UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re CITY OF DETROIT, MICHIGAN, Debtor.	Chapter 9 Case No. 13-53846 Hon. Steven W. Rhodes
THE OFFICIAL COMMITTEE OF RETIREES OF THE CITY OF DETROIT, MICHIGAN, et al., Plaintiffs, v. THE CITY OF DETROIT, MICHIGAN, et al., Defendants.	Chapter 9 Adv. Pro. No. 14-04015 Hon. Steven W. Rhodes

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

Plaintiffs,[1] by and through their respective undersigned attorneys, hereby respond to Defendants' Motion to Dismiss Complaint [Docket No. 7] and state as follows:

Introduction

The Motion to Dismiss seeks this Court to summarily deny the Constitutionally protected rights of more than 23,500 retirees and their families under the guise that Bankruptcy Code section 904 prevents this or any court oversight of the City's actions. The City's position—

[1] The Plaintiffs are the Official Committee of Retirees of the City of Detroit, Michigan, the Retired Detroit Police and Fire Fighters Association, the Detroit Retired City Employees Association, and AFSCME Sub-Chapter 98, City of Detroit Retirees.

which if allowed to stand would result in an 83% reduction in current healthcare spending—is unsupported by law and violates both the requirements and practicalities of this case.

First, Plaintiffs' action does not implicate Bankruptcy Code section 904 as it merely seeks to prohibit the City from taking unconstitutional action. Importantly, Plaintiffs are not seeking an order mandating existing benefits to continue; rather, they seek to enjoin the imposition of the unconstitutional level of cuts sought by this preconfirmation City plan. Indeed, the enormity of the harm to retirees is such that a subsequent money judgment or distribution under a plan of adjustment cannot cure the damage. This is because the City's obligations are not simply monetary, rather, it must provide a level of coverage as well as administer healthcare programs. *See* Complaint ¶¶ 39, 66; *see also Cole v. ArvinMeritor, Inc.*, 516 F.Supp.2d 850 (E.D. Mich. 2005) ("Alteration and elimination of retiree health benefits causes retirees and dependents health risk, uncertainty, anxiety, financial hardship, and other irreparable harm."). As a result, Plaintiffs' request is readily distinguishable from the matter of *Stockton* on which the City seeks to rely.

Second, the City's unilateral action constitutes an improper attempt to implement a *sub rosa* plan of adjustment. The City has estimated that other post-employment benefits ("OPEB"), which largely consist of healthcare, equals approximately $5.6 billion; thus making OPEB the largest claim in the case. If permitted to stand, the City's change would have the immediate effect of altering the rights of more than 23,500 creditors *in advance* of a confirmed plan. Such action is improper, but it also violates the spirit of the plan negotiation currently in mediation at this time.[2]

[2] The City's repeated assertion that it cannot afford more OPEB than what it plans to implement on March 1, 2014 is not supported by the facts. A similar assertion was raised by the City in response to the first injunctive action filed by Plaintiffs in October, which was withdrawn without prejudice after the City extended existing healthcare benefits

Third, because Defendants' proposed unilateral action violates the Constitutional rights of retirees and constitute more than a mere breach of contract, Plaintiffs have properly pleaded a claim for which relief may be granted under the Contracts Clause of the Federal and State Constitutions and for violation of their Due Process rights.

Finally, even if the this Court were to determine that it did not have jurisdiction to enter the requested relief due to section 904, neither that provision nor any other prevents the Court from granting immediate relief from the automatic stay so that retirees may pursue such relief in another Court.

OPPOSITION

A. Section 904 Is Not Implicated And Does Not Bar The Relief Plaintiffs Seek.

1. The City Cannot Violate Retirees' Constitutional Rights Under the Guise of "Governmental Power."

Section 904 of the Bankruptcy Code was enacted to preserve the Constitutional integrity of chapter 9 of the Bankruptcy Code. Section 904 is a jurisdictional statute enacted to ensure that chapter 9 does not violate the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people." U.S. Const. amend. X. The purpose of section 904 "is to prevent the statute or the court from interfering with the power constitutionally reserved to the State by the Tenth Amendment." H.R. Rep. 94-686, at 557 (1975). However, section 904 was not created and cannot serve as an iron curtain behind which the City may act as a municipal outlaw by taking unfettered and unconstitutional actions in derogation of the lives and interests of retirees.

