

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

| | | |
|---|---|------------------------|
| In re | X | |
| | : | |
| | : | Chapter 9 |
| | : | |
| CITY OF DETROIT, MICHIGAN, | : | Case No. 13-53846 |
| | : | |
| Debtor. | : | Hon. Steven W. Rhodes |
| | : | |
| | : | |
| | : | |
| | X | |
| CITY OF DETROIT, MICHIGAN, | : | Chapter 9 |
| | : | |
| Plaintiff, | : | Adversary No. 14-04112 |
| | : | |
| | : | Hon. Steven W. Rhodes |
| vs. | : | |
| | : | |
| DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, <i>et al.</i> | : | |
| | : | |
| | : | |
| Defendants. | : | |
| | X | |

**DEFENDANTS DETROIT GENERAL RETIREMENT SYSTEM SERVICE
CORPORATION AND DETROIT POLICE AND FIRE RETIREMENT SYSTEM
SERVICE CORPORATION’S MOTION TO DISMISS**

Defendants Detroit General Retirement System Service Corporation and Detroit Police and Fire Retirement System Service Corporation (together the “Service Corporations”) respectfully request that this Court dismiss the Plaintiff’s Complaint for Declaratory and Injunctive Relief in its entirety. The Service Corporations bring this Motion under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), as incorporated into bankruptcy proceedings by Fed. R. Bankr. P. 7012,

and rely on the facts, arguments, and law stated in the accompanying Memorandum in Support.
Concurrence in the relief requested was sought on March 26, 2014, but it was denied.

Respectfully submitted,

BUTZEL LONG, a professional corporation

By: /s/ Thomas B. Radom

Cynthia J. Haffey (P57352)

Bruce L. Sendek (P28095)

Thomas B. Radom (P24631)

Brian E. McGinty (P76459)

150 West Jefferson, Suite 100

Detroit, MI 48226

(313) 225-7000

e-Mail: sendek@butzel.com

radom@butzel.com

haffey@butzel.com

mcginty@butzel.com

Attorneys for Defendants Detroit General
Retirement System Service Corporation and
Detroit Police and Fire Retirement System Service
Corporation

Dated: April 10, 2014

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

| | | |
|---|---|-------------------------------|
| | X | |
| In re | : | |
| | : | Chapter 9 |
| | : | |
| CITY OF DETROIT, MICHIGAN, | : | Case No. 13-53846 |
| | : | |
| Debtor. | : | Hon. Steven W. Rhodes |
| | : | |
| | : | |
| | : | |
| | X | |
| CITY OF DETROIT, MICHIGAN, | : | Chapter 9 |
| | : | |
| Plaintiff, | : | Adversary No. 14-04112 |
| | : | |
| | : | Hon. Steven W. Rhodes |
| vs. | : | |
| | : | |
| DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, <i>et al.</i> | : | |
| | : | |
| | : | |
| Defendants. | : | |
| | X | |

**INDEX OF ATTACHMENTS TO DEFENDANTS DETROIT GENERAL RETIREMENT
SYSTEM SERVICE CORPORATION AND DETROIT POLICE AND FIRE
RETIREMENT SYSTEM SERVICE CORPORATION'S MOTION TO DISMISS**

| | |
|-----------|------------------------|
| Exhibit 1 | Proposed Form of Order |
| Exhibit 2 | Notice |
| Exhibit 3 | Memorandum in Support |
| Exhibit 4 | Certificate of Service |

EXHIBIT 1

Proposed Form of Order

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

| | | |
|---|---|-------------------------------|
| | X | |
| In re | : | |
| | : | Chapter 9 |
| | : | |
| CITY OF DETROIT, MICHIGAN, | : | Case No. 13-53846 |
| | : | |
| Debtor. | : | Hon. Steven W. Rhodes |
| | : | |
| | : | |
| | : | |
| | X | |
| | : | |
| CITY OF DETROIT, MICHIGAN, | : | Chapter 9 |
| | : | |
| Plaintiff, | : | Adversary No. 14-04112 |
| | : | |
| | : | Hon. Steven W. Rhodes |
| vs. | : | |
| | : | |
| DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, <i>et al.</i> | : | |
| | : | |
| | : | |
| Defendants. | : | |
| | : | |
| | X | |

