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
	:	

CONSOLIDATED RESPONSE OF THE OFFICIAL COMMITTEE OF RETIREES IN OPPOSITION TO MOTIONS FOR STAY PENDING APPEAL OF ORDER OF CONFIRMATION OF THE CITY'S EIGHTH AMENDED PLAN OF ADJUSTMENT

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The Official Committee of Retirees (the "Committee") of the City of Detroit, Michigan (the "City") submits this Consolidated Response in Opposition (the "Response") to all motions to stay the Order approving the *Eighth Amended Plan for the Adjustment of Debts of the City of Detroit* [Dkt. 8045] (the "Plan"), including the *Second Amended Motion for Limited Stay Pending Appeal* filed by Jaime S. Fields on behalf of the Ochaleus appellants [Dkt. 8341] (the "Fields Motion") and *John P. Quinn's Motion for Partial Stay Pending Appeal* [Dkt. 8413] (the "Quinn Motion," collectively with all joinders thereto and the Fields Motion, the "Stay Motions"),[1] and respectfully states as follows:

PRELIMINARY STATEMENT

1. The sacrifices and settlements by retirees are at the center of this the largest municipal debt adjustment case in United States history. The retiree classes under the Plan comprised of classes 10 (PFRS Pension Claims), 11 (GRS Pension Claims) and 12 (OPEB) overwhelmingly favored implementation of the settlements embodied in the Plan. Notwithstanding, the settlements and the Plan that embodied them were attacked by certain other retirees who thought the sacrifices agreed to by retirees were either generally unfair to retirees or specifically unfair to them.

2. However, it was only after an exhaustive 24-day trial, in which the Court considered 2,327 exhibits and testimony from more than 40 witnesses offered by the City, the Committee and various other parties-in-interest, that this Court confirmed the Plan on November 7, 2014. In confirming the Plan, the Court found that the pension settlement agreed upon between the City and Class 10 and 11 pension creditors which contemplates a consensual, bilateral reduction in the City's future pension obligations was reasonable. Now, on the cusp of

[1] Several joinders to the Quinn Motion were filed on November 24, 2014. [Dkts. 8429, 8432, 8434, 8435, 8436, 8438, 8439, 8440, 8441, 8442, 8443, 8444, 8445, 8446, 8448, 8449, 8450, 8451, 8452, 8453, 8454]. One additional joinder was filed on November 25, 2014. [Dkt. 8464]. This Response opposes all joinders to the Quinn Motion.

the Plan's consummation and the closing of multiple financing arrangements that contribute (i) more than $600 million from third parties to fund retiree pension claims and (ii) more than $10 million from third parties to fund initial retiree healthcare costs, the appellants seek to rehash arguments considered (and rejected) at trial and to indefinitely delay, and perhaps scuttle, implementation of the Plan.

3. The Stay Motions are insufficient to justify the extraordinary stay relief that they seek. Any harm incurred by appellants absent a stay (if any) pales in comparison to the substantial harm faced by retirees and City residents associated with the delay of crucial financing arrangements that are necessary to fund pension and immediate healthcare costs. The weight of these interests alone justifies denial of the Stay Motions.

ARGUMENT

I. THE STANDARD FOR STAY PENDING APPEAL

4. The standard to obtain a stay pending appeal under Fed. R. Bankr. P. 8005 is amply set forth in this Court's January 29, 2014 order:

> In determining whether a stay pending appeal should be granted pursuant to Fed. R. Bankr. P. 8005, a court considers the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction. *Mich. Coal. Of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). In determining whether to issue an injunction, a bankruptcy court must consider:
>
> > 1. Whether the movant has shown a strong or substantial likelihood of success of the merits;
> >
> > 2. Whether the movant has demonstrated irreparable injury;
> >
> > 3. Whether the issuance of an injunction would cause substantial harm to others; and
> >
> > 4. Whether the public interest is served by the issuance of an injunction.
>
> *Am. Imaging Serv., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.*), 963 F.2d 855, 858-59 (6th Cir. 1992) (citing *In re Delorean Motor Co.*, 755

> F.2d 1223, 1228 (6th Cir. 1985)). The moving party bears the burden of proving by a preponderance of the evidence that a stay should issue. "[A] court's decision to [grant or] deny a Rule 8005 stay is highly discretionary." *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997).

Order Denying Motion to Stay Pending Appeal [Dkt. 2594].

