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
CITY OF DETROIT, MICHIGAN,	:	Chapter 9
Plaintiff,	:	Adversary Proceeding No. 14-04112
vs.	:	Hon. Steven W. Rhodes
DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, *et al.*,	:	
Defendants.	:	

CITY OF DETROIT'S MOTION TO DISMISS IN PART FGIC'S COUNTERCLAIMS

Plaintiff City of Detroit, by and through its undersigned counsel, hereby files this Motion to Dismiss, and requests, pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(c) and Federal Rule of Bankruptcy Procedure 7012(b), that this Court dismiss in full FGIC's Second through Sixth Counterclaims against it, as well as dismiss the First Counterclaim to the extent that that counterclaim asserts a claim for estoppel. In support of this Motion, the City respectfully refers the Court to the Memorandum in Support attached hereto as Exhibit 3.

Counsel for the City sought the concurrence in the relief requested herein from counsel for FGIC, but such concurrence was not obtained, necessitating the filing of this motion.

WHEREFORE, the City of Detroit respectfully requests that the Court grant its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b) and 12(c) and Fed. R. Bankr. P. 7012(b), and grant such other and further relief as the Court deems appropriate.

[signature page follows]

Dated: August 28, 2014

Respectfully submitted,

/s/ Deborah Kovsky-Apap
Robert S. Hertzberg (P30261)
Deborah Kovsky-Apap (P68258)
PEPPER HAMILTON LLP
4000 Town Center, Suite 1800
Southfield, MI 48075
Telephone: (248) 359-7300
Facsimile: (248) 359-7700
hertzbergr@pepperlaw.com
kovskyd@pepperlaw.com

Corinne Ball
JONES DAY
222 East 41st Street
New York, NY 10017
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
cball@jonesday.com

Thomas F. Cullen, Jr. (DC 224733)
Gregory M. Shumaker (DC 416537)
Geoffrey S. Stewart (DC 287979)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
tfcullen@jonesday.com
gshumaker@jonesday.com
gstewart@jonesday.com

ATTORNEYS FOR THE CITY OF DETROIT

EXHIBIT 1

Proposed Order

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
CITY OF DETROIT, MICHIGAN,	Chapter 9
Plaintiff,	Adversary Proceeding No. 14-04112
vs.	Hon. Steven W. Rhodes
DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, *et al.*,	
Defendants.	

ORDER DISMISSING IN PART, WITH PREJUDICE, FGIC'S COUNTERCLAIMS

This matter having come before the Court on the motion (the "Motion")[1] of Plaintiff/Counter-Defendant City of Detroit, and the Court being otherwise advised in the premises;

[1] Capitalized terms not otherwise defined herein shall have the meanings set forth in the Motion.

IT IS HEREBY ORDERED that the Second through Sixth Counterclaims filed by FGIC in the above-captioned adversary proceeding are DISMISSED WITH PREJUDICE; and

IT IS FURTHER ORDERED that the portion of the First Counterclaim filed by FGIC in the above-captioned adversary proceeding that asserts a claim for estoppel is DISMISSED WITH PREJUDICE.

EXHIBIT 2

Notice

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
CITY OF DETROIT, MICHIGAN,	Chapter 9
Plaintiff,	Adversary Proceeding No. 14-04112
vs.	Hon. Steven W. Rhodes
DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, *et al.*,	
Defendants.	

NOTICE OF MOTION AND OPPORTUNITY TO RESPOND

PLEASE TAKE NOTICE that on August 28, 2014, Plaintiff/Counter-Defendant City of Detroit filed its *Motion to Dismiss in Part FGIC's Counterclaims* (the "**Motion**") in the United States Bankruptcy Court for the Eastern District of Michigan (the "**Bankruptcy Court**") seeking entry of an order dismissing in part the Counterclaims filed in the above-captioned adversary proceeding.

PLEASE TAKE FURTHER NOTICE that <u>your rights may be affected</u> by the relief sought in the Motion. You should read these papers carefully and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

PLEASE TAKE FURTHER NOTICE that if you do not want the Bankruptcy Court to grant the City's Motion, or you want the Bankruptcy Court to consider your views on the Motion, on or before **September 11**[1] you or your attorney must:

1. File a written objection or response to the Motion explaining your position with the Bankruptcy Court electronically through the Bankruptcy Court's electronic case filing system in accordance with the Local Rules of the Bankruptcy Court or by mailing any objection or response to:[2]

United States Bankruptcy Court
Theodore Levin Courthouse
231 West Lafayette Street
Detroit, MI 48226

You must also serve a copy of any objection or response upon:

Jones Day
51 Louisiana Ave. NW
Washington, D.C. 20001-2113
Attention: Geoffrey Stewart

-and-

[1] *See* Case Management Order, Docket No. 131.

[2] A response must comply with F. R. Civ. P. 8(b), (c) and (e).

Pepper Hamilton LLP
Suite 1800, 4000 Town Center
Southfield, Michigan 48075
Attn: Robert Hertzberg and Deborah Kovsky-Apap

2. If an objection or response is timely filed and served, the clerk will schedule a hearing on the Motion and you will be served with a notice of the date, time and location of the hearing.

PLEASE TAKE FURTHER NOTICE that if you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the Motion and may enter an order granting such relief.

[signature page follows]

Dated: August 28, 2014

Respectfully submitted,

/s/ Deborah Kovsky-Apap
Robert S. Hertzberg (P30261)
Deborah Kovsky-Apap (P68258)
PEPPER HAMILTON LLP
4000 Town Center, Suite 1800
Southfield, MI 48075
Telephone: (248) 359-7300
Facsimile: (248) 359-7700
hertzbergr@pepperlaw.com
kovskyd@pepperlaw.com

Corinne Ball
JONES DAY
222 East 41st Street
New York, NY 10017
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
cball@jonesday.com

Thomas F. Cullen, Jr. (DC 224733)
Gregory M. Shumaker (DC 416537)
Geoffrey S. Stewart (DC 287979)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
tfcullen@jonesday.com
gshumaker@jonesday.com
gstewart@jonesday.com

ATTORNEYS FOR THE CITY OF DETROIT

EXHIBIT 3

Brief

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
CITY OF DETROIT, MICHIGAN,	Chapter 9
Plaintiff,	Adversary Proceeding No. 14-04112
vs.	Hon. Steven W. Rhodes
DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, *et al.*,	
Defendants.	

