IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re	:	Chapter 9
CITY OF DETROIT, MICHIGAN,	:	Case No. 13-53846
Debtor.	:	Hon. Steven W. Rhodes

DEBTOR'S BRIEF IN OPPOSITION TO MOTION FOR LIMITED RELIEF FROM AUTOMATIC STAY[1]

Although the Plaintiffs style their motion as one for "limited relief," in actuality, the motion requests complete relief from the automatic stay. The Plaintiffs ask that their potential class action lawsuit proceed as if the City's bankruptcy had not occurred. This is not "limited" relief; it is exemption from the automatic stay applicable to all lawsuits pending against the City. The Plaintiffs fail to identify any legitimate basis for this exemption or explain why their alleged general unsecured claims differ from the thousands of other general unsecured claims that will be resolved through the claims resolution process. Additionally, courts have consistently held that once a bankruptcy case is filed, judicial economy favors resolving potential class claims in the bankruptcy case rather than in a

[1] Capitalized terms not otherwise defined herein have the meanings given to them in the Debtor's Objection to Motion for Relief from the Automatic Stay.

separate class action lawsuit. A bankruptcy case consolidates all claims in one forum and allows class action claimants to file proofs of claim without counsel and at virtually no cost. It is, in reality, a more effective process than a class action lawsuit.

As set forth in the City's motion to establish a claims bar date, the City intends to file a motion seeking approval of an efficient process for liquidating prepetition claims asserted against the City. Allowing the Plaintiffs' lawsuit to proceed *ad hoc* outside the claims resolution process would undermine one of the most fundamental protections afforded to the City as a chapter 9 debtor. As of the Petition Date, approximately 700 lawsuits were pending against the City. *See* Creditor List at Schedule G. Absent the enforcement of the automatic stay, the City would be spending its already limited resources defending these cases rather than focusing its efforts and resources on its restructuring. The Plaintiffs fail to provide a basis to proceed outside of the normal claims resolution process and should not be afforded relief from the stay to do so.

I. BACKGROUND

A. The Lawsuit in the District Court

On August 23, 2012, the Plaintiffs filed a complaint against the City of Detroit, acting through its Detroit Water and Sewerage Department, in the United States District Court for the Eastern District of Michigan ("District Court"),

commencing case number 12-13747 ("Lawsuit"). The Complaint (without exhibits) is attached as Exhibit 1. Paragraph one of the Complaint alleges that the Lawsuit involves a "class of all persons and entities which own dwellings or buildings with multiple units that are utilized for residential purposes or other entities that pay water and sewerage utility charges for such dwelling/buildings, such as, but not limited to apartment buildings, cooperatives, town houses and condominiums whom and which have been charged improper or commercial rates by the Detroit Water and Sewerage Department." Complaint ¶ 1. The relief sought in the Complaint includes class certification, money damages in an amount equal to the allegedly improperly paid commercial rates, and an incentive fee to the named plaintiffs. Complaint at 10.

On October 2, 2012, the City, represented by Clark Hill PLC ("Clark Hill"), filed its answer and affirmative defenses ("Answer"). The Answer is attached as Exhibit 2. In the Answer, the City denies that the Plaintiffs are entitled to the relief sought in the Complaint and raises numerous affirmative defenses, including *res judicata* based upon a prior settlement between many of the Plaintiffs and the City.

On January 16, 2013, the District Court entered its Order Setting Discovery and Motion Deadlines Relative to Class Certification and Setting Hearing Date ("Pre-Certification Scheduling Order"). The Pre-Certification Scheduling Order is attached as Exhibit 3. As set forth in the Pre-Certification Scheduling Order, at the

parties' request, the District Court divided the Lawsuit into pre-certification and post-certification stages. Pre-Certification Scheduling Order at 1. The Court established March 31, 2013 as the pre-certification discovery cutoff and June 4, 2013, as the deadline for the final brief on the Plaintiffs' motion for certification. *Id.* at 2.

On May 21, 2013, the City filed its motion to dismiss the Complaint ("Motion to Dismiss"). The Motion to Dismiss (without exhibits) is attached as Exhibit 4. As set forth in the Motion to Dismiss, the Plaintiffs' claims are barred by *res judicata* because they could and should have been asserted in an earlier equal protection action against the City. Further, the Plaintiffs' equal protection claim fails as a matter of law because the City has a rational basis for charging commercial water and sewerage rates to multiple family buildings with five or more units. Motion to Dismiss at 1.

On July 11, 2013, the District Court conducted a hearing on the Motion to Dismiss and the Plaintiffs' Motion to Certify Class. At the conclusion of the hearing, the District Court took both matters under advisement. On July 29, 2013, the District Court entered an order staying and administratively closing the Lawsuit due to the City's bankruptcy filing. In or around July 2013, Clark Hill was terminated as counsel due to the irreconcilable conflict caused by its representation

of the General Retirement System of the City of Detroit in connection with this chapter 9 case. Exhibit 5, Wolfson Dec. ¶¶ 6-7.

B. The City's Bankruptcy Case

On July 18, 2013 (the "Petition Date"), the City filed a petition for relief in this Court, commencing the largest chapter 9 case in history.

On October 10, 2013, the City filed its Motion for Entry of Order Establishing Bar Dates for Filings Proofs of Claim ("Bar Date Motion"). [Dkt. No. 1146]. As set forth in the Bar Date Motion, consistent with this Court's order of October 8, 2013 [Dkt. No. 1114], the City intends to file a motion by November 12, 2013 for approval of an efficient process for liquidating prepetition tort claims asserted against the City. Bar Date Motion ¶ 25. The City anticipates that this process: (a) may involve the use of alternative dispute resolution practices, including mediation or consensual arbitration; and (b) would be implemented once the tort claims have been asserted through the proof of claims process. *Id*. The City also intends to establish a process for the assertion of other administrative expense claims at a future date if and to the extent necessary. *Id*. ¶ 13.

II. ARGUMENT

Under the factors generally applied to stay motions in this circuit, there is no cause for relief from stay. Section 362(a) of the Bankruptcy Code provides in relevant part that:

> a petition filed under . . . this title . . . operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case . . . .

11 U.S.C. § 362(a). The Automatic Stay "is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." *Javens v. City of Hazel Park (In re Javens)*, 107 F.3d 359, 363 (6th Cir. 1997) (quoting H.R. REP. NO. 95-595, at 340 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6296).

Section 362(d) of the Bankruptcy Code authorizes a bankruptcy court to grant relief from the Automatic Stay in limited circumstances. *See* 11 U.S.C. § 362(d). In particular, section 362(d)(1) of the Bankruptcy Code provides that a party in interest may obtain relief from the Automatic Stay "for cause, including

the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. §362(d)(1).

"The Bankruptcy Code does not define 'cause' as used in [section] 362(d)(1). Therefore, under [section] 362(d), 'courts must determine whether discretionary relief is appropriate on a case by case basis.'" *Chrysler LLC v. Plastech Engineered Prods., Inc. (In re Plastech Engineered Prods., Inc.)*, 382 B.R. 90, 106 (Bankr. E.D. Mich. 2008) (*quoting Laguna Assocs. L.P. v. Aetna Casualty & Surety Co. (In re Laguna Assocs. L.P.)*, 30 F.3d 734, 737 (6th Cir. 1994)). The determination of whether to grant relief from the Automatic Stay "resides within the sound discretion of the Bankruptcy Court." *Sandweiss Law Center, P.C. v. Kozlowski (In re Bunting)*, No. 12-10472, 2013 WL 153309, at *17 (E.D. Mich. Jan. 15, 2013) (*quoting In re Garzoni*, 35 F. App'x 179, 181 (6th Cir. 2002)).

