UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Maurikia Lyda, John Smith, Nicole Hill, Rosalyn Walker, Annette Parham, Janice Ward, Sylvia Taylor, Scott Eubank, Joann Jackson, Tammika R. Williams, Michigan Welfare Rights Organization, Peoples Water Board, National Action Network-Michigan Chapter, and Moratorium Now! Appellants, v. City of Detroit, Michigan, Appellee.	Case No. 2:15-cv-10038-BAF-RSW Honorable Bernard A. Friedman Magistrate Judge R. Steven Whalen
Maurikia Lyda, John Smith, Nicole Hill, Rosalyn Walker, Annette Parham, Janice Ward, Sylvia Taylor, Scott Eubank, Joann Jackson, Tammika R. Williams, Michigan Welfare Rights Organization, Peoples Water Board, National Action Network-Michigan Chapter, and Moratorium Now! v. City of Detroit, Michigan	Adv. Proc. No. 14-04732
In re: City of Detroit, Michigan, Debtor.	Bankruptcy Case Number 13-53846 Honorable Steven W. Rhodes Chapter 9

APPELLEE CITY OF DETROIT'S BRIEF ON APPEAL

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STATEMENT REGARDING ORAL ARGUMENT

The City of Detroit ("City") does not believe that oral argument is necessary but welcomes the opportunity to address the Court if it were to schedule oral argument.

BASIS FOR APPELLATE JURISDICTION

The City agrees with this Court's conclusion that it is exercising appellate jurisdiction under 28 U.S.C. § 158 over the Bankruptcy Court's dismissal of the Appellants' amended complaint and the denial of the Appellants' motion for leave to amend its complaint. *Order Denying Appellants' Emergency Motion*, Doc. No. 14. The Court does not, however, have jurisdiction over the Bankruptcy Court's order denying the Appellants' motion for a preliminary injunction because it was not a final order and leave to appeal has not been requested nor granted.

The Appellants' discussion of jurisdiction is self-contradictory and puzzling. The Appellants assert that the Bankruptcy Court acted in an "advisory capacity" to this Court; then admit that a final order was entered (which they now appeal); and finally claim that *no* final order was entered on non-core issues. Appellants' Brief at vii, 7. Likewise, they assert that they asked the Bankruptcy Court to submit proposed findings of fact. *Id.* at vii, 6; Doc. No. 2, Pg ID 49-85. The City cannot find this alleged request, and notes that the complaint alleges that all matters are core. Doc. No. 2, Pg ID 52. The City agrees with this Court's holding that it is exercising appellate jurisdiction over the dismissal of the complaint and the denial of the motion to amend, and thus will let the Appellants' references to other types of jurisdiction (e.g., 42 U.S.C. § 1983 and pendant jurisdiction) pass without further remark. *Order Denying Appellants' Emergency Motion*, Doc. No. 14.

I. Jurisdiction over the Dismissal of the Complaint

This Court has jurisdiction over the appeal of the Bankruptcy Court's dismissal of the Appellants' amended complaint. A court's determination that it lacks authority over a matter is a final order. *King v. Long Beach Mortg. Co.*, 672 F. Supp. 2d 238, 244 (D. Mass. 2009) ("When Congress enacts a statute prohibiting the federal courts from granting certain remedies, such limitations are jurisdictional."); *In re E.C. Morris Corp.*, No. 14-8016, 2014 WL 6952724 at *1 (B.A.P. 6th Cir. Dec. 10, 2014); *Thickstun Bros. Equip. Co. v. Encompass Servs. Corp. (In re Thickstun Bros. Equip. Co.),* 344 B.R. 515, 517 (B.A.P. 6th Cir. 2006). Likewise, "an order dismissing an adversary complaint under Federal Rule of Civil Procedure 12(b)(6) is a final, appealable order." *Se. Waffles, LLC v. U.S. Dept. of Treasury (In re Se. Waffles, LLC),* 460 B.R. 132, 134-135 (B.A.P. 6th Cir. 201). As such, this Court has jurisdiction over the Bankruptcy Court's dismissal of the Appellants' complaint.

II. Jurisdiction over the Denial of Leave to Amend

Similarly, this Court has jurisdiction over the appeal of the Bankruptcy Court's denial of the Appellants' motion for leave to amend their complaint. A denial of leave to amend a complaint is a final order when accompanied by an order dismissing the action. *See Azar v. Conley*, 480 F.2d 220, 223 (6th Cir. 1973). This Court has jurisdiction over this aspect of the appeal.

III. No Jurisdiction over the Denial of the Preliminary Injunction

This Court lacks jurisdiction over the appeal of the Bankruptcy Court's refusal to grant injunctive relief because (1) the order denying the preliminary injunction was not a "final" order and (2) an interlocutory appeal of this issue was not requested and should not be granted.[1] District Courts have jurisdiction to hear "appeals from final judgments, orders, and decrees" and may hear appeals "from other interlocutory orders and decrees," if leave is granted. 28 U.S.C. § 158(a)(1), (3).

