69

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-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.

_______________________________________/

FILED
2015 MAR 13 P 3: 18
U.S. DIST. COURT CLERK
EAST. DIST. MICH.
DETROIT

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

Appellants hereby submit this Corrected Response in Opposition to the City of Detroit's Motion to Dismiss on the basis of equitable and constitutional mootness. Appellants' original submission on March 12, 2015, contained the incorrect District Court Appeal Number.

TABLE OF CONTENTS

INDEX OF AUTHORITIES. 3

JURISDICTION AND VENUE. 5

BRIEF IN SUPPORT OF RESPONSE IN OPPOSITION. 5

STATEMENT OF ISSUES PRESENTED PURSUANT TO LR 7.1(d)(2). 5

CONTROLLING OR MOST APPROPRIATE AUTHORITY. 6

INTRODUCTION/BACKGROUND. 6

ARGUMENT. 9

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

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 11

III. EQUITABLE MOOTNESS IS INAPPLICABLE TO CHAPTER 9 BANKRUPCY PROCEEDINGS. 14

IV. EQUITABLE MOOTNESS SHOULD NOT BE EXTENDED TO THESE CHAPTER 9 PROCEEDINGS 16

V. EQUITABLE MOOTNESS IS NOT APPLICABLE BASED ON THE FACTS OF THIS CASE. 22

CONCLUSION. 29

INDEX OF AUTHORITIES

In re Am. Homepatient, Inc.,
420 F.3d 559, 563-564 (6th Cir. 2005). 15

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). 21

In re: Barnwell County Hospital, Debtor, 491 BR 408, 415 (Bankruptcy Court,
District Ct of South Carolina, 2013). 10

Bennett v. Jefferson Cnty., (In re Jefferson Cnty.),
518 B.R. 613 (N.D. Ala. 2014). 14, 17, 19, 21

Bill Roderick Distrib., Inc. v. A.J Mackay Co.(In re A.J. Mackay Co.),
50 Bankr. 756, 759 (D.Utah. 1985). 9

Corcoran v. McDonald (In re McDonald),
165 B.R. 60, 82 (E.D. Mich. 2012). 16

In re Crystal Oil Co.,
854 F.2d 79 (5th Cir. 1988). 17

Curreys of Neb., Inc. v. United Producers, Inc. (In re United Producers, Inc.),
526 F.3d 942, 949 (6th Cir. 2008). 23

Detroit Police Officers Asso. v. Detroit,
391 Mich. 44; 214 N.W.2d 803 (1974). 20

In re Hilal,
534 F.3d 498, 500 (5th Cir. 2008). 15

Knox v. Knox,
337 Mich. 109, 118 (1953). 25

Knox v SEIU, Local 1000,
132 S Ct 2277; 183 L Ed 2d 281 (2012). ....

In re Manges,
29 F.3d 1034, 1039-1041 (5th Cir. 1994). 18

Ronit, Inc. v. Stemson Corp. (In re Block Shim Dev. Co.),
939 F.2d 289, 291 (5th Cir.1991). 17

Russo v. Seidler (In re Seidler),
44 F.3d 945, 947 n. 3 (11th Cir. 1995).. 17

In re Semcrude,
L.P. 728 F3rd 313, 320 (3rd Cir 2013). 22

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).. 15

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). 21

In re Wolf Creek Valley Metro. Dist. No. IV,
138 B.R. 610, 619 (D. Colo. 1992)... 9, 11

Controlling authorities

11 U.S.C. § 1101(2). 18
11 U.S.C. § 943(b)(4)... 21

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 *Curreys 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

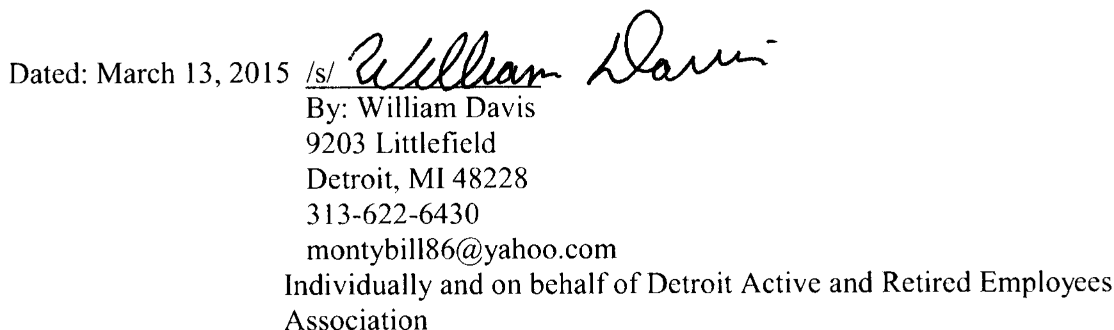
Defendant's Motion to Dismiss based on equitable and constitutional mootness must be denied in its entirety.

