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, Individually and on behalf of all other similarly situated, and MICHIGAN WELFARE RIGHTS ORGANIZATION, PEOPLES WATER BOARD, NATIONAL ACTION NETWORK-MICHIGAN CHAPTER, and MORATORIUM NOW!,	]	Case No. 2:15-cv-10038-BAF-RSW Hon. Bernard A. Friedman Magistrate Judge R. Steven Whalen Adv. Proc. No. 14-04732 Bankruptcy Case Number 13-53846 Honorable Steven W. Rhodes Chapter 9

Plaintiffs-Appellants,

CITY OF DETROIT, a Municipal Corporation, through the Detroit Water and Sewerage Department, its Agent,

Defendant-Appellee.

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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A. Basis For District and Bankruptcy Court Jurisdiction

Core Issues.

Core issues are defined by 28 USC 157(b)(2). Treatment of executory contracts are core proceedings. The proceeding arises out of the mass water shut offs in which the City of Detroit engaged after the date the bankruptcy case was filed, presenting the sole core issue. The District Court has appellate jurisdiction pursuant to 28 USC 158 and reviews a bankruptcy court's factual findings for clear error and its conclusions of law *de novo.* See *In re Cook*, 457 F.3d 561, 565 (6th Cir. 2006); *In re Musilli*, 398 B.R. 447, 452-53 (E.D. Mich. 2008), *Syncora Guarantee Inc., v City of Detroit* (USDC, E.D. Mich, 7/11/2014, Friedman, Bernard A).

Noncore Issues;

Noncore issues are defined by 28 USC 157(c)(1). All other issues beside the executory contract issues arise from the mass water shut offs which began after the bankruptcy case was filed; however, the Bankruptcy Judge failed to couch his findings a proposed findings of fact and law on the noncore issues, although so requested in Plaintiffs' Amended Complaint, and although the Bankruptcy Judge was required to do so by 28 USC 157(b)(3) and FRBP 9033(a). The District Court makes a complete de novo review of facts and law concerning the noncore issues. *Exec. Benefits, Ins. Agency, Inc. v Arkison (in re Bellingham)*, 573 US____, 189 L.Ed.2d83 (2014*); Stern v Marshall,* 564 U.S. _____, 131 S.Ct. 2594, 2620 (2011)

B. Basis for Appellate Court Jurisdiction

The District Court has jurisdiction over Bankruptcy matters pursuant to 28 USC 1334, and over Bankruptcy appeals pursuant to 28 USC 158. There is only one Bankruptcy Court issue (the treatment of executor contracts) and that issue may now be moot with the termination of the bankruptcy case. Otherwise the Court has independent jurisdiction under 42 USC 1983 and pendant jurisdiction over Plaintiff's noncore claims.

C. Filing Dates Establishing the Timeliness of the Appeal for Review

The Supplemental Opinion and Order Denying Plaintiff's Motion for Reconsideration were filed On November 19, 2014. The appeal was filed on November 26, 2014 date with a designation of record on December 13, 2014 date and amended designation of the record and statement of the issues on appeal filed on December 17, 2014 date.

D. Final Order Assertion.

This Appeal Is from a final order of the Bankruptcy Court Denying Plaintiffs/Appellants' Request for Reconsideration of the Court's Order Dismissing Plaintiffs' claims and denying their request for a Temporary Restraining Order; and denying Plaintiffs' motion to file a second amended complaint.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE BANKRUPTCY COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE CITY'S MOTION TO DISMISS PLAINTIFFS' EXECUTORY CONTRACT CLAIM, PURSUANT TO FRCP 12(b)(6)?;

II. WHETHER THE BANKRUPTCY COURT IN ITS ADVISORY CAPACITY TO THIS DISTRICT COURT, IMPROPERLY GRANTED CITY'S MOTION TO DISMISS PLAINTIFFS' DUE PROCESS CLAIMS, PURSUANT TO FRCP 12 (b)(6), WHERE PLAINTIFFS ALLEGED THAT DWSD FAILED TO FOLLOW ITS OWN NOTICE PROCEDURES BEFORE TERMINATING WATER SERVICE AND THE COURT FOUND UPON RECONSIDERATION THAT PLAINTIFFS HAD SUFFICIENTLY ALLEGED A LIBERTY AND PROPERTY INTEREST IN WATER SERVICE?;

III. WHETHER THE BANKRUPTCY COURT IN ITS ADVISORY CAPACITY TO THIS DISTRICT COURT, IMPROPERLY GRANTED THE CITY'S MOTION TO DISMISS PLAINTIFFS' EQUAL PROTECTION CLAIM, PURSUANT TO FRCP 12(b)(6), DESPITE FINDING THAT PLAINTIFFS HAD ALLEGED THAT DWSD TREATED TWO SIMILARLY-SITUATED CLASSES OF CUSTOMERS DIFFERENTLY?;

IV. WHETHER THE BANKRUPTCY COURT IN ITS ADVISORY CAPACITY TO THIS DISTRICT COURT, IMPROPERLY GRANTED THE CITY'S MOTION TO DISMISS THE COMPLAINT IN ITS ENTIRETY, PURSUANT TO 12(b)(6), WITHOUT MAKING ANY FINDINGS OR RULING ON PLAINTIFFS' 1) ESTOPPEL CLAIM, 2) RIGHT TO HEALTH AND WATER CLAIM, AND 3) CLAIM REGARDING WATER AS A PUBLIC TRUST?;

V. WHETHER THE BANKRUPTCY COURT IN ITS ADVISORY CAPACITY TO THIS DISTRICT COURT, IMPROPERLY GRANTED PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT AS UNTIMELY WHERE PLAINTIFFS FIRST MADE SUCH REQUEST IN THEIR OPPOSITION TO THE CITY'S MOTION TO DISMISS?; and

VI. WHETHER THE BANKRUPTCY IN ITS ADVISORY CAPACITY TO THIS DISTRICT COURT, IMPROPERLY GRANTED PLAINTIFFS' MOTION

FOR A TEMPORARY RESTRAINING ORDER WHERE THE COURT FOUND THAT PLAINTIFFS OFFERED SIGNIFICANT EVIDENCE OF IRREPARABLE HARM BUT NONETHELESS PLACED MORE WEIGHT ON FINANCIAL COSTS TO DEFENDANTS THAN ON HARM OR COST TO PLAINTIFF'S RIGHT TO HEALTH, WATER AND HUMAN LIFE?.

STATEMENT OF THE CASE

A. INTRODUCTION

Plaintiffs-Appellants ("Plaintiffs") are several low income Detroit residential water customers who represent a putative class of similarly situated households subjected to the City's new massive campaign of water shut offs targeting accounts delinquent for more than 60 days or exceeding $150.00. Plaintiffs also include four organizations whose purpose in part has been to respond to the water shut-off crisis. Plaintiffs filed an adversary complaint in the bankruptcy proceedings seeking injunctive relief to stop the shut-offs. This is an appeal from the bankruptcy court decision denying Plaintiffs' request for reconsideration of the Court's bench opinion dismissing Plaintiffs' complaint in its entirety, denying their alternative request to amend the Complaint, and alternatively denying their motion for temporary injunctive relief.

B. PROCEDURAL HISTORY

On July 21, 2014, Plaintiffs filed a putative class action lawsuit as an adversary proceeding in the Detroit bankruptcy case,[1] challenging the City's aggressive new water shut-off campaign. (ADR #23, DKT #90). The complaint was amended of right on July 30, 2014. (ADR #1, DKT #33) On August 23, 2014, Plaintiffs sought a Temporary Restraining Order (ADR #5, DKT #20), and on August 28, 2014, the Defendant-Appellee City of Detroit (the "City") responded with a Rule 12 (b)(6) motion to dismiss the complaint for failure to state a claim. (See Amended Designated Record (hereinafter "ADR") #6, DKT #26).