Temporary restraining orders are usually of such short duration that they are not "final." *Mathieson v. Harry F. Shea & Co. (In re Mathieson)*, 75 B.R. 340, 342 (N.D. Ill. 1987). Preliminary injunctions are not always "final," either. *Kore Holdings, Inc. v. Rosen (In re Rood)*, 426 B.R. 538, 547-58 (D. Md. 2010). While such orders may be final if of unusual duration or entered without a hearing, *Mathieson*, 75 B.R. at 342 (collecting cases), where a court holds a hearing, then enters an order of short duration or denies relief entirely, further proceedings will follow, so the order will not be final. *Id.* at 342-43; *Rood*, 426 B.R. at 546-58. Even had the complaint not been dismissed, the Bankruptcy Court's refusal to grant injunctive relief was not a final order because it would be followed by

[1] This assumes that the Court reverses or vacates the Bankruptcy Court's dismissal of the Appellants' complaint and thus actually reaches this question.

proceedings that were more than "ministerial" in nature. *Settembre v. Fid. & Guar. Life Ins. Co.*, 552 F.3d 438 (6th Cir. 2009).

Thus, for this Court to have jurisdiction, it must both treat the notice of appeal as a motion for leave to appeal and grant an interlocutory appeal. *Rood*, 426 B.R. at 548 (citing Fed. R. Bankr. P. 8003(c)); *Cousins Props., Inc. v. Treasure Isles HC, Inc. (In re Treasure Isles HC, Inc.)*, 462 B.R. 645, 647 (B.A.P. 6th Cir. 2011). "The factors to be considered in determining whether to grant leave to appeal are: (1) the question must be one of law; (2) it must be controlling; (3) there must be substantial ground for difference of opinion about it; and (4) an immediate appeal must materially advance the ultimate termination of the litigation." *Treasure Isles* HC, 462 B.R. at 647 (citations and internal quotation marks omitted).

The Appellants have not carried their burden of establishing these factors. The Bankruptcy Court's decision was an exercise of discretion, not a purely legal determination. *See Wonderland Shopping Ctr. Venture Ltd. P'ship v. CDC Mortg. Capital, Inc.*, 274 F.3d 1085, 1097 (6th Cir. 2001); *Treasure Isles HC*, 462 B.R. at 647. Immediate appeal of this issue would not advance the underlying litigation. *Treasure Isles HC*, 462 B.R. at 647. Finally, the refusal to grant injunctive relief does not present "substantial grounds for difference of opinion," at least for purposes of considering whether an interlocutory appeal is appropriate. *Watson v.*

Boyajian (In re Watson), 309 B.R. 652, 660 (B.A.P. 1st Cir. 2004) ("Substantial grounds for difference of opinion exist where the proposed interlocutory appeal presents one or more difficult and pivotal questions of law not settled by controlling authority."). As such, the Court lacks jurisdiction over the Bankruptcy Court's denial of the preliminary injunction because there is no reason to grant leave for an interlocutory appeal.

COUNTERSTATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

Did the Bankruptcy Court correctly determine that:

(1) Except as to the Appellants' constitutional claims, 11 U.S.C. § 904 prevented the Bankruptcy Court from granting the relief the Appellants requested, thus divesting the Bankruptcy Court of jurisdiction over those counts of the Appellants' complaint;

(2) The relief the Appellants sought on their executory contract claim was outside the scope of Bankruptcy Code § 365 and prohibited by § 904, and even if it were not, the relationship between the Detroit Water and Sewerage Department ("DWSD") and its customers is not an executory contract because it is purely a matter of law;

(3) Although § 904 did not deprive the Bankruptcy Court of jurisdiction to determine the constitutional claims raised, the Appellants failed to plead constitutional claims on which relief could be granted;

(4) The evidence presented to the Bankruptcy Court did not warrant entry of a preliminary injunction; and

(5) The Appellants were not entitled to amend their complaint after it was dismissed.

The Bankruptcy Court's determinations that (1) 11 U.S.C. § 904 limits its authority, (2) the nature of the relationship between DWSD and its customers is not an executory contract because it is purely a matter of law, and (3) the Appellants failed to state constitutional claims on which relief could be granted are all rulings of law, subject to *de novo* review. *In re Cook*, 457 F.3d 561, 565 (6th Cir. 2006).

