STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MICHIGAN AFSCME COUNCIL 25, and its LOCALS 25, 101, 409, 1659, 1862, 2057, 2926, & 3317,

Plaintiff,

v

COUNTY OF WAYNE,

Defendant.

Case No. 16-011322-CZ
Hon. Susan Hubbard

16-011322-CZ
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PLAINTIFF'S MOTION TO COMPEL ARBITRATION

NOW COMES Plaintiff **MICHIGAN AFSCME COUNCIL 25 AND ITS LOCALS 25, 101, 409, 1659, 1862, 2057, 2926, & 3317** ("AFSCME"), by and through its attorneys MILLER COHEN, P.L.C., with its Motion to Compel Arbitration, and states as follows:

Plaintiff relies on its Brief in Support. Plaintiff sought but was unable to obtain concurrence for the relief request below.

WHEREFORE Plaintiff requests that this Honorable Court grant Plaintiff's Motion to Compel Arbitration and enjoin Defendant, County of Wayne, to participate in the arbitration of the grievances described in Plaintiff's Amended Complaint, and award all costs, attorney fees, and other relief as this Court deems appropriate.

Respectfully submitted,

MILLER COHEN, P.L.C.

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Dated: December 1, 2016

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PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION

NOW COMES Plaintiff **MICHIGAN AFSCME COUNCIL 25 AND ITS LOCALS 25, 101, 409, 1659, 1862, 2057, 2926, & 3317** ("AFSCME"), by and through its attorneys MILLER COHEN, P.L.C., with its Brief in Support of its Motion to Compel Arbitration and states as follows:

INTRODUCTION

Defendant Wayne County continues to breach the Parties' agreements to resolve their differences before a neutral third party arbitrator by refusing to advance Plaintiff-AFSCME's grievances to binding arbitration. The Defendant's stubborn refusal is contrary to decades of federal and state labor law encouraging the use of labor arbitration to resolve industrial disputes

and promote labor stability. *See e.g., United Steelworkers v Warrior and Gulf Navigation Co*, 363 US 574 (1960); *Kaleva-Norman-Dickson School Dist No 6, Counties of Manistee, et al v Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583 (1975). To promote reliance on labor arbitration, courts broadly compel parties to an agreement who have agreed to such an alternative dispute resolution mechanism to utilize that process in lieu of litigation before the courts. Courts have routinely required parties to use an agreed-to arbitration process to resolve their disputes absent an "'***express provision excluding a particular grievance from arbitration' or 'the most forceful evidence of a purpose to exclude the claim from arbitration.'***" *Kaleva-Norman-Dickson School Dist No 6*, 393 Mich at 593, n.12 (quoting *United Steelworkers*, 363 US at 585) (emphasis added).

This case involves three separate issues all dealing with Defendant violating its obligations to provide retirement benefits as a form of deferred compensation to Plaintiff's members in exchange for years of service. Specifically, Defendant has failed to meet its contractual duty to fully fund the pension system by making annual contributions to that system as determined by the Retirement Commission. Further, Defendant simply abolished the Inflation Equity Fund—a retirement benefit funded by excess investment earnings that were used to pay a "13th Check" to act as a buffer against inflation. Finally, Defendant discontinued healthcare benefits for those who retire from a duty or non-duty disability without bargaining with Plaintiff. Plaintiff filed grievances regarding these issues, which Defendant has refused to advance to binding arbitration. This further violates the parties' collective bargaining agreements. Now, Plaintiff has been forced to file this lawsuit and expend additional resources to compel Defendant to adhere to its contractual obligation. For this reason, Plaintiff requests that this Court order Wayne County to arbitrate these grievances and grant Plaintiff costs and attorney fees for being forced to litigate this matter.

STATEMENT OF FACTS

AFSCME Council 25 and its Locals 25, 101, 409, 1659, 1862, 2057, 2926, & 3317 are the collective bargaining agents of Wayne County's supervisory employees and non-supervisory employees, as well as the Wayne County Sheriff's Sergeants and Lieutenants. The matter at hand deals with three separate sets of grievances that relate to retirement benefits under the parties' Collective Bargaining Agreements (CBAs). (***Exhibits A***, ***B***, & ***C***) At all relevant times, the Parties' CBAs were in full force and effect.

Under Article 48.03 of the CBA between AFSCME Council 25 and its Locals 25, 101, 409, & 1659 ("non-supervisors") and Wayne County and Article 49.03 of the CBA between AFSCME Council 25 and its Locals 1862, 2057, & 2926 ("supervisors") and Wayne County, the agreements continue in effect on a yearly basis until notice is provided by one of the parties:

> This Agreement shall continue in effect for successive yearly periods after September 30, 2014, ***unless notice is given in writing by either party at least sixty (60) days prior to September 30, 2014, or any anniversary date thereafter***, of its desire to modify, amend or terminate this Agreement.