The Bankruptcy court scheduled a hearing on Plaintiffs' TRO motion for September 2, 2014. On September 2, 2014 the court ordered the parties to mediation and took the argument under advisement. (ADR #6, DKT #26) When mediation failed, the court issued an order on September 17, 2014 scheduling a two day evidentiary hearing (ADR #14, DKT #50), conducted

on September 22 and 23, 2014. On September 23, 2014, the Court also heard the City's Rule 12(b)(6) Motion to Dismiss Plaintiffs' Complaint (ADR #24, DKT #91).

On September 29, 2014, the Court ruled from the bench, granting the City's motion and dismissing Plaintiffs' Complaint in its entirety. It also denied Plaintiffs alternative request to amend the complaint. Having dismissed the case, the court found that the request for injunctive relief was moot, yet it nevertheless alternatively considered and denied Plaintiffs' motion for a TRO. In response, on October 14, 2014 Plaintiffs sought reconsideration of the Court's order dismissing the adversary proceeding, denying Plaintiffs' motion to amend the complaint and denying the TRO (ADR #26, DKT #101 and ADR #27, DKT #104). The court issued a Supplemental Opinion on November 19, 2014 denying the motion. (ADR #30, DKT #107; ADR #31, DKT #107). Plaintiffs appealed of right to this court on November 26, 2014.

C. RULINGS PRESENTED FOR REVIEW

1. Rule 12(b)(6) Ruling Dismissing Plaintiffs' Complaint and Denying Permission to Amend

On Sept. 29, 2014, the Bankruptcy Court, ruling from the bench, granted the City's Rule 12 (b)(6) motion to dismiss Plaintiff's Complaint.. (ADR #21, DKT #83; ADR #25, DKT #10) Court ruled that it lacked jurisdiction pursuant to 11 USC §904 over all of the claims that were not constitutional (Counts: I, IV, V and VI). However, the Court decided that it did have jurisdiction over the constitutional claims for due process (Count II) and equal protection (Count III) violations, but dismissed those counts, because it could not find a property right to water, entitled to constitutional protection. (ADR #25, DKT #92).

In response to Plaintiffs' Motions for Reconsideration, the Court issued a Supplemental Opinion on November 19, 2014 (ADR #26, DKT #101; ADR #27, DKT #10), partially reversing the earlier opinion and finding a property and liberty interest in water based on the

City's legal obligation to provide municipal water service to its residents. (ADR #30, DKT #107 at 10) However, the court nonetheless found that (1) Plaintiffs failed to adequately state plausible claims for relief under *Ashcroft v Iqbal*, 536 U.S. 661 (2009) and *Bell Atlantic Corp v Twombly,* determining that the due process allegations pled were largely legal conclusions not sufficiently factually supported and (2) that the equal protection claims failed to describe how the differing treatments of residential and commercial customers failed the rational basis test. (ADR #30, DKT #107 at 21). Once again, the Court failed to even consider or rule on the Plaintiffs' claims regarding violations of the public trust and human right to water, health and family. Finally, Plaintiffs' alternative request for permission to amend the complaint was denied as untimely, following the dismissal of the Complaint. (ADR #30, DKT #107 at 2)

2. Denial of Plaintiffs' Motion for Temporary Restraining Order

In its bench ruling on September 29, 2014, after dismissing the Complaint and finding the request for injunctive relief moot, the Court ruled alternatively on the motion for a TRO request:

> ***a customer whose water service is discontinued does likely suffer irreparable harm, especially if the service is lost for more than a few days. These harms include the risk of serious and even life-threatening medical conditions as well as adverse consequences in employment, in family and personal relations, and for children in their education. It cannot be doubted that water is a necessary ingredient for sustaining life. (Opinion, Transcript 9/29/14 (hereafter, cited as ADR #25, DKT #92 at 9/29)***

However, when the Bankruptcy court balanced these life-threatening harms against alleged political injury to the City should it grant Plaintiffs' request for a temporary moratorium on shut-offs pending the development of a plan or rules consistent with due process to protect vulnerable persons from unlawful terminations, the court concluded:

> Turning now to the harm that the city might experience if the requested relief is granted, the Court must conclude that it would be significant. The court finds substantial merit in the city's concern that a six-month injunction against terminations would increase its customer default rate and seriously threaten its

> revenues, and the Court so concludes even though the city normally would not execute service terminations during a good part of that time due to freezing weather conditions……
>
> The context of the city's concern here is extremely important. Detroit cannot afford any revenue slippage, and its obligations to its creditors requires it to take all reasonable and businesslike measures to collect the debts that are owed to it. As it prepares to show the Court that its plan is feasible and as it undertakes its preparations with its hope that the court will confirm the plan, like any debtor would do in similar circumstances, *the last thing it needs is this hit to its revenues that would inevitably result from the injunction that the Plaintiffs request.* More specifically, the evidence establishes that the city is justifiably concerned about the impact that the requested injunction might have in the continuing development of the Great Lakes Water Authority. This court has found on the record that this is an important initiative. Any threat to it must be seriously considered
>
> (ADR #26, DKT #92) [emphasis added]

In response to Plaintiffs' Motion for Reconsideration, the court reaffirmed its earlier decision balancing the four factors for injunctive relief (likelihood of success on the merits, irreparable harm, respective injuries to the parties and the public interest) in favor of the city. Noting that the regional water authority had since obtained the political support of the major county participants, the court observed that negotiations concerning implementation of the regional plan were continuing and therefore found that "the injunctive relief that plaintiffs seek would pose a threat to the successful completion of those negotiations". (ADR #30, DKT #107 at 23) It therefore also found that the public interest overlapped with the interest of the City and the region and not Plaintiffs. With respect to the likelihood of success on the merits, the court found that the relationship between DWSD and its customers was not in the nature of an executory contract entitled to the protection of the bankruptcy court, and that Plaintiffs failed to adequately allege the due process and equal protection constitutional claims.

SUMMARY OF ARGUMENT

Plaintiffs argue that the court committed reversible error in several respects. The billing and service contracts for water were clearly executory and entitled to the protection and jurisdiction of the bankruptcy court as core proceedings. Moreover, with respect to the non-core constitutional claims, since the court agreed that Plaintiffs possessed a property interest in continued water service, that interest was entitled to due process protection for termination of service, including the City's obligation, at the very least, to follow its own written rules for collection practices. These rules, *inter alia*, required that DWSD offer customers with delinquent accounts, reasonable payment plans based on income, which it failed to do. The rules also detailed special procedures for medically vulnerable households, collection activities for amounts in active dispute or under payment plans, which Defendant failed to follow. Plaintiffs maintain that the allegations in their complaint concerning these due process violations were sufficiently pled with adequate factual support to survive Defendant's 12(b)(6) motion.

The court incorrectly held that the due process claims were legal conclusions when it failed to consider the entire complaint, including descriptions of the experience of numerous individual plaintiffs, the new mass shut-off initiative, and prior policy which eschewed shut-offs in favor of tax lien transfers and enforcement through foreclosure. Plaintiffs also argue that their equal protection claims based on the active termination of delinquent residential but not commercial accounts, were sufficiently pled under *Twombly* and *Iqbal.* Moreover, Plaintiffs argue that if any of their claims were deficient, the court should have permitted them to amend the complaint. Also, Plaintiffs point out that the court ignored their equitable estoppel, state constitution, public trust and human rights claims, wrongly dismissing their case in its entirety without any ruling on these issues. Finally, Plaintiffs argue that they were entitled to injunctive relief in the form of a TRO. As stated above, they possessed a likelihood of success on their

claims for relief, for protection of their executory contracts, due process and equal protection rights, As the court agreed, they clearly established that deprivation of water caused irreparable harm that was life-threatening. Under these circumstances. the court's decision to strike the balance of harms and public interest in favor of the City based on a perceived threat to the political agenda for a regional water authority, which the court believed would be jeopardized by the issuance of an injunction, amounted to an abuse of discretion.

