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DAUPHIN COUNTY  
PENNSYLVANIA

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SUPERIOR COURT  
DAUPHIN COUNTY  
PENNSYLVANIA  
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**IN THE COURT OF COMMON PLEAS  
OF DAUPHIN COUNTY, PENNSYLVANIA**

**TD BANK, NATIONAL ASSOCIATION,:**  
**MANUFACTURERS AND TRADERS :**  
**TRUST COMPANY, and ASSURED :**  
**GUARANTY MUNICIPAL CORP. :**

**Plaintiffs,**

**v.**

**THE HARRISBURG AUTHORITY, :**  
**THE CITY OF HARRISBURG, :**  
**PENNSYLVANIA, and PAUL P. :**  
**WAMBACH, TREASURER OF THE :**  
**CITY OF HARRISBURG, :**

**Defendants.**

**CIVIL ACTION**

**No. 2010 CV 11737 CV file**

**TD BANK, NATIONAL ASSOCIATION,:**

**Plaintiff, :**

**v. :**

**CIVIL ACTION**

**PAUL P. WAMBACH, :**

**TREASURER OF THE CITY :**

**OF HARRISBURG, THE CITY OF :**

**HARRISBURG, and THE :**

**HARRISBURG AUTHORITY, :**

**Defendants. :**

**No. 2010 CV 11738**

**PLAINTIFFS' POST-HEARING BRIEF ON MOTION FOR ORDER OF MANDAMUS  
PURSUANT TO SECTIONS 8261, 8283 AND  
8104 OF THE LOCAL GOVERNMENT UNIT DEBT ACT**

Plaintiffs TD Bank, National Association ("TD"), Manufacturers and Traders Trust Company ("M&T"), and Assured Guaranty Municipal Corp. ("Assured") respectfully submit this Post-Hearing Brief on the Motion for Order of Mandamus.

**PROCEDURAL HISTORY**

Plaintiffs filed their complaint against the City and the Authority on September 13, 2010. On November 9, 2010, Plaintiffs filed a Motion for an Order of Mandamus Pursuant to Section 8261 and 8283 of the Local Government Unit Debt Act and for Equitable Relief ("Mandamus Motion").

On November 30, 2010, the City filed its Reply to the Mandamus Motion.

On January 14, 2011, the City filed a motion to dismiss or stay the Mandamus Motion on the basis of the Act 47 proceedings. The motion also asserted that the Pennsylvania Department of Community and Economic Development ("DCED") as the state agency in charge of the Act 47 proceedings was an indispensable party.

On February 4, 2011, the Court issued an Order scheduling the Mandamus Motion for hearing on February 17, 2011. On February 9, 2011, the Court granted the City's request for a short continuance, and on February 17, 2011 issued an Order resetting the hearing on the Mandamus Motion for March 1, 2011. On February 25, 2011 during oral argument on the City's motion to stay or dismiss, counsel for the City informed the Court that new counsel had been engaged and asked for another continuance. New counsel entered their appearance on March 9, 2011.

On February 22, 2011, the DCED filed a petition to intervene in which it argued that it was an indispensable party and that the Act 47 process would be harmed if the Mandamus Motion hearing was allowed to go forward. On April 29, 2011, Local Union No. 48, International Association of Firefighters, the union representing the City's firefighters, filed a petition to intervene, arguing that because the mandamus order would impair the City's ability to pay its firemen, the Union was an indispensable party and that the Federal Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* ("FLSA"), preempted the Mandamus Motion.

On May 16, 2011, the Court issued orders denying the City's motion to dismiss or stay, the DCED's petition to intervene, and the firefighter's petition to intervene.

On August 12, 2011, the Court issued an Order scheduling a conference by agreement of the parties for August 16, 2011 to discuss the rescheduling of the hearing for the Mandamus Motion. On August 16, the Court issued an Order scheduling the Mandamus Motion for hearing on September 22 -23, 2011.

On September 13, Defendant the City of Harrisburg filed a motion to amend its Answer to the Complaint and its Response to Plaintiffs' motion. Plaintiffs have filed a statement with the Court consenting to the amended pleadings.

On September 21, the parties filed a Joint Stipulation, stipulating to many of the pertinent facts related to the hearing. On September 22, 2011, the Court held a hearing on Plaintiffs' Motion.

On September 22, the Court issued an Order directing Plaintiffs to file their post-hearing brief seven days after receipt of the Hearing Transcript and Defendants to file their post-hearing brief fifteen days after receipt of the Plaintiffs' brief.

