

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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

MICHIGAN COUNCIL 25 OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, MOTION FOR ENTRY OF AN ORDER MODIFYING THE AUTOMATIC STAY SOLELY TO ALLOW ADMINISTRATIVE LAW JUDGE TO EXECUTE HIS OPINION AND LIQUIDATE DAMAGE AWARD BEFORE HE RETIRES ON OCTOBER 4, 2013

The Michigan Council 25 of the American Federation of State, County & Municipal Employees, AFL-CIO (“**AFSCME**”), submits this motion (the “**Motion**”) for entry of an order pursuant to sections 362(d) and 922(b) of title 11 of the United States Code (the “**Bankruptcy Code**”) modifying the automatic stay imposed pursuant to sections 362 and 922 of the Bankruptcy Code solely to permit the administrative law judge (“**ALJ**”), who is presiding over legal proceedings against the above-captioned debtor (the “**Debtor**”) in a matter before the Michigan Employment Relations Commission (“**MERC**”), to execute his recommended opinion and order before his October 4, 2013 retirement. The requested relief would assist in liquidating the dollar amount of an award made pursuant to said legal proceedings, thereby facilitating this Court’s treatment of that ministerial question by referring it to the statutorily empowered regulatory entity which has particular expertise in the subject matter and which is intimately familiar with the facts and law at issue as reflected in an already-issued bench decision by one of its ALJs.

JURISDICTION, VENUE AND BASIS FOR RELIEF REQUESTED

1. The Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 362 and 922 of the Bankruptcy Code and Bankruptcy Rule 4001.

BACKGROUND

3. On February 8, 2013, ALJ Doyle O'Connor of the MERC heard oral argument on and decided to recommend to the MERC for entry of a final order a resolution in AFSCME's favor of an unfair labor practice charge (the "**ULP**") filed by AFSCME against the Debtor (Case Number C12-E-092, Docket Number 12-000777).¹ A transcript of the hearing before ALJ O'Connor is attached hereto as Exhibit A, and the ALJ's "bench opinion, which will be followed by a written opinion" in AFSCME's favor appears at pages 37-53 of that attachment.

4. ALJ O'Connor's decision "restore[s] to the Pension Board" of the Detroit General Retirement System ("**GRS**") "the discretion previously exercised . . . regarding [distribution of annual] excess earnings" of GRS to "affected retirement plan participants" and explicitly orders that these participants "be made whole by the City to the extent that there is any practical impediment to the Pension Board making those participants whole otherwise." *Id.* at 50.

5. Following ALJ O'Connor's February 8 bench decision, the parties submitted supplemental briefing on the appropriate remedy to be ordered by the ALJ.

¹ AFSCME filed the ULP under the Michigan Public Employment Relations Act ("**PERA**"), MCL 423.201 *et seq.*, which provides that an administrative law judge hold a hearing on all unfair labor practice charges and issue a recommended decision and order of the MERC, which is then reviewed by the three-member MERC itself for issuance of a final order.

6. As of July 18, 2013, ALJ O'Connor had not issued his written decision which, among other things, would have referred this matter to the MERC to liquidate the dollar amount of the award. *Id.* at 50-51.

7. On July 18, 2013, the Debtor filed its chapter 9 petition.

8. Since July 18, 2013, ALJ O'Connor has not issued his written decision – which would assisting in liquidating a dollar amount of the “make whole” remedy he ordered orally – perhaps as a result of his view of the effect of the automatic stay on the ULP proceeding before the MERC.

RELIEF REQUESTED

9. AFSCME hereby moves this Court to modify the automatic stay to allow this matter to proceed before the MERC for the sole purpose of permitting the ALJ to execute his recommended decision, including affixing any damage award, before he retires on October 4, 2013.

ARGUMENT

10. A movant has the initial burden of showing a legally sufficient basis for lifting the automatic stay. *See In re M.J. & K. Co.*, 161 B.R. 586, 590 (Bankr. S.D.N.Y. 1993). Once the movant shows such cause exists, the debtor must prove that it is entitled to the protections of the stay. *See id.*; *In re Wedtech Corp.*, 87 B.R. 279, 289 (Bankr. S.D.N.Y. 1988).

11. In determining whether cause exists under section 362(d)(1) of the Bankruptcy Code to lift the automatic stay to allow litigation to proceed in another tribunal, courts consider a number of factors (the “**Sonnax Factors**”) enumerated by the Second Circuit in *In Sonnax Industries, Inc. v. Tri Component Products Corp.* (*In re Sonnax Indus., Inc.*), 907 F.2d 1280 (2d Cir. 1990). *See, e.g., In re ExpressTrak, LLC*, 2004 WL 3735126, at *8 (Bank. E.D. Mich. Jan. 20, 2004) (*Shefferly, J.*) (applying *Sonnax Factors*). Those factors are:

- (1) whether relief would result in a partial or complete resolution of the issue;
- (2) lack of any connection with or interference with the bankruptcy case;
- (3) whether the other proceeding involves the debtor as a fiduciary;
- (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- (5) whether the debtor's insurer has assumed full responsibility for defending it;
- (6) whether the action primarily involves third parties;
- (7) whether litigation in another forum would prejudice the interest of the creditors;
- (8) whether the judgment claim arising from the other action is subject to equitable subordination;
- (9) whether the movant's success in the other proceeding would result in a judicial lien avoidance action by the debtor;
- (10) the interests of judicial economy and the expeditious and economical resolution of litigation;
- (11) whether the parties are ready for trial in the other proceeding; and
- (12) impact of the stay on the parties and the balance of harms.

Sonnax, 907 F.2d at 1286. Further, in determining whether cause exists to grant relief from the automatic stay under section 922, section 362(d)(1) is illustrative.

12. “Not all of these factors will be relevant in every case,” *Mazzeo v. Lenhart (In re Mazzeo)*, 167 F.3d 139, 143 (2d Cir. 1999), and a court need not give equal weight to each factor. *In re Burger Boys, Inc.*, 183 B.R. 682, 688 (S.D.N.Y. 1994). As set forth below, the relevant *Sonnax* Factors weigh in favor of modifying the automatic stay merely to permit Council 25 to liquidate the amount in controversy before a tribunal with special expertise in the relevant statutory cause of action and particular knowledge of the underlying facts and law at issue in the ULP.

13. First, allowing the ALJ to issue a written opinion before his departure is appropriate. Because the ULP was filed long before the chapter 9 case was commenced, and because “the litigation that has taken place in [the MERC] has been extensive,” the relief requested herein is warranted. *See In re ExpressTrak*, 2004 WL 3735126, at *9.

14. Second, the ULP is not connected to the bankruptcy case and would not affect proceedings before this Court other than to heighten the efficiency of those proceedings by furthering the process of placing a dollar amount on what the Debtor owes in connection with the ULP.

15. Third, and most important, the MERC is a specialized tribunal with regulatory expertise assigned by statute specifically – and exclusively – to hear this cause of action. The “MERC alone has jurisdiction and administrative expertise to entertain and reconcile competing allegations of unfair labor practices and misconduct under the PERA.” *Kent Cnty. Deputy Sheriff’s Ass’n v. Kent Cnty. Sheriff*, 463 Mich. 353, 359; 616 NW2d 677 (2000) (quoting *Rockwell v. Crestwood Sch. Dist.*, 393 Mich. 616, 630; 227 NW2d 736 (1975)). Both for this reason and “because of the pendency of the litigation” and “extensive activity that has already taken place in” the MERC, it has special “familiarity . . . with the substantive laws governing the disputes between the parties,” as well as the facts to apply to that law, and thus it will be ideal for the MERC to liquidate the dollar amount in controversy here. *See In re ExpressTrak*, 2004 WL 3735126 at *11.

16. Fourth and similarly, the interests of judicial economy and the expeditious and economical resolution of the ULP would best be served by permitting the ALJ to execute the opinion. MERC and the assigned ALJ are intimately familiar with the facts and law at issue and

can most economically aid this Court, and its busy docket, with resolution of the dollar amount in controversy.

17. Notably, the Supreme Court reached an analogous conclusion in *Nathanson v. N.L.R.B.*, 344 U.S. 25 (1952), where the Court held that a bankruptcy court must defer to the National Labor Relations Board (the “**NLRB**”) for liquidation of federal unfair labor practice claims. The NLRB had found the employer guilty of unfair labor practices and ordered payment of back wages. While an action to enforce the order was pending in the court of appeals, an involuntary bankruptcy petition was filed against the employer. The court of appeals subsequently enforced the NLRB order and the NLRB filed a claim in bankruptcy. The bankruptcy court denied the claim and the Supreme Court reversed on the following rationale:

The bankruptcy court normally supervises the liquidation of claims. But the rule is not inexorable. A sound discretion may indicate that a particular controversy should be remitted to another tribunal for litigation. And where the matter in controversy has been entrusted by Congress to an administrative agency, the bankruptcy court normally should stay its hand pending an administrative decision.... It is the Board, not the referee in bankruptcy nor the court, that has been entrusted by Congress with authority to determine what measures will remedy unfair labor practices.

Id. at 30 (citations omitted).

18. Relying on *Nathanson*, the Sixth Circuit has noted that “courts which have considered this issue have generally concluded that NLRB unfair labor practice proceedings are excepted from the automatic stay by § 362(b)(4).” *N.L.R.B. v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 941 (6th Cir. 1986) (collecting cases) (holding that the NLRB could enforce decision of unfair labor practice charge despite respondent employer’s filing for bankruptcy under chapter 11).

19. As in *Nathanson*, here it is the MERC which has been entrusted by statute with special authority to determine what measures will remedy unfair labor practices. *See Kent Ctny.*

Deputy Sheriff's Ass's, supra. Like the NLRB, the MERC thus possesses special expertise and investment which make it best suited to liquidate the dollar amount for this Court.

20. Moreover, “the legislative history of the statute states that § 362(b)(4) excepts a governmental unit from the automatic stay where it is ‘attempting to fix damages for violation’ of a police or regulatory law.” *Edward Cooper Painting*, 804 F.2d at 943. In contrast, “only attempts to *enforce* money judgments are subject to the automatic stay,” *id.* (emphasis in original), while the entry of such judgments by statutorily designated governmental tribunals enforcing regulatory regimes are permitted to proceed concurrent with the stay.

21. However, to be clear, AFSCME is not asking this Court to determine at this time one way or the other whether, as a rule, state law unfair labor practice charges are subject to the automatic stay, and AFSCME reserves all its rights on this issue.

22. Instead, AFSCME is merely asking this Court to allow the MERC proceedings to run their course, which will aid this Court’s resolution of the chapter 9 case by permitting the tribunal of special expertise, which has already made a substantial investment in the matter, to finalize a preliminary conclusion on the merits, which was announced from the bench long before the Debtor filed its chapter 9 petition.

WAIVER OF STAY

23. Bankruptcy Rule 4001(a)(3) provides that “[a]n order granting a motion for relief from an automatic stay . . . is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 4001(a)(3). A waiver of the requirements of Bankruptcy Rule 4001(a)(3) is appropriate under the circumstances to permit the ALJ to execute the opinion before his October 4th departure.

CONCLUSION

24. For the reasons stated above, the Court should modify the automatic stay such that it does not prohibit the ALJ at the MERC from fixing a dollar amount in damages to the recommended bench decision on the merits already entered in AFSCME's favor against the Debtor by ALJ O'Connor on February 8, 2013.

25. Such an order would not involve any further effort of the parties in that litigation, and would permit this Court to better evaluate that award, in the orderly processing of such. The ALJ is encouraged to consider the above standards in his effort at evaluating the claim.

WHEREFORE, AFSCME respectfully requests the entry of an order clarifying and/or modifying the automatic stay as requested herein and for such other and further relief as this Court deems just.

Dated: September 23, 2013

LOWENSTEIN SANDLER LLP

By: /s/ Sharon L. Levine

Sharon L. Levine, Esq.

John K. Sherwood, Esq.

Philip J. Gross, Esq.

65 Livingston Avenue

Roseland, New Jersey 07068

(973) 597-2500 (Telephone)

(973) 597-6247 (Facsimile)

slevine@lowenstein.com

jsherwood@lowenstein.com

pgross@lowenstein.com

-and-

Herbert A. Sanders, Esq.

THE SANDERS LAW FIRM PC

615 Griswold St., Suite 913

Detroit, MI 48226

(313) 962-0099 (Telephone)

(313) 962-0044 (Facsimile)

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hsanders@miafscme.org

-and-

Richard G. Mack, Jr., Esq.
Miller Cohen, P.L.C.
600 West Lafayette Boulevard
4th Floor
Detroit, MI 48226-3191

*Counsel to Michigan Council 25 of the American
Federation of State, County and Municipal
Employees (AFSCME), AFL-CIO*

-9-

SUMMARY OF ATTACHMENTS

The following documents are attached to this Motion, labeled in accordance with Local Rule 9014-1(b).

Exhibit 1	Proposed Form of Order
Exhibit 2	Intentionally Omitted (<i>Ex Parte</i> Motion to be Filed Concurrently)
Exhibit 3	Intentionally Omitted (No Brief Required)
Exhibit 4	Certificate of Service
Exhibit 5	Intentionally Omitted
Exhibit 6	Documentary Exhibit
Exhibit A	Transcript of Hearing Before Administrative Law Judge Doyle O'Connor of the Michigan Employment Relations Commission Dated February 8, 2013

Exhibit 1

Proposed Form of Order

3. This Court finds that Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure is waived for purposes of the relief granted in this Order.

Exhibit 4

Certificate of Service

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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

CERTIFICATE OF SERVICE

The undersigned certifies that on September 23, 2013, *The Michigan Council 25 of the American Federation of State, County & Municipal Employees, AFL-CIO Motion for Entry of an Order Modifying the Automatic Stay Solely to Allow Administrative Law Judge to Execute His Opinion and Liquidate Damage Award Before He Retires on October 4, 2013* was filed with the Clerk of the Court using the CM/ECF system, which provides electronic notification of such filing to all counsel of record.

Dated: September 23, 2013

/s/ Keara M. Waldron
Keara M. Waldron, Esq.
LOWENSTEIN SANDLER LLP
65 Livingston Avenue
Roseland, New Jersey 07068
(973) 597-2500 (Telephone)
kwaldron@lowenstein.com

Exhibit 6

Documentary Exhibit

Exhibit A

AFSCME COUNCIL 25 v. CITY OF DETROIT

AFSCME COUNCIL 25 MOTION HEARING

February 8, 2013

Prepared by



Depos@NetworkReporting.com
Phone: 800-632-2720
Fax: 800-968-8653
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STATE OF MICHIGAN

DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH

EMPLOYMENT RELATIONS COMMISSION

In the matter of:

AFSCME Council 25,

Charging Party,

v

Case No.: C12-E-0092

Docket No.: 12-000777

City of Detroit, a Michigan
Municipal Corporation,

Respondent.

/

MOTION HEARING

BEFORE DOYLE O'CONNOR, ADMINISTRATIVE LAW JUDGE

3026 West Grand Boulevard, Detroit, Michigan

Friday, February 8, 2013, 9:00 a.m.

APPEARANCES:

For the Charging Party:

MR. RICHARD G. MACK, JR. (P58657)
Miller Cohen, PLC
600 West Lafayette Boulevard, Floor 4
Detroit, Michigan 48226
(313) 964-4454

For the Respondent:

MS. LETITIA C. JONES (P52136)
Assistant Corporation Counsel
City of Detroit Law Department
2 Woodward Avenue, Suite 500
Detroit, Michigan 48226
(313) 237-3002

Also Present:

Edward L. McNeil, AFSCME Council 25
Anita Berry



800-632-2720

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**Diane H. Draugelis, CER 2530
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TABLE OF CONTENTS

1		
2		PAGE
3		
4	Statement by Mr. Mack.	10,35
5	Statement by Ms. Jones	28,37

EXHIBIT INDEX

6			
7			
8			PAGE
9			
10		IDENTIFIED	RECEIVED
11			
12	Commission Exhibit 1.	7	9
13	(2008-2012 Collective Bargaining Agreement Excerpt)		
14	Commission Exhibit 2.	7	9
15	(11-8-2011 Letter from Crittendon to City Council)		
16	Commission Exhibit 3.	8	9
17	(10-10-2011 Letter from Crittendon to City Council)		
18	Commission Exhibit 4.	8	9
19	(Letter from Corley to City Council)		
20			
21			
22			
23			
24			
25			

(Exhibits retained by Judge O'Connor)



STATEWIDE COURT REPORTERS

800-632-2720

1 Detroit, Michigan

2 Friday, February 8, 2013 - 9:11 a.m.

3 JUDGE O'CONNOR: We're here on Michigan AFSCME
4 Council 25, Charging Party, and City of Detroit in the MERC
5 Case Number C12-E-092, Docket Number 12-000777. Doyle
6 O'Connor, the Administrative Law Judge with the Michigan
7 Administrative Hearing System hearing this case on behalf of
8 the Michigan Administrative -- no; sorry -- on behalf of
9 Michigan Employment Relations Commission.