**ORDER GRANTING DEFENDANTS DETROIT GENERAL RETIREMENT SYSTEM
SERVICE CORPORATION AND DETROIT POLICE AND FIRE RETIREMENT
SYSTEM SERVICE CORPORATION’S MOTION TO DISMISS**

This matter having come before the Court on a motion of Defendants Detroit General Retirement System Service Corporation and Detroit Police and Fire Retirement System Service Corporation (together the “Service Corporations”) to dismiss this Adversary Proceeding (the “Motion”); and the Court having jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court

pursuant to 28 U.S.C. § 1409; and due and proper notice of the hearing to consider the relief requested therein (the “Hearing”) having been given to all parties registered to receive electronic notices in this matter; and the Court having held the Hearing with the appearances of interested parties noted in the record of the Hearing; and upon the entire record of all the proceedings before the Court; the Court finds as follows:

1. Article III of the United States Constitution grants jurisdiction to the federal courts only over “cases” and “controversies.” This limited grant of jurisdiction is applicable to the federal bankruptcy courts.

2. Due to the City of Detroit, Michigan’s characterization of the Service Corporations as its own mere instrumentalities, which is taken as true for purposes of a motion to dismiss, there is no actual “case” or “controversy” here and no true adverse parties. Therefore, this adversary proceeding must necessarily be dismissed.

3. The legal and factual bases set forth in the Motion establish just and sufficient cause to grant the relief requested therein; and the relief requested herein is necessary, reasonable and appropriate.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The objections, if any, to entry of this Order are overruled in their entirety.
3. This adversary proceeding is dismissed with prejudice in its entirety.

It is so ordered.

Signed on _____, 2014

HONORABLE STEVEN RHODES
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT 2

Notice of Motion

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

| | | |
|---|---|------------------------|
| In re | X | |
| | : | |
| | : | Chapter 9 |
| | : | |
| CITY OF DETROIT, MICHIGAN, | : | Case No. 13-53846 |
| | : | |
| Debtor. | : | Hon. Steven W. Rhodes |
| | : | |
| | : | |
| | : | |
| | X | |
| CITY OF DETROIT, MICHIGAN, | : | |
| | : | Chapter 9 |
| | : | |
| Plaintiff, | : | Adversary No. 14-04112 |
| | : | |
| | : | Hon. Steven W. Rhodes |
| vs. | : | |
| | : | |
| DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION, <i>et al.</i> | : | |
| | : | |
| | : | |
| Defendants. | : | |
| | X | |

NOTICE OF DEFENDANTS DETROIT GENERAL RETIREMENT SYSTEM SERVICE CORPORATION AND DETROIT POLICE AND FIRE RETIREMENT SYSTEM SERVICE CORPORATION'S MOTION TO DISMISS

Detroit General Retirement System Service Corporation and Detroit Police and Fire Retirement System Service Corporation (together the "Service Corporations") have filed papers with the court to seek entry of an order pursuant to Fed. R. Civ. P. 12(b)(1), as incorporated into bankruptcy proceedings by Fed. R. Bankr. P. 7012, dismissing Adversary Proceeding Number 14-04112-swr, captioned *City of Detroit Michigan v. Detroit General Retirement System Service Corporation, et al.*

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the Court to grant the relief sought in the motion, or if you want the Court to consider your views on the motion, on or by April 24, 2014, you or your attorney must:

1. File with the Court a written response or an answer, explaining your position at:

United States Bankruptcy Court
211 W. Fort Street, Suite 2100
Detroit, Michigan 48226

Your response or answer must comply with Fed. R. Civ. P. 8(b), (c) and (e). If you mail your response to the Court for filing, you must mail it early enough so the Court will **receive** it on or before the date stated above. All attorneys are required to file pleadings electronically.

2. You must also mail a copy to:

Cynthia J. Haffey
Butzel Long, a professional corporation
150 W. Jefferson Avenue, Suite 100
Detroit, MI 48226
Telephone: (313) 225-7000
Facsimile: (313) 225-7080

If a response or answer 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.

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 that relief.

