UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AFSCME COUNCIL 25, AND ITS AFFILIATED LOCALS,

Plaintiff,

v

CHARTER COUNTY OF WAYNE and WARREN EVANS, County Executive/Chief Administrative Officer,

Defendants.

Case No. 15-13288

Hon. Judith Levy

Magistrate Judge R. Steven Whalen

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DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO DISMISS

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QUESTIONS PRESENTED

I. Whether P.A. 436 violates the First Amendment rights of free speech and petition.

Defendants Answer: **No.**

Plaintiff Answers: **Yes.**

II. Whether P.A. 436 deprives Plaintiff of Property Rights Without Due Process of Law.

Defendants Answer: **No.**

Plaintiff Answers: **Yes.**

III. Whether P.A. 436 is preempted by Chapter 9 of the federal Bankruptcy Code.

Defendants Answer: **No.**

Plaintiff Answers: **Yes.**

INTRODUCTION

This case arises under Michigan's Local Financial Stability and Choice Act, 2012 PA 436, MCL 141.1541 et seq. ("Act 436"). Act 436 grants local authorities such as Defendant Wayne County ("County") temporary emergency powers to remedy dire financial conditions facing local municipalities. These powers include the right to determine terms and conditions of employees whose collective bargaining agreements have expired – as is the case here. Act 436, as distasteful as it may be to Plaintiff AFSCME Council 25 ("Plaintiff"), is the law in Michigan and serves as a critical tool for financially distressed communities to regain fiscal stability. Plaintiff asks this Court to do what no other court that has considered the issue has done – declare Act 436 unconstitutional under federal law.

Despite Plaintiff's claims that it seeks to protect federal rights, this lawsuit is the latest in futile claims having previously lost before the Michigan Employee Relations Commission ("MERC") and the Michigan Court of Appeals. The MERC, which is the authoritative body regulating public labor relations in Michigan, granted Defendants' Motion to Dismiss Plaintiff's pending for arbitration under Michigan's Compulsory Arbitration of Labor Disputes In Police And Fire Departments Act, 312 PA 1969, MCL 423.231, et seq. ("Act 312") on September 16, 2015 finding that Act 436 was controlling. Likewise, on September 17, the Michigan Court of Appeals reversed a trial court's decision to grant

Plaintiffs' Motion for a Temporary Restraining Order because Plaintiff failed to show an irreparable harm or probability of success on the merits because Act 436 was controlling law over these issues. Like MERC and the Michigan Court of Appeals before it, this Court should deny Plaintiff's Motion for a Preliminary Injunction and dismiss Plaintiff's Complaint in its entirety pursuant to Fed. R. Civ. Pro. 12(b)(6) and (7) because Plaintiff cannot show irreparable harm and Act 436 is constitutional under state and federal law.

PROCEDURAL BACKGROUND

I. Act 436 and Wayne County's Financial Emergency

For years, Wayne County has been insolvent. As the result of years of declining tax revenues and mismanagement, Defendant Wayne County Chief Executive Office Warren Evans ("CEO Evans") took office on January 1, 2015 with a fiscal mess. A $52 million annual structural deficit, $1.3 billion of unfunded health care liabilities, over $900 million in unfunded pension obligations and a partially built jail and aging jail facilities that likely will require hundreds of millions of dollars to remedy. And this is only a partial list of the County's fiscal challenges. Without significant reductions in the cost of health care and pensions, the county could not avoid eventually bankruptcy. After months of negotiation with the County's 11 unions, it was clear that CEO Evans needed additional authority to solve the County's fiscal crisis. On June 17, 2015 CEO Evans sent a

letter to the State Treasurer of Michigan seeking to invoke the powers of Act 436. Act 436 is the final measure before a local government enters bankruptcy.

Pursuant to the process required under Act 436, the Governor of the State of Michigan determined that a state of financial emergency exists within the County after review by the State Appointed Wayne County Review Team. (Ex. 1) To address the County's financial crisis and restore fiscal health, the County Commission and CEO Evans entered into a Consent Agreement with the State of Michigan effective August 21, 2015. (Ex. 2, Consent Agreement). The Consent Agreement requires the County to implement remedial measures to address the financial emergency and regularly report to the State on its progress. (Ex. 2, pp. 1-2, 6). The Consent Agreement also provides that the State can find the County in breach of the Consent Agreement if remedial measures do not result in the elimination of the County's structural deficit. A breach can result in the State placing the County in receivership. (Ex. 2, pp. 8-9).

Historical and current labor costs – including those associated with AFSCME members – constitute a significant cause of the County's financial crisis. (Ex. 2, pp. 1-2). Reduction of such costs is a necessary and critical component of the remedial measures required under the Consent Agreement.[1]

[1]The estimated savings that will be achieved from implementing or imposing these changes upon POAM and AFSCME Local 3317 include an estimated reduction of OPEB UAAL for active POAM employees of $84 million and $12.45 million for

Pursuant to Section 8(11) of Act 436 and Section 2(b) of the Consent Agreement, thirty days after the effective date of the Consent Agreement, September 21, 2015, the County's obligation to bargain with its unions, as otherwise required by Michigan's Public Employment Relations Act ("PERA"), MCL 423.201, MCL 423.215, was suspended. PERA governs the scope of public sector collective bargaining obligations. In addition, pursuant to Act 436 and the Consent Agreement, CEO Evans assumes the power prescribed for emergency managers under section 12(1)(ee) of Act 436 to impose wages, hours, and other terms and conditions of employment. (Ex. 2, p. 3, Sections 2b and 2c).