CITY OF DETROIT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS IN PART FGIC'S COUNTERCLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c), made applicable here by Bankruptcy Rule 7012(b), plaintiff the City of Detroit moves to dismiss the First Counterclaim asserted by counter-plaintiff Financial Guaranty Insurance Company ("FGIC") to the extent that such counterclaim asserts a claim against the City for estoppel,[1] and to dismiss in full FGIC's Second through Sixth Counterclaims. These Counterclaims constitute new and untimely claims against the City, well after the bar date, and should be dismissed for that reason alone.

Even more fundamentally, the Counterclaims must be dismissed because the Service Contracts are illegal, and FGIC cannot recover amounts transferred pursuant to illegal contracts at law or in equity. The City must point out the almost absurd posture of this matter: In order for FGIC to maintain its non-contractual Counterclaims at all, the Court must first determine that FGIC participated in an

---

[1] The City does not move to dismiss the First Counterclaim to the extent that it seeks declaratory judgment that the Service Contracts at issue here are valid and enforceable, since that Counterclaim, at bottom, simply is the mirror image of the City's own claims. *See* Counterclaims of Defendant Financial Guaranty Insurance Company, ¶ 119 ("FGIC's Counterclaim"). However, the City denies all material allegations of the First Counterclaim.

Rather than repeat the factual background of the case, the City respectfully refers the Court to the detailed facts set forth in the City's Complaint, the transactional documents attached to the Complaint, and FGIC's Counterclaim. *See Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 192 (2d Cir. 2006) (when ruling on a Rule 12(b)(6) motion to dismiss, the court may consider the "facts stated in the complaint, documents attached to the complaint as exhibits and documents incorporated by reference in the complaint") (internal quotation marks omitted).

illegal scheme, and then award relief to FGIC for acting illegally. This turns the concept of equity on its head.

Moreover, even assuming that every allegation in FGIC's Counterclaim is true, there are no legally operative facts on which its claims can survive. There are only two factual issues relevant to determining whether the COPs transaction was illegal: (1) how much debt did the City have, relative to its legal limit; and (2) what was the structure of the COPs transaction? The former was publicly disclosed in the City's CAFR, and the latter in the offering circulars and City ordinances. In short, no facts were hidden, and as a result it should have been absolutely clear to anyone who looked at the structure of the transaction and reviewed the applicable law that the deal was nothing more than a sham designed to circumvent the City's debt limit. Notably, FGIC does not allege any misrepresentations of *fact* by the City; rather, its Second, Third and Fifth Counterclaims are premised on the City's alleged misrepresentations of *law*. But since the law is equally available to everyone, such allegations cannot form the basis for valid claims against the City.

I. ARGUMENT

A. The Counterclaims Must Be Dismissed Because the Trusts Cannot Recover Under an Illegal Contract at Law or in Equity

1. The City Is Entitled to Judgment on the Pleadings that the Service Contracts Are Illegal and Void

Under Fed. R. Civ. P. 12(c), a party is entitled to judgment on the pleadings when, even after taking as true "all well-pleaded material allegations of the pleadings of the opposing party . . . the moving party is nevertheless clearly entitled to judgment." *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012) (citation omitted). The relevant facts regarding the COPs transactions are well-known and largely undisputed; they are set forth in the City's enacting ordinance and transactional documents relied upon by the City and FGIC in their respective pleadings. *See Finisar Corp. v. Cheetah Omni*, *LLC*, 2012 U.S. Dist. LEXIS 185232 (E.D. Mich. Dec. 10, 2012) (stating that "when determining whether a plaintiff is entitled to a Judgment on the Pleadings, such a judgment may be based on admissions by the Defendant under Fed. R. Civ. P. 8(b)").

As set forth in detail in the City's Complaint, the City's authority to issue debt is strictly prescribed by Michigan law. In particular, § 4a of the Home Rule City Act ("HRCA"), MCL § 117.4a, sets a ceiling on the amount of net indebtedness the City may incur at the greater of: (1) ten percent of the assessed value of all the real and personal property in the city; or (2) fifteen percent of the

assessed value of all the real and personal property in the city if that portion of the total amount of indebtedness incurred which exceeded ten percent was or had been used solely for the construction or renovation of hospital facilities. It is undisputed that the City had only $660 million remaining under its debt limit as of May 2, 2005. *See* 2005 Offering Circular, Complaint Ex. A.

Moreover, under Michigan law, the City may only incur indebtedness if it is specifically authorized to do so by state law. *See* Mich. Const., art. VII, § 21 ("The legislature shall provide by general laws for the incorporation of cities and villages. Such laws shall . . . restrict the powers of cities and villages to borrow money and contract debts."). The Michigan Revised Municipal Finance Act ("Act 34"), MCL § 141.2101 *et seq.*, provides this authorization and sets the conditions under which municipalities are permitted to incur debt. It is also undisputed that the COPs were not issued in accordance with the requirements of Act 34, including, among other things, the requirement that the State Treasury Department qualify or approve any municipal borrowing. *See* MCL §§ 141.2303(2), 141.2303(3); 2005 Offering Circular, at 5, Complaint Ex. A.

By 2005, the City already was in serious financial straits. Among other problems, it had fallen behind in making its contributions to its two employee retirement systems, the Detroit General Retirement System ("GRS") and the Detroit Police and Fire Retirement System ("PFRS"). According to the City's 2005

Comprehensive Annual Financial Report ("CAFR"), the PFRS had unfunded accrued actuarial liabilities ("UAAL") of $783 million and the GRS had UAAL of $914 million, for a total of almost $1.70 billion, at the end of the 2004 fiscal year. Due to the debt limit imposed by HRCA § 4a, however, the City could not legally issue debt in an amount sufficient to fund its UAAL shortfall.