[Remainder of Page Intentionally Left Blank]

*[SIGNATURE PAGE TO NOTICE OF DEFENDANTS DETROIT GENERAL RETIREMENT
SYSTEM SERVICE CORPORATION AND DETROIT POLICE AND FIRE RETIREMENT
SYSTEM SERVICE CORPORATION'S MOTION TO DISMISS]*

Respectfully submitted,

BUTZEL LONG, a professional corporation

By: /s/ Thomas B. Radom

Cynthia J. Haffey (P57352)

Bruce L. Sendek (P28095)

Thomas B. Radom (P24631)

Brian E. McGinty (P76459)

150 West Jefferson, Suite 100

Detroit, MI 48226

(313) 225-7000

e-Mail: sendek@butzel.com

radom@butzel.com

haffey@butzel.com

mcginty@butzel.com

Attorneys for Defendants Detroit General
Retirement System Service Corporation and
Detroit Police and Fire Retirement System Service
Corporation

Dated: April 10, 2014

EXHIBIT 3

Memorandum in Support

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

| | | |
|--|---|-------------------------------|
| In re | X | |
| | : | |
| | : | Chapter 9 |
| | : | |
| CITY OF DETROIT, MICHIGAN, | : | Case No. 13-53846 |
| | : | |
| Debtor. | : | Hon. Steven W. Rhodes |
| | : | |
| | : | |
| | : | |
| | X | |
| CITY OF DETROIT, MICHIGAN, | : | |
| | : | Chapter 9 |
| | : | |
| Plaintiff, | : | Adversary No. 14-04112 |
| | : | |
| | : | Hon. Steven W. Rhodes |
| vs. | : | |
| | : | |
| DETROIT GENERAL RETIREMENT | : | |
| SYSTEM SERVICE CORPORATION, <i>et al.</i> | : | |
| | : | |
| | : | |
| Defendants. | : | |
| | X | |

**MEMORANDUM IN SUPPORT OF DEFENDANTS DETROIT GENERAL
RETIREMENT SYSTEM SERVICE CORPORATION AND DETROIT POLICE AND
FIRE RETIREMENT SYSTEM SERVICE CORPORATION'S MOTION TO DISMISS**

I. Introduction

Defendants, Detroit General Retirement System Service Corporation and Detroit Police and Fire Retirement System Service Corporation (collectively, the “Service Corporations”), submit this Memorandum in Support of their Motion to Dismiss pursuant to Fed. R. Civ. P.

12(b)(1) and 12(b)(6).¹ As discussed below, it is plain on the face of the Complaint filed by Plaintiff, City of Detroit, Michigan (the “City”) that the Court does not have subject matter jurisdiction over this proceeding against the Service Corporations, as no case or controversy has been alleged or is otherwise discernible. To the contrary, the City’s allegations describe a symbiotic relationship between the City and the Service Corporations that is the antithesis of adversarial. As such, there is no cognizable controversy over which this Court has jurisdiction as to the Service Corporations.

II. Factual Background

This motion relies on the allegations contained in the City’s Complaint. The City alleges that the Service Corporations “existed only on paper” and that the “sole ongoing function of the Service Corporations disappeared almost as soon as it was created” when “the Service Corporations irrevocably transferred their entire right to receive the City’s payments to defendant Detroit General Retirement Systems Funding Trust 2005.” (Complaint, ¶¶ 14-15)

Repeatedly, the Complaint characterizes the Service Corporations as mere instrumentalities the City created; the Complaint alleges that “[t]he Service Corporations are a sham” (Complaint, ¶ 38); that they “were without independent economic substance” (Complaint, ¶ 13); that the City controlled the Service Corporations fully, as they merely “act[ed] as an instrumentality and enterprise of the City” (*id.*); and that the *ex officio* directors of the Service Corporations were all members of the City government (*id.*). Critically, there is nothing in the Complaint’s allegations that shows, or even hints at, a dispute between the Service Corporations and the City.

¹ The Service Corporations take no position on the merits and validity of the City’s claims as that is not required for the purposes of this Motion.

III. Argument

- A. There is no “case” or “controversy” as required by Article III of the U.S. Constitution, and as a result, this suit must be dismissed for lack of subject matter jurisdiction.

