UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DETROIT, MICHIGAN

Debtor,

Chapter 9 Case no.: 13-53846
Hon. Steven W. Rhodes
Dist Ct. Appeal Case. No. 14-cv-14899
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.

_____/

APPELLANT'S RESPONSE AND BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL AS EQUITABLY AND CONSTITUTIONALLY MOOT

Appellants hereby submit this Response in Opposition to the City of Detroit's Motion to Dismiss on the basis of equitable and constitutional mootness.

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Controlling authorities

JURISDICTION AND VENUE

Plaintiffs agree that this Court has jurisdiction over this matter and that venue is proper.

BRIEF IN SUPPORT OF RESPONSE IN OPPOSITION

Appellants file this brief in support of their Response in Opposition to the City of Detroit's Motion to Dismiss this pending appeal on equitable and constitutional mootness grounds. In support of this motion, the Appellants incorporates the following arguments as well as the supporting exhibits.

STATEMENT OF ISSUES PRESENTED PURSUANT TO LR 7.1(d)(2)

1. Whether the equitable mootness doctrine is available for proceedings under Chapter 9 of the United States Bankruptcy Code where an appeal involves important constitutional questions as well as complex and novel questions of state law.

   Appellants answer: No.

2. Whether, if the doctrine of equitable mootness is available, the doctrine prevents this Court from hearing Appellants' arguments.

   Appellants answer: No.

3. Whether this appeal is constitutionally moot because there is no available remedy for Appellants even in the event this Court finds in favor of

Appellants on the underlying issues on appeal.

Appellants answer: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Bennett v. Jefferson Cnty. (In re Jefferson Cnty.), 518 B.R. 613 (N.D. Ala. 2014).

INTRODUCTION/BACKGROUND

In Defendant-Appellee's Motion, they state that the plan of adjustment reduced the City of Detroit's debt load by approximately $7 billion. While Appellee attempts to trivialize the impact on the city's retirees, in fact, it was the retirees who took the brunt of the reduction in the form of the virtual elimination of their health benefits, and significant reductions to their month benefit payments.

For example, the City of Detroit's contribution to retiree health costs was reduced by 90%, from $4.3 billion to $450 million. Pensioners, who retired on the promise of health benefits being provided for life, now find themselves having to dedicate a large percentage of their monthly incomes to procuring benefits on their own, changing their whole life situations. Of and in itself this is a dramatic cut in pension benefits, which Appellee, the Emergency Manager and his former law firm, all well-heeled and long gone from Detroit, do not even take cognizance of in their pleadings which insultingly depict retirees as greedily unwilling to accept "modest" cuts.

In fact, the immense cuts in health care, despite their horrifying character and impact, are not subject to challenge in this appeal, as the Michigan Supreme Court has held in prior precedent that they are not subject to Michigan's constitution bar on impairing accrued pensions.

The next largest reduction in City of Detroit debt is in the city's contribution to unfunded pensions, which was reduced from $3.1 billion to $1.4 billion. The City of Detroit is not scheduled to make any contributions to its pension funds through 2023, with funding coming through the "Grand Bargain" which will be discussed more fully below, as well as by contributions from the water department, from unlimited tax obligation bonds, and a couple of independently funded departments. The total contributions to the Police and Fire Retirement System and General Retirement System through 2023 add up to $979.3 million. **Exhibit 1, attached, Docket 8045-10**.

Retirees face up to a 20% reduction in monthly benefits, 4.5% for each general retirement system retiree with a potential 15.5% additional cut based on the annuity clawback. They also have their 2% yearly cost of living allowance eliminated.

While the retiree pensions have contributions to their pensions and benefits reduced by $5.55 billion, the cuts to other creditors total $1.83 billion. Thus 75%

of the total debt reduction in the City of Detroit bankruptcy was off the backs of the city's retirees. **Exhibit 2, chart**.

In addition, Defendant in its motion suggests that City of Detroit retirees voluntarily voted to waive their right to challenge the unconstitutional impairment of their pension benefits. But this assertion covers up the reality of the alternatives the retirees were presented.

