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

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|---|---|
| IN RE:<br>CITY OF DETROIT, MICHIGAN<br><br>DEBTOR<br>_____/ | Chapter 9<br>Case No. 13-53846<br>Hon. Steven W. Rhodes |
| CITY OF DETROIT, MICHIGAN,<br><br>Plaintiff,<br>v.<br><br>DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, DETROIT POLICE AND FIRE RETIREMENT SYSTEM SERVICE CORPORATION, DETROIT RETIREMENT SYSTEMS FUNDING TRUST 2005, DETROIT RETIREMENT SYSTEMS FUNDING TRUST 2006, and WILMINGTON TRUST, N.A.<br><br>Defendants, et al.<br>_____/ | Chapter 9<br>Adv. Proc. No. 14-04112<br>Hon. Steven W. Rhodes |

**MOTION OF THE OFFICIAL COMMITTEE OF RETIREES OF THE CITY OF DETROIT TO INTERVENE UNDER RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 7024 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, AND SECTION 1109(b) OF THE BANKRUPTCY CODE**

For the reasons provided in the attached memorandum in support of this motion, and based on the authorities cited therein, the Official Committee of Retired Employees ("Retiree Committee") respectfully requests that this Court grant its motion to intervene.

This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

Consistent with Local Rule 9014-1(g) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the Eastern District of Michigan, counsel

for the Retiree Committee sought the concurrence of counsel for the Defendants and current Intervenors, but such concurrence was not obtained prior to the filing of this Motion. However, counsel for the City has advised that the City supports the instant motion.

Wherefore, the Retiree Committee respectfully requests that the Court grant this motion, along with any other additional relief that this Court deems appropriate.

Respectfully submitted,

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# Exhibit 1

**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

CITY OF DETROIT, MICHIGAN,

Plaintiff,
v.

DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, DETROIT POLICE AND FIRE RETIREMENT SYSTEM SERVICE CORPORATION, DETROIT RETIREMENT SYSTEMS FUNDING TRUST 2005, DETROIT RETIREMENT SYSTEMS FUNDING TRUST 2006, and WILMINGTON TRUST, N.A.

Defendants, et al.
_____/

Chapter 9
Adv. Proc. No. 14-04112
Hon. Steven W. Rhodes

OFFICIAL COMMITTEE OF RETIREES OF THE CITY OF DETROIT,

Intervening Plaintiff
v.

DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, DETROIT POLICE AND FIRE RETIREMENT SYSTEM SERVICE CORPORATION, DETROIT RETIREMENT SYSTEMS FUNDING TRUST 2005, DETROIT RETIREMENT SYSTEMS FUNDING TRUST 2006, and WILMINGTON TRUST, N.A.

Defendants.
_____/

**[PROPOSED] OFFICIAL COMMITTEE OF RETIREES OF THE CITY OF DETROIT'S COMPLAINT FOR DECLARATORY RELIEF**

The Official Committee of Retirees of the City of Detroit ("Retiree Committee"), for its intervening complaint seeking declaratory relief, states the following:

**PARTIES**

1. The Official Committee of Retirees of the City of Detroit ("Retiree Committee") is a Court appointed committee representing approximately 34,000 city retirees.

2. The City of Detroit ("the City") is a Michigan municipal corporation located in Wayne County. The City is a home rule city organized under PA 279 of 1909, as amended, the Home Rule City Act, MCL 117.1, *et seq.* The City has home rule power under the State Constitution of 1963, PA 279, and the 2012 Charter of the City of Detroit, subject to the limitations on the exercise of that power contained in the State Constitution, City Charter, or imposed by statute. The City initiated this adversary proceeding by filing is Complaint for Declaratory Relief ("City Complaint") on January 31, 2014.

3. Upon information and belief based on the City Complaint, Defendant Detroit General Retirement System Service Corporation is a non-profit Michigan corporation created by the City in April 2005 for the ostensible purpose of providing financial assistance to the City in meeting its unfunded accrued actuarial liabilities to the GRS.

4. Upon information and belief based on the City Complaint, Defendant Detroit General Retirement System Service Corporation is a non-profit Michigan corporation created by the City in April 2005 for the ostensible purpose of providing financial assistance to the City in meeting its unfunded accrued actuarial liabilities to the PFRS.

5. Upon information and belief based on the City Complaint, Defendant Detroit Retirement Systems Funding Trust 2005 is a trust created and existing under Michigan law for

the purpose of issuing Certificates of Participation in 2005 to provide funding for the unfunded accrued actuarial liabilities of the GRS and PFRS (collectively, the "Retirement Systems").

6. Upon information and belief based on the City Complaint, Defendant Detroit Retirement Systems Funding Trust 2006 is a trust created and existing under Michigan law for the purpose of issuing Certificates of Participation in 2006 to provide funding for the refinancing of certain 2005 Certificates of Participation.

7. On March 17, 2014, Defendants Detroit Retirement Systems Funding Trust 2005 and Detroit Retirement Systems Funding Trust 2006 (collectively, the "Funding Trusts") filed an Answer, Affirmative Defenses and Counterclaim in response to the City Complaint.

8. On June 30, 2014, this Court entered an Opinion and Order that provided, among other things, for intervention by Intervenors FMS Wertmanagement AÖR, Deutsche Bank AG, London, Erste Europäische Pfandbrief- Und Kommunalkreditbank Aktiengesellschaft in Luxemburg S.A., Hypothekenbank Frankfurt International, S.A., Hypokthekenbank Frankfurt AG, Dexia Holdings, Inc., Dexia Credit Local, and Financial Guaranty Insurance Company (collectively, the "Intervenors").

## VENUE AND JURISDICTION

9. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). An actual case and controversy under 28 U.S.C. § 2201(a) exists. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

## BACKGROUND

10. The City established two pension plans for its employees. The first, for the benefit of its uniformed police and fire fighters, was the Detroit Police and Fire Retirement

System ("PFRS"). The second, for the benefit of other City employees, was the Detroit General Retirement System ("GRS"). At all relevant times, Article 9, Section 24, of the Michigan Constitution required that, outside of bankruptcy, the City's obligations to the PFRS and GRS be funded on an annual basis.

11. By 2005, the City had fallen behind schedule in funding its annual contributions to the Retirement Systems. Upon information and belief based on the City Complaint, the City decided to raise the necessary funds by borrowing them to meet its payment obligations to the Retirement Systems.

12. The City was subject to a strict limitation on the amount of indebtedness it could incur. Section 4a of the Home Rule City Act ("HRCA"), MCL 117.4a, set maximum limits on a city's net indebtedness 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. Upon information and belief based on the City Complaint, according to a calculation prepared by the City's Finance Department, the City had only $660 million remaining under its debt limit as of May 2, 2005.