### **STATEMENT OF QUESTION PRESENTED**

**Question:** Have Plaintiffs established an entitlement to an order of mandamus under sections 8261, 8283 and 8104 of the Local Government Unit Debt Act?

**Suggested Answer:** Yes.

### **SUMMARY OF EVIDENCE AT THE HEARING**

#### **The Parties and Operative Agreements**

##### **The Harrisburg Authority Bonds and Related Swap Transaction**

- The Harrisburg Authority is the issuer of the Guaranteed Federally Taxable Resource Recovery Facility Subordinate Variable Rate Revenue Notes Series A of 2002 ("2002 Notes"). (Stipulation of Facts ¶ 2, Exhibit A to the Complaint in Civil Action No. 2010 CV 11737 CV ("737 Complaint").)
- For the 2002 Notes, M&T is the current Trustee, as that term is defined in the 2002 Indenture, and the statutory Trustee appointed through the filing of an Instrument of Appointment with the Dauphin County Recorder of Deeds on September 8, 2010. (Stipulation of Facts ¶ 2, Exhibit A to the 737 Complaint; Exhibit O the 737 Complaint.)
- The Harrisburg Authority is the issuer of the Guaranteed Federally Taxable Resource Recovery Facility Subordinate Revenue and Refunding Revenue Bonds, Series A of 2003, Guaranteed Federally Taxable Resource Recovery Facility Subordinate Variable Rate Refunding

Revenue Notes, Series B of 2003, and Guaranteed Resource Recovery Facility Subordinate Refunding Revenue Notes, Series C of 2003 (collectively the “2003 A-C Notes”). (Stipulation of Facts ¶ 3, Exhibit B to the 737 Complaint.)

- For the 2003 A – C Notes, TD is the current Trustee, as that term is defined in the 2003 A – C Indenture, and the statutory Trustee appointed through the filing of an Instrument of Appointment with the Dauphin County Recorder of Deeds on September 8, 2010. (Stipulation of Facts ¶ 4, Exhibits B and P to the 737 Complaint.)

- The Harrisburg Authority is the issuer of the Guaranteed Resource Recovery Facility Revenue Bonds, Series D of 2003, Guaranteed Federally Taxable Resource Recovery Facility Revenue Bonds, Series E of 2003, and Guaranteed Federally Taxable Resource Recovery Facility Revenue Bonds, Series F of 2003 (collectively the “Retrofit Bonds”). (Stipulation of Facts ¶ 5, Exhibit C to the 737 Complaint.)

- For the Retrofit Bonds, TD is the current Trustee, as that term is defined in the Retrofit Indenture, and the statutory Trustee appointed through the filing of an Instrument of Appointment with the Dauphin County Recorder of Deeds on September 8, 2010. (Stipulation of Facts ¶ 6, Exhibits C and Q to 737 Complaint.)

- The Harrisburg Authority is a party to the ISDA Master Agreement, Schedules and Confirmations dated December 20, 2003 (the “Swap Documents”). TD administers payments to and from the Swap Provider under the Swap Documents. (Stipulation of Facts ¶ 7, Exhibit D to 737 Complaint; Hearing Transcript of Testimony (“TR”) at 39, (Wallett).)

- Assured is the current Bond Insurer, as defined in the Indentures, for the 2002 Notes, 2003 A-C Notes, the Retrofit Bonds, and is the current Swap Insurer as defined in the Swap Documents. (Stipulation of Facts ¶ 8, Exhibits I to N to 737 Complaint.)

- Section 15(iii) of the Schedule to the Swap Documents states that “[e]ach party agrees that each of its. . . agreements in this Agreement is expressly made to and for the benefit of the Swap Insurer.” (Exhibit D to the 737 Complaint.)

- Section 15(iv) of the Schedule to the Swap Documents states that Assured is an “express third party beneficiary” of the Swap Documents. (Exhibit D to the 737 Complaint.)

#### The City Guarantees

- The City of Harrisburg is a party to a Guaranty Agreement dated August 15, 2002 with the Harrisburg Authority and the Indenture Trustee for the 2002 noteholders ( the “2002 Guaranty”). (Stipulation of Facts ¶ 9, Exhibit E to the 737 Complaint.)

- M&T is the current 2002 Trustee and Assured is the current Bond Insurer as those terms are defined in the 2002 Guaranty. (Stipulation of Facts ¶ 10.)

