UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, MICHIGAN,	.	Docket No. 13-53846
	.	Detroit, Michigan
	.	October 23, 2013
Debtor.	.	9:00 a.m.
. . . . .		

EXCERPT OF HEARING RE. ELIGIBILITY TRIAL
(10:00 a.m. - 11:59 a.m.)
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

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THE CLERK: All rise. Court is in recess.

(Recess at 9:49 a.m., until 10:00 a.m.)

THE CLERK: All rise. Court is in session. Please be seated. Recalling Case Number 13-53846, City of Detroit, Michigan.

THE COURT: All counsel are present. Ma'am.

MS. GREEN: Good morning, your Honor. I apologize. I think our motion got lost in the shuffle. The Retirement Systems filed a similar motion to the UAW's. I just have a few --

THE COURT: I was actually going to hear it after, but if you'd like to be heard now, that's fine.

MR. GREEN: Oh, you know, I just -- it dovetailed with what they were arguing, so I just had a few points --

THE COURT: Okay. Go ahead.

MS. GREEN: -- to raise. The first thing I wanted to add is that at the time we drafted our motion, we thought that the June 5th, 2012, e-mail was being reasserted as privileged. Mr. Irwin in his argument this morning has said that they are not waiving privilege -- or they are now waiving privilege to that. It is back in the record. So to clarify, the e-mail does say that the memos were shared with the treasurer. It says they were memos that we did for Andy. I presume that means they were shared with him. I don't know

if that's actually true or not, but the memo does seem to indicate that they were shared with a third party.

As far as the work product analysis, in our brief we went through the relevant standard in the Sixth Circuit, your Honor, and I don't believe that we talked about that yet today. There's a two-part test. The first part of that test is whether the document was prepared, quote, "because of the party's subjective anticipation of litigation, as contrasted with ordinary business purpose, and (2) whether that subjective anticipation was objectively reasonable." And, furthermore, the driving force behind the preparation of the document is what is key, and we assert that the "because of" part fails. They did it because of the fact that they were trying to prepare themselves for the prospect of being hired, not because of the fact that there was actually anticipated litigation. And, moreover, it's very attenuated that in 2011 they had some kind of crystal ball that they knew two years from now they were going to be in this courtroom arguing about eligibility under Chapter 9. And we did cite case law in our brief. You had asked counsel this morning if there was any case law regarding some kind of temporal factor, and we cited two cases. One states, "the mere fact that litigation does eventually ensue does not, by itself, cloak materials with work product immunity," so between that and the next case that we cited, "The abstract possibility that

an event might be the subject of future litigation will not support the claim of privilege," I think those are dispositive. This was two years before any of this even arose.

Furthermore, I think that goes to whether or not the anticipation of litigation could be objectively reasonable. I don't know how two years prior to the litigation it could be objectively reasonable that, number one, PA 4 still had to get past the referendum. Number two, it was ten months before the EM was hired even if you assume that these were prepared in June of 2012 when the memo -- memos were shared with the governor or with Andy Dillon. They may have been prepared prior to that. We don't know. Moreover, the EM had to be appointed. PA 436 had to become effective. All of these things had to happen before we could be here today, and Jones Day had to be retained. So there are like at least five or six major contingencies that had to occur before the actual litigation would ensue.

Furthermore, even if they can establish the work product, which we don't think they can, they still have to overcome the waiver issue, and I don't -- I think that today is a further example that they have selectively waived. They waived the memo itself but not the attachments. Today the state stood up and said, you know, "We have an e-mail from March 3rd, 2013, between Kevyn Orr. There are two attorneys

on it from the State of Michigan. But to be cooperative, we will give you that e-mail." Well, if they're saying it's privileged but they're giving it to us, to me, again, that's a selective waiver. They just give us what they want when they want it, but they keep what they want as well, and I don't see how they get past that.

In addition, my last point would be it's still not clear who the client is that Jones Day is claiming they've been representing. No city official, to my knowledge, through any of my review of these documents or the e-mails -- there is not a single city official that is ever cc'd, bcc'd, you know, sent the memos. It's purely between Jones Day attorneys, Miller Buckfire, Huron Consulting, all of these advisors that, again, when I think it comes to waiver, clearly these are third parties and not the potential client.

The last point I will make because I want to be brief -- I know you are ready to rule, I think -- is that I think the wrong standard was stated earlier by the city. He said that there's a different standard for waiver of the attorney-client privilege versus work product, and that is not true in the Sixth Circuit. We cited two cases in our brief. The first one is New Phoenix Sunrise, and it says, "Both the attorney-client privilege and work product protection are waived by voluntary disclosure of private communications to third parties." We also cited the In re.

Columbia case also --

THE COURT: I'm sorry. Are waived by what? I just didn't hear what you said.

MS. GREEN: Disclosure of private communications to third parties. And he had said that some sort of different standard applied when it was work product versus attorney-client, and we also cited the In re. Columbia case that said the same thing. There's no compelling reason for differentiating waiver of work product from waiver of the attorney-client privilege, so to me it's a distinction without a difference to say, "Well, we gave it to," and I think the quote he said a minute ago was, "numerous consultants and advisors as well as the state." And to me that is disclosing it to third parties; therefore, it was waived when it was created a year or two ago, not to mention the fact that as part of this litigation, they have selectively waived certain e-mails that somewhat have to do with this subject matter in that they relate to, for instance, reviewing the consent agreement or reviewing and commenting on PA 4 and the analysis related to PA 4. And we cited case law in our brief stating that if you waive the privilege on selected pieces, you, therefore, waive it as to the entire subject matter, and, therefore, you can't selectively say, "Well, you can have the e-mail, but you can't have the attachments," or, "You can have this e-mail,

but you can't have this e-mail." So we would say that the entire privilege has been waived by selectively waiving it as to a few e-mails here and there. Those are my comments.

THE COURT: Thank you.

MS. GREEN: Thank you.

MR. IRWIN: I'll simply respond to those few points that counsel made. The first, in connection with whether the timing of all of this should make a difference, I would submit that that is arbitrary. There are lots of things that could have happened in the middle of 2012 that would have been litigation events. Maybe they didn't, but that doesn't mean that at the time that all of this was being considered, when legal advice -- or when Jones Day was considering some of these issues, they weren't anticipating litigation. It is fortuitous that this happened two years later, actually, a year and a half later or one year later, but that doesn't mean that either potential clients or Jones Day were not working in anticipation of litigation, which, as we indicated in our brief, does not need to be a specific litigation event. You can anticipate litigation broadly. You never know what form it will take. You know there are going to be fights. You know there will be disputes. You don't know if it'll be a private -- private lawsuits. You don't know if it'll be a Chapter 9 filing, but you can anticipate the need for legal advice in an adversarial proceeding in some form

and meet the standard.

In terms of select -- whether there's been selective waiver or subject matter waiver, as counsel suggests, this is I think fundamentally incorrect. The standard for subject matter waiver is whether documents have been disclosed. It's the shield and sword problem. It's if documents have been disclosed and counsel intends to rely on them affirmatively and yet withholds the balance of the documents that, in fairness, should be considered, and I think this is codified pretty clearly in the advisory committee notes to Federal Rule 502 where they say, "Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation." We are not -- we, the city, are not using any of these materials affirmatively. They are not on our exhibit lists. We are not introducing them through witnesses. We are not using them to our advantage that should open us to some sort of claim of subject matter waiver or selective disclosure under the rules.

And then lastly, I think fundamentally there is -- and I believe this is black letter law -- there are different standards for whether there is waiver by disclosure under

attorney work product as opposed to attorney client. If you disclose attorney-client communications to a third party, you are much more likely to be deemed to have waived that privilege, but with attorney work product, you can make disclosures. And as long as they are disclosures to parties who are nonadversarial, then you can still enjoy that protection. And that is a fundamental difference between the two privileges. It is not something where they are -- where disclosures to folks who are within the potential group of clients or advisors who are working these problems operates to waive the privilege. And I think we've demonstrated that, your Honor.

THE COURT: I want to -- I want to be sure the record accurately reflects your position regarding what's to be disclosed and what isn't. Is it correct that to the extent any of these memoranda that were attached to this June 2012 e-mail from Ms. Lennox were disclosed to state officials, you are willing to make them available to counsel here?

MR. IRWIN: Yes, your Honor, but the e-mail itself suggests -- if memoranda was prepared to prepare a Jones Day lawyer for a meeting with counsel, that would not be. It's not my understanding of what we're talking about.

THE COURT: Okay. But you don't know which of the several memoranda were shared and which weren't?

MR. IRWIN: We'll do that.

THE COURT: How will you determine that or --

MR. IRWIN: Because we have the -- the Jones Day lawyers are accessible, and we can figure that out.

THE COURT: All right. Thank you.

MS. GREEN: I have a brief rebuttal.

THE COURT: Yes, of course.

MS. GREEN: I think the hypo that you stated earlier compared to what he just said -- you know, these were memos preparing a Jones Day lawyer to go seek work -- is different than the hypo that you stated earlier, which was you meet with a client who wants to meet with you for the purpose of retaining you, and you may make notes. That's different to me than, "I did memos to prepare myself to go pitch a client." To me those are two different scenarios, and there's a distinction, I think, between did the state ask for this work, or was Jones Day just doing it internally, again, to prepare. I think those are two distinct scenarios.

One other thing that occurred yesterday, you made a note on the record about PA 4 and that perhaps the intent behind the appropriation -- the inclusion of the appropriation was a factual issue for this trial, and I think that some of the e-mail correspondence may go to that issue, quite frankly, because the PA 4 appropriation was extensively discussed in all these e-mails, and for that reason I think

there is a possibility that it would become relevant to a separate issue than what Mr. Ciantra stated this morning, which was the good faith and the bad faith issues and things like that.

The last thing I would offer is our Exhibits 31 through 65 have a lot of the e-mail correspondence that has been produced by the city, and there is a lot of, I guess, internal -- what they would consider their internal work product in those e-mails. I don't concede it's work product, but according to what they are defining as work product, it's in those e-mails, and it's already been produced, and it's been waived. So if you'd like to look at those e-mails to sort of familiarize yourself with what we're talking about, I've produced a copy of our binder for your clerk this morning if you'd like to look at those. Thank you, your Honor.

THE COURT: All right.