The County, under the direction of CEO Evans, released its Recovery Plan on April 29, 2015. It sets an aggressive but necessary timeline to address the County's structural deficit and begin the process of reducing the County's long term financial liabilities in an effort to avoid bankruptcy. (Ex. 3, Saunders Affidavit Ex. A). Critical components of the Recovery Plan rely on significant reductions in health care and pension labor costs. The Recovery Plan also focuses on the necessary significant restructuring of County government in order to allow the County to flourish in the future while continuing to mitigate it financial

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Local 3317 employees. Active employee health care savings averaging $1,593,022 annually for POAM members and $209,493 annually for AFSCME Local 3317 members will also be achieved. Finally, the annual pension savings average $4,491,171 annually for POAM membership and $590,619.76 annually AFSCME Local 3317 membership.

liabilities. A large portion of that restructuring requires significant changes to work rules and other non-economic conditions of employment in order to allow the County to provide quality services efficiently. The County has taken difficult but necessary steps to meet the deadlines in the Recovery Plan (*Id.*, ¶4). On March 25, 2015, the County began negotiating with all Unions to reach tentative agreements regarding wages, hours and other terms and conditions of employment recognizing what was necessary to meet the Recovery Plan requirements. (*Id.*, ¶5).

The County reached tentative agreements ("TAs") with nine out of ten unions (Ex. 3, ¶12, Ex. 4, Wilson Affidavit ¶7). AFSCME Local 3317 is the only union that has not reached a tentative agreement with Wayne County. *Id.* On September 21, 2015, the County imposed upon Local 3317 "County Terms of Employment". Upon information and belief, all of the other unions are expected to hold ratification votes on the TAs prior to September 30, 2015 and the County has extended the terms of the expired CBAs to that date.

The irreparable harm that will befall the County if this Court grants a Preliminary Injunction to the Plaintiff is most obvious with respect to the County's situation with another of its unions. In addition to AFSCME Local 3317, one other union – the Police Officers' Association of Michigan ("POAM") – is also subject to Act 312. POAM is the second largest and costliest County union, representing 726 County employees, and including more members in the defined benefit plans

than any other union. POAM's leadership advised the County that its membership will not seek ratification of the TAs unless AFSCME Local 3317 agrees to and ratifies similar changes or CEO Evans imposes similar changes under the authority granted pursuant to Act 436. (Ex. 4, ¶9). If this Court enters an injunction, the County will be prevented from unilaterally implementing the changes necessary to achieve the costs savings it seeks from AFSCME Local 3317 but, more importantly, upon information and belief result in POAM refusing to hold its ratification vote on the TAs reached with the County.

In sum, the inability of the County to implement the agreed upon concessions in the POAM contract and the anticipated economic savings from the similar changes from County Employment Terms imposed by action of the CEO on employees represented by AFSCME Local 3317 would represent millions of dollars of budgetary variances for the County fiscal year commencing October 1, 2015. What is more, while the POAM and AFSCME Local 3317 portions of these savings are significant, upending the County's ability to act under Act 436 may drive Wayne County into more draconian measures to avoid insolvency. Such a result would unjust to the employees in the eight (8) other bargaining units who have sacrificed by agreeing to the majority of the Recovery Plan's pension and health care savings' targets toward the fiscal solvency of Wayne County.

II. Michigan Employment Relations Commission Proceedings – Act 312

The collective bargaining agreement between AFSCME 3317 and the County expired on September 30, 2014. AFSCME filed its original Petition for Act 312 on September 9, 2014. By agreement, AFSCME withdrew the Petition on October 1, 2014 and the parties executed a series of temporary agreements extending the expired collective bargaining agreement for short periods while the parties attempted to negotiated a successor agreement. Ultimately the negotiations were unsuccessful. The last extension agreement expired on June 23, 2015, and MERC appointed C. Barry Ott as arbitrator in the matter of *Wayne County & Wayne County Sheriff – and – Local 3317*, MERC Case No. D 14 A-0018.

The County determined that in order to restore its fiscal health, on or after September 20, 2015, CEO Evans would, if necessary, exercise the power to impose terms and conditions of employment authorized under Act 436 as to Local 3317 and therefore moved to dismiss the AFSCME Act 312 arbitration on September 1, 2015. (Ex. 3, ¶23, Ex. 4, ¶10, Ex. 5). AFSCME filed its Response and Brief in Opposition of the County's Motion to Dismiss Act 312 Arbitration Petition on September 4, 2015. (Ex. 6). The County filed a Reply Brief on Monday, September 14, 2015. (Ex. 7). On Wednesday, September 16, 2015, the MERC heard and granted the County's Motion to Dismiss Act 312, with a written order to follow.

III. State Court Proceedings

On Thursday, September 10, 2015, Local 3317 filed a Verified Complaint and Motion for Temporary Restraining Order and Show Cause ("Motion for TRO"). The County received a copy of these pleadings late in the afternoon on that Thursday and was advised that Plaintiff would appear in court the following morning requesting the TRO. On Friday, September 11, 2015, counsel for Local 3317 and the County appeared on Local 3317's Motion for TRO. The County had no opportunity to file a written response and so responded orally and submitted exhibits in support of its oral response at the hearing. Judge John Murphy granted Plaintiff's request for a TRO on September 11, 2015, and on Defendant's Emergency Motion for Entry of Order entered a written order on September 14, 2015. (Ex. 8).

