

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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In re	:	Chapter 9
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CITY OF DETROIT, MICHIGAN,	:	Case No. 13-53846
	:	
Debtor.	:	Hon. Steven W. Rhodes
	:	
-----X	:	
CITY OF DETROIT, MICHIGAN,	:	Chapter 9
	:	
Plaintiff,	:	Adv. Pro. No. 14-04112
	:	
vs.	:	Hon. Steven W. Rhodes
	:	
DETROIT GENERAL RETIREMENT	:	
SYSTEM SERVICE CORPORATION,	:	
DETROIT POLICE AND FIRE	:	
RETIREMENT SYSTEM SERVICE	:	
CORPORATION, DETROIT	:	
RETIREMENT SYSTEMS FUNDING	:	
TRUST 2005, and DETROIT	:	
RETIREMENT SYSTEMS FUNDING	:	
TRUST 2006	:	
	:	
Defendants.	:	
-----X	:	

**MEMORANDUM OF DETROIT RETIREMENT SYSTEMS
FUNDING TRUST 2005 AND DETROIT RETIREMENT
SYSTEMS FUNDING TRUST 2006 IN OPPOSITION TO
CITY OF DETROIT'S MOTION TO TAKE EXPEDITED
DISCOVERY OF THE SERVICE CORPORATIONS**

Wilmington Trust, National Association (“WTNA”), successor trustee for the above-captioned defendants (a) Detroit Retirement Systems Funding Trust 2005 (the “2005 Funding Trust”) and (b) Detroit Retirement Systems Funding Trust 2006 (the “2006 Funding Trust” and, together with the 2005 Funding Trust, the “Trust Defendants”), hereby submits, on behalf of the Trust Defendants, by and through its undersigned counsel, this Memorandum in Opposition to *City of Detroit’s Motion to Take Expedited Discovery of the Service Corporations* (the “Motion”) (Adv. Pro. Doc. 90).

I. PRELIMINARY STATEMENT

With the filing of the Motion the City appears manifestly unhappy with the content of the answer filed by the Service Corporations.¹ As a result, the City requests the ability to take premature and isolated depositions under Rule 30(b)(6) of the Federal Rules of Civil Procedure (the “Rules”), made applicable in this Adversary Proceeding pursuant to Rule 7030(b)(6) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) – this request has no support in the Rules or law and accordingly should be denied. The Motion serves no purpose other than to: (a) express the City’s disappointment with the two non-profit corporations it formed back in 2005; (b) make this Adversary Proceeding a

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the *Answer with Affirmative Defenses and Counterclaims of Defendants Detroit Retirement Systems Funding Trust 2005 and Detroit Retirement Systems Funding Trust 2006 to Complaint for Declaratory and Injunctive Relief* (Adv. Pro. Doc. 10).

distraction to the larger Chapter 9 proceeding;² and (c) increase the City's legal fees.

Given where matters stand in the main Chapter 9 proceeding with a contested confirmation hearing currently set to begin in a mere three (3) weeks and depositions still being conducted for confirmation on a near daily basis, there is no need to move the Adversary Proceeding forward at this time. But at a bare minimum, there is simply no need to address the extraordinary relief the City seeks with respect to the Service Corporations' answer now. Tabling (if not completely staying) matters is further supported by the recent developments of (a) the motion (Adv. Pro. Doc. 94) filed a few days ago by the Official Committee of Retired Employees ("Retiree Committee") seeking intervention in the Adversary Proceeding and (b) the revised Plan filed by the City on July 25, 2014 (*i.e.*, the Fifth Amended Plan). To date, not much has occurred substantively with respect to any of the claims asserted in the Adversary Proceeding. Therefore, judicial economy would dictate that at a minimum the Retiree Committee's

