UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	
CITY OF DETROIT, MICHIGAN	Chapter 9 Case No. 13-53846 Hon. STEVEN W. RHODES
Debtor.	
MAURIKIA LYDA, et al.,	Adversary Proceeding
Plaintiffs,	Case No. 14-04732
v.	
CITY OF DETROIT, et al.	
Defendant.	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

In the course of the nation's largest-ever municipal bankruptcy proceedings, Debtor commenced a massive breach of executory contracts held with residential customers of the Detroit Water and Sewer Department (henceforth "DWSD"). DWSD engaged the services of a private, for-profit demolition company to terminate water service to any residence, according to DWSD's unverified records, with an account more than two months delinquent or a balance of more than $150.00.

The shut-offs were conducted without timely warning and often took place in the early morning hours. No attempt was made to find out if an affected residence housed children, elderly or disabled persons, or persons whose illnesses required available water for survival.

Detroit is home to more people existing below the poverty line than any other major city in the U.S. Despite this, DWSD terminated service to homes without any attempt to first determine

whether the alleged non-payment was valid, or whether it was due to an inability to pay or to an unwillingness to pay. Customers and their advocates who tried to call the service centers to contest or question or seek assistance with their bills were put on hold for hours at a time, and eventually told there was nothing to be done to help them.

Amid the uproar and public demonstrations, as well as national attention and outrage that a city in the United States of America would deliberately allow its residents to live without water, the Emergency Manager announced a "pause" in terminations on July 21, 2014, though there was no means for the citizens to enforce it, nothing was done to restore service to those already terminated and no action was taken against commercial accounts whose arrearages dwarf the entire residential alleged debt.[1]

At a status conference, on the record, the Court asked if it had jurisdiction over the mass water shut offs in the City of Detroit. It is the view of the Plaintiffs that any judicial challenge to these shut offs should be presented to this Court, first, in view of prior rulings of the Court. Order of July 25, 2013 (Docket # 166); **In re City of Detroit**, 501 B.R. 702 (E.D. Mich. 2013).

Plaintiffs seek injunctive relief in the form of a moratorium on water shut-offs and the reconnect of those who have had their water terminated since April, 2014 when the mass shut-off program was commenced. The moratorium is sought as a temporary measure while Plaintiffs in this litigation pursue a water affordability plan and other measures that ensure that all Detroit residents are guaranteed their fundamental human right to water.

The current moratorium on water shut-offs was implemented on July 21, 2014 after this honorable court ordered Detroit Water & Sewerage Department (DWSD) officials to appear before it. This action was in response to the mounting public emergency and crisis that had been

[1] In a spectacularly punitive move, DWSD "addressed" the disparity in treatment of residential versus commercial accounts by terminating water service to an occupied apartment building.

created by the mass shut-off plan initiated by the Emergency Manager and DWSD officials. Protests were occurring almost daily against these shut-offs and Detroit was coming under international scrutiny for the violation of human rights implicated by them.

The moratorium has had a positive effect. It has allowed space for thousands of Detroiters to enter into payment plans that have allowed for at least the temporary restoration of water service, including to a number of the named Plaintiffs in this case. However, without a lasting solution to decrease the cost of water to Detroiters, the implementation of a water affordability plan, and a process for waiving unverifiable arrearages and fees that customers have carried for years due to DWSD's previously lackadaisical collection policies, many of these same Detroit residents will once again face shut-offs and the crisis will quickly reassert itself.

The resumption of water shut-offs also poses a risk of irreparable harm to all Plaintiffs and putative class members, and, indeed, to the entire city, because the shut-offs create a public health hazard. This is especially true with the impending start of the school-year. Water shut-offs create unsanitary conditions in people's homes, which can potentially lead to "the transmission of dangerous bacteria contributing to increased urinary tract infections; gastrointestinal problems; hepatitis A; influenza; and other diseases that are linked to unsafe water and poor sanitation." Exhibit 6-5, June 30, 2014 Letter from G. Gaines, Former Deputy Director, Detroit Health Department, to V. Anthony, Director, Detroit Department of Health and Wellness Promotion; *see also* Declaration of National Nurses United, http://nurses.3cdn.net/134f8dcfebf46c1f9b_odm6b1zsi.pdf ("We need clean water for proper sanitation to combat the growth and spread of multiple infectious diseases and pandemics.").

