

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AFSCME COUNCIL 25, AND ITS
AFFILIATED LOCALS,
Plaintiff,

Case No. 15-13288
Hon. Judith Levy

v

CHARTER COUNTY OF WAYNE Magistrate Judge
and WARREN EVANS, County R. Steven Whalen
Executive/Chief Administrative Officer,
Defendants.

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**PLAINTIFFS' SECOND AMENDED VERIFIED COMPLAINT
UNDER FRCP 15(a)(1) FOR DAMAGES AND INJUNCTIVE RELIEF**

NOW COME THE PLAINTIFFS, on behalf of themselves as well as those similarly situated, and by and through their counsel of record, to state to the Court:

JURISDICTION AND VENUE

1. The Plaintiffs plead that they possess specific and detailed issues of law and fact,, based upon accrued and vested rights recognized in **Litton Financial Printing Div. v N.L.R.B.**, 501 U.S. 190, 192, 206-207, 111 S. Ct. 221 (1991); that case cited with approval by the Supreme Court in **M&G Polymers v.**

Tackett, _____ U.S. _____, 135 S. Ct. 926 (2015) (Docket No. 13-1010). They allege that the Defendants as of August 21, 2015, have illegally bound themselves by a “Consent Agreement” with the State of Michigan’s Executive Branch. On September 20, 2015, protected and accrued benefits will be dramatically slashed or terminated, contrary to the U.S. Constitution. The Court’s jurisdiction is pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331. All actions took place within the venue of this Court, pursuant to 28 U.S.C. §1391, and Defendants place of business and residence are in the County of Wayne, Michigan, and they conduct their business within the judicial district of this Court.

2. Pursuant to Rule 23(a), Rule 23(b)(1), and (2) of the Federal Rules of Civil Procedure, the Lead Plaintiff attests that it represents of a class of over 2,500 Plaintiffs-employees through its various local bargaining units.

3. The pending impairments and loss of benefits as pleaded in this Complaint entitle Plaintiffs to injunctive and declaratory relief pursuant to 42 U.S.C. §1983.

4. The taking of Plaintiffs’ property without substantive and procedural due process, as well as without just compensation is contrary to the U.S. Constitution and actionable under 42 U.S.C. §1983.

5. Defendants acted pursuant to official policies and customs, as well as by a *faux* “Consent Agreement” with the State of Michigan whose specific intent is to deprive Plaintiffs of their vested and protected benefits.

THE PARTIES

6. Plaintiffs reincorporate by reference Paragraphs 1-5.

7. Plaintiffs are the collective bargaining representatives for approximately 2,500 current employees of the County of Wayne, Michigan, certified as such by the Michigan Employment Relations Commission.

8. Defendants are incorporated, organized and elected pursuant to Michigan's "Optional Unified Form of County Government Act," **1973 P.A. 139**, with Defendant County Executive Warren Evans was elected pursuant to **Section-2** of that Act, **M.C.L. 45.552** and is being sued individually and in his **official capacity as the elected county executive and appointed "Chief Administrative Officer"**

FACTUAL ALLEGATIONS

9. Plaintiffs reincorporate by reference Paragraphs 1-8.

10. On or about June 17, 2015, Defendant Warren Evans forwarded a letter to the Treasurer for the State of Michigan, Nick Khouri, claiming that the County had achieved one or more factors, or "trip wires" for the State's Emergency Manager Act [2012 P.A. 436] to be used:

[They] exist or are likely to occur within the current or next succeeding fiscal year and threaten the County's capability to provide necessary governmental services essential to the public health, safety, and welfare. Therefore, I recommend that a financial emergency be declared in the County. Exhibit 1

11. The letter was a pre-arranged agreement with the State's Executive Branch to create an agreement, or "contract" to bypass the County's charter

system of government and create authoritarian control over fiscal matters for Defendant Evans.

12. The letter's basic claims were false. Wayne County is not suffering a financial emergency as defined by Act 2012 P.A. 436. Wayne County has the ability to levy almost 7 mils which would bring in approximately \$209,000,000.00 per year for a 20 year period. (Exhibit #2- Affidavit of Hugh Macdonald).