> To guide the bankruptcy court's exercise of its discretion . . . the Sixth Circuit identifies five factors for the court to consider: (1) judicial economy; (2) trial readiness; (3) the resolution of the preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; and (5) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors.

Bunting, 2013 WL 153309, at *17 (*quoting Garzoni*, 35 F. App'x at 181) (internal quotation marks omitted). In determining whether cause exists, however, "the

bankruptcy court should base its decision on the hardships imposed on the parties with an eye towards the overall goals of the Bankruptcy Code." *Plastech*, 382 B.R. at 106 (*quoting In re C & S Grain Co.*, 47 F.3d 233, 238 (7th Cir. 1995)). In that regard, a primary purpose of bankruptcy is the centralization of claims against the debtor for determination by the bankruptcy court through the claims allowance process. *See In re Hermoyian*, 435 B.R. 456, 464 (Bankr. E.D. Mich. 2010) (stating that an underlying policy of the Bankruptcy Code is the provision of a centralized forum for claims resolution and orderly distribution of assets). Further, the automatic stay benefits the creditor body at large by ensuring their equal treatment and preventing a race to the courthouse. *See* H.R. REP. NO. 95-595, at 340 (1977) ("The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors.").

Here, consideration of these factors confirms that no cause (much less sufficient cause) exists to justify relief from the Automatic Stay to allow the Lawsuit to proceed. With respect to the first factor, the interests of judicial economy weigh heavily in favor of denying the Stay Relief Motion. Courts have generally held that once a bankruptcy case is filed, judicial economy favors resolving claims of any alleged class by the bankruptcy claim resolution process

rather than in a separate non-bankruptcy class action lawsuit. "[B]ankruptcy significantly changes the balance of factors to be considered in determining whether to allow a class action and . . . class certification may be less desirable in bankruptcy than in ordinary civil litigation." *TL Admin. Corp. v. Twinlab Corp. (In re Ephedra Prods. Liab. Litig.)*, 329 B.R. 1, 5 (S.D.N.Y. 2005) (citations and internal quotation marks omitted). As the *Ephedra* court noted, "[the] superiority of the class action vanishes when the 'other available method' is bankruptcy, which consolidates all claims in one forum and allows claimants to file proofs of claim without counsel and at virtually no cost." *Id.* at 9; *see also In re Motors Liq. Co.*, 447 B.R. 150, 163-65 (Bankr. S.D.N.Y. 2011) (noting that "class litigation is inherently more time-consuming than the expedited bankruptcy procedure for resolving contested matters"). In short, the claims of the Plaintiffs and any other putative members of the class can be resolved most efficiently through the centralized claims resolution process, a fundamental aspect of bankruptcy, which affords both the claimant and debtor necessary protections.

With respect to the second factor, the Lawsuit is in its preliminary stages. The City's Motion to Dismiss and the Plaintiff's motion for class certification are pending. There is no timeline for a decision by the Court, and it is inevitable that

the non-prevailing party will seek to appeal an adverse ruling.[2] No trial date appears on the docket. Thus, the Lawsuit is not even advanced beyond the pre-certification stage, much less trial ready.

The third and fourth factors also weigh in favor of denying the Stay Relief Motion. The Court has not yet resolved the City's eligibility for relief in this chapter 9 case. Nothing could be more basic or preliminary to the ultimate outcome of this chapter 9 case. Further, as set forth in the Motion to Dismiss, the Plaintiffs have not demonstrated a likelihood of success on the merits. *See* Exhibit 4.

Additionally, the fifth factor weighs in favor of denying the Stay Relief Motion. If this Court were to allow the Plaintiffs to proceed with the Lawsuit, the City would be required to obtain new outside counsel to represent it in the Lawsuit. Wolfson Dec. ¶ 8. Hiring new outside counsel would cause the City to incur substantial expenses. *Id.* ¶ 9. New outside counsel would be required to, among other things, review the numerous motions, pleadings and discovery responses filed in the Lawsuit. *Id.* Further, if the Lawsuit were allowed to proceed and the

[2] The broad relief requested by the Plaintiffs to "liquidate the claim" would seemingly permit all necessary appeals or other motions until liquidation is achieved. At a minimum, it would be fundamentally unfair to permit a ruling on the class certification issue and, if certification is granted, deny the City the ability to further challenge such a ruling. Liquidating all of the claims in the bankruptcy process avoids all of these issues and both expedites the claims liquidation process and reduces its cost.

Motion to Dismiss not granted by the District Court, the Lawsuit would consume large resources. *Id.* ¶ 10. As a potential class action, the Lawsuit is a significant matter requiring considerable legal expenses. *Id.* Requiring the City to defend the Lawsuit would distract its restructuring efforts, diverting its limited resources at a time when it is both working to negotiate and deliver a plan of adjustment quickly and engaged in a substantial amount of discovery and litigation (all on an expedited timeframe) arising in the bankruptcy case itself.

Perhaps sensing that the stay relief factors do not tilt in their favor, the Plaintiffs cite to *Urbain v. Knapp Brothers Manufacturing Company* for the proposition that this Court should "stay its actions." Stay Relief Motion ¶ 15. *Urbain*, however, did not involve the automatic stay or a bankruptcy case, but instead focused on the idea that if two separate but related Federal District Court actions are filed, the court in which the first action is filed can stay proceedings in the second until matters in the first proceeding are resolved. *Urbain v. Knap Bros. Mfg. Co.*, 217 F.2d 810 (6th Cir. 1954). That case is entirely different from the facts here, where a bankruptcy case has been filed and the Bankruptcy Code § 362 automatic stay is in effect. The entire purpose of the automatic stay is to provide debtors with breathing room and avoid the race to the courthouse. The Plaintiffs' assertion, which is essentially that they "won the race to the courthouse" and thus should be allowed to proceed is contrary to the Bankruptcy Code.

In short, allowing the Lawsuit to proceed undermines the protections of the automatic stay. The City sought relief under chapter 9 in part to obtain the "breathing spell" afforded by the automatic stay and the consequent protection from its creditors while it restructures its affairs and prepares a plan of adjustment. The City's finances would be further depleted and its personnel distracted from their mission to operate the City for the benefit of its citizens and restructure its affairs if it were denied this basic protection of chapter 9 and forced to defend itself against the Plaintiffs so early in the case. Accordingly, the overall goals of chapter 9 weigh heavily in favor of denying stay relief to the Plaintiffs.

III. CONCLUSION

WHEREFORE, the City respectfully requests that this Court: (a) deny the Stay Relief Motion; and (b) grant such other and further relief to the City as the Court may deem proper.

Dated: October 24, 2013 Respectfully submitted,

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ATTORNEYS FOR THE CITY OF DETROIT

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LASALLE TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, NICOLET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, LAFAYETTE TOWN HOUSES, INC., a Domestic Nonprofit Corporation, and JOLIET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, ST. JAMES COOPERATIVE, a Domestic Nonprofit Corporation, individually and on behalf of all similarly situated entities,

Plaintiffs,

CLASS ACTION

v.

Case No.
HON.

CITY OF DETROIT, acting through its DETROIT WATER AND SEWERAGE DEPARTMENT,

Defendant.