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,

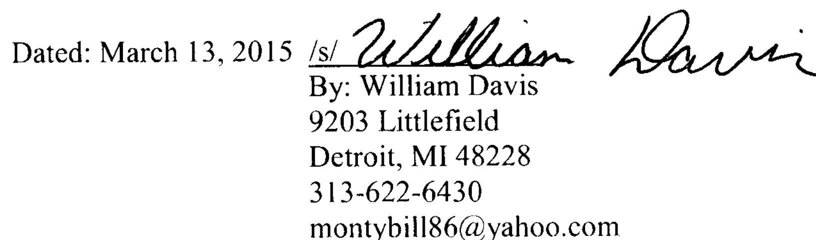


Dated: March 13, 2015 /s/

By: William Davis
9203 Littlefield
Detroit, MI 48228
313-622-6430
montybill86@yahoo.com
Individually and on behalf of Detroit Active and Retired Employees Association

CERTIFICATE OF SERVICE

The undersigned certifies that opposing counsel was served a Appellants' Corrected Response in Opposition to Defendant's Motion to Dismiss via first class mail, postage prepaid on Friday, March 13, 2015.



Dated: March 13, 2015 /s/

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

INDEX OF EXHIBITS

1. Pension contributions
2. Chart on Debt reduction
3. Retiree ballot
4. Plan of adjustment reflecting potential future retiree cuts
5. Article on current Detroit fiscal problems
6. Conditions to State and DIA funding
7. Article on national impact of Judge Rhodes ruling on pensions
8. Illinois brief citing Judge Rhodes ruling on pensions
9. Article reflecting Judge Rhodes comments on pensions

EXHIBIT 1

City of Detroit

GRS Pension contributions (FY14 - FY23)

$ in millions

GRS	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	10-Year
Source:											
DWSD	$ -	$ 65.4	$ 45.4	$ 45.4	$ 45.4	$ 45.4	$ 45.4	$ 45.4	$ 45.4	$ 45.4	$ 428.5
UTGO	-	4.4	4.0	4.0	3.9	3.7	3.7	3.6	2.3	2.0	31.7
State	-	98.8	-	-	-	-	-	-	-	-	98.8
DIA	-	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	45.0
Other	-	14.6	22.5	22.5	22.5	22.5	2.5	2.5	2.5	2.5	114.6
Total	-	188.2	76.9	76.9	76.8	76.6	56.5	56.5	55.2	54.9	718.6

City of Detroit

PFRS Pension contributions (FY14 - FY23)