² Further, the City's statement that the Adversary Proceeding should be resolved expeditiously is inconsistent with the City's Plan of Adjustment (as may be supplemented or amended, the "Plan"), which provided, prior to the most recent amendment, that the Retiree Committee (as defined herein) acting, as the "Creditor Representative," would pursue the Adversary Proceeding post-effective date. *See* Plan, Article III, Section D1 (the Fourth Amended Plan); *see also* Adv. Pro. Doc. 94 (Retiree Committee's intervention motion). As recently amended, the City is establishing a Litigation Trust (as defined in the Plan) under the Plan and is "transfer[ring] all of its rights and interests in the [Adversary Proceeding] to the Litigation Trust." *See* Plan, Article IV, Section I (the Fifth Amended Plan). As such, it is clear that the City never had an expectation of resolving the Adversary Proceeding prior to confirmation of the Plan; thus, there is no need for expedited discovery at this time.

intervention motion be adjudicated before any litigation begin in earnest; thus, allowing the stage to be completely set with all the possible players present. Moreover, it could be argued that in light of the fact that the players may change again upon confirmation as now contemplated in the Plan, the Retiree Committee's intervention motion should be adjourned *sine die* until after confirmation to see if it even needs to be adjudicated or becomes moot. Once the confirmation hearings have concluded, the Court and the parties will know if the City is pursuing the Adversary Proceeding or transferring it to the Litigation Trust. It is at that time it should be determined if discovery respecting the Service Corporations' answer is necessary, which as set forth herein it is not. To proceed otherwise will only result in the City incurring unnecessary legal fees in pursuit of a matter it intends to transfer.

Alternatively, if it is determined that the Adversary Proceeding move forward now, there are other avenues of redress for the City and far more effective ways to move the Adversary Proceeding forward other than with unnecessary expedited motion practice and expedited discovery outside of regular protocol as contemplated by the Motion. For example, if the City's goal really is to move the Adversary Proceeding forward, which is confusing at this time given that it intends to hand it off right after confirmation, the focus should be on resolving the claims against those defendants – the Trust Defendants and the COPs holders and

Financial Guaranty Insurance Company (collectively, the “Intervenors”) – who have claimed an economic stake in the transactions at issue. This could be accomplished as set forth below by globally staying litigation of the counterclaims/motion to dismiss and proceeding, after determination of the Retiree Committee’s intervention motion, with an orderly discovery process respecting the declaratory relief claims relating to validity.

II. ARGUMENT

A. **The Requested Expedited Depositions are Unnecessary and Prejudicial to the Co-Defendants.**

As the City acknowledges, the Rules provide that fact discovery begins *after* the parties have had an opportunity to conduct a conference pursuant to Rule 26(f), made applicable in this Adversary Proceeding pursuant to Bankruptcy Rule 7026(f). The City has failed to meet the required standard and show any good cause (because none presently exists) for a departure from this prescribed procedure, much less any legitimate reason to take isolated Rule 30(b)(6) depositions before any document discovery has even started.

The pretext for the City’s request is the answer filed by the Service Corporations and the fact that the Services Corporations chose to respond to certain allegations in the Complaint as lacking sufficient knowledge and information needed to admit or deny the certain allegations. While the City may have expected more admissions from the Service Corporations, that

disappointment in the answer does not justify expedited and isolated Rule 30(b)(6) depositions. The City argues that it “cannot even frame the issues that it will be litigating with the Service Corporations, making a Rule 26(f) conference with them likely to be an exercise in futility.” Motion at 3. But that explanation for the expedited discovery rings hollow.

As a threshold matter, a Rule 26(f) conference has not yet taken place, so the suggestion that it would be a wasted effort is, at best, speculative. Moreover, as a practical matter, the City does not need an answer from the Service Corporations to “frame the issues” it will be litigating. The germane and truly disputed issues of fact, which are many, have been more than adequately framed by the City in the Complaint, as well as in the answers on file from the Trust Defendants and, more recently, from the Intervenors. It is highly unlikely that the City’s proposed Rule 30(b)(6) depositions would “frame the issues” any better. First, many of the topics listed in the deposition notice are perfunctory; some of which are easily obtainable or answered through publically available means. Second, any admissions that the City might obtain from the Service Corporations would not be binding on the other parties in the Adversary Proceeding.³

