTIFICATE OF SERVICE**

We certify that on January 27, 2015, we filed the aforementioned document with the Clerk of the Court pursuant to the Court Electronic Filing System (ECF). We understand that by utilizing ECF, service on all persons entitled to service in this action is affected.

/s/ Dennis Taubitz

/s/ Irma Industrious

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Dated: January 27, 2015