5. While the factors to be considered for a preliminary injunction and a stay pending appeal are the same, the Sixth Circuit has explained that a stay motion places a higher burden on the movant:

> [A] motion for a stay is generally made after the [trial] court has considered fully the merits of the underlying action and issued judgment, usually following completion of discovery. As a result a movant seeking a stay pending review on the merits of a [trial] court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Presumably, there is a reduced probability of error, at least with respect to a court's findings of fact, because the [trial] court had the benefit of a complete record that can be reviewed by this court when considering the motion for a stay.

Griepentrog, 945 F.2d at 153-54; *see City of Akron v. Akron Thermal, L.P. (In re Akron Thermal, L.P.)*, 414 B.R. 193, 203-07 (N.D. Ohio 2009) (denying stay as to matters that were previously decided and ruled upon by the Bankruptcy Court).

6. This burden is particularly onerous for a stay of plan confirmation, which often, as is the case here, involves reconsideration of factual determinations that are subject to limited appellate review and significant harm to creditors by delaying payment. *See In re Pub. Serv. Co. of N.H.*, 116 B.R. 347, 349-50 (Bankr. D.N.H. 1990) (finding that factual issues at confirmation are subject to a "clearly erroneous" standard of review and that "the delay caused to creditors receiving their payments is . . . a significant harm warranting denial of a stay."); *In re Calpine Corp.*, No. 05-60200, 2008 Bankr. LEXIS 217, at *18-20 (Bankr. S.D.N.Y. Jan. 24, 2008) (denying stay of confirmation order where objecting parties simply "rehash[ed] the same

arguments" that the court already rejected). Here, the Stay Motions fail to satisfy the appellants' heavy burden to warrant stay of plan confirmation and therefore should be denied.

II. STAY OF CONFIRMATION THREATENS SUBSTANTIAL HARM TO RETIREES

7. A stay of confirmation, if granted, would jeopardize and unnecessarily delay external financing arrangements that are essential to retiree healthcare and pension recoveries. *See Pub. Serv. Co. of N.H.*, 116 B.R. at 350 ("[D]elay caused to creditors receiving their payments is … a significant harm warranting denial of a stay.").

A. Risk of Harm to Retiree Healthcare

8. Stay of confirmation would jeopardize the payment and administration of healthcare benefits for thousands of retirees on or after January 1, 2015. Pursuant to the Retiree Healthcare Settlement Agreement (as defined and approved in the Plan), the City agreed to maintain a mutually agreed upon level of healthcare benefits for retirees through December 31, 2014. (Plan Ex. I.A.298.) The Plan contemplates that a Detroit General VEBA (as defined in the Plan) and the Detroit Police and Fire VEBA (as defined in the Plan, collectively with the Detroit General VEBA, the "VEBAs") will assume the City's responsibility to fund and design retiree healthcare benefits. (*See* Plan at 43.) Pursuant to the Plan, the VEBAs can only be established after the "Effective Date", (*id.* at 42-43), which can only occur if "[t]he Confirmation Order is not stayed ***in any respect***." *Id.* at 54 (emphasis added).

9. The mechanics to establish and implement the VEBAs prior to December 31, 2014 are set forth in that certain letter agreement, dated November 4, 2014, between the City and the Committee (the "VEBA Letter").[2] It provides that "[t]he City will be responsible for all retiree health benefit costs incurred up to and including December 31, 2014" and "[t]he VEBAs,

[2] The VEBA Letter was filed with this Court on November 12, 2014. [Dkt. 8183] and is attached hereto as Exhibit 1.

acting through their respective trustees, will be responsible for design and funding of retiree health coverage benefits on and after January 1, 2015." (*Id.*) To fund the first six months of retiree healthcare benefits, the VEBAs are expected to receive six third-party grants in an approximate aggregate amount of $10.63 million. (*Id.*) Four of the grants totaling roughly $10.28 million are payable on the Effective Date. An additional two grants, each in the amount of $175,000, are payable by December 31, 2014 and January 31, 2015, respectively. (*Id.*) Moreover, the City has agreed to "provide one-year of third party benefits administration services to each VEBA" provided that "the trustees of each requesting VEBA agree [to the VEBA Letter] by December 31, 2014." (*Id.*) Absent formation of the VEBAs prior to December 31, 2014, neither the Plan nor the VEBA Letter sets forth a procedure for retirees to receive the $175,000 grant due December 31, 2014 or administer healthcare benefits after January 1, 2015.[3] In sum, stay of confirmation would threaten the continuity of retiree healthcare benefits, jeopardize $350,000 in third-party healthcare funding (due on or before January 31, 2015), and unnecessarily delay more than $10 million of additional third-party healthcare funding for retirees. A further effect in 2015 caused by delay of the "Effective Date" beyond December 31, 2014 is a loss of $1.6 million each month in interest that would have been received by the VEBAs on account of the New B Notes (as defined in the Plan). Taken together, delay of the "Effective Date" beyond December 31, 2014 could result in the loss of retiree healthcare during that delay as well as for several months beyond the delay to the "Effective Date".