STANDARD OF REVIEW

Core issues are defined by 28 USC 157(b)(2). The treatment of executory contracts such as the service contracts for water, are core proceedings. This case arises out of the mass water shut offs conducted after the City filed bankruptcy, presenting a core issue when contracts for water service were not honored and terminated. The Court has appellate jurisdiction pursuant to 28 U.S.C. § 158 and reviews a bankruptcy court's factual findings for clear error and its conclusions of law *de novo*. See *In re Cook*, 457 F.3d 561, 565 (6th Cir. 2006); *In re Musilli*, 398 B.R. 447, 452-53 (E.D. Mich. 2008), *Syncora Guarantee Inc. v. Detroit* (USDC, E.D. Mich).

Noncore issues in bankruptcy are defined by 28 USC 157(c)(1). All of the other (federal and state constitutional, estoppel, public trust and human rights) claims presented by Plaintiffs were noncore. However, the Bankruptcy Court failed to explicitly determine that these issues were noncore, although requested to do so in Plaintiffs' Amended Complaint, and required to do so by 28 USC 157(b)(3). On these issues, the District Court exercises *de novo* review of facts and law. *Exec. Benefits, Ins. Agency, Inc. v. Arkison* (In *re Bellingham),* 573 US ____, 189 L.Ed.2d 83 (2014); *Stern v. Marshall*, 564 U.S._____, 131 S.Ct. 2594, 2620 (2011).

Plaintiffs ask this Court to consider *de novo* the Bankruptcy Court's dismissal of their complaint pursuant to Rule 12(b)(6) for failure to state a claim, and if necessary, to permit them

to amend their complaint. Plaintiffs also ask this court to review *de novo* the denial of their request for injunctive relief.

Because this court has original *de novo* jurisdiction on non-core issues, it may consider those issues now since no final order has been entered. The Bankruptcy court is only authorized to issue an advisory opinion for review by this court. Finally, Plaintiffs are also entitled to *de novo* review of the Bankruptcy court's alternative order denying their request for preliminary injunctive relief, based on newly discovered evidence that moots the court's concerns about threats to the political process for the establishment of a regional water authority which has been approved by the major participating regional parties since the issuance of the order.

ARGUMENT

I. PLAINTIFFS FIRST AMENDED COMPLAINT SHOULD BE REINSTATED

1. *The Bankruptcy Court Committed Reversible Error In Dismissing Plaintiffs' Executory Contract Claim, Rule 12(b)(6).*

The only count of Plaintiffs' Amended Complaint which seeks relief under the core jurisdiction of the Bankruptcy Court is Count I, which addresses Plaintiffs' claims for protection of their executory contracts. The Bankruptcy Court had core jurisdiction to determine this claim under 11 USC § 901(a), 11 USC § 365(d)(2), and to hear it as a core issue under 28 USC§ 157(b)(1); *In re Hurricane Memphis, LLC*, 405 BR 616 (USBC, W.D. Tenn, 2005).

This cause of action arises under the relationship between residents of the City of Detroit who receive processed water from the Detroit Water and Sewerage Department. These are universally referred to as customers by witnesses including Plaintiffs and the witnesses they called indicated a desire to pay for water services, but under existing agreements were unable to do so because of financial emergency or illness. Under existing guidelines in (ADR #18, DKT #65 Ex 120) the City was required to suspend payments in these circumstances, but did not do

so. Thus the Bankruptcy Court created an exception to the definition of executory contract not recognized by law. The court found that:

> (2) While issues arising under § 365 of the bankruptcy code relating to executory contracts do fall within the Court's core jurisdiction, the relationship between DWSD and its customers is not an executory contract. See 11 U.S.C. § 365. Moreover, even if the relationship is an executory contract, the relief that the plaintiffs seek is outside of the scope of § 365 and is prohibited by § 904. (ADR #30, DKT #107).

The reasons why this relationship was held not to amount to an executory contract are found in the court's bench opinion of September 29, 2014. "It is not a mere private party that has contracted to provide water services to customers. The city does so under law." (ADR #25, DKT #92, at 10/7-9). The problem with the Court's reasoning is that virtually every action a city takes is done according to law. Private parties contract under law. Cities enter contracts because permitted or required by laws creating cities. As Chief Justice Hughes stated in a case under a predecessor statute to Chapter 9, "The State is free to make contracts with individuals and give consents *upon which the other contracting party may rely* with respect to a particular use of governmental authority *United States v. Bekins*, 304 U.S. 27 at 52 , 58 S.Ct. 811, 82 L.Ed. 1137 (1938). [Municipal bankruptcy case, emphasis added].

This is precisely the kind of executory contract ripe for specific performance, because courts have held that in the event of a dispute, the water customer is entitled to injunctive relief until the dispute is resolved. At common law, courts grant temporary restraining orders freely in cases where a water shut off is disputed. *Steele v. Clinton Electric Light & Power Co.,* 123 Conn. 180, 192 A. 613 (1937), *Solorza v. Park Water Co.*, 94 Cal. App. 2d 818. 211 P.2d 891 (1949), *Spaulding Mfg. Co. v. City of Grinnell*, 155 Iowa 500 136 N.W. 649 (1912), *Carter v. Suburban Water Co.*, 151 Md. 91, 101 A. 771 (1917), *Ten Broek v. Miller,* 240 Mich. 667, 216 NW 385

(1927), *City of Mansfield v. Humphrey Mfg. Co.*, 82 Ohio St. 216, 97 N.E. 233 (1910), *Bourke v. Olcott Water Co.*, 84 Vt. 121, 78 A. 715 (1911).

Further the Court contradicts itself when it says that these are rights arising under law, rather than contract, when at the same time the court denies that any claim for equal or due process protection of these legal rights may arise under the 14th Amendment. The Bankruptcy Court essentially rendered contracts for water service an expectation "under law" to dispose of Plaintiffs' Executory Contract claim, and then found that these same service agreements were not legally created expectations entitled to due process and equal protection.

Plaintiffs recognize that these issues may be resolved in a reopening of the case inasmuch as the confirmation of the Chapter 9 proceeding has been the subject of numerous pending appeals. Therefore Plaintiffs wish to preserve this issue. Should this Court determine that the issue is moot; it can withdraw reference under the Local Court rules and hear the remaining issues as properly within its original federal court jurisdiction.

2. *The Bankruptcy Court Improperly Dismissed Plaintiffs' Due Process Claims Where Plaintiffs Alleged That DWSD Failed To Follow Its Own Rules and Plaintiffs Had A Sufficient Property Interest In Water.*

On reconsideration, the Bankruptcy Court found that Plaintiffs could establish a liberty or property right to water service to which procedural due process rights apply, based on the City's legal obligation to provide municipal water service to its residents and pursuant to *Memphis Light, Gas & Water Div. v Craft,* 436 US 1, 8 (1978); *Mansfield Apartment Owners Ass'n v City of Mansfield*, 988 F2d 1469, 1474 (6th Cir 1993); *Palmer v Columbia Gas of Ohio*, 479 F.2d 153 (6th Cir. 1973). (ADR #30, DKT #107). However, the court incorrectly concluded that Plaintiff's Complaint failed to adequately allege the due process violations.