On Tuesday, September 15, 2015, the County filed an Emergency Application for Leave to Appeal with the Michigan Court of Appeals. On September 17, 2015, the Court of Appeals issued its order reversing the TRO at 12:30 PM. (Ex. 9). This effectively ended the action and cleared the way for the County to proceed with implementation of its Recovery Plan under the Consent Agreement. MERC Decisions are reviewable directly and only by the Michigan Court of Appeals. MCL 423.216(e). Plaintiff, therefore, still has a remedy under state law by appealing the MERC decision to the Court of Appeals. Moreover,

AFSCME still has a claim for breach of an alleged contract pending in the Wayne County action. There, Plaintiff claims that the County entered into an agreement in 2014 to participate in Act 312 proceedings, preventing the County from exercising its grant of authority to unilaterally implement terms and conditions of employment under Act 436. The County denies this and will shortly be filing a motion to dismiss this remaining claim.

The instant case was filed the morning of Wednesday, September 16, 2015, while the parties were before the MERC. On Thursday, September 17, 2015 District Judge Matthew Leitman held a hearing, telephonically, on Plaintiff's request for a Temporary Restraining Order. Judge Leitman denied the request.

ARGUMENT

I. Standard of Review for Defendants' Motion to Dismiss

In addition to responding to Plaintiff's Motion for Preliminary Injunctive Relief, Defendants also move this Court to dismiss Plaintiff's Complaint in its entirety for failing to state a claim. A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the pleadings.[2] Defendants' motion tests whether

[2] When reviewing motions under Rule 12(b)(6), the Court is permitted to construe documents attached to the complaint as part of the complaint. Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). Additionally, the Court may consider matters of public record and items that appear in the records of the case. *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)(stating that "the court primarily considers the allegations in the complaint, although matters of public record, orders, items

Plaintiff has, under Fed. R. Civ. P. 8(a), made the requisite "showing that [they are] entitled to relief." To survive a motion to dismiss, a plaintiff must assert sufficient factual allegations to establish that his claim is "plausible on its face," *i.e.*, there must be more than the mere possibility that a defendant acted unlawfully. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007)("A plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

In *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009), the Supreme Court elaborated on *Twombly*:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. ...
>
> Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

129 S.Ct. at 1949-50 (citing *Twombly*, 550 U.S. at 555). Under *Iqbal/Twombly*, the court first disregards all conclusory statements and allegations in the complaint. It must then review the remaining allegations to determine whether they "plausibly" entitle the plaintiff to relief. For a claim to be "plausible," it is insufficient that the

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appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.").

facts alleged are "'consistent with' a defendants' liability," or that a violation is "conceivable." *Id.* at 1949-51 (quoting *Twombly*, 550 U.S. at 557). As is shown below, Plaintiff's Complaint contains little more than conclusory statements and allegations in support of its constitutional and federal preemption claims.

II. Plaintiff Failed to Join Indispensable Parties to this Lawsuit

This Court should dismiss Plaintiff's Complaint without consideration of the underlying merits because Plaintiff failed to join the State of Michigan and State Treasurer, N.A. Khouri, who are all indispensable parties under Rule 19. *See* Fed. R. Civ. P. 12(b)(7). In construing Rule 19, a court should take a "pragmatic approach" and use the rule "to promote the full adjudication of disputes with a minimum of litigation effort." *Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 665 (6th Cir. 2004)(internal quotation marks omitted).

Under the accepted analytical approach, a court must first determine "whether a person is necessary to the action." *Soberay Mach. & Equip. Co. v. MRF Ltd.*, 181 F.3d 759, 763-64 (6th Cir. 1999). A party is necessary under Rule 19 when (1) it is subject to service of process and (2) "in that person's absence, the court cannot accord complete relief," or when the person has a legal interest at issue in the case and "disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double . . . or otherwise inconsistent obligations . . ." Fed. R. Civ. P. 19(a); *Keewenaw Bay Indian Comm.*

v. Michigan, 11 F.3d 1341, 1345 (6th Cir. 1993). This inquiry "stresses the desirability of joining those persons [without whom relief] would be partial or 'hollow' rather than complete . . . The interests [include] that of the public in avoiding repeated lawsuits on the same essential subject matter." Fed. R. Civ. P. 19 Committee Note, 1966 amend. (West 2014).

In this case, Governor Rick Snyder declared the financial emergency under Act 436 and State Treasurer N.A. Khouri is a party to the Consent Agreement which is the basis of the challenges asserted by Plaintiff. Since 2012, at least 10 local units of government have been subject to emergency management under Act 436 (or its predecessor Act 4) and currently Detroit Public Schools, Muskegon Heights School District and Highland Park Schools are operating under the controls of Act 436. The State of Michigan and State Treasurer N.A. Khouri are, therefore, necessary parties.