[3] Absent an "Effective Date" due to the grant of an indefinite stay, it is possible that the City may argue that it is no longer responsible for funding healthcare after December 31, 2014. The Committee reserves its rights to compel the City to administer retiree healthcare benefits in the event that the VEBAs have not been established on or before December 31, 2014.

B. Risk of Harm to Retiree Pension Funding

10. Stay of confirmation similarly jeopardizes the availability of third-party funding for the benefit of retiree pensions. Pursuant to the Plan, the State of Michigan (the "State") will contribute the net present value of $350 million (at a 6.75% discount rate) payable over 20 years to the GRS and PFRS in order to fund future pension claims. (Plan at 55.) However, the State's contribution is expressly conditioned upon, *inter alia*, the Confirmation Order becoming a "Final Order" (*i.e.* an order that has not been stayed) by December 31, 2014. (*Id.* at 16, 56.) By preventing the Confirmation Order from becoming a "Final Order," a stay prevents satisfaction of a condition precedent to the State Contribution Agreement (as defined in the Plan) and thereby jeopardizes the availability of state funding to retirees. Moreover, "the agreement of the State to provide the State Contribution" is an express condition of the DIA Settlement (as defined in the Plan), by which third-parties will contribute more than $450 million payable over 20 years for the benefit of pension creditors. (*Id.* at 57). Therefore, by preventing the Confirmation Order from becoming a "Final Order" by December 31, 2014, any stay jeopardizes more than $600 million of funding for retiree pension claims.

11. Accordingly, the potential loss and/or delay of essential Plan financing constitutes significant harm warranting denial of the Stay Motions.

III. THE STAY MOTIONS FAIL TO SET FORTH COUNTERBALANCING HARM TO THE APPELLANTS ABSENT A STAY

12. The Stay Motions cite the risk of "mootness," but fail to explain how each of the respective appeals might become moot. (Fields Mot. at 10; Quinn Mot. at 5). Even assuming that the Stay Motions persuasively described how their respective appeals are at risk of becoming moot, such harm is not sufficient to warrant a stay pending appeal where, as here, such harm is

otherwise outweighed by the other stay factors. (Fields Mot. at 10) (citing *Weingarten Nostat, Inc. v. Serv. Merchandise Co., Inc.*, 396 F.3d 737, 741 (6th Cir. 2005)).[4]

IV. THE STAY MOTIONS FAIL TO DEMONSTRATE THAT THE COURT ABUSED ITS DISCRETION IN APPROVING THE PENSION SETTLEMENT

13. To the extent that the appellants intend to contest the pension settlement as unreasonable, the Stay Motions fail to detail how the settlement is subject to a likelihood of reversal on appeal. To approve a bankruptcy settlement as reasonable, a "bankruptcy judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision." *Hindelang v. Mid-State Aftermarket Body Parts Inc. (In re MQVP, Inc.),* 477 Fed. App'x. 310, 312 (6th Cir. Apr. 13, 2012). The Sixth Circuit has "distilled four factors for bankruptcy courts [to evaluate whether a settlement is just and equitable]: (a) the probability of success the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the interest of creditors." *Id.* Approval of a bankruptcy settlement pursuant to Fed. R. Bankr. P. 9019 is only reviewed for abuse of discretion. *Id.*

14. At the conclusion of a 24-day trial and consideration of testimony from more than 40 witnesses, the Court concluded that it would be a "vast understatement to say that the pension settlement is reasonable. It borders on the miraculous." (Confirmation Opinion at 7.) To support its approval, the Court found that (i) pension classes overwhelmingly voted to accept the Plan by 82% in class 10 (PFRS) and 73% in class 11 (GRS), (ii) pension creditors had only a 25% chance of success to appeal the eligibility decision, and (iii) even if pension creditors were successful on appeal, the City would still have no ability to pay their claim. (*Id.* at 6-7.) The

[4] In *Weingarten*, the Sixth Circuit affirmed a district court decision that denied stay of a § 363 sale even though the district court determined that appeal would be potentially moot absent a stay. *Id.*

Stay Motions fail to articulate why any of the Court's rulings in support of the pension settlement were an abuse of discretion as would be necessary to justify reversal of the pension settlement on appeal. For this additional reason, the Stay Motions should be denied.

CONCLUSION

For the reasons set forth herein, the Committee requests that Stay Motion be denied.