In rendering this decision, the court discusses the "Legal Claims" section of the complaint at Section VI, page 25 listing the various due process violations at Paragraph 124 and

ignores the numerous intensely factual earlier allegations in the Complaint at Section IV describing the "Statement of Facts" for "Water Shut-Offs at Households of Plaintiffs and Other Persons Similarly Situated" at Paragraphs 35-68; the "New Policy of Mass Water Shut-offs" at Paragraphs 69-71 and "Defendant's Former Policy of Transferring Water Bills to Tax Liens for Enforcement" at Paragraphs 93-98, which together support the due process allegations in Paragraph 124 and meet the test for sufficiently pled allegations under *Ashcroft v Iqbal*, 536U.S. 662 (2009) *and Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007). Instead the court opinion focuses on what it describes as the "legal conclusions" in the claims section and ignores the remaining factual allegations of the complaint. It examines 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. The court attempts to justify this reliance on the record beyond the complaint, citing *Tellabs, Inc. v Makor Issues & Rights, Ltd*, 551 U.S. 308, 322 (2007), permitting the court to consider "documents incorporated into the complaint by reference and matters of which a court may take judicial notice" beyond the four corners of the complaint. (ADR #30, DKT #107 at 13) However, this is dangerous territory, itself violative of the basic due process right to trial, when, as here, the parties have not yet been afforded discovery, and when the court selectively chooses which undeveloped factual proofs it will adopt as true in the truncated process for immediate injunctive relief. Moreover, even *Tellabs, Inc* requires that courts must consider the complaint "in its entirety" when ruling on Rule 12(b)(6) motions. Here the court clearly ignored many of the allegations in the complaint to strike down the due process claims as insufficiently pled.

The statement of the due process claims in the complaint appear in a list at Paragraphs 123 and 124 and the court finds that these claims are largely legal conclusions not sufficiently supported by factual allegations. Characterizing paragraphs 124 a, b, c, f, g, k, and l as

allegations that the DWSD shut-off notices were constitutionally inadequate, the court concludes that without further description of the content of the notices, the complaint fails to state an adequate due process claim. However, these paragraphs must be read in light of the entire complaint. Paragraphs 124 a, b and c focus on the systemic nature of the new shut-off campaign adopted in the Spring of 2014, which provoked this case and which is described at paragraphs 69 through 71 of the Complaint as follows:

The statement of the due process claims in the complaint includes:

69. On or about April of 2014, Defendant commenced a policy and program of mass water shut offs for any residential customer more than 60 days delinquent or with an arrearage exceeding $150.

70-. The individual Plaintiffs and thousands of other similarly situated residential customers were subjected to water shut-offs without adequate notice or an opportunity to be heard.

71. Moreover these shutoffs were conducted in violation of Defendant's written collection policies.

The new systemic campaign was also contrasted at paragraphs 93 -98 to Defendant's former policy and practice (for the past several years) of not shutting off delinquent water accounts and instead attaching those bills to property taxes subject to foreclosure, as the primary method of collection. It is the lack of any further individualized notice in the context of this new shut-off campaign that was constitutionally inadequate as described at Paragraphs 124 a, b and c, as well as g and k. Moreover, the newly announced rules for shut-off were age of the account (exceeding 60 days) and size of the debt (more than $150), neither of which corresponded to the City's published interim (for more than a decade) rules and policies. These written rules were referenced and restated in part at (ADR #1, DKT #3 at 64-68).

With respect to the individually named Plaintiffs, there were specific allegations of no new individualized notice prior to shut-off, (ADR #1, DKT #3 at 40 (Smith), 43 (Hill), 50 (Parham), 56 (Taylor))); shut-offs prior to the date listed for termination of service on a notice,

(ADR #1, DKT #3 at 47 (Walker)); same day notice of termination, (ADR #1, DKT #3 at 68 (Jackson)); and terminations while disputes were pending (ADR #1, DKT #3 at 43 (Hill)).

With respect to Paragraph 124 d, e, h, i and j, Plaintiffs' complaints focused on the City's failure to comply with its own published collection policies in effect for the past decade. Whenever a protected property interest is created by statute, regulation, or rule, the government is bound to follow its own rules. *U.S. v Nixon*, 418 US 683 (1974); *Hicks v Oklahoma*, 447 US 343 (1980); *Logan v Zimmerman Brush Co*, 455 US 422(1982).

Plaintiffs' factual allegations showing that the City's interim rules for termination of water service were largely ignored in the recent mass shut off campaign, must be accepted as true in a proper 12(b) (6) analysis. *Iqbal, supra.* These included, as described above, shut-offs prior to the listed date for termination of service, and terminations while disputes were pending. In addition, they included shut-offs to households with medically fragile members with no apparent explanation of rights to a temporary medical hold on the account without payment and with a medical verification[2] (ADR #1, DKT #3 at 35 -37 (Lyda with educationally challenged child)), (ADR #1, DKT #3 at 38-40 (Smith living with his senior citizen mother with a medical disability)), (ADR #1, DKT #3 at 41-45 (Hill's two children with medical conditions)); (ADR #1, DKT #3 at 46-48, Walker's minor child suffering from asthma requiring treatments with a water based nebulizer)); (ADR #1, DKT #3 at 49-51 (Parham, a physically disabled adult)); (ADR #1, DKT #3 at 52-54 (Ward, a disabled senior citizen living with two minor children with asthma requiring water based nebulizer treatments)), (ADR #1, DKT #3 at 55-56 (Taylor with a minor child suffering from asthma)); (ADR #1, DKT #3 at 59-61, (Jackson, who lives with her husband, a dialysis patient and two minor grandchildren)).

As the court observed, a major issue for all Plaintiffs was payment plans and deposits to obtain plans that were not affordable. (ADR #1, DKT #3 at 37 (Lyda, required to pay $438 for a

payment plan)), (ADR #1, DKT #3 at 39-40 (Smith, required to pay $1000 for a plan)), (ADR #1, DKT #3 at 44 (Hill, required to pay a $1,700 deposit for a plan)); (ADR #1, DKT #3 at 47 (Walker)) and (ADR #1, DKT #3 at 50-51 (Parham)), both required to pay one-third of their bills in order to obtain payment plans; (ADR #1, DKT #3 at 53 (Ward)) and (ADR #1, DKT #3 at 55 (Taylor)), both unable to pay monthly payments of 20% or more of their incomes.

However, the City's Interim Rules referenced in the Complaint require that payment plans must be "reasonable". Rule 27(7), and for purposes of determining reasonableness, the plans must be based on "ability to pay", as well as the "amount due" and "other factors which may be relevant" (Rule 16(2)). It is clear from the complaint that the payment plans for nearly every named Plaintiff were not based on ability to pay. Instead they were entirely based on the amount due which determined the down payments (as a percentage of the debt) and monthly payments which were also based on the remaining debt in addition to current bills which Plaintiffs alleged they could not afford.