13. The State of Michigan's Executive Branch, through State Treasurer Khouri's office, quickly responded, and just 13-days later issued a "Final Report" to the State Treasurer that lip-synced Defendant Evans' letter of June 17th. The Final Report ignored the availability of the 7-mils of available tax revenue, and instead concentrated on the costs of employee wages, benefits, and retirement costs.

14. The "Consent Agreement" was drafted by the State Treasurer's office and issued to the County's Commission and Defendant Evans for ratification, citing P.A. 436 at M.C.L. 141.1548. It was ratified by all parties as of August 13, 2015, and granted Defendant Evans extraordinary powers to bypass the County Commission and the County's residents on major issues of budgets, personnel decisions, and County services. (Exhibit 3 -Consent Agreement)

15. In particular, the Consent Agreement illegally enhanced the purported powers of Defendant Evans, by claiming that it could grant him the

authority to immediately impose any and all conditions of employment on Plaintiffs' members.

16. The Consent Agreement cites **§12(1)(ee)** of P.A. 436, at **M.C.L. 141.1552(1)(ee)**, claiming to give only an Emergency Manager the power to:

Take any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government. The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities. (Emphasis added)

17. P.A. 436, however, specifically prohibits those powers from being granted to Defendant Evans. The statute at **§12(1)(I)** only permits a State-appointed administrator under a Consent Agreement to “*act as sole agent of the local government in collective bargaining with employees or representatives and approve any contract or agreement.*” **M.C.L. 141.1552(1)(I)**. (Exhibit 4 Act 436).

18. Defendant Evans has announced drastic cuts and unilateral changes to Plaintiff, AFSCME Local 3317 collective bargaining agreements, as well as the County's charter and ordinances, which became effective on September 21, 2015. (Exhibit 4)

19. By the terms of the Consent Agreement, there is no appeal by the employees and Plaintiffs who will be adversely affected by the illegal impairments of their contracts, working conditions, and benefits.

20. The Consent Agreement gives the Emergency Manager powers of **M.C.L. 141.1552** to Defendant Evans, including the power to obtain a resolution from the County Commission that will “reject, modify, or terminate 1 or more

terms and conditions of an existing contract,” at **M.C.L. 141.1552(1)(j)**. (Exhibit 4 Act 436)

21. The Consent Agreement at **§3** also grants Defendant Evans all “powers prescribed for emergency managers under Section 10 of Act 436 to issue and enforce orders necessary to accomplish the purposes of **Act 436** and this agreement.”

22. The executive powers given to Defendant Evans strips all rights of the citizens and stakeholders who attempt to interact with Wayne County and its County Executive. There will be no appeals permitted for any orders issued by Defendant Evans, once a rubber-stamped approval is issued by the State Treasurer’s office.

23. An example is the Local 3317 contracts which were valid on September 21, 2015 and which are still valid as of this date are:

A. Article 38.01(L) of the Collective Bargaining Agreement between AFSCME Local 3317 and Wayne County which had an expiration date of September 30, 2020; (Exhibit 5)

b. The Collective Bargaining Agreements for all of plaintiff’s local Unions which provided for a 75% pension benefit for those employees injured in the line of duty and in receipt of workers compensation benefits. (Exhibit 5)

c. The order issued by Evans on September 21, 2015, eliminated these pension benefits in violation of Article IX, Section 24 of the Michigan Constitution.

d. All of the AFSCME locals had and still have a grievance arbitration clause which provided for the arbitration of class action grievance 2015-1 relating to pension funding. The County stated in its September 5th, 2015 communication that it will not take the grievance to arbitration, the class action grievance and the right to arbitrate are contractual rights. (Exhibit 7).

e. Act 436 does not provide for the Chief Administrative Officer to have the power to change non-economic provisions of the Collective Bargaining Agreements; here again these are contractual rights protected by Article I, Section 10 of the United States Constitution.