- The City of Harrisburg is a party to a Guaranty Agreement dated June 4, 2003 with the Harrisburg Authority and the Indenture Trustee for the 2003 A-C note and bondholders (the “2003 A – C Guaranty”). (Stipulation of Facts ¶ 11, Exhibit F to the 737 Complaint.)

- TD is the current 2003 Trustee and Assured is the current Bond Insurer as those terms are defined in the 2003 A – C Guaranty. (Stipulation of Facts ¶ 12.)

- The City of Harrisburg is a party to a Bond Guaranty Agreement dated December 1, 2003 with the Harrisburg Authority and the Indenture Trustee for the Retrofit bondholders (the “Retrofit Guaranty”). (Stipulation of Facts ¶ 13 and Exhibit G to the 737 Complaint.)

- TD is the current Retrofit Trustee and Assured is the current Retrofit Bond Insurer as those terms are defined in the Retrofit Guaranty. (Stipulation of Facts ¶ 14.)

- The City of Harrisburg is a party to a Swap Guaranty Agreement dated December 1, 2003 between the City of Harrisburg, the Harrisburg Authority and TD, as trustee for the Retrofit bondholders (the “Swap Guaranty”). (Stipulation of Facts ¶ 15, Exhibit H to the 737 Complaint.)

- TD is the current Retrofit Trustee and Assured is the current Retrofit Insurer as those terms are defined in the Swap Guaranty. (Stipulation of Facts ¶ 16.)

- Each Guaranty states, as part of its preamble, that the City of Harrisburg desires to enter into the Guaranty as an inducement to the Bond Insurer to issue the Bond Insurance or Swap Insurance Policy and as an inducement to the initial and all future owners of the Bonds to purchase the Notes. (Exhibits E, F, G and H to the 737 Complaint.)

- In Article II (A) and (E) of the 2002 Guaranty, the 2003 A-C Guaranty and the Retrofit Guaranty, the City represents and warrants that the City is a “local government unit” under provisions of the Debt Act and that the City, in entering into the Guaranty, is incurring “lease rental debt” pursuant to the terms and conditions of the Debt Act. (Exhibits E, F, and G to the 737 Complaint.)

- In Article II(A) and (E) of the Swap Guaranty, the City represents that it is a “local government unit” under the Debt Act and that the guaranty is a Qualified Interest Rate Management Agreement pursuant to the terms and conditions of the Debt Act. (Exhibit H to the 737 Complaint.)

- Pursuant to section 3.01 of each Guaranty, the City guaranteed, unconditionally and irrevocably to the Trustee for the relevant bond issue “for the benefit of the registered owners” (or in the case of the Swap Guaranty for the benefit of the Swap Provider) and to Assured, as the Bond Insurer as subrogee of the registered owners (or in the case of the Swap Guaranty, as subrogee of the Swap Provider) the full and prompt payment of principal, premium and interest when and as due

on the applicable bonds (or in the case of the periodic payments, the Swap Documents). (Exhibits E, F, G and H to the 737 Complaint.)

- As defined in section 8.14 of each indenture, Assured, as the Bond Insurer, is deemed to be the sole registered owner of the bonds for purposes of exercising the rights and remedies of the bond owners thereunder and is the “registered owner” as that term is used in section 3.01 of the Guarantees. (Exhibits A, B, C, E, F, G and H to the 737 Complaint; TR 19 -20, (George).)

- Section 3.11 of each Guaranty authorizes the Trustee to proceed directly against the City in the event of a default in payment under the Guaranty. (Exhibits E, F, G, H to the 737 Complaint.)

- Section 3.13 of each Guaranty authorizes Assured, as the Bond Insurer, to proceed directly against the City in the event of a default in payment under the Guaranty. (Exhibits E, F, G, H to the 737 Complaint.)

#### The Authority’s Defaults Under The Trust Indentures And The Swap Documents

- Section 8.01(a) of the Indentures for each of the 2002 Notes, the 2003 A-C Notes and the Retrofit Bonds provides that “failure by the Authority to pay the principal of, or the premium (if any) payable upon the redemption of, any Note or Bond when due and payable either at maturity, declaration, or by proceedings for redemption, or otherwise” is an event of default. (Exhibits A, B and C to the 737 Complaint.)

- Section 8.01(b) of the Indentures for each of the 2002 Notes, the 2003 A-C Notes and the Retrofit Bonds provide that “failure by the Authority to pay any installment of interest on any Note or Bond when due and payable” is an event of default. (Exhibits A, B and C to the 737 Complaint.)