QUESTIONS PRESENTED

Does this Court have jurisdiction to grant emergency relief to customers of Debtor City of Detroit and its Department of Water and Sewage where the relief requested will restore policies and procedures previously adopted, but not followed by the Department?

Does this Court have Final Authority as to Acceptance and Rejection of Executory Contracts in a Municipal Bankruptcy?

Where city officials engaged in Chapter 9 Municipal Bankruptcy have terminated water service to residential customers without due process of law, are Plaintiffs and the putative class they represent entitled to a Temporary Restraining Order on Fourteenth Amendment grounds?

Standard for Granting Preliminary Relief

Plaintiffs recognize that granting preliminary injunctive relief to maintain the status quo during litigation is extraordinary relief, and not to be granted lightly. In this instance, however, lives are at stake, a public health emergency is imminent, Detroit's most vulnerable citizens are suffering, and the world is watching.

In determining whether to grant injunctive relief, the Court must weigh four factors: (1) whether the moving party has shown a strong likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. **Overstreet v. Lexington-Fayette Urban County Gov't,** 305 F.3d 566, 573 (6th Cir. 2002). These four considerations are factors to be balanced, not prerequisites that must be met. **McPherson v. Michigan High Sch. Athletic Ass'n, Inc.,** 119 F.3d 453, 459 (6th Cir. 1997), and there is no "rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief." **Tate v. Frey,** 735 F.2d 986, 990 (6th Cir. 1984).

In the Sixth Circuit, "[t]he standard for issuing a temporary restraining order is logically the same as for a preliminary injunction with emphasis, however, on irreparable harm[.]" **Motor Vehicle Bd. of Calif. v. Fox**, 434 U.S. 1345, 1347 n.2 (1977)). On the other hand, "[a]lthough no one factor is controlling, a finding that there is simply *no likelihood* of success on the merits is usually fatal." **Gonzales v. Nat'l Bd. of Med. Exam'rs**, 225 F.3d 620, 625 (6th Cir. 2000). (Emphasis added.)

Even if this Court questions if Plaintiffs are likely to succeed on the merits, preliminary relief is still appropriate where a plaintiff shows "'serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant'" or if "the merits present a sufficiently serious question to justify further investigation." **In re DeLorean Motor Co.,** 755 F.2d 1223, 1229-30 (6th Cir. 1985) (quoting **Friendship Materials, Inc. v. Michigan Brick, Inc**., 679 F.2d 100, 105 (6th Cir.1982)). Here the City stands to suffer no loss, or at the most, a mitigable loss. The relief sought here has already been granted in part by the current moratorium on shut offs and the "10 Point Plan," which suggests that the potential harm to DWSD has already been contemplated and set aside by DWSD itself. In fact, DWSD recently announced that it has collected over $500,000 in past due accounts since the moratorium began. Press Release, *United Way, Ford Motor Company Fund and General Motors Foundation Donate $200K to the Detroit Water Fund* (Aug. 18, 2014), http://www.detroitmi.gov/News/tabid/3196/ctl/ReadDefault/mid/4561/ArticleId/516/Default.aspx. Thus, the balance of these factors weighs in favor of Plaintiffs, for whom the harms are potentially devastating if DWSD resumes shut-offs, and against DWSD, for whom the harms are negligible.

II. Plaintiffs Have a Strong Likelihood of Success on the Merits of their Claims

A. Plaintiffs Have a Strong Likelihood of Success on Their Due Process Claim.

1. Plaintiffs have a legitimate property interest in continued water service.

The Due Process Clause of the Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV, §1. For a successful procedural due process claim, a "[p]laintiff must show (1) that it was deprived of a protected liberty or property interest, and (2) that such deprivation occurred without the requisite due process of law."[2] A property interest in continued water service sufficient to trigger due process protection can be found in state statutes, municipal ordinances, express or implied contracts, and common law.

In **Memphis Light, Gas & Water Division v. Craft.,** 436 U.S. the United States Supreme Court ruled that customers of a utility must first establish an entitlement to the continued utility service arising either from an independent source of state or local law, or by contract. The Court held that the Due Process Clause applied to terminations of the plaintiff's utility services because common law prohibited public utilities from terminating utility service "at will," requiring instead 'just cause" for the termination of utility services. ***Craft***, 436 U.S. at 11. The Sixth Circuit has found a property interest in water service, holding in **Mansfield Apartment Owners Ass'n v. City of Mansfield** that "[i]t is well settled that the expectation of utility services rises to the level of a 'legitimate claim of entitlement' encompassed in the category of property interests protected by the due process clause. 988 F.2d 1469, 1474 (6th Cir. 1993).