(***Exhibit A***, pg 90& ***Exhibit B***, pg 86) (emphasis added) Although the County had sent a notice terminating the contracts for the supervisors and non-supervisors effective September 30, 2014, on September 22, 2015, Defendant agreed to extend those contracts retroactively noting that, "the collective bargaining agreement which expired on September 30, 2014 between the County of Wayne and AFSCME Council 25 . . . is extended through September 30, 2015, except as modified below . . . ."[1] (***Exhibits U*** & ***V***) Thus, the respective CBAs were in effect at all relevant times.

The CBA between AFSCME Council 25 and its Local 3317 ("Sergeants and Lieutenants") and Wayne County continued in effect for successive yearly periods after September 30, 2014 as well. (***Exhibit C***, pg 122) The Parties expressly agreed to extend the contract multiple times

[1] The modifications are not relevant to this case.

beginning October 1, 2014 without ever expressly terminating the agreement. (***Exhibit W***) However, on September 21, 2015 (outside of the sixty day window provided by the CBA), Defendant imposed the County Employment Terms ("CET") on Local 3317 and claimed it had the authority to do so while under a Consent Agreement pursuant to 2012 PA 436.[2] (***Exhibit X***) While still under the Consent Agreement, Defendant imposed amended terms on Local 3317 on September 23, 2016. (***Exhibit Y***) The CET provides for a grievance process ending in binding arbitration. (***Exhibit W***, pgs 11-12; ***Exhibit X***, pg 8) Nothing was changed in regards to that process, and the terms of that process remained in full force and effect for all relevant periods of time for this case.

Article 30[3] of all the CBAs describes retirement benefits and incorporates the un-amended Retirement Ordinance:

> The detailed provisions of the Wayne County Employees Retirement System shall control except where changed or amended below.

(***Exhibit A***, pg 65; ***Exhibit B***, pg 64; ***Exhibit C***, pg 99) The effect of this language is to incorporate the Wayne County Retirement Ordinance except in two circumstances: (1) where the Ordinance is amended, or (2) where there is a conflicting provision in the CBA.[4]

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[2] AFSCME does not believe that PA 436 gave Wayne County the right to unilaterally impose terms on its Locals, but that dispute is not material here as the terms imposed are irrelevant to the grievances at issue.

[3] Except where discussed below, the relevant terms in Article 30 of the CBAs for Locals 25, 101, 409, 1659, 1862, 2057, and 2926 are identical to Article 38 of the CBA for Local 3317. When referenced, the term "Article 30" should be read as "Article 38" in reference to Local 3317's CBA.

[4] According to the uncontradicted testimony of every witness at the earlier unfair labor practice hearing regarding the changes that were imposed to the IEF in 2010, this was the understanding. (***Exhibit D***; Tr Vol 1, 111-112; Tr Vol 2, 105-106; Tr Vol 3, 49-50) This included the testimony of Ronald Yee, the former director of the retirement system and former chief negotiator on behalf of the County, who summarized that:

> [I]t says the detailed provisions of the Wayne County Employees Retirement System—basically that's the retirement system ordinance—shall control, and then there's two exceptions when the retirement ordinance does not control. It's when it's changed, meaning the retirement ordinance is changed, or if it's amended below, which—then there's other section that go down and make changes.

(*Id.* at Tr Vol I, 111-12)

Article 10.01[5] of the relevant CBAs provides for a dispute resolution process: "In the event differences should arise between the Employer and the Union during the term of this Agreement as to the interpretation and application of any of its provisions, the parties shall act in good faith to promptly resolve such differences . . . ." (***Exhibit A***, pg. 14; ***Exhibit B***, pg 14; ***Exhibit C***, pg 12) The process ends in final and binding arbitration over "the interpretation, application, or enforcement of any specific article and section of this Agreement, or any written supplementary agreement . . . ." (***Exhibit A***, pg. 15; ***Exhibit B***, pg 16; ***Exhibit C***, pg 14[6])

Pursuant to this grievance procedure, Plaintiff filed grievances asserting that Defendant breached the CBAs in three ways: (1) by failing to fully fund the Retirement System; (2) by abolishing the Inflation Equity Fund (IEF) and discontinuing the 13th Check; and (3) by discontinuing disability retirement healthcare benefits.

A. Underfunded Pension (Class Grievance C-25-15-1)

Plaintiff filed a grievance asserting that the County refused to pay its required annual contributions to the pension system. (***Exhibit E***) This grievance was presented to the County at Step 4 of the grievance procedure on April 20, 2015 and argued that the County's refusal to pay constituted a violation of Section 141-36 of the Retirement Ordinance as incorporated by the CBAs.

Section 141-36 provides that the Wayne County Retirement System is to receive contributions sufficient to fund the actuarial cost allocated to the current year by the actuarial

[5] Except where discussed below, the relevant terms in Article 10 of the CBAs for Locals 25, 101, 409, 1659, 1862, 2057, and 2926 are identical to Article 12 of the CBA for Local 3317. When referenced, the term "Article 10" should be read as "Article 12" in reference to Local 3317's CBA.