MS. BRIMER: Your Honor, I'll be very brief.

THE COURT: Why should I hear you? You're not a party to these motions.

MS. BRIMER: I understand that, your Honor. I want to clarify one matter on the record that Ms. Green made, and --

THE COURT: I will let you clarify a statement on the record, but I can't let you argue on one side or the

other of these motions.

MS. BRIMER: That's fine, your Honor. And Ms. Green raised the issue of your ruling on Monday with respect to the intent of the appropriation in PA 4, and I want to be sure the record is very clear that it's the appropriation in PA 436 that your Honor ruled may be a factual issue that prior to that was not considered a factual issue. I want to be sure the record is very clear on that, which law we are addressing, your Honor. It may have an impact on the memos. Thank you.

THE COURT: Thank you, I guess. All right. On the issue -- on the first issue, which is the motion for reconsideration of the Court's previous ruling on the common interest doctrine, the Court concludes that the record does not establish cause to consider that motion out of time, and, accordingly, for that reason alone, the motion is denied.

But having said that, I want the record to be clear and the parties to understand that to the extent a question is asked of a witness and either a witness or counsel on the witness' behalf claims attorney-client privilege and asserts the common interest doctrine or any other privilege, for that matter, the Court will take a fresh look at that and consider counsel's arguments relating to that.

On the motions to compel, the Court appreciates the city's willingness to disclose to counsel for the objecting

parties whatever memoranda it shared -- the city's counsel, Jones Day, shared with state officials and would request that that disclosure be accomplished as promptly as possible.

To the extent, however, that the moving parties seek a ruling from the Court that the mere fact that memoranda or other documents that would otherwise be protected by the work product doctrine were prepared pre-retention means that they are not protected by that doctrine, the Court must reject and overrule that position.

Accordingly, to the extent that the city is maintaining this privilege as to any of these memoranda that were attached to Ms. Lennox's e-mail or any other memoranda, for that matter, the Court will look at them in camera and ask the city to produce them for that purpose, again, as promptly as possible.

As to the documents that Mr. Wertheimer suggests were improperly withheld in discovery, this presents a more challenging request if only because the documents that are the subject of Mr. Wertheimer's request are not identified, and so, Mr. Wertheimer, all I can do in that regard is ask you to identify, again, as promptly as possible, what documents or range of documents you seek the city to be compelled to disclose, review that with the city, and to the extent you can't work it out, we will take a break from our trial whenever you are ready and work our way through it.

MR. WERTHEIMER: Yes, your Honor. I believe you meant the state.

THE COURT: The state. I did.

MR. WERTHEIMER: Yes.

THE COURT: Thank you.

MR. WERTHEIMER: Thank you, your Honor.

THE COURT: All right. So are there any other issues still open before we begin our opening statements?

MR. SCHNEIDER: Your Honor, there is one, and that is because there has been discussion about the trial subpoenas that were issued to the governor, the treasurer, Mr. Baird, and Mr. Ryan. The last time I appeared before you, I argued -- I opposed that. I want the Court to know I am not going to file a motion to quash. The governor, in the spirit of cooperation and because he wants to move this proceeding along, is willing to testify, and we have made -- we will make all of those state witnesses available. And we believe that Monday between 1 p.m. and 3 p.m. the governor would be available, and we think the other witnesses -- well, the other witnesses will be available on Monday or Tuesday.

THE COURT: Thank you.

MR. DECHIARA: Good morning, your Honor. Peter DeChiara from the law firm of Cohen, Weiss & Simon for the UAW. The UAW and the Flowers plaintiffs appreciate the state's decision to change its position and to produce the

state witnesses. We just want to be careful to note for the record that there's been no agreement that there should be any set time for the testimony of the state witnesses, including the governor. While we realize the governor has a busy schedule, it is also our view that the governor, perhaps with the exception of Mr. Orr, is maybe the most important witness in this case, and given the significance of his testimony and given the significance of the fact that there may be documents we may have to examine him on which we have not yet seen, we would just want to note for the record that there's been no agreement that his testimony would be limited to two hours. Thank you.

THE COURT: Thank you. Mr. Schneider.

MR. SCHNEIDER: As of this point, your Honor, I fail to see the reason for the objector's argument that the governor would require to testify for a lengthy period of time. This Court is well aware of the governor's situation and who he is in the state. He is willing to do this, but I think we will have to work with the objectors as to timing.

THE COURT: Well, I would certainly encourage that, but it's not for a witness who appears in any court to condition his appearance on a specific time limit.

MR. SCHNEIDER: He's certainly not doing that. That's certainly not the case.

THE COURT: The UAW certainly interpreted it that

way, and, frankly, I did, too.

MR. SCHNEIDER: Well, I'm sorry about that, your Honor, but I can tell you, as I indicated before, the governor wants to be cooperative --

THE COURT: All right.

MR. SCHNEIDER: -- as possible.

THE COURT: Good. Thank you. All right. We do have to get to the issue of the amended joint final pretrial order. If I read it correctly, one or more of the objecting parties decided after our final pretrial conference to object to a certain small number of exhibits, and the state was -- or excuse me -- the city was not willing to allow for a statement of such a late asserted objection. Is that what this is about?

MR. ULLMAN: Not really, your Honor.

THE COURT: Not really?

MR. ULLMAN: Not really, not in our view.

THE COURT: Oh, so you're withdrawing your objections?

MR. ULLMAN: No. Should I -- may I speak?

THE COURT: Please.

MR. ULLMAN: No. The issue is not that we're trying to add new objections. This whole --

THE COURT: So you're not trying to add new objections --

MR. ULLMAN: We are maintaining the same --

THE COURT: -- so to the extent there are new objections, we can strike them.

MR. ULLMAN: No, your Honor. Let me try to explain. We had always told the state -- the city that for this subset of documents -- I believe there are six of them -- that we were not opposing admissibility in general, but we believe that they were admissible for limited purposes only to show that these documents were said, that they were, you know, created, that they were given to people. We weren't contesting that they're authentic documents, but we spoke with Mr. Irwin and told him but at the same time -- that's why we're not contesting admissibility in general -- we do not agree that they're admissible for the truth of what they say. Some of these documents have forward-looking projections that we don't think there's been an adequate foundation for, and in our discussions with Mr. Irwin, he said, "Yeah, we understand that. We're not asking you to concede to the truth of what's in there." And we said, "Fine. On that basis" --

THE COURT: Well, but hang on. The admission of a document into evidence or the agreement of the admission of a document into evidence is not a stipulation to the truth or credibility of the document. It just means that it meets the criteria for admissibility under the rules.

MR. ULLMAN: And that may be all that's going on here. The reason this came up is because I had heard -- I was not here at the legal argument yesterday, but I had been told that your Honor had indicated that if a document did not have a note on it saying there was some sort of objection, it would be admitted for any and all purposes, at which point I said to Mr. Irwin, "Wait a minute. There's a couple of documents here that we know from our discussions" -- you know, they're limited for -- we agree they're admissible for limited purposes only, and we have the right --

THE COURT: Well, but what -- for what purpose do you assert these six documents are not admissible for?

MR. ULLMAN: Just for the truth of what's in them, the hearsay, expert opinion, and then lack of foundation. Some of these have forward-looking numbers or values in them as to the amount of the unfunded pension liability, and for those we're saying we don't disagree that you gave these documents out, but we're not agreeing that the numbers that are in there are necessarily true numbers. That's all we're saying. That was understood from day one with discussions with Mr. Irwin, and we just wanted to make sure that your Honor -- that if the document came in, that your Honor would not assume that everything that was in it on these -- on these six documents was true. That's all that we cared about. We don't deny that they were either created, that

they were given to people, and for that purpose we have no problem with admission. And it may have been that we misinterpreted what your Honor said.

THE COURT: I'm having a hard time comprehending what you're saying, frankly. If a piece of evidence has hearsay within hearsay --

MR. ULLMAN: Um-hmm.

THE COURT: -- which I think is what you're talking about here; right? The document itself is hearsay.

MR. ULLMAN: Okay.

THE COURT: And it contains hearsay statements.

MR. ULLMAN: Yes.

THE COURT: Okay. If the document is admitted, opposing parties waive -- if they agree to the admission, they waive both hearsay objections. That does not mean that that party is stipulating to the truth of any of that hearsay. It just doesn't mean that. All it means is it's evidence.

MR. ULLMAN: Okay. And if, you know, I had been given a misinterpretation or a misapplication of what your Honor indicated the other day, then you're right. This is a moot issue, and there is no problem based on what your Honor said. I think that's true.

THE COURT: Okay. All right. Then in that event, the Court will enter the amended final pretrial order, and

based on the list of documents that are shown as having no objections, the Court will prepare an order admitting all of those documents into evidence. Okay. Opening statements.

MR. BENNETT: One second, your Honor. Good morning, your Honor. I'm assuming that you want to hear from us first, notwithstanding that the order was different in the other -- in the legal issues proceedings, but, in any event --

THE COURT: Well, you have the burden of proof; right?

MR. BENNETT: Correct.

OPENING STATEMENT

MR. BENNETT: First of all, I want to make crystal clear -- many people have in different environments -- that I'm not going to speak about any arguments that came up in the context of the legal argument part of the proceedings.

THE COURT: Thank you.

MR. BENNETT: I appreciate that part, too. And I'm going to confine myself to the issues -- or the parts of the eligibility standard and the part of 521(c) that have some factual disputes that have been identified in connection with them. And toward the end I do want to spend a minute on the materiality of facts relating to legislators' or governors' intent relating to statutes because I think it was not something that we did cover when we were here before.

So, first of all, I'm going to start with the issue of insolvency, and what I'm going to say about that because I could stand here for hours describing the evidence that is going to come in on that subject, but I'm not going to do that -- I'm going to say simply that the witnesses that we will present on the subject are going to present a mountain of evidence showing insolvency of the city. Sadly, that evidence will show that the city is insolvent on every relevant standard. And, your Honor, there's been at least intimated in a lot of the papers about the significance that no expert report has been submitted. Quite frankly, that is because no expert report is required. This is one of those cases where the data speaks very clearly and persuasively on its own -- it needs no gloss -- and that only AFSCME is objecting on the insolvency point, at least as I read the papers, itself speaks volumes.