The court noted that the unaffordable plans appeared to be the gravamen of Plaintiff's due process complaints. However, the court incorrectly characterized Plaintiff's claim as a "constitutional right to water service at a price they can afford to pay." (ADR #30, DKT #107) This straw argument has never been Plaintiffs' claim. They do not insist that they have a right to pay a different or affordable rate for water, and agree that all customers pay rates based upon the cost of delivering the service. However, they claim that DWSD is constitutionally obligated to follow its own published collection practices and procedures which require it to offer payment plans which are "reasonable" which is defined as "based on ability to pay" as well as the "amount due". Plans which bear no relation whatsoever to income, but are entirely based on the amount due, are by definition, not reasonable pursuant to the written policies of the City. As a result, although all water customers in the same class (eg., residential) would be required to pay

the same amount or rate for water based on the cost of service and amount of water used, any of these customers who could not pay the resulting bill would be entitled under the City's published rules, to a reasonable payment plan which by definition must be based on income. Therefore a low income household would pay the same amount for water as any other residential customer, but over a longer period of time in affordable monthly payments that are based on income, as required by the City's own rules.[3]

In addition, there are rules governing the behavior of "Water Bill Collectors (DWBCs)" and "Field Service Representatives (FSRs)" who arrive at the residential site at the point of actual shut-off. (Rules 20A and 20 B). These include the obligation of the DWBC or FSR to identify himself/herself to the customer or other responsible person in the household and request payment of the delinquent amount (Rule 20A (1); Rule 20B(1)). The DWBC or FSR is required to have the water bill with him/her and is prohibited from terminating service if the customer presents evidence that the bill has been paid, is in dispute, or that there is a valid payment agreement. (Rule 20A(2), 20B (2)) The DWBC is also authorized to accept payment at the shut-off site and payment may be made by cash, money order or personal check. (Rule 20A(3);

The only circumstance under which service may be terminated without notice is "for reasons of health, safety or state of emergency" (Rule 24(2)). And even in these cases, "in the event that DWSD has advance knowledge of a proposed emergency shutoff, customers will be notified, if possible." *Id.*

It is clear that the mass shut-off campaign commenced by the City in the Spring of 2014 which was the basis for this lawsuit, did not comply with these home visit notice requirements as published in the City's operative collection rules. The grounds for shut-off under the new campaign were simply bills older than 60 months or exceeding $150 for residential customers.

The complaint identifies Plaintiffs who were shut-off despite active payment plans (ADR #1, DKT #3 at 12 (Taylor)) and amounts in dispute (ADR #1, DKT #3 at 43 (Hill)).

3. *The Bankruptcy Court Improperly Dismissed The Equal Protection Claims, Despite Finding That Plaintiffs Had Alleged That DWSD Treated Two Similarly-Situated Classes Of Customers Differently Without a Rational Basis.*

The Appellants' First Amended Adversary Complaint alleges that the City of Detroit's water department engaged in discriminatory collection practices in violation of the Equal Protection Clause of the Fourteenth Amendment. (ADR #2, DKT #3) The amended complaint alleges numerous facts sufficient to support a plausible claim for relief such that dismissal under Fed. R. Civ. P. 12 (b) (6) was improper.

In the present case, the trial court's dismissal of Appellants' equal protection claims was based Fed. R. Civ. Pr. 12 (b) (6) and, in part, on understandings of that rule as found in *Ashcroft v. Iqbal*, 536 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The *Iqbal* and *Twombly* opinions are actually helpful to the Plaintiffs, but the court below simply misapplied the standards established by these cases. The lower court misapplied the standards by failing to accept the well-pleaded factual allegations of the amended complaint and by then engaging in speculation to reach its own findings of fact, well beyond common sense.

Federal Rule 12 (b)(6) only permits dismissal where Plaintiffs fail "to state a claim upon which relief can be granted." A complaint does not need to allege detailed facts in support of its claims but rather must plead facts sufficient to "give the City fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, at 555. In making this determination, the court must use its "experience and common sense." *Iqbal*, at 679. See also *16630 Southfield Ltd. v. Flagstar Bank*, 727 F.3d 502, 504 (6th Cir. 2013).

Under the federal rules as interpreted in *Twombly* and *Iqbal*, Plaintiffs' Complaint need only "state a claim to relief that is plausible on its face." *Iqbal*, at 678. "[W]e do not require

heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, at 570. On the facts alleged, the court is required to "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, at 679. Plausibility exists when a complaint "contain[s] either direct or inferential allegations ... to sustain recovery under some viable legal theory. *Han v. Univ. of Dayton*, 541 F. App'x 622, 625-26 (6th Cir. 2013) (citing *Twombly*, at 562). "The plausibility standard does not impose a probability requirement at the pleading stage, even when the plaintiff faces a difficult road ... in proving their claims." *General Ret. Sys. v. UBS, AG*, 799 F. Supp. 2d 749, 761 (E.D. Mich. 2011).

The trial court may not dismiss a complaint simply because recovery seems difficult or even doubtful. Dismissal is improper and "[a] well-pleaded complaint may proceed, even if it appears that a recovery is very remote and unlikely." *Twombly*, at 556 (citing with approval *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). See also *Gen. Ret. Sys.*, at 761; *Safeco Ins. Co. of Am.*, 625 F. Supp. 2d 508, 514 (E.D. Mich. 2008); and *Permobil, Inc. v. Am. Express Travel Related Servs. Co*, 571 F. Supp. 2d 825, 830 (M.D. Tenn. 2008). Rule 12 (b)(6) "does not countenance dismissal based on a judge's disbelief" of the claims. *Safeco Ins. Co. of Am.*, at 514.

The amended complaint provides a specific factual allegation that residential and commercial water consumers are similarly situated because they receive the same exact services from the City of Detroit's water department. (ADR #2, DKT #3 at 79). The services received are water. The amended complaint further alleges facts:

- Identifying a city policy that customers with bills more than 60 days overdue and owing more than $150 were subject to having their water shutoff (ADR #1, DKT #3) July 30, 2014);

- That the city policy had been implemented to shut off water service to thousands of residential customers; (ADR #1, DKT #3, July 30, 2014);

- That the city policy was not being implemented to shut off water service to any commercial customers; (ADR #1, DKT #3, July 30, 2014); and

- Identifying numerous commercial customers who had bills more than 60 days overdue and owed much more than the $150 threshold. (ADR #1, DKT #3, July 30, 2014).

In short, water services for thousands of residential consumers with relatively small debts were terminated while commercial consumers with five, six and seven figure payment delinquencies were allowed uninterrupted access to water.

The Plaintiffs' amended complaint further alleges that this differing treatment between the City of Detroit's residential and commercial customers is in violation of the Equal Protection Clause. (ADR #1, DKT #3 at 126-129). There is no question that Plaintiffs' Amended Complaint alleges well-pleaded facts showing discriminatory treatment by a government agency acting under color of law and pursuant to official policies and practices. As a result, the City's actions are subject to scrutiny under the Fourteenth Amendment. The only question is whether the claim is plausibly viable under the Equal Protection standards.

The Equal Protection Clause of the Fourteenth Amendment, § 1 provides that state actors cannot "deny to any person within its jurisdiction the equal protection of the laws." While all differentiation between classes of persons is not prohibited, the clause "keeps governmental decision makers from treating differently persons who are in all *relevant respects* alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

When the state's differing treatment is not alleged to impact a fundamental right or to classify groups based on inherently suspect characteristics such as race or gender, the state must show that the differing treatment between two groups "rationally further[s] a legitimate state interest." *Nordlinger,* at 10. While rational basis is a deferential review, "deference is

not abdication and 'rational basis scrutiny' is still scrutiny." *Nordlinger,* at 31 (Justice Stevens dissenting). The Court recognizes:

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, *we insist on knowing the relation between the classification adopted and the object to be attained.* The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.

Romer v. Evans, 517 U.S. 620, 632 (1996) (emphasis added). "Courts must always ensure that some rational link exists between a statute's classification and objective." *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 744 (W.D. Ky. 2012). The relationship between the state's classification and the state's goal cannot be "so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, at 11. In the present case, no rational link has been articulated or exists between the city's differing treatment of residential and commercial customers and any legitimate interest of the city.