[6] The CBA for Local 3317 provides for arbitration "relating only to the interpretation, or enforcement of a specific article and section of this Agreement, or any Supplemental Agreement hereto . . . ." (***Exhibit C***, pg 14)

method and to fund unfunded actuarial costs to prior years by the actuarial cost method. That sections states:

> (a) Financial objective.
>
> (1) The financial objective of the retirement system is to receive contributions each fiscal year which, as a percentage of member payroll, are designed to remain level from year to year and are sufficient to (i) fund the actuarial cost allocated to the current year by the actuarial cost method, and (ii) fund unfunded actuarial costs allocated to prior years by the actuarial cost method as follows:
>
> a. Over not more than 35 years for amounts existing December 1, 1982.
>
> b. Over not more than 25 years for amounts arising from benefit changes effective after November 30, 1982.
>
> c. Over not more than 15 years for amounts arising from experience losses or gains during retirement system fiscal years ending after November 30, 1981.
>
> (2) Contribution requirements for defined benefits shall be determined by annual actuarial valuation. The actuarial cost method shall be one which produces a contribution requirement not less than the contribution requirement produced by the individual entry-age normal cost method.
>
> (3) The excess of actual contributions made for periods after November 30, 1981, over the minimum required by subsections (a)(1) and (2) of this section may be used to reduce contributions required for subsequent fiscal years.
>
> (4) Contribution requirements of the county for defined contribution benefits shall be in accordance with the county contribution program specified for a member's coverage group. The contribution requirement may be actuarially discounted for anticipated forfeitures.
>
> (b) Certification of contribution requirement.
>
> The retirement commission shall certify to the county executive the amount of annual contribution needed to meet the financial objective.

The Retirement Commission is required to certify to the county executive the amount of annual contribution needed to meet that financial objective. On or about February 26, 2015, an audit report found that the Plan had an unfunded actuarial accrued liability of $910 million for a

funded ratio of 45 percent. (***Exhibit F***) The County has refused to pay that unfunded actuarial accrued liability in full.

The County responded to that Fourth Step grievance claiming that the matter was not subject to the grievance procedure and refused to arbitrate. (***Exhibit G***) The County refused to advance the grievance asserting that the matter was pre-empted by the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 *et seq.*

Plaintiff requested to advance the grievance to the Fifth Step—arbitration—and even selected an Arbitrator, George Roumell. (***Exhibit H***) In a letter from Arbitrator Roumell to the parties dated August 21, 2015, Arbitrator Roumell noted that the County refused to arbitrate and that a hearing would not be scheduled until a court ordered a hearing. The Arbitrator went on to note, "In the labor context in one of the Steelworkers Trilogy cases the Court did state, 'An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers that asserted dispute . . . .'" (*Id.*) (quoting *United Steelworkers*, 363 U.S. at 582-83). Still, the County refused to arbitrate. (***Exhibit I***)

B. 13th Check (Grievances 2015-001 and 2015-13)

In the mid-1980s, the Parties negotiated an important employee deferred compensation benefit referred to as the "13th Check." (***Exhibit D***; Tr Vol I, 83; Tr Vol II, 93-100)[7] The 13th Check was paid in lieu of a cost of living adjustment for pension benefits to act as a buffer against inflation so that pension benefits did not substantially diminish with time. (*Id.* at Tr Vol I, 80-82;

[7] In a separate litigation involving changes to the IEF that occurred in 2010, sworn testimony was taken before MERC Administrative Law Judge Doyle O'Connor that established the origins of the 13th Check. Attached to this Brief are the transcripts of that testimony, including the testimony of Ronald Yee, the former director of the retirement system and the former chief negotiator for the County, Hugh Macdonald, the former President of Local 1862 and lead negotiator for the Union as well as a Commissioner of the Retirement System, and Richard Johnson, the AFSCME Staff Representative who negotiated almost all of the CBAs since 2000.

Tr Vol II, 99-100) The 13th Check was paid from a separate fund called the Inflation Equity Fund ("IEF") that consisted of the excess investment earnings from the money invested in the Retirement System pursuant to Section 141.32 of the Retirement Ordinance.

The earnings that were added to the IEF were supposed to remain in that fund in trust for active employees and retirees. In September 2010, the County Board of Commissioners voted to amend the Retirement Ordinance to impose a $12 million ceiling on the IEF and a $5 million cap on total annual disbursements from the IEF. (*Id.* at Tr Vol 1, 106) In addition, the County confiscated $32 million from the IEF and misappropriated those funds to cover a portion of the County's annual required contribution to the Retirement System. (*Id.* at Tr Vol 1, 103) Those changes were imposed by the County on the bargaining units without providing notice and opportunity to bargain, during the middle of two contracts, and during statutory fact finding over a third contract.

