

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

**AFSCME COUNCIL 25, AND ITS  
AFFILIATED LOCALS,**

Plaintiff,

v

**CHARTER COUNTY OF WAYNE, a  
Municipal Corporation, WARREN EVANS,  
Individually and in His Official Capacity  
as County Executive/Chief Administrative  
Officer and Nick I. Khouri, Individually and  
In His Official Capacity as State Treasurer;  
Jointly and severally,**

Defendants.

Case No. 15-13288

**Hon. Judith Levy**

**Hon. R. Steven Whalen**  
Magistrate Judge

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**PLAINTIFFS' MOTION TO FILE THIRD AMENDED COMPLAINT UNDER  
THE PROVISIONS OF FEDERAL RULE OF CIVIL PROCEDURE 15(a)(2) and  
LOCAL RULE 7.1**

Now comes plaintiffs, AFSCME Council 25 and its affiliated Locals, by and through its attorneys, Jamil Akhtar, P.C. and Mark Porter & Associates and brings this Motion to file a Third Amended Complaint naming Nick A. Khouri, individually and in his official capacity as the Treasurer of the State of Michigan and amending its complaint to add a Count III, an action under the “Taking Clause” of the State and Federal Constitutions; 5<sup>th</sup> Amendment to the United States Constitution and Constitution 1963 of the State of Michigan, Article 10, §2.

For their Motion, plaintiffs state as follows:

1. In plaintiffs’ Second Amended Complaint, which is now before this Honorable Court, plaintiffs did not name as an defendants, the State of Michigan or the Treasurer of the State of Michigan. Plaintiffs took the position that in accordance with the holding by the 6<sup>th</sup> Circuit Court of Appeals En Banc decision in the matter of *Pontiac Retirees Ass’n, et al v Schimmel, et al*, 751 F3d 427 (6<sup>th</sup> Cir. 2014); that the naming of the Emergency Manager as a defendant (in this matter, the naming of Warren Evans, the Chief Administrator Officer appointed under Act 436, P.A. 2012), was in fact the appropriate defendant; the Emergency Manager, under Act 436, is vested by the Legislature, with the power of the State.

2. The Court in its decision of November 5, 2015 and December 4, 2015, held that some of the plaintiffs’ Constitutional challenges had to be dismissed, as plaintiffs did not show that the actions of Evans were acts

empowered by the State Legislature and therefore, the challenge as to Impairment of Contracts and the plaintiffs right to petition the government were not properly before the Court. (Dkt.34 &35)

3. On May 5, 2016 the Honorable Gershwin A. Drain, District Court Judge in the matter of Kaminski et al, v Brad Coulter, et al, Case No. 2(15)-cv-12810, held that the actions of the Emergency Manager appointed under the provisions of Act 436, P.A. 2012 were in fact actions of the acts of the State of Michigan and therefore, constitutional challenges which were pled for by the plaintiffs in Kaminski were not dismissed, as the actions of the Emergency Manager were in fact actions of the State of Michigan. (Exhibit 1 - Kaminski).

4. Under the provisions of the Consent Agreement entered into between Wayne County and the State of Michigan dated August 21, 2015, Warren Evans, the County Executive, was appointed by the State Treasurer to be the "Chief Administrative Officer" as defined under the provisions of Act 436 and further, under the provisions of the Consent Agreement at Sec. 1(c) the County Executive/Chief Administrative Officer is granted the powers prescribed for Emergency Managers under Section 12(1) of Act 436 and Evans may exercise the powers of an Emergency Manager. Further, under the provisions of Section 3, of the Consent Agreement, the County Executive/Chief Administrative Officer is also granted the powers prescribed for an Emergency Manager under Section 10 of Act 436.

5. Plaintiffs are also requesting the right to amend the Complaint by adding an additional Count (Count III) claiming a violation of their rights under the Taking Clause of the United States Constitution, being the 5<sup>th</sup> Amendment and/or the Taking Clause under the Michigan Constitution of 1963, being Article 10, §2.

Plaintiffs state that the taking away of (5) years of vested pension benefits, for those employees who purchased time in Retirement Plan 5 and Retirement 6, in addition to being actionable as a violation of their 14<sup>th</sup> Amendment rights, as spelled out in Count I of their Second Amended Complaint, that the action of the defendants constitutes a violation of their rights to be allowed to continue to accrue (5) additional years of pension vesting and that said cause of action is enforceable as an action for injunction.