Article III of the U.S. Constitution does not provide the federal courts with unlimited jurisdiction. Instead, it defines the reach of the courts as follows:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. Const., Art. III, Section 2. In brief, then, the jurisdiction of the federal courts extends to “cases” and “controversies” of specified types. If there is no “case” or “controversy,” there is no jurisdiction, and a federal court may not decide an action.

This restriction on federal courts’ power has been recognized by the U.S. Supreme Court for centuries. It was first dealt with in *Hayburn’s Case*, 2 U.S. 408 (1792) (confirming the existence of “doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us”) and reaffirmed and detailed in the seminal case of *Muskrat v. United States*, 219 U.S. 346, 356, 31 S. Ct. 250, 55 L. Ed. 246 (1911) (“As we have already seen by the express terms of the Constitution, the exercise of the judicial power is limited to ‘cases’ and ‘controversies.’ Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere

conferred.”). Notably, the Supreme Court allows for no exceptions to the rule; federal courts’ jurisdiction reaches cases and controversies, and “[b]eyond this it does not extend.” *Id.*

The Supreme Court has reinforced this principle many times since *Muskrat*. *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (“Article III, § 2, of the Constitution extends the ‘judicial Power’ of the United States only to ‘Cases’ and ‘Controversies.’”); *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 471, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982). Additionally, the Sixth Circuit has stated the same rule. *Toth v. United Auto.*, 743 F.2d 398, 404 (6th Cir. 1984).

The *Muskrat* court elaborated as follows on precisely what the terms “case” and “controversy” require:

By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

Muskrat, supra at 357. Later, it was clarified that the “triad of injury in fact, causation, and redressability comprises the core of Article III’s case-or-controversy requirement.” *Steel Co., supra* at 103-104. Moreover, as recognized in *Muskrat*, it is implicit in the Article III jurisdictional standard that a case or controversy cannot exist without adverse parties. *See, e.g., GTE Sylvania v. Consumers Union of United States*, 445 U.S. 375, 382-383, 100 S. Ct. 1194, 63 L. Ed. 2d 467 (1980) (“The purpose of the case-or-controversy requirement is to ‘limit the business of federal courts to questions presented in an adversary context and in a form

historically viewed as capable of resolution through the judicial process.’ The clash of adverse parties ‘sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.’” (internal citations omitted)).

“Just as this restriction applies to federal district courts, the courts of appeals, and the U.S. Supreme Court, this restriction necessarily applies to federal bankruptcy courts” and adversary proceedings in the bankruptcy courts. *Cassim v. Educ. Credit Mgmt. (In re Cassim)*, 594 F.3d 432, 437 (6th Cir. 2010) (citations omitted). In particular, the standard of Article III has been applied by this Court multiple times in adversary proceedings. *See, e.g., Erikson v. United States Dep’t of Treasury*, No. 12-59165, Adv. No. 12-05546, 2013 Bankr. LEXIS 2049 (Bankr. E.D. Mich. May 10, 2013) (Shapero, J.) (dismissing adversary proceeding for lack of a case or controversy). *See also In re City of Detroit*, No. 13-53846, 2013 Bankr. LEXIS 5120, 89 (Bankr. E.D. Mich. Dec. 5, 2013) (Rhodes, J.) (considering an aspect of the City’s bankruptcy petition under the case-or-controversy standard).

The City’s Complaint fails to meet the requirements of Article III. Giving the Complaint deference for purposes of this Motion, there are no true adverse parties here and no genuine dispute as between the City and the Service Corporations. Throughout the Complaint, the City argues that “[t]he Service Corporations are a sham” (Complaint, ¶ 38) and that “[t]he Service Corporations [] existed only on paper” (Complaint, ¶ 14). The City alleges, in effect, that it created the Service Corporations to bypass statutory debt limitations. Both corporations, under this theory, exist only for the purpose of putting the obligations for the COPs at one step removed from the City itself and are no more than an arm of the City. Taking these assertions as true, *arguendo*, the Service Corporations have no independent existence and thus are inseparable

from the City itself. This necessarily leads to the conclusion that the Service Corporations are not adverse parties to this proceeding and that no case or controversy exists.