13. Upon information and belief based on the City Complaint, in 2005 and at all times since then, the sums the City needed to borrow to satisfy its obligations to the PFRS and the GRS would have exceeded the debt limits set by Section 4a of the HRCA and thus, the City was therefore unable to fund its UAAL shortfall through the issuance of debt, such as the sale of bonds to the public. Upon information and belief based on the City Complaint, the City began searching for a means of borrowing money by structuring a transaction that would evade the

HRCA's debt limit and – at the prompting of investment banks that would profit handsomely from the transaction – decided to embark upon transactions to sell so-called "Certificates of Participation" ("COPs") to investors.

14. Upon information and belief based on the City Complaint, because the HRCA's debt limit prohibited the City from borrowing the amounts it needed to satisfy the UAAL of the PFRS and the GRS, the City's investment bankers convinced the City to enter into a transaction calculated to allow the City to avoid calling its new borrowings "debt." Upon information and belief based on the City Complaint, at the investment bankers' suggestion, the City did this by (a) creating two shell entities called "Service Corporations,") (b) having the Service Corporations create a trust to sell the 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 to pay the Service Corporations the monies they would need to satisfy their obligations to the trust. Upon information and belief based on the City Complaint, the City was advised that, by characterizing its payments to the Service Corporations as contractual obligations, the funds it borrowed by issuance of the COPs would somehow not amount to debt. Upon information and belief based on the City Complaint, four series of these COPs were sold to the public in this way, two in 2005 and two in 2006.

15. Upon information and belief based on the City Complaint, in April 2005, City officials incorporated two non-profit corporations – defendants Detroit General Retirement System Service Corporation and Detroit Police and Fire Retirement System Service Corporation, (collectively, the "Service Corporations"). The stated purpose of these Service Corporations was to provide assistance to the City in funding its UAAL to the two retirement systems.

16. The board of each Service Corporation consisted of five *ex officio* directors, all of whom were members of the City government – the City's Finance Director, Budget Director, and Corporation Counsel, plus two members of the City Council. The City ordinance establishing the Service Corporations explained that the Service Corporations were "acting as an instrumentality and enterprise of the City and performing an important public purpose by assisting the City to meet its constitutional obligations with respect to the particular Retirement System." *Id.* Upon information and belief based on the City Complaint, the Service Corporations were simply pass-through entities that were created to enable the City to circumvent legal prohibitions against further borrowing and their sole purpose in the COPs transaction was to make a one-time payment to the Retirement Systems to reduce the City's UAAL obligations. Upon information and belief based on the City Complaint, their obligation to make payment to the Retirement Systems was expressly conditioned upon the Service Corporation receiving sufficient funds from the next shell entity – the "Funding Trust" – that would sell the COPs to investors Upon information and belief based on the City Complaint, the Service Corporations, in other words, were without independent economic substance.

17. Upon information and belief based on the City Complaint, The Service Corporations existed only on paper and, after their initial organizational meetings, the boards of the two Service Corporations never regularly met, never maintained minutes of any meetings, did not keep books and records, and observed no other formalities of corporate existence.

18. On May 25, 2005, the City entered into a "Service Contract" with each Service Corporation. In the Service Contracts, the City promised to make a series of periodic payments (the "City Payments") to the Service Corporations in an amount sufficient to pay the interest and principal due on the COPs. Upon information and belief based on the City Complaint, on the

closing date of the transaction (less than ten days after they entered into the Service Contracts with the City), the Service Corporations irrevocably transferred their entire right to receive the City Payments to defendant Detroit Retirement Systems Funding Trust 2005. Thus, the sole ongoing function of the Service Corporations disappeared almost as soon as it was created.

19. Upon information and belief based on the City Complaint, the purpose, design, and effect of the 2005 Service Contracts was to allow the City to borrow money in violation of the HRCA and other state laws by characterizing the City Payments as "contractual obligations," rather than debt service. Upon information and belief based on the City Complaint, at the time the $1.44 billion of Certificates of Participation were issued in 2005, the City had only approximately $660 million remaining under its HRCA debt limit, and thus could not issue traditional debt to cover the $1.70 billion pension shortfall. Upon information and belief based on the City Complaint, the 2005 COPs transaction was intended to allow the City to borrow about $780 million that it was not permitted to borrow under the HRCA.

20. The Service Contracts created in the 2005 COPs transaction and the COPs themselves did not comply with the Revised Municipal Finance Act, PA 34 of 2001, MCL 141.2101, *et seq*. ("RMFA"). Under the RMFA, the City was required to obtain approval of the Michigan Department of Treasure before undertaking a debt financing of the magnitude and character of the COPs. *See* MCL 141.2303(7). Upon information and belief based on the City Complaint, the City did not obtain this approval before entering into the Service Contracts or causing the 2005 Funding Trust to issue the COPs. Nor were the Service Contracts or the COPs transaction an authorized method for financing unfunded pension obligations under the RMFA or any other state law.

21. Upon information and belief based on the City Complaint, as part of their plan to circumvent the HRCA's debt limit and the RMFA's requirements, the City and its bankers interposed yet another layer between the City and the COPs. Upon information and belief based on the City Complaint, the Service Contracts required the Service Corporations to create a so-called "funding trust" as a conduit to actually issue, sell, and service the COPs.

22. On or about June 2, 2005, the Service Corporations entered into a Trust Agreement with U.S. Bank, N.A., as Trustee, to create defendant Detroit Retirement Systems Funding Trust 2005 ("2005 Funding Trust"). In the Trust Agreement, the Service Corporations made an absolute transfer to the 2005 Funding Trust of all their rights to receive the City Payments and directed that the Trust could not transfer or assign these rights to another party.

23. Upon information and belief based on the City Complaint, each COPs certificate represented a proportional interest in the stream of City Payments that the 2005 Funding Trust was to receive. Upon information and belief based on the City Complaint, the 2005 Funding Trust was obligated to sell the COPs to investors, and to remit the proceeds from the sale of the COPs to the Service Corporations for onward payment to the Retirement Systems in satisfaction of the City's UAAL. Upon information and belief based on the City Complaint, the role of the 2005 Funding Trust was thereafter to receive the City Payments and pay the holders of the COPs the interest and principal they were due.

24. Upon information and belief based on the City Complaint and attachments, the 2005 Trust Agreement provided for the issuance of two series of these COPs. Upon information and belief based on the City Complaint, the first was COPs Series 2005-A, which totaled $640 million and paid a fixed rate of interest, and the second was COPs Series 2005-B, which totaled $800 million and paid a variable rate of interest. Upon information and belief based on the City

Complaint, each of the two series of COPs represented an undivided proportionate interest in the 2005 Funding Trust's right to receive the City Payments under the 2005 Service Contract.

25. Upon information and belief based on the City Complaint, the two series of the 2005 COPs were sold to the public in May and June of 2005, raising $1.44 billion, and the 2005 Funding Trust, after accounting for the costs of the transaction and the generous fees paid to bankers and others, turned over $1.37 billion of the proceeds to the Service Corporations, who in turn distributed them to the PFRS and the GRS. Upon information and belief based on the City Complaint, the City began making its City Payments to service the obligations of the 2005 Funding Trust under the COPs shortly thereafter.