Dated: November 26, 2014
New York, New York

Respectfully submitted,

By: */s/ Claude D.Montgomery*

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Attorneys for the Official Committee of Retirees of the City of Detroit, Michigan

CERTIFICATE OF SERVICE

I, Claude D. Montgomery, hereby certify that the foregoing document was filed and served via the Court's electronic case filing and noticing system on November 26, 2014.

By: */s/ Claude D. Montgomery*
Claude D. Montgomery

Exhibit 1

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Private & Confidential

November 4, 2014

Mr. Kevyn D. Orr
Emergency Manager of the City of Detroit
Coleman A. Young Municipal Center
2 Woodward Avenue, Suite 1126
Detroit, Michigan 48226

Re: In re City of Detroit, Michigan, Chapter 9 Case No. 13-53846

Dear Mr. Orr:

This letter constitutes and memorializes the agreement (the "Agreement") reached by and between the City of Detroit (the "City") and the Official Committee of Retirees of the City of Detroit, Michigan (the "Committee"), as the representative of the Class 12 OPEB participants in mediation on September 15, 2014, as clarified and affirmed by and before Mediators Judge Gerald Rosen and Eugene Driker (collectively the "Mediators") on September 19, 2014. Based on the Agreement as outlined herein, the Committee hereby acknowledges that it consents to modification of the Sixth Amended Plan for Adjustment of Debts for the City of Detroit, as incorporated into the Seventh Amended Plan for Adjustment of Debts for the City of Detroit (as it has been or may be subsequently modified or amended, the "POA") and also to the settlement of the claim of Syncora Guarantee, Inc. and Syncora Capital Assurance, Inc. (collectively, "Syncora") pursuant to the Plan Support and Settlement Agreement dated September 10, 2014 (hereafter the "Committee Consent"). This letter supersedes the letter from Evan Miller to Claude Montgomery dated September 13, 2014. Any capitalized terms not defined in this letter have the meaning ascribed in the POA or as commonly referred to in the Bankruptcy Case. If there is any conflict between the provisions of this letter and the POA, the terms of the POA shall govern.

1. On the Effective Date and pursuant to the terms of the POA, the City will establish a Detroit General Retirement System VEBA trust and the Detroit Police and Fire VEBA trust (the "VEBAs"), which VEBAs will be responsible for designing and funding health benefits for retirees of the City who retired on or before December 31, 2014. The City will be responsible for all retiree health benefit costs incurred up to and including December 31, 2014, regardless of the date those claims, invoices or bills are received by the City and without recourse to the VEBAs. The VEBAs, acting through their respective trustees, will be

responsible for design and funding of retiree health coverage benefits on and after January 1, 2015.

2. The City and Committee project that the estimated cost for the VEBAs to provide benefits to retirees for the six-month period from January 1, 2015 to and including June 30, 2015 (the "Initial Six Month Period) – to the extent that the benefit design under the VEBAs for 2015 is the same as the 2014 Retiree Healthcare Program -- is approximately $16,800,000 (the "VEBA Starting Costs"). Such sum is without regard to third party benefit administration expenses and is comprised of:

    a. Approximately $16,200,000 in estimated healthcare related payments to retirees and eligible beneficiaries, an amount based upon the City's representation that it has expended approximately $2,700,000 in monthly costs to provide certain retiree health care coverage or payments over the last several months under the terms of a written settlement between the City, Committee and other parties (the "2014 Retiree Healthcare Program"); and

    b. Approximately $600,000 in estimated fees and costs for VEBA financial advisors, attorneys, insurance, and custodians, and trustee fees.

3. The City and Committee estimated that, in the absence of efforts between the parties to make additional amounts available to the VEBAs beyond the interest payments on the New B Notes, there would be a deficiency between the cash amounts available to the VEBAs during the first six months of 2015 and the VEBA Starting Costs (the "Projected Deficiency").

4. To eliminate the Projected Deficiency and to obtain the Committee's Consent, the City and Committee agreed to work in good faith under the supervision and assistance of the Mediators to resolve the Projected Deficiency and operational issues. As a consequence of the mediation efforts, the following amounts and sources of funds will be available to cover the VEBA Starting Costs, which amounts total approximately $18,000,000:

    a. $5,500,000 from the Employee Benefit Plan of the City of Detroit (the "Detroit Benefits Board"), in the form of a grant, payable on the Effective Date of the POA;
    b. $1,500,000 from and approved by the Detroit Benefits Board on September 17, 2014, in the form of an additional grant, payable on the Effective Date of the POA;
    c. $1,000,000 from and approved by the Detroit Benefits Board on September 17, 2014, in the form of a two-year loan bearing interest at 4% upon maturity (unless principal and interest is forgiven), which the Committee will seek to have paid on the Effective Date;
    d. $2,782,857, which reflects the present value of $5,000,000 pledged from the Michigan Building and Trades Council in the form of a grant, which amount has