10 Appearance of the counsel, starting with Charging
11 Party.

12 **MR. MACK: Richard Mack, your Honor.**

13 **MS. JONES: Letitia Jones, on behalf of the City**
14 **of Detroit. Seated to my right is Anita Berry, from the**
15 **Labor Relations Department, City of Detroit.**

16 JUDGE O'CONNOR: Good morning.

17 MS. BERRY: Good morning.

18 JUDGE O'CONNOR: We're here on a motion -- on
19 actually cross motions for summary judgment. I have
20 reviewed the pleadings. I have a couple introductory
21 comments, as Mr. Mack is accustomed to my doing.

22 The Union's motion for summary disposition in this
23 case relates to the adoption of a new City ordinance which
24 prohibited the General Retirement System Pension Board, NESAB
25 Board, which as I understand handles pension questions for

1 all City employees or virtually all City employees other
2 than police and fire. Anyway, the ordinance prohibited the
3 Board from granting a rate of return on annuities greater
4 than the actual return, and which had the apparent impact of
5 precluding the issuance of the 13th checks to retirees.

6 The Employer has responded and asserted its own
7 cross motion for summary disposition. There's no dispute
8 over the fact that a changed ordinance was adopted in
9 November of 2011 and that a timely charge was filed.
10 There's likewise no dispute over the fact that the terms of
11 the pension plan are mandatory subjects of bargaining, which
12 the City concedes in its brief.

13 It's alleged, and seemingly undisputed, that in
14 November 2011 the City adopted a pension ordinance to be
15 effective December 20, 2011 which altered certain prior
16 practices of the Pension Board. That change occurred
17 without bargaining and during the term of an existing
18 collective bargaining agreement. That existing collective
19 bargaining agreement incorporated by reference the prior
20 version of the pension ordinance and City charter
21 provisions.

22 I want to note, because it's a procedural question
23 of some importance, City raised the concern with the
24 identity of the Charging Party. The motion was brought as
25 captioned solely on behalf of AFSCME Council 25 and its

1 several locals and not on behalf of the so-called coalition
2 of Detroit Unions, to which a passing reference is made in
3 the original charge, even though the coalition was not
4 listed as a charging party. Unless I'm told otherwise
5 immediately, my consideration of arguments is limited to
6 AFSCME Council 25 and its various subordinate locals.

7 MR. MACK: That is correct, your Honor.

8 JUDGE O'CONNOR: Okay. I thought so, and I
9 thought it was good the City raised it because the worst
10 thing possible is to end up not knowing who is fighting over
11 what.

12 All right. Based on the pleadings I have relied
13 on the terms of several documents which both sides relied
14 on, and I'm going to list them, and I guess I will
15 denominate them as exhibits, even though I don't have copies
16 prepared. You both have them.

17 So Commission Exhibit 1 is the 2008 to 2012
18 Collective Bargaining Agreement, which I think is attached
19 in part to one of the pleadings.

20 MS. JONES: Respondent Pleading Number -- Letter
21 A. I'm sorry.

22 JUDGE O'CONNOR: All right. And that's an
23 excerpt.

24 MR. MACK: Yes.

25 JUDGE O'CONNOR: Is it acceptable to both parties

1 that I just treat the excerpt as the exhibit or does
2 somebody want to submit the whole contract?

3 MR. MACK: I think the excerpt is fine.

4 JUDGE O'CONNOR: Okay. We'll mark the excerpt,
5 and I will clean up the file on this later. We'll mark the
6 excerpt as Commission Exhibit 1 as attached to the
7 Employer's brief at Tab A. I'll just copy that, mark it as
8 Commission Exhibit 1 and put it in the file.

9 (Commission Exhibit 1 marked)

10 JUDGE O'CONNOR: Commission Exhibit 2 will be the
11 November 8, 2011 letter by Corporation Counsel Crittendon --
12 I guess I should say former Corporation Counsel
13 Crittendon -- to the City Council attaching the then
14 proposed ordinance, and that's attached to somebody's -- I
15 think the City's brief again.

16 MS. JONES: Exhibit C?

17 JUDGE O'CONNOR: Yes; Exhibit C to the City's
18 brief will be Commission Exhibit 2.

19 (Commission Exhibit 2 marked)

20 JUDGE O'CONNOR: There's then a Commission Exhibit
21 3 will be an October 10, 2011 letter to the City Council by
22 Crittendon, which is at City Tab D.

23 MS. JONES: As well as AFSCME D.

24 JUDGE O'CONNOR: Right. And both sides relied on
25 all these things in whole or in part.

1 (Commission Exhibit 3 marked)

2 JUDGE O'CONNOR: 4, Commission Exhibit 4, will be
3 a letter from City Council Financial Analysis Division
4 Director Corley -- that's C-o-r-l-e-y -- to the City
5 Council, which incorporated Corley's description of the
6 pension plan's prior practice, and attached to that was an
7 analysis and related charts prepared by the City Council for
8 actuary -- by Actuary Joseph Esuchanko -- that's
9 E-s-u-c-h-a-n-k-o. The Union attached one of Esuchanko's
10 charts to its brief as I recall.

11 MR. MACK: That was --

12 JUDGE O'CONNOR: It looked the same.

13 MR. MACK: Yeah, it was similar data. It was not
14 actually an Esuchanko chart, it was just a chart provided to
15 the Union by the City at some point.

16 JUDGE O'CONNOR: Anyway, I'm marking -- and that's
17 the Corley/Esuchanko document is at Tab E of the City's
18 brief.

19 (Commission Exhibit 4 marked)

20 JUDGE O'CONNOR: All right. Has anybody got any
21 objection to any of those?

22 MR. MACK: No.

23 MS. JONES: That's fine.

24 JUDGE O'CONNOR: They lay the ground work for how
25 we got where we are today. As I understand it, the Union's

1 assertion is that the change was an unlawful unilateral
2 change in an existing condition of employment, and a
3 repudiation of the then in place collective bargaining
4 agreement.

5 The Union's motion is additionally supported by
6 facially competent affidavit. Oh, I should note -- I don't
7 think I expressed this. I am admitting Commission Exhibits
8 1 through 4.

9 (Commission Exhibits 1 through 4 received)

10 MR. MACK: Okay.

11 JUDGE O'CONNOR: The City earlier asserted the
12 defense that the question of the Pension Board's exercise of
13 discretion in the distribution of excess earnings was not an
14 established condition of employment, and rather was in
15 essence an ultra vires act by the Board. The Union
16 addressed that assertion at least in part by its reliance on
17 the decision in AFSCME v Detroit, 218 Mi App 263, 1996, in
18 which the City prevailed. In that case the City had sought
19 a similar change regarding distribution of excess earnings,
20 in that case via charter amendment, and according to the
21 Court, the City acknowledged at the time that no such change
22 can actually be implemented without first bargaining because
23 the then current system of distribution of earnings was an
24 established condition of employment.

25 As both parties are presumably aware, the wisdom

1 of the prior practice and the wisdom of the ordinance change
2 are not issues before me for review. The only question
3 before MERC is whether a change in mandatory conditions of
4 employment was implemented in an unlawful manner.
5 Similarly, the wisdom of the Court of Appeals decision in
6 1996 was not before me. It's a published decision involving
7 these same two parties.

8 All right. Unless there's any procedural
9 questions, issues, the Union filed the first motion, so
10 you're going first.

11 MR. MACK: Thank you, Judge. Judge, you've laid
12 out clearly the background concerning the nature of this
13 dispute. This is a dispute concerning the practice that has
14 been going on as the City even acknowledges, since the early
15 '80's concerning the distribution of earnings from
16 investments of the City of Detroit Retirement System. The
17 outline of exactly what has been happening since the early
18 '80's is as follows.

19 The Retirement Board, which is appointed in large
20 part by individuals who are either elected from
21 employment -- positions of employment with the City of
22 Detroit retirees, and there are some appointees from the
23 mayor and the City Council, but the majority of the Board
24 represents either employees or retirees. This Board will
25 have an actuary establish an actuarial rate of return,

1 essentially an expected rate of return as to how the
2 investments of the Retirement System should perform in the
3 market. In the event that those investments perform above
4 that level -- 7.9 percent has been the level for the last I
5 think almost 10 years -- what the Board will then do is
6 treat the earnings above that level of performance in what
7 are called excess earnings. The Board then decides to
8 distribute those excess earnings in three different ways.
9 They will allocate a portion of the excess earnings to
10 retirees into what is known as the 13th check. Usually came
11 around December. This is just additional check going to
12 retirees. They will allocate a portion of those earnings to
13 active employees as an enhancement into their annuity
14 accounts.

15 Describing that a bit, active employees have
16 options to contribute either three, five or seven percent of
17 their salary into an account, and the City contributes some
18 as well. For years when the Retirement System performed
19 above that actuarial estimated percentage, 7.9 percent for
20 instance, a portion of those excess earnings are given to
21 those active employees into their annuity accounts so that
22 the interest rate of investment for purposes of that year in
23 the annuity account is enhanced.

24 So, for instance, if normally the market performed
25 at "X" percent for that year, the City will treat the

1 earning in the annuity account as a little bit more so that
2 basically they get more money into the annuity account, and
3 it's cash in their pocket essentially.

4 And then the third way that they allocate these
5 excess earnings is by having the City's contribution to the
6 Retirement System reduced by a certain amount by whatever is
7 remaining. Every year the City makes -- actually, every
8 month -- the City makes a contribution into the Retirement
9 System. The City general fund makes a contribution into the
10 Retirement System representing its liability toward that
11 system for employees on the rolls who are expected to be
12 retiring. And it makes that -- the Retirement System Board
13 would take the third portion of the excess earnings and
14 reduce what the City is responsible for contributing of
15 that. And this was a practice that as the City indicated in
16 an affidavit that was attached to its motion, and even
17 earlier, had been going on for decades. I note specifically
18 in Tab B, the affidavit of Marilyn Roc Berdijo, and she
19 indicated that she worked for the General Retirement System
20 for approximately 24 years and three months, and she has
21 been the assistant executive director of the General
22 Retirement System since January of last year, and she says:

23 "I can testify that in each year when there were
24 excess earnings, the Board would make decisions on
25 crediting those accounts within the retirement system

1 with the earnings. This is the understanding that the
2 term excess earnings -- excess is defined as funds
3 above the actuarially assumed rate."

4 So there's an acknowledgment that this happened.
5 There's an acknowledgment that the Board made these
6 distributions. Such an acknowledgment, Judge, that in the
7 case that you just referenced, which I have is Senior
8 Accountants Analyst and Appraiser's Association versus City
9 of Detroit, 218 Mi App 263, in that case I think it's
10 important for two reasons that I highlight now for you.

11 The first is that the leaders of the City of
12 Detroit at that time felt it important to end this practice.
13 They felt that the only way they could end the practice of
14 making the distributions into these funds, the three-way
15 distribution of excess earnings that I've just described, is
16 by placing a charter amendment before the city voters to end
17 the practice. So, in other words, it was their opinion that
18 this practice was not only an established practice as we
19 know in labor law, but it was something that was so
20 established that you couldn't change it without a charter
21 amendment.

22 The second part, of course, is that in that
23 case -- I'll get to it a little bit later -- but they
24 acknowledged that they did in fact have to bargain the
25 change with the Union in the event that the charter

1 amendment was successful, which of course, gets into our
2 theory of judicial estoppel.

3 So that's the practice. The facts, as you
4 indicated, are really beyond dispute. We have the affidavit
5 of June Nickleberry. Her real name is Armella Nickleberry.
6 I don't think I remembered that. But she's the president of
7 Local 214, as well as the president of the City of Detroit
8 Presidents. So there's an organization City of Detroit
9 Presidents; all of the AFSCME presidents who represent City
10 of Detroit employees have an organization where all 18 of
11 them together, and she's the head of that group as well.
12 And she actually pulled her annuity statements for several
13 years that she could locate them and demonstrated the
14 existence of this practice where, in fact, when the returns
15 were above 7.9 percent, her annuity reflected an investment
16 beyond that amount. And in one year, as an example,
17 paragraph three of her affidavit, the investment was 15.9
18 percent.

19 So the other part to this practice, Judge, it's
20 important to note is that when there was a return in the
21 market that was below the expected return, assumed rate of
22 return, 7.9 percent as the example, the annuity account and
23 the retirees still received some -- I'm sorry. The annuity
24 account still received some contribution. So, in other
25 words, the 7.9 percent, the expected rate of return was seen

1 as a floor, so any investment rate of return below that
2 amount, it was still treated as if 7.9 percent had in fact
3 been realized in the market investments irrespective of what
4 was actually realized.

5 This ordinance change changed things in two
6 respects with respect to this practice. The easiest way to
7 describe it with respect to the annuity is that it took the
8 7.9 percent from being a floor to being a ceiling. And as
9 far as the 13th check, it eliminated the 13th check practice
10 altogether. So this was done, as you've indicated, and it's
11 not been disputed without bargaining really, without notice
12 as Ms. Nickleberry indicates, the president of Detroit
13 Presidents, she would have been one of the individuals
14 contacted if the City wanted to alert the unions of the
15 potential change in practice for the purpose of bargaining.
16 Of course, at that time they were in the middle of a
17 contract, so under law, there really was no obligation of
18 the Union to have bargained. But nonetheless, the City did
19 not attempt to make efforts at bargaining, but merely went
20 forward with the change, introduced it, and as of November
21 the 30th, the new ordinance came into effect which
22 eliminated the floor of the expected rate of return for the
23 annuity accounts, and as a matter of fact, it created it as
24 a ceiling, so now for annuity accounts, in the event that
25 there is a rate of return that's above 7.9 percent, the

1 investment -- let me phrase it right. The annuity accounts
2 only seeks 7.9 percent. So if there is a, for instance, as
3 she testified in the event of -- I think it was just this
4 past year in 2012 -- there was a -- her paragraph five of
5 her affidavit indicates that her understanding is that the
6 GRS rate of return for its investments would have been 20.9
7 percent. However, the annuity investment rate was now
8 capped based on the ordinance at 7.9 percent. And the
9 ordinance language lays that out clearly that it is now
10 capped. So the expected rate of return that's determined by
11 the actuary went from being a ceiling -- went from being a
12 floor to a ceiling. And that actually, Judge, amounts to a
13 taking of sorts. If I'm a City employee and I put my money
14 into an annuity and that annuity performs beyond 7.9
15 percent, the City is still capping me at 7.9 percent
16 regardless of what my money actually did in the market. But
17 you're not dealing with Constitutional issues, you're
18 dealing with parity issues, not unless it's a cap and it's a
19 significant change which results in a significant loss.

20 If you look at the charts that have been provided
21 by both sides in what you've deemed Exhibit B, I believe it
22 is.

23 JUDGE O'CONNOR: 4.

24 MR. MACK: 4. I'm sorry.

25 JUDGE O'CONNOR: That's Corley/Esuchanko.

1 MR. MACK: Yes.

2 JUDGE O'CONNOR: Is that Tab E on the City's
3 brief?

4 MR. MACK: Yes. Thank you. You can see the value
5 of what this actuary lays out was actually contributed and
6 should have been contributed. And he lays out that there is
7 this is -- page nine of his report, the bottom indicates,
8 "The approximated accumulated cost to the City due to excess
9 earnings being distributed to DGRS, Detroit General
10 Retirement Service members, rather than being applied to the
11 contractual DGRS benefits is 1.9 to 1.2 billion dollars."

12 JUDGE O'CONNOR: That's a lot of money.

13 MR. MARK: So over the course of time, it's a lot
14 of money. And again, this was a practice that was set up
15 decades ago by City leadership, consultation with the Union
16 membership. At the time they had actuaries, and at the time
17 they I'm sure were told the financial consequence of the
18 practice. Nonetheless, they put the practice in place and
19 we in the state of Michigan still have labor laws which
20 provide that if you're going to change a practice which is a
21 mandatory subject of bargaining, the way to do that is to
22 approach the Union.

23 As a side note, I think that had the City
24 approached the Union in a reasonable fashion with the
25 proposed changes, a way to save some money, they would have

1 found the same ear that they found last year when the City
2 unions gave well over \$100 million in concessions to the
3 City. But again, it's unfortunate that the City opted not
4 to go that route, but instead decided to make a unilateral
5 change in the middle of an existing bargaining agreement.