26. Upon information and belief based on the City Complaint, at the time the 2005 COPs were issued, the City's advisors justified the COPs structure on the ground that the Service Contracts did not create indebtedness for the City because the City Payments were being made in exchange for future services by the Service Corporations. Upon information and belief based on the City Complaint, the Service Corporations provided no significant services to the City in the years following the COPs transactions, and none are expected in the future. The Service Contracts themselves make clear that the Service Corporations' only services to the City consisted in acting as a conduit for paying over the proceeds of the COPs sales to the Retirement Systems. Upon information and belief based on the City Complaint, the periodic City Payments were thus not being made to compensate the Service Corporations for any ongoing services, but rather solely to pay the principal and interest due on the COPs.

27. Upon information and belief based on the City Complaint, City officials turned a blind eye to the requirements of state law and to the City's desperate financial condition. Sean K. Werdlow, who was at that time the Finance Director of the City, as well as the President of

both the Service Corporations, executed the 2005 Trust Agreement on behalf of both Service Corporations. Upon information and belief based on the City Complaint, shortly after closing the 2005 COPs transaction, Mr. Werdlow left employment of the City and joined SBS Financial Products Company, LLC, one of the investment banks that engineered the 2005 COPs deal.

28. Upon information and belief based on the City Complaint and attachments, among investment banks, the COPs transaction was celebrated as a clever circumvention of the law. *The Bond Buyer* – named the 2005 COPs transaction as one of the most innovative financings of the year. That publication explained that the City had to rely on "a unique combination of legal precedents . . . dating back to the 19th century" because it lacked the legal authority to issue the COPs without having them count against its debt limit. Upon information and belief based on the City Complaint, the transaction was extolled within the investment banking community for its creativity in evading the state-imposed debt limits by taking the concept of a contract for future services further than ever before. Upon information and belief based on the City Complaint, the 2005 COPs transaction was the largest municipal financing ever offered in Michigan.

29. When the 2005 COPs were issued, the City was required to fund any UAAL over 13 years and 20 years, respectively. On or about February 8, 2006, and March 30, 2006, the governing boards of both Retirement Systems increased the amortization period of the UAAL to 30 years. Upon information and belief based on the City Complaint, to take advantage of this longer amortization schedule, the City determined to have additional COPs issued to replace certain of the 2005 COPs.

30. Upon information and belief based on the City Complaint, in a resolution dated April 26, 2006, the City provided for execution of new Service Contracts with the Service

Corporations and approved the form of a Trust Agreement for a new funding trust, defendant Detroit Retirement Systems Funding Trust 2006 ("2006 Funding Trust"). Upon information and belief based on the City Complaint, the function of the 2006 Funding Trust was to float a $949 million issue of two new series of 2006 COPs to fund a replacement of the full $800 million of variable rate Series 2005-B COPs and $104 million of fixed rate Series 2005-A COPs, plus the fees and costs of the transaction.

31. Upon information and belief based on the City Complaint, the City entered into Service Contracts with the Service Corporations; the Service Corporations irrevocably transferred all of their rights to receive payments from the City to the 2006 Funding Trust; and the Trust issued and sold new COPs to the public in two series – COPs Series 2006-A totaling $149 million and carrying a fixed rate of interest and COPs Series 2006-B totaling $800 million and carrying a variable rate of interest. Upon information and belief based on the City Complaint, the Service Corporations used the proceeds of the sale of the 2006 COPs to refund all of the variable rate 2005 COPs, to refund a portion of the fixed rate 2005 COPs, to pay the costs of issuing the new COPs, and to pay even more fees to its lawyers and bankers.

32. Upon information and belief based on the City Complaint, at the time the $949 million of 2006 COPs were issued, the City was already approximately $803 million over its debt limit. Upon information and belief based on the City Complaint, the HRCA did not permit the City to borrow *any* of the $949 million it raised through the sale of the 2006 COPs. Upon information and belief based on the City Complaint, even after proceeds of the 2006 COPs were used to retire the $800 million of principal outstanding on the Series 2005-A COPs, the City was still about $858 million over its debt limit. The City failed to satisfy the requirements of the RMFA for the issuance of debt and was not authorized by any other state law to incur the debt.

33. Upon information and belief based on the City Complaint, as of today, there is approximately $503 million in principal outstanding on the Series 2005-A COPs, which have fixed interest rates of between 4.848 and 4.948 percent and maturity dates that range between 2013 and 2025. Upon information and belief based on the City Complaint, another $149 million in principal is outstanding on the Series 2006-A COPs, which have fixed interest rates of 4.989 percent and maturity dates that range between 2034 and 2035; About $800 million in principal is outstanding on the Series 2006-B COPs, which carry variable interest rates of 3M LIBOR plus 0.30 to 0.34 percent and maturity dates that range between 2019 and 2034. Upon information and belief based on the City Complaint, the total amount of the outstanding COPs is approximately $1.45 billion.

34. The economic reality of the COPs transactions was that they were municipal bond offerings by the City, with the Service Corporations and the Service Contracts serving as the instrumentalities by which the City hoped to evade the requirements of state law for the issuance of that debt. Upon information and belief based on the City Complaint, the COPs sale provided the City with an immediate benefit of approximately $1.44 billion, which was used to pay the City's obligations to the two Retirement Systems and the costs of the transaction. Upon information and belief based on the City Complaint, the City, in turn, promised – by its City Payments to the Funding Trusts through the Service Corporations – to make payments, over time, in an amount exactly sufficient to cover the interest on and principal of the COPs. There was no reason or purpose behind the convoluted structure of the COPs deals other than to avoid the HRCA's debt limit and the strictures of the RMFA.

35. Upon information and belief based on the City Complaint, the debt burden created by the Service Contracts in the COPs transaction has put the very, fatal strains upon the City's

finances that the HRCA's debt limit and the RMFA's review requirements were imposed to prevent. Upon information and belief based on the City Complaint, to hedge the City's exposure to the floating interest rates on the 2006 COPs, the Service Corporations entered into interest rate swap contracts with some of the banks that also helped to engineer the COPs transaction. Upon information and belief based on the City Complaint, in 2009, the City was required to directly assume the Service Corporations' obligations to the banks under the swaps, with further, disastrous financial consequences.

36. On December 6, 2001, the Michigan Department of Treasury began a preliminary review of the City's financial condition pursuant to state law. On December 21, 2011, the State Treasurer informed the Governor that "probable financial stress" existed in the City, due to, among other things, cash-flow shortages, repeated deficit spending, and an improper reliance on borrowing. In response, the Governor appointed a financial review team to examine the City's financial condition, which reported to the Governor on March 26, 2012, that the City was "in a condition of severe financial stress." This finding led to the establishment of a consent agreement between the City and the State of Michigan that gave certain oversight powers to a financial advisory board created for the City and placed conditions on the City's ability to borrow more funds.