Further Plaintiffs' property interests in continued water service is supported by the contractual relationship between DWSD and Plaintiffs and by policies of DWSD. Defendants' own policies and procedures, entitled "Interim Collection Rules and Procedures [of the] City of

[2] **Aarti Hospitality, LLC v. City of Grove City, Ohio,** 350 F. App'x 1, 14 (6th Cir. 2009) (quoting **Club Italia Soccer & Sports Org., Inc. v. Chapter Tp. of Shelby, Mich**., 470 F.3d 286, 296 (6th Cir. 2006), *overruled on other grounds as recognized by* **Davis v. Prison Health Servs**., 679 F.3d 433 (6th Cir.2012)).

Detroit Water and Sewerage Department" is attached hereto as Exhibit 6, Part 3. These procedures were revised and approved on January 2003 and have been in effect in different forms since January 1979. The rules are further clarified through the Mayor's "Ten Point Plan." *See* Detroit Water and Sewerage Department, *DWSD 10-Point Plan*, available at http://www.dwsd.org/downloads_n/announcements/general_announcements/DWSD-10-point-plan.pdf. The contract for services between DWSD and Plaintiffs creates a property interest.

2. Defendants Have Deprived Plaintiffs of Property Without Due Process of Law, in Violation of the 14th Amendment to the United States Constitution.

The U.S. Supreme Court, in **Mullane v. Central Hanover Bank & Trust Co**., 339 U.S. 306 (1950), states the familiar standard for procedural due process: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." These dual rights to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.

Defendant has consistently failed to provide adequate due process to its customers by failing to abide by its own rules and procedures. The inconsistent, arbitrary, and unlawful treatment of residents by DWSD representatives includes but is not limited to:

a. Terminating water service or preparing for service termination (i.e. marking residence with blue spray paint near water valve, preparing the water valve for shutoff, sending termination operators to residence) without notice; (See, Declaration of V. Alexander ("Alexander Decl. Exh. 5-1"), ¶¶ 11-14).

b. terminating water service or preparing for service termination (i.e. blue spray paint, preparing the water line for shutoff, sending termination operators to

residence) without providing adequate opportunity for customers to contest the shutoffs; (*See* Alexander Decl. Exh. 5-1), ¶¶ 11-21)

c. failing to implement and observe its own bill collection rules, practices, and procedures, including but not limited to:

   i. terminating water service to residents who are actively disputing their bills (*see* Amended Compl. ¶¶ 43-44);

   ii. failing to provide notice of the availability of a postponement of termination due to a medical emergency (*see* Declaration of D. Donaldson ("Donaldson Decl." Exh. 5-2), ¶¶ 8-14);

   iii. termination of water service during the termination moratorium (*see* Declaration of M. Lewis-Patrick ("Lewis-Patrick Decl." Exh. 5-3), ¶¶ 9; Declaration of R. Adams ("Adams Decl.", Exh. 5-4), ¶¶ 5.); and

   iv. failure to make financial assistance available as purported to eligible low-income customers (*see* Donaldson Decl. Exh. 5-4 ¶¶ 8-14; Lewis-Patrick Decl. ¶¶ 10);

d. failing to give adequate or accurate notice of bills due (*see* Alexander Decl. Exh. 5-1, ¶¶ 4-14);

e. failing to give adequate notice of due dates, deadlines and other dates related to payment of bills and remittance opportunities prior to shutoffs (*see* Alexander Decl. Exh. 5-1, ¶¶ 4-14);

f. failing to give adequate time for the payment of water bills after giving notice of bills due (*see* Donaldson Decl., Exh. 5-4 ¶¶ 8-14; Declaration of F. Phillips ("Phillips Decl." Exh. 5-5), ¶¶ 9-12; Alexander Decl. Exh. 5-1, ¶¶ 4-20);

g. failing to provide notice of potential payment plans on termination notices (*see* Donaldson Decl. Exh. 5-4, ¶¶ 8-14: Exhibit C; Phillips Decl. Exh. 5-5 ¶¶ 3-12);

h. failing to offer reasonable, achievable payment plans to qualifying customers (*see* Donaldson Decl. Exh. 5-4 ¶¶ 8-14; Phillips Decl. Exh. 5-5 ¶¶ 3-12; Alexander Decl. Exh. 5-1 ¶¶ 11-20), and;

i. failing to provide notice of and/or provide procedures to dispute accuracy or fairness of bills prior to a shutoff (*see* Alexander Decl., Exh. 5-1 ¶¶ 7-14).[3]

j. poor to nonexistent response to customer calls for assistance, Rall Decl. Exh. 5-6.

k. water affordability fairs have failed to resolve existing account problems, Rall Decl., Exh. 5-6, Lin-Luse Decl., Exh. 5-6.