The proposition that a party may not sue itself, while arguably incontestable on its face, has been stated by a range of courts throughout the United States. *See, e.g., Harrison v. Ford Motor Co.*, 370 Mich. 683, 687 (1963) (citing *Tate v. Tate*, 190 Tenn. 39 (1950) (“One may not sue himself. One cannot be both plaintiff and defendant at the same time in the same suit.”)); *Allen v. Evans*, 7 Ariz. 354, 357 (1901) (“That adversary parties are essential in every cause is fundamental. One may not sue himself any more than he may contract with himself.”); *Chadd v. Delavan Industries, Inc.*, No. 86-74241, 1987 U.S. Dist. LEXIS 15758, *5 (E.D. Mich. May 19, 1987) (citing and quoting *Harrison, supra*, for the proposition that “one may not sue himself.”); *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 F. 774, 777 (2d Cir. 1921) (“It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action.”).

Taking the pleadings as true, the Service Corporations are simply the alter ego of the City. In essence, the City is suing itself. As alleged, the City created the Service Corporations solely to incur debt without running afoul of state debt restrictions; all funds of the Service Corporations have come from the City; the Service Corporations’ directors are officials of the City government; and so forth. The City’s assertion that the Service Corporations “exist[] only on paper” is a crucial aspect of the City’s Complaint. Should the Service Corporations be found to have a truly independent existence, then the City’s claims for relief fail because the Complaint’s allegations are untrue, but if the Service Corporations have no life of their own, then, in the case of the Service Corporations, the City is “adverse” to no one but itself.

The prohibition on suing oneself continues to apply even when a party acts in two roles via a legal fiction. For example, in *Allen, supra*, the court so found in the context of the

administrator of an estate: “Neither may one sue himself in a representative capacity; for, after all, there is but one person before the court as plaintiff and defendant, and no refinement of reason can, without violence to common sense and manifest absurdity, make it appear otherwise.” *Id.* at 357. Similarly, in *Globe & Rutgers, supra*, the court examined whether or not the Director General of Railroads could act for two railroads under his control when vehicles from the two railroads collided: “the rule [against self-suing] has been applied where the same person sues and defends in different capacities. Thus a town treasurer has been held incapable of maintaining an action in his individual capacity against himself in his official capacity on a claim against the town.” *Id.* at 777. It is clear then that a party may not be on both sides of a lawsuit simply because of his role as administrator, director general, town treasurer, or any other representative capacity. Hence, it is equally clear that a party may not justify bringing an action against itself on the grounds that it acted through companies that it asserts to be “shams.”

Put somewhat differently, the case or controversy language of Article III requires causation. That is, whatever harm has come to the plaintiff must be the result of actions or inactions of the defendant. *See Toth, supra* at 404 (“[A]t an irreducible minimum, Art. III requires the party who invokes the court’s authority to ‘show that he personally has suffered some actual or threatened injury *as a result of the putatively illegal conduct of the defendant,*’ and that the injury ‘fairly can be traced to the challenged action’ and ‘is likely to be redressed by a favorable decision.’”) (emphasis in original); *Steel Co., supra* at 103 (“there must be causation -- a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant.”); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (“the ‘case or controversy’ limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant.”).

Accepting the Complaint's allegations as true, it is the City and not the Service Corporations that created a mechanism to avoid the state debt limitation statute. The asserted harm suffered by the City was caused by its own actions and not by those of the Defendants. Even if the Service Corporations violated the statute in some way or assisted in doing so (which is not admitted), according to the Complaint these violations were simply committed by the City using the Service Corporations as an instrumentality. It is, after all, not possible for the City to argue that the Service Corporations are "shams" and at the same time that their independent actions caused damage to the City.