37. On February 19, 2013, a second financial review team determined that the City was in a "local government financial emergency" due to its critical cash position, its repeated deficits, and it's more than $14 billion in long-term liabilities. After reviewing the report, the Governor agreed with this determination, and requested that the Local Emergency Financial Assistance Loan Board appoint an Emergency Financial Manager for the City. Kevyn D. Orr was appointed to this position on March 15, 2013.

38. Consistent with his duties under state law, Mr. Orr began a detailed review of the City's financings after being appointed. By early June 2013, it became clear to Mr. Orr that the City could not maintain adequate cash liquidity if it made the June 14 COPs payment of almost $40 million. As a result, Mr. Orr instructed that payments on the COPs be suspended along with payments on most other unsecured liabilities. Upon information and belief based on the City Complaint, the impending cash crisis and the need to comprehensively restructure $18 billion in debt led the City to file a petition for bankruptcy under chapter 9 of the Bankruptcy Code, 11 U.S.C. § 901, *et seq.*, on July 18, 2013.

39. On or about July 21, 2014, the City's balloting agent formally announced that the Retiree classes (Classes 10, 11, and 12) voted to accept the City's Fourth Amended Plan for the Adjustment of Debts of the City of Detroit (the "Plan").

40. Under the Plan, the Retiree Committee becomes the "Creditor Representative" if the Retiree Classes [Classes 10-12] accept the Plan and the Retiree Committee supports the Plan. (Plan, I.A.70). The Retiree Classes have in fact voted to accept the Plan and the Retiree Committee has and will continue to support the Plan. Upon confirmation, the Retiree Committee will be the Creditor Representative for purposes of this adversary proceeding by the City.

41. With respect to this adversary proceeding, the Plan provides that the City may assign its rights to pursue litigation to the Creditor Representative. If this matter is to be settled on terms other than those contained in the Plan, the Plan requires the City to use its best efforts to reach agreement on such settlement with the Creditor Representative. (Plan, II.B.3.a.p.i.).

42. To facilitate the provision of some level of future OPEB benefits to its constituents, the Retiree Committee negotiated Plan provisions calling for the establishment of VEBA Trusts for the City's General and Police and Fire Retirees. Under the Plan, these VEBAs

are to be set up as soon as practicable following the Effective Date. The VEBAs will be funded at the outset from, among other sources, the City's contribution of $450 million. In addition, the VEBAs shall also be entitled to contingent additional distributions from the "Disputed COP Claims Reserve," as set forth below.

43. The Plan provides the holders of COP claims with the option to settle issues relating to those claims by agreeing to have their claims deemed Allowed Claims in an amount equal to 40% of the unpaid principal amount of such claims. (Plan, II, B.3.p.iii.A). On the Effective date, the City will establish a Disputed COP Claims Reserve, which shall contain an unsecured pro-rata share of New B Notes calculated as if Disputed (not-settling) COP Claims were allowed in their full aggregate principal amount. (Plan, II.B.3.p.iii.3.a.1.)

44. The Plan further provides that following the resolution of all objections to the Disputed COPs Claims, after distributions with respect to such claims and after paying the expenses of the adversary proceeding, 65% of the funds remaining in the Disputed COP Claims Reserve shall be distributed to the Detroit General VEBA and the Detroit Police and Fire VEBA. (Plan, II.B.3.p.iii.2).

**COUNT I – DECLARATORY JUDGMENT**

45. The Retiree Committee adopts by reference the allegations of paragraphs 1 through 44.

46. Upon information and belief based on the City Complaint, the 2005 and 2006 COPs transactions were nothing more than borrowings by the City of Detroit, thinly disguised as a back-to-back series of contract payments.

47. Upon information and belief based on the City Complaint, the Service Corporations are a sham as the City has received no material services from the Service

Corporations since the COPs transactions were completed and does not expect to receive any such services in the future. Upon information and belief based on the City Complaint, the Funding Trusts were, and are, simply conduits for selling and servicing the City's debt.

48. Upon information and belief based on the City Complaint, the 2005 and 2006 COPs transactions as a whole, and the 2005 and 2006 Service Contracts in particular, resulted in the City incurring net indebtedness that exceeded the municipal debt ceiling established by Section 4a(2) of the HRCA. There is no judicial or statutory exception exempting the City from the limits set by Section 4a(2).

49. Upon information and belief based on the City Complaint, the COPs transactions and the Service Contracts also resulted in the creation of City debt that was not authorized by the RMFA or any other state law.

50. The 2005 and 2006 Service Contracts are thus illegal under Michigan law, and the Service Contracts and all other contractual or other obligations incurred by the City in connection with the COPs transactions are unenforceable and void *ab initio*.

51. An actual and existing controversy has arisen between the original parties as to their respective rights and obligations under the Service Contracts. As a Creditor Representative under the Plan, as a beneficiary of the Disputed COP Claims Reserve Creditor Representative, and as a potential assignee of the City's adversary proceeding, the Retiree Committee has a significant legal interest in pursuing a declaratory judgment. A declaratory judgment is necessary to guide the City of Detroit and Retiree Committee's future conduct and to preserve their legal rights.

52. The Retiree Committee seeks a declaratory judgment that the Service Contracts are illegal, void, and of no effect whatsoever, and that the City has no enforceable obligation to continue making the City Payments to the Service Corporations or to the Funding Trusts.

**COUNT II – DECLARATORY JUDGMENT**

53. The Retiree Committee adopts by reference the allegations of paragraphs 1 through 52.

54. The City of Detroit filed a petition for chapter 9 bankruptcy on July 18, 2013. The City was determined to be eligible to become a debtor under chapter 9 by an order of this Court dated December 5, 2013.

55. The PFRS and GRS are creditors to the chapter 9 bankruptcy. On or about July 21, 2014, the City's balloting agent formally announced that the Retiree classes (Classes 10, 11, and 12) voted to accept the City's Plan.

56. Upon information and belief based on the City Complaint, On June 14, 2013, the City failed to make a payment due on the COPs, and has paid no amounts under the Service Contracts on account of the COPs since that date. Upon information and belief based on the City Complaint, The City currently owes approximately $1.45 billion in principal on the 2005 and 2006 COPs.

57. The Trustee of the Funding Trusts and the Contract Administrator for the 2005 and 2006 COPs transactions have appeared and participated in the City's bankruptcy case. Upon information and belief based on the City Complaint, The transactional documents created in the 2005 and 2006 COPs transactions give the Contract Administrator the power to file a proof of claim in the City's bankruptcy case for the whole amount of the City Payments owed to the Funding Trusts.

58. An actual case or controversy has arisen between the City and the Defendants regarding whether a valid and enforceable right to payment by the City exists under the Service Contracts. As a Creditor Representative under the Plan, as a beneficiary of the Disputed COP Claims Reserve Creditor Representative, and as a potential assignee of the City's adversary proceeding, the Retiree Committee has a significant legal interest in pursuing a declaratory judgment. A declaratory judgment is necessary to guide the City of Detroit and Retiree Committee's future conduct with regard to the chapter 9 plan of adjustment, and to preserve their legal rights thereunder.