6. On June 7, 2016 the Michigan Court of Appeals published its decision in the matter of *AFT Michigan, et al v State of Michigan*, \_\_\_\_\_Mich App \_\_\_\_\_(2016); Court of Appeals Number 303702 and *Timothy L. Johnson, et al v Public School Employees Retirement System, et al*; \_\_\_\_\_Mich App \_\_\_\_\_(2016); Court of Appeals Number 303704, (Exhibit 2); wherein the Michigan Court of Appeals held that the Taking Clauses, Article 5 of the United States Constitution and Michigan Constitutions, is actionable. The principles established by the Michigan Court of Appeals in *AFT, et al*, as it relates to Taking without Just Compensation by the State of Michigan is applicable in the request by the Union to file an 3<sup>rd</sup>. Amended Complaint.

**WHEREFORE, PLAINTIFFS RESPECTFULLY REQUEST** that this Honorable Court grant the plaintiffs' right to file a Third Amended Complaint.

Dated: July 17, 2016

/S/Jamil Akhtar

Jamil Akhtar, Attorney for Plaintiffs

/S/Mark A. Porter

Mark A. Porter, Co-Counsel for Plaintiff

**PLAINTIFFS' BRIEF IN SUPPORT OF ITS MOTION TO FILE A THIRD  
AMENDED COMPLAINT**

**Part I: Statement of Facts**

Plaintiffs hereby incorporates the facts identified above in its Motion to File a Third Amended Complaint as its Statement of Facts.

**Part II: Legal Argument**

Plaintiffs are before this Honorable Court requesting the right to file a Third Amended Complaint. Plaintiffs wish to amend their Second Amended Complaint by adding the State Treasurer as a named defendant. This request is supported by the holding of Judge Gershwin Drain in the matter of *Kaminski v Brad L. Coulter, individually and in his official capacity as the State Appointed Emergency Manager of the City of Lincoln Park, et al*, Case No. 2:15-cv-1281 (Exhibit 1).

Further, Judge David Lawson, on Thursday, July 7, 2016 issued his Order in the matter of *Concerned Pastors for Social Action, et al v Nick A. Coury, et al*, Case No. 2:16-cv-10277 wherein he held that the members of the “Flint Receivership Transition Advisory Board”, a Board created under the provisions of Act 436 P.A. 2012 were State officials, and the Board is a non-judicial entity; stated that the Board’s actions were in fact actions of the State Treasurer. (Exhibit 3).

Plaintiffs are now before the Court requesting that the State Treasurer, who appointed Warren Evans as the “Chief Administrative Officer” under the

provisions of Act 436 is a necessary party and must be included as such in plaintiffs' complaint.

Pursuant to Federal Rule of Civil Procedure 15(a)(2), the right to amend a complaint, where a plaintiff has moved to do so in an expedited manner, should be freely given when justice so requires. *Fomen v Davis*, 371 U.S. 178, 83 Sup.Ct. 227 (1962); *C.F.V. Capistrano Unified School District*, 654 F3d 975, 985 (9<sup>th</sup> Cir. 2011) wherein the 9<sup>th</sup> Circuit stated that the request to file an amended complaint be construed with "extreme liberality".

It is within the discretion of the Court to determine whether or not to grant a request to file an amended complaint; a reason for such denial would be that it is a "futile" act, *Rose v Hartford Underwriters Ins. Co.* 203 F3d 417, 420(6<sup>th</sup> Cir 2000).

Based upon the cases cited by plaintiffs herein, the granting of the request by plaintiffs for the filing of a Third Amended Complaint cannot be considered futile.

**WHEREFORE, PLAINTIFFS RESPECTFULLY REQUESTS** that this Honorable Court grant their Motion to file a Third Amended Complaint (Exhibit 4).

Dated: July 17, 2016

Respectfully submitted:

/S/ Jamil Akhtar  
Jamil Akhtar, Attorney for Plaintiffs

/Mark A. Porter  
Mark A. Porter, Co-Counsel for  
Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on July 17, 2016, I electronically filed the foregoing Plaintiff's Motion, Brief and Proposed third Amended 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