The City, its advisors, and representatives of investment banks began casting about for ways of circumventing the HRCA's debt ceiling. In the end, they concluded that they could evade the law by structuring a transaction in which the City could raise money without calling it "debt." Relying upon Michigan cases that had held that a municipality's contractual obligations to pay for future services was not indebtedness, they structured a transaction that, at least superficially, was supposed to look like a contract for future services. The City did so by (a) creating two entities called "Service Corporations," (b) having the Service Corporations create a trust to sell certificates of participation ("COPs") to investors, (c) requiring the Service Corporations and the trust to remit the proceeds of the COPs sale to the Retirement Systems, (d) arranging to have the Service Corporations pay the trust the monies required to service the interest upon and retire the principal of the COPs, and (e) agreeing, pursuant to "Service Contracts," to pay the Service Corporations the monies they would need to satisfy their obligations to the trust.

See 2005 Offering Circular, Complaint Ex. A, at 1. The City did this twice, once in 2005 and again in 2006.

But the COPs transactions were an obvious sham. The *sine qua non* of a future services contract is that the contracting party, in truth, actually provides services in the future. This is critical, because under a true future services contract, no payment obligation arises until the services are rendered. Only in that circumstance are the payments by the City , not just in form but also in substance, payments of current expenses rather than satisfaction of pre-existing indebtedness. This is demonstrated by the very cases the parties to the 2005 and 2006 COPs transactions said they relied upon. In *Walinske v. Detroit-Wayne Joint Bldg. Auth.*, 39 N.W.2d 73, 77 (Mich. 1949), for example, the City could not finance the construction of new city offices, so it incorporated a municipal building authority to which it transferred the land on which the offices were to be built. The building authority then issued bonds of its own, constructed the building, and leased it back to the City for a period of thirty years. 39 N.W.2d at 77. Each lease payment entitled the City to ongoing access to the offices. In *Drain Commissioner of Oakland County v. City of Royal Oak*, 10 N.W.2d 435 (Mich. 1943), the city received ongoing waste disposal services in exchange for the payments it made. In *Ludington Water-Supply Co. v. City of Ludington*, 78 N.W. 558 (Mich. 1899), the contract counterparty similarly provided ongoing services of supplying water.

It is not seriously disputed that this critical component is missing from the COPs transaction. In 2005, the Service Corporations did nothing more than sign a Service Contract with the City under which they were to receive a stream of payments; form Funding Trusts to issue the COPs; assign the stream of payments under the Service Contracts to the Funding Trusts; receive the proceeds of the COPs sale; and remit those proceeds to the respective Retirement Systems. The 2006 transaction was virtually identical, except that the proceeds were instead used to refund certain of the 2005 COPs. In each case, the "service" provided by the Service Corporations was a one-time event.

The COPs transactions resulted in a one-time infusion of $1.4 billion to the Retirement Systems, with certain of the 2005 COPs replaced in 2006. Since the time of the transactions, until June 2013, the City has made payments of interest and principal to the Funding Trusts pursuant to the Service Contracts; however, the Service Corporations have provided no services to the City and, in fact, have done nothing at all. This was by intentional design. In the 2005 COPs transaction, for example, the Service Corporations signed their Service Contracts with the City on May 25, 2005. Their main obligation was the single duty to take the money they received from the Funding Trusts (the "Stated Funding Amount") and pay it over to the Retirement Systems. *See, e.g.,* GRS 2005 Service Contract General Terms, § 4.01, Complaint Ex. C.

In theory, the Service Corporations also were obligated to handle the ministerial task of receiving periodic payments from the City to service the principal and interest on the COPs and pass those funds along to the Funding Trusts. However, on June 2, 2005, the Service Corporations conveyed their rights to receive these payments to the Funding Trusts, who thereafter were paid directly by the City. *See* 2005 Trust Agreement, Complaint Ex. D. Thus, neither Service Corporation ever did anything, except provide, for a few days in May 2005, the *present* service of helping to close the deal.[2] The Service Corporations admitted as much in their amended answer to the City's complaint: "The Service Corporations further admit that the sole ongoing function of the Service Corporations disappeared almost as soon as they were created." Docket No. 148, ¶ 15.

Neither the Service Contracts nor any other transactional document reveals that either Service Corporation was to provide any ongoing *future* services to the City. In fact, the Offering Circulars – which described the COPs deals to potential investors, and of which FGIC was certainly aware – openly admitted that the "Service Corporations are not expected to have a significant active role" following the closing of the COPs transactions. *See* 2005 Offering Circular at 5; 2006 Offering Circular at 6. Nor, for that matter, would the Service Corporations

[2] The 2006 COPs transaction was identical in all material respects other than the use of the proceeds. *See* 2006 Offering Circular, Complaint Ex. J, at 1-2.

be rendering any "*services*." The Underwriting Agreement for the 2005 COPs offering all but concedes this essential point. It points out that the City will have to handle various administrative tasks itself on behalf of the Service Corporations and the Trusts "because neither Service Corporation has or will have any staff and the Funding Trust will have no staff." Docket No. 10, Ex. 1, at 2. This, of course, highlights the absurdity of the COPs transactions: since the Service Corporations had no staff, it would be the City – and not the Service Corporations – that would be rendering any services and, strangely, it would be rendering these services to itself.

The City obtained a discrete, present service from the Service Corporations in each of 2005 and 2006. Although the City may continue to experience the benefit of funding its UAAL with the proceeds of the COPs transaction, the receipt of a future benefit from a past transaction cannot transform that funding mechanism from a borrowing of money into a contract for future services. Indeed, it will be true with any debt offering that the benefits of the one-time infusion of cash may be experienced for years into the future, while the borrower must make periodic payments into the future for the right to receive the cash up-front. The unconditional and unsubordinated obligation to repay an amount received is the hallmark of true indebtedness. *Dorsey v. United States*, 311 F. Supp. 625, 629 (S.D. Fla. 1969); *see also LTV Steel Co. v. United States*, 174

F.3d 1359, 1362 (Fed. Cir. 1999) (stating that a "repayment obligation . . . is the hallmark of debt").

Because the Service Contracts were not structured to provide the City with future services, they fail to meet the fundamental requirement of future services contracts. Instead, the obligations they imposed were those of indebtedness, in violation of Michigan law.[3]

2. As Illegal Contracts, the Service Contracts Are Void and Cannot Be Enforced

Courts in Michigan and elsewhere have long refused to enforce or grant affirmative relief under illegal contracts.