$ in millions

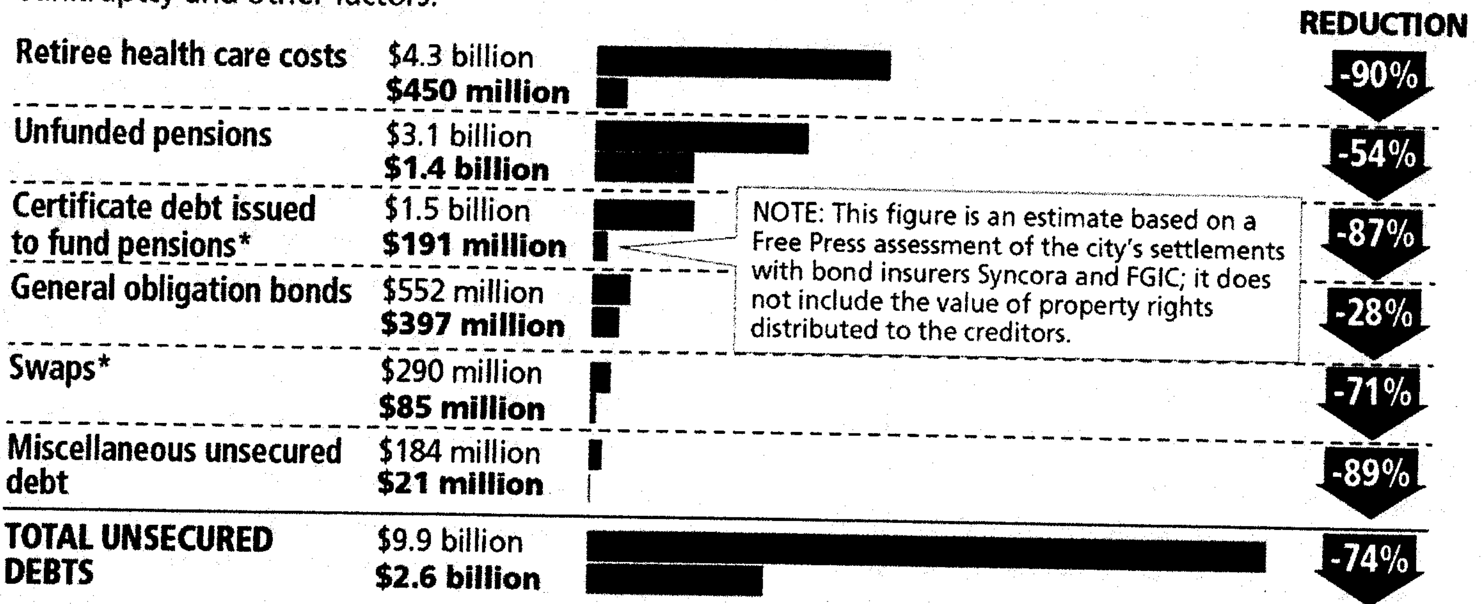
PFRS	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	10-Year
Source:											
State	$ -	$ 96.0	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ 96.0
Foundations	-	18.3	18.3	18.3	18.3	18.3	18.3	18.3	18.3	18.3	164.7
Total	-	114.3	18.3	18.3	18.3	18.3	18.3	18.3	18.3	18.3	260.7

EXHIBIT 2

DETROIT BANKRUPTCY: BEFORE AND AFTER

Here's how Detroit plans to cut more than $7 billion in unsecured debt and liabilities through bankruptcy. Some figures may have changed slightly due to settlements reached in the late stages of the bankruptcy and other factors.

BEFORE THE BANKRUPTCY
AFTER THE BANKRUPTCY



NOTE: Detroit will maintain $6.4 billion in secured water, sewer, general obligation and parking bonds, which legally must be paid 100%. Numbers are rounded based on city estimates.

*These debts, backed by bond insurers Syncora and Financial Guaranty Insurance Co., were approved by Mayor Kwame Kilpatrick's administration in 2005 to finance $1.4 billion in unfunded pensions.

SOURCE: City projections

MARTHA THIERRY/DETROIT FREE PRESS

EXHIBIT 3

Replacement Ballot, Class 11 GRS Pension Claims – Retirees

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re	: Chapter 9
CITY OF DETROIT, MICHIGAN,	: Case No. 13-53846
Debtor.	: Hon. Steven W. Rhodes

REPLACEMENT BALLOT FOR ACCEPTING OR REJECTING THE
PLAN FOR THE ADJUSTMENT OF DEBTS OF THE CITY OF DETROIT

CLASS 11: GRS Pension Claims – Retirees
Claimant's [**Name/Identifier**]: [____________]
Allowed Claim for Voting Purposes: $[____________]

THE "VOTING DEADLINE" TO ACCEPT OR REJECT THE PLAN IS 5:00 P.M., EASTERN TIME, ON JULY 11, 2014

ALL AMOUNTS STATED ON THIS BALLOT ARE ESTIMATES. YOUR FINAL, ACTUAL PENSION AMOUNTS WILL BE DETERMINED BY THE GENERAL RETIREMENT SYSTEM AFTER THE CITY'S PLAN IS CONFIRMED. YOUR ACTUAL PENSION AMOUNTS MAY BE MORE OR LESS THAN THE ESTIMATES CONTAINED IN THIS BALLOT.

This Ballot is for RETIREES OR SURVIVING BENEFICIARIES WHO ARE CURRENTLY RECEIVING PENSION payments from the General Retirement System of the City of Detroit ("GRS").