59. The Retiree Committee seeks a declaratory judgment that any claims based on the City's obligations to make the City Payments under the Service Contracts on account of the COPs should be disallowed pursuant to 11 U.S.C. § 502(b)(1) because the agreements creating those obligations are unenforceable, void, and of no effect whatsoever, or other such relief as the Court deems just and appropriate.

**WHEREFORE**, the Retiree Committee respectfully prays that the Court enter judgment declaring the Service Contracts illegal, unenforceable, and void *ab initio* because they contemplated and effectuated the accrual of further indebtedness by the City of Detroit in violation of Section 4a(2) of the HRCA and the creation of debt not authorized by the RMFA or any other state law.

Respectfully submitted,

By: /s/

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# Exhibit 2

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

IN RE:
CITY OF DETROIT, MICHIGAN

DEBTOR
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Chapter 9
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Defendants, **et al**.
_____/

Chapter 9
Adv. Proc. No. 14-04112
Hon. Steven W. Rhodes

**ORDER GRANTING OFFICIAL COMMITTEE OF RETIREES OF THE CITY OF DETROIT'S MOTION TO INTERVENE**

This matter having come before the Court on the Official Committee of Retired Employees ("Retiree Committee")'s Motion to Intervene under Rule 24 of the Federal Rules of Civil Procedure, Rule 7024 of the Federal Rules of Bankruptcy Procedure, and Section 1109(b) of the Bankruptcy Code (the "Motion"); this Court having jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334; venue being proper before this Court under 28 U.S.C. §§ 1408 and 1409; notice of the relief requested in this Motion having been provided to all parties and intervenors registered to receive electronic notice in this matter; and based on the record and proceedings before the Court; the Court finds that:

1. Fed. R. Civ. P. 24(a)(2), made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7024, requires intervention by anyone who

> … claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. [*Id*.]

The Court find that the requirements for intervention of right have been met because: (1) the motion is timely based on the early stages of this proceeding; (2) the retirees have a significant legal interest in this matter; (3) the retirees' ability to protect their interests will be impaired absent intervention of the Retiree Committee; and (4) the retirees' significant legal interests may not be adequate protected by the City of Detroit.

2. Fed. R. Civ. P. 24(a)(1), made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7024, requires intervention by anyone who "is given an unconditional right to intervene by a federal statute." Bankruptcy Code § 1109(b) provides:

> A party in interest, including the debtor, the trustee, ***a creditors' committee***, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on ***any issue in a case*** under this chapter. [*Id*. (emphasis added).]

The Court finds that the Retiree Committee is a party in interest and a creditors' committee with a significant legal interest in the resolution of claims. Therefore, the Retiree Committee has an unconditional right to intervene.

3. The legal and factual support provided in the Motion establish just and sufficient cause to grant the relief requested by the Retiree Committee;

**IT IS HEREBY ORDERED THAT:**

1. The Motion is **GRANTED.**

2. Any objections to entry of this Order are overruled.

3. The Retiree Committee is authorized to intervene in this Adversary Proceeding.

4. The Retiree Committee will file its Complaint no later than ten (10) days following entry of this Order.

# Exhibit 3

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

| | |
|---|---|
| IN RE:<br>CITY OF DETROIT, MICHIGAN<br><br>DEBTOR<br>/ | Chapter 9<br>Case No. 13-53846<br>Hon. Steven W. Rhodes |
| CITY OF DETROIT, MICHIGAN,<br>Plaintiff,<br>v.<br><br>DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, DETROIT POLICE AND FIRE RETIREMENT SYSTEM SERVICE CORPORATION, DETROIT RETIREMENT SYSTEMS FUNDING TRUST 2005, DETROIT RETIREMENT SYSTEMS FUNDING TRUST 2006, and WILMINGTON TRUST, N.A.<br>Defendants, et al.<br>/ | Adv. Proc. No. 14-04112<br>Hon. Steven W. Rhodes |

**MEMORANDUM IN SUPPORT OF THE MOTION OF THE OFFICIAL COMMITTEE OF RETIREES OF THE CITY OF DETROIT TO INTERVENE UNDER RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 7024 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, AND SECTION 1109(b) OF THE BANKRUPTCY CODE**

**Preliminary Statement**

The Official Committee of Retirees of the City of Detroit ("Retiree Committee") submits this memorandum in support of its motion to intervene in this adversary proceeding brought by the City of Detroit ("City"). The Retiree Committee represents the interests of approximately 34,000 city retirees in this case. The Retiree Committee's intervention is warranted and necessary because:

(1) Late on July 21, 2014, the City's balloting agent formally announced that the Retiree classes (Classes 10, 11, and 12) voted to accept the City's Fourth

Amended Plan for the Adjustment of Debts of the City of Detroit ("Plan"). Pursuant to the Plan, the Retiree Committee will be the designated "Creditor Representative" in the COP Litigation upon confirmation. Allowing the Retiree Committee to participate in this proceeding now, rather than substitute in as a party at a later date, will avoid potential litigation delays and promote judicial economy and efficiency;[1]

(2) In addition, to provide a level of post-confirmation healthcare benefits, the Retiree Committee negotiated the establishment of VEBA trusts for General Retirees and for Police and Fire Retirees. The VEBAs will be funded by (a) contributions from the City in the form of new "B Notes" and (b) the majority interest (65%) of the Disputed COP Claims Reserve upon a successful outcome of the COP Litigation. The City's retirees therefore have a direct and material interest in the outcome of this litigation and need to be allowed to intervene to protect that interest;

(3) On June 30, 2014, the Court granted, in part, motions filed by Financial Guaranty Insurance Company ("FGIC") and certain Certificates of Participation ("COPs") holders to intervene in this proceeding. With the addition of FGIC and the COPs holders to this proceeding, the Retiree Committee's constituents are the only interested parties that will be impacted by the outcome of this litigation that are not participating in this proceeding; and

(4) The named defendants have asserted affirmative defenses and counterclaims in response to the City's Complaint which, if successful, would purport to require the General Retirement System and the Police and Fire Retirement System (collectively, "Retirement Systems") to disgorge approximately $1.45 billion of funds held for the benefit of the Retirees that the Retirement Systems received in connection with the transactions at issue in this proceeding.

The Retiree Committee should be permitted to intervene to protect the retirees' dual interests in the COPS Reserve and the Retirement Systems as a consequence of the claims at issue in this proceeding. Further, the City has advised that it supports this motion.

## I. Background

### A. The COPs Transactions

Given that this Court is familiar with the underlying transactions ("COPs Transactions") and relationships, the Retiree Committee will not repeat those transactions here. In the interests

[1] All capitalized terms not otherwise defined in this memorandum shall have the meaning ascribed in Article I of the Plan.

of brevity, the Retiree Committee shall rely principally upon and adopt the factual allegations set forth in the City's Complaint. The Retiree Committee notes that it's attached, proposed Complaint substantially mirrors the City's Complaint as well. (See Proposed Official Committee of Retirees of the City of Detroit's Complaint for Declaratory Relief, attached as Exhibit 1).