As Plaintiffs' Complaint and Preliminary-Injunction Motion make clear, the Retiree Health Plan for March 1, 2014 through December 31, 2014 (the "March 1, 2014 Plan") is an

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for two months. The current plan is exactly the same as the original plan, other than a slight (1%) increase, which only benefits duty disabled retirees.

affront to the retirees' rights under both the United States and Michigan Constitutions. In fact, the City does not appear to contest the level of cuts or the harm that will befall the retirees. Plaintiffs' Constitutional claims are not "reserved to the States" and this Court's adjudication of Plaintiffs' claims does not "interfer[e] with the power constitutionally reserved to the State by the Tenth Amendment."

Section 904 was initially enacted in response *Ashton v. Cameron County Water Imp. Dist. No. 1*, 298 U.S. 513 (1936), which considered that chapter 9 "might materially restrict [state] control over its fiscal affairs" and so enacted section 904 to "expressly avoid[] any restriction on the powers of States or their arms of government *in the exercise of their sovereign rights and duties*. H.R. Rep. 94-686, at 9-10 (emphasis added) (quoting, *inter alia*, *U.S. v. Bekins*, 304 U.S. 27, 4-50 (1938). There is no state sovereign right to acquiesce in a constitutional violation.

What the City calls a "partial reduction[] in retiree health benefits" actually conceals a gutting of retiree health obligations—reducing current obligations by a massive 83%—which amounts to an unconstitutional repudiation of its obligations to retirees. (Mot. to Dismiss at 1.) It simply is not the case that section 904 requires this Court to sit idly by while Defendants trample on the Constitutional rights of the retirees, especially when violations of such rights are certain to have dire consequences for so many while alternative, less severe, and Constitutionally permissible reductions are available. Section 904, like any other state or federal statute, must yield to Constitutional mandates. *See, e.g.*, U.S. CONST. ART. VI, CL. 2. ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *In re Flynn*, 402 B.R. 437, n.11 ("regardless of what the Bankruptcy Rules allow, they may not be used to circumvent constitutional due process requirements."); *In re Bennett*, 466 B.R. 422, 426 (Bankr.

S.D. Ohio 2012) ("the United States Constitution, and in particular the due process requirement under the Fifth Amendment, trumps the Bankruptcy Code and Rules"); *see also In re Sanitary Imp. Dist. No. 7 of Lancaster Cty., Neb.*, 96 B.R. 966, 967 (Bankr. D. Neb. 1989) ("The debtor is vested with its property and is subject to state law concerning its distribution."). The Court is not only empowered to enter the requested relief, but under threat of a grave Constitutional violation, is obligated to do so. Section 904 was not meant to grant chapter 9 debtors unfettered power to take actions for which it would be held accountable outside of bankruptcy or to excuse compliance with state or federal Constitutions.

Moreover, Plaintiffs' claims do not interfere with the "governmental powers" of the City because such powers do not include Constitutional violations. 11 U.S.C. § 904(1). Not surprisingly, the City does not identify which of its "powers" Plaintiffs seek to inhibit (much less how Plaintiffs' relief will do so). The scant case law construing section 904(1) suggests that the subsection does not encompass every decision the City makes, rather, it prohibits actions that undermine a municipality's form of government, *i.e.,* the electoral process, actions taken by elected officials, services and benefits provided to citizens, etc. *See, e.g., In re City of Stockton, Cal.*, 499 B.R. 802 (Bankr. E.D. Cal. 2013) (finding that "[p]roposing a local tax for voter approval is an exercise of the political or governmental powers"); *In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 649 (Bankr. E.D. Mich. 1994) ("chapter 9 was created to give courts only enough jurisdiction to provide meaningful assistance to municipalities that require it, not to address the policy matters that such municipalities control") (emphasis added). In essence, section 904(1) contemplates an "interference" with a debtor's ability, as an elected government, to execute its duties and carry out the will of the electorate. No such intrusion is at issue here.

Indeed, the bankruptcy court granted injunctive relief under similar circumstances in *In re County of Orange*, 179 B.R. 177, 184 (Bankr. C.D. Cal. 1995), where the court enjoined a chapter 9 debtor from treating employees as permanently laid off where the debtor suspended certain provisions of its employee agreements without first satisfying state law requirements for modifying its obligations in a fiscal emergency. The court stated that "any unilateral action by a municipality to impair a contract with its employees must satisfy these factors [set forth in *Sonoma County Organization of Employees v. County of Sonomoa*, 23 Cal.3d 296 (1979)], if not as a legal matter, certainly from an equitable standpoint." *Id.* Although the employees were treated as "temporarily laid off," the court entered its order prohibiting the debtor from permanently laying off the employees to require compliance with state law notwithstanding the indirect economic effects of that decision.