AFSCME opposed these amendments and filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC) alleging that the County violated its statutory duty to bargain in good faith under the Public Employment Relations Act (PERA), MCL § 423.201, *et seq*. (MERC Case No. C10 J-266) The Administrative Law Judge, Doyle O'Connor, held that the County had violated its statutory duty to bargain in good faith. The County filed exceptions to the ALJ's Decision and Recommended Order, which were partially granted and partially denied by the MERC. The matter is currently pending on appeal by both parties before the Michigan Court of Appeals. (Court of Appeals Case Nos. 327727 & 327782)

In a separate action brought by the County Retirement Commission, the Michigan Supreme Court struck some of the amendments to the ordinance relating to funding the IEF in December

2014 based on separate and independent statutory claims. *Wayne Cty Employees Ret Sys v Wayne Charter Cty*, 497 Mich 36 (2014).

It has been Plaintiff's position that the funding of the 13th Check in effect prior to the 2010 revision applies to all eligible members of the bargaining unit as those amendments were never agreed to—let alone even negotiated—by the parties and remain challenged in the above-referenced ULP.[8]

Despite the on-going litigation over the 2010 amendments, on or about June 18, 2015, the Wayne County Commission voted to alter the "13th Check" benefit yet again, only this time the Commission voted to abolish it entirely. (Wayne County Commission adopted Enrolled Ordinance 2015-302) The County passed and implemented 2015-302 without negotiating those changes with AFSCME.

In response, Plaintiff filed grievances asserting that the imposition of the IEF abolishment constituted a breach of the parties' CBAs. Specifically, Article 30 of the CBAs between AFSCME and Wayne County incorporates the Retirement Ordinance "***except where changed*** or amended below." (***Exhibit A***, pg 65; ***Exhibit B***, pg 64; ***Exhibit C***, pg 99) (emphasis added) The County implemented its changes to the Retirement Ordinance during the life of the collective bargaining agreements and without reaching an agreement or even negotiating with AFSCME. Additionally, Article 30.06 states that "Employees in the Hybrid Retirement Plan shall be eligible for post-retirement cost-of-living adjustments in the form of distributions from the Reserve for Inflation

[8] Indeed, the County has requested that Plaintiff waive its statutory right to challenge the 2010 amendments under PERA in subsequent negotiations. Even though the County proposed the waiver of the ULP charge before Judge O'Connor, Charging Party rejected the offer, maintained its position that the changes were unlawfully imposed on the bargaining units, and are ineffective as a result. (***Exhibit D*** at Tr Vol 3, 78-79) A new agreement was reached in late 2011 without any waiver language relating to that ULP charge and with the understanding that the Union maintains that those changes constituted a repudiation of the parties' CBAs. (*Id.*)

Equity." (***Exhibit A***, pg 72; ***Exhibit B***, pg 70; ***Exhibit C***, pg 106) By abolishing the IEF the County made it impossible for employees to receive distributions in violation of the CBAs.

The grievances were filed at Step Four[9] pursuant to Article 10 of the CBAs. (***Exhibit J***) Despite its contractual obligation to meet with the Union within fourteen days to discuss the grievance and to submit the disposition of the grievance, in writing, to the Union, the Defendant failed to do so. (***Exhibit A***, pg 16; ***Exhibit B***, pg 16; ***Exhibit C***, pgs 13-14) Instead, the matter was only discussed in the context of a separate unfair labor practice charge that alleged that the abolishment violated Defendant's statutory obligation to bargain in good faith under PERA. At that point, it became clear that Defendant did not intend to advance the grievance to arbitration, Defendant's counsel communicated to Plaintiff's counsel that Defendant refused to arbitrate. (***Exhibit K***)

C. Disability Retirement (Class Grievance C-25-15-2)

It has been the practice of the Parties for at least thirty years that an employee retiring on a duty or nonduty disability pension would be entitled to medical benefits. This practice was based on Section 141-1, *et seq.*, of the Retirement Ordinance that provides that the Wayne County Retirement System is to grant a duty or nonduty disability pension to employees who meet the service requirements. Specifically, Retirement Ordinance Sections 141-10, 141-13, 141-20, 141-21, 141-22, 141-22.1, and 141.24 describe duty and non-duty disability retirement eligibility. Further, Article 30.10 of the CBAs provide that "All employees retiring after December 1, 1997, who are eligible for medical benefits under the current system, shall be allowed to select a medical benefit plan among other available plans offered during open enrollment." (***Exhibit A***, pg 75; ***Exhibit B***, pg 73) For Local 3317, the CBA provides, "The specific terms of the benefits to be

[9] Step Three for Local 3317, which provides for arbitration at Step Four.

provided to non-duty disability retirees under Plan #4 shall be as published by the Retirement Department. Upon request the parties will meet to negotiate changes if necessary." (***Exhibit C***, pg 110) Furthermore, employees hired on or after May 2, 2007 are eligible to participate in the Employee Health Care Benefit Trust, while employees hired prior to May 2, 2007 ***may*** elect to permanently relinquish eligibility to receive post-retirement insurance and health care benefits from the County. (*Id.* at 110-11) (emphasis added)

Despite these contractual obligations, on May 1, 2010, the County implemented Administrative Personnel Order 1-2010, (***Exhibit L***) unilaterally terminating its contractual obligation of providing medical benefits to employees who meet the service requirements for duty or nonduty disability pension. The County's act of unilaterally depriving Union members of medical benefits they are contractually entitled to is a violation of the CBAs.