PENTIUK, COUVREUR & KOBILJAK, P.C.
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CLASS ACTION COMPLAINT

NOW COME Plaintiffs, LASALLE TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, NICOLET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, LAFAYETTE TOWN HOUSES, INC., a

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Domestic Nonprofit Corporation, JOLIET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, and ST. JAMES COOPERATIVE, a Domestic Nonprofit Corporation, individually and on behalf of all similarly situated entities, by and through their Attorneys, PENTIUK, COUVREUR & KOBILJAK, P.C., and for their Complaint, states as follows:

INTRODUCTION

1. This action is brought on behalf of a class of all persons and entities whom and which own dwellings or buildings with multiple units that are utilized for residential purposes or other entities that pay water and sewerage utility charges for such dwellings/buildings, such as, but not limited to apartment buildings, cooperatives, town houses and condominiums whom and which have been charged improper or commercial rates by the Detroit Water and Sewerage Department (hereinafter "DWSD"). A prior 2009 similar action was filed in *Village Center v City of Detroit*, 2:07-cv-12963.

2. DWSD is the entity designated under law that provides water and sewerage to its residents which include the Plaintiffs and others similarly situated.

3. For many years continuing through the date of filing this Complaint, Defendant has been charging Plaintiffs' residents, and upon information and belief others similarly situated, at a commercial rate rather than a residential rate. See Exhibit 1, LaSalle; Exhibit 2, Nicolet; Exhibit 3, Lafayette; Exhibit 4, Joliet; and Exhibit 5, St. James.

4. Upon information and belief, waste water discharged in the City of Detroit is treated by the DWSD pursuant to an agreement with the City of Detroit and DWSD.

JURISDICTION AND PARTIES

5. This Court has jurisdiction as per 28 USC 1331 and venue is proper under 28 USC 1391(b).

6. Plaintiff, LASALLE TOWN HOUSES COOPERATIVE ASSOCIATION, is a Domestic Nonprofit Corporation located in the City of Detroit, Wayne County, Michigan, that pays water and sewage utilities applicable to LaSalle Town Houses Cooperative Association.

7. Plaintiff, NICOLET TOWN HOUSES COOPERATIVE ASSOCIATION, is a Domestic Nonprofit Corporation, located in the City of Detroit, Wayne County, Michigan, that pays water and sewage utilities applicable to Nicolet Town Houses Cooperative Association.

8. Plaintiff, LAFAYETTE TOWN HOUSES, INC., is a Domestic Nonprofit Corporation, located in the City of Detroit, Wayne County, Michigan, that pays water and sewage utilities applicable to Lafayette Town Houses, Inc.

9. Plaintiff, JOLIET TOWN HOUSES COOPERATIVE ASSOCIATION, is a Domestic Nonprofit Corporation, located in the City of Detroit, Wayne County, Michigan, that pays water and sewage utilities applicable to Joliet Town Houses Cooperative Association.

10. Plaintiff, ST. JAMES COOPERATIVE, is a Domestic Nonprofit Corporation, located in the City of Detroit, Wayne County, Michigan, that pays water and sewage utilities applicable to St. James Cooperative.

11. The Defendant, CITY OF DETROIT and the DETROIT WATER AND SEWERAGE DEPARTMENT, are located in Wayne County, Michigan.

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CLASS ALLEGATIONS

12. Plaintiffs incorporate paragraphs 1 through 11as if more fully set forth herein.

13. All Plaintiffs and class members have suffered and continue to suffer similar harm due to being charged improper water rates and/or being charged at a commercial rate rather than a residential rate.

14. Class Definition: Plaintiffs seek to certify the following class.

> All entities or individuals owning, or acting for owners of, buildings, apartment buildings, town houses, housing cooperatives and condominiums with multiple units and utilized for residential purposes whom and which have been charged at a commercial rate by the DWSD which DWSD has not previously adjusted based on prior litigation for the time period of at least six years prior to filing the instant complaint through the date of final judgment, or such longer amount of time as may be allowed by law.

15. Numerosity. The proposed class is so numerous that joinder of all members is impracticable. While the exact number of class members is not now known, the Plaintiffs believe the class number is significant and may be readily identified from Defendant's records.

16. Commonality. There are questions of law or fact common to the members of the class that predominate over questions affecting only individual members.

17. Among the questions of law or fact common to the class are the following:

a) Whether the commercial rate being charged bears a reasonable relation to the use of the utilities by the residential class and the services provided by the DWSD.

b) Are all persons of the same class included and affected alike, or are immunities or privileges extended to an arbitrary or unreasonable class

while denied to others of like kind?

c) Does any ordinance, statute, court order or law prohibit and preclude the commercial rate to be assessed to Plaintiffs and those similarly situated?

18. Typicality. The harm suffered by named Plaintiffs is typical of the harm suffered by other class members as to the rate, differing only in amount. Accordingly, the claims of Plaintiffs are the same as those of the other class members. Resolution of these common questions will determine the liability of the Defendant to the class members in general. Thus, they properly form the basis for class treatment in this case.

19. Although the amount of damages between individual class members may vary, the underlying liability issues remain the same as between all members of the class and the Defendant, to wit: Plaintiffs should be charged at residential and not commercial rates.

20. Adequacy of Representation. The represented parties will fairly and adequately assert and protect the interest of the class. The named Plaintiffs have already demonstrated their willingness to pursue this litigation on their own behalf, and have no known conflicts with the class members.

21. Plaintiffs' counsel will also fairly and adequately represent the interest of the class. The law firm of Pentiuk, Couvreur & Kobiljak, P.C., is well versed in the facts and the substantive law underlying the Plaintiffs' claims.

22. This class action is maintainable under Federal Rule of Civil Procedure 23(b)(1)(A)(B), (2) and (3).

23. The maintenance of this action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

a) The prosecution of separate actions by or against individual members of the class could create a risk of inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; and/or

b) Prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

24. The party opposing the class has acted or refuses to act on grounds that apply generally to the class, so that final equitable, injunctive or corresponding declaratory relief is appropriate respecting the class as a whole. Specifically, Defendant continues to charge an improper commercial rate as more fully described in this Complaint, despite prior litigation in connection with non-party entities.

25. The questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

26. The action is and will be manageable as a class action and in fact more manageable than the prosecution of separate actions.

27. In view of the complexity of the issues and expense of the litigation the separate claims of individual class members are insufficient in amount to support separate actions.

28. It is probable that the amount which may be recovered for individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action.

29. Plaintiffs are aware that potential members of the proposed class may have been parties to similar litigation in *Village Center v City of Detroit*, USDC #2:07-cv-12963 (2009). It may be that some Plaintiffs or potential class members' remedies in part are extinguished or modified by the Final Order in that case. Yet, since the conclusion of that case, it appears from Exhibits 1 - 5 that Plaintiffs were not accorded permanent relief and that the instant suit is required.

30. The class action is the appropriate method for the fair and efficient adjudication of the controversy. The legal and factual basis for the Plaintiffs' claims are the same as for the claims of all class members. The only difference between individual claims is the severity of the damages. Adjudicating this case on a class wide basis will promote substantial judicial economy by eliminating the likelihood of multiple cases turning on the same question of law and fact. The class action will also provide the Plaintiffs with the only meaningful avenue for relief, due to the economy of spreading their litigation costs, thereby reducing each individual's expenses over the class and enabling counsel to pursue the litigation by aggregating the claims. Further, the class action will save the Defendant the burden of defending multiple suits.

COUNT I
VIOLATION OF EQUAL PROTECTION - COMMERCIAL RATE CHARGES

31. Plaintiff incorporates paragraphs 1 through 30 as if more fully set forth herein.

32. The charging of residential units at commercial rates is a Constitutionally improper

classification and in violation of the State and Federal guarantees of equal protection (Mich Constitution 1963, Article 1, Section 2; U.S. Constitution Article 14, Section 1).