**B. The COP Litigation**

On January 31, 2014, the City filed its Complaint against Defendants Detroit General Retirement System Service Corporation and Detroit Police and Fire Retirement System Service Corporation (collectively the "Service Corporation"), as well as Defendants Detroit Retirement Systems Funding Trust 2005 and Detroit Retirement Systems Funding Trust 2006 (collectively the "Funding Trusts"), alleging that the 2005 and 2006 COPs Transactions were invalid, illegal and unenforceable because the debt incurred by the City in the transactions exceeded the City's statutory debt limit and was not incurred in conformity with other state laws.

On March 17, 2014, the Funding Trusts answered the complaint. In their answer, the Funding Trusts denied the City's allegations that the COPs Transactions caused the City to exceed its statutory debt limit and created debt not in conformity with state law. The Funding Trusts also raised several affirmative defenses, and asserted several counterclaims, alleging that the City's claims were barred based upon various legal and equitable principles. Among the relief sought by the Funding Trusts is a request that if the COPs Transactions are vitiated, the Court find that neither the City nor *the Retirement Systems* be permitted to retain the consideration received from the COPs Transactions. (*See e.g.*, Funding Trusts' Answer and Affirmative Defenses, Dkt #10, Eighteenth Affirmative Defense at p. 37).

In its June 30, 2014 Opinion and Order (1) denying a motion to dismiss filed by the Service Corporations and (2) granting motions to intervene with limitations, this Court provided

a synopsis of the relationships and transactions between the City of Detroit, the Service Corporations, and the Funding Trusts. (Opinion and Order, Dkt #73, pp. 2-3). In addition to denying the Service Corporations' motion to dismiss the adversary proceeding against them, the Court granted, in part, motions to intervene filed by FGIC and certain COPs holders. (Opinion and Order, Dkt #73, pp. 9, 13). The intervenors also attempted to assert third-party claims against the Retirement Systems seeking equitable relief which, if granted, would require the Retirement Systems to disgorge approximately $1.37 billion that they hold for the benefit of the Retirees. (See e.g. Proposed Answer, Affirmative Defenses, Counterclaims, and Third-Party Complaint of FGIC, Dkt #11-45, pp. 67-68). However, the Court granted the motion to intervene "with the condition that the Intervenors shall file neither a third party complaint against any party nor a counterclaim except upon leave of the Court." (Dkt #73, p. 13). Nevertheless, FGIC has since filed a motion to intervene and file its counterclaims.

**C. Plan Provisions Regarding the COPs Claims and COP Litigation**

Under the Plan, the Retiree Committee becomes the "Creditor Representative" if the Retiree Classes [Classes 10-12] accept the Plan and the Retiree Committee supports the Plan. (Plan, I.A.70). The Retiree Classes have in fact voted to accept the Plan and the Retiree Committee has and will continue to support the Plan. Upon confirmation, the Retiree Committee will be the Creditor Representative for purposes of the COP Litigation.

With respect to the COP Litigation, the Plan provides that the City may assign its rights to pursue litigation to the Creditor Representative. In addition, if the COP litigation is to be settled on terms other than those contained in the Plan, the Plan requires the City to use its best efforts to reach agreement on such settlement with the Creditor Representative. (Plan, II.B.3.a.p.i.).

In order to facilitate the provision of some level of future OPEB benefits to its constituents, the Retiree Committee negotiated Plan provisions calling for the establishment of VEBA Trusts for the City's General and Police and Fire Retirees. Under the Plan, these VEBAs are to be set up as soon as practicable following the Effective Date. The VEBAs will be funded at the outset from, among other sources, the City's contribution of $450 million. In addition, the VEBAs shall also be entitled to additional, contingent distributions from the Disputed COP Claims Reserve, as summarized below.

The Plan provides the holders of COP claims with the option to settle issues relating to those claims by agreeing to have their claims deemed Allowed Claims in an amount equal to 40% of the unpaid principal amount of such claims. (Plan, II, B.3.p.iii.A). On the Effective date, the City will establish a Disputed COP Claims Reserve, which shall contain an unsecured pro-rata share of New B Notes calculated as if Disputed (not-settling) COP Claims were allowed in their full aggregate principal amount. (Plan, II.B.3.p.iii.3.a.1.)

The Plan further provides that following the resolution of all objections to the Disputed COPs Claims, and after distributions with respect to such claims and after paying the expenses of the COP Litigation, 65% of the funds remaining in the Disputed COP Claims Reserve shall be distributed to the Detroit General VEBA and the Detroit Police and Fire VEBA. (Plan, II.B.3.p.iii.2). Given the significant legal interests of the City's retirees in this adversary proceeding, the Retiree Committee should be permitted to intervene under Rule 24 at this time.

## II. The Retiree Committee Has An Unconditional Right To Intervene Under Fed. R. Civ. P. 24(a)(2) and Fed. R. Civ. P. 24(a)(1).

Fed. R. Civ. P. 24(a), applicable to adversary proceedings pursuant to Fed. R. Bankr. Pro. 7024, provides in pertinent part:

> On timely motion, the court must permit anyone to intervene who … (1) is given an unconditional right to intervene by a federal statute; or … (2) claims

> an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. [Fed. R. Civ. P. 24(a); See *In re Bethel Res., Inc.*, 73 B.R. 24, 25 (Bankr. S.D. Ohio 1987).]

"The purpose of the rule allowing intervention is to prevent a multiplicity of suits where common questions of law or fact are involved." *United States v. Marsten Apartments, Inc.*, 175 F.R.D. 265, 267 (E.D. Mich. 1997) (citation omitted). "Rule 24 is to be construed liberally with all doubts resolved in favor of permitting intervention." *Id.*; See *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000); *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991).

**A. The Retiree Committee Is Entitled To Intervene Under Rule 24(a)(2).**

As the Court observed in its June 30, 2014 Opinion and Order:

> Intervention as a matter of right is proper when the proposed intervenors demonstrate that the following four criteria have been met: (1) the motion to intervene is timely; (2) the proposed intervenors have a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede the proposed intervenors' ability to protect their legal interest; and (4) the parties to the litigation cannot adequately protect the proposed intervenors' interest. [*Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990) (citing *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1984)).]

As explained below, the Retiree Committee meets the above criteria and the Court should grant this motion and permit the Retiree Committee to intervene.

***1. The Retiree Committee's motion is timely.***

The Sixth Circuit looks to the following factors in determining whether a motion to intervene is timely:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. [*Jansen*, 904 F.2d at 340; See *Stupak-Thrall v.*

*Glickman*, 226 F.3d 467, 472-73 (6th Cir. 2000); See *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir.1989).]