**COUNT I - UNCONSTITUTIONAL DEPRIVATION OF
PROPERTY INTEREST WITHOUT DUE PROCESS
OR JUST COMPENSATION - 42. U.S.C. §1983**

24. Plaintiffs reincorporate by reference Paragraphs 1-23.

25. The Plaintiffs' collective bargaining agreements, as well as the Wayne County charter, ordinances, Civil Service Rules and other employment agreements, created property rights between the Plaintiffs and Defendants.

26. Defendants, acting under color of law through 2012 P.A. 436, has deprived Plaintiffs and the memberships of all property rights related to wages, hours, and terms and conditions of employment, without any due process or independent appeal - because no due process or appeal is permitted by P.A. 436.

27. Employment contracts and agreements are entitled to review for the due process violations of the Plaintiffs members' legitimate entitlements.

28. For public employs, property rights are created by contract and/or

statutes. Cleveland Bd. of Educ. v Loudermill, 470 U.S. 532 (1985); Ottawa County v Jaklinski, 423 Mich 1 (1985); Bd. of Regents of State Coll. v Roth, 408 U.S. 564, 577 (1972). The provisions of the Collective Bargaining Agreement which constitutes property rights protected under the 14th Amendment to the United States Constitution are as follows:

a. **Duty disability pension.**

For those employees who have 30 years of credited service, they have a vested right to a disability pension of 75% of their average final compensation; the defendants have changed the 75% to 60% thus reducing the duty disability pension benefits which were accrued to prior to September 21, 2015 from 75% to 60%. This affects all AFSCME bargaining units; (Exhibit 5 and Exhibit 6)

b. **(5) years of retirement vesting.**

The Collective Bargaining Agreement which is in effect until the year 2020 relating to pension accrual for members of Local 3317 was eliminated with the imposed working conditions on September 21, 2015. AFSCME/Local 3317's Collective Bargaining Agreement, entered into with the employer in 2010 provided that the Union did not have to bargain pension benefits until the year 2020. All members of the bargaining unit were guaranteed pension credit vesting until 2020 or an additional 5 years of pension credits. The defendants unilaterally took away these 5 years of vested benefits. (Exhibit 5)

c. **AFSCME right to grievance arbitration.**

Under Ottawa; surpa, and Gibraltar School District v. MESPA; 443 Mich 326 (1993), any grievance that accrued as of September 20, 2015, was subject to

the grievance arbitration provision of the Collective Bargaining Agreement.

In April 2015, AFSCME filed a class action grievance as it relates to the funding of the pension system. On September 5, 2015, approximately 20 days after the execution of the Consent Agreement, Wayne County sent a letter to plaintiff stating that it would not take the grievance to arbitration. (Exhibit 7-A)

On June 26, 2015 Richard Johnson presented AFSCME Class Action 2015-2 to the County relating to Disability Retirement Medical. (Exhibit 7-B)

On June 29, 2015, Matt Gloster Vice President of AFSCME Local 3317 filed Local 3317 Class Action Grievance 2015-001, referred to as the 13th Check Grievance (Exhibit 7-C)

d. **AFSCME Local 3317 had a statutory and common law right not to allow for the restructuring of the pension system.**

The Michigan Court of Appeals in interrupting the Public Employment Relations Act determined that the makeup of a public employee pension board was a mandatory subject of bargaining; however, the Court also stated that all labor Unions had to agree as to any changes in the statutory composition of a retirement board., **Werdlow et al v City of Detroit Police & Fire System Board of Trustees**, et al; 269 Mich App 383 (2006); (Exhibit 8).

The defendants are in the process of removing elected members from the Pension Board and replacing them with the County Executive's appointees, thus giving the County Executive complete control of the Pension Board.

AFSCME Local 3317 has a 20 year contract bar (ending September 30, 2020) as

it relates to negotiating changes to the pension plan, which would include the composition of the Pension Board. The County now takes the position, that because it imposed working conditions on the Union that the 20 year contract bar does not exist. (Exhibit 9 - Affidavit of Richard Johnson)

29. All of the above stated property rights, created by Statute or Contract, have been unilaterally altered by Evans, the Union has no avenue of appeal and therefore has been deprived of a property right without being accorded due process of law.