Once a party is, as here, determined to be necessary, a court must decide if it is indispensable under Rule 19(b). "[T]here is no prescribed formula for determining whether a party is indispensable . . ." *Soberay Mach. & Equip. Co.*, 181 F.3d at 765. Under Rule 19(b), a court considers "four factors: 1) to what extent a judgment rendered in the person's absence might prejudice . . . those already parties; 2) the extent to which the prejudice can be lessened or avoided; 3) whether a judgment rendered in the person's absence will be adequate; and 4)

whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." *Soberay Mach. & Equip. Co.*, 181 F.3d at 764. In this case, Governor Rick Snyder declared the financial emergency under Act 436 and State Treasurer N.A. Khouri is a party to the Consent Agreement which is the basis of the challenges asserted by Plaintiff. Failing to include the State of Michigan and the State Treasurer in this challenge to the constitutionality of Act 436 results in substantial prejudice because Act 436 is the primary tool used by the State of Michigan to remedy local municipal financial distress. Under any reading of Rule 19, the State of Michigan and State Treasurer N.A. Khouri are indispensable parties. Plaintiff's failure to join them should result in dismissal of this lawsuit.

III. Plaintiff Fails to Satisfy the Prerequisites for Obtaining Injunctive Relief

A. Governing Principles for Preliminary Injunctive Relief

In analyzing a motion for preliminary injunctive relief, courts must consider the following four factors: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Wells Fargo & Co. v. WhenU.Com, Inc.*, 293 F.Supp.2d 734, 757 (E.D. Mich. 2003)(quoting *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). These factors are not prerequisites

to relief, but rather are factors to be balanced. *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

Plaintiff has the burden of proving entitlement to injunctive relief. *Wells Fargo*, 293 F. Supp.2d at 757. The decision of whether to issue preliminary injunctive relief is within the discretion of the trial court. *Lakeshore Terminal & Pipeline Co. v. Defense Fuel Supply Center*, 777 F.2d 1171, 1172 (6th Cir. 1985). However, a preliminary injunction "is an extraordinary remedy best used sparingly." *Schalk v. Teledyne*, 751 F. Supp. 1261, 1263 (W.D. Mich. 1990), *aff'd*, 948 F.2d 1290 (6th Cir. 1991). "It is because injunctive relief is such a 'drastic' remedy that plaintiffs must show circumstances [that] clearly demand its entry." *Wells Fargo*, 293 F. Supp.2d at 757 (citations omitted). Plaintiffs have not carried their burden of proving that they are entitled to this extraordinary remedy.

B. Plaintiffs Cannot Establish Irreparable Harm

i. *Collateral Estoppel* bars Plaintiff from relitigating this issue

The State Court of Appeals reversal of the TRO entered by Judge Murphy was expressly predicated on Plaintiff's failure to show irreparable harm. That decision precludes Plaintiff from making the same claim here under the doctrine of *collateral estoppel*. When considering the preclusive effect of a state court judgment, courts must look to the law of that state. *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 640 (6th Cir. 2007)(citing *Allen v. McCurry*, 449 U.S. 90,

96, 101 S.Ct. 411(1980)); see also 28 U.S.C. § 1738. Under Michigan law, "[R]es judicata, or merger and bar, precludes relitigation of the same claim while collateral estoppel precludes relitigation of the same issue." *McCoy v. Cooke,* 165 Mich.App 662, 666; 419 N.W.2d 44 (1988). Collateral estoppel "requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v. Titus,* 481 Mich. 573, 578–579; 751 NW2d 493 (2008). "Collateral estoppel applies when the basis of the prior judgment can be clearly, definitely, and unequivocally ascertained." *Ditmore v. Michalik,* 244 Mich.App 569, 578; 625 N.W.2d 462 (2001).

Here, the basis of Plaintiff's irreparable harm claims – although vague and conclusory – can only be the claimed but unspecified effect of the operation of Act 436 and the suspension of the duty to bargain under Act 436 and the Consent Agreement. All three of the prerequisites for application of collateral estoppel are met in this case. Plaintiff's Motion must, therefore, be denied.

ii. Plaintiff's allegations fail to meet the requisite harm

Even if this Court ignores the Michigan Court of Appeals reversal of the TRO entered by Judge Murphy, Plaintiff's allegations fall far short from establishing such harm. Plaintiff alleges, in conclusory fashion without identifying

facts, that its members would suffer irreparable harm in the form of "financial actions" to be taken by Defendants that "are designed to be beyond economic." However, in further defining these irreparable injuries, Plaintiffs cite unnamed "protected entitlements" and that their "access to appropriate health care" will be adversely affected. This type of amorphous and undefined economic harm is insufficient to warrant the extraordinary remedy of injunctive relief and fails to satisfy the heightened pleading standards established under *Iqbal/Twombley.* Moreover, "the hallmark of irreparable injury is the unavailability of money damages to redress the injury." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir. 2007). Plaintiff has not and cannot make such a showing in this case because if Plaintiff is correct, money damages can fully restore Plaintiff's alleged injuries.

C. Plaintiff Cannot Succeed On the Merits of its Claim[3]

i. P.A. 436 does not violate the First Amendment rights of free speech and petition (Count I).

The basis for Plaintiff's speech and petition claim rest on allegations that Act 436 strips the local officials of all authority, mirrors 2011 PA 4 ("Act 4"), which was rejected by voter referendum, and improperly vests in Act 436 powers in emergency financial managers. These precise arguments were made in *Phillips*

[3] For these same reasons this Court should dismiss Plaintiff's Complaint in its entirety under Fed. R. Civ. Pro. 12(b)(6).

v. Snyder, No. 2:13-CV-11370, 2014 WL 6474344 (E.D. Mich. Nov. 19, 2014) (Ex. 10), and were soundly rejected by District Judge George C. Steeh. The result in this case should be no different.[4]

ii. P.A. 436 does not deprive Plaintiff of Property Rights Without Due Process of Law (Count II).