> It is well settled that the law will not aid either party to an illegal agreement. It leaves the parties where it finds them. Neither a court of law or equity will aid the one in enforcing it, or give damages for the breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back.

Benson v. Bawden, 149 Mich. 584, 587 (Mich. 1907); *American Trust Co. v. Michigan Trust Co.*, 248 N.W. 829, 830 (Mich. 1933) ("The general rule of law is,

[3] The City has alleged, and believes it is true, that the Service Corporations are mere shells and alter egos of the City itself. The Court need not decide that issue, however, in order to grant judgment in the City's favor. The dispositive fact is that the Service Contracts did not obligate the Service Corporations to provide future services in the years in which the City was to make scheduled payments thereunder. Thus, they do not fall within the court-created exception to the definition of indebtedness. The result would be the same even if the counterparty under the Service Contracts were a genuine third party.

that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." (quoting *Miller v. Ammon*, 145 U.S. 421, 426 (U.S. 1892)).

The fundamental principle set forth in *Benson*, *American Trust* and numerous similar cases continue to guide Michigan courts. *See, e.g. Kukla v. Perry*, 105 N.W.2d 176, 183 (Mich. 1960) (stating that "where an illegal contract is involved, the court will not enforce it or grant relief thereunder"); *see also Mino v. Clio Sch. Dist*., 255 Mich. App. 60, 71 (Mich. Ct. App. 2003) (citing *American Trust* and finding that plaintiffs could not maintain an action for breach of contract where the contract clause at issue violated a Michigan statute); *Shapiro v. Steinberg*, 176 Mich. App. 683, 687 (Mich. Ct. App. 1989) ("It is well established that the courts of this state will not enforce, either in law or in equity, a contract which violates a statute or which is contrary to public policy.").

Moreover, this principle has been applied expressly in the context of illegally-issued municipal debt. The leading Michigan case is *McCurdy v. Shiawasee County*, 118 N.W. 625 (1908). For over 20 years, Shiawasee County had occasionally borrowed money to pay ordinary expenses. In accordance with this well-known common practice, plaintiff loaned the county $10,000 (more than $270,000 in today's dollars), evidenced by two notes. The Michigan Supreme Court ruled that, notwithstanding two decades of practice and the good faith of the

parties, the county had no authority to incur the debt, and therefore the notes were void. *Id.* at 629 (citing a number of cases holding that "there could be no liability against a municipality upon contracts not made in conformity with the statutes").

As demonstrated above, the Service Contracts created indebtedness of the City which it had no legal authorization to incur. Thus, the Service Contracts are unenforceable under Michigan law.

3. The Counterclaims Must Be Dismissed Because FGIC Cannot Use Alternative Theories to Receive an Illegal Recovery

FGIC has asserted a host of alternative, non-contract theories under which, it argues, it is entitled to recover. However, it is well-established under Michigan law – particularly in the context of illegally-issued public debt – that a creditor cannot recover in equity what would be illegal for the municipality to pay him under contract. In the allocation of risk between lender and municipal borrower, the law protects the public and essentially imposes strict liability on the lender.

In *McCurdy*, the court found not only that the notes were void as illegal, but that the plaintiff was not even entitled to a return of his principal under any equitable theory. The Michigan Supreme Court explained that this "is the only rule which can be relied on to prevent fraud and collusion." 118 N.W. at 629. The court reasoned that "if a township can be held on implied contract, or estopped by

the acts of its officers, when there is no valid contract, it would enable these persons to disregard the law entirely, and collude with their friends to do indirectly what, if directly done, would be a plain illegality." *Id.* (citations omitted).

On the lack of an equitable remedy for holders of illegally-issued debt, the United States Supreme Court's decision in *City of Litchfield v. Ballou*, 114 U.S. 190 (1885) is particularly instructive because it is so closely on point. That case, which was relied upon by the Michigan Supreme Court in *Newberry v. Nine Mile Halfway Drain Dist.*, 30 N.W.2d 430 (1948), dealt with an Illinois constitutional provision limiting the indebtedness of a municipal corporation. The bonds at issue were void because they exceeded the constitutional debt limit. *Litchfield*, 114 U.S. at 191-92. The plaintiff bondholder, apparently conceding that he could not, through a legal action for breach of contract, recover the money he had lent the city of Litchfield, instead alleged fraudulent inducement and sought to recover "ex aequo et bono." *Id.* The court below ruled in his favor, but on appeal, the Supreme Court reversed and remanded with instructions to dismiss his suit. The Supreme Court explained that the plaintiff could not circumvent the problem of suing on an illegal contract by bringing a claim in equity:

> [T]here is no more reason for a recovery on the implied contract to repay the money, than on the express contract found in the bonds. The language of the Constitution is that no city, &c., "shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per

> centum on the value of its taxable property." It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any purpose. . . .
>
> If this prohibition is worth anything it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law.

Id. at 192-93.

The result is a kind of strict liability, in which a lender or insurer assumes all of the risk if it turns out that the municipality was not legally permitted to incur the debt. Although strict adherence to the rule against imposing *any* liability on a municipality for an illegal contract might seem harsh in some instances, Michigan courts have recognized that it serves an important public interest:

> In cases where equitable reasons are urged for the purpose of placing liability upon a municipality, consideration of the rights and interests of those most seriously interested must not be lost sight of. ***The taxpayer is entitled to the protection of all constitutional and statutory restrictions***. In the aggregate he is the public for whose benefit the municipality exists, and which bears all the burdens put upon it, but which is not consulted when such burdens, as in this case, are assumed. . . .
>
> If this court should undertake to say that this indebtedness, admittedly illegal, must be paid by this county, it will practically declare the restrictions above mentioned to be inoperative, and subject the treasuries of all the municipalities of this State to the rapacity of

> designing and dishonest officials, leaving no protection whatever against recklessness, extravagance, crime, and bankruptcy. Such holding would be contrary to the spirit of previous decisions of this court, and against public policy.

McCurdy, 154 Mich. at 561-63 (emphasis added).