I want to say that from the near term perspective, the city did not run out of cash because -- only because actions were taken to prevent that from happening. The evidence will show that if the city just kept on paying debts as and when they were becoming due, cash would have run out. The fact that the city stopped doing that is the only reason why there are positive cash balances. As I said before, there's no question that if the actions were not taken, cash would have run out.

I will also say that the steps that the city took during past years to pay many of its debts as they become due didn't turn out particularly well. One of the consequences you'll see in the evidence and, in fact, a good document to keep around at all times is the proposal for creditors dated June 14th. There's a section there that deals with this. It shows that there were numerous secured borrowings made to create liquidity in the city in past years when there were similar cash flow problems. Each and every one of those borrowings were done on a secured basis, and so the consequence that we face today is that those borrowings consume a very significant amount of cash otherwise available for creditors generally, so that was -- so avoiding a liquidity problem in the prior periods didn't exactly work out well from the perspective of many other creditors.

Also, as will come into evidence, pension contributions were deferred during at least the past two fiscal years with the effect that the underfunding under anyone's measure -- we don't have to worry about the fight between the different measures of pension underfunding. It's greater than it might otherwise have been.

Finally, on the insolvency point, you are going to hear from several witnesses, but most importantly perhaps Chief Craig, about the fact that the city is failing to provide basic services to its residents. We don't think

about that as another one of the creditor claims or obligations, but the reality is it's as important as anything else. As we've indicated before and as the witnesses will indicate, without solving that problem, there may not be a city to reorganize.

Now, AFSCME makes a few points that are worth discussing how the evidence will deal with them. First, much is made over the dispute about the underfunding amount, and it is asserted that because there's a dispute of the underfunding amount, the city can't demonstrate it's insolvent. Well, as your Honor knows, the insolvency test focuses on cash flow. It focuses on near term and longer term cash flow type measures, and in that connection, there are cash flows that will be put into evidence. There's also a convenient place to find them in the proposal for creditors. There's different versions with different levels of updates and different assumptions that are baked into them, but the line items that talk about pension contributions your Honor is going to learn don't change very much whether you use the city's assumptions as to underfunding amount or the city's calculation of underfunding amount or the Gabriel, Roeder calculation of underfunding amount, Gabriel, Roeder, of course, being the actuaries retained by the pension funds, the pension fund management themselves, to give them advice. And so your Honor will be

taken through the numbers, and you will find that the contribution amounts, which are the relevant numbers in the insolvency calculation, don't move around very much notwithstanding the very different calculations of underfunding amounts, and the reason for that will be explained. Mr. Moore of Conway MacKenzie will be the witness that will cover that area.

There's also a little bit of numerical confusion concerning the percentage of the city's contribution to the GRS Pension Fund that is attributable to DWSD employees. You will see in the papers a number bandied around, 62 percent. Well, actually, the number is the reverse of that. It's 38 to 39 percent. Mr. Orr got that wrong in his deposition. He corrected it at the end, but, of course, the correction wasn't cited in the papers. There will be evidence on the point so there won't be confusion on the point as we go forward with the numbers.

Then AFSCME says that the city deferred sales of assets, and they talk about two examples. We will demonstrate, of course, that that is not true. First of all, the Belle Isle deal, Belle Isle leased to the state in exchange for the state taking over the maintenance and CAPX requirements with respect to Belle Isle, never involved the generation of incremental spendable cash. It did and always has involved a reduction of the cost on the city to maintain

Belle Isle. And what the evidence will show is that those anticipated savings were included in the projections that were the basis for insolvency calculations, and they are in the projections. They're the basis for the proposal for creditors or at least the lead-up to the proposal for creditors in the June 14th presentation.

It's also very hard for us to understand how anyone can say that art sales were deferred. It is common knowledge -- and I suspect we'll figure out a way to get this into evidence as well -- that there's an attorney general opinion out there that basically says that the art can't be sold for creditors. We, unfortunately -- in the absence of some form of an agreement, there are no sales possible without a significant change in current management of the museum or litigation and -- maybe and/or litigation relating to some of the points made in the attorney general's opinion. There were no pre-filing opportunities to liquidate art.

Next, AFSCME talks about the swap deal, which, of course, your Honor is familiar with because it's before you in still another adversary setting in this case. The swap deal itself, you will hear, does not provide adequate cash relief, but the transaction hasn't been approved yet. And there is, unfortunately, no assurance as we stand here today and certainly as we stood here several months ago, that it will be done. It turns out that some of the objectors in

this proceeding are also objectors in that one, and so I'm not sure how we're supposed to even count the anticipated cash flow relief attributable to the swap transaction as something that could have even affected the city's insolvency calculations.

And lastly, there is the assertion -- and I'm anxious to hear what the evidence will be to support this one -- that the appointment of the emergency manager prevented the city from taking actions designed to raise revenue and avoid insolvency. Of course, in the briefs that have been filed, there is no suggestion about exactly what steps those are that the City Council or the mayor or whoever else has been displaced in the view of AFSCME have been planning and anxious to implement that would solve the city's financial problem. No such actions have ever been specified. We have no idea where that evidence is coming from. It will be quite a surprise if there is any.

It was for these reasons, the insolvency and the fact that there really weren't anything left, that the city or the state could think of to do to address the problems that the June 14th presentation was put together, and it proposes a plan that includes significant reductions in the city's obligations, including bonds, including other post-employment benefits, including other unsecured claims, and including pension underfunding claims. Whatever the law

turns out to be concerning protections to be afforded to various claims, there is no law prohibiting the city from trying to commence negotiations to resolve its financial problems, and that's what we were trying to do.

Now, while we're near this subject, there is an issue that ripples through actually several of the standards, which is whether or not the proposal that's included in the proposal to creditors -- and I'm referring to the materials that are, I think, between pages 101 and 109 or thereabouts of that document -- whether that proposal was a -- was close enough to a confirmable plan of adjustment to qualify for the purposes of, open paren, one, demonstrating that the city desires to implement a plan; open paren, two, that the city was in good faith as part of the good faith negotiations because they had to be talking about a certain kind of plan that is asserted; and, three, whether the city was acting in good faith generally. And I think the proposal for creditors, that June 14th document, has been admitted into evidence, again, for all purposes, but very clearly for the purpose of showing this is what the proposal was that the city presented as its initial presentation to creditors, and so it speaks for itself. We can look at it. We don't need testimony. It's reasonably detailed. In fact, I would argue your Honor sees disclosure statements, summaries of plans all the time, and you will see this measures up quite

nicely to the standard that's applicable even in disclosure statements to what a plan should look like. It is -- it has a classification scheme. It defines treatment for all classes. It includes a very extensive term sheet for notes that are proposed to be distributed to creditors, and it is a plan, your Honor, that for that reason is a plan that could be confirmable.

Now, there is clearly disputes over what law should be applied by this Court in determining whether or not it would confirm that plan if it was fleshed out, put into plan form, and presented to your Honor. I told your Honor in prior hearings that I doubt that's the way this case is going to come out, but that's the relevant standard for today.

And the reality is is that on the city's very reasonable view of the law, there is no question that it could be confirmed. I understand that with respect to the retiree constituents' views of the law, they say it can't be, but that doesn't render the proposal inappropriate for purposes of a Chapter 9 case. We are dealing with issues that your Honor has heard argument about, is going to ultimately decide, but the plan hangs together as an appropriate expression of the kind of debt relief the city should be able to get based upon one very reasonable view of the law. We think it's absolutely the right view.

The other assertion as to why the plan isn't an

appropriate plan is that it doesn't adequately liquidate claims, and here again they're talking about the pension underfunding amount. But I think we know both from the structure of the Bankruptcy Code itself and from many, many, many other cases that the liquidation of claims is not a prerequisite to confirmation of a plan. Plans are confirmed all the time with the treatment specified as the treatment is specified in the plan in the proposal for creditors that is not claim size dependent. It's by plan. It makes distributions based upon pro rata interests in the overall claims pool. It was designed that way because there is, in fact, uncertainty concerning the aggregate amount of certain claims. Frankly, the city believes there's more questions relating to the size of the OPEB, or other post-employment benefit, claim pool than there is with respect to the pension claim pool, but there's uncertainty on these issues. It is acknowledged there is uncertainty of issues. Those are not confirmation problems. At least they're not confirmation problems with some plan structures, and they're certainly not confirmation problems with the plan structure that was offered by the city.

So for these reasons, that is a plan that is sufficiently detailed, more detailed than it has been in many other of the other reported Chapter 9 cases, and it is appropriate for all purposes as a starting point for good

faith negotiations, demonstration of the city's intent to implement a plan in Chapter 9, and demonstration of the city's overall good faith in commencing its Chapter 9 case. And so I think we've dispensed of that component of the different standards.

We now turn to impracticability. Can I have a second for a glass of water? Thank you, your Honor. Moving to impracticability, the record shows in numerous places that the city has many, many issues of bonds outstanding, and another reason to keep the proposal for creditors nearby is that toward the back of it -- and I think it's between pages like 115 and 130, thereabouts -- there is an extensive list in a type size not so good for people who wear bifocals. I think you will hear in the evidence, if it's not already clear from the record, that most of the individual bond issues do not have indenture trustees as we think of them in the commercial context or any other equivalent holder representative. In fact, holders reserve more rights in most muni structures or assign them to their insurers, to bond insurers if insurers are involved. And so what you have here is that in order to compromise principal or interest as well as many other terms of debt that have to be addressed in connection with resolving the city's financial problems either under the proposed plan that was in the proposal for creditors or in any other plan, there is going to have to be

extensive solicitation, efforts to find relevant bondholders to get the right consents. The bankruptcy process is going to make it a little bit easier because, of course, it will be majorities of those who vote, and the solicitation rules are clearer. Outside of a proceeding you might have to get everybody in order to implement changes. In fact, you do have to get everybody with respect to most of the issues. There are a couple where there might be an exception if the insurer exercises certain extensive levels of control. The bottom line is it is an awful mess. There is many, many, many, many issues, many, many, many holders, and this, of course, is the definition of impracticability in a lot of ways in the Bankruptcy Code because the whole reason we have impracticability was because of New York's case back in the '70s. New York back then -- the numbers were different; times have changed -- didn't have materially more and may have had less bond issues and bondholders than Detroit has today. And the purpose of the impracticability standard was to recognize the fact that with that kind of a debt structure, having good faith negotiations with creditors in advance of a proceeding in an effort to have an out-of-court workout were, frankly, pointless or would have been pointless.