General Retirement System Retirees were sent ballots that presented two alternatives. Under one alternative, they would receive a 4.5% reduction in their base pensions, be subject to annuity clawback, and having their yearly cost of living factor eliminated. Voting in favor of this proposal entailed waiving their right to challenge Judge Rhodes' unilateral declaration that Michigan's constitutional bar on impairing and diminishing pensions.

Voting No to this proposal, meant they were accepting the alternative as presented in the ballot: a 27% cut in the base pension benefits, the annuity clawback, and having their yearly cost of living eliminated. **Exhibit 3, attached, ballot.**

The retirees were between a rock and a hard place. They could vote for a 27% cut in benefits, with no waiver of legal right to challenge the pension impairment (but with their legal representatives making clear they were not going

to pursue this challenge). Or they could waive their legal right and receive a severe, but less draconian cut in benefits.

The pensioners were never given the right to simply vote, without the duress outlined above, on whether they wanted their representatives to fight to uphold their constitutional rights.

Despite the terms on this vote, it should be emphasized that less one-half of all retirees voted to accept the pension cuts.

ARGUMENT

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

Defendant is also in error when suggesting that a chapter 9 plan of adjustment cannot be modified *after* confirmation. Courts retain jurisdiction to implement the plan of adjustment, including the authority to correct mistakes. *See In re Wolf Creek Valley Metro. Dist. No. IV*, 138 B.R. 610, 619 (D. Colo. 1992). As the court explained in that case, confirmation is only the beginning:

> In a bankruptcy case . . . the confirming of a plan of reorganization is in some ways only the beginning of the case. The bankruptcy court generally retains broad jurisdiction over a case even after a plan has been confirmed . . . This jurisdiction is necessary to settle disputes concerning the administration of the plan as they arise, and to ensure that changes in the reorganized debtor's financial condition are handled equitably.

(*quoting Bill Roderick Distrib., Inc. v. A.J Mackay Co.(In re A.J. Mackay Co.)*, 50 Bankr. 756, 759 (D.Utah. 1985)).

The court held that after a plan is confirmed, there is a need for judicial review of potential mistakes, and that this equitable power is derived from Section 105(a) of the bankruptcy code which applies to Chapter 9 by virtue of Section 103(3). The court held:

> "There is practical utility in the application of a rule which permits the vacation or modification of bankruptcy orders where subsequent events presented during administration demonstrate the necessity therefor; and to do would not be inequitable." (quoting Otte v Manufacturers Hanover Commercial Corp. 596F2d 10692, 1101 (2d Cir 1979). . . .

In re: Wolf Creek, 138 BR at 618, and n.5.

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

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

In the present case, in light of the importance of the constitutional issue at hand, whether Michigan's Article IX Section 24 bar on impairment of pensions is operative even in the context of a chapter 9 bankruptcy, especially where the statute authorizing the bankruptcy filing explicitly incorporates the constitutional

bar, modification of the plan would be consistent with law if this court on appeal an after review ruled in favor of Plaintiff on this issue.

Moreover, while in both *In re: Wolf Creek and In re: Barnwell County Hospital*, the courts note that allowance of and the character of the modification is to be balanced by disruption to the plan and its impact on other creditors, as outlined below, modifications of the plan can be achieved without such disruption. Notice to affected parties can be accomplished on remand, to the extent that it is necessary. *See In re Wolf Creek*, 138 B.R. at 620 ("The Bankruptcy Court may confirm the plan as originally filed without the amendments specific to Ault's property or require a new plan to be submitted and considered at a hearing for which proper notice is given to all parties in interest including *Ault*.").

II. BECAUSE THE COURT CAN GRANT SOME KIND OF MEANINGFUL RELIEF TO THE PLAINTIFF, DEFENDANT'S CHALLENGE TO THE APPEAL BASED ON CONSTITUTIONAL MOOTNESS MUST BE DENIED

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

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

> A case becomes moot only when it is impossible for a court to grant " ' "any effectual relief whatever" to the prevailing party.' Erie v. Pap's A. M., 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (quoting Church of Scientology of Cal. v. United States, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992), in turn quoting Mills v. Green, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Ellis v. Railway Clerks, 466 U.S. 435, 442, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984).