GRS Pension Claims are included in Class 11 under the *Fourth Amended Plan for the Adjustment of Debts of the City of Detroit (May 5, 2014)* (as it may be amended, supplemented or modified, the "Plan").[1]

Please complete, sign and date the Ballot and mail it by regular mail to Kurtzman Carson Consultants LLC (the "Balloting Agent") in the enclosed addressed envelope so that it is ACTUALLY RECEIVED by the July 11, 2014 Voting Deadline.

DO NOT RETURN THE BALLOT TO THE CITY OF DETROIT, THE BANKRUPTCY COURT OR ANYONE OTHER THAN THE BALLOTING AGENT.

Ballots may not be submitted by fax, email or other electronic means.

Please contact the Balloting Agent if you have questions regarding the ballot return instructions. PLEASE NOTE, HOWEVER, THAT THE BALLOTING AGENT IS NOT PERMITTED TO PROVIDE LEGAL ADVICE.

---

[1] Capitalized terms used in this Ballot and the attached instructions that are not otherwise defined have the meanings given to them in the Plan.

The City of Detroit, Michigan (the "City") is soliciting votes with respect to the Plan, which is described in the accompanying *Fourth Amended Disclosure Statement with Respect to Fourth Amended Plan for the Adjustment of Debts of the City of Detroit (May 5, 2014)* (as it may be amended, supplemented or modified, the "Disclosure Statement"). The Disclosure Statement was approved by the Bankruptcy Court on May 5, 2014. By orders entered on March 11, 2014 and May 5, 2014, the Bankruptcy Court approved procedures regarding the solicitation and tabulation of votes on the Plan.

You are receiving this Ballot because you are a retired Holder of a GRS Pension Claim as of March 1, 2014 (the "Pension Record Date").

Your GRS Pension Claim has been temporarily allowed in the estimated amount of $[___________] only for the purpose of voting on the Plan. The actual amount of the claim may change before the end of the bankruptcy case.

The Plan proposes two possible treatments for GRS Pension Claims, described below as "Alternative A" and "Alternative B." The results of the voting on the Plan will determine whether the GRS will receive money from proposed settlements with third-party foundation funders, The Detroit Institute of Arts and the State of Michigan (the "Outside Funding"). The Outside Funding also depends, in part, on Bankruptcy Court approval of the settlements and the fulfillment by the outside funders of their respective commitments.

You cannot avoid a reduction of your pension benefits by refusing to vote. If the Plan is confirmed, your pension will be reduced.

NOTICE REGARDING EFFECT OF VOTING ON RELEASES OF CLAIMS

If you vote to accept the Plan: You may be giving up any right you may have to sue the State of Michigan, the City or other entities specifically protected by the Plan releases, to try to recover the full amount of your pension, only if the necessary conditions (the "Initial Funding Conditions") for the funding from the State and the other Outside Funding parties that can be satisfied before the Confirmation Hearing are satisfied or waived. These preconditions include adoption of relevant legislation and appropriations by the State and completion of necessary agreements and documents by the State and the other Outside Funding parties, among other things.

If you vote to accept the Plan and the Initial Funding Conditions are not satisfied or waived: Your vote will be deemed a vote to reject the Plan.

If you vote to reject the Plan: If you vote to reject the Plan, it will be less likely that the Outside Funding will be available. Nevertheless, if Classes 10 and 11 vote to accept the Plan so that the State funding will be made despite your vote to reject the Plan, you will not have any right to sue the State of Michigan, State officials, the City or other entities specifically protected by the Plan releases to try to recover the full amount of your pension, but you will benefit if the Outside Funding is received.

ALTERNATIVE A: If both Class 10 (the PFRS Pension Claims) and Class 11 (the GRS Pension Claims) vote to accept the Plan and the Court approves the Plan, the Outside Funding will be contributed to GRS. Under this alternative, your monthly pension payments are estimated to change as follows:

Line 1: Your Current Monthly Pension Is: $____________

Line 2: Line 1 multiplied by 0.955 (to show a 4.5% reduction) is: $____________

Line 3: Your Estimated Annuity Savings Fund Monthly Recoupment is:*** $____________

Line 4: Your New Estimated Monthly Pension Payment (flat payment; no COLAs) is: $____________

*** The total Estimated Amount of your Annuity Savings Plan Recoupment is: $____________

***

ALTERNATIVE B: If either Class 10 or Class 11 votes to reject the Plan and the Court approves the Plan, the Outside Funding will not be contributed to GRS. Under this alternative, your monthly pension payments are estimated to change as follows:

Line 1: Your Current Monthly Pension Is: $____________

Line 2: Line 1 multiplied by 0.73 (to show a 27% reduction) is: $____________

Line 3: Your Estimated Annuity Savings Fund Monthly Recoupment is:*** $____________

Line 4: Your New Estimated Monthly Pension Payment (flat payment; no COLAs) is: $____________

*** The total Estimated Amount of your Annuity Savings Plan Recoupment is: $____________

***

In addition, if you vote for the Plan ***and*** the adjusted pension amount you are to receive under the Plan is so low that your total income falls below a certain level, you may be eligible to receive supplemental payments. These additional payments will not be available to higher income retirees.