- For each of the 2002 Notes, the 2003 A-C Notes and the Retrofit Bonds, the Authority has failed to pay principal when due and interest when due and is, therefore, in default under the terms of the applicable Indenture. (TR at 18-19, (George); 38, (Wallett); 65-66, (Kroboth).)

- Section 5(a)(i) of the Swap Documents provides that a “failure by the party to make, when due, any payment under this Agreement” is an event of default. (Exhibit D to 737 Complaint.)

- The Authority has failed to make payments when due to the Swap Provider under the Swap Documents and is, therefore, in default under the Swap Documents. (TR at 39, (Wallett), 65-66, (Kroboth).)

#### The City’s Defaults Under The Guarantees

##### Failure to Pay

- In Section 3.05 of the 2002, 2003 A-C and Retrofit Guarantees, the City “covenants to and with the Authority and the registered owners” of the relevant Notes, that the City shall (a) include the amounts payable in respect of the Guaranty for each fiscal year in which such sums are payable in its budget for that fiscal year, and (b) appropriate such amounts from its general revenues for payment to the Trustee of its obligations under the Guaranty, and (c) duly and punctually pay or cause to be paid from any of its revenues or funds all amounts payable in respect of the Guaranty. (Exhibits E, F, G to the 737 Complaint.) Section 3.05 of the Swap Guaranty contains a comparable covenant with and for the Authority and the Swap Provider. (Exhibit H to the 737 Complaint.)

- Section 3.05 of the 2002, 2003 A-C, Retrofit and Swap Guarantees provides further that “[a]s provided in the Debt Act, this covenant shall be enforceable specifically against the City.” (Exhibits E, F, G, H to the 737 Complaint.)

• The Indenture Trustees have made demand on the City to pay the following amounts under the 2002 Guaranty, 2003 A – C Guaranty, Retrofit Guaranty and the Swap Guaranty that were not paid by the Authority:

- a) \$3,395,914.29 of principal and/or interest due on or about June 1, 2009 on the Retrofit Bonds;
- b) \$284,194.75 of periodic payments due on or about June 1, 2009 on the Swap Documents;
- c) \$1,792,460 of interest due on or about September 1, 2009 on the 2003 A – C Notes;
- d) \$1,196,657.10 of principal and interest due on or about November 1, 2009 on the 2002A Notes;
- e) \$6,115,375 of principal and/or interest due on or about December 1, 2009 on the Retrofit Bonds;
- f) \$859,616 of periodic payments due on or about December 1, 2009 on the Swap Documents;
- g) \$1,792,460 of interest due on or about March 1, 2010 on the 2003 A – C Notes;
- h) \$425,282 of interest due on or about May 1, 2010 on the 2002 Notes;
- i) \$3,324,290.32 of principal and/or interest due on or about June 1, 2010 on the Retrofit Bonds;
- j) \$809,999.77 of periodic payments due on or about June 1, 2010 on the Swap Documents;
- k) 1,633,285.71 of interest due on or about September 1, 2010 on the 2003 A – C Notes;
- l) \$1,215,282 of principal and interest due on or about November 1, 2010 on the 2002A Notes;
- m) \$6,179,297.50 of principal and/or interest due on or about December 1, 2010 on the Retrofit Bonds;

- n) \$815,000 of periodic payments due on or about December 1, 2010 on the Swap Documents;
- o) \$1,401,977.30 of interest due on or about March 1, 2011 on the 2003 A – C Notes;
- p) \$402,688 of principal and interest due on or about May 1, 2011 on the 2002 Notes;
- q) \$2,106,138.20 of principal and/or interest due on or about June 1, 2011 on the Retrofit Bonds;
- r) \$541,098.65 of periodic payments due on or about June 1, 2011 on the Swap Documents;
- s) \$1,397,421.24 for interest payments due on or about September 1, 2011 on the 2003 A – C Notes. (Stipulation of Facts ¶ 17.)

- The total amount demanded from the City for payment under the Guarantees is \$34,874,252.83. (Stipulation of Facts ¶ 18.)

- The City has made no payments under the Guarantees since November 2009. (Stipulation of Facts ¶ 19.)

#### Failure to Budget

- The City of Harrisburg did not budget in the 2010 fiscal year budget for any principal, interest or periodic payments due under the 2002 Notes, 2003 A-C Notes, Retrofit Bonds or Swap Documents and guaranteed under the 2002 Guaranty, 2003 A – C Guaranty, Retrofit Guaranty or the Swap Guaranty, or Series C and Series D Notes of 2007. (Stipulation of Facts ¶ 20.)