33. DWSD does not incur any greater expense in the sewage that flows from multiple residential dwellings than single family dwellings.

34. DWSD does not incur any greater expense in providing water/sewage service to multiple residential dwellings than it does other residential properties.

35. Multiple residential dwellings that are charged the higher commercial rate are placed at a financial disadvantage compared with single family dwellings charged the lower residential rates.

36. Defendant does not incur any greater expense per unit in controlling sewage for multiple dwellings than it does in controlling waste or sewage from single family dwellings.

37. There is no natural distinguishing characteristic bearing a reasonable relationship to the object of the classification which results in multiple dwellings paying a higher commercial rate and single family dwellings paying a lower residential rate.

38. There is no natural distinguishing characteristic of increased expense for controlling waste/sewage of multiple dwellings as compared to the like class of excluded properties.

39. Single family dwellings are granted an immunity from paying a higher commercial rate while multiple dwellings are denied such a benefit.

40. Plaintiffs' equal protection rights as well as the rights of others similarly situated have been violated by Defendant and as a result have incurred monetary damages.

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COUNT II - RESTITUTION/ASSUMPSIT

41. Plaintiffs incorporate paragraphs 1 through 40 as if more fully set forth herein.

42. For years Defendant has been charging the higher commercial rate to Plaintiffs and those similarly situated for services continuously provided by it which charges are not authorized by the Orders of this Court in 2:07-cv-12963, or the contract they have with DWSD.

43. Water and sewer bills per Michigan State Laws and Detroit's own Municipal Ordinance are liens against properties that receive such services until paid.

44. Michigan law provides that an assumpsit action – an action to recover damages for a breach of promise, may be maintained against a municipality and/or its divisions without regard to governmental immunity when restitution is being sought for illegal or inappropriate assessment.

45. Plaintiffs seek a Court order ordering the cession of such illegal or inappropriate charges that are paid and restitution paid back to such time as is applicable under the relevant Statute of Limitations.

COUNT III – ACCOUNTING AND ESCROW

46. Plaintiffs incorporate paragraphs 1 through 45 as if more fully set forth herein.

47. Members of the class continue to accrue damages daily to the extent that they are still being charged commercial rates.

48. Plaintiffs request this Honorable Court require Defendant to show cause why the commercial rates to the proposed class members should be subject to an accounting and not be paid into escrow with the Court during the pendency of the action.

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COUNT IV - INJUNCTIVE RELIEF

49. Plaintiffs incorporate paragraphs 1 through 48 as if more fully set forth herein.

50. Plaintiffs seek injunctive relief enjoining Defendant, its agents, employees and those persons in active concert and/or participation with charging residential multi-units commercial rates.

WHEREFORE, Plaintiffs, on their own and on behalf of those similarly situated, pray for the following relief;

A. An Order certifying the Plaintiffs' class and appointing Plaintiffs and their counsel to represent the class.

B. A Judgment of Money Damages to Plaintiffs and class members in an amount equal to the improperly paid commercial rates as described in the Complaint, or in the alternative, credits to Plaintiffs' accounts.

C. Injunctive relief as requested in Count IV of the Complaint.

D. An award of reasonable attorney fees and costs.

E. An incentive fee award to named Plaintiffs.

F. Such other and different relief as is just and equitable.

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G. A declaration that Defendants have not fully complied with the prior orders of this Court.

Respectfully submitted,

PENTIUK, COUVREUR & KOBILJAK, P.C.

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Dated: August 23, 2012.
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EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LASALLE TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, NICOLET TOWN HOUSES COOPERATIVE, A Domestic Nonprofit Corporation, LAFAYETTE TOWN HOUSES, INC., a Domestic Nonprofit Corporation, and JOLIET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, ST. JAMES COOPERATIVE, a Domestic Nonprofit Corportation,

Plaintiffs,

CITY OF DETROIT, acting through its DETROIT WATER AND SEWERAGE DEPARTMENT,

Defendant.

Case No. 12-CV-13747

Hon. Paul D. Borman

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DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

Defendant City of Detroit, ("Defendant"), by and through its attorneys Clark Hill PLC, for its Answer and Affirmative Defenses to the Complaint of Plaintiffs LaSalle Town Houses Cooperative Association ("LaSalle"), Nicolet Town Houses Cooperative Association ("Nicolet"), Lafayette Town Houses, Inc., ("Lafayette"), Joliet Town Houses Cooperative

Association ("Joliet"), and St. James Cooperative ("St. James"), (collectively, "Plaintiffs"), states as follows:

1. Defendant denies the allegations contained in this Paragraph, and denies the allegation that any of the Plaintiffs have been improperly charged "commercial rates" as alleged by Plaintiffs. Defendant further denies that the instant action is a "similar action" to *Village Center v. City of Detroit*, Case No. 07-CV-12963 ("*Village Center Action*"). The *Village Center Action* related to a challenge to industrial waste control ("IWC") charge rates, which Defendant does not levy on any of Plaintiffs' facilities.

2. Defendant admits that the Detroit Water and Sewerage Department ("DWSD") is the department within the City of Detroit that provides water and sewerage services to Detroit residents. Defendant denies that DWSD is an entity separate and distinct from the City of Detroit itself.

3. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this Paragraph which serves as a denial. The allegations contained in this Paragraph do not specify the component(s) of the charges being challenged.

4. Defendant denies the allegations contained in this Paragraph in the manner alleged. Waste water, usually understood to be sanitary sewage, discharged in the City of Detroit is treated by DWSD pursuant to the Charter of the City of Detroit and its ordinances, as opposed to agreement between DWSD and the City of Detroit.

JURISDICTION AND PARTIES

5. The allegations contained in this Paragraph state conclusions of law to which no response is required.

6. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this Paragraph which serves as a denial.

7. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this Paragraph which serves as a denial.

8. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this Paragraph which serves as a denial.

9. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this Paragraph which serves as a denial.

10. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this Paragraph which serves as a denial.

11. Defendant admits that it is located in Wayne County, Michigan. Further, DWSD is a department within the City of Detroit that is also located in Wayne County, Michigan.

CLASS ALLEGATIONS

12. Defendant incorporates its responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

13. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Defendant further states that some members of the Plaintiffs' putative class may be currently charged, or may have been charged, residential rates for periods of time up to and including present charges.

14. Defendant denies that class certification is warranted in this case, and further denies that the class proposed by Plaintiffs is appropriate.

15. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

16. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

17. The allegations contained in this Paragraph, and its Subparagraphs, present questions and conclusions of law to which no response is required. To the extent a response is required, Defendant denies that the questions presented in this Paragraph present common issues supporting Plaintiffs' claims.

18. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

19. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Further answering, the allegations contained in this Paragraph do not specify the component(s) of the charges being challenged.

20. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

21. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations contained in this Paragraph which serves as a denial.

22. Defendant denies that the instant action is certifiable as a class action under FED. R. CIV. P. 23.

23. The allegations contained in this Paragraph, and its Subparagraphs, state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

24. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Further answering, the allegations contained in this Paragraph do not specify the component(s) of the charges being challenged.

25. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

26. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

27. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

28. Defendant denies the allegation contained in this Paragraph for the reason that it is untrue.

29. Defendant admits that it was a party to the *Village Center Action*. Defendant denies any allegation that it has not complied with any obligation arising out of the *Village Center Action*. Further, Plaintiff LaSalle also appears to have been a party to the *Village Center Action*. Any claims that were brought or could have been brought by any named Plaintiff, or putative class member, in the *Village Center Action* are barred in this action under the doctrines of merger and/or bar, and/or *res judicata*.

30. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

COUNT I
VIOLATION OF EQUAL PROTECTION - COMMERCIAL RATE CHARGES

31. Defendant incorporates its responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

32. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

33. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Further answering, the allegations contained in this Paragraph do not specify the component(s) of the "sewage" charge(s) being challenged.

34. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Further answering, the allegations contained in this Paragraph do not specify the component(s) of the "sewage" charge(s) being challenged.

35. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Further answering, the allegations contained in this Paragraph do not specify the component(s) of the "sewage" charge(s) being challenged.

36. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Further answering, the allegations contained in this Paragraph do not specify the component(s) of the "sewage" charge(s) being challenged.

37. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Further answering, the allegations contained in this Paragraph do not specify the component(s) of the "sewage" charge(s) being challenged.

38. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue. Further answering, the allegations contained in this Paragraph do not specify the component(s) of the "sewage" charge(s) being challenged.

39. Defendant denies the allegations in this Paragraph for the reason that they are untrue.

40. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

COUNT II - RESTITUTION/ASSUMPSIT

41. Defendant incorporates its responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

42. Defendant denies the allegations contained in this Paragraph as phrased for the reason that they are untrue.

43. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant admits the allegations contained in this Paragraph.

44. The allegations contained in this Paragraph state conclusions of law to which no response is required. To the extent a response is required, Defendant denies the allegations contained in this Paragraph, and denies any allegation that it has engaged in any illegal or inappropriate assessment for the reason that it is untrue.

45. Defendant admits that Plaintiffs seek relief from this Court. Defendant denies that any requested relief is warranted, and denies the allegation that it has engaged in any illegal or inappropriate assessment for the reason that it is untrue.

COUNT III - ACCOUNTING AND ESCROW

46. Defendant incorporates its responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

47. Defendant denies the allegations contained in this Paragraph for the reason that they are untrue.

48. Defendant admits that Plaintiffs seek relief. Defendant denies that Plaintiffs are entitled to any relief, and deny that a show cause order is warranted.

COUNT IV - INJUNCTIVE RELIEF

49. Defendant incorporates its responses to the allegations contained in the preceding paragraphs as though fully set forth herein.

50. Defendant admits that Plaintiffs seek relief. Defendant denies that Plaintiffs are entitled to any relief, and deny that an injunction is warranted.

RELIEF REQUESTED

WHEREFORE, Defendant respectfully requests that this Court:

a. Dismiss Plaintiffs' Complaint with prejudice;

b. Award Defendant its attorneys' fees and costs for having to defend this action; and

c. Award such other relief as the Court deems just and equitable.

Respectfully submitted,

CLARK HILL PLC

By: /s/ Reginald M. Turner, Jr.

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Attorneys for Defendant

Date: October 2, 2012

AFFIRMATIVE DEFENSES

Defendant, City of Detroit, hereby puts Plaintiffs on notice that it may rely upon one or more of the following affirmative defenses:

1. Plaintiffs' claims are barred in whole or in part because they have failed to state a claim upon which relief can be granted.

2. Plaintiffs' claims against the Defendant, City of Detroit, are barred by the Governmental Immunity Act, MICH. COMP. LAWS § 691.1401, *et seq*.

3. Plaintiffs failed to mitigate damages.

4. Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

5. Plaintiffs' claims, either intentionally or unintentionally, improperly fail to distinguish between commercial IWC charges, and the actual components of the commercial rates that DWSD charges Plaintiffs.

6. Plaintiffs' claims are barred, in whole or in part, because Defendant's classification, if any, is rationally based and otherwise constitutes a proper exercise of municipal power.

7. Plaintiffs' claims are barred, in whole or in part, because Defendant's classification of property for Storm Water Drainage ("SWD") charges is rationally based on assumptions made regarding storm water volume due to meter sizes and/or expansive impervious surfaces.

8. No rate structure takes into account every different circumstance between properties, and every rate structure makes broad classifications in which it puts various types of properties, classifying them on the basis of practical similarities or differences for purposes of

water and sewage services, costs of services, and rates, not necessarily based on labels or types of use of the property.

9. The reclassifications of property sought by Plaintiffs may result in a denial of Equal Protection rights for DWSD customers.

10. Defendant's conduct is also authorized by the Detroit City Code ("Code") which requires that storm water shall be discharged into public sewers, Code Sec. 56-3-8(b), the Federal Water Pollution Act, which requires that each party that uses a municipal sewer system pay its fair share of the cost of operating the system, 33 U.S.C. § 1284(b)(1)(A), and Section 18 of the Michigan Revenue Bond Act, MICH. COMP. LAWS § 141.118, which prohibits municipal utilities from providing free service to any user of the utility system.

11. Plaintiffs' claims are barred by the Voluntary Payment Doctrine because Plaintiffs' payments of SWD charges were mistakes of law (as to Plaintiffs' rights).

12. Plaintiffs' Equal Protection claims are subject to dismissal because no City of Detroit Ordinance creates an impermissible class which is treated in a disparate fashion in relation to others similarly situated.

13. Some members of the Plaintiffs' putative class may be currently charged, or may have been charged, residential rates for periods of time up to and including present charges.

14. Plaintiffs' claims are barred, in whole or in part, by the doctrines of laches, acquiescence, and ratification.

15. Plaintiffs' claims are barred, in whole or in part, by the doctrines of *res judicata*, merger, and/or bar.

16. Plaintiffs' claims are barred, in whole or in part, by waiver and/or estoppel.

17. Defendant reserves the right to assert additional affirmative defenses.

RELIEF REQUESTED

WHEREFORE, Defendant respectfully requests that this Court:

a. Dismiss Plaintiffs' Complaint with prejudice;

b. Award Defendant its attorneys' fees and costs for having to defend this action; and

c. Award such other relief as the Court deems just and equitable.

Respectfully submitted,

CLARK HILL PLC

By: /s/ Reginald M. Turner, Jr.

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Attorneys for Defendant

Date: October 2, 2012

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause at their respective email addresses as listed for service via the Courts electronic filing system on October 2, 2012. I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge, and belief.

By:/s/Paula Proffitt
Paula R. Proffitt

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LASALLE TOWN HOUSES
COOPERATIVE ASSOCIATION, *et al.*,

Plaintiffs,

Case No. 12-cv-13747
Honorable Gershwin A. Drain

v.

CITY OF DETROIT, acting
through its DETROIT WATER
AND SEWERAGE DEPARTMENT,

Defendant.
_____/

ORDER SETTING DISCOVERY AND MOTION DEADLINES RELATIVE TO CLASS CERTIFICATION ISSUE AND SETTING HEARING DATE

The parties appeared for a status conference on this date. On August 23, 2012, Plaintiffs filed a class action complaint alleging that Defendant, the City of Detroit, through its Water and Sewerage Department, has improperly charged Plaintiffs for water and sewerage utility services at commercial rates rather than residential rates. Plaintiffs currently include five entities which own cooperative residential dwellings or buildings with multiple residences. They seek class certification pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure.