3. Plaintiffs Must Have the Right to Challenge Unfair Bills and Shut-offs, not Just Those in Dispute.

The right to notice and an opportunity to be heard protects not simply the individual from mistaken deprivations; these rights protect against unfair deprivations as well. **Fuentes v. Shevin,** 407 U.S. 67 (1972). An occupant who can't point to a bona fide dispute as to the amount of the bill may still challenge the fairness of taking away the property right. Hence, Plaintiffs are not required to have a bona fide dispute about the amount of the bill in order to be entitled to due process. Plaintiffs have established a strong likelihood of success on their due process claim. In Section III-V, below, they will show that without immediate relief, they will suffer and have

[3] The problems the water service customers encounter in trying to obtain administrative justice from DWSD are *sui generis* with those described by the Court in taking jurisdiction. ("…an archaic payroll system..", :"technology infrastructure and software is obsolete..", "An IRS audit….characterized these systems as 'catastrophic''..", "..journal entries are booked manually…", "..systems also lack reliable fail-over and back-up systems..", **In re City of Detroit,** 504 B.R. 97 (Bankr. E. D. Mich., 2013).

suffered irreparable harm, that Defendants will suffer no harm or easily mitigable harm, and that the public interest will be served by granting the relief requested.

B. Plaintiffs Have a Strong Likelihood of Success on Their Unauthorized Rejection of Executory Contracts Claim.

The Court has jurisdiction over this case because the Plaintiffs have executory contracts with the Defendant. An executory contract may only be accepted or rejected by the Debtor or Trustee with the consent of the Court. 11 U.S.C. § 365 *See* **Trayfur v. Sepi LP**, CA 2:14-413 (U.S. Dist. Ct., W. D. Pa., July 7, 2014), Exh. 6-2.

Congress never excluded Section 365 of the Code in municipal bankruptcies. Section 904 of the Code applies to policy and lawmaking functions. In Chapter 9 a municipality surrenders its sovereign immunity and consents a statutory system of contract resolution in order to reorganize. Section 904 forbids the Court from setting municipal policy, but doesn't take away traditional jurisdiction over contract, nor does 904 give the municipality the power to engage in unlawful behavior. 11 U.S.C. § 943(b)(4). Chief Justice Charles Evans Hughes stated: "The State is free to make contracts with individuals and give consents upon which ***the other contracting party may rely*** with respect to a particular use of governmental authority" **United States v. Bekins,** 304 U.S. 27 at 52 , 58 S.Ct. 811, 82 L.Ed. 1137 (1938). (Municipal bankruptcy case, emphasis added).

This principle guides the court **In re City of Central Falls, R.I. ("Central Falls")**, 2011 WL 9933766, at *3 (D. R.I. Nov. 2, 2012) Exh. 6-1. (In a Chapter 9 case the debtor acts as the trustee and thus is subject to the authority of the Court to determine whether to accept or reject executory contracts). The debtor's decision about whether to assume or reject executory contracts is subject to this court's approval. See **In re A.H.Robins Co., Inc.,** 68 B.R. 705 (Bankr. E.D. Va. 1986) ("court approval is necessary before the debtor-in-possession may

assume or reject an executory contract"). This authority is not an exercise of executive or legislative power, hence it is not affected by 11 U.S. C. §904. As ***Central Falls*** explains:

> The power of the court under [section 365] is the power to permit or disapprove the rejection of a contract, a form of bankruptcy relief. Denial of the relief sought is not control over the property, revenues, or political or governmental powers of the debtor. Nothing in those sections entitles a municipal debtor to bankruptcy relief on standards less than or different from those the Bankruptcy Code establishes.

Id. at *4.