In any event, neither the Complaint nor the Preliminary-Injunction Motion implicate or affect the City's ability to provide services (*i.e.* fire, police, sewerage, etc.) to its residents. Instead, Plaintiffs seek narrowly-tailored relief, asking only that the City honor its Constitutional obligation with respect to retiree healthcare benefits as well as its agreement to mediate the dispute between the parties over such benefits. Indeed, the relief sought is tailored to respect the City's authority over its property and affairs—Plaintiffs do not purport to dictate what healthcare benefits are appropriate, Plaintiffs simply argue that Defendants' proposed cuts are so harsh as to violate retirees' Constitutional rights.

The City's argument that an injunction would "usurp [its] ability to control" the services it provides thus "interfering with its ability to provide for the health and safety of its residents" strains credulity. (Mot. to Dismiss 8). The City does not (and indeed, cannot) ground any such statement in fact. Plaintiffs, by their Preliminary-Injunction Motion, do not ask the Court to find

that the City cannot ever change the level of benefits provided to retirees. Rather, Plaintiffs ask only that the City work with retirees in good faith with respect to implementing changes to retiree healthcare benefits in order to honor their representations to the Court and the Constitutional rights of retirees. Nothing in the Preliminary-Injunction Motion implicates the "governmental powers" of the City much less its ability to continue to provide the current level of services to its citizens.

Simply put, section 904(1) of the Bankruptcy Code is not a tool for enabling the City to obtain relief that is otherwise forbidden under state and federal law. The statute was never meant to silence the Court in the face of Constitutional violations that will surely have life or death consequences for those affected.

2. Plaintiffs Neither Ask This Court to Interfere With The "Day To Day Operations" Of The City Nor With The City's "Property Or Revenues."

Defendants similarly mischaracterize the relief sought by Plaintiffs by arguing that Plaintiffs "invite the Court to manage a city's finances by injunction" and to "involve itself in the day to day operations of the municipality." (Mot. to Dismiss 4-5) (quoting 6 COLLIER ON BANKRUPTCY P 904.01 (Alan N. Resnick & Henry J. Sommer, 16th ed. 2013)). The March 1, 2014 Plan is not the product of the City's "day-to-day operations." Rather, it is a singular, unprecedented act that seeks to unilaterally rescind retiree health benefits in direct contravention of the state and federal Constitutions. This is not the daily business of government. Moreover, granting Plaintiffs' requested relief will neither impact the City's financial viability during the short period before its chapter 9 plan is proposed and/or confirmed, *see In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 649 (Bankr. E.D. Mich. 1994) ("it is crucial that chapter 9 relief allow these entities enough flexibility to remain viable."), nor interfere with the City's "property or revenues." 11 U.S.C. § 904(2).

3. *Stockton* Is Neither Binding On This Court Nor Persuasive As It Is Distinguishable From The Facts At Bar.

In support of its position, the Defendants attempt to rely on a case out of the Eastern District of California, *Association of Retired Employees of Stockton v. City of Stockton, Cal. (In re City of Stockton) (Stockton)*, 478 B.R. 8 (Bankr. E.D. Cal. 2012). This case, however, is factually and legally distinct from the instant matter.

Unlike the retirees in *Stockton*, Plaintiffs are not asking "this court to order the City to keep paying for their health benefits during this chapter 9 case." 478 B.R. at 13. Rather, Plaintiffs seek entry of an order that effectively (i) facilitates continued mediation of retiree healthcare benefit issues, consistent with the terms of the Mediation Order [Main Case Docket No. 322], and (ii) directs the parties to address any reductions in the appropriate context, the City's proposed plan of adjustment. Thus, Plaintiffs are not asking this Court to direct or compel the City to spend (or not spend) its money at any particular level.

Further, the *Stockton* retirees sought injunctive relief at the outset of the case, just over a week after the debtor filed its chapter 9 petition. At the time of the *Stockton* court's decision, a plan of adjustment was months, if not years, away. Indeed, the complaint in *Stockton* was filed fifteen months before the debtor would propose a chapter 9 plan. Such is not the case here.