In response, AFSCME indicated that it intended to file a grievance, but also filed an unfair labor practice charge with the Michigan Employment Relations Commission ("MERC"). In the meanwhile, the County agreed in writing to waive the deadlines in the grievance procedure pending resolution of the MERC ULP charge. (***Exhibit M***)

The MERC held that the County breached its duty to bargain. The County appealed. On October 19, 2014, the Michigan Court of Appeals held that an arbitrator must determine whether the Parties' thirty-year history of past practice providing health care benefits to retirees regardless of whether they met age or years of service criteria is covered by the CBAs and, if so, what would be the appropriate contractual remedy. *Cty of Wayne v Michigan AFSCME Council 25*, No 312708, 2014 WL 5066057 (Mich Ct App Oct 9, 2014) (attached as ***Exhibit N***). The court also held:

> Contrary to the MERC's majority holding, we find that the CBAs do contain contract language that addresses retiree eligibility and health care. Because we find that ***the disputed issue is covered in the CBAs***, we also find that remand for

> arbitration is the appropriate remedy for addressing the charging parties' past practice claims.

Id. at *3 (emphasis added). As such, the Court of Appeals remanded the matter to arbitration. *Id.* at *4.

Following the appellate decision, AFSCME filed a class grievance seeking to restore medical benefits to those who had them denied them after May 1, 2010 and award the same to any employees who retire in the future on duty or nonduty disability pension. (***Exhibit O***) On January 9, 2015, AFSCME reached out to Arbitrator Barry Goldman, requesting that he arbitrate the dispute. (***Exhibit P***) Later that day, the County emailed Arbitrator Goldman, stating that the Parties had not agreed to have him arbitrate the dispute. (*Id.*) On January 13, 2015, AFSCME emailed the County asking why Arbitrator Goldman was not agreeable. (*Id.*) The Parties agreed to discuss the issue the following day. (*Id.*) Nonetheless, the grievance was never arbitrated. On or about September 1, 2015, AFSCME raised the issue that there had been no discussion for over 60 days. (***Exhibit Q***) On September 3, 2015, the County stated that it "[looked] forward" to arbitrating the grievance. (***Exhibit R***) Nonetheless, the County refused to advance the grievance to arbitration.

ARGUMENT

A. Courts Must Exercise Extreme Deference to the Arbitral Process

In *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) the United States Supreme Court explained:

> Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. . . . ***Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions*** of the collective agreement.

(emphasis added) The Court continued:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.

Id. at 584-85. The reason for this extreme deference to the arbitration process, as *Warrior and Gulf* explained, is that the "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *Id.* at 578. The Court explained, "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.* Thus, when a court hears a complaint to compel arbitration, "the judicial inquiry under s 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *Id.* at 582.

In *Kaleva-Norman-Dickson School Dist No 6, Counties of Manistee, et al v Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583, 586 (1975), a public sector union filed a grievance on behalf of its member over her discharge. The employer argued that the grievance was not arbitrable, and all parties agreed that the question of arbitrability should be reserved for the court. *Id.* at 586-87. The court recounted the doctrine that "[a]rbitration is a matter of contract. A party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration." *Id.* at 587. The Court went on to state that deference to the jurisdiction of an arbitrator is favored:

> The policy favoring arbitration of disputes arising under collective bargaining agreements, as enunciated by the United States Supreme Court in the Steelworkers' Trilogy, is appropriate for contracts entered into under the PERA.

Id. at 591. The *Kaleva-Norman-Dickson* Court even cited a federal Ninth Circuit case for the proposition that only areas of contention expressly excluded from arbitral determination may be withheld from an arbitrator:

> Although arbitration is a matter of mutual agreement between the parties, and they may choose to exclude certain areas of contention from the arbitration process, ***the standard set by the Court for finding a dispute nonarbitrable is a strict one: There must be either an "express provision excluding a particular grievance from arbitration" or "the most forceful evidence of a purpose to exclude the claim from arbitration.***"

Id. at 593, n.12 (quoting *International Association of Machinists v Howmet Corp*, 466 F2d 1249 (CA9, 1972)) (emphasis added).

In *Kaleva-Norman-Dickson*, the Court quoted another of the Steelworker Trilogy cases, *USWA v American Manufacturing Co*, 363 US 564 (1960), which addressed the scope of judicial inquiry as follows:

> [The judicial inquiry] is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for. The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

Id. at 568. Furthermore, the Court recited the principle of extreme deference to the arbitration of disputes:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the *arbitration clause* is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Absent an "e*xpress provision* excluding [a] particular grievance from arbitration" or the "*most forceful* evidence of a purpose to exclude the claim," the matter should go to arbitration . . . .

Id. at 592 (quoting *United Steelworkers*, 363 US at 582-83)). The Court concluded by placing the burden of excluding a matter from arbitral jurisdiction on the party who seeks to so exclude. *Id.* at 595. More so, where a contract contains an arbitration clause, there is a presumption of arbitrability. *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986).