Count II alleges simply that actions taken by Defendants "will deprive Plaintiffs and the memberships of all property rights related to wages, hours, and terms and conditions of employment, without due process ..." (Dkt#1, Compl., ¶¶ 31). Plaintiff's Complaint, however, lacks sufficient factual allegations to establish a constitutional violation that is "plausible on its face" under *Iqbal/Twombly*. A procedural due process claim requires a showing that the plaintiff has been deprived of a protected property interest without adequate process. *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999). "A contract, such as a collective bargaining agreement, may create a property interest." *Leary v. Daeschner*, 228 F.3d 729, 741 (6th Cir. 2000). To have a property interest in a contractual benefit, however, a person must "have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Because "public employees ... by definition serve the public and their expectations are necessarily defined, at least in part, by the public interest[,]" they have a diminished

[4] Defendants refer this Court to the arguments set forth in Defendants' Motion to Dismiss filed in *Phillips v. Snyder*, No. 2:13-CV-11370 (E.D. Mich.) Docket # 41, and incorporates them by reference as if fully set forth herein (Ex. 11).

expectation that their contacts will not be impaired. *UAW v. Fortuño,* 633 F.3d 37, 42-45 (1st Cir. 2011)(internal quotes omitted). In this case, Plaintiff fails to adequately plead the specific contractual rights and entitlements that they allege will be deprived. Moreover, Plaintiff does not fully inform this Court that the collective bargaining agreement which it references expired on September 30, 2014. This defect is fatal to Plaintiff's due process claim.

Moreover, public sector collective bargaining agreements ("CBAs") in Michigan do not exist in a vacuum. Instead, their existence, interpretation and enforceability depend on applicable state and federal law. Federal law leaves regulation of the labor relations of state and local governments and their employees exclusively to the states. 29 U.S.C. §152(2). As noted by the Supreme Court, such "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....'" *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 1491 (1985).

In Michigan, PERA governs public sector labor law. *City of Lansing v. Carl Schlegel,* 257 Mich.App. 627, 631; 669 N.W.2d 315 (2003). "Until the enactment of the PERA in 1965, public employees did not enjoy the substantive collective bargaining rights possessed by employees in the private sector." *Demings v. City of Ecorse,* 423 Mich. 49, 76; 377 N.W.2d 275 (1985)(dissent). PERA "declare[s] and

protect[s] the rights and privileges of public employees." *Muskegon County Prof'l Command Ass'n v. County of Muskegon,* 186 Mich. App. 365, 369; 464 N.W.2d 908 (1990). To this end, PERA states that it is lawful for public employees to bargaining collectively with public employers. MCL 423.209. Thus, but for PERA, public employees in Michigan would not enjoy the benefits of collective bargaining.

State law not only governs Plaintiff's rights, it also sets forth the County's authority to enter into CBAs with its employees and its ability to modify or terminate the benefits and conditions afforded under the CBAs. Political subdivisions, such as Wayne County, act pursuant to delegated authority by the State. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *City of Taylor v. Detroit Edison Co.*, 475 Mich. 109, 116, 715 N.W.2d 28 (2006). Because of this, the County's authority to enter into CBAs and its obligations under those agreements is governed solely by state law, namely PERA and related legislation, such as Act 436. Accordingly, the existence of any property rights described in Plaintiff's Complaint depend on State law. *Porter v. City of Highland Park*, No. 263470, 2006 WL 1479909, *4 (Mich. Ct. App. May 30, 2006) ("it is well established that 'that which the legislature gives, it may take away.'") (Ex. 11).

The courts are clear that the collective bargaining rights of public employees are exclusively reserved to the states and the Michigan legislature retained its

sovereign right to change those bargaining rights and the scope of a political subdivision's obligations thereunder at any time. *Winston-Salem/Forsyth County Unit of North Carolina Ass'n of Educators v. Phillips,* 381 F.Supp. 644, 646 (M.D.N.C. 1974)(statute that "simply voids contracts between units of government ... and labor unions and expresses the public policy" does not violate the Constitution). Act 436 is a legitimate and constitutional exercise of these reserved rights and Plaintiffs' attempt to challenge Act 436 under the guise of a federal constitutional due process claim should be rejected. *MacFall v. City of Rochester*, 764 F. Supp. 2d 474 (W.D.N.Y. 2010) (due process claim); *Albrecht v. Treon*, 617 F.3d 890, 896 (6th Cir. 2010)(not all property rights are constitutionally protected). For example, temporary alterations of contractual relationships will not support claims that state action unconstitutionally impaired a contract right. *Baltimore Teachers Union v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1021 (4th Cir. 1993); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447 (1934). Similarly, laws passed "for the protection of a basic interest of society" that infringe contract rights do not give rise to a constitutional claim. *Blaisdell*, 290 U.S. at 445. And, laws permitting the modification of contract rights, but which are justified by fiscal emergencies do not violate the Contract Clause. *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 369 (2nd Cir. 2006)(citing *Blaisdell*, 290 U.S. at 444-48).[5]