For more information regarding the calculation of the amount of your allowed claim and your monthly pension payments, please consult with your counsel and/or counsel to the Retiree Committee at detroitretirees@dentons.com.

SUBMITTING YOUR BALLOT:

If you were not retired or a surviving beneficiary as of the Pension Record Date, if you did not hold a GRS Pension Claim as of the Pension Record Date, or if you believe for any other reason that you received the wrong ballot, please contact the Balloting Agent immediately at (877) 298-6236 or via email at detroitinfo@kccllc.com.

To have your vote counted, you must complete, sign and return this Ballot in accordance with the voting information and instructions provided below. You must complete your Ballot and return it to the Balloting Agent so that it is actually received by the Voting Deadline.

The Balloting Agent will not accept Ballots received after the Voting Deadline or Ballots delivered by email, fax or any other electronic method. Ballots should not be sent to the City, the Bankruptcy Court or any entity other than the Balloting Agent.

VOTING INFORMATION AND INSTRUCTIONS FOR COMPLETING THE BALLOT

1. In the boxes provided in Item 1 of the Ballot, please indicate your vote to accept or reject the Plan.

   Your GRS Pension Claim against the City has been placed in Class 11 under the Plan. **The attached Ballot is designated only for retirees to vote GRS Pension Claims in Class 11 under the Plan.**

   If you vote to accept the Plan, you are voting to approve certain cancellation, discharge, exculpation, expungement, injunction and release provisions contained in the Plan. Such provisions include, but are not limited to, the provisions contained in Article III.D, Article IV.J, Article IV.K and Article V.C of the Plan. Such provisions include a release of claims against third parties, including the State of Michigan, and may affect your rights and interests regarding certain other nondebtor third parties.

2. Please complete Item 2 of the Ballot.

3. Sign, date and return the Ballot to:

   Detroit Ballot Processing Center
   c/o KCC
   2335 Alaska Avenue
   El Segundo, CA 90245

   The Balloting Agent must actually receive all Ballots by the Voting Deadline. If a Ballot is received after the Voting Deadline, it will not be counted. The Balloting Agent will not accept Ballots received after the Voting Deadline, or Ballots delivered by email, fax or any other electronic method. Ballots should not be sent directly to the City, the Bankruptcy Court or any entity other than the Balloting Agent. Any Ballots received by the City or the Bankruptcy Court will not be valid and will not be counted as cast.

4. If you also hold Claims in other Classes, you will receive a separate ballot for each such Claim. You must complete and return each ballot you receive to ensure that your vote will be counted with respect to each Class in which you are a Claim holder. You may have also received a ballot for your claim for health care benefits, also called post-employment benefits or OPEB.

5. The Ballot does not constitute and shall not be deemed an assertion of a Claim.

6. If you were not retired or a surviving beneficiary as of March 1, 2014, if you were not a Holder of a GRS Pension Claims as of March 1, 2014, or if you believe for any other reason that you received the wrong Ballot, please contact the Balloting Agent immediately at (877) 298-6236 or via email at detroitinfo@kccllc.com.

PLEASE TAKE NOTICE THAT:

If you accept the Plan, you are voting to approve a release of any claims that you may have against the State, the City, and other entities in connection with the loss of part of your pension.

If you vote to accept the Plan, you are also voting to approve certain other cancellation, discharge, exculpation, expungement, injunction and release provisions contained in the Plan. Such provisions include, but are not limited to, the provisions contained in Article III.D, Article IV.J, Article IV.K and Article V.C of the Plan. These provisions include the release of claims against the State of Michigan and may affect your rights and interests regarding certain other nondebtor parties, but only if the Initial Funding Conditions are met or waived by the Confirmation Hearing. By accepting the Plan AND if the Initial Funding Conditions are satisfied or waived, you will be forever releasing any rights you may have against the State and other nondebtor parties for matters described in the Plan and you will be forever barred from suing the State or other nondebtor parties for matters described in the Plan. Specifically, this release would release all claims and liabilities arising from or related to the City, the chapter 9 case (including the authorization given to file the chapter 9 case), the Plan and exhibits thereto, the Disclosure Statement, PA 436 and its predecessor or replacement statutes, and Article IX, § 24 of the Michigan Constitution.