- The City of Harrisburg did not budget in the 2011 fiscal year budget for any principal, interest or periodic payments due under the 2002 Notes, 2003 A-C Notes, Retrofit Bonds or Swap Documents and guaranteed under the 2002 Guaranty, 2003 A – C Guaranty, Retrofit

Guaranty or the Swap Guaranty, or Series C and Series D Notes of 2007. (Stipulation of Facts ¶ 21.)

- In 2010 and in 2011, the City administration proposed a budget that made provision for the payment of any principal, interest or periodic payments due under the 2002 Notes, 2003 A-C Notes, Retrofit Bonds or Swap Documents and guaranteed under the 2002 Guaranty, 2003 A – C Guaranty, Retrofit Guaranty or the Swap Guaranty, or Series C and Series D Notes of 2007 but the budget adopted by the Harrisburg City Council deleted those provisions. (Plaintiffs' Exhibit 5, TR 73 (Kroboth).)

- In a letter to City Council concerning the Fiscal Year 2011 Budget as adopted, the Mayor of the City of Harrisburg stated: "Further, the various bond indentures and covenants require that the city budget for debt repayment and for the replenishment of debt service funds. The City is obligated to budget for Resource Recovery Facility Debt obligations. The removal of these amounts makes the city in violation of these budgeting requirements and, as such, is actionable." (Plaintiffs' Exhibit 5, p. 11, TR 89-90 (Kroboth).)

- The Mayor of the City of Harrisburg issued a statement regarding the Fiscal Year 2011 budget as adopted which stated, in part "Further, city ordinances and various bond indentures require that the city budget for debt repayment and for the replenishment of debt service reserve funds or other funds used to make Incinerator debt payments in 2011 and that such must be in the City's fiscal 2011 Budget. Council chose to ignore this requirement yet again." The statement went on to state that "Council's 2011 adopted amended General Fund budget . . . ignores the City's legal obligation to budget for debt guarantee payments." (Plaintiffs' Exhibit 6, TR 90-91 (Kroboth).) The City's Finance Director concurred with the Mayor's assessment of the City's obligations under the Guarantees. (TR 91 (Kroboth).)

### Failure to Appropriate

- The City of Harrisburg did not appropriate any funds in 2010 or 2011 to pay the principal, interest and periodic payments due under the 2002 Notes, 2003 A-C Notes, Retrofit Bonds or Swap Documents and guaranteed under the 2002 City Bond Guaranty, 2003 A – C City Bond Guaranty, Retrofit City Bond Guaranty or the City Swap Guaranty. (Stipulation of Facts ¶ 22.)

### Payments By The County Pursuant To The County Guarantees

- The County of Dauphin is a party to a Bond Guaranty Agreement (“the County Retrofit Guaranty”) dated December 1, 2003, with the Harrisburg Authority and the Retrofit Indenture Trustee for the 2003 D –E bondholders. (Stipulation of Facts ¶ 24 and Stipulation Exhibit V.)

- The County of Dauphin is a party to a Swap Guaranty dated December 1, 2003, with the Harrisburg Authority and the Retrofit Indenture Trustee for the 2003 D – E bondholders. (Stipulation of Facts ¶ 25 and Stipulation Exhibit W.)

- TD is the current Retrofit Trustee and Assured is the current Retrofit Bond Insurer as those terms are defined in the County Retrofit Guaranty. (Stipulation of Facts ¶ 27.)

- TD is the current Retrofit Trustee and Assured is the current Retrofit Bond Insurer as those terms are defined in the County Swap Guaranty. (Stipulation of Facts ¶ 28.)

- Pursuant to the provisions of section 6.03(d)(ii) of the Indenture for the Series D & E Retrofit Bonds, payments by the County under the County Retrofit Guaranty are required to be deposited in the Debt Service Reserve Account maintained by TD for those bonds. (Exhibit C to the 737 Complaint, TR 46 (Wallett).)

- Through September 16, 2011, Dauphin County has made payments of \$8,540,543.02 under the County Retrofit Guaranty to the Debt Service Reserve Funds for the Series D & E Retrofit Bonds and payments under the County Swap Guaranty of \$3,033,568.16 in connection with the Swap Documents. (Stipulation of Facts ¶ 30.)

Payments By Assured Under The Bond And Swap Insurance Policies

- Through September 1, 2011, Assured has made payments under its policies in the amount of \$5,454,865.92 relating to the 2002 Notes, 2003 A-C Notes and the Retrofit Bonds. (Stipulation of Facts ¶ 29; Plaintiffs' Exhibits 2A through 2I.)