If this Court should find that it has jurisdiction to review the Bankruptcy Court's denial of the motion for preliminary injunction, the Bankruptcy Court's decision would be reviewed under an abuse of discretion standard. *See Wonderland Shopping Ctr. Venture Ltd. P'ship v. CDC Mortg. Capital, Inc.*, 274 F.3d 1085, 1097 (6th Cir. 2001). As that court explained

> Under this standard, the Court will overturn a district court's determination regarding a preliminary injunction if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. A legal or factual error may be sufficient to determine that the district court abused its discretion. However, absent such an error, the district court's weighing and balancing of the equities is overruled only in the rarest of cases.

Id. (citations and internal quotation marks omitted).

Last, review of the Bankruptcy Court's denial of leave to amend the complaint after entry of the order dismissing the complaint is also reviewed under an abuse of discretion standard. *Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776 (6th Cir. 2000).

STATEMENT AND FACTS OF THE CASE

In July of 2014, the Appellants filed the complaint which began the adversary proceeding at issue. Appellants' Amended Designation of the Record ("ADR"), Doc. No. 2, Pg ID 49-85. The Bankruptcy Court summarized the relief requested by the Appellants:

> The Complaint seeks an injunction: (1) imposing a six month moratorium on residential shut-offs; (2) requiring that water service be restored to all residents whose water service has been terminated; and (3) directing the City to implement a water affordability plan with income-based payments for residential customers. The complaint also seeks a declaratory judgment finding that DWSD's policies, procedures and actions relating to notice of bills, disputes of bills, opportunities for payment, and hearings prior to water service shutoffs violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See* U.S. Const. amend. XIV. Finally, the plaintiffs seek declaratory and equitable relief finding that the City's policies, procedures and actions related to the denial, interference or deprivation of the plaintiffs' right to use water are protected by the public trust doctrine, the human right to water and the laws and Constitutions of Michigan and the United States.

Suppl. Op. at 4; ADR, Pg ID 83-84.

On August 14, the Bankruptcy Court rejected a similar request by another set of plaintiffs who sought to intervene in the City's bankruptcy case, holding that § 904 prevented it from granting such relief. Counter-Designation of Record ("CDR"), Doc. No. 3, Pg ID 98-102. Undeterred by this ruling, on August 20, the Appellants moved for a preliminary injunction order seeking a "six-month

prohibition on water service terminations and a restoration of service for all customers whose service was discontinued." Suppl. Op. at 24; ADR, Pg ID 94-199.

In its objection to this motion, the City provided the Bankruptcy Court with a list of the many steps it was taking to help lower income customers. *Id.*, Pg ID 224-25; 295-340. The cornerstone of these efforts was the City's 10 Point Plan, which provided additional time for customers to cure their delinquencies and substantial financial assistance to customers in need of assistance in paying their water bills. *Id.;* Suppl. Op. at 19-20. The Bankruptcy Court emphasized that the 10 Point Plan was "bold, commendable and necessarily aggressive." Suppl. Op. at 10.

On August 28, the City moved to dismiss the complaint, noting that the relief sought by the Appellants was almost identical to the relief the Bankruptcy Court had rejected in its August 14 ruling. *Id.*, Pg ID 200-22; Pg ID 207. In their response, the Appellants claimed that by filing a bankruptcy petition, the City consented to the Bankruptcy Court's authority to grant injunctive relief. *Id.*, Pg ID 341-68; Pg ID 345-47. They also noted that the Bankruptcy Court should permit them to amend their breach of contract claim if it found the wording of the claim confusing. *Id.*, Pg ID 349.

On September 22 and 23, 2014, the Bankruptcy Court held two days of evidentiary hearings at which both parties presented evidence on the Appellants' motion for a preliminary injunction. *Id.*, Pg ID 1922-2136; 2171-2393. At the

conclusion of the evidentiary hearing, the Bankruptcy Court heard oral argument on the City's motion to dismiss. A week later, the Bankruptcy Court dismissed the complaint, and ruled in the alternative that, even if had not dismissed the complaint, it would not have granted the preliminary injunction. *Id.*, Pg ID 2394-2418.

October 14 through 19 saw a flurry of motions and amended motions to reconsider by the Appellants, including a request by the Appellants to amend their now-dismissed complaint. *Id.*, Pg ID 2419-2449; Suppl. Op. at 2. The City objected to the request to amend, arguing that the Appellants were not entitled to an advisory opinion as to the defects in their complaint. *Id.*, Pg ID 2511-2520. The Appellants' arguments prompted the Bankruptcy Court to issue its written supplemental opinion, where it reasserted that dismissal was proper. Suppl. Op.

On appeal, the Appellants filed a designation of the record that included items not in evidence. (Doc. No. 2.) They also moved this Court to stay briefing and hold a status conference so that they might obtain discovery. (Doc. Nos. 6, 9, 13.) The City objected. (Doc. Nos. 8, 10, 12.) The Court ruled in the City's favor on both issues. (Doc. No. 13.)