Some twenty years after *McCurdy*, the Michigan Supreme Court again stressed the importance to the public interest of strict adherence to limitations on a city's ability to incur obligations. In *Stratton v. City of Detroit*, 246 Mich. 139 (Mich. 1929), the City council had appropriated $700,000 for the construction of a tuberculosis sanitarium and contracted with architects to draw up the plans. The architects were to receive fees calculated as a percentage of the total building cost. *Id.* at 141. The architects instead prepared plans and specifications that were used in erecting the sanitarium at a cost of $1.7 million, and sought commissions based on the actual cost of the building. *Id.* at 142-43.

The City's charter prohibited the City from entering into a contract for public works that would obligate it for more than the amount appropriated by the City council for the project. *Id.* at 142. The plaintiff architects sought equitable relief, arguing that because the City knowingly accepted the benefit of plaintiffs' services, it was liable to pay for the results, notwithstanding the limitations of the City's charter. *Id.* at 146. The Michigan Supreme Court disagreed. "To accept this proposition is to eliminate from the city charter the express limitation upon the

power to bind it by contracts of this character. Neither the city officials nor the courts have the right or power to do this." *Id.* Furthermore, "not having the power to make an express contract, [the City of Detroit] could not become liable on an implied contract on the theory of ratification or estoppel." *Id.* (citations omitted).

The court recognized that "[i]t may seem hard to hold that the city can have the benefit of plaintiffs' services and not be bound to pay therefor." *Id.* at 147. But, the court held, such outcome was "an unavoidable consequence to those who attempt to contract with municipalities in total disregard of the limitations placed upon their powers, and which have been found ***necessary to safeguard the rights of their citizens***." *Id.* (emphasis added).

The same result was reached in a number of subsequent cases:

- In *Hanslovsky v. Leland Twp.*, 281 Mich. 652 (Mich. 1937), the plaintiff held two promissory notes signed by the clerk and treasurer of a township. A jury found that the plaintiff had no right to recover from the township because neither the clerk nor the treasurer had authority to bind the township, but the trial judge decided that the township should return the money on equitable grounds. The Michigan Supreme Court reversed, noting that "[t]ownship officers have no power or authority to bind the township generally. They may borrow money only when expressly authorized to do so. To hold the defendant liable in this case would be to disregard all the limitations upon the power and authority of the township officers prescribed by law to bind the township." *Id.* at 656 (citing *McCurdy* and *Stratton*).
- In *Newberry v. Nine Mile Halfway Drain Dist.*, 30 N.W.2d 430 (1948), the Michigan Supreme Court summarized several decisions involving bonds that, without valid basis, had been issued to finance drain and sewer projects. The court emphasized that the bondholders could not seek any recovery even though the bonds had been

invalidated. It also refused to impose a constructive trust, whether based on fraud, "unjust enrichment, the right of restitution, restitution, or on the basis of good conscience and equity." *Id*. at 436.

- In *People v. Doyle and Associates, Inc.*, 132 N.W.2d 99 (1965), the Michigan Supreme Court invalidated a lease-back agreement because the county lacked authority to incur such indebtedness. "This being so," the court explained, "Doyle may not claim compensation under it, nor, under the settled law of this State, may Doyle make claim against the county in *quantum meruit* for the facility it erected upon the leased ground." *Id.*

To hold the City liable for illegally-incurred debt under any theory, whether sounding in contract, tort or equity, would strip away the protections and safeguards to which its citizens are entitled and would do violence to public policy. This is equally true of FGIC's claims premised on the City's alleged misrepresentations. Were it otherwise, all that would be needed to completely vitiate debt limits would be for cash-strapped municipalities to offer assurances that they are legally permitted to borrow, and for lenders and insurers to claim reliance on those assurances. Instead, the law recognizes that a form of strict liability is needed to protect the public fisc.

The COPs and related swaps transactions have already contributed to the City's need for bankruptcy protection. Requiring the City to continue paying the illegal debt would leave the people of Detroit further exposed to "the rapacity of designing and dishonest officials," *McCurdy*, 118 N.W. at 629, such as the

mayor who championed the COPs deals and is now serving a record prison sentence for his financial crimes.

Thus, the Counterclaim, which seeks to hold the City liable for illegal debt under alternative theories of fraud, misrepresentation, estoppel, unjust enrichment and mistake, must be dismissed because FGIC cannot evade the consequences of an illegal contract by re-framing its contract claims as claims in tort or equity.

B. The Second, Third and Fifth Counterclaims Additionally Must Be Dismissed Because the FGIC Has Alleged No Misrepresentation of Fact

The claims set forth in the Second, Third and Fifth Counterclaims – that the City made material misrepresentations on which FGIC justifiably relied to its detriment – must be dismissed for at least two reasons. First, FGIC has failed to identify a single misrepresentation of *fact* on which it relied. Second, FGIC has failed to allege any facts that could give rise to a plausible inference that its alleged reliance on the City's representations as to the state of the law was justifiable.

1. Fraud and Misrepresentation Claims Cannot Be Based Upon Statements of Legal Opinion

Claims for fraudulent inducement and misrepresentation both require, as a threshold matter, that the defendant actually made a false representation. But not all representations qualify. Although the distinction seems to escape FGIC, there is a fundamental difference between representations of *facts* and

representations of the *law.* Michigan law requires FGIC to allege fraudulent misrepresentations that "are statements of past or existing fact." *Tocco v. Richman Greer P.A.*, 912 F. Supp. 2d 494, 516 (E.D. Mich. 2012) (quoting *Cooper v. Auto Club Ins. Ass'n*, 751 N.W.2d 443, 452 (Mich. 2000)). "The general rule is that ***fraud cannot be based upon a misrepresentation of law***." *DIRECTV, Inc. v. Keehn*, 2003 U.S. Dist. LEXIS 19679, at *16 (W.D. Mich. Oct. 20, 2003) (quoting *Rosenberg v. Cyrowski*, 198 N.W. 905, 906 (Mich. 1924)) (emphasis added); *see also Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004) ("[A]s a general rule, . . . fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law.") (quoting *Am. Jur. 2d Fraud & Deceit* § 97 (2001)).