In this case, the above factors weigh in favor of finding this motion timely. First, this adversary proceeding is still in its relatively early stages, with only initial pleadings and motions having been filed. Second, the Retiree Committee seeks to intervene to protect its own interests under the Plan, against claims of the Funding Trusts and against any potential third party claims of the Intervenors, whose intervention has just been granted. Third, results of the voting on the Plan, pursuant to which the retirees may benefit from the Disputed COP Claim Reserve, was just announced a few nights ago. Fourth, the Retiree Committee has negotiated for the establishment of VEBAs under the Plan, which will be funded in part by a significant portion of the COPs Reserve upon a successful outcome of the COP Litigation, providing it with a direct interest in the adversary proceeding. Fifth, given the early stages of this litigation and the fact that the current Intervenors' motion was granted within the last few weeks, there is no prejudice to the original parties. Considering that the Sixth Circuit found a motion to intervene timely in *Janson*, 904 F.23d at 341, after six months of a twelve month discovery period had already passed,[2] and this Court just recently entered its June 30 Order permitting intervention of the current Intervenors, this Court should similarly find the Retiree Committee's motion timely.

***2. The Retiree Committee has a significant legal interest in the subject matter of this proceeding.***

Although there "is 'no clear definition' of what constitutes a substantial interest for purposes of intervention," the "Sixth Circuit has opted for an expansive definition, instructing that 'interest' is to be construed liberally." *Estate of Siemen ex rel. Siemen v. Huron Med. Ctr.*, 2012 WL 909820 at *4 (E.D. Mich. Mar. 16, 2012) (citing *Purnell*, 925 F.2d at 947-948).

[2] In the case of *In re Nitschke*, Bankr. No. 05-74861, 2008 WL 141510, at *2 (Bankr. N.D. Ohio Jan. 11, 2008), the court found a motion to intervene timely filed six months after the action was filed and approximately three weeks after the parties filed motions for summary judgment.

Indeed, "a party seeking to intervene need not possess the standing necessary to initiate a lawsuit." *Purnell*, 925 F.2d at 948 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 536–39; 92 S. Ct. 630' 30 L.Ed.2d 686 (1972)). Even when the question of whether one has a significant legal interest is a close one, "close calls should be resolved in favor of recognizing an interest under Rule 24(a)." *AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); See *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999).

As the Court recognized in its June 30 Opinion, the City would have "no duty to make payments under" the Service Contracts if this Court declared the Service Contracts to be "void *ab initio*." (Dkt. 73, p. 10). In addition, under the Plan, sixty-five (65%) percent of the unused Disputed COP Claims Reserve would be apportioned to the new VEBAs for the benefit of the retirees to pay for their future health care costs. Further, the Funding Trusts have filed counterclaims requesting that neither the City nor the Retirement Systems be permitted to retain consideration received from the COPs Transactions. Finally, the Retiree Committee's direct interest in this adversary proceeding is demonstrated by its being designated as a Creditor Representative upon confirmation of the Plan. Given that the City's retirees have a direct interest in the disposition of the above funds, and that the Retiree Committee represents them, and given that this Court has already held that the FGIC and the COPs Holders have a significant legal interest in these same funds, this Court should similarly find that the Retiree Committee has a significant legal interest warranting its intervention.

***3. Disposition of this action may impair or impede the Retiree Committee's ability to protect the retirees' legal interest.***

To "satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied." *Miller*, 103 F.3d at 1247 (citing *Purnell*, 925 F.2d at 948) (emphasis added). The Sixth Circuit has held that

"[t]his burden is minimal." *Miller*, 103 F.3d at 1247. As this noted in the June 30 Opinion, courts have found that *potential* collateral estoppel effect in later proceedings satisfies this factor. See *Nitschke*, 2008 WL 14510, at *2-3; See also *Ute Distribution Corp. v. Norton*, 43 F. App'x 272, 279 (10th Cir. 2002) ("Litigation impairs a third party's interests when the resolution of the legal questions in the case effectively foreclose the rights of the proposed intervenor in later proceedings, whether through *res judicata*, collateral estoppel, or *stare decisis*").

Any determination made by the Court regarding whether the Service Contracts are void *ab initio* will impact the retirees' significant legal interest in the above referenced funds, especially in light of the claims by the Funding Trusts and proposed claims by the Intervenors. Consequently, if intervention is denied, the retirees could lose rights based on findings occurring in an adversary proceeding from which they were precluded from participating (while virtually everyone else with an interest was permitted to participate). Given that this Court found this rationale sufficient to grant the motions to intervene pursuant to the June 30 Opinion, the same conclusion is warranted for this motion.

***4. The City cannot adequately protect the interests of the retirees represented by the Retiree Committee because the retirees' ultimate interests are different from those of the City.***

Both the Supreme Court and Sixth Circuit have recognized that the burden of establishing inadequate representation is "minimal." *Grutter*, 188 F.3d at 400 (citing *Trbovich*, 404 U.S. at 538, n. 10). A proposed intervenor is "not required to show that the representation will in fact be inadequate," but rather "need show only that there is a potential for inadequate representation." *Id*. For example, "[i]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.*

In this case, while the City seeks a declaration that the Service Contracts are void *ab initio* and that there is no obligation to repay those obligations, its pecuniary interest in the

outcome is in fact less significant than that of the retirees under the Plan. Consequently, the City has advised that it supports this motion. The retirees, through the VEBAs, stand to recover an additional contribution to their future healthcare of 65% of the unused Disputed COP Claim Reserve. The City's upside is only 35%, and potentially less if the City were to apportion any percentage of its share to another creditor in settlement.[3]

The Retiree Committee has arguments unique to the Retiree Committee as it was not an actual party to the Service Contracts but nevertheless has a significant, beneficial legal interest in them. Further, the interests of the City are different than those of the Retiree Committee based on the ultimate disposition of funds set forth in the Plan. Given that the Retiree Committee meets all of the elements under Rule 24(a)(2), this Court should similarly permit the Retiree Committee to intervene in this matter.

**B. The Retiree Committee Is Entitled To Intervene Under Rule 24(a)(1).**

As previously discussed, Fed. R. Civ. P. 24(a)(1) provides: "On timely motion,[4] the court must permit anyone to intervene who . . . is given an unconditional right to intervene by federal statute." Fed. R. Civ. P. 24(a)(1). Further, Bankruptcy Code § 1109(b) further provides:

> A party in interest, including the debtor, the trustee, ***a creditors' committee***, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on ***any issue in a case*** under this chapter. [*Id*. (emphasis added).]

Although the Sixth Circuit has not yet addressed whether "case" includes an "adversary proceeding" and this Court has recognized the split of authority among other courts of appeal regarding this issue (Dkt #73, p. 9, n. 5), this Court should find the Retiree Committee has an

[3] As of the filing of this brief, it is the further expectation of the Committee that the City will assign its remaining interests in the COPS Reserve to at least two other creditor constituencies. Thus, the City has limited economic interest in the outcome of the case.