Amount Due By The City Under The Guarantees

- Through the date of the hearing, the amount due and unpaid by the City under the 2002 Guaranty is \$2,843,177.10. (Plaintiffs' Exhibit 1; TR 25-26, 34 (George).)

- Through the date of the hearing, the amount due and unpaid by the City under the 2003 A-C Guaranty is \$8,017,619.01. (Plaintiffs' Exhibit 1; TR 43 (Wallett).)

- Through the date of the hearing, the amount due and unpaid by the City under the Retrofit Guaranty is \$19,063,369.39. (Plaintiffs' Exhibit 1; TR 43 (Wallett).)

- Through the date of the hearing, the amount due and unpaid by the City under the Swap Guaranty is \$3,516,918.57. (Plaintiffs' Exhibit 1; TR 43 (Wallett).)

- Through the date of the hearing, the total amount due and unpaid by the City under the 2002, 2003A-C, Retrofit and Swap Guarantees is \$33,441,084.07. (Plaintiffs' Exhibit 1.)

Payment By The City Of Its Other General Obligation Debt

- The City failed to pay amounts due under the Guarantees as early as May 2009 and has made no payments of amounts due under the Guarantees since November 2009. (Stipulation of Facts ¶ 19; TR 72-74 (Kroboth).)

- The City of Harrisburg has paid its other Bonded General Obligation Debt (“GO Debt”) due on other municipal debt obligations as it has come due from 2009 through June, 2011. (Stipulation of Facts ¶ 23.)

- Payments of the amounts due under the Guarantees (“Guaranty Debt”) and payments of the City’s other general obligation debt is made from the City’s Debt Service Fund. (TR 79 (Kroboth).)

- For Fiscal Year 2009, the City paid \$11,949,975 from its Debt Service Fund for general obligation debt other than the Guaranty Debt. (Plaintiffs’ Exhibit 4, TR 80 (Kroboth).)

- For Fiscal Year 2010, the City made no payment under the Guarantees but paid \$11,858,124 from its Debt Service Fund for general obligation debt other than the Guaranty Debt. (Plaintiffs’ Exhibits 8 and 10, p. 55, TR 82-87 (Kroboth).)

- In September 2010, the City received a payment of \$4.3 million from the Commonwealth of Pennsylvania. The City used \$3.3 million of this money to make a payment on its general obligation bonds and used the balance for other purposes. No portion of the payment from the Commonwealth was used to make payment on the Guaranty Debt. (Plaintiffs’ Exhibit 9, TR 94 (Kroboth).)

- For Fiscal Year 2011, the City budgeted for \$12,213,229 in payments from its Debt Service Fund for general obligation debt other than the Guaranty Debt. (Plaintiffs’ Exhibit 5, pp. 6, 145-153; TR 95-96 (Kroboth).)

- Through June 30, 2011, the City made no payment under the Guarantees but paid \$7,533,920 from its Debt Service Fund for general obligation debt other than the Guaranty Debt. (Plaintiffs Exhibit 10, p. 55, TR 96 (Kroboth).)

- In 2011, the City received \$ 7.4 million from the Harrisburg Parking Authority. The City used a portion of this money to make payment on its general obligation debt other than the Guaranty Debt and the balance for other purposes. No portion of the money received from the Harrisburg Parking Authority was used to pay Guaranty Debt. (TR 126 (Kroboth).)

- For Fiscal Years 2010 and 2011, the only debt of a type payable out of the City's Debt Service Fund for which the City has not made provision in its budget is the Guaranty Debt. (TR 122-124 (Kroboth).)

#### Calculation of Amounts To Be Budgeted For Fiscal Year 2012

- Section 3.05 of each of the City Guarantees provides that the City will include amounts payable in respect of the Guaranty for each fiscal year in which such sums are payable in its budget for that fiscal year including amounts equal to payments that were due but unpaid in a prior fiscal year. (Exhibits E, F, G and H to the 737 Complaint.)

- The City administration, in preparing its proposed budgets for the 2010 and 2011 fiscal years, proposed budgeting an amount that represented the total of amounts due but unpaid in prior years and amounts that would come due in the year of the budget. (TR 72-73 (Kroboth).)

- In section 3.01 of each of the City Guarantees, the City acknowledges and agrees to the subrogation rights of the Bond Insurer and to the City's obligation to reimburse the Bond Insurer for payments made by the Bond Insurer pursuant to the Bond Insurance policies. (Exhibits E, F, G and H to the 737 Complaint.)