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

The case of *Alexander v. Barnwell County Hosp.,* 498 B.R. 550 (D.S.C. 2013) is also distinguishable. In that case, there was no effective relief because almost all assets of the debtor had been transferred and any remaining assets were assigned for imminent distribution to non-parties. In this case, however, there is still effective relief available, even on narrow grounds. That includes a decision finding that the pension cuts were altogether illegal and unenforceable but it also includes the possibility of ordering, on narrower grounds, that pensions cannot be reduced based on a failure to procure annual DIA funding. This latter finding would not disrupt the Grand Bargain or the current distribution, but it would prohibit any future pension

cuts based on the Pensions Clause.

In the present case, even if this honorable court was to hold that from an equitable standpoint, restoring Plaintiff's and his fellow retirees pension payments would be too disruptive to the bankruptcy plan (which Plaintiff submits it would not as outlined further below), there is relief that can be afforded to plaintiff that satisfies his constitutional standing to bring this appeal, but do not disrupt the plan from moving forward.

For one thing, the 8th and final Amended Plan of Adjustment, leaves open the prospect of further reductions in pension payments, both for police and firefighter pension benefits and general retirement pension benefits. Article II B.2q.ii.C and Article II.B2riiC of the 8th Amended Plan of Adjustment specifically provide that the "[a]djusted Pension Amount shall be (1) automatically reduced by the DIA Proceeds Default Amount in the event of a DIA Proceeds Payment Default." **Exhibit 4, Doc. 30 pp 237, 239**. The potential for such a default exists through 2023, as DIA payments to the funds are to be made yearly through that year. **See Exhibit 1.**

If this honorable court ruled in favor of Plaintiff's appeal as to the applicability of the State of Michigan constitutional bar on impairment of pensions

in a chapter 9 bankruptcy, it could order that the plan of adjustment be modified to remove any further potential impairment of accrued pension benefits from the plan.

It should also be noted that the bankruptcy court still retains jurisdiction over the Chapter 9 bankruptcy. Already, there are questions as to whether the financial assumptions upon which the plan of adjustment and subsequent order were filed are feasible, and whether the City of Detroit will have to revisit its plan of adjustment or reenter Chapter 9 bankruptcy. **Exhibit 5, article**.

If the City of Detroit, reenters Chapter 9 or returns to the court to amend the plan of adjustment based on changed financial conditions, under the current law of the case, pensions would once again be subject to impairment. A ruling upholding the Michigan constitutional bar on impairing and diminishing pensions would thus not be moot, but rather protect pensions in any prospective chapter 9 refiling or if the court was to revisit the plan of adjustment based on changed financial assumptions.

III. EQUITABLE MOOTNESS IS INAPPLICABLE TO CHAPTER 9 BANKRUPCY PROCEEDINGS

Although Defendants are liberal with their citation to Sixth Circuit case law on equitable mootness in other contexts, they fail to cite a single case of the doctrine being applied within the Chapter 9 context. There are important reasons to adopt the holding in *Bennett V Jefferson County, Alabama*, 518 BR 613, 629,

630 (No Dist. Ala, Southern Division 2014)., and refuse to recognize the doctrine within the context of Chapter 9.

"Equitable mootness is a prudential, not a constitutional, doctrine that evolved in response to the particular necessities surrounding consummation of confirmed bankruptcy reorganization plans." *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008))(internal quotations omitted). Less than ten years ago, the Sixth Circuit adopted the Fifth Circuit's approach to equitable mootness, after acknowledging that the appeals court had "yet to delineate with clarity the appropriate standard for addressing claims of equitable mootness." *See In re Am. Homepatient, Inc.*, 420 F.3d 559, 563-564 (6th Cir. 2005). In such cases, there are a series of factors that the Court examines, including (1) whether a stay has been obtained; (2) whether the plan has been 'substantially consummated'; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *Id* at 564 (internal citations and quotations omitted).

The continuing validity of "equitable mootness" is questionable, given the Supreme Court's "recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U. S. ___,

___, 134 S. Ct. 1377, 1386, 188 L. Ed. 2d 392, 402 (2014). (quoting *Sprint Communications, Inc. v. Jacobs*, 571 U. S. ___, ___, 134 S. Ct. 584, 591, 187 L. Ed. 2d 505, 513 (2013)))(internal quotation marks omitted).