[4]Given the Retiree Committee has already addressed timeliness in Section I(A)(i), it respectfully refers this Court to that section in support of the fact that this request is timely.

unconditional right to intervene under Section 1109(b) because "Rule 24 should be 'broadly construed in favor of potential intervenors,'" *Stupak-Thrall,* 226 F.3d at 472 (citing *Purnell,* 925 F.23d at 950), and this adversary proceeding impacts the entire bankruptcy "case" as a whole.

In *Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445, 457 (3rd Cir. 1982), the Third Circuit Court of Appeals held that Section 1109(b) affords creditors' committees an "absolute right" to intervene in an adversary proceeding. The *Marin* court explained that narrowly reading Section 1109(b) such that "case" did not encompass "adversary proceeding" would restrict parties' rights to be heard because "[m]ost litigated matters in a bankruptcy case are adversary proceedings." *Id*. at 450. Calling attention to "the exact language of section 1109(b), which grants a right to appear and be heard not in a "case" but "on any issue in a case," it then observed:

> It is unlikely that Congress would have used such sweeping language if it had not meant "case" to be a broadly inclusive term. Congress' failure specifically to mention adversary proceedings in section 1109(b) is hardly surprising, given that Congress did not specifically mention adversary proceedings anywhere in the Bankruptcy Code. [*Id*. at 451; See *In re Caldor Corp*., 303 F.3d 161, 164 (2nd Cir. 2002) (Section 1109(b) "grants right to raise, appear and be heard on *any issue* regardless of whether it arises in a contested matter or an adversary proceeding"); *In re Shubh Hotels Pittsburgh, LLC,* 495 B.R. 274, 282 (Bankr. W.D. Pa. 2013); *In re Neuman,* 124 B.R. 155, 159-160 (S.D.N.Y. 1991); *In re D.H. Overmyer Telecasting Co.,* 53 B.R. 963, 975 (N.D. Ohio 1984) (holding "language of § 1109(b) clearly provides an equity security holder with the right to be heard in an adversary proceeding"), *aff'd* 787 F.2d 590 (6th Cir. 1986).]

Given that appellate courts have held that Section 1109(b) applies to adversary proceedings and the Sixth Circuit generally construes Rule 24(a) broadly to favor intervention, this Court should adopt the above view and conclude that the Retiree Committee has an absolute right to intervene under Rule 24(a)(1) (based on Section 1109(b)). Indeed, now that the Court has granted FGIC's and the COPs holders' motions to intervene, the retirees are the only parties in interest with a very significant stake in the outcome of this proceeding who are not currently

participating in this litigation. Section 1109(b) gives the Retiree Committee an unconditional right to intervene and participate in this proceeding, particularly where the issues being litigated include the Retirement Systems' right to receive and retain funds for the retirees' benefit arising from the COPs Transactions. The Retiree Committee therefore has an absolute right to intervene in this proceeding under section 1109(b) as it is a creditor committee with a substantial interest in the resolution of the claims at issue and in the preservation of the funds held by the Retirement Systems for the benefit of the City's retirees.

## III. The Retiree Committee Should Alternatively Be Permitted To Permissively Intervene Pursuant To Fed. R. Civ. P. 24(b)(1)(B).

Alternatively, the Retiree Committee requests that the Court permit it to intervene in this proceeding under Rule 24(b)(1)(B), which again is applicable under Fed. R. Bank. Pro. 7024. In pertinent part, Rule 24(b) provides:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." [Fed. R. Civ. P. 24(b)(1)(B).]

When "exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

> The Sixth Circuit has held that when considering a motion for permissive intervention, a court should weigh the following: the timeliness of the motion, whether there is at least one common question of law or fact, whether there would be undue delay, any prejudice to the original parties, and any other relevant factors identified by the parties. [*Wells Fargo Fin. Leasing, Inc. v. Griffin*, 5:13-CV-00075-M, 2014 WL 241778 at *4 (W.D. Ky. Jan. 22, 2014)(citing *Stupak–Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir.2000)).]

Again "Rule 24 should be 'broadly construed in favor of potential intervenors.'" *Stupak-Thrall*, 226 F.3d at 472 (quoting *Purnell*, 925 F.2d at 950). The Retiree Committee satisfies the requirements of Rule 24(b)(1)(B) for the reasons provided below.

***1. The Retiree Committee's motion is timely.***

"When determining timeliness for permissive intervention, courts rely on the same five factors used to determine timeliness to intervene as of right." *Estate of Siemen*, 2012 WL 909820 at *7 (citing *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (6th Cir. 1982)). Because the Retiree Committee's motion is timely for the reasons provided in Section I(A)(i) of this brief, this Court should conclude that this request for permissive joinder is timely.

***2. There are common questions of law or fact.***

In this instance, the Retiree Committee's claims, as set forth in its proposed attachment, share common questions of law and fact with the claims asserted in the City's Complaint, in the Funding Trusts' claims, and the City's objection to the proposed claims filed by FGIC and the COPs holders, including but not limited to the claim that the Service Contracts are void *ab initio* and that there is no threat to the funding status of the Retirement Systems or the City's pension benefit restoration promises as a result of agreements undertaken by the Service Corporation and the Funding Trusts. In fact, as noted earlier, assuming the Plan is confirmed, the Retiree Committee will become a Creditor Representative under the Plan, which would require the City to confer with the Retiree Committee prior to any resolution of the adversary proceeding.

***3. Granting this motion would not cause undue delay or prejudice to the original parties.***

The Retiree Committee's intervention will not cause any delay or prejudice, because the intervenors were just granted the right to intervene on June 30, 2014 and this proceeding remains in its early stages. Allowing the Retiree Committee to intervene now will avoid unnecessary delay, promote judicial economy, avoid the possibility of piecemeal litigation and allow the interests of all relevant parties to be resolved together, once and for all, in a single proceeding. *See e.g. Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990) ("interests are better

served by having *all* relevant interests represented . . . because piecemeal litigation is likely to be avoided."). Accordingly, the Retiree Committee should be permitted to intervene under Rule 24(b)(1)(B).

#### *4. Granting this motion is warranted by the Committee's Economic Stake in the Litigation Outcome.*

Under the Plan, the Committee negotiated a sixty five percent (65%) interest in the outcome of the COP litigation for the benefit of the two VEBAs established under Class 12. In addition, the COPS Intervenors have threatened third party claims against the Retirement Systems which could pose a threat to negotiated benefit restoration rights. The greatest benefit of the litigation and concurrent threat belongs to the Committee's constituency. The Committee should be permitted to intervene and adequately protect what will now be its own rights and interests.

## IV. Conclusion

As previously stated, the City has advised that it supports the instant motion by the Retiree Committee. For the above reasons, the Official Committee of Retired Employees respectfully requests that its motion to intervene be granted. (See Proposed Order, Exhibit 2).

Respectfully submitted,

By: /s/ Matthew E. Wilkins

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