- Section 3.08 (R) of each of the City Guarantees provides that the City's obligations under the Guaranty shall not be modified, diminished or impaired by payments by the Bond Insurer pursuant to the Bond Insurance policies. (Exhibits E, F, G and H to the 737 Complaint.)

- In Section 3.15 of each of the City Guarantees, the City acknowledges and agrees that the City's obligation to make payments under the Guaranty shall not be reduced by transfers from the Debt Service Reserve Account for the applicable bond issue. (Exhibits E, F, G and H to the 737 Complaint.)

Facts Concerning The City's Affirmative Defenses Generally

- Section 3.08 of each of the Guarantees provides that the obligations of the City under the Guaranty are absolute, irrevocable and unconditional, irrespective of any other agreement or instrument to which the City is a party and that the City's obligations shall not be affected, modified, diminished or impaired upon the happening of any event, including but not limited to insolvency or similar proceedings relating to the City (§3.08(N)) or any other defense normally available to a guarantor (§3.08(T)). (Exhibits E, F, G, H to the 737 Complaint.)

Facts Concerning City's Employees

- Each of the labor or collective bargaining agreements to which the City is a party permit reductions in force or layoffs. (Defendant's Exhibits D-4 (Article XXII), D-5 (Article 21) and D-6 (Article XXIV, § 4).)

- Each of the labor or collective bargaining agreements to which the City is a party permit layoffs or reductions in force in the event that the City is not able to continue to pay the affected employees. (TR 126 (Kroboth).)

- The City has laid off employees, including policemen, firemen and other employees subject to labor or collective bargaining agreements, because the City cannot continue to pay the laid off employees' wages and benefits. (TR 125-26 (Kroboth).)

- The City was not precluded by the Fair Labor Standards Protection Act from laying off employees, including policemen, firemen and other employees subject to labor or collective bargaining agreements for economic reasons. (TR 126 (Kroboth).)

## LEGAL ARGUMENT

### I. Entitlement to Relief Under Section 8261 of the Debt Act

#### A. Relief Is Mandatory Under Section 8261

Plaintiffs have established a right to a mandamus order pursuant to section 8261 of the Debt Act. Section 8261 provides:

[i]f a local government unit having outstanding any . . . lease rental debt or guaranty of authority obligations fails or refuses to make adequate provision in its budget for any fiscal year for the sums payable in respect of the bonds or notes, lease rental or guaranty . . . or fails to appropriate or pay the moneys necessary in that year for the payment of the amount of the lease rental or guaranty . . . then at the suit of the holder of any . . . guaranty . . . the court of common pleas shall, after hearing held upon such notice to the local government unit as the court may direct and upon a finding of such failure or neglect, by order of mandamus require the treasurer of the local government unit to pay . . . for each series of bonds or notes then outstanding, or for each guaranty . . . the first tax moneys or other available revenues or moneys thereafter received in the fiscal year by the treasurer, equally and ratably for each series for which provision has not been made in proportion to . . . the amounts due upon the guaranties or as payments with respect to lease rental debt . . .

53 Pa. C.S.A. § 8261 (emphasis added). Thus, under section 8261 if a municipality fails to budget for or to pay its lease rental debt obligations or its guaranty of authority obligations, then “upon a finding of such failure or neglect” the Court “shall” issue an order of mandamus to the Treasurer.

The mandatory requirements of section 8261 give effect to the protections for holders of municipal debt contained in the Pennsylvania Constitution. Article 9, section 10 provides:

Any unit of local government, including municipalities and school districts, incurring any indebtedness, shall at or before the time of so doing adopt a covenant, which shall be binding upon it so long as any such indebtedness shall remain unpaid, to make payments out of its

sinking fund or any other of its revenues or funds at such time and in such annual amounts specified in such covenant as shall be sufficient for the payment of the interest thereon and the principal thereof when due.

Pa. Const. art. 9, § 10. (emphasis added).

The Legislature gave effect to this Constitutionally mandated obligation in the Debt Act by requiring municipalities to:

Duly and punctually pay or cause to be paid from its sinking fund or any other of its revenues or funds the principal of and interest on every bond or note or, to the extent of its obligation, the amount payable in respect of the guaranty, at the dates and places and in the manner stated in the bonds and in the coupons thereto appertaining or in the guaranty, according to the true intent and meaning thereof.

53 Pa. C.S.A. § 8104(a)(3). The Debt Act further requires that the municipality “shall pledge its full faith, credit and taxing power” to its debt obligations. *Id.*, § 8104(b) (emphasis added).