Finally, it is not the Service Corporations but the certificate holders who are the end beneficiaries of the COP transactions, and so a cancellation of the COP obligations would benefit the Service Corporations just as it would the City or at a minimum would have a neutral effect on the Service Corporations. Nowhere in the Complaint does the City identify an interest of the Service Corporations that is contrary to its own; indeed, since the Service Corporations "irrevocably transferred their entire right to receive" payments from the City in 2005 (Complaint, ¶ 15), and since the City "directly assume[d] the Service Corporations' obligations to the banks" regarding alleged interest rate swaps in 2009 (Complaint, ¶ 32), it appears from the Complaint that the Service Corporations have no interest in this litigation of any kind. The Supreme Court has found that "there is no Art. III case or controversy when the parties desire precisely the same result." *GTE Sylvania, supra* at 383. *See also Moore v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 47, 47-48, 91 S. Ct. 1292, 28 L. Ed. 2d 590 (1971) ("We are thus confronted with the anomaly that both litigants desire precisely the same result . . . There is, therefore, no case or controversy within the meaning of Art. III of the Constitution."). If, as the City asserts, the Service Corporations are simply its tools, then they will either be indifferent to the

continuance or cancellation of the COP obligations or benefit from the reduced debt. Accordingly, the City has failed to plead any actual case or controversy.

This Court should find that it lacks subject matter jurisdiction over this suit, because the City's Complaint does not satisfy the case or controversy requirement of Article III of the U.S. Constitution.

B. Alternatively, the City's suit is collusive and should be dismissed for that reason.

Closely related to the constitutional requirement of a case or controversy is the prohibition against collusion in bringing legal actions. If the parties, rather than truly opposing each other, are in fact working together to achieve the same result, then the Supreme Court has held that a federal court may not adjudicate the action. This is true even in the absence of fraud. In *United States v. Johnson*, 319 U.S. 302, 63 S. Ct. 1075, 87 L. Ed. 1413 (1943), the Court examined a situation in which the plaintiff was essentially a stand-in for the defendant and had never met his supposed counsel or read the pleadings submitted in his name. The Court stated that "[t]he Government does not contend that, as a result of this cooperation of the two original parties to the litigation, any false or fictitious state of facts was submitted to the court. But it does insist that the affidavits disclose the absence of a genuine adversary issue between the parties, without which a court may not safely proceed to judgment Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated -- a safeguard essential to the integrity of the judicial process." *Id.* at 304-305. The Court went on to conclude that "[w]henver in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It

is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them." *Id.* at 305.

If one is to take the City's allegations seriously, including their statements that the directors and officers of the Service Corporations are all members of the City government and that the Service Corporations have no ability to act for themselves, then this suit is inherently collusive.

Importantly, the *Johnson* Court's decision was in a context in which "an important public interest [wa]s at stake" having "far-reaching effects." *Id.* at 304. While the instant suit does not involve the same type of interest (determining a statute's constitutionality), it is inarguable that the City's bankruptcy implicates myriad important public interests. The COP transaction in particular is also of surpassing importance to the citizens of Detroit and indeed beyond, as this Court's decision will determine the legality and effect of a major city's unorthodox method of ensuring payment to its pensioners. It is likely that other cities will find themselves similarly cash-strapped in the future, and it is by no means impossible that the City will again run up against state-imposed debt ceilings someday. Hence, the logic of *Johnson* applies fully.

Even if it were not so clear that the City's allegations affect the public interest, the *Johnson* Court specified that its ruling was applicable to other contexts, *i.e.*, "[e]ven in a litigation where only private rights are involved." This logic has also been applied by another district court in this circuit. Specifically, in *In re Waverly Acc. of February 22-24, 1978*, 502 F. Supp. 1, 6 (M.D. Tenn. 1979), the court professed its unease at an "agreement requir[ing] plaintiff to continue to prosecute her action against movant even though the controversy between them is settled." In a footnote, the court then cited *Johnson* and stated that "[t]he court believes that this also brings the case dangerously close to a 'collusive action,' a contrived lawsuit in

which there are no actual disputes between the parties. Were it such, the court would be required to dismiss the case.” *Id.* at fn. 7.

Thus, even if this Court were to find that it had subject matter jurisdiction over the City’s Complaint under Article III’s case or controversy requirement, dismissal of the City’s suit would still be warranted on the grounds that it is collusive.

C. There is no “case of actual controversy” as required by the Declaratory Judgment Act, and as a result, this suit must be dismissed.