6 The Tab E that we attach to ours is a different
7 formulation; Exhibit E to our motion for partial summary
8 disposition. What this chart shows, and this is again a
9 chart created by the General Retirement System, what this
10 chart shows is the amount of real dollars placed into each
11 of those three pots year after year as a result of the
12 excess earnings. And you can see the retirees earn anywhere
13 from -- one year, 1995, they didn't earn anything because
14 they don't get -- they did not get a 13th check when the
15 excess earnings did not exceed or did not at least reach
16 that 7.9 percent. They didn't lose any other, their normal
17 pension checks, but they did not receive the 13th check.
18 But in every year where the savings were as such, they
19 received it. And then as I indicated for the annuity
20 accounts, they are -- it's not excess in that the
21 investments weren't seen as beyond 7.9 percent, but again
22 the floor was at 7.9 percent, so the columns marked in here
23 zero indicate a -- that there was no dollars above the 7.9
24 percent rate. And again, all of this is laid out in their
25 quarterly report and the Krystal Crittendon letter, so there

1 really isn't any dispute as to how this money was allocated.

2 So the change came into effect as indicated on
3 November the 30th without bargaining. Those are the facts.

4 The City makes --

5 JUDGE O'CONNOR: Let me ask just for a second.

6 MR. MACK: Sure.

7 JUDGE O'CONNOR: Any objection to marking the
8 Union's Exhibit E as --

9 MS. JONES: We don't know where he got "E" from.
10 He is claiming that it's from the General Retirement System,
11 but there is no verification of that.

12 JUDGE O'CONNOR: That's the objection; fine. Go
13 on.

14 MR. MACK: I wonder if Ms. -- okay. There are a
15 couple of legal defenses raised by the City to the general
16 argument, first off, that this was a unilateral change in
17 the mandatory term and condition of employment.

18 There's no dispute that the benefits that we're
19 addressing here were, in fact, mandatory subject to
20 bargaining. The Macomb County case which is cited in our
21 brief at 294 Mi App 149, and specifically on page 160, makes
22 clear that "Retirement or pension benefits and methods of
23 calculating them are mandatory subjects of bargaining."

24 Here there is no dispute that these benefits are
25 benefits that are realized by active members. First off,

1 active members are those who hold the annuity accounts.
2 When monies are distributed into the annuity accounts, it's
3 active members who realize that benefit. The retirement
4 benefits are benefits realized by active members upon
5 retirement. Again, case law is clear. Not only the Macomb
6 County case, but many other cases within MERC precedent
7 make very clear that benefits afforded to active members
8 upon retirement are, in fact, mandatory subject to
9 bargaining that they enjoy as active members. It's part of
10 their retirement package as it were. So the loss of this
11 13th check has an impact on active employees.

12 The other argument that the City raises as to why
13 this is not a unilateral change is because it was an
14 issue -- it was a change made by the -- it was a practice
15 done by the Retirement System and not the City of Detroit,
16 and they felt the Retirement System for all of these decades
17 was acting ultra vires. It was acting beyond the scope of
18 its authority. And again, the best case to point to with
19 respect to that is the City's response, if, in fact, that
20 were the case, was in 1996, or actually earlier, to try to
21 change the charter with respect to this practice. So the
22 City obviously took the position back then that the practice
23 was within the charter because it felt it needed a change to
24 the charter in order to adjust the practice. The City's
25 response was not to say, "Board, we're suing you to enjoin

1 you from continuing to violate the charter and the
2 ordinances," it was to, "Let's change the charter to make
3 illegal your practice," which obviously was, at the time,
4 legal and currently today legal.

5 In addition to that, the Macomb County case again,
6 pages 159 to 160, cite to what established the precedent
7 stating, quoting, "Employer was responsible for its
8 bargaining obligations regardless of whatever actions are
9 taken by an independent Pension Board," and it cites the
10 Detroit Police Officers Association case versus City of
11 Detroit, 212 Mi App 383, on page 390, and then it even says,
12 quote, "It is even improper for an employer to remove a
13 subject of mandatory bargaining from the scope of PERA by
14 assigning its management to a body insulated from PERA,"
15 close quote.

16 And for the City to argue that you've been
17 breaking the law all this time, but we tried to change the
18 law back in the early '90's, and we then actually changed
19 law again in November 2011 is a conflict of an argument
20 which is not resolvable.

21 The City of Detroit case, what I call the SAAA
22 case, I think makes out best our argument as to why this
23 Commission should judicially estop the City from claiming
24 that this mandatory subject of bargaining is not, in fact, a
25 mandatory subject of bargaining that requires bargaining to

1 change.

2 In that case as indicated the City sought -- City
3 administration sought a change in the charger language in
4 order to prohibit the excess earnings practice, and when the
5 City of Detroit was sued by the Unions as AAA AFSCME to
6 prohibit them from going forward with the change in the
7 charter, arguing that this change would infringe upon a
8 mandatory subject of bargaining with respect to us and it
9 has to be bargained first, the City's response was, "Wait a
10 minute. Wait a minute. We'll bargain. We can't change
11 this until we bargain it with the Unions." So the City laid
12 out to the court in response to the Union's request for
13 injunctive relief, emergency injunctive relief, the City's
14 defense was, "We have a two-step process in order to have
15 this change applied to unionized City workers. The first of
16 the two step process is we have to get it passed on the
17 ballot. We have to change the charter because currently
18 it's legal and we have to make it illegal."

19 The second of the two-step process is we have to
20 bargain the change with respect to unionized workers. And
21 we realize that we have to bargain that change. The Court
22 denied the injunction, Court of Appeal in its opinion
23 approved the denial of the injunction by saying in part,
24 City acknowledges it has to bargain, so there is no
25 irreparable harm that the City would suffer because the

1 City -- I'm sorry -- that the Unions would suffer because
2 the City realizes that if the change comes into effect, it
3 will have to bargain it with the Unions. It won the case on
4 that basis. It was successful in defeating the City's --
5 the Union's attempt at seeking an injunction.

6 For the City now to come and claim that this
7 unilateral change is not a violation of PERA and it does not
8 have to bargain with the Unions first is in violation of the
9 Doctrine of Judicial Estoppel, and we lay that out in our
10 brief. The brief indicates the rising of the judicial
11 estoppel is, quote:

12 "A rising from equitable estoppel. It's a
13 doctrine that one may not take inconsistent positions
14 during legal proceedings. The Doctrine of Judicial
15 Estoppel concludes a party as a matter of law from
16 adopting a legal position in conflict with one earlier
17 taken in the same or related proceeding."

18 And we analyzed the Spohn v Van Dyke Public Schools case
19 which lays out how one party in that case took a position in
20 one venue and then took a -- one based on that position, and
21 then took an opposite position in a different venue and it
22 was judicially estopped from advancing that legal theory.
23 And that's exactly what the City is doing here, so we think
24 that this ought to be declared a unilateral change and a
25 mandatory subject of bargaining.

1 We also argue that this constitutes repudiation,
2 and repudiation of not only express language of the contract
3 and the incorporated language of the charter and ordinances,
4 but also a past practice which is now engrafted into the
5 contract as a result of 30-some years of practice at least.

6 A repudiation exists when there's a substantial
7 contract breach, there's a significant impact on the
8 bargaining unit and there's no bonafide dispute over the
9 interpretation of the contract.

10 Here the contract breach you have is substantial.
11 It impacts every single AFSCME member who has an annuity,
12 and every single AFSCME member who is subject to retirement
13 from the City of Detroit; that's all of them.

14 The significant impact is that what the one
15 actuary indicated over the years \$1.9 billion, so we're
16 talking about a lot of money. And the chart lays out
17 dollars year by year, so it's a significant amount of money
18 for the individuals involved.

19 And then, finally, no bonafide dispute over the
20 interpretation of the contract. Well, the best evidence of
21 that is Corley report, the Krystal Crittendon report, the
22 other documents from the City which lay out the practice as
23 to how it went, the affidavit of the City's affiant, Ms.
24 Nickleberry, the Charging Party's affiant. There's no
25 dispute over the fact that this practice did, in fact,

1 exist. It is, in fact, a past practice, and we lay out the
2 law with respect to that. This is the Amalgamated Transit
3 Union form of past practice as opposed to Port Huron form of
4 past practice.

5 Of course, Amalgamated lays out that:

6 "If a collective bargaining agreement is ambiguous
7 or silent on the subject for which a past practice is
8 developed, there need only be a tacit agreement that
9 the practice would continue."

10 Port Huron is applicable when there is conflicting
11 language within the contract and the parties are seeking to
12 treat the practice as part of the contract which conflicts
13 with already existing language, and that is a higher
14 standard of proof involved in clear and express. But we
15 don't have that here. We have an agreement on the practice.
16 So we think that this falls squarely within the realm of a
17 repudiation as well.

18 And, finally, the City did raise a claim about how
19 the retirees are not proper parties to this matter. I've
20 laid out earlier how these retirees -- well, when the charge
21 brought on behalf of active employees who have lost the
22 annuity enhancement and have lost the opportunity for the
23 13th check upon retirement, but in addition to that we
24 believe that this court could look at the West Ottawa
25 Education Association case, 126 Mi App 306, or the City of

1 Trenton opinion, no exceptions, 24 MPER, paragraph 26 out of
2 2011, for the doctrine that if a change can constitute a
3 mandatory subject of bargaining if, quote, "the concerns
4 bodily effect the terms and conditions of employment of
5 active employees," close quote.

6 And what you have here is a change in an
7 ordinance, a retirement ordinance which impacted everybody.
8 The City did not parse out how it would treat actives versus
9 retirees, but it lumped them all together, and when you have
10 a provision to -- when you have a change which impacts
11 retirees and actives and is intertwined in that fashion, the
12 change will constitute a mandatory subject of bargaining, so
13 even if there is some claim that this charge is not brought
14 on behalf of active employees, that argument ought to
15 encompass the change that was made to the ordinance as well.

16 So with that, if there are no questions, we ask
17 that this Commission order that the status quo be returned,
18 that there be back pay, back benefits made, all individuals
19 impacted made whole, with respect to the 13th checks, with
20 respect to the annuity enhancement losses, and that there be
21 an order to bargain, and that the order to bargain will be
22 that the City has an obligation to maintain that status quo
23 throughout bargaining until there is a legitimate good faith
24 impact.

25 JUDGE O'CONNOR: The collective bargaining

1 agreement, the 2008-2012, has it expired?

2 MR. MACK: Yes.

3 JUDGE O'CONNOR: It hasn't been extended?

4 MR. MACK: Okay. I'm going to hear from the City
5 next, but why don't we take five.

6 (Off the record)

7 JUDGE O'CONNOR: Back on the record. All right.
8 From the City?

9 MS. JONES: Okay. Brother Counsel and I had some
10 discussion. We note in your introductory comments that you
11 were admitting four of the exhibits, and we were wondering
12 why all of the exhibits were not being considered by the
13 Commission. I shouldn't say "all," because I am objecting
14 to the one, but --

15 JUDGE O'CONNOR: The reason I selected the ones I
16 selected was you both relied on them.

17 MS. JONES: Okay.

18 JUDGE O'CONNOR: And they seemed undisputed of
19 origin. If there's something else that either side wants to
20 propose, the other side doesn't object to, I'll admit it,
21 too, but I picked the ones that seemed public records and
22 undisputed.

23 MS. JONES: Did you want your affidavit in?

24 MR. MACK: The discussion was about the affidavits
25 in particular, whether they have to be exhibits or are they

1 just more like testimony.

2 JUDGE O'CONNOR: Well, I don't think the
3 affidavits have to be admitted as exhibits.

4 MS. JONES: Okay.

5 JUDGE O'CONNOR: I'm fine with admitting them as
6 exhibits. It keeps the record a little bit cleaner. You
7 both have affidavits. If you both want them admitted,
8 that's fine. I don't care. They're attached to the
9 motions.

10 MR. MACK: Yeah, that's correct.

11 MS. JONES: Okay. That's fine.

12 JUDGE O'CONNOR: Good enough?

13 MS. JONES: Good enough.

14 MR. MACK: That's fine.

15 JUDGE O'CONNOR: Okay.

16 MS. JONES: Okay. Specifically Brother Counsel
17 gave you quite a bit of background, so I won't belabor the
18 record with a lot of background.

19 The issue before you is whether a change in
20 mandatory conditions of employment was implemented in an
21 unlawful manner, and specifically the City of Detroit states
22 it has not been implemented in an unlawful manner. The City
23 did concede after reviewing the cases that the judge
24 referred us to, we did concede in our response and counter
25 motion that on page 10 of our motion that it is conclusive

1 that the issue of retirement plans is a mandatory subject of
2 bargaining.

3 So let me get to some of the points that Brother
4 Counsel brought up before I get into my main argument. He
5 suggests that there is a past practice, and in order to have
6 a past practice as he indicated by the cases he cited,
7 Amalgamated or Port Huron, there has to be either contract
8 language or a tacit agreement, and it is our position that
9 there has not been a tacit agreement; that, yes, it has been
10 over a period of time, but there have been challenges along
11 the way, so it was not necessarily agreed upon, and just to
12 focus on that.

13 Then he suggests that there was a taking because
14 if you remove the floor, the 7.9 as the floor, that
15 constitutes a taking, but yet still when the plan doesn't
16 make the 7.9, wouldn't it also constitute a taking when they
17 get to 7.9 and they -- and it wasn't earned?

18 Finally, as it relates to retirees not being
19 proper parties, and he suggests that based on West Ottawa
20 and City of Trenton that he is bringing it forth because his
21 active members will eventually retire and this is a benefit
22 they'll lose, I refer your Honor to the case on page nine
23 that we reference, Butler versus Wayne County, citing to
24 Allied Chemical. Butler versus Wayne County is 289 Mi App
25 664. It's a 2010 case and it cites to Allied Chemical,

1 which is 404 US 157, a 1971 case which holds that the
2 retirees are not members of the Union, they are not
3 employees of the Employer, and therefore, they would not be
4 considered under the Union's realm unless specifically
5 stated in the contract language, and it does not state so in
6 the contract language.

7 Now, that being said, that was just to address
8 some of the points that Brother Counsel brought out. As it
9 relates to the actual question in this matter, we have what
10 is a mandatory subject of bargaining, which is the
11 retirement plans. When the ordinance was implemented, it
12 was implemented under the time period when Public Act 4 was
13 still legally in effect. Thus, it was legally enacted. It
14 was not implemented in an unlawful manner. And when I cite
15 the PA 4, let me give you the cite to that. Michigan
16 Compiled Laws, Section 141.1501 et seq. Specifically under
17 Public Act 4 there was a provision under specifically
18 Section 10. It stated that Section 15, the right of
19 collective bargaining was suspended, and that cite is
20 Michigan Compiled Laws, Section 141.1514(a), Section 10,
21 and specifically the ordinance was enacted November 2011
22 with an effective date of December 15th, 2011. Public Act 4
23 was enacted and in full effect on March 16, 2011. It was
24 not repealed until November 2012, so the action that was
25 taken by the City to change the ordinance, as well as other

1 terms and conditions of employment to other Unions and
2 members of AFSCME, was legally enacted. We had no duty to
3 bargain, and even Brother Counsel states in his argument
4 earlier today, he stated something to that effect that the
5 Union, because they were in the middle of a contract, had no
6 obligation to bargain. The City didn't even attempt to
7 bargain. But at that point when it was enacted, the City
8 did not have a duty to bargain.

9 So because of that, and there have been numerous
10 cases involving this and involving AFSCME, in fact, and then
11 the most recent case, which is not cited in our motion,
12 counter motion, but was just issued last week, Judge Stern
13 in a MERC decision regarding POAM also agreed with the
14 following -- the holdings of the following cases -- excuse
15 me. Feel like I'm going to sneeze here. DPOA versus City
16 of Detroit, which was a case in the Court of Claims;
17 Roberts versus Detroit Board of Education, which was a Wayne
18 County Circuit Court; DPOA versus City of Detroit, Wayne
19 County Circuit Court; City of Detroit versus AFSCME, which
20 was a MERC decision by Judge Peltz, all of these -- and now
21 the Judge Stern decision that came down last week -- all of
22 these acknowledged that when the City imposed or implemented
23 certain terms under PA 4 they had a right to do so and it
24 was not an unlawful implementation of that, of PERA. And
25 the reason for that is because of that specific language

1 under Michigan 141.1514(a), Section 10, that the duty to
2 bargain was suspended. And because of that we are asking
3 that you grant in favor of the City that there was no --
4 that the change of mandatory conditions was not implemented
5 in an unlawful manner.

6 And as it relates to the relief requested by
7 Brother Counsel, status quo being restored, back pay remedy
8 and an order to bargain, those remedies, they are bargaining
9 right now I guess as it relates to various terms and
10 conditions before the Right to Work Act comes into play,
11 but -- and before the new emergency management law comes
12 into play, but as it relates to this particular ordinance,
13 we were legally correct in implementing it and we would ask
14 that you rule in our favor.