And, frankly, for the most part, the objectors don't disagree with anything I've just said. It's hard to. What

they say instead is that whether -- however negotiations might have been practicable with bondholders, negotiations were practicable with them, with the -- in some senses, self-appointed or appointed representatives of particular labor groups or retirees, and we're going to talk about that in detail in a second, but we have a point first, which is if you have a situation where it's admitted or almost admitted -- and the Court may have to decide -- that negotiations are impracticable with a huge universe of creditors but they might be practicable with respect to another universe of creditors, what do you do? And the Retiree Committee actually is good about admitting there's law on this in one of their footnotes, and the law is that if you've got an impracticability problem, you have an impracticability problem; that negotiating with the groups you can groups with are kind of pointless. I think that if we think about it a little bit, that has to be right because, of course, if -- let's take a hypothetical that you've got, you know, a group over here not organized, and then you've got one bank debt piece, which is clearly organized and you can clearly negotiate it. Well, you try to do everything you can with the bank, but at some point the bank is going to say what's going to happen with them, all those people that you can negotiate with, because no one ever makes a deal in a vacuum. And even if you could get all the way to conclusion

with a bank and you still have to file a Chapter 9 case, doesn't that make you start -- effectively start all over again with the one that was easy to negotiate with? And even if it doesn't, even if it's possible to negotiate a deal with both the bank and the city decides this is it, we're going to make this deal no matter what happens in the Chapter 9 case that you need for everybody else, you still have to go through the Chapter 9 case. And waiting to file a Chapter 9 case while you work with the bank and finally reach the deal that you're going to have with the bank that's going to be permanent, you've wasted a lot of time because you have to start a Chapter 11 case and go through that process anyway. So I submit that the couple of cases that have focused on this that we cite in our papers and that the Retiree Committee cites in a footnote have got it exactly right. If you have an impracticability with respect to a material part of your capital structure, you have an impracticability problem, period, so I think by looking at this -- and by the way, before we go off, I want to say there's one paragraph of the AFSCME brief that I think is just terribly important on this. They argue this point a lot, but then they have paragraph 102 at page 46, and it's only two sentences, so I'm going to -- three sentences, so I'm going to read the whole thing. "AFSCME is not suggesting that pre-petition negotiations could have bound everyone" -- hold that

thought -- "or must have involved all of the city's thousands of creditors." I don't under -- I think that sentence means we're done because if the pre-petition negotiations couldn't have bound everyone, how would you get a plan done? And if it didn't involve all the city's thousands of creditors, how would you get a plan done? So I think they're conceding that our situation has to be regarded as impracticable, but they go on. They say, "Some level of negotiation with principal creditors could have led the city to a nonbankruptcy solution." I think that's a non sequitur. If you're not talking to everyone, you can't possibly have a solution. But then they go on further, "By way of analogy, Section 109(c)(5)(B) of the Bankruptcy Code contemplates pre-bankruptcy negotiations with creditors that the municipality" -- there's a "the" missing -- "intends to impair, not all creditors." Well, one of the complaints of AFSCME is that the city intends to impair substantially all of its material creditors. It has no other choice. So I suppose there's a circumstance if the city was arguing that we have a huge group of creditors as to which negotiations are impracticable, but we're not going to impair them, and we have another group of creditors that we really can talk to, and we're going to impair them, if the city said no discussions, that would be a rather extreme and silly position. It's just not our case. We need impairment pretty

much across the board. We have proposed impairment pretty much across the board. And in that circumstance, the fact that huge chunks of the relevant constituencies are not organized, can't be organized, can't be found, that is to me the end of the impracticability discussion.

But maybe we should go on. Maybe we should try to figure out whether it was really impracticable to negotiate with the unions themselves. And, your Honor, I think the answer to whether or not it was impracticable to negotiate with the unions themselves -- and I include here the unions and the other retiree groups -- is, frankly, what happened when we asked the unions whether or not they could represent retirees and the other groups or they could represent retirees, and we have a demonstrative that we'll come back to and put into evidence later on, but I think it's useful to pause on, and I think it can go up on -- oh, you have a -- oh, okay. Okay. We have a big one there, and I have a few that I can hand out to people, so with the Court's permission --

THE COURT: Yes, sir.

MR. BENNETT: I think it's also in the -- I think it's also in the binders. Now, there's a lot of information on this chart, and I'm not going to try to take us all the way through it, but I want to zero in on the fourth line of data, which is the -- which is -- well, first of all, the

third line of data, which says, "Was a letter sent to a creditor?" What that is is a letter that basically asked, "Are you in a position to represent retirees and which ones?" You'll see it. It'll be in evidence. And then the next line is, "Respondent is able to represent retirees," and I'll give you the key. "X" means they said no, the green check means they said yes, and the question mark is there was no response or it's not clear, and your Honor is going to hear some evidence on that. And so look across the line. I have a number of your most vigorous objectors who said, "No, we can't represent retirees," so I'm going to come back to this in the context of good faith, but let's -- we can start thinking about it now. What is -- what do you expect of the city having made a proposal heavily supported, certainly, again, as standards go in this -- in similar circumstances, had lots of meetings to explain, answered every question, every question that was asked at the meetings -- there will be evidence on that, too -- and your negotiating partner says to you, in many instances in writing, "We actually can't represent the people who are impaired by your proposal"? To say that anything that happened afterwards is not in good faith, you've got to have a good answer as to what do you do. What's the next sentence in the dialogue? You're getting feedback from someone who doesn't have authority to give feedback if they give you any feedback. By the way, the

bottom line is feedback. "X" means no. There's no other term we need to define. If they say -- if they said -- responded otherwise constructively, which was either "No, but I might do this," or "Yes, if you make the following changes," that's okay, but that just came from somebody who said they don't represent the person who's going to be affected. What is the next step in a negotiation where the person who said they're here to negotiate says to you, "We really don't represent the person who's affected by the plan we're discussing"? None of the objectors say how that question is supposed to be answered.

The reality is is the city said, "Tell us your suggestions anyway." And if we got suggestions, feedback, we would have had to then figure out what to do with it in that very unusual circumstance that I, frankly, haven't confronted very often in my career, but we weren't even put to that hard question because what the other part says is is that -- and this is more toward the good faith negotiation part than this one, but as long as I've got the chart up, as the bottom line indicates, the evidence will show that from this creditor constituency, not from others -- I'll get to that in a second -- we received no concrete proposal or comprehensive feedback. We got a lot of "no," but I'll come to that later.

With respect to this part, again, impracticability, AFSCME cites results of past collective bargaining as an

example of negotiations with unions that have succeeded. That doesn't surprise me in the slightest, but there's also no evidence and I don't think there will be any that those past discussions began with unions disclaiming power to bargain on behalf of the relevant constituency. As the evidence will demonstrate, that's how these discussions did.

So the bottom line, again, with respect to this part, is even if -- and it's not -- the standard for impracticability of negotiations is impracticability with every major constituency, I think the fourth line of this chart demonstrates that negotiations were impracticable with the retiree side, and they were impracticable with the bondholder side.

Good faith negotiations. Again, this is a question I don't think we have to reach because I think we've demonstrated that those kinds of negotiations were impracticable, but we tried really hard anyway. The evidence will show that we presented the June 14th plan. Mr. Buckfire of Miller Buckfire, who was integral to all the negotiations, but others, Mr. Moore, Mr. Malhotra, people you will hear from, they also extensively participated and will testify about what happened in the rooms. The city told the creditors essentially the following. The city would have discussions with all parties willing to speak for the city for about a month after the June 14th presentation so

that the city could listen to people and figure out if there was an out-of-court solution possible for this enormously complex and dire circumstance. The city representatives asked for feedback, including proposals that the creditors would accept if they weren't going to accept the city's proposal. And the city said in writing and separate -- and verbally that it would evaluate what it heard during the following month, during the week beginning July 15th, 2013, and decide what came next. It's conceivable -- I think people would say they doubted it would happen -- that one of the things that would have come next were consensual negotiations on the effort to build some kind of plan. That could have commenced.

THE COURT: You said July. Did you mean June?

MR. BENNETT: No. July 15th was the evaluation week.

THE COURT: Oh, okay.

MR. BENNETT: The June 14th proposal and July 15th evaluation week, meetings in the middle. I'll have a timeline at some point, and you'll see how this fits together.

THE COURT: Okay.

MR. BENNETT: So one of the things that might have happened next would have been negotiations on a consensual plan, but if the -- after the month of discussions and after

the evaluation week the city could not see a path to an out-of-court restructuring that could be implemented outside of court, a Chapter 9 case was absolutely a possibility. No one was shy about that. And, frankly, it should not be surprising to anyone that the evidence shows that work on both contingencies was proceeding throughout this entire period. Much is made of the fact that there's contingency planning going on for a Chapter 9 case. Absolutely there was. It would have been irresponsible not to. By the way, nothing in the Jones Day pitch is inconsistent with this way of organizing a case. And there's a lot of complaints about, well, people thought they had to keep a record, make a record. Absolutely they have to keep a record and make a record. Making a record of out-of-court steps taken in a Chapter 9 negotiating process is just sensible when everybody knows, based upon the play book executed in the last six or seven major cases have involved vigorous objections to eligibility by bondholders and labor unions, depending upon the case which, sometimes both, and in every single one of those cases, the judge has to go through pages and pages and pages about what happened during the out-of-court phase to determine whether people were in good faith. So courts through their opinions have sent a message to people who are serious about Chapter 9 restructurings. Keep records, and we did.

There is a lot of criticism in the papers that there were instances where the city said these are not negotiations or particular meetings were not negotiations. I confess that this implicates an area of law that I'm not tremendously familiar with. It has to do with collective bargaining. As the evidence will show, the collective bargaining was suspended as a result of a statute passed, and there was a clear concern by the city that they were not going to waive the -- or reverse the suspension of collective bargaining and all of the baggage that came with that. However, we don't really have to deter ourselves much over that incident because it's admitted by the objectors that the city sought feedback. The evidence will show that. It's admitted that there were, quote, discussions, close quote, and by the way, the leading case that people cite as the -- I think it's Endicott Schools case that is cited for the proposition of, you know, what is a nonnegotiated process or absence of negotiations. That case talks about absence of discussions. That's the actual quote if you go back to the case itself.