In this case, the grievance procedure clearly culminates in binding arbitration over "differences [that] arise between the Employer and the Union during the term of this Agreement as to the interpretation and application of any of its provisions . . . ." (***Exhibit A***, pg. 14; ***Exhibit B***, pg 14; ***Exhibit C***, pg 12) The agreements further require that "the parties shall act in good faith to promptly resolve such differences . . . ." (***Exhibit A***, pg. 14; ***Exhibit B***, pg 14; ***Exhibit C***, pg 12) The grievance procedure provides the arbitrator with authority over "the interpretation, application, or enforcement of any specific article and section of this Agreement, or any written supplementary agreement . . . ." (***Exhibit A***, pg. 15; ***Exhibit B***, pg 16; ***Exhibit C***, pg 14[10])

As noted earlier, the disputes as to retirement benefits at issue in the grievances referenced above all deal with the "interpretation, application, or enforcement of" the agreements. All of the CBAs include an entire article on retirement benefits that deal with the 13th Check and disability retirement benefits. That Article incorporates the un-amended Retirement Ordinance "except where changed", including sections 141-32 and 141-36—dealing with the County's required contributions to the Retirement System and the IEF as discussed above. (***Exhibit A***, pg 72; ***Exhibit B***, pg 70; ***Exhibit C***, pg 106)[11] The agreements incorporate the prior Retirement Ordinance

[10] The CBA for Local 3317 provides for arbitration "relating only to the interpretation, or enforcement of a specific article and section of this Agreeemnt, or any Supplemental Agreement hereto . . . ." (***Exhibit C***, pg 14)

[11] Michigan law is clear that when one agreement incorporates another agreement, the two agreements must be read together as if the incorporated language has been inserted into the initial contract. In *Rorabacher v Lee*, 16 Mich 169 (1867), the defendant agreed to pay the plaintiff (Lee) a sum of money, if another party executed proper title for the property in question, "according to the conditions of a certain bond executed by Wm. M. Power to me." *Id.* The court found that the "certain bond" became an essential part of the agreement between the plaintiff and defendant, since it was incorporated into such agreement:

Sections 141-10, 141-13, 141-20, 141-21, 141-22, 141-22.1, and 141.24 of the Retirement Ordinance that describe duty and non-duty disability retirement eligibility. Further, Article 30.10 of the agreements themselves provide that "All employees retiring after December 1, 1997, who are eligible for medical benefits under the current system, shall be allowed to select a medical benefit plan among other available plans offered during open enrollment." (***Exhibit A***, pg. 75; ***Exhibit B***, pgs; ***Exhibit C***, pgs.) So all of the disputes described in the above-referenced grievances deal with matters involving the "interpretation, application, and enforcement" of the CBAs.

Furthermore, Defendant cannot point to a single "express provision excluding a particular grievance from arbitration." Nor is there "the most forceful evidence of a purpose to exclude the claim from arbitration." Indeed, there is ***NO*** evidence that the parties intended to exclude grievances over retirement benefits from arbitration.

Defendant will likely argue that the grievances are meritless—that there is no contractual right to a 13th Check, disability retirement benefits, or full payment of the County's accrued liability to the pension system. However, that issue should be left to an arbitrator to decide pursuant to the parties' explicit agreement. Under *Kaleva-Norman-Dickson*, the role of the Court in the matter at hand is to determine whether the CBA expressly excludes these grievances from

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> There was no error in admitting in evidence the agreement between William M. Power and the defendant, in reference to the sale and conveyance of the land. This was the instrument referred to in the defendant's contract of October 8th, as the "bond" of Power, and by this reference it became an essential part of the defendant's contract (upon which the suit was brought), without which the meaning and effect of the proviso in that contract could not be understood.

Id. The *Whittlesey v Herbrand C.*, 217 Mich 625, 629 (1922), case quoted favorably and adopted the finding of the *Adams v Hill*, 16 Me 215 court, which stated: "When a contract has reference to another paper for its terms, the effect is the same as if the words of the paper referred to were inserted in the contract."

arbitration.[12] If not, then the Court should enforce the CBAs as they are written and order the County to advance the grievances accordingly.[13]

B. The Grievance Related to a Breach of Contract that Occurred Prior to Expiration of any of the Contracts

Defendant will likely argue that there is no duty for a party to an expired CBA to submit a grievance to arbitration, unless the grievance arises under the contract. *Litton Fin Printing Div v NLRB*, 501 US 190, 205-06 (1991); s*ee also Gibraltar Sch Dist v Gibraltar MESPA-Transportation*, 443 Mich 326 (1993). A grievance arises under the contract, however, when "the facts and occurrences . . . arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Litton Fin Printing Div*, 501 US at 205-06.

[12] Similarly, the Defendant may attempt to argue timeliness. While any such argument is without merit, timeliness is a matter of procedural arbitrability that is left to an arbitrator, not a court, to decide. *See e.g., AFSCME Council 25 v Hamtramck Housing Comm'n*, 290 Mich App 672, 676 (2010) ("Allowing procedural challenges to be heard by a court rather than by the arbitrator runs contrary to the presumption of arbitrability and would leave every arbitration subject to piecemeal litigation, a result contrary to a central purpose of arbitration.").