15 JUDGE O'CONNOR: Is that it?

16 MS. JONES: Uh-huh (affirmative)

17 JUDGE O'CONNOR: Let me ask you, in your brief you
18 refer to PA 4. You assert that the City was subject to a
19 consent agreement under PA 4. Today you seem to argue that
20 the duty to bargain generally was suspended by PA 4. Can
21 you clarify that for me?

22 MS. JONES: Without having -- I probably should
23 have brought the Act with me. Without having the Act with
24 me, there is specific language in the Act that states the
25 duty to bargain under PERA has been suspended.

1 MR. MACK: I can read the Act.

2 JUDGE O'CONNOR: I'm familiar with the Act.

3 Referring to the Employer's brief at page seven, it asserts
4 that "In March 2011, Public Act 4 was enacted. With the
5 City being under a consent agreement, the terms requiring
6 collective bargaining under PERA were suspended."

7 MS. JONES: That is correct.

8 JUDGE O'CONNOR: When was the City under a consent
9 agreement?

10 MS. JONES: I don't have the date that the City --
11 April 2012, I'm being told by Ms. Berry, of Labor Relations.

12 JUDGE O'CONNOR: April 2012?

13 MS. BERRY: Yes.

14 JUDGE O'CONNOR: And when was the unilateral
15 change made to the pension plan?

16 MS. JONES: The plan was made -- the change to the
17 pension plan was in November of 2011, effective date
18 December 2011.

19 JUDGE O'CONNOR: So the consent agreement doesn't
20 come into play until six months later?

21 MS. JONES: That is correct. However, Public Act
22 4 specifically states that PERA was suspended.

23 JUDGE O'CONNOR: Do you really want to argue that
24 to me?

25 MS. JONES: That is our argument, that the duty to

1 collectively bargain was suspended during the time period
2 that Public Act 4, when it was in existence.

3 JUDGE O'CONNOR: Under what provision of PA 4?
4 The part that says that bargaining is suspended during a
5 consent agreement perhaps?

6 MS. JONES: Without -- as I indicated earlier,
7 without the actual Act in front of me, I cannot state that
8 you had to be under an agreement to be -- for Public Act 4
9 to -- the provisions of Public Act 4 to be in existence or
10 be effective.

11 JUDGE O'CONNOR: That is what you assert in your
12 brief with the City being under a consent agreement. I
13 thought it notable that your brief didn't assert when the
14 City was under a consent agreement notwithstanding providing
15 in that same paragraph, and the preceding one, all the
16 effective dates of everything else, you didn't provide the
17 effective date of the consent agreement.

18 MS. JONES: And that was my error. I did not know
19 what the date of the consent agreement, when it started.

20 JUDGE O'CONNOR: But you sought to have this
21 Tribunal rely on that in dismissing a claim?

22 MS. JONES: I'm relying on the Act, the Public Act
23 4 which states that Section 15 of PERA was suspended.

24 JUDGE O'CONNOR: Okay. Anything else from the
25 City?

1 MS. JONES: Nothing else from the City.

2 JUDGE O'CONNOR: Mr. Mack, anything further from
3 you?

4 MR. MACK: Just on that point, Judge, the Act,
5 Public Act 4 that Counsel for the City is referencing is
6 specifically 141.1514(a), paragraph 10, and it reads as
7 follows:

8 "Unless the State Treasurer determines otherwise,
9 beginning 30 days after the date a local government
10 enters into a consent agreement under this Act, that
11 local government is not subject to Section 15.1 of
12 1947, PA 336, MCL 423.215 for the remaining term of
13 the consent agreement."

14 The consent agreement, I asked the Court to take
15 judicial notice of the fact that the consent agreement was
16 signed on April the 4th, 2012, which meant that that
17 provision, paragraph 10, did not come into effect until 30
18 days thereafter, being May the 4th, 2012. I think it's
19 apparent that any change made to a unilateral term and
20 condition of employment prior to that date without question
21 certainly is governed by PERA.

22 As a matter of fact, the coalition, and yours
23 truly, actually, made an argument in a different case before
24 this Tribunal that even that paragraph does not in fact
25 constitute a removal of the duty to bargain in its entirety

1 because there are several other provisions of PERA, namely
2 Sections 9, 10 and 11 which also call for an Employer to
3 have a duty to bargain. That particular paragraph only
4 removed paragraph 15 of PERA. But nonetheless, that
5 paragraph was not in effect because the ordinance change was
6 not made. And all of the cases that Counsel cited to,
7 whether it be the Robert Davis case, whether it be the Judge
8 Manderfield ruling, the Judge MacDonald ruling, even Judge
9 Stern's recent ruling, the POAM case, all of those cases
10 addressed changes that were made to terms and conditions of
11 employment post the May 4, 2012 execution or effective date
12 of the paragraph 10 of PERA -- of PA 4 rather. They did not
13 involve anything that which took place prior to. So none of
14 those cases are relevant here.

15 And finally I note that on the Krystal Crittendon
16 letter of October 10, 2011, page six of that letter, she
17 does go into --

18 JUDGE O'CONNOR: Let me get to that in a second.
19 Page six? Okay. Got it.

20 MR. MACK: Nothing but that was where she
21 addressed the labor law considerations, and, of course, she
22 does not raise any argument that there is no duty bargain,
23 Public Act 4, it's in existence and therefore, we had the
24 right to make this unilateral change.

25 That's all, Judge.

1 JUDGE O'CONNOR: Does the City want to do any
2 response?

3 MS. JONES: I'm trying to get to the letter.

4 JUDGE O'CONNOR: Sure. In particular I want you
5 to focus on whether you want to withdraw your argument as to
6 PA 4.

7 MS. JONES: As it relates to PA 4, no, I do not
8 want to withdraw that argument, but I do wish to speak to
9 what Brother Counsel just brought up about labor law
10 considerations.

11 Her labor law considerations is speaking to the
12 fact that we can't give unbargained for benefits on Union
13 members. I guess his argument is in the same vein, you
14 can't take them away without negotiations. But we are
15 acknowledging in her letter that there is collective
16 bargaining process as it relates to these benefits.

17 JUDGE O'CONNOR: Anything further from the City?

18 MS. JONES: No.

19 JUDGE O'CONNOR: All right. I am prepared to
20 issue a bench opinion, which will be followed by a written
21 decision. The time for filing exceptions to the written
22 decision, to the decision, begins to run on the date the
23 written decision is issued, not today. So today really is a
24 preview of what will be inserted into a written decision.

25 I should note for the record that Judge Tyra

1 Wright has joined us and is sitting in the back of the
2 courtroom. She sometimes observes the trials.

3 I find that this case is controlled by the
4 indistinguishable decision in the 1996 published Court of
5 Appeals decision involving these same parties, AFSCME and
6 Detroit. It's further controlled by judicial estoppel where
7 the City prevailed in that case by asserting the very thing
8 they deny today, and that is the City, in the '96 case as
9 recounted by the Court of Appeals conceded, as it must have
10 done under the then existing law, that regardless of charter
11 provision or any change to it, regardless of ordinance or
12 any change to it, the City could not unilaterally change
13 aspects of the pension plan without bargaining first with
14 the Union.

15 The City today acknowledges in its brief duty to
16 bargain, but asserts to the contrary, there was no duty to
17 bargain under PA 4, which I'll address in a minute.

18 The City never addresses, either in oral argument
19 or its brief, the impact of the clearly controlling
20 published decision between these same two parties. I find
21 that shocking and troubling that it wasn't even addressed,
22 because it is so clearly controlled.

23 The City, in the 1996 decision, sought to change
24 by charter amendment the very issue, or at least part of the
25 very underlying issue at stake here today, and that is the

1 Pension Board's allocation of excess earnings. In 1996 the
2 City sought to change it by charter amendment. In 2011 they
3 sought to change it by pension ordinance change. That is
4 not a distinction where the question is was there a duty to
5 bargain.

6 Then and now there was no factual dispute; there
7 is no factual dispute. The excess earnings have always been
8 allocated at the discretion of the Pension Board. The Union
9 has argued that that's a binding past practice. The City
10 asserts that it wasn't mutual. I find the assertion of a
11 lack of mutuality frivolous given the prior litigation,
12 given the City's concession in the prior litigation that it
13 was an established prior practice. It's also -- I also find
14 it frivolous based on the exhibits produced by the City in
15 this case. The Corley letter, which was an advice letter to
16 City Council by its own staff which recounts in very
17 specific terms that there was an existing prior practice
18 that was well recognized, but the City did not like that
19 prior practice and wanted to change it, but acknowledging
20 with incredible specificity that the prior practice that
21 existed for over 20 years, spelling out year by year the
22 amount of money allocated by the Pension Board over the
23 City's concern about how it was being allocated, but with
24 the City's acquiescence in collective bargaining agreement
25 after collective bargaining agreement, and the City

1 repeatedly re-adopted collective bargaining agreements,
2 including the 2008-2012 agreement which was initially
3 unilaterally imposed on the Union and then expressly
4 acquiesced by the Union which incorporates by reference the
5 very pension ordinance that the City sought to unilaterally
6 change. It was more than a tacit agreement. It was an
7 express agreement with full understanding by both parties.

8 Then -- in 1996 that is -- and now, in --
9 actually, before the change in 2011. The excess earnings
10 have always been allocated at the discretion of the Pension
11 Board. The Board as set forth in the City's exhibits
12 allocated the so-called excess earnings, that is earnings
13 above a projected target rate of return, to essentially
14 three different things or three funds; the retiree 13th
15 check, and secondly to supplement the holdings in individual
16 employee annuity funds and to reduce the City pension
17 contribution. The Esuchanko charts which the City submitted
18 made clear that in each and every year where there were
19 excess earnings the Pension Board allocated them amongst
20 those three funds at the Pension Board's discretion and in
21 roughly comparable amounts each time.

22 There was no dispute even in 1996 the practice had
23 been longstanding. It's obvious that the City's preference,
24 for understandable reasons, was to change that practice. It
25 attempted to do so unilaterally in 1996 and again in 2011.

1 As I said, I see no distinction between the City's
2 unilateral effort to change it by pension ordinance or by
3 charter amendment. In each case, as the City rightly
4 conceded in 1996, regardless of a change to those ordinances
5 or charter provisions, the duty to bargain remained.

6 In the 1996 decision, which is a published
7 decision binding on the parties and binding on me, the Court
8 recounts that the City in response to AFSCME's challenge,
9 quote, "Agrees that the challenged provision cannot be
10 legally implemented even if enacted by the voters without
11 first bargaining," close quote.

12 The City's concession in 1996 that there was a
13 duty to maintain these precise conditions of employment
14 absent bargaining was correct under the law then, and
15 remains correct under current case law interpreting PERA.
16 Regardless, I would otherwise find the City bound by res
17 judicata and by collateral estoppel by that 1996 decision
18 involving these two parties before me today on that same
19 mixed question of fact and law.

20 I think it's particularly notable -- why don't we
21 add who just came in at counsel table?

22 MR. MACK: Yes.

23 MR. MCNEIL: Good morning. Ed McNeil, Special
24 Assistant to President Alvin Garrett, Michigan AFSCME
25 Council 25.

1 JUDGE O'CONNOR: Wanted to make sure it was in the
2 transcript.

3 It's particularly notable that one of the earliest
4 cases interpreting and enforcing PERA involved the City of
5 Detroit and the DPOA, and an assertion by the City, and this
6 was in the early '70's.

7 MR. MACK: '74.

8 JUDGE O'CONNOR: Counsel for the Union indicates
9 it was '74. I was just going by vague recollection.
10 Because it is such black letter law, I don't have to
11 remember the cite to the case. I'll insert it in the
12 decision. But in the Detroit DPOA case the City asserted,
13 "We don't have to bargain about pensions because they're
14 controlled by our charter, and our pension ordinance," and
15 the Michigan Supreme Court said, "You're wrong. You've been
16 wrong since 1974." You were wrong in -- you were right in
17 1996 in acknowledging that they had to bargain before they
18 could make a change, and it's not just wrong, but frivolous
19 today to argue otherwise.

20 The Union Counsel cited to the Macomb County Court
21 of Appeals decision, another more recent decision which
22 again involved a change in what the Court found to be a
23 tacitly agreed-upon, very arcane question under the pension
24 plan of the use of a particular actuarial table, whether it
25 was mixed gender or single gender use of the actuarial

1 table. In that case the Court of Appeals upheld MERC's
2 finding that a unilateral change by an Employer to something
3 as arcane and minute an impact as which actuarial table to
4 use, a mixed, or a blended or a single table, was a
5 violation of the duty to bargain. MERC's case law has long
6 held that an attempt -- the NLRB makes the same findings --
7 but an attempt by an Employer to unilaterally change a
8 process that involves a particular decision maker or
9 discretionary decision making process to a unilateral
10 Employer decision is an unlawful change in existing
11 conditions of employment.

12 The City adopted the change and dispute in this
13 case by amending a pension -- not just amending a pension
14 ordinance. It's undisputed that after the pension ordinance
15 was adopted, the City unilaterally implemented that change,
16 unlike the position the City took in 1996 which was that
17 they needed to change the charter, and that even if the
18 charter were changed, which has a higher status than a
19 pension ordinance, the City acknowledged they would still
20 not be able to implement the change until they bargained
21 with the Unions over it. Here the City threw out that
22 concession and actually implemented the change without
23 bargaining.

24 It's undisputed and supported by affidavit
25 submitted by the Union and not contradicted by the City,

1 that in each year in which there were excess earnings, the
2 Pension Board allocated those earnings, then divided the
3 monies as I've described into three separate pots,
4 essentially; part to reduce the City's contribution under
5 the defined benefit plan, part to the 13th check and part to
6 the annuity accounts. The Corley and Esuchanko documents
7 submitted by and relied on by the City unequivocally
8 establish that the practice was consistent and of
9 longstanding.

10 Again, the 1996 Court of Appeals decision alone
11 would have regardless established this process was an
12 established condition of employment. If it existed in 1996
13 and still existed in 2011, it's an established condition of
14 employment.

15 The change directly affected an existing and
16 fundamental condition of employment. Again, Detroit versus
17 DPOA held that pension plans and promises made under them
18 were a fundamental condition of employment such that the
19 City of Detroit had to bargain over them in the DPOA case
20 notwithstanding a preexisting charter provision which set
21 terms different than the DPOA was seeking. City's conduct
22 was unlawful and constitutes a refusal to bargain in good
23 faith by unilaterally changing an existing condition of
24 employment as to active employees.

25 Additionally, the City's conduct occurred at a

1 point in time when the parties had in place a negotiated
2 collective bargaining agreement. This is really the second
3 half of the charge, and it's subject to a separate analysis.

4 That binding collective bargaining agreement
5 expressly incorporated by reference the prior version of the
6 pension ordinance and charter provisions, and taking
7 judicial notice, was negotiated in the context of both
8 parties understanding and being aware of the 1996 Court of
9 Appeals decision on this very topic as they were both
10 parties to that case. They can't deny knowledge of it
11 having previously litigated the very dispute that we're here
12 on today.

13 The law, the case law, and PERA did not change in
14 any relevant aspect between the 1996 decision by the Court
15 of Appeals and the 2011 action by the Employer. I was,
16 frankly, I think I indicated, stunned by the failure of the
17 City in its brief on the merits of the case to even address
18 the obviously relevant 1996 decision.

19 The City had and has no colorable claim that it
20 did not face a clear and binding contractual obligation to
21 keep in place the preexisting and previously litigated
22 method of allocating excess earnings. As such, the City's
23 conduct further constituted an unfair labor practice as it
24 was an unlawful repudiation of the binding 2008-2012
25 collective bargaining agreement, which obviously was still

1 in effect at the point of the November 2011 pension
2 ordinance change.

3 Union Counsel appropriately cited to the ATU past
4 practice case and the line of cases following ATU. This
5 was, I think, beyond a tacit agreement, but it was at
6 minimum a tacit agreement. A practice that continues for
7 three decades is a tacit agreement. A practice where the
8 City has previously sought a charter amendment
9 unsuccessfully to end the practice is, at minimum, a tacit
10 agreement. I think, frankly, it rises to the level of an
11 express agreement where the parties having previously fought
12 over the terms of the charter and the pension ordinance,
13 then incorporate them by reference in the collective
14 bargaining agreement. What is incorporated by reference is
15 the then existing pension ordinance and charter, and that's
16 in keeping with the Macomb County decision.