SUMMARY OF THE ARGUMENT

The Bankruptcy Court's decision should be affirmed. None of the Appellants' claims provides any legal basis to grant the extraordinary relief of stopping all water shutoffs in the City, ordering the City to restore water service to all residents whose water service had been terminated and directing the City to implement an income-based water affordability plan for all of its citizens. The Appellants non-constitutional claims fail because Bankruptcy Code § 904 specifically prohibits the Bankruptcy Court from granting this relief. And, the Appellants constitutional claims were properly dismissed because they failed to state claims on which relief could be granted. The Bankruptcy Court correctly rejected the "crux" of the Appellants' Due Process claim – "a constitutional right to water service at a price they can afford to pay" – because no such right exists and Michigan law does not permit a municipality to base its water rates on ability to pay. Suppl. Op. at 15 (*citing* M.C.L. § 141.121). Likewise, the Equal Protection claim was properly dismissed because the Appellants never identified how the City's collection policies fail the "rational relationship" test.

The Bankruptcy Court also properly concluded that the relationship between the DWSD and its customers does not fall within the definition of an executory contract under Bankruptcy Code § 365. Rather, as the Bankruptcy Court determined, the arrangement is part of the variety of services the City has

determined to provide pursuant to state law and local ordinance. Bankruptcy Code § 365 does not authorize the City to assume or reject law and thus the arrangement is not an executory contract. Further, even if the arrangement were an executory contract, the Bankruptcy Court correctly concluded that the relief that the Appellants sought was outside the scope of § 365 and is prohibited by § 904.

The Bankruptcy Court properly found that the Appellants' request to file an amended complaint to correct these deficiencies was untimely under binding Sixth Circuit precedent, which precedent the Appellants were required (but failed) to bring to this Court's attention pursuant to Rule 3.3(a)(2) of the Michigan Rules of Professional Conduct.

Finally, this Court lacks jurisdiction to review the appeal of the denial of the preliminary injunction, but should affirm the Bankruptcy Court if it determines otherwise. The refusal to grant a preliminary injunction is an interlocutory matter. The Appellants never sought leave to appeal on this issue, presumably because there is no basis for interlocutory relief. Even if this Court were to grant interlocutory relief, the Bankruptcy Court correctly found that such relief was prohibited by 11 U.S.C. § 904 and, in the alternative, applied the traditional four-part test to correctly determine that preliminary injunction should be denied.

The Appellants' brief on appeal largely ignores these central holdings in the Bankruptcy Court's opinion to focus on irrelevancies. Even though § 904 formed

the basis for the Bankruptcy Court's dismissal of all of the Appellants' non-constitutional claims, it gets but four mentions in the Appellants' brief. Instead, the Appellants devote pages to explaining why their non-constitutional claims (e.g., estoppel) would survive Rule 12(b)(6) challenges—even though these claims were dismissed because the Bankruptcy Court did not have authority to grant the Appellants relief. The Appellants likely avoid discussion of § 904 because they have no legally cognizable response to it.

For these reasons, the City respectfully asks this Court to AFFIRM the Bankruptcy Court's decision and order.

ARGUMENT

I. The Bankruptcy Court Correctly Determined that it Lacked the Authority to Grant Relief on the Appellants' Non-Constitutional Claims.

Although the Appellants allege that the Bankruptcy Court did not address their non-constitutional claims, the Bankruptcy Court properly dismissed these claims when it held that it did not have the authority to grant the relief the Appellants' sought. *See* Appellants' Brief at 22-28. Bankruptcy Code § 904 provides:

> Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with
>
> (1) any of the political or governmental powers of the debtor;
>
> (2) any of the property or revenues of the debtor; or
>
> (3) the debtor's use or enjoyment of any income-producing property.

"This section makes clear that the court may not interfere with the choices a municipality makes as to what services and benefits it will provide." *In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 649 (Bankr. E.D. Mich. 1994) (citation omitted); *see also Hollstein v. Sanitary & Improvement Dist. No. 7 of Lancaster Cnty., Neb.*, 96 B.R. 967, 970 (Bankr. D. Neb. 1989).

> In the overall construct, § 904 performs the role of the clean-up hitter in baseball. Its preambular language

> "[n]otwithstanding any power of the court, . . . the court may not, by any stay, order, or decree, in the case or otherwise . . ." is so comprehensive that it can only mean that a federal court can use no tool in its toolkit—no inherent authority power, no implied equitable power, no Bankruptcy Code § 105 power, no writ, no stay, no order—to interfere with a municipality regarding political or governmental powers, property or revenues, or use or enjoyment of income-producing property. As a practical matter, the § 904 restriction functions as an anti-injunction statute—and more.

Ass'n of the Retired Emps. of the City of Stockton v. City of Stockton, Cal. (In re City of Stockton, Cal.), 478 B.R. 8, 20 (Bankr. E.D. Cal. 2012).

These restrictions are based in the United States Constitution.