[5] Prior amendments to PERA which have affected existing contract rights have

Here, the MERC dismissal of Act 312 effectively disposes of any claim that Plaintiff has a property right in collective bargaining under state law where an Act 436 Consent Agreement is in place. This decision followed MERC previous dismissal of similar Act 312 petitions – decisions that were never appealed. (Ex. 12, 06-14-13 and 06-21-13 MERC Decisions). The MERC decision establishes, and is *res judicata* on, the question of whether, under state law, the County may decline to bargain, participate in Act 312 proceedings, or impose terms and conditions of employment under state law. *Hamilton's Bogarts, Inc.*, 501 F.3d at 640. The MERC decision also obviates any claim of lack of due process. MERC is the statutory administrative body empowered to manage and enforce PERA and Act 312. MERC decisions are subject to Michigan Court of Appeals review. Plaintiff has availed itself of MERC and the state Courts in its quest to avoid the legitimate operation of Act 436 and the Consent Agreement. This Court should, therefore, dismiss Plaintiff's Due Process claim because this claim is governed first by State law which does not afford Plaintiff a protected property right.[6]

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been upheld as constitutional. *Michigan State AFL-CIO v. MERC*, 453 Mich. 362; 551 N.W.2d 165 (1996) (rejecting challenge that PERA amendments violated First amendment rights).

[6] "Not only are existing laws read into contracts in order to fix obligations as between the parties, *but the reservation of essential attributes of sovereign power is also read into contracts* as a postulate of the legal order." *Blaisdell*, 290 U.S. at 435 (emphasis added). States "continue[] to possess authority to safeguard the vital interests of its people" and in such circumstances "it does not matter that the legislation ... has the result of modifying or abrogating contracts already in effect."

Assuming *arguendo* for purposes of this Motion only that the property rights alleged by Plaintiff arise from the MOA entered into October 1, 2015 and a series of amendments dated: December 9, 2014; February 7, 2015; March 3, 2015; April 16, 2015 and May 30, 2015 (collectively the "MOA"), Plaintiff's due process claim still fails because these documents do not establish a property right.[7]

Id. at 434-35. Indeed, the Supreme Court has held that "the economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id.* at 437. Act 436, which the legislature determined is "vitally necessary to the interests of the citizens of Michigan" and which describes certain actions that may be taken in a "financial emergency," along with PERA, which Act 436 modified, are two legitimate exercises of these essential, reserved State powers. MCL 141.1543, MCL 141.1548, MCL 141.1552.

[7] To the extent it relies on the MOA, Plaintiff's Due Process claim should be dismissed for lack of subject matter jurisdiction and for failure to state a claim because it is purely a breach of contract action for which Plaintiff has a remedy under state law. *Yellow Cab Co. v. City of Chicago*, 3 F. Supp. 2d 919, 925 (N.D. Ill. 1998); *Charles v. Baesler*, 910 F.2d 1349, 1356 (6th Cir. 1990). *Horwitz-Matthews v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir. 1996)("It would be absurd to turn every breach of contract by a state or municipality into a violation of the federal Constitution."). Here, although Plaintiff uses the constitutional buzzwords "impairment" and "due process," while carefully ignoring contractual breach language, they essentially allege that CEO Evans plans to unilaterally modify the terms of a CBA. In other words, Plaintiff alleges that the County, through the actions of Evans, is not performing what it promised to do in the contracts. Any actions taken by CEO Evans do not foreclose other remedies available to Plaintiff under PERA because these are breach of contract allegations. *Baesler*, 910 F.2d at 1356. In the public employment collective bargaining setting in Michigan, it is well-settled that parties to a labor agreement that contains a mandatory grievance procedure are "obliged to exhaust their remedies under the collective bargaining agreement before proceeding to circuit court." *AFSCME v. Highland Park Board of Education*, 214 Mich.App. 182, 187, 542 N.W.2d 333 (1995), *aff'd*, 457 Mich. 74, 577 N.W.2d 79 (1998). In Michigan, as at the federal level, courts therefore "... require the exhaustion of union remedies in order to

First, the MOA was terminated by letter from AFSCME Counsel Jamil Akhtar to Kenneth Wilson dated June 20, 2015, effective June 23, 2015 when the MERC re-appointed Act 312 Arbitrator C. Barry Ott. (See Ex. 2). As such, the MOA cannot provide a basis for Plaintiff's property rights.

Second, it is a well-established principle of contract law that unambiguous contracts are not open to judicial construction and must be enforced as written. *See, e.g., Henderson v. State Farm Fire & Cas.Co.*, 460 Mich. 348, 354, 596 N.W.2d 190 (1999); *Juif v. State Hwy. Comm'r*, 287 Mich. 35, 41, 282 N.W. 892 (1938); *Forbes v. Darling,* 94 Mich. 621, 625; 54 N.W. 385 (1893)). A court may not find ambiguity in the face of clear express terms. *Frankenmuth Mut. Ins. Co. v. Masters*, 460 Mich. 105, 111, 595 N.W.2d 832 (1999). Even the closest scrutiny of the MOA and its amendments evidences no agreement on the part of the County to participate in Act 312 proceedings where a consent agreement has been entered into and the duty to bargain is suspended by Act 436. All the MOA provides is that Plaintiff may re-file its petition for Act 312 which would then be processed according to the Act. Nowhere does the County agree to participate in Act 312