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

IV. EQUITABLE MOOTNESS SHOULD NOT BE EXTENDED TO THESE CHAPTER 9 PROCEEDINGS

Defendants expend substantial space and time distinguishing a "recent, out-of circuit decision[2] from the Northern District of Alabama opining that the doctrine of equitable mootness is inapplicable to appeals of orders confirming Chapter 9 plans of adjustment" as a "flawed and...distinguishable...Chapter 9 Case." Def.

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

[2]This language is somewhat surprising, given the paucity of Sixth Circuit case law on this subject and Defendant's liberal use of citations to out-of-circuit and unpersuasive authority.

Brief in Support of Mtn. To Dismiss, pp. 14-15.[3] For the reasons outlined below, however, the case of *Bennett v. Jefferson Cnty. (In re Jefferson Cnty.)*, is persuasive and should be followed in these proceedings.

First, Defendant appears to deliberately distort the reasoning of *Bennett*, suggesting that the court refused to apply the doctrine of equitable mootness because it relied on the case of *Russo v. Seidler (In re Seidler)*, 44 F.3d 945, 947 n. 3 (11th Cir. 1995) for the proposition that because the phrase "substantial consummation" is only defined within the context of Chapter 11, it is incapable of being applied elsewhere. In fact, however, ***Bennett* simply cited *Seidler* for the proposition that equitable mootness is not identical in the Chapter 13 and Chapter 11 contexts**, a point that is irrefutably true for the Fifth Circuit. *See Seidler*, 44 F.3d at 947 n. 3. The Fifth Circuit, when it developed the test for equitable mootness, relied upon the concept of "substantial consummation" in order to create an appropriate test for the Chapter 11 context. *See, i.e., In re Crystal Oil Co.*, 854 F.2d 79 (5th Cir. 1988); *Ronit, Inc. v. Stemson Corp. (In re Block Shim Dev. Co.)*, 939 F.2d 289, 291 (5th Cir.1991). The test, as developed by the Fifth Circuit and applied within the Fifth Circuit and Sixth Circuit, relies on the

[3]Given that this issue is also addressed in plaintiffs' opening brief on appeal and the City will have an opportunity to address it in oral arguments on the merits, and given that the doctrine is prudential, the matter should be addressed as part of the underlying appeal, not within the context of a motion to dismiss.

definition of "substantial consummation" found within the Bankruptcy Code. *See id*; *see also* 11 U.S.C. § 1101(2); *In re Manges*, 29 F.3d 1034, 1039-1041 (5th Cir. 1994)(" Substantial consummation" is a statutory measure for determining whether a reorganization plan may be amended or modified by the bankruptcy court...This court, in addressing the mootness issue, has borrowed the "substantial consummation" yardstick because it informs our judgment as to when finality concerns and the reliance interests of third parties upon the plan as effectuated have become paramount to a resolution of the dispute between the parties on appeal.")(citations and quotations omitted). In effect, the Fifth Circuit test makes it clear that this statutory yardstick is simply a method of measuring finality and effect on third parties. Accordingly, there's no basis for transplanting this Chapter 11 yardstick into Chapter 9 proceedings.

In light of the historical development of the "substantial consummation" factor, it is inappropriate to suggest, as Defendant does, that "substantial consummation" is unrelated to the doctrine of equitable mootness as developed by the Fifth Circuit and applied by the Sixth Circuit. The *Bennett* court was simply stating the obvious: No courts can apply "substantial consummation" to an equitable mootness analysis outside of the Chapter 11 context, because that factor was developed based on an existing statutory yardstick that speaks to concerns of

finality concerns and the reliance interests of third parties. *See Bennett*, 518 B.R. at 636 ("The judge-made doctrine of equitable mootness was developed for and should only be used when, 'granting relief on appeal [is] almost certain to produce a perverse outcome—chaos in the bankruptcy court from a plan in tatters and/or significant injury to third parties. Only then is equitable mootness a valid consideration.'") (quoting *In re Semcrude,* L.P., 728 F.3d 314, 320 (3d Cir. 2013)(internal citations omitted)).