Even if the debtor decides to reject the executory contracts and this court upholds that decision, such rejection constitutes a breach of those contracts which gives rise to pre-petition claims for the plaintiffs - - claims that are also within the court's jurisdiction to adjudicate. *See id.*; *see also* 11 U.S.C. §502(g)(1) ("A claim arising from the rejection, under section 365 of this title . . .of an executory contract . . . shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.")[4]

In this case, Defendant violated the requirements of 11 U.S.C. §365(a) and unilaterally rejected its executory contracts with the named plaintiffs without obtaining the requisite court approval. 11 U.S.C. §365(a)(the trustee, subject to the court's approval, may assume or reject any executory contract . . . of the debtor.); *see also* **In re Trans World Airlines, Inc.,** 261 B.R. 103, 115 (Bankr. Del. 2001) ("the Bankruptcy Code prevents the debtor-in-possession from making a unilateral decision to assume or reject a contract"). Plaintiffs now seek a temporary restraining order to prevent the debtor from taking further unilateral action and breaching the

[4] Conversely, if the debtor decides to assume these contracts then it agrees to continue the performance required under the contracts. Failure to perform will give plaintiffs post-petition claims that enjoy administrative priority. *See* **In re El Paso Refinery, L.P.,** 220 B.R. 37, 41 (Bankr. W.D. Tex. 1998). In the event a wrongful shut-off results in injury or death, these administrative priority claims will significantly burden the reorganization.

executory contracts of the putative class members by terminating their water service without court approval.[5] In application of the business judgment rule in this case, the Plaintiffs ask "if a department of the city undertakes to threaten the health of a significant portion of the population by mass water shut-offs, is this a valid exercise of business judgment?"

C. Plaintiffs Have a Strong Likelihood of Success on Their Claim Regarding the Creation of a Public Health Emergency.

If DWSD resumes shutting off water to thousands of Detroit residents, it will create a massive public health crisis. Lack of access to water creates unsanitary conditions which can lead to transmission of disease and increase the likelihood of getting infections. *See* Exhibit 6-5, June 30, 2014 Letter from G. Gaines, Former Deputy Director, Detroit Health Department, to V. Anthony, Director, Detroit Department of Health and Wellness Promotion. National Nurses United (NNU) has already participated in protests and issued statements regarding the need for water, including a declaration that all citizens need water to survive, and to clean their homes and themselves, to prepare food, to flush toilets, and combat the spread of disease. Declaration of National Nurses United, http://nurses.3cdn.net/134f8dcfebf46c1f9b_odm6b1zsi.pdf. At a rally on July 18, 2014, NNU members stated it simply: "Lack of water directly undermines the health and safety of Detroit residents." National Nurses United, Historic rally in Detroit — 3,000, led by RNs and community leaders 'Turn on the water.', July 18, 2014,

[5] At common law, Courts grant temporary restraining orders freely in cases where a water shut off is disputed. **Steele v. Clinton Electric Light & Power Co.,** 123 Conn. 180, 192 A. 613 (1937), **Solorza v. Park Water Co.,** 94 Cal. App. 2d 818. 211 P.2d 891 (1949),, **Spaulding Mfg. Co. v. City of Grinnell,** 155 Iowa 500 136 N.W. 649 (1912), **Carter v. Suburban Water Co**., 151 Md. 91, 101 A. 771 (1917), **Ten Broek v. Miller,** 240 Mich. 667, 216 NW 385 (1927), **City of Mansfield v. Humphrey Mfg. Co.,** 82 Ohio St. 216, 97 N.E. 233 (1910), **Bourke v. Olcott Water Co**., 84 Vt. 121, 78 A. 715 (1911). See also letter of the DWSD to Kary L.Moss and Sherrilyn Ifill, dated August 11, 2014, Exh. 6-4. While disagreeing with the author of the letter as to whether in fact the city gave effective notice or implemented its own policies, Plaintiffs agree service should not be shut off in the event of a dispute, but Plaintiffs say this should apply equally to rich and poor alike.

http://www.nationalnursesunited.org/blog/entry/historic-rally-in-detroit-3000-led-by-rns-and-community-leaders-turn-on-the/.

