

Motion to file 3rd Amended Complaint
Exhibit #4
Proposed Amended Complaint

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' PROPOSED THIRD AMENDED VERIFIED COMPLAINT
UNDER FEDERAL RULE OF CIVIL PROCEDURE 15(a)(2) FOR INJUNCTIVE
RELIEF AND DAMAGES**

NOW COME THE PLAINTIFFS 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. 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.

3. 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.

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

THE PARTIES

5. Plaintiffs reincorporate by reference Paragraphs 1-5.

6. 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.

7. Defendants Charter County of Wayne is incorporated, organized pursuant to Michigan's "Optional Unified Form of County Government Act," 1973 P.A. 139; further, 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" by defendant Khouri, under the provision of Act 436, P.A. 2012.

8. At all times relevant to this Complaint, defendant Nick I. Khouri, is and was the Treasurer of the State of Michigan and personally appointed Warren Evans to be the Chief Administrative Officer for Wayne County under the provisions of Act 436 P.A. (2012) and pursuant to the Consent Agreement dated August 21, 2015.

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, by way of defendant, 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 jointly drafted by defendants, Evans and Khouri and approved by the County’s Commission, citing P.A. 436 at M.C.L. 141.1548. It was ratified by all parties as of August 21, 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, acting in his official capacity as Chief Administrator Officer, by stating that Consent Agreement grants 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)(l) 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)(l). (Exhibit 4 Act 436).

18. Defendant Evans announced drastic budget cuts and unilateral changes to Plaintiff, AFSCME Local 3317 collective bargaining agreements, as well as ignoring some of the County's Charter and Ordinances. Evans imposed working conditions 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 defendant, Khouri.

23. An example is the Local 3317 contract which was valid on September 21, 2015 and which Plaintiff states is 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 worker's compensation benefits. (Exhibit 6)
- c. The order issued by Evans on September 21, 2015, changed the 75% pension benefits in violation of Article IX, Section 24 of the Michigan Constitution. (Exhibit 5 & 6)
- d. All of the AFSCME locals had and still have a grievance arbitration clause which provided for the arbitration of three outstanding class action grievances. The County stated position is that it will not take the grievance to arbitration, (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 Act 436 P.A. 2012, has deprived Plaintiffs and the memberships of property rights related to wages, hours, and terms and conditions of employment, without 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 employees, 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 5th and 14th Amendments 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 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 and which was eliminated with the imposed working conditions on September 21, 2015 (Exhibit 4). 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)

The defendants have refused to submit these three grievances to Arbitration!

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 defendants, Evans and Khouri, 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 10 & 11).

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;

(Exhibit 11)

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 an 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 & 11).

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 a n opportunity to present new proposals which were more severe than those the defendant imposed on the other AFSCME locals. (Exhibit 9,10 & 11)

41. Evans imposed both economic and non-economic terms which are far worst then 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 continuing to implement any of the September 21, 2015, imposed terms and conditions of employment on Local 3317 and the other AFSCME bargaining units; enter a Scheduling Order for discovery and to award plaintiff its costs and attorney fees under 42 U.S.C. 1988.

COUNT III

TAKING OF PROPERTY WITHOUT DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION ACTIONABLE UNDER 42 U.S.C. 1983

42. Plaintiffs hereby incorporate paragraph 1 through 41 above.

43. On September 20, 2015, the members of Local 3317 had a contractual and constitutional property right of being guaranteed (5) additional years of vesting in their respective retirement plans. (Exhibit 5 - 6 and Exhibit 14 - Michigan Constitution Article IX §24).

44. In order to become members of Retirement Plan 5 and Retirement Plan 6, the employees were required to pay tens of thousands of dollars to the Retirement System, in order to transfer to Plan 5 and Plan 6. After being transferred to Plan 5 and Plan 6, these employees were guaranteed, by way of a Collective Bargaining Agreement, that they would not have their pension benefits changed until the year 2020. (Exhibit 5).

45. On September 21, 2015, defendant, Evans, upon receiving approval from defendant Khouri, imposed terms and conditions of employment, which included the elimination of the (5) additional years of vested retirement benefits, which the employees had previously paid for (and which included pay outs of Vacation, Sick and Holiday pay and earned Overtime which was to be included in determine their Average Final Compensation (AFC), as a condition of being transferred to Retirement Plan 5 and Retirement Plan 6. (Exhibit 4, 5 & 9)

46. The actions of defendants, Evans and Khouri, constituted an act of depriving plaintiffs of their property rights without due process of law and further, constitutes the taking of property for public use without just compensation in violation of the 5th Amendment to the United States Constitution.

47. Pursuant to the Michigan Court of Appeals holding in *Aft, et al v Snyder*, ____ Mich App ____ (2016), COA Docket No. 303702,303704 & 303706, the actions of defendants, Evans and Khouri, constitutes a violation of Plaintiffs

rights under the 5th Amendment of the United States Constitution. (Exhibit14 - *AFT*, et al).

48. Plaintiffs are requesting that this Honorable Court issue an injunction preventing the defendants from taking plaintiffs' property (5 years' retirement credits) for public use (taking the cost of providing these benefits and applying said funds to the governmental debt), therefore, an injunction is appropriate as the actions of Evans constitutes an unlawful taking of property for public use without just compensation.

WHEREFORE, PLAINTIFFS RESPECTFULLY REQUESTS that this Honorable Court grant the prayed for injunctive relief.

REQUEST FOR PRELIMINARY INJUNCTION

49 Plaintiffs reincorporate by reference Paragraphs 1-48.

50. 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 and the Executive Branch actions and implementation of the Evans/Khoury changes to the Contracts.

51. The language contained at **M.C.L. 141.1552(j)** and the Consent Agreement (Exhibit #3) are direct, head-on assaults on the U.S. Const. Art 1, §10, 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.

52. 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).

53. 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.

54. 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).

55. 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)

56. 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
JAMIL AKHTAR (P38597)
Attorney for Plaintiffs

/s/Mark A. Porter
MARK A. PORTER (P42280)
Co-Counsel for Plaintiffs

Dated: July 17, 2016

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 and if called by the court to testify is fully competent to do so.

Executed this 17th day of July, 2016

/s/Richard E. Johnson