In order to resolve this matter in an efficient manner, the Court adopts the parties' proposal set forth in their joint discovery plan, filed on November 26, 2012. Accordingly, this matter shall be divided into pre-certification and post-certification stages. Therefore, the following dates shall apply:

PRE-CERTIFICATION SCHEDULING DEADLINES	
Initial Disclosures required by Rule 26(a) due:	January 15, 2013
Pre-Certification Discovery cutoff:	March 31, 2013
Plaintiffs' Motion to Certify Class due:	April 30, 2013
Defendant's Response in Opposition due:	May 21, 2013
Plaintiffs' Reply in Support of Class Certification due:	June 4, 2013

Oral argument on Plaintiffs' Motion to Certify Class is set for June 18, 2013 at 2:00 p.m.

A status conference will also be held on June 18, 2013.

SO ORDERED.

Dated: January 16, 2013

/s/Gershwin A Drain
GERSHWIN A. DRAIN
United States District Judge

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on January 16, 2013, by electronic and/or ordinary mail.

/s/ Tanya Bankston
Deputy Clerk

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LASALLE TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, NICOLET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, LAFAYETTE TOWN HOUSES, INC. a Domestic Nonprofit Corporation JOLIET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, and ST. JAMES COOPERATIVE, a Domestic Nonprofit Corporation, Individually and on behalf of all similarly,

Plaintiffs,

v.

CITY OF DETROIT, acting through its DETROIT WATER AND SEWERAGE DEPARTMENT,

Defendant.

Case No. 4:12-cv-13747

Hon. Gershwin A. Drain

DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND/OR 12(c)

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DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(6) and 12(c)

Defendant City of Detroit, acting through its Detroit Water and Sewerage Department ("Defendant" or "DWSD"), through its counsel Clark Hill PLC, hereby move this Court for dismissal of the complaint in this action for Plaintiffs' failure to state a claim upon which relief can be granted. As such, Defendant is entitled to dismissal as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6) and/or 12(c). For the reasons set forth in the attached Brief, Defendant respectfully requests that this Court grant its Motion filed pursuant to FED. R. CIV. P. 12(b)(6) and/or 12(c).

Concurrence to the relief sought in this Motion was requested from counsel for Plaintiffs on March 5, 2013. Concurrence was denied on March 27, 2013.

Respectfully Submitted By:

CLARK HILL PLC

/s/ Jenice C. Mitchell Ford
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Counsel for Defendant

Date: May 21, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LASALLE TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, NICOLET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, LAFAYETTE TOWN HOUSES, INC. a Domestic Nonprofit Corporation JOLIET TOWN HOUSES COOPERATIVE ASSOCIATION, a Domestic Nonprofit Corporation, and ST. JAMES COOPERATIVE, a Domestic Nonprofit Corporation, Individually and on behalf of all similarly,

Plaintiffs,

v.

CITY OF DETROIT, acting through its DETROIT WATER AND SEWERAGE DEPARTMENT,

Defendant.

Case No. 4:12-cv-13747

Hon. Gershwin A. Drain

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND/OR 12(c)

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STATEMENT OF ISSUES PRESENTED

I. Should Plaintiffs Claims Be Dismissed For Failure To State A Claim Pursuant To Fed. R. Civ. P. 12(b)(6) and/or 12(c)?

Defendant answers 'Yes.'
Plaintiffs answer 'No.'

MOST CONTROLLING OR PERSUASIVE AUTHORITY

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND/OR 12(c)

Defendant City of Detroit respectfully requests that this Court dismiss Plaintiffs' Complaint because Plaintiffs' claims, which are allegedly common to the proposed class members, are legally and factually insufficient. Specifically, Plaintiffs' equal protection claims are barred by *res judicata* because they could have and should have been asserted in an earlier equal protection action against the City of Detroit. Further, Plaintiffs' equal protection claim fails as a matter of law because Defendant has a rational basis for charging commercial water and sewerage rates to multiple family buildings with five or more units. As such, Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) and/or (12(c).

BACKGROUND

I. THE PARTIES

Plaintiffs own and operate town home cooperatives and/or condominiums (the "Co-ops"). *See* Plaintiffs' Class Action Complaint ("*Plaintiffs' Complaint*"), ¶¶1 and 5-10 *[Docket Entry No. 1]*, attached as **Exhibit A**. The Co-ops contain five or more residential units (the "Co-ops"). *See* Plaintiffs' Response to Defendant's First Combined Set of Interrogatories, Requests for Production and Requests To Admit ("*Response To Combined Discovery Requests*"), Requests To Admit Nos. 4, 9, 16, 21 and 26, attached as **Exhibit B**. The Co-ops are not single family residential dwellings. *See Response To Combined Discovery*, Requests To Admit Nos. 5-8, 10-13, 17-20, 22-25 and 27-30. Unlike single family dwellings, the Co-ops do not have individual water meters or individual lawns for each unit. *Id.* Plaintiffs seek to add as class members all residential dwellings (apartment buildings, condominiums, co-ops, *etc.*) located within the City of Detroit that feature five or more residential units. *See* Plaintiffs' Motion For Class Certification ("*Plaintiffs' Motion*") at p. 1.

Defendant City of Detroit, acting through its Detroit Water and Sewerage Department ("Defendant" or "DWSD") provides water and sewerage to residential buildings and other buildings and facilities, including the Co-ops. *See* Defendant's Answer To Complaint, ¶2.

II. PLAINTIFFS' CLAIMS ASSERTED IN THIS INSTANT MATTER

Plaintiffs claim that they are charged "improper or commercial rates" rather than a "residential rate" and that these charges violate "the equal protection clause of the United States and Michigan Constitutions." *Plaintiffs' Complaint* at ¶¶ 1, 3 and 32. *See also Plaintiffs' Motion* at p. 1. Plaintiffs seek to certify a class consisting of:

> [A]ll entities or individuals owning, or acting for owners of buildings, apartment buildings, town houses, housing cooperatives and condominiums with multiple units and utilized for residential purposes whom and which have been charged at a commercial rate by the DWSD which DWSD has not previously adjusted based on prior litigation for the time period of at least six years prior to filing the instant complaint through the date of final judgment, or such longer amount of time as may be allowed by law.

Plaintiffs' Complaint at ¶14. *See also* Plaintiffs' Motion at p. 1. In this matter, Plaintiffs seek to add as class members ". . . hundreds if not . . . a thousand members . . . . from a "listing of apartment accounts provided by Defendant which identifies 2,432 structures . . . ." *Plaintiffs' Motion* at pp. 3-4.

III. PLAINTIFFS' CLAIMS ARE BARRED BY *RES JUDICATA* BECAUSE SUCH CLAIMS WERE, OR COULD HAVE BEEN, RAISED IN THE PRIOR MATTER VILLAGE CENTER, ET AL. V. CITY OF DETROIT

In *Village Center Associates Limited Dividend Housing Association, et al. v. City of Detroit, acting through its Detroit Water and Sewerage Department*, Case No. 07-cv-12963 (Hon. John Feikens) ("*Village Center*"), the plaintiffs filed a class action complaint alleging, *inter alia*:

> 3. The Defendant has created an account classification in order to determine what rate to charge to certain customers (see Exhibit A). Based upon Defendants own classifications Plaintiffs and the class of persons and entities similarly situated are classified as commercial and/or apartment buildings, as all have greater than four (4) units.

> 4. During the class period those Plaintiffs and members of the proposed class that were charged commercial or apartment building rates were also charged an Industrial Waste Control charge in direct contradiction to specific ordinances enacted pursuant to a Consent Judgment in U.S. District Court Case No. 77-1100 as amended from time to time.

Village Center First Amended Class Action Complaint at ¶¶ 3-4 [*Village Center Docket Entry No. 21, Ex. 4*] ("*Village Center Complaint*"), attached as **Exhibit C**. The plaintiffs alleged that the proposed class number was "in excess of 2,000 members and [could] be readily identified from Defendant's records." *Id.* at ¶22.