17 The City's sole proffered defense really was, in
18 its brief, was that the financial stability agreement
19 entered into under 2011 PA 4 suspended the duty to bargain.
20 The City disingenuously failed to disclose in its brief that
21 the financial stability agreement, also referred to as a
22 consent agreement, was not entered into until more than five
23 months after the complained of conduct. The argument was
24 frivolous. The assertion that PA 4 suspended the duty to
25 bargain generally was a frivolous argument. It demeans the

1 City and the Tribunal for an argument that specious to be
2 made. It was shocking. PA 4 was very clear by its terms,
3 as the City is well aware. And I have no doubt, but that
4 the City is well aware.

5 PA 4 while it was in place provided for several
6 options, the appointment of a financial manager or entering
7 into a consent agreement. It provided very expressly and
8 clearly and the section of the statute cited by City Counsel
9 is absolutely clear and unambiguous. It provided that the
10 duty to bargain was suspended 30 days following entering
11 into consent agreement, which clearly had not occurred in
12 November of 2011.

13 The April 2012, and it is conceded belatedly by
14 the City that the financial stability agreement was not
15 entered into until April of 2012, cannot and did not
16 possibly excuse the City's November 2011 unlawful acts.

17 The failure to disclose to the Tribunal the
18 financial stability agreement on which the City's argument
19 relied was entered into long after this dispute arose, while
20 asking the Tribunal to rely on the financial stability
21 agreement as the City's principal defense exhibited a
22 troubling lack of candor contrary to the expectations of
23 MRPC 3.3.

24 The City has further raised the question of
25 AFSCME's standing to represent already retired former

1 employees. The City is incorrect in its assertions that the
2 case law cited provide that AFSCME former employees who are
3 retirees are not members of AFSCME. They may well be, they
4 may not be. It's individually -- some retirees continue to
5 belong to unions, some don't. They are, however, no longer
6 part of the bargaining unit. The City was correct to that
7 extent.

8 It is axiomatic that neither the Employer nor the
9 Union can demand to bargain over changes in conditions
10 affecting already retired former employees. It doesn't
11 alter the Union's claim as to the impact on active employees
12 who were promised that the Pension Board would have the
13 discretion to allocate certain funds, excess earnings, to
14 their annuity accounts and were promised that upon
15 retirement they would and eligible for 13th checks to the
16 extent that there were unearned excess earnings or excess
17 earnings above their rate, expected one. I stumbled over
18 that phrase. I'm not an actuary.

19 As I said, there's no duty to bargain over changes
20 and conditions affecting already retired former employees.
21 However, that doesn't fully answer the question in this
22 case. The parties may, of course, voluntarily enter into
23 negotiations over permissive subjects of bargaining. The
24 question of possibly raising a pension benefit for people
25 who already are retired is a permissive subject of

1 bargaining. It's not prohibited. The parties can, if they
2 choose to, negotiate over it.

3 Here the Union has not sought as relief any demand
4 over any right to bargain as to former employees. Rather
5 the Union is seeking to enforce the Employer's obligation to
6 not make unilateral changes in promises that had already
7 been made and were still in effect, both the current
8 employees regarding their entitlements once they retire,
9 which is a perfectly ordinary mandatory subject to
10 bargaining, and as to individuals who were part of the
11 bargaining unit and since retired.

12 The Union is asserting, and I have found the
13 Employer in implementing unilaterally the changes to the
14 pension ordinance and cutting off the 13th check, has
15 repudiated the terms of an existing collective bargaining
16 agreement. Under PERA, the repudiation of the clear,
17 undisputed terms of an existing contract is more than a mere
18 contract breach which would otherwise be left to the
19 grievance procedure or circuit court suit over damages or
20 whatnot, breach of contract. Rather it's treated as a
21 refusal of bargaining in good faith and is therefore an
22 unlawful unfair labor practice even if related to a
23 permissive subject of bargaining over which there was
24 necessarily no duty to bargain as in the Commission
25 decisions in the Kalamazoo County Sheriff case where the

1 Commission held that where you have a mixed question, a
2 collective bargaining agreement that covers both mandatory
3 subjects and permissive subjects, the package is the
4 package. It's a single package. Neither side can
5 unilaterally carve it up into pieces and say, "We'll comply
6 with one piece. We won't comply with this other piece,"
7 unilaterally and without violating the duty to bargain.
8 Once a contract has been reached, it must be treated as
9 binding on both parties, as the Commission held in Kalamazoo
10 County Sheriff, or the possibility of productive future
11 bargaining is destroyed.

12 I will be recommending the restoration of the
13 status quo by restoring to the Pension Board the discretion
14 previously exercised by the City being ordered to not
15 interfere in the exercise of that discretion by the Pension
16 Board regarding excess earnings, that the Retirement Board
17 be notified by the City of the restoration of their
18 preexisting discretion, that affected retirement plan
19 participants, both active employees and retirees, be made
20 whole by the City to the extent that there is any practical
21 impediment to the Pension Board making those participants
22 whole otherwise.

23 Because it may be -- the most practical resolution
24 may be for the Pension Board to reallocate those assets.
25 Either way, it is ultimately the obligation of the City to

1 correct the problem it caused by its unilateral action
2 which, again, was taken in direct rejection of the
3 obligations it conceded that it had in the 1996 litigation.

4 I will recommend a posting of a notice to reaffirm
5 for active employees, posting of the notice at the work
6 places to reaffirm for active employees that the contractual
7 promises made to them must be kept.

8 That's it. I will issue a written decision
9 following this up once I receive the transcript. Any
10 questions?

11 MR. MACK: Yes, Judge. On the make whole, just as
12 a clarification to the extent practical, would that involve
13 I imagine in the compliance phase I presume some
14 determination as to what would have been allocated but for
15 the change? I mean part of it is discretionary, so I
16 realize that there may be some additional steps to take to
17 determine the allocation which would have been made but for
18 the change, but I believe that could be addressed for
19 instance in just having the Pension Board in a meeting make
20 that decision, had this been our investment earnings, with
21 this being the actuarial rate of return, I mean this amount
22 was the excess earnings, here's what we would have done
23 putting it into three pots, something to that effect, and
24 then determining who was made whole, who was harmed and who
25 needs to be made whole following that determination. Is

1 that something along the lines of what you indicated?

2 JUDGE O'CONNOR: Well, what I've indicated I
3 intend to order is that -- if I can have everyone's
4 attention.

5 MS. JONES: Go ahead, sir.

6 JUDGE O'CONNOR: That the status quo be restored,
7 the steps that I'll be recommending be ordered are that the
8 City restore to the Pension Board the discretion previously
9 exercised, specifically that the City notify the Pension
10 Board that the discretion has been restored. The Pension
11 Board will have to act based on that discretion and
12 determine what they think is necessary to put back together
13 what would have otherwise happened. And the Pension Board
14 has a prior history as laid out by Corley and Esuchanko of
15 how they typically did that, but it is within the discretion
16 of the Pension Board how precisely they do that.

17 The part that you asked your question about which
18 was to the extent practical, that's not what I said.

19 MR. MACK: Okay.

20 JUDGE O'CONNOR: What I said was that my
21 expectation is that the first level response will be by the
22 Pension Board just using their discretion to decide what
23 they think should happen.

24 MR. MACK: Okay.

25 JUDGE O'CONNOR: What I propose to order is that

1 to the extent that there's any practical impediment to the
2 Pension Board making the participants whole, it will be upon
3 the City to make the participants whole.

4 Any questions from the City as to the nature or
5 extent of the order?

6 MS. JONES: No. I'll wait for the written
7 decision.

8 JUDGE O'CONNOR: Okay. Thank you, all.

9 MR. MACK: Thank you, Judge.

10 (Proceedings concluded at 10:55 a.m.)

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19
20
21
22
23
24
25

A				
AAA 22:5	actual 5:4 30:9 34:7	affidavits 27:24 28:3,7	altered 5:15	applicable 25:10
able 43:20	actuarial 10:25 11:19 42:24,25	affirmative 32:16	altogether 15:10	applied 17:10 22:15
absent 41:14	43:3 51:21	afforded 20:7	Alvin 41:24	appointed 10:19
absolutely 47:9	actuarially 13:3	AFSCME 1:5,24 4:3 5:25 6:6 7:23	Amalgamated 25:2 25:5 29:7	appointees 10:22
acceptable 6:25	actuaries 17:16	9:17 14:9 22:5	ambiguous 25:6	appointment 47:6
account 11:17,23 12:1,2 14:22,24	actuary 8:8,8 10:25 16:11 17:5 24:15	24:11,12 31:2,10	amending 43:13,13	Appraiser's 13:8
Accountants 13:8	48:18	31:19 38:5 41:24	amendment 9:20 13:16,21 14:1	approach 17:22
accounts 11:14,21 12:25 15:23,24	add 41:21	48:2,3	38:24 39:2 41:3	approached 17:24
16:1 18:20 20:1,2	addition 21:5 25:23	AFSCME's 41:8 47:25	46:8	appropriately 46:3
44:6 48:14	additional 11:11 51:16	ago 17:15	amount 12:6 14:16 15:2 18:10 24:17	approved 22:23
accumulated 17:8	additionally 9:5 44:25	agreed 29:11 31:13	39:22 51:21	approximated 17:8
accustomed 4:21	address 30:7 38:17 45:17	agreed-upon 42:23	amounts 16:12 40:21	approximately 12:20
acknowledged 9:21 13:24 31:22 43:19	addresses 38:18	agreement 3:12 5:18,19 6:18 9:4	analysis 8:3,7 45:3	April 33:11,12 35:16 47:13,15
acknowledges 10:14 22:24 38:15	addressing 19:19	18:5 25:6,8,15	Analyst 13:8	arcane 42:23 43:3
acknowledging 37:15 39:19 42:17	adjust 20:24	27:1 29:8,9 32:19	analyzed 23:18	argue 21:16 24:1 32:19 33:23 42:19
acknowledgment 13:4,5,6	administration 22:3	33:5,9,19 34:5,8	Anita 1:24 4:14	argued 39:9
acquiesced 40:4	Administrative 1:13 4:6,7,8	34:12,14,17,19	annuities 5:3	arguing 22:7
acquiescence 39:24	admit 27:20	35:10,13,14,15	annuity 11:13,21 11:23 12:1,2	argument 19:16 20:12 21:19,22
act 9:15 30:12,17 30:22 32:10,23,23	admitted 28:3,7	39:24,25 40:2,6,7	14:12,15,22,23	26:14 29:4 31:3
32:24 33:1,2,4,21	admitting 9:7 27:11 28:5	45:2,4,25 46:5,6,7	15:7,23,24 16:1,7	33:25 35:23 36:22
34:2,7,8,9,22,22	adoption 4:23	46:10,11,14,18,21	16:14,14 18:19	37:5,8,13 38:18
35:4,5,10 36:23	advancing 23:22	47:18,21 49:16	20:1,2 24:11	46:23,25 47:1,18
52:11	advice 39:15	50:2	25:22 26:20 40:16	arguments 6:5
acting 20:17,17	affiant 24:23,24	agreements 40:1	44:6 48:14	Armella 14:5
action 30:24 45:15 51:1	affidavit 9:6 12:16 12:18 14:4,17	Agrees 41:9	answer 48:21	arose 47:19
actions 21:8	16:5 24:23 27:23	ahead 52:5	anybody 8:20	asked 35:14 52:17
active 11:13,15,21 19:25 20:1,3,4,7,9	43:24	alert 15:14	Anyway 5:2 8:16	asking 32:2 47:20
20:11 25:21 26:5		alleged 5:13	App 9:17 13:9 19:21 21:11 25:25	aspect 45:14
26:14 29:21 44:24		Allied 29:24,25	29:24	aspects 38:13
48:11 50:19 51:5		allocate 11:9,12 12:4 48:13	apparent 5:4 35:19	assert 32:18 34:11 34:13
51:6		allocated 19:1 39:8 39:22,23 40:10,12	Appeal 22:22	asserted 5:6 9:11 42:12
actives 26:8,11		40:19 44:2 51:14	Appeals 10:5 38:5 38:9 42:21 43:1	asserting 38:7 49:12
acts 47:16		allocating 45:22	44:10 45:9,15	assertion 9:1,16 39:10 42:5 46:24
		allocation 39:1 51:17	Appearance 4:10	assertions 48:1
		alter 48:11	APPEARANCES 1:16	

<p>asserts 33:3 38:16 39:10</p> <p>assets 50:24</p> <p>assigning 21:14</p> <p>assistant 1:21 12:21 41:24</p> <p>Association 13:8 21:10 25:25</p> <p>assumed 13:3 14:21</p> <p>attach 18:6</p> <p>attached 6:18 7:6 7:14 8:6,9 12:16 28:8</p> <p>attaching 7:13</p> <p>attempt 15:19 23:5 31:6 43:6,7</p> <p>attempted 40:25</p> <p>attention 52:4</p> <p>ATU 46:3,4</p> <p>authority 20:18</p> <p>Avenue 1:22</p> <p>aware 9:25 45:8 47:3,4</p> <p>axiomatic 48:8</p> <p>a.m 1:15 4:2 53:10</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>B 12:18 16:21</p> <p>back 20:22 21:18 26:18,18 27:7 32:7 38:1 52:12</p> <p>background 10:12 28:17,18</p> <p>ballot 22:17</p> <p>bargain 13:24 22:10,11,20,21,24 23:3,8 26:21,21 31:3,6,7,8 32:2,8 32:20,25 34:1 35:25 36:3,22 38:16,17 39:5 41:5 42:13,17 43:5 44:19,22</p>	<p>46:19,25 47:10 48:9,19 49:4,24 50:7</p> <p>bargained 15:18 22:9 43:20</p> <p>bargaining 3:12 5:11,17,18,19 6:18 9:3,22 15:11 15:15,19 17:21 18:5 19:3,20,23 20:9 21:8,13,24 21:25,25 22:8 23:25 24:8 25:6 26:3,12,23,25 29:2 30:10,19 32:8 33:6 34:4 37:16 38:13 39:24 39:25 40:1 41:11 41:14 43:23 45:2 45:4,25 46:14 48:6,23 49:1,10 49:11,15,21,23 50:2,11</p> <p>based 6:12 16:8 23:20 29:19 39:14 52:11</p> <p>basically 12:2</p> <p>basis 23:4</p> <p>beginning 35:9</p> <p>begins 37:22</p> <p>behalf 4:7,8,13 5:25 6:1 25:21 26:14</p> <p>belabor 28:17</p> <p>belatedly 47:13</p> <p>believe 16:21 25:24 51:18</p> <p>belong 48:5</p> <p>bench 37:20</p> <p>benefit 20:3 29:21 44:5 48:24</p> <p>benefits 17:11 19:18,22,24,25</p>	<p>20:4,4,7 26:18 37:12,16</p> <p>Berdijo 12:18</p> <p>Berry 1:24 4:14,17 33:11,13</p> <p>best 20:18 21:22 24:20</p> <p>beyond 14:4,16 16:14 18:21 20:17 46:5</p> <p>billion 17:11 24:15</p> <p>binding 39:9 41:7,7 45:4,20,24 50:9</p> <p>bit 11:15 12:1 13:23 28:6,17</p> <p>black 42:10</p> <p>blended 43:4</p> <p>Board 4:24,25 5:3 5:16 9:15 10:19 10:23,24 11:5,7 12:12,24 13:5 20:25 21:9 31:17 39:8,22 40:11,11 40:19 44:2 48:12 50:13,16,16,21,24 51:19 52:8,10,11 52:13,16,22 53:2</p> <p>Board's 9:12 39:1 40:20</p> <p>bodily 26:4</p> <p>body 21:14</p> <p>bonafide 24:8,19</p> <p>bottom 17:7</p> <p>Boulevard 1:14,18</p> <p>bound 41:16</p> <p>breach 24:7,10 49:18,20</p> <p>breaking 21:17</p> <p>brief 5:12 7:7,15,18 8:10,18 17:3 19:21 23:10,10 32:17 33:3 34:12 34:13 38:15,19</p>	<p>45:17 46:18,20</p> <p>bringing 29:20</p> <p>Brother 27:9 28:16 29:3 30:8 31:3 32:7 37:9</p> <p>brought 5:24 25:21 26:13 29:4 30:8 32:23 37:9</p> <p>Butler 29:23,24</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 1:20 7:16,17</p> <p>calculating 19:23</p> <p>call 21:21 36:2</p> <p>called 11:7</p> <p>candor 47:22</p> <p>cap 16:18</p> <p>capped 16:8,10</p> <p>capping 16:15</p> <p>captioned 5:25</p> <p>care 28:8</p> <p>carve 50:5</p> <p>case 1:7 4:5,7,23 9:18,20 13:7,9,23 19:20 20:5,6,18 20:20 21:5,10,21 21:22 22:2 23:3 23:18,19 25:25 29:22,25 30:1 31:11,16 35:23 36:7,9 38:3,7,8 39:15 41:3,15 42:11,12 43:1,5 43:13 44:19 45:10 45:13,17 46:4 48:2,22 49:25</p> <p>cases 20:6 28:23 29:6 31:10,14 36:6,9,14 42:4 46:4</p> <p>cash 12:3</p> <p>caused 51:1</p> <p>ceiling 15:8,24 16:11,12</p>	<p>CER 2:1</p> <p>ceratin 48:13</p> <p>certain 5:15 12:6 31:23</p> <p>certainly 35:21</p> <p>Certified 2:1</p> <p>challenge 41:8</p> <p>challenged 41:9</p> <p>challenges 29:10</p> <p>change 5:16 9:1,2 9:19,21 10:1,3 13:20,25 15:5,15 15:20 16:19 17:20 18:5 19:2,16 20:13,14,21,23 21:2,17 22:1,3,6,7 22:10,15,17,20,21 23:2,7,24 26:2,6 26:10,12,15 28:19 30:25 32:4 33:15 33:16 35:19 36:5 36:24 38:11,12,12 38:23 39:2,3,3,19 40:6,9,24 41:2,4 42:18,22 43:2,7 43:10,12,15,17,20 43:22 44:15 45:13 46:2 51:15,18</p> <p>changed 5:8 15:5 21:18 43:18</p> <p>changes 17:25 36:10 48:9,19 49:6,13</p> <p>changing 44:23</p> <p>charge 5:9 6:3 25:20 26:13 45:3</p> <p>charger 22:3</p> <p>charging 1:6,17 4:4 4:10 5:24 6:4 24:24</p> <p>chart 8:14,14 18:8 18:9,10 24:16</p> <p>charter 5:20 9:20</p>
---	---	--	--	--