The trial court found that a rational basis for the differing treatment between residential and commercial customers existed based on irrational speculation that commercial customers have more complex connections. In ruling on the motion to dismiss, the court below stated:

> The Court concludes that the fact that some commercial customers have not been disconnected while some residential customers have been disconnected does not establish a violation of equal protection. Moreover, the Court finds that there is a rational basis for the differing treatment. *Some commercial customers have more complex service connections*[4] and, therefore, more complex disconnection procedures. Accordingly, the Court concludes that the complaint must be dismissed.

(ADR #25, DKT #92 at 15-16). The lower court's finding that commercial customers have more complex service connections and therefore must have more complex disconnection procedures is not based on facts in the record, the court's experience, logic or even common sense. The conclusory factual finding appears based on nothing more

than a speculative assumption. While commercial customers may use more water than residential customers, the faucets, lawn sprinklers, toilets and other water fixtures at the city's stadiums, restaurants, and office buildings appear substantially identical to those found in residential homes. More often than not, the only outward differences are that there are more of them in a single commercial building than in a residential home. The volume of water that passes through the pipes might be greater, but no rule of logic or common sense leads to a conclusion that the water connection or shutoff procedures are "more complex." The trial court's conclusions of fact are simply not rational.

The trial court's reasoning in its order on reconsideration of the Equal Protection claim's dismissal is equally flawed. In its order, the trial court wrote:

> What is missing from the Plaintiffs' claim is an articulation of how DWSD's collections policies fail the rational basis test; in other words, they fail to identify what part of DWSD's policy is "not rationally related to a legitimate state interest."

(ADR #30, DKT #107 at 18). The trial court again misapplies the standard of review under *Twombly* and *Iqbal* and misconstrues the burdens of proof on an Equal Protection claim. The lower court's decision imposes a requirement that Plaintiffs' amended complaint prove the *irrationality* of the classification. No such requirement exists under Rule 12(b)(6) or Equal Protection Clause jurisprudence. At the pleading stage, Plaintiffs only need show differing treatment between two groups by a state actor acting under color of law and allege that the differing treatment is not rationally related to the state's legitimate goals. The state must articulate a rational reason for the differing classification or the court can take judicial notice of the same. In either instance, the articulated reason must be based on actual facts, experience, logic or common sense. Once the state or the court has done so, Plaintiffs bear the burden of

negating the same. In the present case, neither the state nor the court has articulated a rational basis for the differing treatment and the Plaintiffs are at a loss to conceive of any to then negate.

Notably, the pleadings for Plaintiffs' discrimination claim satisfied the *Iqbal* and *Twombly* requirements, and the court below erred in dismissing the complaint. The section of the complaint setting forth the discrimination between water customers does not rest on "bald allegations," "conclusory statements," or a "formulaic recitation" of an Equal Protection claim.

Although the Appellants did not recite the elements of an Equal Protection claim in a formulaic way, their amended complaint does set forth facts to satisfy those elements. As such, some conceivable set of facts must be articulated that will justify the classification at issue and satisfy rational basis scrutiny. When there is an equal protection issue regarding water service, "...all that is required is that there be a reasonable relationship between the continued water service and the conditions imposed by the City. We will strike down the conduct in question only if it is arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare." *Magnuson v. City of Hickory Hills*, 933 F.2d 562, 567 (7th Cir. 1991).

The Appellants' complaint sets forth more than "enough facts to state a claim to relief that is plausible on its face." The complaint also demonstrates that the actions of DWSD were "arbitrary and unreasonable bearing no relationship to the public health, safety or welfare."

Among other highly significant facts, the complaint states that water services were terminated for thousands of residential water customers who were alleged to be delinquent in their payments, and services for commercial water customers with large debts continued without interruption, even though the two classes of customers are similarly situated with respect to their relationships with the water department. The complaint lists not only the names of nearly 40 delinquent commercial customers, but also the specific amounts of their respective debts – some in the hundreds of thousands of dollars. The complaint further states that, in response to public

pressure finding that the department's policy was highly discriminatory and irrational, the water department acknowledged that water services of delinquent commercial customers would be terminated. (ADR #1, DKT #3).

The foregoing facts that were set forth in the complaint are sufficient to satisfy the pleading requirements of *Iqbal* and *Twombly*. These facts establish that two classifications of customers received the same services, but nevertheless received disparate treatment. Further, by stating that the water provider decided in response to public pressure to begin terminating services to delinquent commercial customers, the complaint includes language necessary to allege that the water provider was capable of providing the same treatment to the two classes of customers, but had previously made a deliberate decision to treat them differently. These facts taken together not only touch the bases of an equal protection claim, they are also sufficiently detailed to satisfy pleading requirements.

In applying the rational relationship test, the court below should have - but failed- to use the facts in the Appellants' complaint to question the reasonableness of allowing powerful, financially well-endowed corporations to continue to receive valuable water services at no cost while depriving residential consumers with minimal to no financial resources of water. If the test is whether the water provider's collection practices are rationally related to an interest in ensuring sufficient revenue to finance the operations of a public utilities provider, then these policies and practices fail. Water shut-offs will not trigger payments by families that have no money to make payments.

Second, eliminating the water services of thousands of families will not only fail to save money and resources, it will create new, costly expenses and problems that the city can neither afford nor, in some cases even address. The absence of water and sewerage services means the onset of obvious toxic conditions and serious illnesses that will translate into considerable

expenses connected with bio-hazard clean-ups, health care, etc. In addition, the desperation of families without water can lead to water piracy and other costly criminal conduct that burdens not only the utility provider but law enforcement and the criminal justice system.

Finally, there is a patent absurdity about the decision to allow continued service for non-paying commercial customers while terminating the water services of the poorest residential customers in the city. Of all of the water provider's customers, large for-profit corporations are in the best position to pay delinquent bills. If the genuine interest is in the collection of needed revenue, the commercial customers are the most logical targets of aggressive collection efforts. Nevertheless, the irrational approach of seeking payments from the poor and granting to those with resources a de facto moratorium on payments was pursued.

There is no rational relationship between differing treatment of residential/commercial classes of water customers and the purported interest in collecting payments for water services. Such policies and practices have violated and continue to violate the Equal Protection Clause.

4. *The Bankruptcy Court Improperly Dismissed The Complaint In Its Entirety, Without Making Any Findings Or Ruling On Plaintiffs' 1) Right To Health And Water Claim, And 3) Claim Regarding Water As A Public Trust, and 3) Estoppel Claim.*

a. Human Rights to Water and Health and Public Trust

Plaintiffs have established a right to the delivery of water from a municipal public water system that threatened their lives, health, families, and children. (ADR #30, DKT #107 at 10) The Court found that the water shutoffs were causing substantial and irreparable harm to the Plaintiffs' health, sanitation, and families. (ADR #30, DKT #107 at 21) Yet the Court also found "there is no enforceable right to free or affordable water." *Id.* But Plaintiffs do not allege a right to free water. Rather Plaintiffs allege constitutional and common law violations of the right to delivery of water with fair procedures, equal treatment, and affordable rates that satisfy the international right to human health, sanitation, family and water under the Supremacy Clause.

As a threshold matter, the Bankruptcy Court recognized that non-core claims alleging violation constitutionally protected rights fell outside the Section 904 bar against claims challenging governmental power. (ADR #30, DKT #107 at 9)

The Bankruptcy Court necessarily accepted Plaintiffs claims regarding constitutionally binding human rights, such as those guaranteed by international law and the Supremacy Clause, or the inalienable public trust rights in water, when it recognized standing. (ADR #30, DKT #107 at 10) Based on the Court's reasoning, such claims would fall outside Section 904. Nowhere in its decisions did the Court address the human right to water, health or family or the public trust claims, or state constitutional limitations pled in the Complaint. Accordingly, the Court committed reversible error by ignoring these claims.

i. Violation of the Human Rights to Health, Water and Family

The human right to water is necessarily included within the human right to health and family, which are recognized and binding rights on the signatory countries to the Universal Declaration of Human Rights, including the U.S. and its states under the supremacy clause. As a result, Plaintiffs' federal constitutional claims are related to the right to health, water, and family.