If the Plan is confirmed, you will not be able to challenge the Annuity Savings Fund Recoupment that will be deducted from your monthly pension check.

If you vote to accept the Plan and the Initial Funding Conditions are NOT satisfied or waived before the Confirmation Hearing, your vote will be deemed to be a vote to reject the Plan.

PLEASE READ THE INSTRUCTIONS CAREFULLY BEFORE FILLING OUT AND MAILING THE BALLOT.

PLEASE READ THE VOTING INFORMATION AND INSTRUCTIONS ATTACHED BEFORE COMPLETING THIS BALLOT.

PLEASE COMPLETE ITEMS 1 AND 2 BELOW. IF NEITHER THE "ACCEPT" NOR "REJECT" BOX IS CHECKED IN ITEM 1, OR IF BOTH BOXES ARE CHECKED IN ITEM 1, THIS BALLOT WILL NOT BE COUNTED AS CAST.

IF THIS BALLOT IS NOT SIGNED ON THE APPROPRIATE LINES BELOW, THIS BALLOT WILL NOT BE VALID OR COUNTED AS HAVING BEEN CAST.

Item 1. Class Vote. The undersigned, a retired GRS Pension Claim Holder in Class 11 as of March 1, 2014 against the City of Detroit, Michigan, votes to (check one box):

☐ **ACCEPT** the Plan. ☐ **REJECT** the Plan.

PLEASE COMPLETE ITEM 2 ON THE NEXT PAGE.

Item 2. Certifications. By signing this Ballot, the undersigned certifies that he, she or it:

i. was retired as of March 1, 2014;

ii. is the Holder of a GRS Pension Claim in Class 11 to which this Ballot pertains, or is an authorized signatory, and has full power and authority to vote to accept or reject the Plan with respect to such Claim;

iii. received a copy of the solicitation package consisting of: (a) a notice regarding the time and place of a hearing to consider confirmation of the Plan, (b) a CD-ROM including the Plan, Disclosure Statement and the exhibits to each filed to date, (c) a Ballot and a ballot return envelope, (d) a copy of certain rules governing the tabulation of ballots, (e) a plain language description of the Plan, (f) a cover letter and (g) a letter from the GRS and possibly from other parties; and

iv. understands that a vote to accept the Plan is a vote to accept certain cancellation, discharge, exculpation, expungement, injunction and release provisions contained in the Plan.

____
Name

____
Fed. Tax I.D. No. or Last 4 Digits of Social Sec. No. (optional)

____
Signature

____
If by Authorized Agent, Name and Title

____
Name of Institution

____
Street Address

____
City, State, Zip Code

____
Telephone Number

____
Date Completed

____
Email Address

EXHIBIT 4

Systems Funding Trust 2006 in connection with any liability arising in connection with or related to (1) Sections 6.5 and 9.1 of the Contract Administration Agreements, (2) Section 8.03 of the COP Service Contracts, (3) distributions made pursuant to or in connection with this Section II.B.3.p.i.A, (4) the FGIC Settlement or (5) the Syncora Settlement. On the Effective Date, Syncora and FGIC shall, to the fullest extent permitted under law, be deemed to forever mutually release, waive and discharge all liabilities against each other relating to distributions made pursuant to or in connection with this Section II.B.3.p.i.A, Sections 6.5 and 9.1 of the Contract Administration Agreements or Section 8.03 of the COP Service Contracts.

ii. Impact of UTGO Settlement.

Pursuant to the UTGO Settlement Agreement, the City has agreed that (a) the Plan shall not permit the Holders of Allowed COP Claims to recover more on a percentage basis on account of such Allowed COP Claims than the Holders of Allowed Unlimited Tax General Obligation Bond Claims recover on a percentage basis on account of such Allowed Unlimited Tax General Obligation Bond Claims, as such percentage recoveries are projected on the terms set forth in the UTGO Settlement Agreement at Confirmation; and (b) if a Trigger Event occurs, the Settling UTGO Bond Insurers shall receive Top-Off Payments (as set forth in Section IV.C).

q. Class 10 – PFRS Pension Claims.

i. Allowance.