The misrepresentation of the *Bennett* decision is further amplified by the refusal of the Defendant to give due weight to the *Bennett* court's appropriate distinction between the very different policy concerns in Chapter 11 and Chapter 9 proceedings. For example, the Defendant suggests that concerns over state sovereignty council even more liberal use of the doctrine, but this ignores the core concern of state sovereignty altogether where, as the *Bennett* court noted, the appeal concerns constitutional and important and difficult questions of state law. *Bennett*, *supra* at 637 ("... applying the doctrine of equitable mootness as the County espouses, would prevent both state and federal Article III courts from deciding those 'knotty state law' and constitutional issues and would prevent any review of a federal bankruptcy court's assumption of jurisdiction to enforce its unreviewed actions.").

Significant public interests are at stake in this appeal, including the cursory and shallow analysis of the State of Michigan's constitutional Pensions Clause provision by the lower court. This elevated, constitutional status for public pensions was described as a "paramount law of the state" by the Michigan Supreme Court in the case of *Detroit Police Officers Asso. v. Detroit*, 391 Mich. 44; 214 N.W.2d 803 (1974). While the court agreed that the City of Detroit had an obligation to bargain over prospective changes to retirement benefits that were part of a collective bargaining agreement, the Court emphasized that the constitutional provision assured "those already covered by a pension plan…that their benefits will not be diminished by future collective bargaining agreements." *Id* at 69. Read in light of Campbell and the text of the constitutional provision, the Michigan Supreme Court's decision leaves no room for the bankruptcy court's cursory analysis, as there would be no impediment to the future modification of pension rights secured by a collective bargaining agreement if the Pensions Clause did nothing more than create a simple contractual obligation. Similarly, several sections of the Michigan Local Financial Stability and Choice Act of 2012 make it clear than an Emergency Manager is subject to the Pensions Clause provisions. *See, i.e.,* Mich. Comp. Law §§ 141.1551(1)(d), 141.1552(m)(ii). It is also clear that state law is incorporated by Chapter 9, and limits the kinds of plans that can be

confirmed. *See, i.e.,* 11 U.S.C. § 943(b)(4)(providing that the plan can be approved if "the debtor is not prohibited by law from taking any action necessary to carry out the plan.").

Equitable mootness must also be sensitive to the constitutional concerns that have been incorporated into the Chapter 9 statutory framework. The current framework is the result of a delicate balance. After Congress created an avenue for municipal bankruptcy in 1934, the Supreme Court found that the arrangement was unconstitutional with the case of *Ashton v. Cameron County Water Improvement District, No 1*, 298 US 513, 80 L Ed 1309, 56 S Ct 892, rehg denied, 299 US 619, 81 L Ed 457, 57 S Ct 5 (1936). Congress responded to *Ashton* with new legislation that attempted to cure some of the defects of the 1934 amendments, a more limited species of municipal bankruptcy that was ultimately upheld in the case of *United States v. Bekins*, 304 US 27, 82 L Ed 1137, 58 S Ct 811, rehg denied, 304 US 589, 82 L Ed 1549, 58 S Ct 1043 (1938).

These are precisely the concerns that the *Bennett* court was addressing when it ruled that, "[i]n light of the public and political interests at stake in any Chapter 9 proceedings, the court will deny the County's appeals to equity to allow allegedly unconstitutional provisions of the Confirmation Order to stand without review." *Bennett*, *supra*, 518 B.R. at 638.

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

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

The doctrine of equitable mootness, (which as outlined in detail above Plaintiff asserts is inapplicable to this Chapter 9 case), can be only invoked if granting relief on appeal is almost certain to produce a perverse outcome – chaos in the bankruptcy court from a plan in tatters and/or significant injury to third parties. *In re Semcrude*, L.P. 728 F3rd 313, 320 (3rd Cir 2013) .

In this case, Appellants concurred in a request to obtain a stay pending appeal, which was denied. *See* Docket Entry Doc 8533 Filed 12/01/14 . The lower court concluded that if the stay was granted and the settlements were not implemented, the plan would likely fall apart. However, the lower court did not make any factual findings suggesting that the plan, including the Grand Bargain and other settlement agreements, would be unraveled if the retirees prevailed on the underlying issues and that part of the Confirmation Order could no longer be

enforced. Without an evidentiary hearing, it is inappropriate for an appellate court to make any findings on this issue.