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advance the policy of encouraging a nonjudicial resolution of labor disputes." *AFSCME, supra* (citing *Clayton v. Automobile Workers*, 451 U.S. 679 (1981)); *U.S. v. Wayne County Community College District*, 242 F. Supp. 2d 497, 521-22 (E.D. Mich. 2003) (constitutional due process claim fails "where a plaintiff fails to avail himself of contractual grievance procedures or other available state remedies (such as an administrative employee relations commission action or a state court action).").

where an Act 436 consent agreement is in place or waive its rights and obligations under the consent agreement or its rights under Act 436.

iii. P.A. 436 is not preempted by Chapter 9 of the federal Bankruptcy Code (Count III)

The Constitution's Supremacy Clause makes the laws that Congress passes pursuant to that power the "supreme Law of the Land[,]" U.S. Const. art. VI, cl. 2 "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *In re Schafer*, 689 F.3d 601, 613 (6th Cir. 2012)(*citing Perez v. Campbell,* 402 U.S. 637, 644, 91 S.Ct. 1704 (1971)). As the Sixth Circuit explained in *Schafer*:

> A state statute may conflict with federal law in one of three ways. Under "express preemption," the intent of Congress to preempt state law is explicit. *R.R. Ventures, Inc. v. Surface Transp. Bd.,* 299 F.3d 523, 561 (2002). Under "field preemption," Congress's regulation in a field "is so pervasive or the federal interest is so dominant that an intent can be inferred for federal law to occupy the field exclusively." *Id.* And, under "conflict preemption," the laws in question conflict such that it is impossible for a party to comply with both laws simultaneously, or where the enforcement of the state law would hinder or frustrate the full purposes and objectives of the federal law. *Id.* Although there is an assumption that the federal law is not preemptive, such an assumption is not triggered "when the [s]tate regulates in an area where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000).

In re Schafer, 689 F.3d at 613-14. Federal preemption of state law will not lie

absent evidence of clear and manifest congressional purpose. *Millsaps v. Thompson*, 259 F.3d 535, 538 (6th Cir. 2001). Neither express, field nor conflict preemption are applicable here.

While the allegations in Plaintiff's complaint do not support a claim for express, field or conflict preemption, they do demonstrate that Plaintiff fundamentally misunderstands Chapter 9 of the Bankruptcy Code. [8] Plaintiff first falsely alleges that under PA 436 it will not enjoy the "independent protections given to litigants in Federal Bankruptcy Courts" because there is no "independent trustee." Complaint ¶ 35. However, "there [is no] provision for a trustee or examiner in a chapter 9 case." *Ass'n of Retired Emps. of the City of Stockton v. City of Stockton, Cal. (In re City of Stockton, Cal.)*, 478 B.R. 8, 20 (Bankr. E.D. Cal. 2012) (comparing 11 U.S.C. § 901(a) with 11 U.S.C. § 1104). Plaintiff's first allegation in support of preemption is thus legally incorrect.

Plaintiff's next allegation fares no better. Citing to Bankruptcy Code § 109(c)(3), Plaintiff asserts that the County is eligible to be a Chapter 9 debtor because it is "legally insolvent." Complaint ¶ 36. Plaintiff fail to recognize, however, that an entity seeking to be a debtor under Chapter 9 must satisfy each of Bankruptcy Code § 109(c)(1), (2), (3), (4) and (5) and not just (c)(3). *See* 11 U.S.C. § 109(c)(4) ("desires to effect a plan to adjust such debts;

[8] Chapter 9 of the Bankruptcy Code is the only chapter under which municipalities may file for bankruptcy.

and...")(emphasis added). Plaintiff does not allege that the County satisfies these remaining requirements. To the contrary, Plaintiff alleges in the next paragraph that the State has forbidden the County to file for bankruptcy under the Consent Agreement. Complaint ¶37; 11 U.S.C. §109(c)(2)(entity must be "specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter").

Moreover, Plaintiff's allegation that the Consent Agreement forbids the County from initiating an action under Chapter 9 does not support a claim for preemption. As set forth in Bankruptcy Code § 109(c)(2), the Bankruptcy Code specifically provides States with the power to determine whether its municipalities may file for bankruptcy. Thus, Congress granted States the power and right to determine whether a municipality is eligible to be a Chapter 9 debtor.

Plaintiff is thus left relying on nothing more than its conclusory allegation that the Bankruptcy Code preempts Act 436. A bald, conclusory allegation will not survive a motion to dismiss much less satisfy the high burden for the granting of a preliminary injunction. *Twombly*, 550 U.S. at 557; *Iqbal*, 556 U.S. at 678-79.

Taken at its best, Plaintiff appears to be arguing that PA 436 is expressly preempted by the Bankruptcy Code because it allegedly deprives Plaintiff of collective bargaining rights that it may have under applicable state law. Pl. Br. at

14. Without specifically identifying its source of law, Plaintiff appears to contend that MCL 141.1548(11) runs afoul to Bankruptcy Code § 903, which provides that:

> This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but--
> (1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
> (2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

11 U.S.C.A. § 903.[9] MCL 141.1548(11) itself provides "Unless the state treasurer determines otherwise, beginning 30 days after the date a local government enters into a consent agreement under this act, that local government is not subject to section 15(1) of 1947 PA 336, MCL 423.215, for the remaining term of the consent agreement." MCLA 141.1548. The term "composition" is a term of art meaning a repayment of less than the full amount of a particular debtor's debt. 5 Norton Bankr. L. & Prac. 3d § 90:2 (*citing* Pub. L. No. 79-481, 60 Stat. 409 (1946)).