So, in any event, there is no dispute that dialogue was something that was encouraged and not discouraged. Nobody said we don't care what you think. Never happens; evidence will show never happens.

Now, again, assuming for a second that what the city did in the negotiations has any relevance at all given the

clear impracticability in this case, what is required of the city in good faith negotiations -- and I intimated that when we started talking about the chart -- is informed what creditors -- by what creditors said and did. Okay. Mr. Buckfire will testify about some of that being especially careful not to talk about proposals that other people made because they were made with an intent that they be kept confidential, but we got permission at least in one instance to talk about the fact that a proposal was made. And what Mr. Buckfire is going to tell the Court is that the proposals that the city got back were proposals that basically said, "Our position is better than everybody else. We should do better than everybody else," and they were, frankly, completely insensitive to the overall problems that the city faced. Again, the fact that we did get proposals from people other than the labor negotiators is going to be -- Mr. Buckfire will testify to it, but there's a letter in evidence, and I don't have the number. I forgot to put it on this morning. There's a letter in evidence -- a cover letter to a proposal that came from three major insurers in the pre-filing period. And, your Honor, that demonstrates that a party that's represented by qualified professionals, as a number of the labor/retiree constituents were, knew exactly what you're supposed to do when you receive a proposal and you don't like it. The way you -- the way you respond to a

proposal and you don't like it is you send back something that you do like, and that's how a negotiation gets started. Whether it would have worked or not is a different question. The point is is that it wasn't a mystery to anybody how to start a negotiation if someone really wanted to start one.

What did labor do besides respond maybe we're not the right person to talk to, which is a problem in and of itself? Well, here the UAW's papers are particularly instructive, and in many places in their papers, particularly their supplemental objection -- I think it's also in the pretrial brief; I'm just not remembering that as clearly today -- the UAW says, "Well, of course we weren't going to say yes to any modifications of retiree benefits or pension benefits in the pre-filing scenario because we had a constitutional guarantee. Any proposal that doesn't pay these in full and does not impair retiree benefits is a proposal we cannot accept," or, "we will not accept." I think it says both those things in different places.

So, again, I think we have to ask the most crucial question in evaluating the city's good faith. When you get back a response that says, "We're never going to agree to anything but nonimpairment," what exactly is the city supposed to do next? What's the next step in that negotiations? "Gee, we were just kidding. We found the money in a mattress. We'll do that"? I don't think that's

the right response. I don't think there is a right response. I think at that point you can determine that negotiations have failed and they're not going to succeed.

The Retiree Committee goes even further in their papers, their pretrial brief. They say that negotiations were not in good faith because they included an impairment, meaning the city wasn't in good faith because we didn't agree with them from day one. Okay. Again, I ask the question, what exactly -- if anyone is going to contend that the city was in bad faith negotiations and got that response, what exactly were they supposed to do next in the negotiations that would have helped matters?

And as I said before, many retiree groups said, "We'd love to talk to you, but we don't represent the relevant people."

Clearly, your Honor, we received many requests for additional information. You will see some interesting charts that show what was in the data room, at least in terms of volumes, how the data room is populated. The evidence will show that the city did its best to comply with information requests. I'm absolutely certain that no one was completely satisfied with what the city gave them. In some instances, that's because the city doesn't always have everything that people want. In some instances, I suspect it's -- we will find that -- to the end of this case we will not find -- we

will find certain people who will never agree that they've gotten everything that they want or they're satisfied with the information they received. It's a hard problem, but the evidence will show that the city created a database, worked really hard to populate it, populated it with enormous amounts of information, and did not withhold information as a basis to obtain a negotiating advantage.

Final point with respect to this section. In almost all the papers -- and I want to -- it could be all -- there is a statement quoted by Kevyn Orr concerning the financial and operating plan at a meeting to discuss the financial and operating plan, which is not the proposal for creditors. The financial and operating plan is a document required by statute to be filed 40 days -- 45 days after his appointment. It's about facts, and he's reporting facts. And someone asked him about negotiating the financial and operating plan, and he said, "This is not something to negotiate. This isn't a plebiscite. This is a report. I'm supposed to file it." So that quote, which I think the objectors would have you think applied to the restructuring plan, and it does not, did not, and it applies to something completely different, and I think the evidence will show that.

For the foregoing reasons, I think the city did act in good faith in all of the negotiations that it conducted. Those negotiations were unsuccessful and, thus, that

prerequisite for filing a Chapter 9 case and being eligible for relief has been met.

I'm now going to turn to good faith generally, spend a little time on it, 921(c). Here again, I want to borrow AFSCME's papers because they're just very instructive and really help us with this. Paragraph 109 on page 48, "The relevant considerations regarding good faith under Chapter 9 include," and they point to five points out of the Stockton case. I'll accept them. Number one, whether the city's financial problems are of a nature contemplated by Chapter 9. The evidence will show that if Detroit's financial problems are not the financial problems of the nature contemplated by Chapter 9, I don't know what city's is, so we think we will satisfy that one very easily. Number two, whether the reasons for filing are consistent with Chapter 9. I think the form and substance of the plan that was proposed and, frankly, everything that the city has been saying about it are indicative that the city is trying very hard to use the powers subject to the limitations included in Chapter 9 to effectuate a financial restructuring for the city. I don't think we'll have any difficulty demonstrating that with the evidence. Number three, the extent of the city's pre-petition efforts to address the issues. Here I want to pause and put on a timeline, and there's -- it's really long, so there's two pieces, but for this purpose it's the first piece

that's the most relevant.

THE COURT: Let me ask you to pause for just a second. We should have the record reflect what exhibit number that chart is.

UNIDENTIFIED SPEAKER: It's Exhibit Number 36.

MR. BENNETT: I have better. They'll try and put it up, but I also have some copies of it. Here's what I'm going to do. I'm going to distribute the first piece now, with the Court's permission, and the second piece in a minute, so -- after I get through this, so here's the first piece. Again, I think everyone has seen this already. If you don't have it, it's okay. Everyone else is going to have it in a second. Obviously in a bunch of ways this chart summarizes lots and lots of evidence that is going to go into the record, but what is going to be seen in the record was that it wasn't a bunch of people up at night on June 13th working on a presentation of a plan for June 14th. The efforts to address the -- the pre-petition efforts to address the issues stretch probably before December 21, '11, but I think at least, as I understand the history and as the evidence will certainly show, no later -- excuse me -- no later than December 21, 2011, December 2011, a number of people within state government and city government started focusing on the fact that the Detroit financial situation was very serious and had to be addressed. And there were a number of efforts

that were attempted all through 2012 to try to grapple this problem -- with this problem short of requiring concessions from creditors, short of Chapter 9. Kind of everything else you might think of doing was done by a large number of really devoted and qualified people. Regrettably, it all failed, and -- but the part about -- you know, this first chart, which covers almost a year and a half on one page -- it was a lot of time and a lot of effort in a search for alternative solutions. So forgetting the near-in -- what happened in the June and July time frame, which we'll get to in a second, the -- it is clear that there was a tremendous amount of time and effort considering the issues.

Next is the fourth item in the AFSCME list, the Stockton list, the extent that alternatives to Chapter 9 were considered. I think alternatives broadly construed include all of this, but then we'll turn to the time frame -- and all of a sudden -- we just got this one up -- the time frame of June and July, which we've blown up because so much happened, onto its own separate chart, so let me pass this one out.

THE COURT: So, ma'am, what's the number of that one that you're just now taking down?

UNIDENTIFIED SPEAKER: They're both Exhibit 104.

THE COURT: Oh, both 104. Okay.

MR. BENNETT: And because so much more happened, at least in terms of dates and places, in the June and July time

frame, we've blown that one up so that the last two months are their separate page. And June was devoted to heavily trying to figure out whether the last round of possible alternatives, any conceivable kinds of out-of-court restructuring, could work, and what the evidence will show is that on this page, which shows all kinds of meetings and all kinds of different interactions with creditors, a concerted decision was made to exclude meetings with individual creditors or individual creditor representatives because it wouldn't be readable anymore, so this is just organized meetings with different groups for different specific purposes. The other key to interpretation is when it says "nonunion," it means the bonds, so the union -- for purposes --

THE COURT: Means what, sir? Pardon? It means what?

MR. BENNETT: The bonds. "Nonunion" means --

THE COURT: Bonds.

MR. BENNETT: -- the bonds and other borrowed money because there is a collection of notes involved in that side of the case as well. Where it says "union," it's really the retiree representatives, which at the time were predominantly union. And so what this demonstrates -- again, it may be part of the good faith piece, too, but for purposes of the fourth prong of the Stockton test, I would say both of these

are relevant, both the long-term assessment of alternatives that were short of debt restructuring, then the close-in effort to figure out whether there was any conceivable way to get something accomplished out of court. It is perfectly clear that there was an extensive effort to evaluate every conceivable alternative that anyone could think of.

And then the last factor, factor five, whether the city residents would be prejudiced by Chapter 9 relief. As we said in argument last week -- and the Court will hear through extensive evidence -- and it's a really important part of the case both for purposes of eligibility and for everything that will follow -- the residents are dramatically prejudiced by denying Chapter 9 relief. Many of the problems the city confronts in providing services to its residents is because so many of its tax dollars are devoted to dealing with bonds and other legacy liabilities. That's the problem. The taxpayer in Detroit puts up a dollar and gets back -- right now the number is something -- right now the number is something like 58 cents, and the projections show it could be some day 35 cents. That's an unstable situation. It's not working now, it's not going to work in the future, and it has to be changed.

The other side of the coin. Very often the first reaction in cases like this is raise taxes. The evidence will show -- it's summarized, by the way, in the June 14th

proposal -- that the taxes in Detroit are already the highest in any municipality in Michigan; that we're already having enforcement problems. The city is already having enforcement problems with respect to property taxes; that the property tax assessments may be too high, not too low, indicating that that revenue source is stressed as well. There's nothing left to do here. There is no revenue solution. So we have come to a case, which is not necessarily like other Chapter 9 cases, where we have a very finite revenue pool, and it just isn't enough to provide services and to pay debt, and, thus, Chapter 9 is more needed here than in any other scenario you can possibly think of. The evidence will show that.