> The foundation of § 904 is the doctrine that neither Congress nor the courts can change the existing system of government in this country. The powers of the federal government are limited by the Constitution. The powers that are not given to the federal government are reserved to the states. One of the powers reserved to the states is the power to create and govern municipalities. Therefore, chapter 9 was created to give courts only enough jurisdiction to provide meaningful assistance to municipalities that require it, not to address the policy matters that such municipalities control.

Addison Cmty. Hosp. Auth., 175 B.R. at 649.

The Bankruptcy Court reached the same conclusion in an earlier matter.

> Unlike other chapters of the bankruptcy code, chapter 9 strictly limits the Court's power in a municipal bankruptcy case. This is to ensure that the separation of powers contemplated in the United States Constitution is upheld and the Court does not overstep its bounds into the sovereign powers of states. Thus, section 904 of the bankruptcy code prohibits the Court from interfering with

> "(1) any of the political or governmental powers of the debtor; (2) any of the property or revenues of the debtor; or (3) the debtor's use or enjoyment of any income-producing property." 11 U.S.C. § 904. This limitation means that the Court cannot interfere with the "choices a municipality makes as to what services and benefits it will provide." *In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 649 (Bankr. E.D. Mich. 1994) (citing H.R. Rep. No. 595, 398). Further, this provision makes clear that "chapter 9 was created to give courts only enough jurisdiction to provide meaningful assistance to municipalities that require it, not to address the policy matters that such municipalities control." *Id.* Consequently, given the constraints of § 904, the Court would not have the authority to require the DWSD to stop mass water shut-offs, to require that the DWSD refrain from implementing a program of mass water shut-offs in the future, or require the DWSD to implement procedures regarding rate setting or water affordability plans.

Suppl. Op. at 5 (quoting *In re City of Detroit, Mich.*, Case No. 13-53846, Doc. No. 6708) (emphasis added)).

Here, the Appellants asked the Bankruptcy Court for relief that it could not grant. The Appellants asked it to enjoin the City from further water shutoffs, order restoration of service previously terminated, provide declaratory relief relating to provision of water, and order the City to set rates the Appellants believe are fair. ADR, Pg ID 83-84. This relief is specifically prohibited by Bankruptcy Code § 904. Since the Bankruptcy Court could not grant relief to the Appellants even if they prevailed, the Bankruptcy Court properly dismissed the Appellants' non-constitutional claims.

II. The Appellants' Executory Contract Argument Must be Rejected

The Bankruptcy Court properly found that the relationship between the DWSD and its customers is strictly a matter of law and not an executory contract. Suppl. Op. at 6-7. The Bankruptcy Court also correctly held that even if "the relationship is an executory contract, the relief that the plaintiffs seeks is outside the scope of § 365 and is prohibited by § 904." *Id.* at 3.

None of the Appellants' arguments cast any doubt on either of the holdings. The Appellants first argue that these are executory contracts because the DWSD's constituents are "universally" referred to as customers. Merely calling someone a "customer", however, does not create a contractual relationship with them and the Appellants cite no law to support their assertion. Appellants' Brief at 8. The Appellants then assert that "virtually every action a city takes is done according to law," and the fact that statutes govern the provision of water changes nothing. *Id.* But, as the Bankruptcy Court noted, the DWSD assumed the duty of providing water according to law and provided service as a governmental function. Suppl. Op. at 7. State law directs how rates are set and provides for termination of service. *Id.* (citing M.C.L. § 123.166 and M.C.L. § 141.121). This is a service governed by statute, not an arrangement entered into by contract.

The Appellants next argue that the Bankruptcy Court contradicted itself by finding rights under state law but rejecting the Appellants' constitutional claims.

Appellants' Brief at 9. This argument misconstrues the Bankruptcy Court's opinion. The fact that the Bankruptcy Court held that the City provides water service to its residents under state law certainly does not contradict the Bankruptcy Court's holding that "there is no constitutional or fundamental right to either affordable water service or to an affordable payment plan for account arrearages." Suppl. Op. at 15. Further, the Bankruptcy Court noted that the Appellants *might* be able to establish a liberty or property right to water. *Id.* at 7, 10. As discussed below, even if the Appellants had done so, the Appellants would still need to establish a Due Process or Equal Protection violation. *Id.* at 10-18. This, the Bankruptcy Court found, the Appellants did not do. Far from contradicting itself, the Bankruptcy Court gave the Appellants' claims full consideration, but held that that they failed.

Finally, for the reasons stated in the previous section, even if the Appellants were correct on their executory contract argument (which they are not), the Bankruptcy Court properly held that the count should be dismissed because it did not have the authority to grant the relief sought.