Wherefore, plaintiff respectfully requests that this Honorable Court grant its injunction and finds that plaintiff is entitled to the redress prayed for herein.

**COUNT II - VIOLATION OF PLAINTIFF'S FIRST AMENDMENT
RIGHTS TO FREEDOM OF SPEECH**

30. Plaintiff hereby incorporates paragraphs 1 - 29 above to avoid repetition.

31. On September 17, 2015, plaintiff filed its complaint against defendant, Evans, and defendant, Wayne County. Plaintiff's complaint was accompanied by a Motion for Temporary Restraining Order and a Preliminary Injunction.

32. On Friday, September 18, 2015 the Honorable Matthew Leitman held **two**, on the record, conference calls with the parties.

33. During the course of the second conference call the Deputy CEO, Richard Kaufman, stated that the County was not going to present the Union

with a non-economic proposal as it wished to make certain changes therein.
(Exhibit 10-transcript of September 18 2015 hearing at pgs. 23-35)

34. At approximately 5:00 pm on Monday, September 21, 2015, the defendants, without bargaining with the Union or without presenting the Union with any non-economic proposals, unilaterally made a wholesale change to the Collective Bargaining Agreement and more specifically the non-economic provisions of the contract. (Exhibit 4-imposed working conditions)

35. The punitive nature of the non-economic changes in the Collective Bargaining Agreement were unconscionable and unheard of in modern labor negotiations. (Exhibit 4).

36. Many of the changes in the non-economic provisions of the Collective Bargaining Agreement were singularly applied to Local 3317 and do not appear in any of the other imposed working conditions demanded by the defendants. (Exhibit 9).

37. AFSCME Local 3317 was singled out by Evans for the imposition of economic and non-economic punitive contractual terms, as an act of retaliation; a reason for said imposition of the punitive economic and non-economic contract provisions, was due to plaintiff filing a lawsuit in Federal Court attempting to block the Evans' action. (Exhibit 11).

Exhibit 11 is an email dated November 30, 2015 from Wayne County Commissioner Diana Webb, to Sgt. Belanger; said email states as follows:

From: "Diane Webb" <dwebb1@waynecounty.com>
To: jbel1@comcast.net
Sent: Monday, November 30, 2015 4:46:24 PM
Subject: Re: Message from Wayne County contact page

Thanks Jacques for your response. I took Evans on about his treatment of 3317 asking him to ask least give you the same deal POAM got. His response was "no way, their lawyer MF'd me up one side and down the other and they want the same as POAM that was willing to work with us?" My response was "you are going to punish all those working guys that had nothing to do with what that lawyer had to say, because he cussed you out? " he said, "that's right", I am not going to reward those that fight us, it wouldn't be those to those that don't". So basically he made an example out of you. Which is total crap, but says a lot for however he rules with an iron fist. He is a Dictator and I am so disappointed, I was hoping he'd be better than Ficano and he is worse! Hard to imagine. I told his people that if he wanted to be a dictator he should of moves to Mexico and ran for president. I am soooooo sorry for what he is doing to our retirees and our employees, it is awful and so unfair. Our people did not cause this county's problems yet they are being made to pay for it. If he was truly a great leader he would go to the taxpayers and ask them to pay for the services we provide-they/we are paying 30% less in property taxes than we did on 2008, over the last 7 years they collectively paid \$700M less in taxes, that is why this county is broke. Ficano's sweetheart pension deals surely didn't help the retirement system and his complete lack of Operational management skills, failing to respond to the falling economy rendering 5-6 yrs of stupid budgets with no organizational changes, he was pathetic but no where near as mean spirited as Evans.