Here, all of the misrepresentations that FGIC alleges in its Counterclaim consist of legal opinions – some of which are not even legal opinions of the City's counsel, but rather opinions of counsel to UBS, one of the underwriters of the COPs transaction. By way of example:

- The City's outside counsel, Lewis & Munday, issued legal opinions on June 2, 2005, concluding that each 2005 Service Contract was duly authorized and executed, valid, binding and enforceable; that no enactment of state legislation was required; and that the City's obligations under the Service Contracts did not constitute indebtedness under Michigan law. (¶¶ 45-46)
- The City's corporation counsel issued a legal opinion on June 2, 2005, concluding that the 2005 Service Contracts were duly authorized and

executed, valid and binding; that the transaction did not conflict with any existing law; and that no other consents were required. (¶ 47)

- Lewis & Munday issued legal opinions on June 12, 2006, concluding that each 2006 Service Contract was duly authorized and executed, valid, binding and enforceable; that no other consents or approvals were required; and that the City's obligations under the Service Contracts did not constitute indebtedness. (¶¶ 52-53)

- Lewis & Munday advised FGIC that under Michigan law, the City "could not avoid a contract, such as the Service Contracts, under which it has accepted the benefits, including the benefits of FGIC's insurance, and retain those benefits, including such insurance benefits." (¶ 54)

- The City's corporation counsel issued a legal opinion on June 12, 2006, concluding that the 2005 Service Contracts were duly authorized and executed, valid and binding; that the transaction did not conflict with any existing law; and that no other consents were required. (¶ 55)

- The City represented and warranted, in each of the Service Contracts, that it was authorized to enter into the transactions and that its obligations did not "constitute indebtedness within the meaning of the HRCA or any Michigan constitutional or other non-tax statutory or City charter limitation." (¶ 57)

- The City and the underwriters provided FGIC with memoranda prepared by their respective counsel, Lewis & Munday (for the City) and Honigman Miller Schwartz & Cohn (for UBS). Both memoranda were prepared in 2004 – long before the COPs transaction was actually structured or finalized – and "opine that the City's contractual obligations under the proposed Alternative Funding Mechanism could not constitute indebtedness under Michigan law or be subject to any limitations on the City's net indebtedness capacity. . . ." (¶ 66)

The law addressed in these legal opinions was not something peculiarly within the City's or UBS's knowledge – it was a matter of public record and was as accessible to FGIC as to any other party involved in the transaction.

Nowhere does FGIC allege that the City misrepresented what its debt limit was, or how close it was to that limit. FGIC does not allege that the City misrepresented the future services it would (or would not) receive from the Service Corporations. Indeed, throughout the 51 pages of its Counterclaim, FGIC fails to allege a single past or present *fact* that was misrepresented by the City. Accordingly, FGIC claims for fraudulent inducement and misrepresentation fail as a matter of law.

2. FGIC Cannot Demonstrate that Its Alleged Reliance on the Legal Opinions of the City's Lawyers Was Justifiable

Even if these legal opinions could have been the basis for a fraud or misrepresentation claim, FGIC would not have been justified in relying on them. FGIC argues, in effect, that it is entitled to ignore legal restrictions on the City's ability to borrow money because the City's lawyers opined that the COPs transaction did not transgress the debt limit, and it *justifiably* relied on the City's lawyers. FGIC is wrong: as a matter of law, a sophisticated party to a complex business transaction with over a billion dollars at stake is not justified in relying on the legal opinions of the lawyers on the other side of the table. *I.L.G.W.U. Nat'l Ret. Fund v. Cuddlecoat, Inc*., 2004 U.S. Dist. LEXIS 3764, *9-10 (S.D.N.Y. Mar. 10, 2004) ("It is a well-settled principle that neither a party nor his attorney may justifiably rely on the legal opinion or conclusions of his or her adversary's counsel.") (internal quotation marks and citation omitted). FGIC had the ability –

and arguably the obligation – to seek the advice of its own counsel rather than relying on the legal opinions of the City and its attorneys.

Courts will deny recovery to a fraud plaintiff "[i]f the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable." *NES Fin. Corp. v. JPMorgan Chase Bank, N.A*., 556 Fed. Appx. 12, 14 (2d Cir. 2014) (internal quotation marks and citation omitted). The Sixth Circuit has found, as a matter of law, that "a sophisticated business entity that entered into an arm's-length negotiation to consummate a significant business deal" cannot demonstrate reasonable reliance on the representations of its opposing party. *Associated Warehousing, Inc. v. Banterra Corp*., 491 Fed. Appx. 516, 520 (6th Cir. 2012) (affirming grant of summary judgment against plaintiff on its claims of deceit, negligent representation and promissory estoppel); *see also NES Fin. Corp*, 556 Fed. Appx. at 14 (noting that courts are "particularly disinclined to entertain claims of justifiable reliance" when "sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access").

Here, FGIC's conduct – at least as alleged in the Counterclaim – was manifestly unreasonable. FGIC nowhere suggests in its Counterclaim that it consulted with its own attorneys regarding the COPs transaction, or what those

attorneys opined regarding its legality.[4] Instead, FGIC alleges, it unquestioningly accepted whatever the City and its lawyers opined about a massive and complex transaction that was (to say the least) on the cutting edge of the law.

FGIC's attempts to demonstrate justifiable reliance are further doomed by the fact that it is presumed to know the law regarding restrictions on the City's borrowing ability. As the Michigan Supreme Court has explained, "[a]ll persons dealing with counties are bound to ascertain the limits of their authority fixed by statute or organic law, and are chargeable with knowledge of such limits. . . . We have had occasion several times to hold that all persons dealing with public corporations are bound to make their contracts according to law, and will not be protected unless they do so." *Id.*; *see also Stratton v. City of Detroit*, 246 Mich. 139, 148 (1929) ("in dealing with the city [of Detroit] one was bound to take notice of the charter provisions"); *Wolverine Engineers & Surveyors v. City of Leslie*, 2011 Mich. App. LEXIS 2048, at *3 (Mich. Ct. App. Nov. 17, 2011) (noting the "fundamental" principle that "those dealing with public officials must take notice of the powers of the officials") (citations omitted).