III. The Complaint Fails to State Claims for Violations of Due Process and Equal Protection

The Bankruptcy Court's dismissal of the Appellants' Equal Protection and Due Process claims should be affirmed. The Appellants' complaint fails to allege that the City's procedures are constitutionally insufficient. Further, the specific

content of the bills provided to the Bankruptcy Court by the Appellants demonstrates that their due process allegations are insufficient as a matter of law. The Appellants' Equal Protection claim is equally unsupported because they have not identified how the City's collection policies failed the "rational relationship" test.

A. The Due Process Claim Fails

The Bankruptcy Court's dismissal of the Appellants' Due Process Claim should be affirmed. The Bankruptcy Court correctly determined that the Appellants' Due Process count consisted of an "everything but the kitchen sink" list of legal conclusions and that it is not "bound to accept as true a legal conclusion couched as a factual allegation." Suppl. Op at 12 (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). It also correctly concluded that the customer bills submitted to the Bankruptcy Court by the Appellants provided notice sufficient to defeat the Appellants' allegations. Finally, the Bankruptcy Court properly rejected the "crux" of the Appellants' claim – "a constitutional right to water service at a price they can afford to pay" – because no such right exists and Michigan law does not permit a municipality to base its water rates on ability to pay. Suppl. Op. at 15 (*citing* M.C.L. § 141.121).

In response, the Appellants first accuse the Bankruptcy Court of improperly entering the "dangerous territory" of considering "the content of bills presented by

the City at the TRO hearing, finding that they defeat the legal claims in a complete conflagration of the 12(b)(6) dismissal and 56 summary judgment rules." Appellants' Brief at 10. This is surprising to hear, because these bills were submitted by the Appellants. Suppl. Op. at 12-13. Plaintiffs' Exhibits 107(a)-(h), which contain the bills, were admitted into evidence and designated as part of the record by the Appellants. Suppl. Op. at 19; *see also* Doc. No. 3, No. 19. The Appellants provide nothing to support their argument that the Bankruptcy Court could not review bills referred to in the Appellants' complaint, admitted into evidence by the Appellants, and of "unquestioned authenticity." Suppl. Op. at 13 (citing *Tellabs, Inc. v. Makor Issue & Rights, Ltd.*, 551 U.S. 308, 322 (2007) and Federal Practice & Procedure).

After arguing that the Bankruptcy Court erred by considering the actual bills that underlie the Appellants' Due Process claim, they next assert that the Bankruptcy Court did not consider all of the "factual" allegations in the Complaint. Appellants Brief at 10. In doing so, the Appellants ignore the Bankruptcy Court's statement that apart from the "kitchen sink" list of legal conclusions, the "complaint alleges little or nothing about the content of the notices provided in those bills and the shut-off notices. The complaint certainly alleges no specific facts suggesting that the bills and notices were constitutionally inadequate." Suppl. Op. at 13. Despite the Appellants' assertion that the Bankruptcy Court did not

consider their factual allegations, they fail to rebut or even address the Bankruptcy Court's conclusion that the "bills and notices give notice of (1) the amount of the bills; (2) the payment due date; (3) the consequence of failing to pay the bill—that water service is subject to disconnection; and (4) the opportunity to dispute the bill by contacting the DWSD." Suppl. Op. at 14. In short, the Bankruptcy Court not only considered all of the factual allegations in the complaint but went even further and reviewed the actual documents submitted by the Appellants which underlie these factual allegations. The Appellants' attempt to fault the Bankruptcy Court's decision must be rejected.

The Appellants final argument similarly fails. They deny asserting a right to affordable water but admit that they claim a constitutional right to reasonable payment plans. Appellants' Brief at 13. These two positions cannot be reconciled. And, in any event, as the Bankruptcy Court correctly held, the "crux of the plaintiffs' real due process claim—that the City is constitutionally required to accommodate their inability to pay their water bills"—has no basis. Suppl. Op. at 15. There is no legal support for this claim because Michigan law requires a "municipality to set water rates at the reasonable cost of delivering the service. Nothing in the case law suggests that it is unconstitutional for state law to require a municipality to fix the price of a service according to the cost of providing it rather than ability to pay." Suppl. Op. at 15. The Bankruptcy Court also correctly

concluded that "there is no constitutional or fundamental right either to affordable water service or to an affordable payment plan for account arrearages." As the "crux" of the Appellants' Due Process claim has no legal support, this Court should affirm the Bankruptcy Court's dismissal of the Appellants' Due Process claim.

B. The Appellants' Equal Protection Claim Fails

The Bankruptcy Court correctly dismissed the Appellants' Equal Protection claim because the complaint failed to articulate how the DWSD's collection policies failed the rational relationship test.

The "disparate treatment of persons is reasonably justified if they are dissimilar in some material respect." *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty., Ohio*, 430 F.3d 783, 790-91 (6th Cir. 2005). Under *TriHealth*, the Appellants must show that there is *no* material difference between residential and commercial customers. *Id.* Otherwise, since "no suspect class or fundamental right is implicated," the DWSD's actions here "must be sustained if *any* conceivable basis rationally supports [them]." *Id.* (emphasis in original).