Last topic, and this gets a lot more technical, but this is responsive to your Honor's suggestion that we had to deal with a disputed issue of fact, and that was the motivation for the inclusion of appropriations provisions in PA 436. Your Honor, I think the following is intended to really indicate that that question isn't material, but I think it's also -- when we did the research, we found that it's also not a legitimate question for judicial review, so I'm going to give you some citations, and I'm going to read a very few quotes, and your Honor is clearly going to find more when you look at this question.

In the State of Michigan, frankly, I think in other places, et al. -- other places as well, the judiciary is not

supposed to engage in guessing about the legislature's intent. The leading case about this turns out to be a referendum case in Michigan. It's called Michigan United Conservation Clubs versus Secretary of State. It's found at 630 N.W. 2d 297. Michigan United involved a review of a Court of Appeals decision -- I think it's called the Court of Appeals here -- a Court of Appeals decision that held, in fact, that the -- that an appropriations provision in gun control legislation was not going to prevent that legislation from being subject to a referendum, and the Supreme Court reverses and says that that -- that the inclusion of that provision is going to insulate that statute from the referendum process. And along the way, the Court was not fractured in result but was fractured a little bit in reasoning. There's a collection of -- I think it's three concurring opinions. There's one judge who writes a dissenting opinion. I think it's just one, but I'm not a hundred percent positive about that. And so the lead -- the first concurring opinion has this to say. "This court has repeatedly held that courts must not be concerned with the alleged motives of a legislative body in enacting a law, but only with the end result - the actual language of the legislation." And then there's a whole series of cases that are cited to support that proposition that I won't read the citations in the record unless your Honor wants them.

The next concurring opinion, Judge Corrigan's, quotes from Justice Cooley's constitutional law thesis or textbook. It looks like it may be a textbook. And the quote, I think, is also instructive. It's a little bit longer. It says the following: "to make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment. Therefore, the courts do not permit a question of improper legislative motives to be raised, but they will in every instance assume that the motives were public and benefitting (sic) the station. They will also assume that the legislature had before it any evidence necessary to enable it to take the action it did take."

Then, your Honor, the next case you would find if you looked at this is Houston versus Governor, which is a 2012 case. There's a longer -- 491 Michigan 876, 810 N.W. 2d 255. And right near the front of the opinion there's a paragraph. I'm only going to read two parts of the paragraph to save time. "There is nothing that is relevant in this regard" -- that's in terms of interpreting a statute -- "that can be drawn from the political or partisan motivations of the parties." I'm going to skip a sentence. "Moreover, this court possesses no special capacity and there are no legal standards by which to assess the political propriety of

actions undertaken by the legislative branch."

Now, of course, much of this makes sense because one of the problems we scratched our heads about when we got back to think about how we would address your Honor's question is there are a whole bunch of legislators in two Houses that conceivably had all kinds of different reasons for supporting the appropriations. It could well be that most of them put the appropriations there because they really thought they needed the money even if some thought they were putting it there because it was a problem relating to the referendum process. I will tell you a very, very persuasive example of the hazards of trying to figure out the intent of statutes was impressed upon me by a law school, an example I learned in law school, which was about the age 55 -- or the 55-mile-per-hour speed limit, and it -- research turns out to show that the purpose of that speed limit was to save fuel, and the reason that it wasn't increased for a long time is because it saved lives. And so also the purpose of legislation actually can change over time or the reason why it stays there, so I think it's a hazardous inquiry. I don't think we know where to start. I don't think we can drag all the legislators in here and ask them all, and I think the only other evidence you're going to see about this is, frankly, inadmissible hearsay.

Maybe more importantly than this, I think I

indicated to your Honor in argument last week that I didn't think there was any consequence to a determination by this Court that the appropriation provisions might prevent a referendum. I said that the statute wouldn't be unconstitutional. It just would be subject to referendum. Well, it turns out in the Michigan United case, one of the concurrences goes back and gives everybody the history of what happened in that case, and so how did that case wind up in court to begin with? And it wound up in court because the persons, the group that wanted to have a referendum went out and got the required number of signatures, went to the appropriate office where the election is going to be held, and the first response was no referendum because of the provisions, and then they went to court to test it. So I think we're in a situation where, frankly, the only circumstance where this issue of whether or not the appropriate -- whether or not the appropriation provisions are in there for an appropriate purpose would conceivably come up is when a person or organization desiring a referendum within the time specified by the statute -- and it could conceivably have run; I couldn't figure that out -- actually collects the signatures, goes down to the appropriate place and tries. That never happened.

It also appears that even if a group or person doesn't do that, there is an initiative process, which is

different from a referendum process, which they could have triggered, and that process is not dependent in any way on whether or not there's an appropriation provision in the relevant statute.

And, finally, I think it was pointed out when we were together last that the PA 436 contains a severability clause, so what's left to have happen at this point is if that provision is somehow inappropriate and has to be stricken for some legally cognizable reason, the rest of the statute is still there. So I would say, again, summarizing from where I started, there's two points here. One is is that I think your Honor has asked for an inquiry that is not only impractical, it's not one for courts, but, in any event, it's not material to anything because it doesn't lead us anywhere that would change the result that we have PA 436 or at least every single one of its provisions with or without the appropriation provision to apply, and it's not upset by reason of the possibility that a referendum could have been attempted in some circumstances where one never apparently has been attempted.

With that, if you have no more questions, I think I'm done.

THE COURT: Thank you.

MR. BENNETT: Thank you. I've been asked to offer 104 for demonstrable purposes only because it would not be on

the relevant lists.

THE COURT: Is there any objection to 104 for demonstrative purposes only? All right. The Court will admit it for that purpose.

(Debtor's Exhibit 104 received at 11:25 a.m.)

MS. LEVINE: Good morning, your Honor. Sharon Levine, Lowenstein Sandler.

THE COURT: Let's just have the record clearly state this. Does the State of Michigan wish to make an opening statement on the issue of the city's eligibility?

MR. SCHNEIDER: No, your Honor. However, we may wish to make a closing statement.

THE COURT: Thank you. You may proceed.

MS. LEVINE: Thank you, your Honor. Sharon Levine, Lowenstein Sandler, for AFSCME. I'm actually here in the role of emcee. As with the oral arguments, we have agreed to work together to try and not duplicate efforts and to make a cohesive presentation, so just to give your Honor a little bit of an understanding, the Retirement System is going to, in essence, go first, spend about 20 minutes going through the timeline as we see it. Following that, the Retired Detroit Police Members Association will react to the city's final portion of their statement and also to their particular issues as reflected in the timeline and apply it to the facts. The UAW, the Public Safety Unions, the Retired

Association Parties, and AFSCME will each spend just a few minutes indicating how we see any additional facts or how the facts apply to our particular situations, and then the Retiree Committee probably for 20 or 30 minutes will give a global overview of applying the facts that came out in the timeline to the law. Thank you.

THE COURT: Okay. Well, do you think it's okay with your group if at a convenient break around noon we take our lunch break?

MS. LEVINE: That would be great.

THE COURT: Okay.

MS. GREEN: Your Honor, can I move the -- oh, I'm sorry.

THE COURT: Yes. Can we arrange to move that easel, please? You can try.

MS. GREEN: Your Honor, Jennifer Green on behalf of the Retirement Systems.

THE COURT: Be sure you speak right into the microphone even though you've angled the lectern there.

OPENING STATEMENT

MS. GREEN: As Sharon mentioned, we have put together a slideshow presentation of the timeline. We believe that these facts will later be used to support certain legal arguments that we will be raising throughout trial regarding the fact that Chapter 9 was a foregone

conclusion well before any creditor negotiations occurred; that Chapter 9 was filed in bad faith to circumvent the pension clause, and we submit, respectfully, we disagree with the city's assertion a moment ago that Chapter 9 was a mere contingency, and our assertion is that it really was a foregone conclusion before any of the creditor negotiations ever occurred, and with that I will begin.

You may ask why we're going back this far to 2011, but at his deposition, your Honor, Governor Snyder testified that this has been a highly structured process for close to three years, so we begin in January 2011 when Richard Snyder takes office as the governor of the State of Michigan.

Shortly thereafter, just three months later, the governor signs into law what we now refer to as PA 4. The legislation makes its way through both Houses within just 34 days. February 2012, Stand Up for Democracy files with the Secretary of State a petition to invoke a referendum on PA 4. Just days later, within -- actually, within three days of Stand Up for Democracy's petition, discussions begin regarding ways to insulate PA 436 -- or what will become PA 436 eventually from referendum. There are notations that discussions were had with Andy Dillon, the treasurer of the State of Michigan's office, and there are notes about Miller Buckfire are going to follow up with Andy directly about the process for getting this to the governor and a notation that

the cleanest way to do all of this is new legislation that establishes a board and includes an appropriation for a state institution. If an appropriation is attached, it concludes, then the statute is not subject to repeal by the referendum process.

In April of 2012, the city enters into the consent agreement with the State of Michigan. Shortly thereafter, Heather Lennox of Jones Day and Ken Buckfire of Miller Buckfire purportedly meet with Governor Snyder on June 6th, 2012, to discuss the Detroit -- the City of Detroit's financial crisis and issues related to potential 9 Chapter -- or Chapter 9 bankruptcy.

Prior to the meeting, in the e-mail that we discussed earlier and that I quoted for you earlier during oral arguments, there is a notation that Mr. Buckfire suggested that all the memos be put together, the ones that were done for Andy. A list of those memos were compiled, and three of those we think are pertinent to some of the issues at trial in this case. One of the memos was regarding a summary and comparison of PA 4 and Chapter 9. One was a memoranda on constitutional protections for pension and OPEB liabilities, and a third memo was analysis of filing requirements of Section 109(c)(5) of the Bankruptcy Code, in particular, negotiation being impracticable and negotiating in good faith.

Two weeks after the meeting with Governor Snyder, Miller Buckfire is engaged by the State of Michigan to perform an analysis and review of the city's financial condition. Shortly thereafter, Ken Buckfire testified that after he got this engagement, he started receiving phone calls from law firms seeing if he would be interested in helping them get inserted in --

THE COURT: I need to interrupt you for a second.

MS. GREEN: Am I going too fast?

THE COURT: Yes.