In this case, we are just weeks away from a proposed plan of adjustment. By unilaterally implementing the March 1, 2014 Plan, the City effectively seeks to fix one of its largest—if not the largest—unsecured claims in the case, without Court approval, creditor negotiation, or input from affected parties. Such an action could drastically affect recoveries for other creditors, dilute certain creditors' voting power, influence plan treatment and classification, and ultimately, determine whether the City can cram down its chapter 9 plan of adjustment. Accordingly, it is in

the best interests of the City, the retirees, and all other interested parties to address healthcare benefits issues in the forthcoming plan of adjustment.

In further contrast to *Stockton*, the City here submitted to the Court's authority with respect to mediation of healthcare benefit-related issues, which includes the relief sought through the March 1, 2014 Plan. *See* Mediation Agreement dated November 1, 2013 (attached as Exhibit A to Plaintiffs' Emergency Motion, etc. [Docket No. 5] (the "Mediation Agreement"). Thus, unlike *Stockton*, the City is bound to mediate in good faith and consented to the Court's jurisdiction with respect to mediation. Accordingly, *Stockton* does not determine the outcome here. Plaintiffs merely ask the Court to send the City back to the bargaining table, prevent the City from violating the Michigan and United States Constitutions, and find the March 1, 2014 Plan and matters related to a reduction in retiree healthcare benefits should be dealt with in the appropriate context, during plan negotiations, all of which is permissible under section 904. It should also be noted that *Stockton*, which arises out of a bankruptcy court in California is also contradicted by the *Orange County* decision. *See In re County of Orange*, 179 B.R. 177 (Bankr. C.D. Cal. 1995) (enjoining municipal debtor from making unilateral changes to collective bargaining agreements).

4. Section 904 Does Not Obviate The Requirements Of Chapter 9 And The Constitution During The Interim Period Between Eligibility And Plan Confirmation.

Section 904 does not prevent this Court from enforcing the other requirements of chapter 9 and of plan confirmation; section 904 yields to the requirements of confirming a chapter 9 plan of adjustment. *See In re Castle Pines N. Met. Dist.*, 129 B.R. 233, 235 (Bankr. D. Colo. 1991). In *Castle Pines*, at issue was approval of costs and fees of the creditors' committee counsel. The chapter 9 debtor asserted "that § 904(2), supra, prohibits the Court from forcing the District to pay the attorney's fee for the Creditors' Committee." *Id.* The court rejected this argument,

stating that "if the District wants to have a plan confirmed under § 943 it must pay all administrative claims . . . . [T]he District voluntarily sought the jurisdiction of this court, and . . . if the District wants to invoke that [chapter 9] power, it must pay the price of admission, and that price, at least in part, is to pay the reasonable fees for the Official Creditor's Committee counsel. If it does not wish to pay these administrative costs it can dismiss the case at any time." *Id.*[3]

So too here, section 904 does not shield a municipality from acting in an unconstitutional manner by reducing retiree health benefits by nearly 83%.

B. The City's Unilateral Action Constitutes An Improper Attempt To Implement A *Sub Rosa* Plan.

The March 1, 2014 Plan represents a monumental reduction in the City's obligations, and by far, the most extraordinary relief sought in this chapter 9 case to date. Defendants' actions, if permitted, will change the complexion of this case for all interested parties, whether by exacerbating creditor losses or amplifying the social and economic fallout certain to follow. Accordingly, reduction of the healthcare benefits proposed in the March 1, 2014 Plan is precisely the sort of issue that should be addressed in the plan of adjustment process. To hold otherwise would be to approve a *sub rosa* plan of adjustment.

Bankruptcy courts have consistently disapproved of transactions, agreements, and other actions taken by debtors that skirt the requirements of the Bankruptcy Code and the goals of reorganization proceedings in an attempt to avoid the plan approval process. *See, e.g. Pension*

[3] In other words, *Castle Pines* holds that section 904 merely allows a chapter 9 debtor to delay payment of committee fees until plan confirmation, whereupon they must be paid as administrative expenses. Section 904 does not permit a chapter 9 debtor to avoid the requirements of § 943(b)(3) altogether that all administrative expenses must be paid, even those incurred during the pendency of the case. *See also In re City of Cent. Falls, R.I.*, 2011 WL 9933766 (Bankr. D. R.I. Nov. 2, 2011) (holding that standard of review for rejection of executory contracts in chapter 9 is the same as in other chapters notwithstanding sections 903 and 904; section 904 does not entitle "a municipal debtor to bankruptcy relief on standards less than or different from those the Bankruptcy Code establishes."). Section 943(b) requires that, in order to confirm a plan, "all amounts to be paid by the debtor . . . for services or expenses in the case or incident to the plan have been fully disclosed and are reasonable." 11 U.S.C. § 943(b)(3) (emphasis added).

Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 700 F.2d 935 (5th Cir. 1983) (finding that "[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets"); *State of Ohio Dep't of Taxation v. Swallen's, Inc. (In re Swallen's, Inc.)*, 269 B.R. 634, 638 (B.A.P. 6th Cir. 2001) (reversing the bankruptcy court's approval of pre-confirmation distributions without an approved plan, absent a showing of extraordinary circumstances).

Indeed, the City's extreme healthcare cuts are akin to a *de facto*, or "creeping" plan of adjustment. *See generally* Sloane, *The Sub Rosa Plan of Reorganization: Side-Stepping Creditor Protections in Chapter 11*, 16 Bankr. Dev. J. 37 (1999) ("Essentially, the concern regarding a plan sub rosa arises when a debtor in bankruptcy seeks to enter into a transaction outside of a plan of reorganization that could have a significant effect upon the bankruptcy case and the bankruptcy estate"). The City purportedly sought the protection of chapter 9 in large part to address its obligations to retirees, of which approximately $5.6 billion pertain to healthcare and other OPEB benefits. By slashing benefits pursuant to the March 1, 2014 Plan, the City will all but fix the amount of one of its largest—if not the largest—unsecured claims in the case, without court approval, creditor negotiation, or input from affected parties. This could drastically affect recoveries for other creditors, dilute certain creditors' voting power, influence plan treatment and classification, and ultimately, determine whether the City can cram down its chapter 9 plan of adjustment. Defendants' unilateral actions are a blatant attempt to silence creditor dissent and circumvent the plan process. Such actions should be scrutinized by the Court and interested parties during the plan-of-adjustment and confirmation processes.[4]

[4] Pursuant to the plan confirmation process, Plaintiffs and Defendants are currently mediating retiree benefit issues, and Defendants' action would violate the spirit of plan negotiation currently in place. To permit Defendants to

II. Plaintiffs State A Claim For Which Relief Can Be Granted

A. Plaintiffs Have Properly Pleaded A Contract Claim Under The Federal And State Constitutions.

The City argues that Emergency Manager Orr's decision to cancel retirees' OPEB benefits and replace them with far inferior benefits is not actionable under the federal and state Constitutions because it constitutes a mere "breach" of contract—but not an "impairment." The problem with this argument is that just two weeks ago, the Sixth Circuit Court of Appeals held the exact opposite: that city of Flint retirees were likely to succeed on the merits of constitutional impairment claims arising out of the cancellation and replacement of their OPEB benefits by an emergency manager appointed under color of Michigan's emergency manager act (the previous, but for purposes of this motion, substantively identical, act). *See Welch v. Brown*, No. 13-1476 (6th Cir., Jan. 3, 2014) ("the district court did not abuse its discretion in finding that this [constitutional] argument has a likelihood of success on the merits"). In *Welch*, the United States District Court for the Eastern District of Michigan granted an injunction against the Flint Emergency Manager's reduction of OPEB benefits, holding:

> The Court finds that the modifications imposed by Defendant Brown operate as a substantial impairment on the existing