The Appellants allege that all commercial and residential customers are similarly situated because they receive water. Appellants' Brief at 16. If true, then all DWSD constituents are similarly situated—one-person residential households, manufacturers drawing thousands of gallons daily, and townships drawing on the

system for their citizens. As the Bankruptcy Court found in its bench opinion, this assertion must be rejected because "[s]ome commercial customers have more complex service connections and, therefore, more complex disconnection procedures." ADR, Pg ID 2407-2409.

Further, even if the Appellants had adequately plead that residential and commercial customers were similarly situated and received differing treatment, they still fail to identify any factual allegations in the complaint which could plausibly establish that the DWSD's alleged policy is not "rationally related to a legitimate state interest." Suppl. Op at 18. The Appellants assert they need not do this, claiming that they "only need show differing treatment between two groups by a state actor" and allege that they were treated differently; the state then "must articulate a rational reason for the differing classification . . . ." Appellants' Brief at 19.

This assertion misstates the law for two reasons. First, it ignores the fact that a government has "no obligation to produce evidence" of rationality and that the burden is on the challenger "to negative every conceivable base which might support it." *Heller v. Doe*, 509 U.S. 312, 321 (1993); *In re Rausch*, 197 B.R. 109, 119 (Bankr. D. Nev. 1996). And second, it ignores that after *Iqbal* and *Twombly*, "a plaintiff cannot overcome a Rule 12(b)(6) motion to dismiss simply by referring to conclusory allegations in the complaint that the defendant violated the law.

Instead, the sufficiency of a complaint turns on its factual content, requiring the plaintiff to plead enough factual matter to raise a plausible inference of wrongdoing." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013) (citing *Twombly*) (internal quotation marks omitted). "Where, as here, the complaint alleges facts that are merely consistent with liability . . ., the existence of obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made." *Id.* at 505. As the Bankruptcy Court emphasized, the Appellants cannot merely allege that a difference in treatment violates the Equal Protection clause but must explain why it does so. This they have not done. For these reasons, the City asks this Court to affirm the Bankruptcy Court's judgment dismissing the Appellants' Equal Protection count for failure to state a claim upon which relief can be granted.

IV. The Bankruptcy Court Properly Denied the Appellants' Untimely Motion for Leave to Amend their Complaint

The Bankruptcy Court properly denied Appellants' request for leave to amend their complaint after it had been dismissed and there are no grounds to reverse the Court under an abuse of discretion standard. As the *Clark* court explained,

> Rule 15 requests to amend the complaint are frequently filed and, generally speaking, freely allowed. But when a Rule 15 motion comes after a judgment against the

> plaintiff, that is a different story. Courts in that setting must consider the competing interest of protecting the finality of judgments and the expeditious termination of litigation. If a permissive amendment policy applied after adverse judgments, plaintiffs could use the court as a sounding board to discover holes in their arguments, then reopen the case by amending their complaint to take account of the court's decision. That would sidestep the narrow grounds for obtaining postjudgment relief under Rules 59 and 60, make the finality of judgments an interim concept and risk turning Rules 59 and 60 into nullities.

Clark v. United States, 764 F.3d 653, 661 (6th Cir. 2014) (citations omitted). "Thus, in the post-judgment context, we must be particularly mindful of not only potential prejudice to the non-movant, but also the movant's explanation for failing to seek leave to amend prior to the entry of judgment." *La. Sch. Emps.' Retirement Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 486 (6th Cir. 2010) (quoting *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 681 (6th Cir. 2004)).

Appellants claim they "initially made the request appropriately in their earlier response to the City's Motion to Dismiss, as an alternative to dismissal should the court determine that the claims were insufficiently pled." Appellants' Brief at 29. This assertion is misleading and ignores binding case law.

The assertion is misleading because, as the Appellants must know (and the Bankruptcy Court reminded them), their "request" was at best limited to their executory contract claim. Suppl. Op. at 3, n.3. It was not a motion to amend, and to represent it as such is disingenuous.

More important, asserting that their "request" was "appropriate" defies binding precedent, of which the Appellants must be aware, having read the City's brief on the issue.[2] The Sixth Circuit has repeatedly held that a request to amend a complaint contained "in [an] opposition to a motion to dismiss" is *not* appropriate. *Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776 (6th Cir. 2000) ("An open request for the Court to permit amendment to cure deficiencies, once the Court identifies those deficiencies, will not defeat a meritorious motion to dismiss pursuant to Rule 12(b)(6). . . . Plaintiffs were not entitled to an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies."). In short, a statement to a court buried "in a memorandum in opposition to the defendant's motion to dismiss is also not a motion to amend." *Id.* at 784. The Sixth Circuit recently reaffirmed this holding, in which it called such a request "throwaway language." *Kuyat v. Biomimetic Therapeutics, Inc.*, 747 F.3d 435, 444 (6th Cir. 2013). Thus, the Bankruptcy Court properly denied leave to amend, and this Court likewise should affirm this decision.