"Everyone has the right to… health and well-being of himself and his (sic) family, including food, clothing, housing, and medical care." Universal Decl. of Human Rights, Art. 25; further, "State parties "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Conv. on the Elimination of All Forms of Discrimination Against Women, Arts. 12 and 14; and, "The enjoyment of the highest standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition," Const. of the World Health Org. The right to family and freedom from denial or interference in raising family and running a home are established by Art. 16, Universal Decl. of Human Rights, Article 10 and 12, Int'l Cov. on

Economic, Social and Cultural Rights, Art. 23, Int'l Cov. on Civil and Political Rights (Including family unit), Art. XI(11) of the American Decl. on Rights and Duties of Man; Art. 25, Conv. on Rights of Persons with Disabilities; and Art. 24, Conv. on the Rights of the Child. See -23-Gen. Comment No. 14 (2000), Right to Health, Art. 12, Int'l Cov. on Economic Social and Cultural Rights (U.N. Economic and Social Council, 12/2000/4).

The integrity of the family free from state interference is applied to the states under the 14th Amend. U.S. Const., *Moore v East Cleveland*, 431 U.S. 494 (1977); *Santosky v Kramer*, 455 U.S. 745 (1982).[5] The Declarations of Alexander, Donaldson, Lewis-Patrick, Adams, Rall and Lin-Luse presented with Plaintiff's TRO motion, establish substantial threats and to health and violations of the integrity of the family, when water is terminated. See also George Gaines, MPH, Plaintiffs Brief in Support of TRO. (ADR #5, DKT #20 and ADR #22, DKT #150, 161)

ii. The Public Trust Doctrine Establishes an Interest and Right to Access to Navigable Water and the Public Water System that Delivers it

The waters of the Great Lakes, connecting waters, and all tributary navigable lakes and streams are owned by the State as trustee to be held and managed as a public trust for the benefit of protected public trust uses. *Obrecht v. National Gypsum*, 361 Mich 399, 105 NW2d 143, (1961). Incorporating the duties, limitations, and standards announced by the U. S. Supreme Court in *Illinois Central Railroad v. Illinois*, 146 US 387, (1892). Michigan has followed the public trust doctrine for its navigable waters since its inception. *Moore v. Sanborn*, 2 Mich 520, (1852); *Collins v Gerhardt*, 237 Mich 38, 211 NW 115, (1926); *Glass v Goeckle*, 473 Mich 667, 703 NW.2d, 58 (2005).

The Public Trust Doctrine is a common law cause of action in Michigan and every State in the Union containing navigable waters. *Glass*, supra at 678 (stating that "Accordingly, under longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to

protect and preserve the waters of the Great Lakes and the lands beneath them for the public."); see also *Illinois Central,* supra; *Phillips Petroleum Co. v. Mississippi*, 108 S.Ct. 791 (1988); *Shively v.Bowlby*, 14 S.Ct. 548 (1894); *Montana v. U.S.,* 101 S.Ct. 1245 (1981); *Ainsworth v.Munoskong Hunting and Fishing Club*, 123 N.W. 802 (Mich. 1909); *Obrecht*, supra. The rights of Plaintiffs, as legal beneficiaries of the public trust, can not be surrendered or subordinated. *Obrecht*, supra; Illinois Central, at 452-456; *Nedtweg*, at 20, *Glass*, at 681. The State violates the Public Trust Doctrine and the citizen retains a common law cause of action when the State or a political subdivision abrogates the public's inherent interest in the Great Lakes. The interests that the Public Trust Doctrine protects are numerous, and include passing, repassing, navigation, fishing, fowling, and sustenance. *Glass,* 473 Mich. at 696. Detroit has abrogated the public's access and rights in the waters of the Great Lakes by shutting off access to potable water. The right of "sustenance," is a recognized and protected right that all citizens of Detroit possess through the Public Trust Doctrine. *Glass*, *Arnold*, supra. Not only is the water itself protected by the Public Trust Doctrine, but its uses as well, *Arnold* and *Glass*, *supra*

Detroit, as a subdivision of the State, cannot interfere with or impair the protected uses of water, nor can it transfer, lease or shift control of this public trust water and infrastructure to other entities unless for a primary public purposes and without impairment to Plaintiffs' public trust uses. *Obrecht, Nedtweg, Glass*, supra. Because the Court failed to rule on the public trust rights in the Great Lakes, including tributaries, the Detroit River and Lake Huron, which are the waters delivered to residents, the Court failed to properly consider the rights granted to Plaintiffs and limits imposed on Defendant to properly evaluate the GLA and the Bankruptcy Plan, or the actions of the City in denying access to public trust water and a public water system.

iii. Violations of the Michigan State Constitution

Art.4, Sec. 30, Mich. Const.(1963) provides: "The assent of two-thirds of the members

elected to and serving in each house of the legislature shall be required for the appropriation of money or property for local or private purposes." Art.9, Sect.8 provides: "The credit of the state shall not be granted to or in aid of any person, association or corporation, public or private, except as authorized in this constitution". This provision has been interpreted to apply to any property or thing of value that is leased, transferred or assigned for a local or private purpose or gain. The lynch pin in each case is the requirement of a state purpose, not a local or private one. If there is a local or private purpose, the transfer, lease or assignment would be invalid and unconstitutional. Therefore where fundamental rights are involved, as in this case, any private gain or purpose, any local purpose for less than full value (where any subsidy exists and the public purpose is weak), is judicially suspect. The "public purpose" must be substantial to justify a transfer to a corporation for local purposes. See, e.g. *In People v Township of Salem*, 20 Mich 452 (1850), *Younglas v. Flint*, 345 Mich. 576 (1956), *Sommers v. Flint*, 355 Mich 655, 96 NW2d 119 (1959), When it comes to property of the people, such as municipal water and infrastructure the bar for public purpose is set higher. .

The actions of the Defendants are subject to the Michigan Constitution, Art. 9, Sec. 18 and Art. 4, Sec 30. To the extent there is a public purpose, there must be a strict evaluation of value to establish full compensation. Moreover, to the extent that any new debt is incurred backed by the state or taxpayers of Detroit, i.e. lending credit of state for a private or non-public purpose, it would also be void. Any attempt to lease or shift DWSD property and water to a local or private corporation is improper. Hence, any attempt to shift lease or transfer control to a public corporation, such as the GLWA relied on by the Court below, would have to be scrupulously analyzed and authorized based on a factual hearing.

b. *Estoppel*

With regard to the Estoppel count in their complaint at Paragraphs 93-98, Plaintiffs pled that the City had changed its former policy of transferring water bills to tax liens as the primary method of collection rather than shut-offs, in favor of the new mass terminations of residential accounts more than 60 days or $150 in arrears. As a result, Plaintiffs alleged at Paragraph 134 that many residents accumulated large bills and the City should be estopped from suddenly terminating services as a result of these accumulated debts. (ADR #1, DKT #3, at 27).

The Court never addressed Plaintiffs' Estoppel count whether on the record or in his Supplemental Opinion dated November 19, 2014. (ADR #25, DKT #92). This court having *de novo* original jurisdiction can reverse the Bankruptcy court and allow for a full discovery and review of these issues.