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unilaterally reduce health benefits is to render the mediations useless and one-sided. Mediation serves no purpose if Defendants can impose whatever constitutionally-violative reductions they please. Moreover, section 904 does not prevent this Court from enforcing its own orders, such as the Mediation Order. Defendants consented to mediate retiree health benefit issues with Plaintiffs pursuant to the Mediation Agreement; through this process, Defendants consented to judicial intervention on retiree healthcare benefits by the judicial mediator as referred by Judge Rhodes. Chapter 9 courts have recognized that consent for section 904 purposes is often implied, for example by filing a 9019 motion to approve a settlement. *See In re City of Stockton, Cal*., 486 B.R. 194, 199 (Bankr. E.D. Cal. 2013) ("when a chapter 9 debtor files a Rule 9019 motion to have the court approve a compromise or settlement, the municipality "consents" for purposes of § 904 to judicial interference with the property or revenues of the debtor needed to accomplish the proposed transaction. 11 U.S.C. § 904."). Despite the Debtor's current protestations, it cannot withdraw its consent now, nor can it do so at least through the effective date of the Mediation Agreement, February 28, 2014. *Hamilton v. Try Us, LLC*, 491 B.R. 561, 566 (W.D. Mo. 2013) (finding that a trustee, who stood in the shoes of the debtor, was bound by the debtor's express consent to bankruptcy court's jurisdiction). To hold otherwise would violate the Mediation Order and the Mediation Agreement, defeat the purpose of mediation between the parties, and would violate the plain language of section 904. If this Court truly desires a consensual plan, mediation must be allowed to continue without the specter of Defendants' unilateral cuts, imposed with no judicial check.

> contracts that exist between those retirees who were provided lifetime health care benefits through CBAs.

Welch v. Brown, 935 F. Supp. 2d 875, 882 (E.D. Mich. 2013). The Sixth Circuit affirmed and explained that "for a substantial impairment to exist, there must be a contractual relationship and a change in law that substantially impairs that relationship." *Welch v. Brown*, No. 13-1476 at 11 (emphasis added). The change in law must come from a legislative act that has the effect of modifying or cancelling the contract rights of a private party, and must give a defense against a breach action to the breaching/impairing party. The Sixth Circuit further held that the emergency manager's cancellation and replacement of OPEB benefits is a "legislative" act. *Id.* at 7-8.

Thus, the key to the analysis is whether the state has taken a legislative act that takes away the contract rights of the private parties. *Id.* If such a legislative act has occurred, the statute would give a defense to any claim for breach. On the other hand, if a city employee, board or officer took action that damaged a private party's contract rights, no statute would give a defense to the action and an action for breach would lie. *Id.* at 8.

The cases cited by the City do not hold otherwise. In *Ramsey*, a local school board issued a policy by which it refused to pay for a teacher's sick leave that was authorized by her contract and by state law. The teacher had the right to sue the board for breach in refusing to pay, as no legislative statute or other act prohibited payment of the teacher or gave a defense to the board for its actions. *Ramsey v. Bd. of Educ. of Whitley County*, 844 F.2d 1268, 1272-73 (6th Cir. 1988). Similarly, in *Charlie's Towing*, a city purchasing department agent rejected a towing company's bid for a city contract, allegedly in violation of state law. The towing company had the right to sue for breach as no legislative statute gave a defense to the purchasing agent for his actions. *Charlie's Towing & Recovery, Inc. v. Jefferson Cnty.*, 183 F.3d 524, 527-28 (6th Cir.

1999). In *Baesler*, a city's mayor and personnel director failed to promote a city employee even though the employee claimed a right to the promotion. The employee had the right to sue the city, the mayor and the personnel director for breach of contract in failing to promote him. No statute gave a defense to the city employees for their failure to promote. *Charles v. Baesler*, 910 F.2d 1349, 1356 (6th Cir. 1990).

Moreover, as Plaintiff AFSCME notes in its Supplemental Memorandum Concerning The Lack Of Power On The Part Of The Emergency Manager To Submit Vested Health Insurance Benefit To The Court's Jurisdiction, at 2-3 [Docket No. 17], though retirees' OPEB rights often originate in collective bargaining agreements and other contracts and statutes, impairment of those rights is not a mere breach of contract.

B. Plaintiffs State A Claim For Violation Of Their Due Process Rights.

The City asks the Court to dismiss Plaintiffs' due process claims, arguing that it is "doubtful" Plaintiffs have a property interest in their OPEB benefits and, even if they do, the bankruptcy plan of adjustment confirmation process is the only process to which they are due. They are wrong on both points.