The parties agreed to settle the matter and that the settlement class would include:

> [A]ll persons or entities who or which on July 28, 2008 owned a residential property consisting of more than 4 residential units which property, based on water and sewage meters applicable to such property, was assessed sewage charges from the Detroit Water Board and Sewerage Department Containing an IWC (Industrial Waste Control Charge) charge at any time from and after June 1, 2001.

Village Center Complaint at ¶21. *Village Center* was dismissed with prejudice, on the merits, pursuant to a Final Judgment and Order dated February 3, 2009 ("*Village Center Final Order*") *[Village Center Docket Entry No. 27]*, attached as **Exhibit D.** The *Village Center Final Order* provides, in pertinent part:

> . . . [P]laintiffs' agree that the lawsuit shall be dismissed with prejudice, and Plaintiffs' and all settlement class members who do not timely exclude themselves from the Settlement Class, including any other person acting on their behalf or for their benefit, and including all Settlement Class members whose mail is returned as undeliverable mail for any reason hereby releases, covenants, not to sue, remises and forever discharges Defendant . . . from any causes of action, claims, debts, contracts, agreements, obligations, liabilities, suits, claims, damages, losses, or demands whatsoever ("claims"), in law or in equity, known or unknown at this time, suspected or unsuspected with Plaintiff and the class now have or ever had, or may in the future have, against [DWSD] . . . under any legal theory, including but not limited to, claims under equal protection or restitution, attorneys fees and/or costs of suit in connection with such claims, whether or not alleged, arising out of the allegations in or subject matter of the First Amended Class Action Complaint attached to this Preliminary Statement of Settlement Terms.

Village Center Final Order at ¶7. *See also* Preliminary Statement of Settlement Terms at ¶8 *[Village Center Docket Entry No. 21, Ex. 2]* ("*Village Center Settlement Agreement*"), attached as **Exhibit E**. The Village Center Settlement Class had 2,310 members. It included all of the Plaintiffs in this matter and many of the proposed class members. *See* DWSD IWC Settlement Final Worksheet ("*Village Center Settlement List*"), attached as **Exhibit F.** *See also* Memorandum As To Final List of Accounts/Class Members And Pro Rata Credit *[Village Center Docket Entry No. 24]* which references the *Village Settlement List*, attached as **Exhibit G** and Attorney Affidavit of Jenice C. Mitchell Ford ("*Attorney Affidavit*"), attached as **Exhibit H**. As part of the settlement, the DWSD provided appropriate remuneration (in the form of refunds, credits or payments) to members of *Village Center* Settlement Class members. *See Village Center Settlement List*. Many of the *Village Center* Settlement Class members, like the Plaintiffs and proposed plaintiffs in this action, own or operate multiple family dwellings with five or more residential units. *Id. Village Center* Settlement Class members were provided notice of the settlement. *See* Affidavit of Gary Watkins dated October 10, 2008 *[Village Center Docket Entry No. 25]*, attached as **Exhibit I**.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for a motion brought pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings for failure to state a claim upon which relief can be granted, is nearly identical to that employed when reviewing a motion brought pursuant to Fed. R. Civ. P. 12(b)(6). *See EEOC v. J.H. Routh Packing, Co.*, 246 F.3d 850, 851 (6th Cir. 2001). *See also* Fed. R. Civ. P. 12(b)(6) and 12(c). When a court is presented with a Rule 12(b)(6) or 12(c) motion, "it may consider the [c]omplaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to the defendant's motion to dismiss, so long as they are referred to in the

[c]omplaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). A court "must construe the complaint in the light most favorable to the plaintiff, accept[ing] all of the complaint's factual allegations as true." *Id.* (citation and internal quotations omitted).

Yet, to survive such a motion, a plaintiff's complaint "must contain either direct or inferential allegations respecting all the material elements [of the claim] to sustain a recovery under some viable legal theory." *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 444 (6th Cir. 2007) (internal quotation omitted). "Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Edison v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). Thus, a party must make "a showing, rather than a blanket assertion of entitlement to relief" and "[f]actual allegations must be enough to raise a right to relief above the speculative level" so that the claim is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 and 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard 'for all civil actions'"). A claim must be dismissed if the legal protections invoked by a party do not provide relief for the conduct alleged in its complaint. *Golden v. City of Columbus*, 404 F.3d 950, 959 (6th Cir. 2005).

A Rule 12(c) motion "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991).

II. PLAINTIFFS' CLAIMS ARE BARRED BY *RES JUDICATA*

The claims of many of members of the putative class are barred under the doctrine of *res judicata* or claim preclusion. A claim will be barred by prior litigation if the following elements are present: (i) a final decision on the merits by a court of competent jurisdiction; (ii) a subsequent action between the same parties or their "privies"; (iii) an issue in the subsequent action which was

litigated or which should have been litigated in the prior action; and (iv) an identity of the causes of action. *Bittinger v. Tecumshe*, 123 F.3d 877, 880 (1997) *citing Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995), *cert. denied*, 134 L. Ed. 2d 949, 116 S. Ct. 1848 (1996); *Sanders Confectionery Prods. v. Heller Financial, Inc.*, 973 F.2d 474, 480 (6th Cir.1992).

Here, all four (4) factors for claim preclusion are met. First, many potential class members were parties to *Village Center* where a final order on the merits was entered on February 3, 2009. *See Village Center Final Order*. Second, Plaintiffs seek to add these same entities to this subsequent matter. *See Plaintiffs' Complaint* at ¶14. *See also Plaintiffs' Motion* at p.1. Third, all members of the *Village Center* Settlement Class were aware that they were being charged commercial rates and could have but failed to challenge the imposition of that rate at that time. In settlement of that matter, all *Village Center* Settlement Class members waived their right to assert the claims now asserted in this matter. *See Village Center Settlement Agreement* at ¶¶1 and 8. Fourth, the claims asserted in this matter mirror those claims either asserted in the *Village Center First Amended Class Action Complaint*, waived in the *Village Center Settlement Agreement* and/or extinguished by the *Village Center Final Order*.

Even Plaintiffs acknowledge that "potential members of the proposed class may have been parties to "similar litigation in Village Center v City of Detroit, USDC #2-07-cv-12963 (2009). It may be that some Plaintiffs or potential class members' remedies in part are extinguished or modified by the Final Order in that case." *Plaintiffs' Complaint* at ¶29. Despite acknowledging this fact, Plaintiffs nonetheless seek to certify a class with approximately 2,332 structures – many if not most of whom were included in the *Village Center* Settlement Class as members or privies to members. Instead of taking measures within their control to refine the potential class, Plaintiffs rely on speculative numbers and unsupported assertions about class membership simply repeating in *Plaintiffs' Motion* what was stated in *Plaintiff's Complaint*.

As such, Plaintiffs have made "a blanket assertion of entitlement to relief" without raising "a right to relief above the speculative level" so that the claim is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009). Under these circumstances, Plaintiffs' claims must be dismissed because the legal protections invoked by a party do not provide relief for the conduct alleged in *Plaintiffs' Complaint*. *Golden*, 404 F.3d 950, 959 (6th Cir. 2005).

For these reasons, Plaintiffs' claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) and/or Fed. R. Civ. P. 12(c).