already been wired to the Community Foundation of Southeastern Michigan and is payable on the Effective Date;

e. $500,000 from the Ralph C. Wilson Foundation in the form of a grant payable on the Effective Date;
f. $175,000 from the Skillman Foundation in the form of a grant payable by December 31, 2014;
g. An additional $175,000 from the Skillman Foundation in the form of a separate grant that will be payable by January 31, 2015;
h. Approximately $6,000,000 in respect of interest payments on the initial $450 million B Notes, which interest is due and payable on April 1, 2015; and
i. Assuming an Effective Date on or about December 1, 2014, approximately $367,000 in interest on the approximately $11,020,000 payable to the VEBAs on account of the Syncora Settlement (defined as the Class 12 share of "Syncora Excess New B Notes" under the POA). Such amount will represent both the interest due on such Syncora Excess New B Notes payable on April 1, 2015, as well as an April 2015 prepayment of the October 2015 interest on such notes (and as a consequence of the prepayment of October 2015 interest in April 2015, no interest would be paid on such notes in October 2015).

5. The provisions of this paragraph 5 are effective if and only if the trustees of the requesting VEBA agree by December 31, 2014 to be bound by this letter. The City agrees to provide one-year of third party benefits administration services to each VEBA (with administrators selected by the City), including the costs of any benefit communications, starting January 1, 2015 and ending December 31, 2015. No later than March 30, 2016, the City shall bill the VEBAs for the actual cost of the third party administration and communication services performed on behalf of the VEBAs during 2015, with such reimbursement to be allocated between the two VEBAs based on their proportion of total covered lives at the start of 2015, which amounts will be paid by the VEBAs by June 30, 2016; provided however, in no event shall the City seek or obtain reimbursement for such third party benefit administration services and communications (i) in an amount that exceeds $450,000, (ii) if the Effective Date does not occur before January 1, 2015, and (iii) under any circumstances by setoff against interest payable on any B Notes or Excess B Notes previously transferred to the VEBAs. In addition to the limitations of (i)-(iii) above, there shall be no reimbursement of the $450,000 to the extent that the VEBA Starting Costs are in excess of $18,500,000, and the City shall request that the Retirement Systems continue to deduct premiums for the three Medicare Advantage Plan options from applicable retirees' pension checks and to remit such deductions to the relevant coverage provider.

6. Upon written request of the applicable VEBA, which shall be made no later than August 1, 2015, the City further agrees to provide such requesting VEBA with an additional one-year

extension of third party benefits administration services (with administrators selected by the City), including the costs of any benefit communications, starting January 1, 2016 and ending December 31, 2016, provided that the requesting VEBA shall reimburse all such costs and fees to the City on a monthly basis, with payment to be made within 10 business days following the requesting VEBA's receipt of a remittance of such fees and costs.

7. The City also agrees to (or acknowledges, as the case may be) the following:

   a. On the Effective Date, New B Notes in the face amount of approximately $11,020,000 will be distributed to the VEBAs as a result of the Syncora Settlement;
   b. If acceptable to the majority of voting VEBA trustees-to-be for its applicable VEBA, amend such VEBA so that voting VEBA trustees are to receive a maximum of $1,000 per month, but only if they attend four or more meetings in a given month. To the extent that a voting VEBA trustee attends less than four meetings in a month, she or he will receive compensation of $250 per meeting;
   c. It acknowledges David Heiman's July 18, 2014 letter to Messrs. Montgomery and Dubrow (the "July 18 Letter"), and the consent rights in such July 18 Letter shall not be diminished or enhanced by anything in this letter. Toward that end, the City further acknowledges that it is bound to comply with Bankruptcy Code section 1127(d) and Federal Bankruptcy Rule section 3019(a) in connection with any action that adversely affects holders of Classes 10, 11 and 12;
   d. Consult with the VEBA trustees concerning operational issues that may arise during the Initial Sixth Month Period; and
   e. Follow Section II.B.3.p.i.A of the Eighth Amended Plan of Adjustment.

8. Each of the undersigned is authorized to sign this letter on behalf of the Retiree Committee (in the case of Ms. Renshaw) and the City (in the case of Mr. Orr).

Sincerely,

Terri L. Renshaw
Chair, Official Committee of Retirees

Agreed:

Kevyn D. Orr
Emergency Manager of the City of Detroit

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