The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides as follows:

In a case of actual controversy within its jurisdiction, except with respect to [exceptions not applicable here], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Congress’s use of the phrase “case of actual controversy” was an explicit incorporation of the standard of Article III, Section 2 of the Constitution. *Textron Lycoming Reciprocating Engine Div. v. United Auto.*, 523 U.S. 653, 661, 118 S. Ct. 1626, 140 L. Ed. 2d 863 (1998) (“The Declaratory Judgment Act of 1934, in its limitation to ‘cases of actual controversy,’ manifestly has regard to the constitutional provision [Art. III, § 2] and is operative only in respect to controversies which are such in the constitutional sense.”); *TCI/TKR Cable v. Johnson*, 30 Fed. App’x 581, 583 (6th Cir. 2002) (the “case of actual controversy” requirement “mirrors the constitutional requirement that the federal district courts adjudicate only actual ‘cases’ or ‘controversies.’”). Additionally, the Supreme Court has stated that “[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy

and reality to warrant the issuance of a declaratory judgment.” *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969).

The City’s Complaint fails to meet the requirements of the Declaratory Judgment Act for the same reasons that it fails to meet the requirements of Article III. For this reason, the Service Corporations rely on their arguments from Section A above regarding the case or controversy requirement for the proposition that the declaratory judgment standard is unsatisfied. The asserted lack of independence of the Service Corporations (if true) can only mean that the City has no actual opponent and no party with an incentive to act as its adversary and argue opposing positions. There is no controversy, at least between the City and the Service Corporations. Consequently, this Court should dismiss the City’s Complaint on the grounds that it is noncompliant with the Declaratory Judgment Act.

III. Conclusion

In light of all of the foregoing, the Service Corporations respectfully request that this Court enter an order dismissing the City’s Complaint against them.

[Remainder of Page Intentionally Left Blank]

*[SIGNATURE PAGE TO MEMORANDUM IN SUPPORT OF DEFENDANTS DETROIT
GENERAL RETIREMENT SYSTEM SERVICE CORPORATION AND DETROIT POLICE AND
FIRE RETIREMENT SYSTEM SERVICE CORPORATION'S MOTION TO DISMISS]*

Respectfully submitted,

BUTZEL LONG, a professional corporation

By: /s/ Thomas B. Radom

Cynthia J. Haffey (P57352)

Bruce L. Sendek (P28095)

Thomas B. Radom (P24631)

Brian E. McGinty (P76459)

150 West Jefferson, Suite 100

Detroit, MI 48226

(313) 225-7000

e-Mail: sendek@butzel.com

radom@butzel.com

haffey@butzel.com

mcginty@butzel.com

Attorneys for Defendants Detroit General
Retirement System Service Corporation and
Detroit Police and Fire Retirement System Service
Corporation

Dated: April 10, 2014

EXHIBIT 4

Certificate of Service

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

| | | |
|--|---|-------------------------------|
| | X | |
| In re | : | |
| | : | Chapter 9 |
| | : | |
| CITY OF DETROIT, MICHIGAN, | : | Case No. 13-53846 |
| | : | |
| Debtor. | : | Hon. Steven W. Rhodes |
| | : | |
| | : | |
| | X | |
| CITY OF DETROIT, MICHIGAN, | : | Chapter 9 |
| | : | |
| Plaintiff, | : | Adversary No. 14-04112 |
| | : | |
| | : | Hon. Steven W. Rhodes |
| vs. | : | |
| | : | |
| DETROIT GENERAL RETIREMENT | : | |
| SYSTEM SERVICE CORPORATION, <i>et al.</i> | : | |
| | : | |
| Defendants. | : | |
| | X | |

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2014, I filed the foregoing documents with the Clerk of Court by using the Court's e-filing system, which will electronically send the same to all counsel of record.

[Remainder of Page Intentionally Left Blank]

[SIGNATURE PAGE TO CERTIFICATE OF SERVICE]

Respectfully submitted,

BUTZEL LONG, a professional corporation

By: /s/ Thomas B. Radom

Cynthia J. Haffey (P57352)

Bruce L. Sendek (P28095)

Thomas B. Radom (P24631)

Brian E. McGinty (P76459)

150 West Jefferson, Suite 100

Detroit, MI 48226

(313) 225-7000

e-Mail: sendek@butzel.com

radom@butzel.com

haffey@butzel.com

mcginty@butzel.com

Attorneys for Defendants Detroit General
Retirement System Service Corporation and
Detroit Police and Fire Retirement System Service
Corporation

Dated: April 10, 2014