Moreover, a finding of substantial consummation is not dispositive and, in the context of this case, not very relevant. In *Currey's of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.)*, 526 F.3d 942, 949 (6th Cir. 2008), a case in which the court addressed the equitable mootness doctrine, the court held:

> Even when a plan has been substantially consummated, it is "not necessarily . . . impossible or inequitable for an appellate court to grant effective relief." *Manges*, 29 F.3d at 1042-43. The most important factor this Court must consider is "whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *In re American Home Patient*, 420 F.3d at 564. "Determinations of mootness . . . require a case-by-case judgment regarding, the feasibility or futility of effective relief should a litigant prevail." *In re AOV Indus., Inc.*, 253 U.S. App. D.C. 186, 792 F.2d 1140, 1147-48 (DC Cir. 1986).

In the present case, as noted in Argument II above, this court can easily grant relief in the form of removing language in the plan of adjustment that provides or potentially for further pension benefits cuts in the future and prohibiting amendments of the plan that would further pension cuts based on changed conditions.[33] This relief would have no impact on any other creditors and would allow the plan to move forward subject to this revision.

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

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

Appellee argues that if Appellant's appeal is granted, it would make the "Grand Bargain" null and void. The "Grand Bargain" is the deal which inserted state and foundation and funding for pensions into the City of Detroit and which Appellee asserts became the anchor for settlement of other claims in the current case.

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

Appellant acknowledges that there were **conditions precedent** for releasing the $194,800,000 in state funding, including the cessation of any litigation challenging PA 436 or any actions taken pursuant to PA 436. **Exhibit 6. Docket 8045, p 63**. Appellant also concedes that pursuant to MCL 141.1608, the state authority in charge of distributing the funds to the retirement systems was only to do so after the bankruptcy court entered an order approving the plan for

adjustment, and the terms and conditions of the contribution agreement have been satisfied.

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

> A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. McIsaac v. Hale, 104 Conn 374, 379 (132 A 916); McFarland v. Sikes, 54 Conn 250, 251 (7 A 408, 1 Am St Rep 111); 3 Corbin, Contracts, § 628 at p 515, § 629; 5 Page, Contracts (2d ed), § 2586; 1 Restatement, Contracts, § 250. A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. 3 Corbin, Contracts, § 633. If the condition is not fulfilled, the right to enforce the contract does not come into existence.

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

As far as the foundations go, the relevant condition precedent for the foundations participation in the DIA Settlement (the Grand Bargain) was "(j) the agreement of the State to provide the State Contribution." **Exhibit 6, Docket 8045, p 64.** Because that condition precedent has been met, the DIA Funding Parties are now obligated to make their contributions to the pension funds, totaling $466 million ($366 from the foundations and $100 million from DIA direct funders). Their contribution is not contingent on the retirees accepting any pension cuts. In addition, they received a direct benefit from the deal in that the DIA art was not sold off and is being held in trust.

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

In addition, no other creditor will be impacted by this honorable court granting Appellant's appeal. Appellees do not suggest that the settlement agreements are in any way contingent on violations of the State of Michigan's Pensions Clause, and in any event provide no record evidence in support of this proposition. In any event, even if the retiree cuts were deemed unconstitutional, the city of Detroit will still enjoy its $3.85 billion reduction in health care costs for retirees as these benefits are not protected by Article IX Section 24. The few other

creditors who experienced a reduction in their return on debt will still get paid. In fact, unlike the retirees or its board, some of them were offered lucrative riverfront city properties in exchange for accepting a lesser payments on debts owed. And the secured creditors will still receive full payment on their loans and bond deals, even when they were tainted by corruption as in the case of interest rate swaps associated with the water bonds (as well as the pension obligation certificates).