As for the neutral mediation option, has we gone that way, he would have gone out his way to fail it, and that would have resulted in an EM that they controlled, probably one of their own. Then the commission would have been powerless to help anyone in any circumstances. We all knew that for certain. Snyder approved his Request for the declaration of a financial emergency in less than a week. This train left the station before Evans even took office. I am sure of it. I have been in government long enough to know that things just don't happen that fast, unless they were pre-planned. So he had us boxed in from the gate. I think we were right to hold on to our powers under the charter. We can't stop him on everything like I wish we could but we can stop him on some of the things he is Trying to do, as long as my colleagues stay strong and don't cave under this pressure we are getting from the media. If we cave, we are toast and he will run all over us. He has already violated several county ordinances. Our chairman doesn't want to file suit because the taxpayers have to pay for it, but I think we have to stop him at any cost. Otherwise the people will have no voice I. The process. We are there to represent the people if we serve no purpose In Protecting the people from a dictatorship what good are we? Our ordinances are there to safeguard the people from the abuses of the past, and so far he has violated the budget ordinance, the procurement ordinance, the executive compensation ordinance and the ethics ordinance! If it were up to me we would be going at it!!! He is a bully and a coward and he doesn't scare me in the least. I just voted against paying the attorneys he used to strip you of your rights to arbitrate. I am not going to pay for the dismantling of organize labor in Wayne County it's bad enough that I have no choice as a taxpayer, i'll be damned if I surrender my rights to advocate on behalf of my constituency as a commissioner. My constituents are working middle class people just like you and me and government at the state level is killing us and I don't know how Evans can run as a Democrat in the next election! He is no better then them. Take care and hang in there and like I tell all my friends that work there. Take care of yourself first, if you can find a better opportunity out there in the world, take it! If there's anything I can do to help you don't hesitate to call or email me.

Diane L Webb
Wayne County Commissioner
8th District
Sent from my iPhone

38. It is beyond dispute that the right to access the Courts is a

fundamental right protected by the United States Constitution. **Swekel v City of River Rouge**, 119 F.3d 1259, 1261 (6th Cir.1997). This provision protects a person's rights of physical access to the Courts as well as to petition for redress at any department of government, including State administrative agencies. **Swekel** at 1261. See also **Jackson v City of Columbus**, et al, 194 F.3d 736 (6th Cir. 1999).

39. Some of the changes made to the Local 3317 contract which were not incorporated in any of the other AFSCME contracts are:

- a. The elimination of payroll deduction of Union dues;
- b. The elimination of the Agency Shop provision;
- c. Seniority Transfers;
- d. Promotions based on merit
- e. Shift and vacation scheduling based upon seniority
- f. Evans now has the ability to hire Sergeants, Lieutenants and Captains from off the street;

40. Plaintiff has made a prima facie case of retaliation under the First Amendment. The 3 elements of retaliation claims are:

- a. The plaintiff engaged in a protected activity;
- b. An adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct;
- c. There is a causal connection between the elements a and b, that is, the adverse action was motivated at least in part by the plaintiff's protective conduct. **Thaddeus/X v Blatter**, 175 F.3d 378, 394 (6th Cir. 1999)(en

banc).

d. AFSCME was engaged in a protected activity, that being filing a Federal lawsuit;

e. AFSCME Local 3317 was subject to an adverse action in that the local Union was singled out for punitive contractual provisions, which were not forced on the other AFSCME bargaining units. (Exhibit 9).

f. Based upon the statements made by Richard Kaufman to the Court, it is clear that on the date of the hearing, September 18, 2015, the defendants withdrew its non-economic proposals in order to have an opportunity to present new proposals which were more severe than those the defendant imposed on the other AFSCME locals. (Exhibit 4 & 10)

41. As can be seen by reviewing Exhibit 11, Evans imposed both economic and non-economic terms which are far worse than the terms and conditions of employment which the POAM bargaining unit was forced to take. (Exhibit 12 POAM terms of employment)

41. Temporal proximity of the filing of the lawsuit and the actions of the defendant are not subject to question. As a direct and proximate result of the actions of the defendants in imposing uniquely different punitive contract provisions on plaintiff, AFSCME, and its local Union 3317 have suffered extreme harm and were made an example to the other Unions, in that if the other AFSCME Locals refused to ratify the imposed contracts, that it would suffer a fate similar to that which plaintiff, Local 3317, was inflicted with.