The PFRS Pension Claims shall be allowed in an aggregate amount equal to the sum of approximately $1,250,000,000.

ii. Treatment.

A. Contributions to PFRS.

During the Fiscal Years from the Effective Date through Fiscal Year 2023, annual contributions shall be made to fund benefits accrued under the Prior PFRS Pension Plan only in the amounts identified on Exhibit II.B.3.q.ii.A. The exclusive source for such contributions shall be certain DIA Proceeds and a portion of the State Contribution. After June 30, 2023, (1) PFRS will receive certain additional DIA Proceeds and (2) the City will contribute sufficient funds required to pay each Holder of a PFRS Pension Claim his or her PFRS Adjusted Pension Amount in accordance with and as modified by the terms and conditions contained in the Plan and the Prior PFRS Pension Plan, in accordance with the State Contribution Agreement and exhibits thereto. Nothing in this Plan prevents any non-City third party from making additional contributions to or for the benefit of PFRS if such party chooses to do so.

B. Investment Return Assumption.

During the period that ends on June 30, 2023, the trustees of the PFRS, or the trustees of any successor trust or pension plan, shall adopt and maintain an investment return assumption and discount rate for purposes of determining the assets and liabilities of the PFRS that shall be 6.75%.

C. Modification of Benefits for PFRS Participants.

During the period that ends no earlier than June 30, 2023, the pension benefits payable to each Holder of a PFRS Pension Claim shall be equal to the PFRS Adjusted Pension Amount for such Holder, provided that such PFRS Adjusted Pension Amount shall be (1) automatically reduced by the DIA Proceeds Default Amount in the event of a DIA Proceeds Payment Default and (2) increased by any PFRS Restoration Payment.

Restoration of all or a portion of the modified pension benefits will be provided in accordance with the methodology set forth on Exhibit II.B.3.q.ii.C. For purposes of calculating a PFRS Restoration Payment, market value of assets shall not include any City contributions through June 30, 2023, other than those listed on Exhibit II.B.3.q.ii.A or any State contributions if the PFRS trustees fail to comply with the requirements described in

ii. Treatment.

A. Contributions to GRS.

During the Fiscal Years from the Effective Date through Fiscal Year 2023, annual contributions shall be made to fund benefits accrued under the Prior GRS Pension Plan only in the amounts identified on Exhibit II.B.3.r.ii.A. The exclusive sources for such contributions shall be certain pension related, administrative and restructuring payments received from the DWSD equal to approximately $428.5 million, a portion of the State Contribution, certain DIA Proceeds, a portion of the Assigned UTGO Bond Tax Proceeds and certain revenues from City departments, the Detroit Public Library and the Detroit Regional Convention Facility Authority. After June 30, 2023, (1) certain DIA Proceeds shall be contributed to the GRS and (2) the City will contribute such additional funds as are necessary to pay each Holder of a GRS Pension Claim his or her GRS Adjusted Pension Amount in accordance with and as modified by the terms and conditions contained in the Plan and the Prior GRS Pension Plan, in accordance with the State Contribution Agreement and exhibits thereto. Nothing in this Plan prevents any non-City third party from making additional contributions to or for the benefit of GRS if such party chooses to do so.

B. Investment Return Assumption.

During the period that ends on June 30, 2023, the board of trustees of the GRS, or the trustees of any successor trust or pension plan, shall adopt and maintain an investment return assumption and discount rate for purposes of determining the assets and liabilities of the GRS that shall be 6.75%.

C. Modification of Benefits for GRS Participants.

During the period that ends no earlier than June 30, 2023, the pension benefits payable to each Holder of a GRS Pension Claim shall be equal to the GRS Adjusted Pension Amount for such Holder, provided that such GRS Adjusted Pension Amount shall be (1) automatically reduced by the DIA Proceeds Default Amount in the event of a DIA Proceeds Payment Default and (2) increased by any GRS Restoration Payment.

Restoration of all or a portion of the modified pension benefits will be provided in accordance with the methodology set forth on Exhibit II.B.3.r.ii.C. For purposes of calculating a GRS Restoration Payment, market value of assets shall not include any City contributions through June 30, 2023, other than those listed on Exhibit II.B.3.r.ii.A or any State contributions if the GRS trustees fail to comply with the requirements described in the State Contribution Agreement. In the event that the Foundations and DIA Corp. accelerate all or a portion of their funding commitments described in Section IV.E.1 prior to June 30, 2023, the incremental portion of the acceleration will not count towards pension restoration.