[13] Defendant will also likely argue that grievances involving retirement benefits are not arbitrable. That is untrue as retirement benefits are an important form of deferred compensation negotiated by the parties. The Michigan Supreme Court has held that the calculation of retirement benefits is an appropriate avenue for a collectively bargained grievance procedure. *Macomb County v. AFSCME Council 25*, 494 Mich. 65, 87 (Mich. 2013). Furthermore, to the extent that Defendant may argue that AFSCME cannot bring a grievance on behalf of retirees, according to the Sixth Circuit, in *Cleveland Electric Illuminating Company v. Utility workers Union of America*, 440 F.3d 809, 816 (6th Cir. 2006), "the presumption of arbitrability applies to disputes over retirees' benefits if the parties have contracted for such benefits in their collective bargaining agreement and if there is nothing in the agreement that specifically excludes the suit from arbitration." Under this assumption of arbitrability, "If the collective bargaining agreement contains an arbitration clause, the Supreme Court found that it should be presumed that the parties intended to arbitrate the dispute unless there is 'positive assurance' that the arbitration clause does not cover the matter." *Id.* at 814. "[U]nless there is 'forceful evidence of a purpose to exclude the claim from arbitration,' the arbitrator's determination in this case that the dispute is arbitrable must stand." *Id.* at 816. Finally, should Defendant argue that the grievance related to the underfunded pension is pre-empted by state law, such argument has no merit. While the Circuit Court for the County of Wayne held that the Michigan Constitution and the Public Employee Retirement System Investment Act ("PERSIA") did not require the County to fully fund the pension, the court also did not state that Defendant could not contract to do so through a CBA.

In other words, there are three situations where a grievance would arise under the contract: 1) where grievance is based on material facts arising before the expiration of the old agreement; 2) the right is one that vested or accrued prior to expiration of the agreement; and 3) under principles of contract interpretation, the right, either explicitly or implicitly, appears to survive the expiration of the old agreement. *Id.*; *In re Fairgrove*, 124 LA 1691 (Landau, 2008).

1. Local 3317

In this case, the grievances are based on material facts that arose while Local 3317 and the County had an operating CBA. The Michigan Court of Appeals has held that nearly identical collective bargaining language regarding the need to give notice to terminate a contract functions to automatically extend the duration of a CBA absent express notice of termination. *36th District Court v AFSCME Council 25, Local 917*, 295 Mich App 502 (2012), *rev'd on other grounds by* 493 Mich 879 (2012) (the arbitration provision of the CBA in *36th District Court* also provided that the arbitrator retained authority to interpret and apply the terms of the agreement during the term of the contract and that the contract automatically continued from year to year unless one of the parties provided 90 days' notice of its desire to modify, amend or terminate the agreement).[14]

Here, the Parties explicitly agreed to extend Local 3317's CBA past October 1, 2014, and neither Party sent the other notice of intent to terminate the CBA. (***Exhibit W***) While terms were imposed by the County on Local 3317, this imposition did not occur until September 21, 2015, and the imposed terms did not alter any of the terms in a material way relevant to the grievances

[14] In that case, the Michigan Court of Appeals articulated the standard for determining whether correspondence was proper notice of the termination of a collective bargaining agreement. The Court of Appeals adopted the lower court's holding that such notice must be "clear and explicit." *Id.* at 521-23. The putative notice in *36th District Court* "referenced plaintiff's intent to 'modify, amend or terminate all or parts of the Labor Agreement . . . .'" *Id.* at 522 (quoting the circuit court decision). Even though the collective bargaining agreement required one of the parties to provide written notice of "its desire to modify, amend or terminate this Agreement," the appellate court adopted the lower court's holding that this notice was insufficient under the "clear and explicit" standard because it did not specify which one. *Id.*

that Plaintiffs' seek to compel. Yet, the IEF was abolished on June 18, 2015. Similarly, AFSCME learned of the underfunded pension on or about February 26, 2015 when an audit report found that the Plan had an unfunded actuarial accrued liability of $910 million for a funded ratio of 45 percent. (***Exhibit F***) Finally, the disability retirement issue arose on May 1, 2010 when the County implemented Administrative Personnel Order 1-2010 and the matter was remanded to arbitration on October 19, 2014. (***Exhibit L***) Thus, all of the grievances arose when there was a valid CBA between the Parties and an effective arbitration provision.