STATEWIDE COURT REPORTERS

800-632-2720

<p>13:16,20,25 20:21 20:23,24 21:1,2 22:7,17 24:3 38:10,24 39:2 41:3,5 42:14 43:17,18 44:20 45:6 46:8,12,15 charts 8:7,10 16:20 40:17 check 11:10,11 15:9,9 18:14,17 20:11 25:23 40:15 44:5 49:14 checks 5:5 18:17 26:19 48:15 Chemical 29:24,25 choose 49:2 circuit 31:18,19 49:19 cite 21:6 30:14,15 30:19 42:11 cited 19:20 29:6 31:11 36:6 42:20 46:3 47:8 48:2 cites 21:9 29:25 citing 29:23 city 1:8,21 3:14,15 3:16 4:4,13,15,23 5:1,1,12,14,20,23 6:9 7:13,21,22 8:3 8:4,7,15 9:11,18 9:18,21 10:14,16 10:21,23 11:17,25 12:7,8,9,14,15 13:8,11,16 14:7,8 14:9 15:14,18 16:13,15 17:8,15 17:23 18:1,3,3 19:4,15 20:12,15 20:22 21:10,16,21 21:23 22:2,2,5,11 22:15,24,25 23:1 23:2,6,23 24:13</p>	<p>24:22 25:18,25 26:8,22 27:4,8 28:21,22 29:20 30:25 31:6,7,15 31:18,19,22 32:3 32:18 33:5,8,10 34:12,14,25 35:1 35:5 37:1,17 38:7 38:8,12,15,18,23 39:2,9,14,16,18 39:25 40:5,16,17 41:3,8,16 42:4,5 42:12 43:12,15,16 43:19,21,25 44:7 44:19 45:17,19 46:8,20 47:1,3,4,8 47:14,24 48:1,6 50:14,17,20,25 52:8,9 53:3,4 City's 7:15,17 8:17 12:5 17:2 20:19 20:24 22:9,13 23:4 24:23 39:12 39:23,24 40:11,23 41:1,12 44:4,21 44:25 45:22 46:17 47:16,18,21 claim 23:6 25:18 26:13 34:21 45:19 48:11 claiming 19:10 21:23 Claims 31:16 clarification 51:12 clarify 32:21 clean 7:5 cleaner 28:6 clear 19:22 20:5,7 25:14 40:18 45:20 47:2,9 49:16 clearly 10:12 16:9 38:19,22 47:8,11 close 21:15 26:5</p>	<p>41:11 coalition 6:1,3 35:22 Cohen 1:17 collateral 41:17 collective 3:12 5:18 5:18 6:18 9:3 25:6 26:25 30:19 33:6 37:15 39:24 39:25 40:1 45:2,4 45:25 46:13 49:15 50:2 collectively 34:1 colorable 45:19 columns 18:22 come 23:6 33:20 35:17 comes 23:2 32:10 32:11 comments 4:21 27:10 Commission 1:3 3:11,13,14,16 4:9 6:17 7:6,8,9,10,18 7:19,20 8:1,2,19 9:7,9 21:23 26:17 27:13 49:24 50:1 50:9 comparable 40:21 competent 9:6 Compiled 30:16,20 complained 46:23 compliance 51:13 comply 50:5,6 concede 28:23,24 conceded 38:9 41:4 47:13 51:3 concedes 5:12 concern 5:23 39:23 concerning 10:12 10:13,15 concerns 26:3 concession 39:12</p>	<p>41:12 43:22 concessions 18:2 concluded 53:10 concludes 23:15 conclusive 28:25 condition 9:2,14,24 19:17 35:20 44:12 44:13,16,18,23 conditions 10:3 26:4 28:20 31:1 32:4,10 36:10 41:13 43:11 48:9 48:20 conduct 44:21,25 45:23 46:23 conflict 21:19 23:16 conflicting 25:10 conflicts 25:12 consent 32:19 33:5 33:8,19 34:5,12 34:14,17,19 35:10 35:13,14,15 46:22 47:7,11 consequence 17:17 consideration 6:5 considerations 36:21 37:10,11 considered 27:12 30:4 consistent 44:8 constitute 26:2,12 29:16 35:25 constituted 45:23 constitutes 24:1 29:15 44:22 Constitutional 16:17 consultation 17:15 contacted 15:14 CONTENTS 3:1 context 45:7 continue 25:9 48:4</p>	<p>continues 46:6 continuing 21:1 contract 7:2 15:17 24:2,5,7,9,10,20 25:11,12 29:7 30:5,6 31:5 49:17 49:18,20 50:8 contractual 17:11 45:20 51:6 contradicted 43:25 contrary 38:16 47:22 contribute 11:16 contributed 17:5,6 contributes 11:17 contributing 12:14 contribution 12:5,8 12:9 14:24 40:17 44:4 controlled 38:3,6 38:22 42:14 controlling 38:19 copies 6:15 copy 7:7 Corley 3:16 8:4 24:21 39:15 44:6 52:14 Corley's 8:5 Corley/Esuchanko 8:17 16:25 Corporation 1:8,21 2:2 7:11,12 correct 6:7 28:10 32:13 33:7,21 41:14,15 48:6 51:1 cost 17:8 Council 1:5,24 3:14 3:15,16 4:4 5:25 6:6 7:13,21 8:3,5 8:7 10:23 39:16 41:25 counsel 1:21 4:10</p>
--	---	--	---	--



STATEWIDE COURT REPORTERS

800-632-2720

<p>7:11,12 27:9 28:16 29:4 30:8 31:3 32:7 35:5 36:6 37:9 41:21 42:8,20 46:3 47:8 counter 28:24 31:12 County 19:20 20:6 21:5 29:23,24 31:18,19 42:20 46:16 49:25 50:10 couple 4:20 19:15 course 13:22 14:1 15:16 17:13 25:5 36:21 48:22 court 9:21 10:5 22:12,21,22 25:24 31:16,18,19 35:14 38:4,9 41:7 42:15 42:20,22 43:1 44:10 45:8,14 49:19 courtroom 38:2 covers 50:2 created 15:23 18:9 crediting 12:25 Crittendon 3:13,15 7:11,13,22 18:25 24:21 36:15 cross 4:19 5:7 current 9:23 41:15 49:7 currently 21:4 22:17 cutting 49:14 C-o-r-l-e-y 8:4 C12-E-0092 1:7 C12-E-092 4:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 7:22,23 damages 49:19 data 8:13 date 30:22 33:10,17</p>	<p>34:17,19 35:9,20 36:11 37:22 dates 34:16 Davis 36:7 days 35:9,18 47:10 dealing 16:17,18 decades 12:17 17:15 20:16 46:7 December 5:15 11:11 30:22 33:18 decide 52:22 decided 18:4 decides 11:7 decision 9:17 10:5 10:6 31:13,20,21 37:21,22,22,23,24 38:4,5,20,23 41:6 41:7,17 42:12,21 42:21 43:8,9,10 44:10 45:9,14,18 46:16 51:8,20 53:7 decisions 12:24 49:25 declared 23:24 deemed 16:21 defeating 23:4 defense 9:12 22:14 46:17 47:21 defenses 19:15 defined 13:2 44:5 demand 48:9 49:3 demeans 46:25 demonstrated 14:13 denial 22:23 denied 22:22 denominate 6:15 deny 38:8 45:10 Department 1:2,21 4:15 describe 15:7 described 13:15</p>	<p>44:3 Describing 11:15 description 8:5 destroyed 50:11 determination 51:14,25 determine 51:17 52:12 determined 16:10 determines 35:8 determining 51:24 Detroit 1:8,14,18 1:21,22 4:1,4,14 4:15 6:2 9:17 10:16,22 13:9,12 14:7,8,10 15:12 17:9 20:15 21:10 21:11,21 22:5 24:13 28:21 31:16 31:17,18,19 38:6 42:5,12 44:16,19 developed 25:8 DGRS 17:9,11 Diane 2:1 different 11:8 18:6 23:21 35:23 40:14 44:21 direct 51:2 directly 44:15 director 8:4 12:21 disclose 46:20 47:17 discretion 9:13 39:8 40:10,20 48:13 50:13,15,18 52:8,10,11,15,22 discretionary 43:9 51:15 discussion 27:10,24 disingenuously 46:20 dismissing 34:21 disposition 4:22</p>	<p>5:7 18:8 dispute 5:7,10 10:13,13 14:4 19:1,18,24 24:8 24:19,25 39:6,7 40:22 43:12 45:11 47:19 disputed 15:11 distinction 39:4 41:1 distribute 11:8 distributed 17:9 20:2 distribution 9:13 9:19,23 10:15 13:15 distributions 13:6 13:14 divided 44:2 Division 8:3 Docket 1:7 4:5 doctrine 23:9,13,14 26:2 document 8:17 documents 6:13 24:22 44:6 doing 4:21 23:23 dollars 17:11 18:10 18:23 24:17 doubt 47:3 Doyle 1:13 4:5 DPOA 31:15,18 42:5,12 44:17,19 44:21 Draugelis 2:1 due 17:8 duty 31:2,8 32:1,20 32:25 33:25 35:25 36:3,22 38:15,16 39:4 41:5,13 43:5 46:19,24 47:10 48:19 49:24 50:7 Dyke 23:18</p>	<p style="text-align: center;">E</p> <hr/> <p>E 8:17 17:2 18:6,7 19:8,9 ear 18:1 earlier 9:11 12:17 20:20 23:16 25:20 31:4 34:6 earliest 42:3 early 10:14,17 21:18 42:6 earn 18:12,13 earned 29:17 earning 12:1 earnings 9:13,19 9:23 10:15 11:6,7 11:8,9,12,20 12:5 12:13,24 13:1,2 13:15 17:9 18:12 18:15 22:4 39:1,7 40:9,12,12,19 44:1,2 45:22 48:13,16,17 50:16 51:20,22 easiest 15:6 ECONOMIC 1:2 Ed 41:23 Education 25:25 31:17 Edward 1:24 effect 15:21 19:2 23:2 26:4 30:13 30:23 31:4 35:17 36:5 46:1 49:7 51:23 effective 5:15 30:22 33:17 34:10,16,17 36:11 effort 41:2 efforts 15:19 either 10:20,24 11:16 27:19 29:7 38:18 50:25 elected 10:20</p>
---	--	--	---	---



STATEWIDE COURT REPORTERS

800-632-2720

<p>Electronic 2:1 eligible 48:15 eliminated 15:9,22 emergency 22:13 32:11 employee 16:13 40:16 employees 5:1,1 10:24 11:13,15,21 12:11 14:10 20:11 25:21 26:5,14 30:3 44:24 48:1,2 48:10,11,20 49:4 49:8 50:19 51:5,6 employer 5:6 21:7 21:12 30:3 36:2 43:2,7,10 45:15 48:8 49:13 Employer's 7:7 33:3 49:5 employment 1:3 4:9 9:2,14,24 10:4 10:21,21 19:17 26:4 28:20 31:1 35:20 36:11 41:13 43:11 44:12,14,16 44:18,24 enacted 30:13,21 30:23 31:2,7 33:4 41:10 encompass 26:15 ENERGY 1:2 enforce 49:5 enforcing 42:4 engrafted 24:4 enhanced 11:23 enhancement 11:13 25:22 26:20 enjoin 20:25 enjoy 20:9 enter 48:22 entered 46:19,22 47:15,19</p>	<p>entering 47:6,10 enters 35:10 entirety 35:25 entitlements 49:8 equitable 23:12 error 34:18 essence 9:15 essentially 11:1 12:3 40:13 44:4 establish 10:25 44:8 established 9:14,24 13:18,20 21:6 39:13 44:11,12,13 estimated 11:19 estop 21:23 estopped 23:22 estoppel 14:2 23:9 23:11,12,15 38:6 41:17 Esuchanko 8:8,14 40:17 44:6 52:14 Esuchanko's 8:9 et 30:16 event 11:3 13:25 15:24 16:3 eventually 29:21 everybody 26:7 everyone's 52:3 evidence 24:20 exactly 10:17 23:23 example 14:16,22 exceed 18:15 exceptions 26:1 37:21 excerpt 3:12 6:23 7:1,3,4,6 excess 9:13,19 11:7 11:8,9,20 12:5,13 12:24 13:2,2,15 17:8 18:12,15,20 22:4 39:1,7 40:9 40:12,19 44:1</p>	<p>45:22 48:13,16,16 50:16 51:22 excuse 31:14 47:16 execution 36:11 executive 12:21 exercise 9:12 50:15 exercised 50:14 52:9 exhibit 3:8,11,13 3:14,16 6:17 7:1,6 7:8,9,10,16,17,18 7:19,20 8:1,2,19 16:21 18:7 19:8 exhibited 47:21 exhibits 3:18 6:15 9:7,9 27:11,12,25 28:3,6 39:14 40:11 exist 25:1 existed 39:21 44:12 44:13 existence 14:14 34:2,9 36:23 existing 5:17,18 9:2 18:5 25:13 38:10 39:17 43:10 44:15 44:23 46:15 49:15 49:17 exists 24:6 expectation 52:21 expectations 47:22 expected 11:1 12:11 14:21,25 15:22 16:10 48:17 expired 27:1 express 24:2 25:14 40:7 46:11 expressed 9:7 expressly 40:3 45:5 47:7 extended 27:3 extent 48:7,16 50:20 51:12 52:18</p>	<p>53:1,5 E-s-u-c-h-a-n-k-o 8:9</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 45:20 facially 9:6 fact 5:8,10 13:24 14:14 15:2,23 19:19 20:8,19 21:24 24:25,25 25:1 31:10 35:15 35:22,24 37:12 41:19 facts 14:3 19:3 factual 39:6,7 failed 46:20 failure 45:16 47:17 faith 26:23 44:23 49:21 falls 25:16 familiar 33:2 far 15:9 fashion 17:24 26:11 favor 32:3,14 February 1:15 4:2 Feel 31:15 felt 13:12,13 20:16 20:23 fighting 6:10 file 7:5,8 filed 5:9 10:9 filing 37:21 finally 24:19 25:18 29:18 36:15 financial 8:3 17:17 46:18,21 47:6,14 47:18,20 find 38:3,20 39:10 39:13 41:16 finding 43:2 findings 43:6 fine 7:3 8:23 19:12</p>	<p>28:5,8,11,14 fire 5:2 Firm 2:2 first 9:22 10:9,10 13:11 19:16,25 22:9,15 23:8 38:13 41:11 52:21 five 11:16 16:4 27:5 46:22 floor 1:18 15:1,8,22 16:12 18:22 29:14 29:14 focus 29:12 37:5 followed 37:20 following 31:14,14 46:4 47:10 51:9 51:25 follows 10:18 35:7 form 25:3,3 former 7:12 47:25 48:2,10,20 49:4 formulation 18:7 forth 29:20 40:11 forward 15:20 22:6 fought 46:11 found 18:1,1 42:22 49:12 four 27:11 frankly 45:16 46:10 Friday 1:15 4:2 frivolous 39:11,14 42:18 46:24,25 front 34:7 full 30:23 40:7 fully 48:21 fund 12:9 fundamental 44:16 44:18 funds 13:2,14 40:14,16,20 48:13 further 35:2 37:17 38:6 45:23 47:24</p>
--	---	---	---	---