MS. GREEN: I was trying to get done by noon. I was trying to get done by noon because you said you wanted to break at noon.

THE COURT: I really want to follow what you say, so --

MS. GREEN: I will slow down.

THE COURT: -- I need you to slow down.

MS. GREEN: I knew I only had 30 minutes, so I was trying hard.

THE COURT: Well, we don't have to stop right at noon.

MS. GREEN: Okay. I will slow down.

THE COURT: But slow down for me by about 50 percent.

MS. GREEN: Wonderful. I get this a lot, so I know

I'm a fast talker. The discussion continues. Mr. Buckfire testified that Corrine Ball had wanted him to meet one of her partners, who was successful in a Chapter 9 case. This is in 2012. In October of 2012, PA -- before PA 4 is even rejected by the voters, the Treasury Department and the Governor's Office begin discussing creation of a new emergency manager statute just in case the referendum is passed. Howard Ryan, who is the 30(b)(6) witness for the State of Michigan, will testify to that. Shortly thereafter, November 6th of 2012, the Michigan electorate rejected PA 4.

In December Senate Bill 865, which would eventually become PA 436, was introduced in the Michigan legislature. The final version is adopted by both Houses just 14 days later on December 15th, and around that same time the treasurer commences a preliminary review of the city's finances under PA 72 and determines that a serious financial problem exists in the City of Detroit.

At the end of December, the governor of Michigan signs PA 436 into law, submits it to the Secretary of State. The entire process for PA 436 took only 26 days, and it is insulated from public referendum because it contains what the objecting parties submit is a minor appropriation of $5.8 million, which is less than .009 of the state budget, and below we have the citation from the exhibit that sets forth the amount of the state budget.

In connection with the PA 436 appropriation, the state 30(b)(6) witness testified at his deposition that he was aware that the appropriation was included for the purpose of insulating it from referendum. He was asked the question,

"Do you recall when that provision of the legislation was added to the draft bill?"

Pretty early on, I believe. It was quite early, maybe from the inception."

He was then asked, "Based on your conversations with the people at the time, was it your understanding that one or more of the reasons to put the appropriation language in there was to make sure it could not -- the new act could not be defended by a referendum?" He answered, "Yes."

"Where did you get that knowledge from?

Well, having watched the entire process unfold over the two -- past two years.

The governor's office knew that was the point of it?

Yes.

That your department" -- his is the treasury -- "knew that was the point of it?

Yes."

In January of 2013, Miller Buckfire was reengaged, this time by the City of Detroit, to continue its evaluation of the city's financial condition. Mr. Buckfire was then

asked by Treasurer Dillon to make arrangements for the city and state officials to meet and interview Jones Day and seven other law firms that were interested in serving as restructuring counsel.

The day before the pitch presentation with the City of Detroit, Kevyn Orr, who attends the pitch, receives an e-mail recounting conversations with Mr. Buckfire -- Mr. Buckfire will be testifying live during this trial -- and listed are the questions that will be asked the following day at the pitch. They all relate to Chapter 9. "Given the issues that Detroit faces, how can they address them outside of Chapter 9?" is the first, but all the rest are, "Under what circumstances should Chapter 9 be used?" "How would one execute a low-cost fast Chapter 9?" "Given Chapter 9 experience, what went wrong with JeffCo and Orange County?" And at the bottom, "If Miller Buckfire finds a way to monetize assets and create liquidity, how would that impact eligibility?"

The next day on January 29th, Jones Day presents its restructuring strategy to the city and state officials, and it explains that while out-of-court solutions are preferred, they conclude they are extremely difficult to achieve in practice. They note that Chapter 9 can create negotiating leverage negotiating with the backdrop of bankruptcy, which we submit is not good faith.

They further conclude in their strategy that an out-of-court plan should contemplate the possibility of Chapter 9 because it creates leverage, you can negotiate in the shadow of Chapter 9, and it helps bolster your eligibility and your success in a Chapter 9 by establishing a record of seeking creditor consensus.

There are notes on the slide that state, "A good faith effort to pursue an out-of-court restructuring plan will establish that clear record and will deflect any eligibility complaints based on alleged failure to negotiate or bad faith. If needed, though, Chapter 9 could be used as a means to further cut back or compromise, quote, 'accrued financial benefits otherwise protected under the Michigan Constitution.'"

The next day Richard Baird, who's Governor Snyder's consultant, reaches out to Jones Day to inquire about hiring Kevyn Orr as the emergency manager. The following day, Mr. Orr calls PA 436 a clear end-run around the prior initiative that was rejected by the voters in November and also comments, "So although the new law, PA 436, provides the thin veneer of a revision, it is essentially a redo of the prior rejected law and appears to merely adopt the conditions necessary for a Chapter 9 filing."

THE COURT: What do those statements appear in?

MS. GREEN: It's Orr Exhibit 4, JDRD0000295. It's

an e-mail.

THE COURT: Right, but what is that?

MS. GREEN: An exhibit. It's an e-mail.

THE COURT: An e-mail. Thank you.

MS. GREEN: E-mail. I'm sorry. In February of 2013, Mayor Bing was approached by Mr. Baird regarding Kevyn Orr as the candidate for the emergency manager position, and Mayor Bing recalls that the only salient qualifications he was offered about Mr. Orr was his bankruptcy experience. Mr. Baird told him about Kevyn Orr's experience in part of the Chrysler bankruptcy team, and Mr. Orr -- Mayor Bing was asked, "Did you ask Mr. Baird anything else about Mr. Orr's qualifications to serve as emergency financial manager?" And then he answers, "He -- yes, I did, and he felt that not only was he a lawyer that dealt with bankruptcy for over 30 years, but he also had some qualification as it related to restructuring." "And did Mr. Baird indicate that Orr had qualifications concerning restructuring outside the context of bankruptcy?" "That would be no" was his response.

In March the governor declared that a local government financial emergency existed in the City of Detroit. At the end of March, Kevyn Orr was appointed emergency manager of the City of Detroit. On March 28th PA 436 becomes effective, and in April of 2013 Jones Day is engaged as legal counsel for the City of Detroit.

After being appointed emergency manager, Kevyn Orr is quoted on May 12th, 2013 -- we've all heard this quote, but I'll say it again -- that the public can comment on the city's financial and operating plan, but we are not, like, negotiating the terms of the plan.

The day before presenting its proposal to the creditors, Mr. Orr gives an interview with the Detroit Free Press and expresses his intent to evade the pensions clause through a federal Chapter 9 bankruptcy proceeding, and we have quoted for you the portion of that interview and highlighted it in yellow. He states, "If you think your state-vested pension rights, either as an employee or retiree -- that's not going to protect you. If we don't reach an agreement one way or the other, we feel fairly confident that the state federal law, federalism, will trump state law."

On June 14th, the emergency manager held a meeting at the Detroit Metropolitan Airport and presented the city's proposal for the creditors. The evidence will show that the city proposed to fully -- fully intended to impair or diminish accrued financial benefits. This is an excerpt from the proposal for creditors, and it clearly states that with respect to unfunded pension liabilities, quote, "such contributions will not be made under the plan." And it further states there must be, quote, "significant cuts in

accrued vested pension amounts for both active and currently retired persons."

On June 20th, the emergency manager undertook a presentation regarding the city's finances and plan restructuring to both uniform and nonuniformed retirees. Numerous witnesses who attended this meeting, several of which will be testifying at trial, will testify that they did not observe or participate in any negotiations regarding the city's financials and that these meetings were purely informational.

On June 27th following this presentation that I just spoke of, the city sends a letter to the UAW thanking them for their time in participating in the meeting, and in that letter even the city acknowledged that the unions would need more information moving forward. The letter here is quoted, "The city recognizes that representatives of active and retired employees will need access to additional information to analyze the restructuring proposals outlined in the June 20 meetings. Information relevant to these proposals will be made available in the on line data room," but at this time on June 27th, that information, as they were saying, was not yet available.

Five days later on July 23rd Gracie Webster and Veronica Thomas commenced lawsuits against the State of Michigan, the governor, and the treasurer seeking a

declaratory judgment that PA 436 violated the pensions clause, and they also sought an injunction.

In July when several of the creditor meetings took place, the evidence will show that the city had no intention of actually negotiating with its creditors. By July 8th you will see an e-mail with an attachment of a timeline and a communications roll-out demonstrating that the city had already determined that its Chapter 9 petition was going to be filed on July 19th. There's a timeline crafted by the State of Michigan that identifies July 19th as a filing date despite the fact that the creditor meetings had not yet occurred. Therefore, the objecting parties submit that Chapter 9 was already a foregone conclusion before the city met with its creditors on July 10th and 11th. In fact, here is a copy of that Chapter 9 roll-out, communications roll-out that I spoke of. In an e-mail from Kevyn Orr's press secretary, Bill Nowling, to certain state officials, he lays out the communications plan. And if you go down to the yellow portion, it starts with, "We negotiated in good faith with all of Detroit's creditors." Mind you, several of the meetings had not yet even occurred. "We presented a comprehensive restructuring plan to creditors in June. At this point, it would be impractical to continue discussions out of court because it is clear that we will be able to reach agreement with some creditors only through a court-

supervised process, and the State of Michigan has authorized the emergency manager to take this step." This is on July 8th.

The timeline attached to that communications roll-out on Thursday, July 18th, states that, "Last minute revisions will be made to all the key documents," and on Friday, July 19th, which is in bold and capital letters called "The Filing Day," at nine o'clock the Governor's Office is supposed to transmit the authorization letter to the emergency manager, and at ten o'clock on the 19th the necessary paperwork is supposed to be filed with the court system, and then a series of press conferences are to be held.

The following day, on July 9th, an e-mail from Treasurer Dillon to the governor of the State of Michigan states that, "We are still in the informational mode." This e-mail is interesting for several reasons. First, it states that Kevyn will meet the Detroit pensions the following day, on July 10th. It says there will be no exchange of documents and that he will not translate that -- the information that he gives into an impact on retiree or employees' vested rights. Treasurer Dillon continues and says that there are a lot of creative options that we can explore to address how they will be treated in restructuring with respect to the pensions, but at his deposition when he was -- when he was

asked whether these creative options were ever explored directly with the Retirement Systems, Dillon said no. And it's not up there, but he also was asked if they were ever -- these creative options were put into written reports or formal proposals, and he also said, no, they were not.