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[9] In a concurring opinion to the *per curiam* decision in *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 433-34 (6th Cir. 2014) (*per curiam*) (McKeague, J., concurring), Judge McKeague suggested that Bankruptcy Code §§ 903(1) and (2) apply only if there is a pending chapter 9 case: "Thus, subsection(1) is an exception to the general proposition that Chapter 9 does not limit or impair State power. The exception appears to reflect congressional intent that where Chapter 9 is invoked, it does operate to limit or impair State power in relation to the specific type of State law described in subsection (1). Viewed in context, then, the plain language of § 903(1) *may* be construed to mean, and today's opinion should not be read to foreclose the possibility, that § 903(1) represents a specific limitation on State power only where Chapter 9 has been invoked."

Courts have interpreted the term "composition" to exclude state laws which permitted wage freezes imposed by a municipality in violation of collective bargaining agreements and the suspension of the municipality's obligation to pay principal amounts on short term notes for three years. *Subway–Surface Supervisors Ass'n v. New York City Transit Auth.*, 44 N.Y.2d 101, 115, 375 N.E.2d 384 (1978); *Ropico, Inc. v. City of New York*, 425 F. Supp. 970, 983 (S.D.N.Y. 1976).

MCL 141.1548(11) does not constitute a "composition of indebtedness." All that MCL 141.1548(11) does is suspend the operation of another Michigan law – PERA – which identifies certain collective bargaining rights of municipal unions. As Plaintiff emphasizes, neither the Consent Agreement nor MCL 141.1548(11) permit the County to modify existing contracts. Pl. Br. at ¶ 7.[10] Further, even if the County had this right, Plaintiff's collective bargaining agreement with the County expired and Plaintiff terminated the MOA. In short, the County is not impairing any existing contract, refusing to pay any debt, discharging any debt or forcing Plaintiff to compromise a claim without its consent. Consequently, PA 436 is not expressly preempted by the Bankruptcy Code because it is not a "composition of indebtedness."[11]

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[10] For this reason, AFSCME's entire discussion of executory contracts in its Brief is irrelevant to the preemption issue.

[11] Although not discussed at all by Plaintiff, neither field nor conflict preemption apply here. Conflict preemption is inapplicable because there is not an irreconcilable conflict between the Bankruptcy Code and PA 436 for the reasons

D. An Injunction Would Harm Third Parties and Send the County Spiraling Towards Bankruptcy

If the changes to terms and conditions of employment are not implemented, including changes applicable to Local 3317 and POAM, by October 1, the County will be unable to fulfill the requirements of the Consent Agreement in a manner envisioned by its Recovery Plan and it will not have implemented remedial measures necessary to solve its structural deficit, amongst other indicators. (Ex. 3, ¶22). Moreover, because County budgets are based on the full implementation of the Recovery Plan, if resources are not available or other reductions cannot be agreed upon to fund the savings anticipated from the changes proposed and/or agreed to for the Local 3317 and POAM contracts, the County risks violating the Uniform Budget and Accounting Act. (Ex. 3, ¶22). Such a violation would be a breach of the Consent Agreement that could allow the Governor to place the County in receivership and appoint an emergency manager. (Ex. 3, ¶22). This Court should, also, consider the impact granting an injunction would have on all other County employees and the members of the public served by the County of Wayne. Granting an injunction and preventing the County from continuing its efforts towards financial solvency will at risk the continued employment, health care benefits and pension benefits to which these employees are presently entitled.

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stated above. In fact, the Bankruptcy Code expressly states that the County will only be eligible to file for bankruptcy if so authorized by the State of Michigan. 11 U.S.C. § 109(c)(2).

Without the County taking these necessary economic actions now, the County will eventually find itself in a similar situation to Detroit and pass the point of no return in which bankruptcy and a greater reduction of wages, health care benefits and pensions are likely.

Finally, such a financial mess will threaten the County's ability to continue to provide essential and needed services to the thousands it serves. So even if the Plaintiff could show some harm, the balance of the equities militate against the granting of an injunction.

E. The Public Interest Is Served By Upholding Act 436

The State has a significant and compelling interest in addressing the financial distress of local units of government. Act 436 does not abridge more speech or petition rights than necessary to address that distress and provides for public meetings and public input. It gives local elected officials options in solving its difficulties, and if locals choose an emergency manager, provides narrowly tailored procedures for the manager's removal. Plaintiffs have ample channels to voice their concerns to their state elected officials. Moreover, the financial exigencies of the local units of government that are subject to the Act justify any temporary abridgment of speech or petition rights. Governments exercise emergency powers that allow them to temporarily suspend constitutional rights.

These emergencies are often economic. As early as 1934, the Supreme Court

addressed an economic emergency in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934), and upheld Minnesota's mortgage moratorium law in response to the Great Depression. The Court noted, "[The] principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." *Id.* Dismissing is consistent with the doctrine that courts should avoid deciding constitutional issues unnecessarily.

CONCLUSION

Plaintiffs' Motion should be denied and this case should be dismissed in its entirety. As the Supreme Court has long recognized, "a fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

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September 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following attorneys:

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