³ “[T]he answer of one defendant cannot be used as evidence against his co-defendant[.]” *Leeds v. Marine Ins. Co.*, 15 U.S. 380, 383 (1817); *see also McMurdy v. Wiseman*, No. 04-cv-00081, 2006 WL 5186509, at *3 (W.D. Ky. Aug. 4, 2006) (the answer of one defendant had “no binding effect on other defendants”). Likewise, admissions at a Rule 30(b)(6) deposition only bind the party who designated the witness, not a co-party. *See, e.g., A&E Products*

At the same time, an expedited Rule 30(b)(6) deposition of the Service Corporations would be prejudicial to the interests of the Trust Defendants and the Intervenors, as it would take place before they have had an adequate opportunity to serve written discovery and review relevant documents. Three of the topics listed in the proposed Rule 30(b)(6) deposition notice⁴ cover core factual issues in the Adversary Proceeding, which the City knows from the answers filed by the Trust Defendants and the Intervenors are contested and will not be resolved at the pleading stage. The balance of the deposition topics⁵ are clearly more suitable to interrogatories or other discovery methods, and they could be (and routinely are) addressed at the Rule 26(f) conference.

B. There are More Effective Ways to Move the Adversary Proceeding Forward.

The City filed its Complaint for declaratory judgment on the basis that such relief was “necessary to guide the City of Detroit’s future conduct and to preserve its legal rights in connection with demands thereunder.” *See* Complaint, ¶ 48. Since that allegation was made, however, the City has opposed intervention, focused more on the Trust Defendants’ Counterclaims than on its own Complaint, and more on the Service Corporations than on the Trust Defendants and the

Group, L.P. v. Mainetti USA Inc., No. 01 Civ. 10820, 2004 WL 345841, at *6 (S.D.N.Y. Feb. 25, 2004) (citing 8A Wright & Miller, *Federal Practice and Procedure* § 2103 (2d ed. 1984).

⁴ *See, e.g.*, Notice of Rule 30(b)(6) Deposition (Adv. Pro. Doc. 90-6), Schedule A (Deposition Topics), ¶¶ 17-19 (GRS) and ¶¶ 16-18 (PFRS).

⁵ *See id.* at ¶¶ 1-16 (GRS) and ¶¶ 1-15 (PFRS).

Intervenors, who collectively have real economic interests at stake. As set forth above, the Adversary Proceeding, and more particularly, the Motion's requested relief, are a distraction to the important matters pending in the main Chapter 9 proceeding and should be left until the confirmation process has concluded.

However, without the premature and prejudicial Rule 30(b)(6) depositions, the Adversary Proceeding could alternatively move forward both fairly and efficiently, if:

1. as previously proposed at the July 14 status conference, the Court continues the stay of the Motion to Dismiss the Trust Defendants' Counterclaims (counterclaims that are largely protective in nature and contingent on the outcome of the declaratory judgment claims); and

2. after resolution of the Retiree Committee's intervention motion, the Court orders the parties to conduct a Rule 26(f) conference, so that discovery can proceed orderly and efficiently as contemplated under the Rules on the City's requests for declaratory relief and the Trust Defendants' and Intervenors' declaratory relief claims that the COPs transactions were valid.

III. CONCLUSION

For the foregoing reasons, the Trust Defendants respectfully request that the Court deny the Motion and the relief for expedited depositions of the Service Corporations.

FOSTER SWIFT COLLINS & SMITH, P.C.

July 28, 2014

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CERTIFICATE OF SERVICE

I, Dirk H. Beckwith, hereby certify that on this day I caused a true and correct copy of the foregoing *Memorandum of Defendants Detroit Retirement Systems Funding Trust 2005 and Detroit Retirement Systems Funding Trust 2006 in Opposition to the City of Detroit's Motion to Take Expedited Discovery of the Service Corporations* to be filed electronically, and to be thereby served upon the following:

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