Moratoriums during periods of crisis or emergency to guarantee public health have been upheld by the United States Supreme Court and Michigan Supreme Court, even where such moratoriums interfere with contractual provisions. For example, in 1934, the United States Supreme Court upheld a Minnesota statute placing a moratorium on foreclosures during the depression. The Court held:

> The interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Home Bldg. & Loan Asso. v. Blaisdell, 290 U.S. 398, 437 (U.S. 1934)

Citing this U.S. Supreme Court, the Michigan Supreme Court upheld the Michigan Moratorium Act in the case of **Russell v. Battle Creek Lumber Co.**, 265 Mich. 649, 649-650 (Mich. 1934). The Michigan moratorium on foreclosures was extended for five years until the 1930's depression ended. Similarly, the Federal Housing Authority automatically implements a 90 moratorium on foreclosures whenever the President declares a State of Emergency or Disaster area. HUD Mortgagee Letter 2013-06.

Mayor Duggan, Emergency Manager Orr and the DWSD are only now beginning the process of developing long term plans to insure that water bills are affordable so that Detroiters are guaranteed their rights to this most basic necessity and the DWSD can be assured of a steady revenue stream. The continuation of the water shut-off moratorium and the restoration of water to residents who have already been terminated, is necessary to allow time for such a

plan to be implemented. During this interim period, continuing the moratorium on water shutoffs is legally consistent with the cases cited above to maintain the health and general welfare.

III. Plaintiffs Will Suffer Imminent, Irreparable Harm if the Relief Requested is Denied.

An irreparable harm is one that cannot be remedied by monetary damages. *See, e.g.,* **Obama for Am. v. Husted,** 697 F.3d 423, 436 (6th Cir. 2012) (internal citations omitted). Plaintiffs here do not seek any monetary damages, nor could any monetary sum undo the harms of their being deprived of access to water without appropriate notice and hearing procedures; of their being put at risk of illness or death; or of their losing custody of their children. Instead, to avoid continuation of those harms, Plaintiffs seek to extend the current moratorium on shut-offs during the pendency of this litigation and for DWSD to restore service to those whose service has been terminated since the policy of mass shut-offs began in approximately April 2014.

A. Any Impairment of Plaintiffs' Constitutional Rights Constitutes Irreparable Harm

Plaintiffs and putative class members have been irreparably harmed by having their water shut off without appropriate due process protections, in violation of the Fourteenth Amendment to the United States Constitution. The Supreme Court has held that the loss of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." **Elrod v. Burns,** 427 U.S. 347, 373 (1976); *see also* **Obama for Am.,** 697 F.3d at 436 ("When constitutional rights are threatened or impaired, irreparable injury is presumed."); **ACLU v. McCreary County**, 354 F.3d 438, 445 (6th Cir. 2003) ("[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated."). Here, Plaintiffs and other residents have demonstrated that DWSD has violated and continues to violate their Fourteenth Amendment

right to due process. A prime example of DWSD's continued due process failures is the case of Denise Donaldson, who cares for her bed-ridden mother. *See generally* Donaldson Decl. The Donaldsons received notice that their water would be shut off on August 27, 2014. Denise Donaldson called DWSD on August 20, 2014 to make a payment arrangement for August 29, which was the first day she would be able to make the required 10% down payment, and notified the representative of her mother's condition. Yet, Ms. Donaldson was told that her water would be cut off on August 27 unless she paid that day, and was not notified of any sources of assistance nor of the possibility of seeking an emergency medical postponement. Ms. Donaldson's case demonstrates that, despite the purported 10-point plan, DWSD still does not have the necessary due process protections in place to notify customers of their rights and provide them with a meaningful opportunity to be heard before their water service is shut off. *See supra* Section II.

Additionally, DWSD violated its own policies and procedures, and Plaintiff Nicole Hill's due process right to adequate notice before being deprived of a property interest, when it shut off Ms. Hill's water despite the fact that she was actively disputing the charges on her bill. *See* Compl. ¶¶ 43-44. Additionally, despite the provisions under the 10-point plan extending Call Center hours and allowing "[a]ny resident with a delinquent account [to] enter into a 24-month '10/30/50' payment plan," DWSD customer service representatives repeatedly fail to inform customers with past-due balances that they are eligible to enter into payment plans. *See DWSD 10-point Plan, http://www.dwsd.org/downloads_n/announcements/general_announcements/DWSD-10-point-plan.pdf;* Donaldson Decl. Exh. 5-2 ¶¶ 8-10; Phillips Decl. Exh. 5-5 ¶¶ 10-12. Because Plaintiffs have provided evidence of DWSD's rampant due process violations, and demonstrated that they are likely to succeed on their Fourteenth Amendment due process claims, *see supra*

Section II, the court must find that plaintiffs will suffer irreparable harm if the injunctive relief sought here is denied.