D. Annuity Savings Fund Recoupment.

1. ASF Current Participants.

On or as soon as reasonably practicable after the Effective Date, the Annuity Savings Fund Excess Amount will be calculated for each ASF Current Participant and will be deducted from such participant's Annuity Savings Fund account and be used to fund the accrued pension benefits of all GRS participants; provided, however, that in no event shall the amount deducted from an ASF Current Participant's Annuity Savings Fund account exceed the ASF Recoupment Cap. In the event that the amount credited to an ASF Current Participant's Annuity Savings Fund account as of the Effective Date is less than such participant's Annuity Savings Fund Excess Amount, the ASF Current Participant will be treated as an ASF Distribution Recipient to the extent of the shortfall.

EXHIBIT 5

2:14-cv-14920-BAF-RSW Doc # 37 Filed 03/13/15 Pg 50 of 50 Pg ID 72119

Detroit's blight-free vision curtailed as money dries up

By John Gallagher, Detroit Free Press 7:19 p.m. EST February 26, 2015

Mayor Mike Duggan said the city has enough money through federal funding to run its blight removal demolition program through August.

(Photo: RYAN GARZA, Detroit Free Press)

Hopes that the city could rid itself of blight in as little as five years have faded as abundant savings from the bankruptcy reorganization did not materialize and federal funds for the job are now drying up in a tight city budget.

Mayor Mike Duggan delivered the sobering reality check on Thursday during the Detroit Regional Chamber's Detroit Policy Conference, saying the city will run out of blight removal cash by late summer. He and his aides are working on a "new strategy" in partnership with federal authorities, he said, but nothing is locked in yet.

"Right now I don't know where that money comes from after August," he told reporters during the Detroit Regional Chamber's Detroit Policy Conference. Without new blight funds, he said, "The pipeline of these demolitions is otherwise going to run dry."

The city is taking down more blighted structures than it has in years, but the cash crunch could significantly sidetrack one of the main goals of the city's reorganization less than three months out of bankruptcy.

Technically, of course, the city does have roughly $1 billion to spend each year, but other tasks, such as hiring more police officers and firefighters and getting streetlights repaired and replaced, are also vying for attention in the city's budget and perhaps crowding out blight removal efforts.

Duggan's comments reflect a much-changed perspective from a year ago when Kevyn Orr, then the city's emergency manager, offered a preliminary reorganization plan last February that envisioned spending $520.3 million over the course of six years to clean up blight within the city. That amount of money would have allowed the city to increase the rate of residential demolitions from an average of a little more than 100 per week to as many as 400 to 450 per week, a pace that would rid Detroit of 40,000 to 60,000 eyesores in no more than five years.

That agressive timetable and vision faded quickly, even during the bankruptcy process. By the time the city was emerging from bankruptcy last November, a final summary of the city's plan did not even mention blight removal specifically but talked in general terms of improving city services.

"That's was version 1," Duggan said of Orr's first and most ambitious goal. "Version 8 didn't include that. There is no money unless the City of Detroit runs surpluses. There is no money."

Detroit demolished about 3,500 derelict structures last year using federal "Hardest Hit" neighborhood funds. Craig Fahle, director of public affairs for the Detroit Land Bank Authority, the entity involved in selecting structures for demolition, said there's enough money left from the federal funds to raze about 3,300 more houses through August. Adding in some money from a few miscellaneous funds, "I wouldn't be surprised if we got to about 4,000 total" by late summer, he said.

After that, though, the city will need a new source of cash. Without a healthy city surplus, Duggan said Thursday, the city will need to continue to rely on outside funding to pay for blight demolitions.

DETROIT FREE PRESS

Duggan addresses issues of jobs for Detroiters, future of public schools

DETROIT FREE PRESS

Detroit on the upswing, Detroit Chamber conference told

The issue of blight removal is critical because it has emerged as a key strategy in the city's efforts to improve its image in the eyes of the world. After decades of decline, Detroit now has tens of thousands of abandoned buildings, most of which will need to come down. Even if Detroit has used federal money to demolish about 4,000 structures, at least 90% of the task lies ahead.