In support of their argument that Plaintiffs might not have a property interest in their OPEB benefits, the City cites three cases, none of which is controlling here. The first case, *Studier v. Michigan Public School Employees' Retirement Board*, 698 N.W.2d 350 (Mich. 2005), does not hold (or even imply) that contractually-provided OPEB benefits are not protected property interests. It deals only with statutorily-enacted benefits, and explains that, except in rare circumstances, statutes will not be read as creating contractual rights because a legislative body cannot foreclose future legislative bodies from changing or repealing laws. *Id.* at 361-64 Therefore, legislative acts should not be considered contractually binding on future bodies unless the contrary intent is clear. *Id.* The other two cases are from district courts in New York. The

first, *Lawrence v. Town of Irondequoit*, 246 F.Supp.2d 150 (E.D.N.Y. 2002), holds only that the language of a New York statute that protected "membership in any pension or retirement system of the state or of a civil division thereof" did not, on its face, convey rights to healthcare benefits. *Id.* at 170. It does not hold that OPEB benefits are not property interests. The second, *Bell v. Westmoreland Central School District*, No. 97-CV-1592, 1991 WL 33161 (N.D.N.Y. Mar. 11, 1991), involved a simple dispute over whether or not a given employee had accumulated sufficient service to qualify for retiree benefits—not whether a municipality could constitutionally gut retiree health benefits without due process. *See id.* at *1.

Other courts have expressly held that a contractual right to OPEB benefits does in fact confer a property interest that is protected by the due process clause. For example, the Sixth Circuit has held that "[a] contract, such as a collective bargaining agreement, may create a property interest." *Leary v. Daeschner*, 228 F.3d 729, 741 (6th Cir. 2000). In *Jackson v. Roslyn Board of Education*, 652 F.Supp.2d 332 (E.D.N.Y. 2009), another court found that collectively bargained medical benefits constitute a protected interest, using language that applies equally here:

> Given the costs associated with medical care and self-insurance, an individual can certainly be dependent on the health insurance provided by their employer. This dependence can be even more pronounced in the case of retired persons. Improper denial of all health insurance coverage can have nearly the same crippling effects as the denial of welfare or social security disability benefits.

652 F.Supp.2d at 343.

To establish that their procedural due process rights were violated when the contractual OPEB benefits were cancelled, the retirees must only identify: (a) a property interest, (b) a deprivation of that protected interest, and (c) the failure by the state to afford adequate procedural rights prior to deprivation of the property interest. *Women's Med. Prof'l Corp. v.*

Baird, 438 F.3d 595, 611 (6th Cir. 2006). All three elements are satisfied here. For the reasons explained above, the retirees' right to contractually-promised healthcare benefits is a protected property interest. The City is cancelling those benefits and replacing them with something far inferior.

Moreover, the City has provided no meaningful process whatsoever prior to the deprivation. To the contrary, the Emergency Manager Act purports to authorize the Emergency Manager to reject a collective bargaining agreement after no more than informally "meeting and conferring" with the union representative and deciding that negotiations would take too long. *See* M.C.L. § 141.1552(1)(k). As the Sixth Circuit has explained, however, "a predeprivation hearing of some sort is generally required to satisfy the dictates of due process." *Leary*, 228 F.3d at 742. The statutory scheme by which the City purports to have rescinded the healthcare benefits does not provide the retirees with any pre- or post-deprivation hearing, or any other procedures for review, except this informal "meet[] and confer[] with the appropriate bargaining representative." After the meet and confer, Mr. Orr has "sole discretion" to discontinue benefits if certain criteria are met. M.C.L. § 141.1552(1)(k).

Recognizing the inadequacy of pre-deprivation process here, the City argues that Plaintiffs will have all of the process they need by participating in the plan of adjustment confirmation process. But the City cannot remedy its failure to provide pre-deprivation process by forcing aggrieved parties to participate in other lawsuits to get that process. That would read out of existence any claim for violation of due process rights, as an aggrieved party can always sue to enforce its rights. The City was required to give process before denying Plaintiffs their property interests.

Moreover, a bankruptcy confirmation process is not an opportunity to be heard on the underlying merits of the deprivation or an opportunity to stop that deprivation. It is only an opportunity to object to the fairness of the plan of adjustment itself. If limited to participation in the confirmation process, the retirees would never have an opportunity to stop the termination of their benefits or state their argument, except as it relates to the fairness of their treatment under the plan itself. *Rodgers v. 36th Dist. Court*, 2013 WL 3357951, at *5 (6th Cir. July 3, 2013) ("If a public employee receives only 'an abbreviated pre-termination hearing, due process requires that a discharged employee's post-termination hearing be substantially more meaningful.'"). That is not enough.