STATEWIDE COURT REPORTERS

800-632-2720

<p>future 50:10</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 1:17 Garrett 41:24 gender 42:25,25 general 4:24 12:9 12:19,21 17:9 18:9 19:10,15 generally 32:20 46:25 give 30:15 37:12 given 11:20 39:11 39:12 go 18:4 19:12 36:17 52:5 going 6:14 10:10,14 11:11 12:17 17:20 22:6 27:4 31:15 42:9 good 4:16,17 6:9 26:23 28:12,13 41:23 44:22 49:21 governed 35:21 government 35:9 35:11 Grand 1:14 grant 32:3 granting 5:3 greater 5:3 grievance 49:19 ground 8:24 group 14:11 GROWTH 1:2 GRS 16:6 guess 6:14 7:12 32:9 37:13</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>H 2:1 half 45:3 handles 4:25 happen 52:23 happened 13:4</p>	<p>52:13 happening 10:17 harm 22:25 harmed 51:24 head 14:11 hear 27:4 hearing 1:12 4:7,7 held 43:6 44:17 50:1,9 higher 25:13 43:18 highlight 13:10 history 52:14 hold 20:1 holdings 31:14 40:15 holds 30:1 Honor 4:12 6:7 29:22 Huron 25:3,10 29:7</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>IDENTIFIED 3:10 identity 5:24 illegal 21:3 22:18 imagine 51:13 immediately 6:5 impact 5:4 20:11 24:7,14 26:24 38:19 43:3 48:11 impacted 26:7,19 impacts 24:11 26:10 impediment 50:21 53:1 implement 43:20 implementation 31:24 implemented 9:22 10:4 28:20,22 30:11,12,14 31:22 32:4 41:10 43:15 43:22 implementing 32:13 49:13</p>	<p>importance 5:23 important 13:10,12 14:20 imposed 31:22 40:3 improper 21:12 including 40:2 inconsistent 23:13 incorporate 46:13 incorporated 5:19 8:5 24:3 45:5 46:14 incorporates 40:4 incorrect 48:1 incredible 39:20 independent 21:9 INDEX 3:8 indicate 18:23 indicated 12:15,19 14:4 15:10 18:19 19:2 22:2 24:15 29:6 34:6 45:16 52:1,2 indicates 15:12 16:5 17:7 23:10 42:8 indistinguishable 38:4 individual 40:15 individually 48:4 individuals 10:20 15:13 24:18 26:18 49:10 infringe 22:7 initially 40:2 injunction 22:22,23 23:5 injunctive 22:13,13 insert 42:11 inserted 37:24 instance 11:20,24 16:2 51:19 insulated 21:14 intend 52:3</p>	<p>interest 11:22 interfere 50:15 interpretation 24:9 24:20 interpreting 41:15 42:4 intertwined 26:11 introduced 15:20 introductory 4:20 27:10 investment 11:22 14:15,17 15:1 16:1,7 51:20 investments 10:16 11:2,3 15:3 16:6 18:21 involve 36:13 51:12 involved 24:18 25:14 42:4,22 involves 43:8 involving 10:6 31:10,10 38:5 41:18 irreparable 22:25 irrespective 15:3 issuance 5:5 issue 20:14 28:19 29:1 37:20 38:24 38:25 51:8 issued 31:12 37:23 issues 10:2,9 16:17 16:18</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>January 12:22 joined 38:1 Jones 1:20 3:4 4:13 4:13 6:20 7:16,23 8:23 19:9 27:9,17 27:23 28:4,11,13 28:16 32:16,22 33:7,10,16,21,25 34:6,18,22 35:1 37:3,7,18 52:5</p>	<p>53:6 Joseph 8:8 JR 1:17 judge 1:13 3:18 4:3 4:6,16,18 6:8,22 6:25 7:4,10,17,20 7:24 8:2,12,16,20 8:24 9:11 10:11 10:11 13:6 14:19 16:12,23,25 17:2 17:12 19:5,7,12 26:25 27:3,7,15 27:18 28:2,5,12 28:15,23 31:12,20 31:21 32:15,17 33:2,8,12,14,19 33:23 34:3,11,20 34:24 35:2,4 36:7 36:8,8,18,25 37:1 37:4,17,19,25 42:1,8 51:11 52:2 52:6,20,25 53:8,9 judgment 4:19 judicata 41:17 judicial 14:2 23:9 23:10,14 35:15 38:6 45:7 judicially 21:23 23:22 June 14:5</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kalamazoo 49:25 50:9 keep 45:21 keeping 46:16 keeps 28:6 kept 51:7 know 13:19 19:9 34:18 knowing 6:10 knowledge 45:10 known 11:10 Krystal 18:25</p>
---	---	---	--	--



STATEWIDE COURT REPORTERS

800-632-2720

24:21 36:15	42:10	Macomb 19:20	19:25 20:1,3,4,7,9	MPER 26:1
<hr/> L <hr/>	Let's 21:2	20:5 21:5 42:20	29:21 30:2 31:2	MRPC 47:23
L 1:24	level 11:4,4,6 46:10	46:16	37:13 48:3	Municipal 1:8
labor 1:2 4:15	52:21	main 29:4	membership 17:16	mutual 39:10
13:19 17:19 33:11	liability 12:10	maintain 26:22	MERC 4:4 10:3	mutuality 39:11
36:21 37:9,11	likewise 5:10	41:13	20:6 31:13,20	<hr/> N <hr/>
45:23 49:22	limited 6:5	majority 10:23	MERC's 43:1,5	name 14:5
lack 39:11 47:22	line 46:4	maker 43:8	mere 49:17	nature 10:12 53:4
Lafayette 1:18	lines 52:1	making 13:14 43:9	merely 15:19	necessarily 29:11
laid 10:11 18:24	list 6:14	50:21 53:2	merits 45:17	49:24
22:11 25:20 52:14	listed 6:4	management 21:14	method 45:22	necessary 52:12
language 16:9 22:3	litigated 45:11,21	32:11	methods 19:22	need 25:8
24:2,3 25:11,13	litigation 39:11,12	manager 47:6	Mi 9:17 13:9 19:21	needed 20:23 43:17
29:8 30:5,6 31:25	51:3	mandatory 5:11	21:11 25:25 29:24	needs 51:25
32:24	little 12:1 13:23	10:3 17:21 19:17	Michigan 1:1,8,14	negotiate 49:2
large 10:19	28:6	19:19,23 20:8	1:18,22 4:1,3,6,8	negotiated 45:1,7
law 1:13,21 4:6	local 14:7 35:9,11	21:13,24,25 22:8	4:9 17:19 30:15	negotiations 37:14
13:19 15:17 20:5	locals 6:1,6	23:25 26:3,12	30:20 32:1 41:24	48:23
21:17,18,19 23:15	locate 14:13	28:20 29:1 30:10	42:15	neither 48:8 50:4
25:2 32:11 36:21	long 43:5 47:19	32:4 49:9 50:2	middle 15:16 18:5	NESA 4:24
37:9,11 38:10	longer 48:5	Manderfield 36:8	31:5	Network 2:2
41:14,15,19 42:10	longstanding 40:23	manner 10:4 28:21	Miller 1:17	never 38:18
43:5 45:13,13	44:9	28:22 30:14 32:5	million 18:2	new 4:23 15:21
48:2	look 16:20 25:24	March 30:23 33:4	minimum 46:6,9	32:11
laws 17:19 30:16	looked 8:12	Marilyn 12:18	minute 22:10,10	Nickleberry 14:5,5
30:20	lose 18:16 29:22	mark 7:4,5,7 17:13	38:17 43:3	15:12 24:24
lay 8:24 23:9 24:22	loss 16:19 20:10	marked 7:9,19 8:1	mixed 41:19 42:25	nine 17:7 29:22
25:1	losses 26:20	8:19 18:22	43:4 50:1	NLRB 43:6
lays 16:9 17:5,6	lost 25:21,22	market 11:3,24	money 12:2 16:13	normal 18:16
23:19 24:16 25:5	lot 17:12,13 24:16	14:21 15:3 16:16	16:16 17:12,14,25	normally 11:24
leaders 13:11	28:18	marking 8:16 19:7	19:1 24:16,17	notable 34:13
leadership 17:15	lumped 26:9	matter 1:4 15:23	39:22	41:20 42:3
left 49:18	<hr/> M <hr/>	23:15 25:19 30:9	monies 20:2 44:3	note 5:22 9:6 12:17
legal 19:15 21:4,4	MacDonald 36:8	35:22	month 12:8	14:20 17:23 27:10
22:18 23:14,16,22	Mack 1:17 3:3 4:12	mayor 10:23	months 12:20	36:15 37:25
legally 30:13,13	4:12,21 6:7,24 7:3	MCL 35:12	33:20 46:23	notice 15:11 35:15
31:2 32:13 41:10	8:11,13,22 9:10	McNeil 1:24 41:23	morning 4:16,17	45:7 51:4,5
legitimate 26:23	10:11 16:24 17:1	41:23	41:23	notified 50:17
Letitia 1:20 4:13	17:4 19:6,14 27:2	mean 51:15,21	motion 1:12 4:18	notify 52:9
letter 3:13,15,16	27:4,24 28:10,14	meant 35:16	4:22 5:7,24 9:5	notwithstanding
6:20 7:11,21 8:3	33:1 35:2,4 36:20	meeting 51:19	10:9 12:16 18:7	34:14 44:20
18:25 36:16,16	41:22 42:7 51:11	member 24:11,12	28:25,25 31:11,12	November 5:9,14
37:3,15 39:15,15	52:19,24 53:9	members 17:10	motions 4:19 28:9	7:11 15:20 19:3

<p>21:19 30:21,24 33:17 46:1 47:12 47:16 Number 2:2 4:5,5 6:20 numerous 31:9</p> <hr/> <p style="text-align: center;">O</p> <p>object 27:20 objecting 27:13 objection 8:21 19:7 19:12 obligation 15:17 26:22 31:6 45:20 49:5 50:25 obligations 21:8 51:3 observes 38:2 obvious 40:23 obviously 20:22 21:3 45:18,25 occurred 5:16 44:25 47:11 October 7:21 36:16 Officers 21:10 Oh 9:6 okay 6:8 7:4 9:10 19:14 27:4,9,17 28:4,11,15,16 34:24 36:19 52:19 52:24 53:8 once 49:8 50:8 51:9 ones 27:15,21 opinion 13:17 22:22 26:1 37:20 opportunity 25:22 opposed 25:3 opposite 23:21 opted 18:3 options 11:16 47:6 oral 38:18 order 20:24 22:4 22:14 26:17,21,21 29:5 32:8 52:3,25</p>	<p>53:5 ordered 50:14 52:7 ordinance 4:23 5:2 5:8,14,20 7:14 10:1 15:5,21 16:8 16:9 26:7,7,15 30:11,21,25 32:12 36:5 38:11 39:3 40:5 41:2 42:14 43:14,14,19 45:6 46:2,12,15 49:14 ordinances 21:2 24:3 41:4 ordinary 49:9 organization 14:8 14:10 origin 27:19 original 6:3 Ottawa 25:24 29:19 ought 23:24 26:14 outline 10:17 O'Connor 1:13 3:18 4:3,6,16,18 6:8,22,25 7:4,10 7:17,20,24 8:2,12 8:16,20,24 9:11 16:23,25 17:2,12 19:5,7,12 26:25 27:3,7,15,18 28:2 28:5,12,15 32:15 32:17 33:2,8,12 33:14,19,23 34:3 34:11,20,24 35:2 36:18 37:1,4,17 37:19 42:1,8 52:2 52:6,20,25 53:8</p> <hr/> <p style="text-align: center;">P</p> <p>PA 30:15 31:23 32:18,19,20 34:3 35:12 36:12 37:6 37:7 38:17 46:19 46:24 47:2,5</p>	<p>package 20:10 50:3 50:4,4 page 3:2,8 17:7 19:21 21:11 28:25 29:22 33:3 36:16 36:19 pages 21:6 paragraph 14:17 16:4 26:1 34:15 35:6,17,24 36:3,4 36:5,12 parity 16:18 parse 26:8 part 6:19 7:25 9:16 10:20 13:22 14:19 20:9 22:23 25:12 34:4 38:24 44:4,5 44:5 48:6 49:10 51:15 52:17 partial 18:7 participants 50:19 50:21 53:2,3 particular 27:25 32:12 36:3 37:4 42:24 43:8 particularly 41:20 42:3 parties 6:25 9:25 10:7 25:11,19 29:19 38:5,20 40:7 41:7,18 45:1 45:8,10 46:11 48:22 49:1 50:9 party 1:6,17 4:4,11 5:24 6:4 23:15,19 Party's 24:24 passed 22:16 passing 6:2 pay 26:18 32:7 Peltz 31:20 pension 4:24,25 5:11,14,16,20 8:6 9:12 18:17 19:22</p>	<p>21:9 33:15,17 38:13 39:1,3,8,22 40:5,10,16,19,20 41:2 42:14,23 43:13,13,14,19 44:2,17 45:6 46:1 46:12,15 48:12,24 49:14 50:13,15,21 50:24 51:19 52:8 52:9,10,13,16,22 53:2 pensions 42:13 people 48:24 PERA 21:13,14 23:7 31:24 32:25 33:6,22 34:23 35:21 36:1,4,12 41:15 42:4 45:13 49:16 percent 11:4,16,19 11:25 14:15,18,22 14:25 15:2,8,25 16:2,7,8,15,15 18:16,21,22,24 percentage 11:19 perfectly 49:9 perform 11:2,3 performance 11:6 performed 11:18 11:24 performs 16:14 period 29:10 30:12 34:1 permissive 48:23 48:25 49:23 50:3 phase 51:13 phrase 16:1 48:18 picked 27:21 piece 50:6,6 pieces 50:5 place 9:3 17:18 36:13 45:1,21 47:5</p>	<p>placed 18:10 places 51:6 placing 13:16 plan 5:11 29:15 33:15,16,17 38:13 42:24 44:5 50:18 plans 29:1 30:11 44:17 plan's 8:6 play 32:10,12 33:20 PLC 1:17 Pleading 6:20 pleadings 4:20 6:12 6:19 POAM 31:13 36:9 pocket 12:3 point 8:15 20:18 31:7 35:4 45:1 46:1 points 29:3 30:8 police 5:2 21:10 Port 25:3,10 29:7 portion 11:9,12,20 12:13 position 20:22 23:16,19,20,21 29:8 43:16 positions 10:21 23:13 possibility 50:10 possible 6:10 possibly 47:16 48:24 post 36:11 posting 51:4,5 potential 15:15 pots 18:11 44:3 51:23 practical 50:20,23 51:12 52:18 53:1 practice 8:6 10:1 10:13 12:15 13:12 13:13,17,18,18</p>
---	--	--	--	---