B. Many Detroiters Will Suffer Irreparable Injury to Their Health and Well-Being if the Moratorium is Not Extended

In addition to the constitutional harms Plaintiffs will suffer if their motion for a temporary restraining order is denied, Plaintiffs and putative class members will face an imminent threat of bodily harm, exposure to health hazards, or even death, posed by lack of access to clean, potable water. Plaintiffs Rosalyn Walker and Janice Ward have children who suffer from asthma. *See* Amended Compl. ¶¶ 48, 52. These children sometimes use a nebulizer, which cannot be operated without water, to treat this condition. Disconnected water service in their homes would cause these plaintiffs and their children irreparable harm because they would be unable to use their nebulizers to treat their asthma symptoms, which include an inability to breathe and which can, of course, be very painful and dangerous. Plaintiff Ward has expressed concern about her ability to pay her water bill to avoid shut off in the future, because she was placed on a payment plan she could not afford in 2013 and has frequently fallen behind on her bills since then. *See* Amended Compl. ¶ 53. Similarly, Detroit residents Ethel and Denise Donaldson are at risk of having their water shut off on August 27, 2014. *See* Donaldson Decl. Exh. 5-2 ¶ 8. Due to Ethel Donaldson's health condition, such a shut-off would irreparably harm the Donaldsons. Ethel Donaldson is 92 years old and is confined to her bed, and her daughter, Denise Donaldson, is her caretaker. *Id.* ¶ 4. Water is required to provide nutrients to Ethel Donaldson by way of a feeding tube. If their home loses access to water for even one day, it will be impossible for Denise Donaldson to feed or bathe Ethel Donaldson, putting her at risk of infection, starvation, dehydration, and death. Denise Donaldson attempted to work out payment arrangements with DWSD, but was told by a DWSD representative on August 20, 2014 that the

amount she was able to pay and the time frame in which she could pay it was not sufficient to prevent shut off. *Id.* ¶ 9. Thus, DWSD's current policies and practices are insufficient to prevent irreparable harm to Plaintiff Ward or to Ethel and Denise Donaldson if the relief sought here is not granted.

Courts have agreed that the type of health risks described above constitute irreparable harm. In **Harris v. Board of Supervisors**, the Ninth Circuit upheld an order granting an injunction barring a county from reducing the number of beds at one hospital that served indigent patients and closing another, noting that plaintiffs had provided the district court with "compelling evidence" of irreparable harm, including "pain, infection, amputation, medical complications, and death due to delayed treatment." **Harris v. Bd. of Supervisors**, 366 F.3d 754, 766 (9th Cir. 2004). In another case, a federal district court granted plaintiff inmates an injunction to protect them from exposure to asbestos, noting that "danger to the health of these inmates" was a "continuing hazard" and constituted irreparable injury. *See* **Webster v. Sowders,** 846 F.2d 1032, 1036-1037 (6th Cir. 1988) (internal quotation marks omitted). Thus, all of the health concerns raised by Plaintiffs and putative class members here similarly constitute irreparable harms, and weigh in favor of an order from this court prohibiting shut offs and restoring water service to those without during pendency of this litigation.

Furthermore, as noted above, not only Plaintiffs, but the entire City of Detroit, is likely to be irreparably harmed if the moratorium is not extended due to the public health crisis created by water shut offs. *See supra* Section II.C.

C. Even a Temporary Loss of Custody of One's Children Constitutes Irreparable Harm

Finally, many Plaintiffs and putative class members who are parents are fearful that if their water is turned off and they do not have the funds to get service restored immediately,

Children's Protective Services (CPS) will attempt to take custody of their children. Plaintiff Nicole Hill, for example, had her water shut off on May 16, 2014. Amended Compl. ¶ 43. Because she feared that CPS would take custody of her children, she sent them to stay with neighbors and relatives. *Id.* ¶ 45. On July 14, 2014, Plaintiffs Michigan Welfare Rights Organization and People's Water Board were able to help Ms. Hill get her water service restored. However, Ms. Hill has received a second shut off notice since then and, because her monthly payments remain so high, she remains fearful that her water service will be shut off the next time she is unable to pay. Similarly, Plaintiff Maurikia Lyda made alternate living arrangements for her children while her home was in shut-off status to avoid having CPS take custody of them. Compl. ¶ 35. Her water service has since been restored, but her bills are still unaffordable on her monthly income comprised of Social Security and federal food assistance benefits.