[2] Pursuant to Michigan Rule of Professional Conduct 3.3(a)(2), the Appellants were required to call these cases to this Court's attention. *E.g.*, *Shirley v. City of Eastpointe*, No. 11-14297, 2013 WL 4666890 at *8 n.6 (E.D. Mich. Aug. 30, 2013) (Rosen, J.) (noting duty to bring controlling cases to a court's attention and stating that "Counsel are strongly cautioned that these sorts of violations of the duty of candor to the Court will not be tolerated, and that their submissions in this and future cases will be carefully scrutinized to ensure that there are no further transgressions of the standards governing the conduct of counsel.")

V. This Bankruptcy Court Properly Denied the Preliminary Injunction

The Bankruptcy Court properly denied the Appellants' motion for a preliminary injunction. After listening to two days of testimony and carefully balancing the traditional four-part test, the Bankruptcy Court correctly determined that the Appellants not only presented "little evidence in support" of their claims but also that if granted, the requested relief would significantly harm the City, its citizens and the prospects of forming the Great Lakes Water Authority. Suppl. Op. at 18-24; *see also* ADR, Pg ID 326-340. The Bankruptcy Court found that the City was justifiably concerned that a six month injunction on terminations would seriously threaten its revenues, a risk that a bankrupt city literally could not afford to take. Suppl. Op. at 22. As the Bankruptcy Court aptly noted, "The context here is extremely important. Detroit cannot afford any revenue slippage as it beings to implement its Eighth Amended Plan of Adjustment." *Id.* In addition to correctly recognizing these substantial harms, the Court also applauded the City on its efforts to provide financial assistance to those in need, emphasizing that the City's new 10 Point Plan was "bold, commendable, and necessarily aggressive." *Id.*at 19; CDR at 2, Part C; ADR, Pg ID 307-325.

As set forth above, however, this Court need only address the Bankruptcy Court's denial of the motion for a preliminary injunction if it (1) vacates or reverses the Bankruptcy Court's dismissal of the Appellants' complaint,

(2) determines that it has jurisdiction to review this interlocutory matter, and (3) finds that the Bankruptcy Court erred in determining that § 904 prohibits the Court from granting the requested relief. As the City previously explained, this Court should not rule in favor of the Appellants on any of these three determinations.

If this Court does decide to review the Bankruptcy Court's decision, as the Sixth Circuit explained in *Wonderland*, it must do so under an abuse of discretion standard. *Wonderland Shopping Ctr. Venture Ltd. P'ship*, 274 F.3d at 1097.

> Under this standard, the Court will overturn a district court's determination regarding a preliminary injunction if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. A legal or factual error may be sufficient to determine that the district court abused its discretion. However, absent such an error, the district court's weighing and balancing of the equities is overruled only in the rarest of cases.

Id.

The Appellants fail to meet this standard. They do not identify any clearly erroneous findings of fact, erroneous legal standards or improper applications of governing law but instead make several bald assertions without any supporting facts or law. The Appellants claim that the Bankruptcy Court "relied on inadmissible self-serving and speculative hearsay opinions" but do not provide any citations to the record or identify any specific opinion. Appellants' Brief at 30.

Similarly, the Appellants allege that the Bankruptcy Court proceeded in a manner which allowed it to "trump the testimony of the Plaintiffs, the opinion of experts for both parties, the City's own documents and testimony" but provide no citations to the record nor identify one specific exhibit or opinion in support of their statement. *Id.* The Appellants also state that the Bankruptcy Court "misapplied the standard for balancing the equities and determining the public interest" without citing to one case or explaining the Bankruptcy Court's alleged misapplication.

Instead, the Appellants simply assert that their alleged harm overrides all other factors, including likelihood of success and harm to the City and its residents. This hollow allegation should not cause the Court to overturn the Bankruptcy Court's ruling under any standard, much less as an abuse of discretion. The Appellants also violate this Court's order by improperly discussing "post judgment events," which by definition are not part of the record before the Bankruptcy Court. This Court should reject the Appellants' half-hearted argument that the Bankruptcy Court abused its discretion. The Appellants' appeal of this issue should be denied for lack of jurisdiction, or, if this Court believes that review is appropriate, it should affirm the Bankruptcy Court's discretion in denying the request for injunctive relief.

CONCLUSION

WHEREFORE, the City asks this Court to AFFIRM the judgment of the Bankruptcy Court, and grant such other relief as this Court deems proper.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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