Further in the e-mail he says to the governor, "Tomorrow's meeting could lead to questions directed to you about your view on this topic. In my view, it's too early in the process to respond to hypothetical questions. We remain in many ways in the -- at the informational stage." This was just one week before the filing. And Mr. Dillon admitted at his deposition that nothing changed between July 9th and the filing date of July 18th that would take them out of this informational stage, as he called it.

On July 10th and 11th, there were a series of creditor negotiations -- alleged creditor negotiations that took place. The emergency manager himself did not even attend, but witnesses who did attend the meeting will testify that they did not observe or participate in any negotiations regarding the city's finances and that, again, these meetings were purely informational. And this is consistent with the state treasurer's report to the governor that as of July 8th, we are still in the informational mode. It's also consistent with Mr. Orr's admission at his deposition when he was questioned, "There were no actual negotiations at the June

14th meeting, were they?" And he answers, "No, not as it's generally understood."

Lastly, the fact that there were no negotiations on July 10th and 11th is consistent with the city's and the state's communications roll-out, which already adopted the excuse that negotiations were going to be impractical.

On July 12th, following those meetings, the Detroit Fire Fighters Association sends a letter to the emergency manager asking for more information and stating, "It would be productive if the city could provide us with its specific proposals on pension benefit restructuring as soon as possible. We have two meetings with the city where pension benefits were addressed and still have only the city's general observation that pension benefits must be reduced." At trial Mark Diaz, the president of the Detroit Police Officers Association, and Dan McNamara, president of the Detroit Fire Fighters Association, will testify that no specific proposals were ever given by the city after this letter, and instead the city filed bankruptcy just six days later.

On July 15th the Webster defendants filed a response brief and a motion for summary disposition. In that court paper, the state asserted that a bankruptcy filing by the City of Detroit is, quote, "only a possibility that plaintiff's claims were, quote, 'unripe, premature, and based

on a speculative threat of future injury.'" And mind you, this position is taken in open court, which conflicts with the timeline that had already been circulated within the Governor's Office that slated the filing date as just four days later.

On July 16th Mr. Orr submitted the bankruptcy recommendation letter to Governor Snyder and Treasurer Dillon. In that letter he stated that dramatic but necessary benefit modifications must be made. The governor acknowledged that he read that letter before authorizing the filing and that he knew that the city's request for authorization that dramatic cuts be given would be part of any Chapter 9 process. He also testified that he knew, quote, "based on the facts going into it, there was a likelihood accrued pension benefits would be reduced in the Chapter 9 case."

The next day, the Detroit Public Safety Unions received correspondence from the city thanking them on behalf of the emergency manager for their, quote, "strong cooperation regarding the City of Detroit pension restructuring." Later that same day, the Retirement Systems filed their lawsuit against the governor and the emergency manager in Ingham County Circuit Court seeking declaratory relief. That same night at 6:23 p.m. the governor's press secretary, Sara Wurfel, circulates an updated timeline that

still shows the bankruptcy filing date of Friday, July 19th. This is July 17th at 6:23 p.m. The following day, the Retirement Systems filed a motion for a TRO seeking an injunction. At 3:05 p.m. that afternoon, Margaret Nelson of the Attorney General's Office received a telephone call informing her that Retirement Systems were in court seeking a TRO. At 3:47 the governor e-mailed his authorization letter to Orr and to Treasurer Dillon, and at 4:06 Orr changes the date on the filing papers from July 18th, crosses out the 19 because it was supposed to be filed the 19th, handwrites in an 18 and files the petition one hour and one minute after finding out that the Retirement Systems were in court seeking a TRO, which is inconsistent with the timeline sent at 6:30 the night before saying it was going to be on Friday.

And at 4:10 p.m. the attorney general appears for the TRO hearing in Ingham County. This is reflected in the papers filed by the state, the docket history and the hearing transcripts. Orr later admitted that he was being counseled that it would be, quote, irresponsible not to file the petition sooner rather than later given all the lawsuits that were popping up.

On July 19th, the following day, the declaratory judgment was entered against the governor, the treasurer, and the State of Michigan and that declaratory judgment states PA 436 is unconstitutional and in violation of Article IX,

Section 24, of the Michigan Constitution, and it further states the governor is prohibited from authorizing an emergency manager to proceed under Chapter 9, yet the city filed its Chapter 9 petition despite the fact that each of its advisors uniformly testified at their depositions that the city's financial information was still incomplete as of the filing, and, in fact, today it is still incomplete.

Charles Moore, senior managing director at Conway MacKenzie, testified that quote, when he was asked, "Has there been a specification of those level of cuts that the city contends must occur?" He says, "I mean have you put a dollar amount on it?" He answers, "No. Our analysis of this continues. Right now we still don't know what assets could be available to put toward the pensions. We still have not had the type of dialogue that we would like to have related to the calculation of the unfunded amount, so because of those two uncertainties, among others, we don't know what cuts, if any, there may need to be."

The state treasurer also agreed that as of July 8th, just a week before the filing, "I thought that the situation was not understood enough for the governor to go on record yet because I couldn't even tell him with any degree of confidence what level of funding the pension funds had, so why should he get in the middle of a debate about this?"

In addition, as of the petition date -- and I

believe the city's witnesses will testify consistent with their depositions -- that to date the city still -- the city still does not know the value of two of its primary assets, including the Water and Sewage Department and the city-owned artwork at the Detroit Institute of Arts. Because the city still does not know what assets are available to satisfy liabilities, does not know the scope of the liabilities, it is the objecting parties' position that the Chapter 9 filing was premature and not made in good faith. Thank you. I believe Mr. Ullman may be following me.

THE COURT: Okay.

MS. GREEN: I apologize. It's Lynn Brimer.

THE COURT: Okay. Perhaps we should move that lectern back to center, huh?

MS. BRIMER: I can do that.

THE COURT: Okay. Thank you.

MS. BRIMER: Is this good, your Honor?

THE COURT: That's great. Let me just ask will there be other uses of the projector during openings?

ATTORNEY: Yes, your Honor.

THE COURT: Okay.

OPENING STATEMENT

MS. BRIMER: Good morning, your Honor. And, your Honor, I thank Mr. Bennett for raising the legal issues with respect to the spending provision because it at least makes

me more comfortable as to why I thought it's so important we clarify the record on the discovery matters with respect to which law had a spending provision added onto it.

THE COURT: Okay.

MS. BRIMER: So rather than address my opening issue to begin with, would the Court like me to address the legal issues raised by Mr. Bennett, or would you like the legal issue -- I am prepared to briefly discuss those. I don't have a written preparation, but I do think it's important for the Court to understand I did look at the case that Mr. Bennett cited. I didn't disregard any case law when coming to this Court and believing that there was a factual issue.

With respect to the Michigan United case, I think it's factually distinguishable again. That case did not involve an original law that did not have a spending provision that was overturned on referendum and then a new law presented. In that case, your Honor, the issue was whether or not the spending provision itself added in the original law such that it was not subject to referendum was, in fact, an appropriate provision taking it out of the referendum provision. You know, under -- your Honor, that is not the facts that we have before us today.

In addition, your Honor, I have reviewed Justice Corrigan's opinion, which, by the way, was a concurring

opinion, not the Court's majority opinion, but she addressed the issue of intent and that, generally speaking, we do not look to the motive or intent of the legislature -- legislative body when passing a law, but she said this is because -- and she notes this in a footnote -- this is because, generally speaking, we do not have any testimonial record regarding motive or intent. That would be, your Honor, in her concurring opinion. There is no testimonial record in the -- in this original action regarding the motive or intent. Well, your Honor, that is simply not the case in this matter. As Ms. Green read to you and as I quoted from the state's own 30(b)(6) witness, we have evidence regarding the motive of the inclusion of the spending provisions on an act that had previously been rejected on referendum. We believe that factual issue is important to this Court in determining that whether or not some or all of PA 436 should have been subject to the second provision that everyone seems to gloss over in Article II, Section 9, of the Constitution, which states specifically that no law that has properly been submitted to referendum can then -- and rejected can then be passed without a referral back to the general electorate.

Your Honor, the cases cited by the state, Ms. Nelson, of Reynolds v. Martin and the case cited this morning just simply are not factually similar enough to PA 436 to be controlling, and we do -- and, you know, my closing -- my

opening can be as simple as, your Honor, the evidence will show that the motive of including the spending provisions was to, in fact, take an act that had previously been overturned on referendum and disregard the will of the people, and it's very clear. The state's attorney argued yesterday that we knew what the people's will was because we have the media. Well, we know what the people's will was. The people's will was that we not have an emergency manager who would supplant the democratically elected officials in the City of Detroit, and that was very clear, and yet we now have PA 436, which disregarded that, which added a spending provision to it, and the facts will demonstrate that we can establish what the motive was in adding those spending provisions. And, moreover, we can establish that the emergency manager, Mr. Orr, was fully aware of that at the time he accepted his appointment as the emergency manager. I'll conclude --

THE COURT: Well, how do you -- how do you deal with Mr. Bennett's argument that if the issue is ever appropriate for court review, it is not appropriate until petition signatures are collected on the bill that has the spending provision in it and the petitions are rejected because it's not the kind of a law that can be subject to a referendum?

MS. BRIMER: Well, certainly I don't think there's any case law that would suggest that the people be required to take an act which on its face would be rejected. I'm not

sure I'm aware of any case law that would suggest that the people had to refer that case -- the law to a referendum and have it denied because of the failure -- or the inclusion of the spending provision. At issue here, your Honor, is whether or not the act is sufficiently similar enough, not that it had to go back to referendum, but whether it's sufficiently similar enough that the second provision would require that it be deemed to be unconstitutional because it was not presented to the people again.

THE COURT: Okay. All right. Let's take our lunch break now. Before we do, I want to remind everyone that we are guests here in this building, and we need to maintain decorum and silence while we are in the hallways. Please don't linger in the halls. You can have your conversations here in the courtroom over lunch if you'd like to do that, or in the elevator or on the 1st floor, but please maintain silence in the hall. Let's see. It's noon. We'll reconvene at 1:30, please, and that's it.

THE CLERK: All rise. Court is in recess.

(Recess at 11:59 a.m., until 1:30 p.m.)

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I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett October 27, 2013

Lois Garrett