Ms. Hill's and Ms. Lyda's concerns that they are at risk of losing custody of her children if her water is shut off are not hypothetical or speculative. A manual by the Michigan Department of Human Services advises those who are required to report child abuse and neglect to report whether a home has running water, among other questions, in cases of physical neglect. State of Michigan Department of Human Services, *Mandated Reporters' Resource Guide* Appendix 2, DHS Pub 112 (Rev. 2-13), www.michigan.gov/documents/dhs/Pub-112_179456_7.pdf. Any Detroit resident with children whose water is shut off, and who is unable to make the required payment to restore service, is at risk of being harmed by having CPS initiate proceedings to remove the children from the home. Courts have held that even a temporary deprivation of custody of one's children constitutes an irreparable harm. *See* **Rocha v. Florez**, 2014 U.S. Dist. LEXIS 10287 (D. Nev. Jan. 28, 2014) Exh. 6-6 ("[E]ven a single hour of wrongfully caused delay is irreparable because the ultimate relief sought is the return of the

child. Every moment of time the custodial parent wrongfully spends away from or without control of the child is time that cannot be replaced.")

IV. Granting Relief will not Cause Substantial Harm to Defendants or Others

Granting the relief sought will not cause substantial harm to defendants or others. DWSD has still been able to collect on delinquent accounts since the start of the moratorium. "Since DWSD began shutting off service in March, nearly $3.1 million in past due amounts have been collected, approximately $506,000 of that since the moratorium was put into effect nearly a month ago." *See* Press Release, *United Way, Ford Motor Company Fund and General Motors Foundation Donate $200K to the Detroit Water Fund* (Aug. 18, 2014), http://www.detroitmi.gov/News/tabid/3196/ctl/ReadDefault/mid/4561/ArticleId/516/Default.aspx. Therefore, maintaining the status quo by extending the moratorium should not pose a substantial burden. Furthermore, where the potential harm to one party is purely financial, while the other is human pain and suffering, relief should be granted to the party facing pain and suffering and not to the purely financial interest. *See* **Lopez v. Heckler**, 713 F.2d 1432, 1437 (9th Cir. 1983) (With respect to an injunction restoring Social Security disability benefits to thousands of disabled and infirmed plaintiffs, the court noted: "Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.").

V. The Public Interest will be Served by Granting the Requested Relief.

Access to clean, affordable water is clearly in the public interest. Michigan courts have observed that water is a necessity and its provision is a public service. *See* **Ten Broek v. Miller**, 240 Mich. 667 (Mich. 1927); **Mitchell v. Negaunee,** 113 Mich. 359, 366 (Mich. 1897) ("Every inhabitant [of a city] needs water . . . and therefore the furnishing of water has been considered a

public service.") (internal citations omitted). Furthermore, as described in Sections II and III above, denial of water to Detroit residents will result in a public health crisis.

Additionally, as noted above, moratoriums during periods of crisis or emergency to guarantee public health have been upheld by the United States Supreme Court and Michigan Supreme Court, even where such moratoriums interfere with contractual provisions. *See* **Home Bldg. & Loan Asso. v. Blaisdell,** 290 U.S. 398, 437 (1934); **Russell v. Battle Creek Lumber Co.**, 265 Mich. 649, 649-650 (Mich. 1934). The Michigan moratorium on foreclosures was extended for five years until the end of the Great Depression.

VI. CONCLUSION

For the reasons stated herein, Plaintiffs pray the Court will grant the relief stated in the Motion for a Temporary Restraining Order.

Respectfully submitted,

FOR THE PLAINTIFFS:
By:_/s/_*alice b. jennings*_____
Alice B. Jennings, Esq.
EDWARDS & JENNINGS, P.C.
Cadillac Tower Building
65 Cadillac Square, Suite 2710
Detroit, MI 48226
(313) 961-5000
ajennings@edwardsjennings.com

By:_/s/_*kurt thornbladh*_____
KURT THORNBLADH P25858
Thornbladh Legal Group PLLC
7301 Schaefer
Dearborn MI 48126
(313) 943 2678
kthornbladh@gmail.com

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