Wherefore, plaintiff requests that this Honorable Court enjoin the

defendants from implementing any of the September 21, 2015, imposed terms and conditions of employment on Local 3317 and the AFSCME bargaining units, enter a Scheduling Order for discovery and to award plaintiff its costs and attorney fees under 42 U.S.C. 1988.

REQUEST FOR PRELIMINARY INJUNCTION

42. Plaintiffs reincorporate by reference Paragraphs 1-41.

43. The continued harm inflicted upon Plaintiffs by the facial and as-applied provisions of **2012 Public Act 436** cannot await a final disposition of this case. Without any rights to petition their governments, much less receive advance, public notice of the County Executive's Orders, all protections contained within the First Amendment and basic due process have been destroyed through Legislative enactment and Executive Branch *fiats*.

44. The language contained at **M.C.L. 141.1552(j)** and the Consent Agreement (Ex#3) are direct, head-on assaults on the U.S. Const. art 1, §10, cl. 1. It goes beyond "impairment" actions against Plaintiffs, and escalates the violations to the complete destruction of all contractual rights or the Plaintiffs and contractual obligations on behalf of the Defendants.

45. The damages are irreparable, in that the imposed financial actions - which have been self-described by Defendant Evans as "draconian" - are designed to be beyond "economic." They will directly and adversely affect Plaintiffs' protected entitlements and also adversely affect their access to appropriate health care. The loss is beyond that which can be financially

recovered. *Sampson v. Murray*, 415 U.S. 61, 90; 94 S. Ct. 937 (1974); also *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Circ. 1992).

46. There is no adequate remedy at law. The actions and omissions of the Defendants, coupled with their active solicitation of State intervention, have placed Defendants in a position where no appeal to any independent forum was available. “A theoretical right to recover money damages will not constitute an adequate legal remedy where difficulties in the collection of any judgment render that remedy illusory.” *Winston v. General Drivers, Warehousemen & Helpers Local Union No. 89*, 879 F. Supp. 719, 725 (W.D. Ky. 1995). In the case at bar, over 2,500 class members will all have collective and individual claims against Defendants – on an ongoing basis.

47. There is a substantial likelihood that Plaintiffs will prevail, in that **2012 P.A. 436** as applied destroys protections against impairment of contracts; the due process property rights to medical care; and the First Amendment rights to petition and participate in the Plaintiffs’ government at both the local and State levels. *ACLU of Kentucky v. McCreary County* 354 F.3d. 438, 445 (6th. Circ. 2003).

48. The Plaintiffs’ Complaint has demonstrated numerous, “serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.” *Friendship Materials, Inc., v. Michigan Brick, Inc.*, 679 F.2d. 100, 105 (6th Circ. 1982)

49. The issuance of a preliminary injunction supports the public interest. For instance, Plaintiffs’ contracts have been in place – and relied upon

the Plaintiffs' members for decades. The benefits will not be merely reduced, but completely eliminated under the guise of a law that facially, and as-applied, violates the U.S. Constitution. "It is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir.1994).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs request that this Court:

- A. Issue a Preliminary Injunction against all Defendants.
- B. Declare the acts and omissions of all Defendants to be unconstitutional, in violation of the Plaintiffs rights under Federal law, and *void ab initio*.
- C. Enter an Order compelling Defendants to maintain the level of benefits provided.
- D. Enter an award of attorney fees pursuant to 42 U.S.C. §1988.
- E. Have the Plaintiffs Otherwise Made Whole, by such other relief as required by law and equity.

JURY DEMAND

Plaintiffs hereby demand a trial by jury on the issues set forth by this Complaint.

Respectfully submitted,

/s/Jamil Akhtar
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Dated: December 7, 2015

VERIFICATION

RICHARD JOHNSON, **under penalty of perjury of the laws of the United States,** verifies that he has read, is familiar with, and has personal knowledge of the contents of the foregoing Verified Complaint, and that to the best of his personal knowledge, information and belief states that the allegations thereof are true and correct.

Executed this 8TH day of October, 2015

/s/Richard E. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2015, I electronically filed the foregoing Plaintiff's 2nd Amended Verified Complaint and this Certificate of Service, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

s/Jamil Akhtar