III. PLAINTIFFS FAIL TO STATE AN EQUAL PROTECTION CLAIM

"To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quotations omitted). Under rational basis review, the governmental policy at issue "will be afforded a strong presumption of validity and must be upheld as long as there is a rational relationship between the disparity of treatment and some legitimate government purpose." *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000); *accord Atlas Valley Golf and Country Club, Inc. v. Village of Goodrich*, 227 Mich. App. 14, 15; 575 N.W.2d 56, 62 (1997). In other words, "a plaintiff faces a severe burden and must negate all possible rational justifications for the distinction." *Gean v. Hattaway*, 330 F.3d 758, 771 (6th Cir. 2003).

One purpose of the utility ratemaking process is to equitably apportion the cost of services to the customers who use them. *See Iroquois Properties v. City of East Lansing*, 160 Mich. App. 544, 561, 408 N.W.2d 495, 503 (1987). Courts have recognized, however, that it is often administratively impossible to measure a customer's actual use of a service. *See, e.g., Village*

Green of Lansing v. Bd. of Water and Light, 145 Mich. App. 379, 394; 377 N.W.2d 401, 409 (1985). For example, it would be unduly burdensome to determine how much electricity each individual tenant consumes in the common areas of a multiple-family dwelling. *Id.* It is likewise impossible to predict usage with mathematical formulas, since there are any number of variables that might affect why and how a customer uses a given service. *Land v. City of Grandville*, 2 Mich. App. 681, 695; 141 N.W.2d 370, 376 (1966) *citing Township of Meridian v. East Lansing,* 342 Mich. 734, 749; 71 N.W.2d 234, 237 (Mich. 1955)).

In light of these administrative difficulties, the rational-basis test does not require utility firms to perfectly measure or predict usage when apportioning the cost of services. *Atlas Valley*, 227 Mich. App. at 16-17. Instead, the Equal Protection Clause permits utility firms to classify customers based on any natural distinguishing characteristic that reasonably assists in the apportionment process. *See Alexander v. City of Detroit*, 392 Mich. 30, 35-36; 219 N.W.2d 41, 43 (1974). As such, courts have upheld a wide variety of classifications aimed at achieving equitable apportionment. *See, e.g.*, *Land*, 2 Mich. App. at 697; 141 N.W.2d at 377 (upholding an ordinance imposing sewer charges based on the total number of residents in a dwelling unit) and *Village Green of Lansing*, 145 Mich. App. 379, 394; 377 N.W.2d 401, 409 (upholding the practice of charging commercial utility rates to the communal portions of a multi-family dwelling).

In the instant case, DWSD operates a combined sewer system that treats both stormwater and sanitary sewage. DWSD measures the usage of sanitary sewage services by metering the sewage as it leaves a given premises. It is too costly and burdensome to measure stormwater runoff, however, so DWSD apportions the costs stormwater treatment by charging higher rates to multiple family dwellings with five or more units.

The number of units in a residential complex is a natural distinguishing characteristic that rationally relates to the amount of stormwater entering a sewage system. On average, DWSD

incurs greater expense to provide sewerage services to multiple family units with five or more residential units than it does to multiple family units with four or less units or to five single family homes. *See* City of Detroit Water and Sewerage Department Report on Fiscal Year 1992 Water and Sewer Rates and Fiscal Year 1990 Sewer Look-Back Adjustments ("*Water and Sewer Rate Report*"), attached as **Exhibit J**. This is only logical, because the parcels of multiple family dwellings with five (5) or more units are generally larger than complexes with fewer units, and therefore have more square footage covered by roofs, driveways, parking lots and other impervious surfaces. These large impervious surfaces increase the amount of stormwater runoff and thereby increase the service costs incurred by DWSD. Thus, distinguishing between residential complexes based on the number of occupants is a rational means of apportioning the cost of utility services. *Land*, 2 Mich. App. at 697.

Plaintiffs rely on *Alexander v. City of Detroit*, 392 Mich. 30; 219 N.W.2d 41 (1974), to support their equal protection claims (and request for class certification), but that case is distinguishable. In *Alexander*, the plaintiffs raised an equal protection claim regarding a City of Detroit ordinance that required multiple dwellings of five or more units to pay a commercial waste charge for city refuse collection. *Alexander,* 392 Mich. at 34. The ordinance exempted condominiums and cooperatives and provided the Detroit City Council with discretion to make reductions or waiver of commercial waste fees. *Id.* The Michigan Supreme Court found the ordinance to be violative of the equal protection clause because its classifications and exceptions were not rationally related to cost of providing trash-collection services. In reaching that conclusion, the Supreme Court was "heavily influenced" by the trial judge's finding that "the City of Detroit did not consider the character of the waste generated in granting exemptions to dwellings with 4 units or less." *Id.* at 37. Moreover, "[t]he City of Detroit did not incur any greater expense in collecting refuse from multiple dwellings with 5 or more units than from condominiums or

cooperatives." *Id.* at 36-37. In the instant cases, DWSD did specifically consider the volume of stormwater produced by properties with five or more residential units and determined that, on average, those properties produced greater service costs per dwelling than other types of housing options. *See Water and Sewer Report* at p. 68 and Table S-17. DWSD also set a single rate for *all* multiple family dwellings with five or more units, and thus did not arbitrarily distinguish apartments from condominiums or cooperatives.

Accordingly, DWSD's ratemaking classifications are rationally related to the cost of providing services, and therefore do not violate the Equal Protection Clause. For this reason, Plaintiffs' Complaint should be dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and/or Fed. R. Civ. P. 12(c).

CONCLUSION

For all of the foregoing reasons, Plaintiffs' Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) and/or 12(c).

Respectfully submitted,

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Date: May 21, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

Respectfully Submitted By:

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EXHIBIT 5

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re	:	Chapter 9
CITY OF DETROIT, MICHIGAN,	:	Case No. 13-53846
Debtor.	:	Hon. Steven W. Rhodes

DECLARATION OF WILLIAM WOLFSON

1. If called as a witness, I am competent to testify to the facts contained in this Declaration and these facts are true.

2. I am the Chief Operating and Compliance Officer/General Counsel of the Detroit Water and Sewerage Department ("DWSD").

3. On August 23, 2012, Lasalle Town Houses Cooperative Association, Joliet Town Houses Cooperative Association, and St. James Cooperative (collectively, the "Plaintiffs") filed a complaint against the City of Detroit, acting through its Detroit Water and Sewerage Department, in the United States District Court for the Eastern District of Michigan ("District Court"), commencing case number 12-13747 ("Lawsuit").

4. Due to the complex nature of the Lawsuit, and the limited legal resources available to the DWSD, the DWSD retained Clark Hill PLC ("Clark Hill") as its counsel.

5. On July 18, 2013 (the "Petition Date"), the City of Detroit filed a petition for relief ("Bankruptcy Case") in the Bankruptcy Court for the Eastern District of Michigan ("Bankruptcy Court").

6. Clark Hill represents the General Retirement System of the City of Detroit in connection with the Bankruptcy Case.

7. As a result of Clark Hill's irreconcilable conflict, in or around July 2013, the DWSD terminated Clark Hill as its counsel in the Lawsuit.

8. If the Bankruptcy Court were to allow the Plaintiffs to proceed with the Lawsuit, the DWSD would be required to obtain new outside counsel to represent it in the Lawsuit.

9. Hiring new outside counsel would cause the DWSD to incur substantial expenses. New outside counsel would be required to, among other things, review the numerous motions, pleadings and discovery responses filed in the Lawsuit.

10. Further, if the Lawsuit is allowed to proceed and the DWSD's motion to dismiss is not granted by the District Court, the Lawsuit would consume large resources. As a potential class action, the Lawsuit is a significant matter requiring considerable legal expenses.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 23, 2013.

William Wolfson