The City of Detroit may have to find some alternative funds to make up the difference in the funding necessary to restore pensioners to their full payments. But that funding will be relatively small and can be provided without disrupting the plan of adjustment. The city can seek alternative sources of funding for blight removal. For example, if the city simply pursued the $300 million in federal Helping Hardest Hit Homeowner funds being withheld inexplicably by the Michigan State Housing Authority, this alone would go a long way to paying off delinquent property tax bills in the city and restoring holes in the city budget as a result of the payment of chargebacks on property taxes to Wayne County. Similarly, as has been done in cities, states and the federal government, the City of Detroit could go after the major banks, whose predatory lending policies led to the destruction of neighborhoods throughout Detroit, to fund blight removal, rather than taking funds out of the general fund. Right now, the City's Chief Financial

Officer is in the process of recommending that high level officials actually get raises of up to 50%, money that instead could help pay for constitutionally protected pensions. The City also contends that a number of third parties will be injured by this Court's consideration of the underlying issues raised in Appellant's opening brief. But the implications of failing to review the lower court's treatment of the Pensions Clause are just as significant: The New York Times recently referred to the lower court's decision in this case as "groundbreaking." **Exhibit 7, attached**. Similarly, the State of Illinois is attempting to use the bankruptcy court's treatment of the Michigan Pensions Clause to argue that virtually identical language in the Illinois state constitution is no barrier to the diminishment or impairment of public pension plans in that state. **See Exhibit 8, attached**. In essence, the decision of a federal Article II court is shaping policy on public pensions across the country, without the benefit of federal or state appellate review.

In fact, Judge Rhodes has just recently revealed that he holds a personal and political hostility to public pensions. **See Exhibit 9, attached**. According to Judge Rhodes, cities should adopt defined contribution plans nationwide and abandon the protections afforded by public pensions. At business luncheon jointly honoring Judge Rhodes, Judge Rosen and Emergency Manager Kevyn Orr, Judge Rhodes was quoted as saying:

> It flies largely under the radar and it doesn't get a lot of attention and it doesn't get a lot of management and I'm deeply concerned about that, Rhodes said. "Because that's money cities don't have that they have promised to their retirees and I think that solution across the country, and including in Detroit, has to be at some point defined contribution (plans).
> *Id*.

Judge Rhodes also "suggested Detroit missed a chance to get out of the pension business altogether during the bankruptcy," a proceeding which he claims "was as much a political case as a legal case." These comments are shocking and demonstrate a risk of hostility and bias motivating the underlying decisions, which simply underscores the importance of having an Article III court independently review these novel and complex legal questions.

CONCLUSION

Defendant's Motion to Dismiss based on equitable and constitutional mootness must be denied in its entirety.

If this court was to rule in favor of Plaintiff on his appeal of the bankruptcy court's opinion that Michigan's constitutional bar on impairing or diminishing pensions was not applicable to this case, there are remedies that can be ordered, that satisfy the requirements for constitutional standing and for disallowing Defendant's claim of equitable mootness. These remedies do not disrupt the entire bankruptcy, nor would they have an impact on other creditors.

If the appeal is granted, the court could (1) order that an amended plan of adjustment be adopted removing any language providing for further reduction of pension payments; (2) order that any future amended plan of adjustments not contain any language impairing or diminishing pension payments; or (3) restore pension benefits unconstitutionally taken from Detroit's retirees.

In addition, the court should hold that equitable mootness is inapplicable to this appeal, as the constitutional issues implicated in this appeal must be subject to review by a higher court.

Respectfully Submitted,

Dated: March 12, 2015 /s/

By: William Davis
9203 Littlefield
Detroit, MI 48228
313-622-6430
montybill86@yahoo.com

/s/

Yvonne Williams-Jones
153 Arden Park
Detroit, MI 48202
313-872-0973
yvonne001@ameritech.net

Individually and on behalf of Detroit Active and Retired Employees Association

CERTIFICATE OF SERVICE

The undersigned certifies that opposing counsel was served via first class mail, postage prepaid on Thursday, March 12, 2015.

Dated: March 12, 2015 /s/

By: William Davis
9203 Littlefield
Detroit, MI 48228
313-622-6430
montybill86@yahoo.com

/s/

Yvonne Williams-Jones
153 Arden Park
Detroit, MI 48202
313-872-0973
yvonne001@ameritech.net