[4] Although it is beyond the scope of this Motion to Dismiss, the City notes that a redacted copy of a September 2004 memorandum from counsel to FGIC regarding the "Reasonableness of Certificate Counsel Opinions" was produced by FGIC in connection with the hearing on plan confirmation. Because FGIC in fact *did* consult with its lawyers regarding the legality of the COPs transaction, FGIC has no basis for claiming justifiable reliance on the City's legal opinions.

Such presumption and imputation of knowledge is particularly appropriate here, given that the structure of the COPs transactions was plainly disclosed in the Offering Circulars and the transactional documents incorporated by reference into the COPs. *See, e.g.*, 2005 Offering Circular at 5-8; 2006 Offering Circular at 5-10. No secret was made of the facts that the Service Corporations were mere pass-through entities and that no future services would be provided under the Service Contracts. *See, e.g.*, 2005 GRS Service Contract § 4.01 (explaining that the "services of the Corporation consist of reducing the financial burden of the Subject UAAL to the City in the current and future years" and that this would be accomplished by making the one-time payment to the Retirement Systems); 2006 GRS Service Contract § 4.01 (same).

Nor was there any attempt to hide the fact that the transaction structure was a novel attempt to avoid the debt limit. To the contrary, the 2005 Offering Circular expressly identified as one of the "Investment Considerations" – that is, the caveats to investors – the fact that "[t]his is a new financing structure which is being used for the first time in the State of Michigan." 2005 Offering Circular at 2. And the transaction was publicly extolled at the time for its "unique combination of legal precedents . . . dating back to the 19th century" that would "take the concept [of a future services contract] further" than ever before. *See*

Elizabeth Carvlin, *Detroit Uses COPs to Shift Pension Burden and Set a Few Records*, The Bond Buyer, Dec. 29, 2005, at 28A, Complaint Ex. G.

It was therefore clear (or should have been, to a party doing its own legal due diligence) that the interposition of the Service Corporations in the transactions was a sham designed to mimic legitimate future services contract arrangements, and that the obligations incurred under the Service Contracts were, in reality, indebtedness of the City. Although the City's lawyers expressed their legal opinion that the transaction did not create indebtedness for the City, Michigan law does not allow potential investors to blindly accept a municipality's legal conclusions about the validity of its debt. *See, e.g.*, *Bloomfield Village Drain Dist. v. Keefe*, 119 F.2d 157, 165 (6th Cir. 1941) (applying Michigan law) (holding that a municipality's recital that bonds complied with the law "was a legal conclusion upon which no purchaser was entitled to rely"). Rather, it was incumbent upon FGIC to evaluate the structure of the transaction with its own legal counsel and to reach its own conclusion about its validity. FGIC had all of the pertinent facts about the transaction at its disposal, and thus insured the COPs at its own risk. *See, e.g., id.* (refusing to enforce illegal bonds because "[a]n examination of the records . . . would have revealed all the facts necessary for a determination that the project was illegal").

Since FGIC cannot, as a matter of law, demonstrate that it justifiably relied on any legal opinion of the City or its counsel, the Second, Third and Fifth Counterclaims must be dismissed.

C. The Fifth Counterclaim Must Be Dismissed for the Additional Reason that FGIC Has Failed to Plead the Elements of Promissory Estoppel

To allege a claim for promissory estoppel against the City, FGIC was required to allege "(1) a promise, (2) that the [City] should reasonably have expected to induce definite and substantial action or forbearance by the plaintiff, and (3) that did in fact induce such action or forbearance in circumstances such that the promise must be enforced if injustice is to be avoided." *KSR Int'l Co. v. Delphi Auto. Sys*., LLC, 523 Fed. Appx. 357 (6th Cir. 2013) (discussing Michigan law). Black's Law Dictionary defines a "promise" as "[t]he manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made; a person's assurance that the person will or will not do something." Black's Law Dictionary (10th ed. 2009).

FGIC has identified no such manifestations by the City. FGIC alleges that the City "promised" that "the FGIC-insured COPs were backed by a reliable payment stream." FGIC's Counterclaim ¶ 156. This is a prediction about the soundness of the City's finances and ability to make payments in the future – not a

covenant to do or refrain from doing something in the future. FGIC further alleges that the City "promised" that FGIC would have subrogration rights and direct claims against the City, and that the City would be unable to avoid the Service Contracts while retaining the benefits of FGIC's insurance. *Id.* Again, these are not "promises" to do or not do something; rather, they are opinions as to the legal interpretation of the relevant contracts.

Finally, FGIC alleges that "[i]f the City's allegations in the Adversary Proceeding are true, then, in fact, the City never intended to honor its obligations under the Service Contracts to pay any party, let alone FGIC, the amounts promised under the Service Contracts, and such statements were misrepresentations." *Id.* But this contention is refuted by FGIC's own allegation that for eight years, until June 2013, "the City regularly made its Contract Payments to the Service Corporations, as provided in the Service Contracts." *Id.* at ¶ 99. The City's payment of millions of dollars under the Service Contracts is flatly inconsistent with FGIC's assertion that the City misrepresented its intentions to make such payments. At the same time, however, the City's willingness to incur and pay debt beyond the legal limit cannot transform an illegal contract into a valid, enforceable one.

Furthermore, Michigan courts only apply promissory estoppel when "an implied agreement exists between the parties, in the absence of an express

contract." *APJ Assocs., Inc. v. North Am. Philips Corp*., 317 F.3d 610, 617 (6th Cir. 2003) (applying Michigan law). "If the performance satisfying the detrimental reliance requirement is the same performance which constitutes the consideration of a written commercial contract, the doctrine of promissory estoppel is not applicable." *Willis v. New World Van Lines, Inc*., 123 F. Supp. 2d 380, 395 (E.D. Mich. 2000). FGIC's performance satisfying the detrimental reliance requirement of a promissory estoppel claim – insuring the COPs – is the same performance that constitutes the consideration of a written commercial contract. Thus, promissory estoppel is inapplicable.