2. Supervisors and Non-Supervisors

Although the County sent notice terminating the supervisory and non-supervisory CBAs effective September 30, 2014, the County subsequently extended the CBAs and applied those terms retroactively. (***Exhibits U*** & ***V***) Specifically, the County stated that "the collective bargaining agreement which expired on September 30, 2014 between the County of Wayne and AFSCME Council 25 . . . ***is extended through*** September 30, 2015 . . . ." (*Id.*) (emphasis added) Numerous courts have held that retroactive adoption of CBAs creates a duty to arbitrate. *See, e.g.*, *Ottawa Cty v Jaklinski*, 423 Mich 1, 28–29 (1985) ("Our holding does not preclude the possibility that employers and employees may be required under a proper contract to arbitrate disputes arising out of postcontract discharges. Rather, we leave control over the question of arbitrability with the parties, from whose agreement the right to arbitration arises. ***Unions and employers can agree that the terms of employment during a hiatus between contracts will include the right to binding arbitration of some or all grievances. Similarly, they can agree that arbitration rights in the new collective bargaining agreement will be given effect retroactively to the date of the expiration of the old agreement.***") (footnote omitted) (emphasis added); *Gogebic Med Care Facility v Serv Employees Int'l Union, Local 79*, No. 247112, 2003 WL 22495578, at *4–5 (Mich. Ct. App. Nov.

4, 2003) (attached as ***Exhibit S***) (holding that a contract can apply retroactively, allowing for the arbitration of a grievance); *Mail-Well Envelope, Cleveland Div v Int'l Ass'n of Machinists & Aerospace Workers, Dist 54*, 916 F2d 344, 346–47 (6th Cir. 1990) (holding that a subsequent agreement could create an obligation to arbitrate grievances that arose during a time in which the Parties did not have an agreement); *Int'l Longshoremen's Ass'n, Local Union No 1768 v Midwest Terminals of Toledo Int'l, Inc*, 49 F Supp 3d 511, 517 (N.D. Ohio 2014) (compelling arbitration where Parties agreed to retroactive application of grievance procedure); *Buffalo Police Benev Ass'n v City of Buffalo*, 114 Misc 2d 1091, 1093, 453 NYS2d 314 (Sup Ct 1982) (holding that language providing for a CBA being effective retroactively "has been interpreted to give retroactive effect to a collective bargaining agreement").[15] As such, the contracts for the supervisors and non-supervisors were in effect. Regardless, the disability retirement issue arose on May 1, 2010 when the County implemented Administrative Personnel Order 1-2010 before the County terminated its CBAs with the supervisors and non-supervisors. *See Litton Fin Printing Div*, 501 US at 205-06, *supra*.

3. Vested Rights

The grievances would also fall under the second exception where a contract right vests or accrues prior to expiration. *Nolde Bros, Inc v Bakery Workers*, 430 US 243 (1977). In *Nolde Bros*, the Court forced an employer to arbitrate the decision to cut severance pay. *Id.* at 255. Since the severance pay provision was a right that vested and accrued prior to expiration of the agreement, the Court found that the grievance arose under the contract. *Id.* at 248-49. The basic standard for determining which policies can vest and accrue is whether the right can be worked towards or

[15] Furthermore, the Parties acted accordingly in regards to the retroactive effect of the CBAs. For example, the County processed a grievance regarding a termination that arose on November 14, 2014 through step 3 and never raised the absence of a contract as a defense. (***Exhibit T***) The Union sent the County a Notice of Intent to Arbitrate, and County did not respond to the notice or argue that it had no duty to arbitrate. (*Id.*)

accumulated over time. *Ottawa Cty v Jaklinski*, 423 Mich 1, 26-27 (1985) (e.g., pension, disability, seniority and vacation benefits, can accrue or vest). Obviously, the decrease in funding for the pension system, disability retirement benefits, and the 13th Check affect compensation that has already vested and accrued for some employees and certainly impacts accumulated contributions. Hence, the expiration of the CBAs since the time that these grievances arose is irrelevant for the purpose of determining arbitrability.

CONCLUSION

WHEREFORE, Plaintiff requests that this Court grant Plaintiff's Motion to Compel Arbitration and enjoin Defendant, County of Wayne, to participate in the arbitration of the grievances described in Plaintiff's Amended Complaint, and award all costs, attorney fees, and other relief as this Court deems appropriate.

Respectfully submitted,
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Dated: December 1, 2016

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MICHIGAN AFSCME COUNCIL 25, and its LOCALS 25, 101, 409, 1659, 1862, 2057, 2926, & 3317,

Plaintiff,

v

COUNTY OF WAYNE,

Defendant.

Case No. 16-011322-CZ
Hon. Susan Hubbard

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NOTICE OF HEARING

PLEASE TAKE NOTICE that a motion hearing is scheduled (MOTION TO COMPEL ARBITRATION) and will be heard before the Honorable Susan Hubbard in her Courtroom, located at Wayne County Circuit Court, 2 Woodward Avenue, Detroit, Michigan, on ***Friday, January 13, 2017***, at **9:00 a.m.**, or as soon thereafter as suits the court. A hearing Praecipe was filed in this matter on December 1, 2016, and attached hereto as *Exhibit Z.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on *December 1, 2016*, the foregoing document (**PLAINTIFF'S MOTION TO COMPEL ARBITRATION**) was electronically filed by the undersigned's authorized representative, using the ECF system, which will send notification of such filing to all parties of record.

Respectfully submitted,

MILLER COHEN, P.L.C.

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