STATEWIDE COURT REPORTERS

800-632-2720

<p>14:3,14,19 15:6,9 15:15 17:14,18,18 17:20 20:14,21,22 20:24 21:3 22:4 24:4,5,22,25 25:1 25:3,4,7,9,12,15 29:5,6 39:9,13,17 39:19,20 40:22,24 44:8 45:23 46:4,6 46:7,9 49:22 practices 5:16 precedent 20:6 21:6 preceding 34:15 precise 41:13 precisely 52:16 precluding 5:5 preexisting 44:20 45:21 50:18 preference 40:23 prepared 6:16 8:7 37:19 Present 1:24 president 14:6,7 15:12 41:24 presidents 14:8,9,9 15:13 presumably 9:25 presume 51:13 prevailed 9:18 38:7 preview 37:24 previously 45:11 45:21 46:8,11 50:14 52:8 principal 47:21 prior 5:15,19 8:6 10:1 35:20 36:13 39:11,12,13,17,19 39:20 45:5 52:14 probably 32:22 problem 51:1 procedural 5:22 10:8</p>	<p>procedure 49:19 proceeding 23:17 proceedings 23:14 53:10 process 22:14,16 22:19 37:16 43:8 43:9 44:11 produced 39:14 productive 50:10 proffered 46:17 prohibit 22:4,6 prohibited 4:24 5:2 49:1 projected 40:13 promised 48:12,14 promises 44:17 49:6 51:7 proof 25:14 proper 25:19 29:19 propose 27:20 52:25 proposed 7:14 17:25 provide 17:20 34:16 48:2 provided 8:14 16:20 47:5,7,9 providing 34:14 provision 26:10 30:17 34:3 35:17 38:11 41:9 44:20 provisions 5:21 34:9 36:1 41:5 45:6 public 23:18 27:21 30:12,17,22 33:4 33:21 34:2,8,9,22 35:5 36:23 published 10:6 38:4,20 41:6 pulled 14:12 purpose 15:15 purposes 11:22</p>	<p>put 7:8 16:13 17:18 52:12 putting 51:23 P52136 1:20 P58657 1:17</p> <hr/> <p style="text-align: center;">Q</p> <p>quarterly 18:25 question 5:22 9:12 10:2 30:9 35:20 39:4 41:19 42:23 47:24 48:21,24 50:1 52:17 questions 4:25 10:9 26:16 51:10 53:4 quite 28:17 quo 26:17,22 32:7 50:13 52:6 quote 21:12,15 23:11 26:3,5 41:9 41:11 quoting 21:7</p> <hr/> <p style="text-align: center;">R</p> <p>raise 25:18 36:22 raised 5:23 6:9 19:15 47:24 raises 20:12 raising 48:24 rate 5:3 10:25 11:1 11:22 13:3 14:21 14:25 15:1,22,25 16:6,7,10 18:24 40:13 48:17 51:21 reach 18:15 reached 50:8 read 33:1 reads 35:6 reaffirm 51:4,6 real 14:5 18:10 realize 20:3 22:21 51:16 realized 15:3,4 19:25 20:4</p>	<p>realizes 23:2 reallocate 50:24 really 14:4 15:11 15:17 19:1 33:23 37:23 45:2 46:17 realm 25:16 30:4 reason 27:15 31:25 reasonable 17:24 reasons 13:10 40:24 recall 8:10 receive 18:17 51:9 received 3:10 9:9 14:23,24 18:19 recognized 39:18 recollection 42:9 recommend 51:4 recommending 50:12 52:7 record 27:6,7 28:6 28:18 37:25 RECORDED 2:1 Recorder 2:1 records 27:21 recounted 38:9 recounts 39:16 41:8 reduce 12:14 40:16 44:4 reduced 12:6 refer 29:22 32:18 reference 5:19 6:2 29:23 40:4 45:5 46:13,14 referenced 13:7 referencing 35:5 referred 28:24 46:21 Referring 33:3 reflected 14:15 refusal 44:22 49:21 regarding 9:19 31:13 49:8 50:16</p>	<p>regardless 16:16 21:8 38:10,11 41:4,16 44:11 Registration 2:2 rejection 51:2 related 8:7 23:17 49:22 relates 4:23 29:18 30:9 32:6,9,12 37:7,16 Relations 1:3 4:9 4:15 33:11 relevant 36:14 45:14,18 reliance 9:16 relied 6:12,13 7:24 27:16 44:7 47:19 relief 22:13,13 32:6 49:3 rely 34:21 47:20 relying 34:22 remained 41:5 remaining 12:7 35:12 remains 41:15 remedies 32:8 remedy 32:7 remember 42:11 remembered 14:6 removal 35:25 remove 21:12 29:14 removed 36:4 repealed 30:24 repeatedly 40:1 report 17:7 18:25 24:21,21 Reporting 2:2 represent 14:9 47:25 representing 12:10 represents 10:24 repudiated 49:15</p>
--	--	--	---	--



STATEWIDE COURT REPORTERS

800-632-2720

<p>repudiation 9:3 24:1,2,6 25:17 45:24 49:16 request 22:12 requested 32:6 requires 21:25 requiring 33:5 res 41:16 resolution 50:23 resolvable 21:20 respect 15:6,7 20:19,21 22:8,20 25:2 26:19,20 respects 15:6 responded 5:6 Respondent 1:9,20 6:20 response 20:19,25 22:9,12 28:24 37:2 41:8 52:21 responsible 12:14 21:7 restoration 50:12 50:17 restore 52:8 restored 32:7 52:6 52:10 restoring 50:13 result 18:11 24:5 results 16:19 retained 3:18 retire 29:21 49:8 retired 47:25 48:10 48:20,25 49:11 retiree 40:14 retirees 5:5 10:22 10:24 11:10,12 14:23 18:12 25:19 25:20 26:9,11 29:18 30:2 48:3,4 50:19 retirement 4:24 10:16,19 11:2,18</p>	<p>12:6,8,10,12,19 12:22,25 17:10 18:9 19:10,22 20:3,5,8,10,15,16 24:12 25:23 26:7 29:1 30:11 48:15 50:16,18 retiring 12:12 return 5:3,4 10:25 11:1 14:20,21,22 14:25 15:1,22,25 16:6,10 40:13 51:21 returned 26:17 returns 14:14 review 10:2 reviewed 4:20 reviewing 28:23 re-adopted 40:1 Richard 1:17 4:12 right 4:14 6:12,22 7:24 8:20 10:8 16:1 27:7 30:18 31:23 32:9,10 36:24 37:19 42:16 49:4 rightly 41:3 rises 46:10 rising 23:10,12 Robert 36:7 Roberts 31:17 Roc 12:18 rolls 12:11 roughly 40:21 route 18:4 rule 32:14 ruling 36:8,8,9 run 37:22</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>SAAA 21:21 salary 11:17 save 17:25 savings 18:18</p>	<p>saying 22:23 says 12:22 21:11 34:4 Schools 23:18 scope 20:17 21:13 Seated 4:14 second 13:22 19:5 22:19 36:18 45:2 secondly 40:15 section 30:16,18,18 30:20,20 32:1 34:23 35:11 47:8 Sections 36:2 see 17:4 18:12 41:1 seeking 23:5 25:11 44:21 49:5 seeks 16:2 seemingly 5:13 seen 14:25 18:21 selected 27:15,16 Senior 13:7 separate 44:3 45:3 seq 30:16 Service 17:10 set 17:14 40:11 44:20 seven 11:16 33:3 Sheriff 49:25 50:10 shocking 38:21 47:2 shows 18:8,10 side 17:23 27:19,20 50:4 sides 6:13 7:24 16:21 signed 35:16 significant 16:19 16:19 24:7,14,17 silent 25:7 similar 8:13 9:19 Similarly 10:5 single 24:11,12 42:25 43:4 50:4</p>	<p>sir 52:5 sitting 38:1 six 33:20 36:16,19 sneeze 31:15 sole 46:17 solely 5:25 somebody 7:2 somebody's 7:14 sorry 4:8 6:21 14:23 16:24 23:1 sorts 16:13 sought 9:18 22:2,3 34:20 38:23 39:2 39:3 40:5 46:8 49:3 so-called 6:1 40:12 speak 37:8 speaking 37:11 Special 41:23 specific 31:25 32:24 39:17 specifically 12:17 19:21 28:16,21 30:4,16,17,21 33:22 35:6 52:9 specificity 39:20 specious 47:1 spelling 39:21 Spohn 23:18 squarely 25:16 stability 46:18,21 47:14,18,20 staff 39:16 stake 38:25 standard 25:14 standing 47:25 started 34:19 starting 4:10 state 1:1 17:19 30:5 34:7 35:8 stated 30:5,18 31:4 Statement 3:3,4 statements 14:12</p>	<p>states 28:21 31:3 32:24 33:22 34:23 stating 21:7 status 26:17,22 32:7 43:18 50:13 52:6 statute 47:8 step 22:16 steps 51:16 52:7 Stern 31:12,21 Stern's 36:9 stumbled 48:17 stunned 45:16 subject 17:21 19:19 20:8 21:13,24,25 22:8 23:25 24:12 25:7 26:3,12 29:1 30:10 32:18 35:11 45:3 48:25 49:9 49:23 subjects 5:11 19:23 48:23 50:3,3 submit 7:2 submitted 40:17 43:25 44:7 subordinate 6:6 substantial 24:6,10 successful 14:1 23:4 sued 22:5 suffer 22:25 23:1 suggests 29:5,13,19 suing 20:25 suit 49:19 Suite 1:22 summary 4:19,22 5:7 18:7 supplement 40:15 supported 9:5 43:24 Supreme 42:15 sure 17:17 19:6 37:4 42:1</p>
--	---	---	---	---

<p>suspended 30:19 32:2,20,25 33:6 33:22 34:1,4,23 46:19,24 47:10 system 4:7,24 9:23 10:16 11:2,18 12:6,9,10,11,12 12:19,22,25 18:9 19:10 20:15,16</p> <hr/> <p style="text-align: center;">T</p> <p>Tab 7:7,22 8:17 12:18 17:2 18:6 table 3:1 41:21 42:24 43:1,3,4 tacit 25:8 29:8,9 40:6 46:5,6,7,9 tacitly 42:23 take 12:13 23:13 27:5 35:14 37:14 51:16 taken 21:9 23:17 30:25 51:2 talking 24:16 target 40:13 term 5:17 13:2 19:17 35:12,19 terms 5:10 6:13 26:4 31:1,23 32:9 33:5 36:10 39:17 44:21 46:12 47:2 49:15,17 testified 16:3 testify 12:23 testimony 28:1 Thank 10:11 17:4 53:8,9 theory 14:2 23:22 thing 6:10 38:7 things 7:25 15:5 40:14 think 6:18 7:3,15 9:7 11:5 13:9 14:6 16:3 17:23</p>	<p>21:22 23:23 25:16 28:2 35:18 41:20 45:16 46:5,10 52:12,23 third 12:4,13 thought 6:8,9 34:13 three 11:8,16 12:20 14:17 18:11 40:14 40:14,20 44:3 46:7 51:23 three-way 13:14 threw 43:21 time 9:21 13:12 15:16 17:13,16,16 21:3,17 29:10 30:12 34:1 37:21 40:21 45:1 timely 5:9 today 8:25 21:4 31:4 32:19 37:23 37:23 38:8,15,25 41:18 42:19 45:12 told 6:4 17:17 33:11 topic 45:9 transcript 42:2 51:9 Transit 25:2 Treasurer 35:8 treat 7:1 11:6,25 25:12 26:8 treated 15:2 49:20 50:8 Trenton 26:1 29:20 trials 38:2 Tribunal 34:21 35:24 47:1,17,20 tried 21:17 troubling 38:21 47:22 truly 35:23 try 20:20 trying 37:3</p>	<p>two 10:7 13:10 15:5 22:16 38:20 41:18 two-step 22:14,19 typically 52:15 Tyra 37:25</p> <hr/> <p style="text-align: center;">U</p> <p>Uh-huh 32:16 ultimately 50:25 ultra 9:15 20:17 unambiguous 47:9 unbargained 37:12 underlying 38:25 understand 4:25 8:25 understandable 40:24 understanding 13:1 16:5 40:7 45:8 undisputed 5:13 27:18,22 43:14,24 49:17 unearned 48:16 unequivocally 44:7 unfair 45:23 49:22 unfortunate 18:3 unilateral 9:1 18:4 19:16 20:13 23:7 23:24 33:14 35:19 36:24 41:2 43:2,9 49:6 51:1 unilaterally 38:12 40:3,5,25 43:7,15 44:23 49:13 50:5 50:7 Union 8:9,15 9:15 10:9 13:25 15:18 17:15,22,24 25:3 30:2 31:5 37:12 38:14 39:8 40:3,4 42:8,20 43:25 46:3 48:9 49:3,5 49:12</p>	<p>unionized 22:15,20 unions 6:2 15:14 18:2 22:5,11 23:1 23:3,8 31:1 43:21 48:5 Union's 4:22 8:25 9:5 19:8 22:12 23:5 30:4 48:11 unit 24:8 48:6 49:11 unlawful 9:1 10:4 28:21,22 30:14 31:24 32:5 43:10 44:22 45:24 47:16 49:22 unsuccessfully 46:9 upheld 43:1 use 42:24,25 43:4 Usually 11:10</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:7 9:17 23:18 vague 42:9 value 17:4 Van 23:18 various 6:6 32:9 vein 37:13 venue 23:20,21 verification 19:11 version 5:20 45:5 versus 13:8 21:10 26:8 29:23,24 31:15,17,18,19 44:16 violate 21:1 violating 50:7 violation 23:7,8 43:5 vires 9:15 20:17 virtually 5:1 voluntarily 48:22 voters 13:16 41:10</p> <hr/> <p style="text-align: center;">W</p>	<p>wait 22:9,10 53:6 want 5:22 7:2 27:23 28:7 33:23 37:1,4,5,8 wanted 15:14 39:19 42:1 wants 27:19 wasn't 29:17 38:21 39:10 way 12:4 13:13 15:6 17:21,25 29:11 50:25 Wayne 29:23,24 31:17,18 ways 11:8 week 31:12,21 went 15:19 16:11 16:11 24:23 weren't 18:21 West 1:14,18 25:24 29:19 We'll 7:4,5 22:10 50:5 we're 4:3,18 19:18 20:25 24:15 45:11 whatnot 49:20 wisdom 9:25 10:1,5 wish 37:8 withdraw 37:5,8 won 23:3 wonder 19:14 wondering 27:11 Woodward 1:22 words 13:17 14:25 work 8:24 32:10 51:5 worked 12:19 workers 22:15,20 worst 6:9 wouldn't 29:16 Wright 38:1 written 37:20,21,23 37:24 51:8 53:6</p>
---	--	---	--	---



STATEWIDE COURT REPORTERS

800-632-2720

wrong 42:15,16,16 42:18	126 25:25	39:2 40:9,25	47:2,5
<hr/> X <hr/>	13th 5:5 11:10 15:9 15:9 18:14,17	44:13 45:15 46:1	4th 35:16,18
X 11:25	20:11 25:23 26:19 40:14 44:5 48:15	46:19 47:12,16	404 30:1
<hr/> Y <hr/>	49:14	2012 6:17 16:4	423.215 35:12
Yeah 8:13 28:10	141.1501 30:16	30:24 33:11,12	48226 1:18,22
year 11:22,25 12:7 12:22,23 14:16	141.1514(a) 30:20 32:1 35:6	35:16,18 36:11	<hr/> 5 <hr/>
16:4 18:1,11,11	149 19:21	47:13,15	500 1:22
18:13,18 24:17,17	15 30:18 34:23 36:4	2013 1:15 4:2	<hr/> 6 <hr/>
39:21,21 40:18	15th 30:22	212 21:11	600 1:18
44:1	15.1 35:11	214 14:7	664 29:25
years 11:5,18 12:20 14:13 24:5,15	15.9 14:17	218 9:17 13:9	<hr/> 7 <hr/>
39:21	157 30:1	237-3002 1:23	7 3:11,13
<hr/> Z <hr/>	159 21:6	24 12:20 26:1	7.9 11:4,19 14:15
zero 18:23	16 30:23	25 1:5,24 4:4 5:25 6:6 41:25	14:22,25 15:2,8
<hr/> \$ <hr/>	160 19:21 21:6	2530 2:1	15:25 16:2,8,14
\$1.9 24:15	18 14:10	26 26:1	16:15 18:16,21,22
\$100 18:2	1947 35:12	263 9:17 13:9	18:23 29:14,16,17
<hr/> 0 <hr/>	1971 30:1	28,37 3:4	70's 42:6
0-0-0 53:12	1974 42:16	289 29:24	74 42:7,9
<hr/> 1 <hr/>	1995 18:13	294 19:21	<hr/> 8 <hr/>
1 3:11 6:17 7:6,8,9 9:8,9	1996 9:17 10:6 20:20 38:4,23	<hr/> 3 <hr/>	8 1:15 3:14,16 4:2 7:11
1-800-632-2720 2:3	39:1 40:8,22,25	3 3:14 7:21 8:1	80's 10:15,18
1.2 17:11	41:4,6,12,17	3.3 47:23	8151 2:2
1.9 17:11	42:17 43:16 44:10	30 35:9,17 47:10	<hr/> 9 <hr/>
10 7:21 11:5 28:25 30:18,20 32:1	44:12 45:8,14,18	30th 15:21 19:3	9 3:11,13,14,16 36:2
35:6,17 36:2,12	51:3	30-some 24:5	9:00 1:15
36:16	<hr/> 2 <hr/>	3026 1:14	9:11 4:2
10,35 3:3	2 1:22 3:13 7:10,18 7:19	306 25:25	90's 21:18
10-10-2011 3:15	20 5:15 39:21	313 1:19,23	96 38:8
10:55 53:10	20.9 16:6	336 35:12	964-4454 1:19
11 36:2	2008 6:17	383 21:11	
11-8-2011 3:13	2008-2012 3:12 27:1 40:2 45:24	390 21:11	
12-000777 1:7 4:5	2010 29:25	<hr/> 4 <hr/>	
	2011 5:9,14,15 7:11 7:21 21:19 26:2	4 1:18 3:16 8:2,2,19 9:8,9 16:23,24	
	30:21,22,23 33:4	30:12,15,17,22	
	33:17,18 36:16	31:23 32:18,19,20	
		33:4,22 34:2,3,8,9	
		34:23 35:5 36:11	
		36:12,23 37:6,7	
		38:17 46:19,24	



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800-632-2720