For the foregoing reasons, FGIC has failed to state a claim for promissory estoppel, and that counterclaim must be dismissed.[5]

D. The Counterclaims Are Barred by the Claims Bar Date

Even if any of FGIC's Counterclaims were legally viable – and they are not – they still must be dismissed as late-filed proofs of claims. As numerous courts have found, "the act of filing a counterclaim in an adversary proceeding instituted by a debtor-in-possession . . . qualifies as filing a 'claim.'" *Schwinn Plan*

[5] FGIC also alleges, as part of its First Counterclaim, that it is entitled to a declaration that "the City is estopped from denying the validity, legality or enforceability of the Service Contracts or the City's obligations thereunder." FGIC's Counterclaim ¶ 120. However, since FGIC identifies no basis for this claim of estoppel, it fails under Fed. R. Civ. P. 8 and the standards set forth by the Supreme Court in *Twombly* and *Iqbal*.

Comm. v. AFS Cycle & Co. (In re Schwinn Bicycle Co.), 184 B.R. 945 (Bankr. N.D. Ill. 1995) (citing cases); *Beverage Enters. v. Hornell Brewing Co. (In re Pocono Springs Co.)*, 1997 Bankr. LEXIS 1750, *6-7 (Bankr. E.D. Pa. Nov. 6, 1997) (finding that "by asserting a Counterclaim in the 232 Proceeding, the Defendant effectively filed a proof of claim").

FGIC filed proofs of claim numbers 1190 and 1195 (the "Proofs of Claim") on or about February 19, 2014. The Proofs of Claim were filed almost three weeks after the filing of this adversary proceeding. FGIC had ample notice of allegations and counts asserted by the City in this proceeding (indeed, FGIC referenced the adversary proceeding in its Proofs of Claim) and the opportunity to include any and all claims against the City in those Proofs of Claim. Yet the Proofs of Claim assert only that the City is liable to FGIC for payments pursuant to the Service Contracts, or for unspecified damages if the Service Contracts are invalidated. It was not until March 17, 2014, more than three weeks *after* the February 21 bar date, that FGIC moved to intervene in the adversary proceeding; and not until July 17, 2014 that FGIC moved for leave to file a counterclaim. The new claims set forth in the Counterclaim ultimately filed by FGIC – ranging from fraudulent inducement to misrepresentation to mutual mistake – appear nowhere in the dozens of pages of the Proofs of Claim.

It is procedurally improper for FGIC to try to "back-door" new claims against the City by raising them in the guise of a counterclaim rather than seeking to amend its Proofs of Claim. Furthermore, FGIC is barred from asserting new claims against the City in any format after the bar date without leave of the Court, and FGIC cannot obtain such leave because they cannot establish that its failure to file the claims timely was the result of "excusable neglect." *See* Fed. R. Bankr. P. 9006(b); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship*, 507 U.S. 380 (1993).

Pioneer sets forth the factors considered by courts in determining whether a creditor's neglect to file a claim timely is excusable. A late-filed claim that does not meet the *Pioneer* standard must be disallowed. "The analysis utilized by the [*Pioneer*] Court presupposes that a finding of 'excusable neglect' is ***necessary*** to allow an otherwise untimely claim." *United States, IRS v. Chavis (In re Chavis)*, 47 F.3d 818, 820 (6th Cir. 1995) (quoting and affirming the bankruptcy court's "well-reasoned opinion") (emphasis added).

The factors established by the Supreme Court in *Pioneer* include (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay, including whether the delay was within the reasonable control of the late party; and (4) whether the late party acted in good faith. *Id.* at 395. These factors are not given equal weight;

rather, "the excuse given for the late filing must have the greatest import." *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc*., 270 F.3d 1, 5 (1st Cir. 2001) (applying *Pioneer* in the context of FRAP 4); *see also City of Concord, N.H. v. N. New England Tel. Operations, LLC (In re N. New England Tel. Operations, LLC)*, 2014 U.S. Dist. LEXIS 111639, *27-29 (S.D.N.Y. Aug. 4, 2014) (focusing on the reason for the delay as the most important factor in denying a creditor's late claim).

Here, whether it was the result of neglect or a strategic decision, FGIC's failure to timely file the claims it now asserts in its Counterclaim is inexcusable. FGIC was well aware, before the bar date, of the City's claims in this adversary proceeding, and of the potential counterclaims it might allege in response. Yet FGIC chose to file two proofs of claim that make no mention at all of its claims for fraudulent inducement, misrepresentation, promissory estoppel, unjust enrichment or mutual mistake.

Accordingly, all of the counterclaims (except to the extent that the First Counterclaim seeks a declaration of the validity of the Service Contracts) must be dismissed as untimely.

II. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court dismiss FGIC's Counterclaim in full, except to the extent that the First

Counterclaim seeks a declaration concerning the validity of the Service Contracts, and grant such other and further relief as the Court deems appropriate.

[signature page follows]

Dated: August 28, 2014

Respectfully submitted,

/s/ Deborah Kovsky-Apap
Robert S. Hertzberg (P30261)
Deborah Kovsky-Apap (P68258)
PEPPER HAMILTON LLP
4000 Town Center, Suite 1800
Southfield, MI 48075
Telephone: (248) 359-7300
Facsimile: (248) 359-7700
hertzbergr@pepperlaw.com
kovskyd@pepperlaw.com

Corinne Ball
JONES DAY
222 East 41st Street
New York, NY 10017
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
cball@jonesday.com

Thomas F. Cullen, Jr. (DC 224733)
Gregory M. Shumaker (DC 416537)
Geoffrey S. Stewart (DC 287979)
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
tfcullen@jonesday.com
gshumaker@jonesday.com
gstewart@jonesday.com

ATTORNEYS FOR THE CITY OF DETROIT

EXHIBIT 4

Certificate of Service

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
CITY OF DETROIT, MICHIGAN,	:	Chapter 9
Plaintiff,	:	Adversary Proceeding No. 14-04112
vs.	:	Hon. Steven W. Rhodes
DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, *et al.*,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2014, I caused to be electronically filed the *City of Detroit's Motion to Dismiss in Part FGIC's Counterclaims* with the Clerk of the Court which sends notice by operation of the Court's electronic filing service to all ECF participants registered to receive notice in this adversary proceeding.

Dated: August 28, 2014

/s/ Deborah Kovsky-Apap
Deborah Kovsky-Apap (P68258)

EXHIBIT 5

Affidavits
(Not Applicable)

EXHIBIT 6

Documentary Exhibits
(Not Applicable)