III. EM Orr Is Not Immune From The Injunctive Powers Of This Court.

Mr. Orr is not immune from the injunctive powers of this Court either in his personal or official capacities.[5] A federal court may properly enjoin a public official from conduct that violates the Constitutional rights of another. *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 159-1160 (1908). Likewise, under Michigan law "[g]overnmental immunity is not available 'where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution.'" *Wendrow v. Mich. Dep't of Human Servs.*, 534 Fed. App'x 516, 525 (6th Cir. 2013) (quoting *Smith v. Dep't of Pub. Health*, 410 N.W.2d 749, 751 (Mich. 1987)). Here, no monetary damages are sought. Indeed, the only relief sought against the Defendants, including Mr. Orr, is merely an injunction to prevent the violation of retirees' Constitutional rights. As such, no immunity attaches to Mr. Orr to prevent this Court from exercising its injunctive powers.

[5] While Defendants move to dismiss all claims against Mr. Orr in his personal capacity, Defendants do not separately challenge the claims against Mr. Orr in his official capacity.

IV. In The Alternative, Relief From The Automatic Stay Is Appropriate For Another Court To Consider The Constitutional Issues.

If this Court views section 904 as preventing it from considering Plaintiff's Complaint or otherwise granting relief, Plaintiffs request relief from the stay to pursue this matter in the District Court or other appropriate forum, for the reasons stated in Plaintiffs Memorandum In Support Of [Preliminary-Injunction Motion] [Docket No. 4-4].[6]

As stated above, section 904 does not prevent this Court from hearing Plaintiffs' constitutional claims, *see Orange Cnty.*, 179 B.R. 177, but this Court could grant relief from stay to allow the District Court to hear Plaintiffs' constitutional claims, or withdraw the reference to the district court for cause.

This Court could grant relief from stay to proceed in state court, where section 904 undoubtedly does not apply.[7] *See In re Wiley*, 288 B.R. 818, 822 (B.A.P. 8th Cir. 2003) (granting relief from stay where bankruptcy court did not have jurisdiction over nondebtor codefendant). To the extent this Court reads section 904 as eliminating this Court's jurisdiction over Plaintiffs' claims in order to guard state sovereignty, such jurisdiction must necessarily lie with the state courts. "The mere filing of a petition in bankruptcy cannot, in and of itself, erase a plaintiff's claim, their opportunity to litigate, or the fact that a debtor may be liable to the plaintiff in some amount." *In re Bock Laundry Mach. Co.*, 37 B.R. 564, 567 (Bankr. N.D. Ohio 1984).

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[6] This request is made in an abundance of caution given that it is doubtful Plaintiffs' requested relief implicates the protections of the automatic stay under section 362(a), as modified by section 902(1) of the Bankruptcy Code.

[7] The *Stockton* court's denial of stay relief is inapposite for the reasons discussed above. The *Stockton* plaintiffs sought an order (i) validating their claim and (ii) compelling the debtor to pay the current level of benefits. *See* 478 B.R. at 25. Such relief is central to the "adjustment of the debtor-creditor relationship." *Id.* Here, however, Plaintiffs' requested relief neither concerns the nature or validity of the retirees' claim nor does it seek to prevent the City from reducing its healthcare benefit obligations. Instead, Plaintiffs ask only that the Court prevent a blatant Constitutional violation. Thus, unlike *Stockton*, Plaintiffs' request strikes at the core of state and federal Constitutional law, not the reorganization process.

Further, the balance of harms unquestionably favors granting stay relief. Absent the requested relief, the retirees will suffer more than mere financial hardship. Left with a drastically reduced income and benefit package and an ever-rising cost of living, the harm to retirees would be significant, many of whom will be forced to compromise, or outright abandon, life-sustaining care. Comparatively, no discernable harm will come to the City. If the Court lifts the stay, this litigation can proceed concurrently with the City's reorganization effort. Moreover, it is plainly in the public's interest that these issues—which will be litigated at some point, ideally through the plan process—be raised, examined, and ruled on as soon as possible. Accordingly, Plaintiffs submit that there is sufficient cause to lift the automatic stay. See 11 U.S.C. § 362(d)(1).

WHEREFORE, Plaintiffs respectfully request that this Court (i) deny Defendants' Motion to Dismiss, with prejudice, and (ii) issue the requested preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew E. Wilkins, hereby certify that the foregoing document was filed and served via the Court's electronic case filing and noticing system on January 21, 2013.

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