In *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1217 (6th Cir. Ohio 1987), the Court enunciated the elements for estoppel and for waiver. The Court held:

> The elements constituting estoppel, as defined by federal common law, are: (1) conduct or language amounting to a representation of material facts; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on or act such that the party asserting the estoppel has a right to believe it so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must detrimentally and justifiably rely on the representation. *Acri v. International Association of Machinists*, 781 F.2d 1393, 1398 (9th Cir. 1986); see also *Hass*, 751 F.2d at 1099-1100. Waiver, as defined by federal common law, requires an "intentional relinquishment of a known right." *Larkins v. NLRB*, 596 F.2d 240, 247 (7th Cir. 1979)

Id. at 1217. This case is distinguished from *Sigal v City of Detroit Water and Sewerage Department*, 140 Mich App 39 (1985), the primary case relied on by the City in its Motion to Dismiss. In *Sigal, supra,* the court held that where Plaintiffs had been under-billed by the City, which later utilized the correct rate structure in calculating the current amount owed, Plaintiffs could not assert that the City was estopped from

collecting on the corrected, higher bill. The court relied on statutory grounds that prohibited different rules for collecting rates for customers within the same utility class.

In the present case, Plaintiffs are not asserting that they should not be held liable for unpaid bills, even where there is evidence that there was a policy of undercharging on bills by the DWSD. (ADR #8, DKT #29 at 5). Rather, Plaintiffs are asserting that City should be estopped from suddenly instituting a policy of mass shut-offs without due process, creating a public health emergency, when it had previously relied on attaching water bills as foreclosable property tax liens as its primary method of collection.

Plaintiffs meet the elements for their claim of equitable estoppel, at least to survive a dismissal motion on the pleadings before discovery has taken place:

> (1) By its conduct of not conducting water shut-offs, Defendant-Appellee represented to Plaintiffs and their fellow class members that it would rely on its right to assert property tax liens as its method for collecting delinquent bills;
>
> (2) the DWSD was aware of the fact that pursuant to statute, MCL 123.166 it had the option of discontinuing water service even where a property tax lien had been asserted, but still chose not to pursue water shut-offs and simply rely on the tax liens;
>
> (3) Defendant-Appellee, by its actions, led Plaintiffs to believe that City intended to utilize tax liens as opposed to shut-offs as the primary method for collecting unpaid bills; (4) Plaintiffs were unaware that they faced shut-off even though a property tax lien was or could be asserted on their delinquent water bills; and
>
> (5) Plaintiffs detrimentally and justifiably relied on the representations by the City through its conduct, that their bills would not be shut-off for delinquencies, and that instead, the unpaid bills would be attached to their property taxes.

The City should also be estopped from instituting its policy of mass shut-offs based on the doctrine of laches. In *Luna Pier Land Development v Republic Bank,* 325 BR 735, 740, 741. (2005), the court articulated the definition of laches under Michigan law, holding:

> The doctrine of laches is a tool of equity that may remedy "the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." It is applicable in cases in which there is an unexcused or

unexplained delay in commencing an action, the corresponding change of material condition that results in prejudice to a party.

In the present case, the City's delay in asserting its legal right to shut-off water for delinquent bills has resulted in the creation of a public health disaster in the City of Detroit caused by the sudden change in policy to mass water shut-offs. And any argument that customers with delinquent bills are barred from asserting equitable remedies to bar the shut-offs is countervened by City's unclean hands in underbilling a third of its customers for a period of six years, resulting in sudden spikes in water bills that make them unaffordable especially in light of Detroit's high poverty rate, and by the City's lack of proper notice and due process before instituting its mass shut-off policy. (ADR #8, DKT #5, Ex. 1).

5. The Bankruptcy Court Improperly Denied Plaintiffs' Motion For Leave To File A Second Amended Complaint.

The court mistakenly believed that Plaintiffs' made their request to amend the Complaint in their Motion for Reconsideration, after the case was dismissed and the court therefore viewed the request as moot and untimely. However, the Plaintiffs 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.

B. IT WAS REVERSIBLE ERROR TO DENY THE TRO WHERE THERE WAS IRREPARABLE LIFE-THREATENING HARM TO PLAINTIFFS, BUT THE COURT DEFERRED TO THE CITY'S FINANCIAL AND POLITICAL COSTS

Clearly the acknowledged and proven "risk of serious and even life-threatening medical conditions as well as adverse consequence for families, and for children in their education", was less important to the Court than the perceived risk of derailing the municipal bankruptcy proceeding or the creation of a regional water authority. Evidence of resulting illnesses, dehydration, inability to treat children whose physical disabilities require use of water, and threats to sanitation and public health including the spread of communicable diseases and

potential deaths[5] was less important than the prospect that negotiations for a regional water authority deal *might collapse.* Denial of a request for the temporary protection of vulnerable persons from life-threatening shut-offs, pending a permanent solution was deemed permissible in the shadow of the specter of possible, but not proven, decreases in revenue.[6] This ruling, based on evidence which misled the court and parties, should have been reconsidered as a palpable defect in the proceedings. L.B.R 9024-1(a). It is also belied by post judgment events which resulted in the creation of a regional water authority, which the court held to be "an important initiative" to be protected from any threat which "must be seriously considered", and for which reason the court acknowledges that it originally referred the development of a regional authority to confidential mediation proceedings. (ADR #25, DKT #92)

Plaintiffs asked this Court for a brief reprieve from water shut-offs and restoration of service to residents who had already lost service in order to maintain life-sustaining water service to vulnerable Detroit residents while a constitutionally adequate plan for termination of service and collection practices that protected their due process and equal protection rights was developed and put in place by the City. The Court misapplied the standard for balancing the equities and determining the public interest. In this process, it also relied on inadmissible self-serving and speculative hearsay opinions drawn from clandestine proceedings, about the possible effect of Plaintiffs' requested relief upon a political process. It proceeded in this manner which it allowed it to trump the testimony of the Plaintiffs, the opinions of experts for both parties, the City's own documents and testimony, and to protect speculative economic and political losses over threats to health and safety.

CONCLUSION

For all of the above reasons, Plaintiff's Complaint in its entirety should be reinstated and their request for temporary injunctive relief granted.

[1] The Plaintiffs were compelled to file their claims as an adversary proceedings because the Bankruptcy court had issued a Global Stay protecting the City from lawsuits.

[2] The court notes that the provision in the Interim Collection Rules and Procedures" governing medical holds on accounts (Rule 6(b)(i) is not specifically mentioned in the First Amended Complaint. However, the Collection Rules are referenced at Subsection IV B of the Complaint and were attached to the TRO motion before the court, enabling the court to consider all of the rules, just as it reviewed Plaintiffs' bills referenced in the complaint and presented by the City's in the TRO hearing (ADR #5, DKT#20)

[3] In fact, under this scenario, the lower income family actually ends up paying more for water service over time based on the delinquent interest rate charges.

[4] The pleadings lack any references to the commercial customers' connection equipment and procedures, and it was improper for the court to base its ruling on speculation when an assertion of this kind requires expert testimony or other evidence provided by experts.

[5] See declarations of Plaintiffs and putative class members attached to the Motion for TRO as well testimonies of these individuals at the hearing and the expert testimonies of George Gaines, MPH, former director of the Detroit Health Department, and John Armelagos, RN, President, Michigan Nurses Association. (ADR #1, DKT #3 at 89; and ADR #22, DKT #89 at 150-161; and 171-173)

[6] In fact, Plaintiff's evidence of possible alternative collection procedures, presented by its expert, Roger Colton, demonstrated the opposite – that there were permanent solutions available that could simultaneously protect vulnerable customers and improve collection efforts. (ADR #26, DKT #89 at 117-144)

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DATED: January 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing instrument was filed electronically on January 27, 2015 using the CM/ECF system, which will give notice of such filing to counsel for defense at their registered electronic mail address.

/s/_alice bonita Jennings