The Pennsylvania Statutory Construction Act confirms that “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S.A. § 1921(b). Applying these principles, Pennsylvania courts have consistently held that the word “shall” in a statute gives rise to a mandatory obligation that cannot be avoided. *See, e.g., Light of Life Ministries, Inc. v. Cross Creek Twp.*, 560 Pa. 462, 467, 746 A.2d 571, 573 (2000) (reversing a decision of the Pennsylvania Commonwealth Court because it “disregarded the mandatory application of the word ‘shall’ ” in a statute); *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 205, 696 A.2d 148, 150 (1997) (“By definition, ‘shall’ is mandatory. Accordingly, there is no room to overlook the statute’s plain language to reach a different result.” (internal citations omitted)); *Commw. v. Burns*, 988 A.2d 684, 690-91 (Pa. Super. Ct. 2009) (“We will presume that the legislature intended ‘shall’ to be mandatory in the statute at hand.” (internal citations omitted)); *Taterka v. Bureau of Prof’l & Occupational Affairs*, 882 A.2d 1040, 1043 (Pa.

Commw. Ct. 2005) (“It is axiomatic under our statutory construction precedents that, by definition, the word ‘shall’ is mandatory, and accordingly entertains no room to overlook a statute’s plain language to reach a different result.” (internal citations omitted)).

Consistent with the importance placed by the Pennsylvania Constitution and statutes on the timely payment of municipal obligations, the Commonwealth Court has recognized the importance that purchasers of bonds and notes place on the ability to enforce the payment obligations and covenants in the Indentures.

There is an expectation by bond buyers that the Pennsylvania courts will uphold the contractual obligations to which its municipalities and their authorities commit in order to receive bond proceeds. Bond buyers are relying upon the covenants in the Indenture to be enforced by the Trustee and the Authority, as issuer of their bonds in the courts of Pennsylvania, particularly those involving the payment of interest and principal on their bonds.

Twp. of Forks v. Forks Twp. Mun. Sewer Auth., 759 A.2d 47, 56 (Pa. Commw. Ct. 2000).

Courts similarly recognize the importance of, and lack of discretion in, the court in enforcing municipal obligations through the remedies provided in the Debt Act. In County of Dauphin v. City of Harrisburg, 24 A.3d 1083 (Pa. Commw. Ct. 2011), the Commonwealth Court reversed the dismissal by the trial court of a cause of action brought by Dauphin County against the City for specific performance of its obligations under a guaranty to budget for and make the payments required under the guaranty. The Court stated:

The Debt Act is the exclusive authority for local government units to issue bonds, notes and guaranties and to enter into other agreements to fund local capital projects . . . . The Debt Act also protects those who invest in debts of the local government unit (1) by mandating the local government unit to covenant with the holders of bonds and notes that it will budget, appropriate and duly and punctually pay the amount of the debt service or guaranty, and to pledge its full faith, credit and taxing power, and (2) by making the covenant “specifically enforceable.” The Debt Act “provides an exclusive and uniform system on the subjects covered by [the Debt Act].” . . . Where, as here,

a remedy is provided or a duty is enjoined by a statute, the directions of the statute must be strictly pursued.

24 A.3d at 1090. Accordingly, where Plaintiffs have met their burden of proof under section 8261, then the Court must strictly pursue the issuance of a mandamus order.

B. The Requirements For Relief Are Met

A review of the evidence supporting the statutory elements of proof under section 8261 establishes that Plaintiffs have met their burden of proof. First, Plaintiffs have established that the City is a "local government unit" with outstanding "lease rental debt or guaranty of authority obligations." Section 2.01(A) of the Guaranty Agreements (Complaint, Exhibits E-H) acknowledges that the City is a "local government unit." Section 2.01(E) of the Guaranty Agreements acknowledges that the City incurred lease rental debt "pursuant to the terms of the Debt Act." Further, each of the Guaranty Agreements is a "guaranty of authority obligations" in that each guarantees the payment of principal, interest or periodic payments owed by the Harrisburg Authority under the Indentures and the Swap Documents. Second, Plaintiffs have established that the City failed to include amounts due under the Guaranty Agreements in its budget, failed to appropriate funds to pay amounts due under the Guaranty Agreements in any fiscal year, and failed to pay lease rental debt or guaranty of authority obligations under the Guaranty Agreements. The City has stipulated that it did not include any amounts in its budget for the debts due under the Guaranty Agreements in 2010 or 2011 and did not appropriate funds to pay amounts due under the Guaranty Agreements in either of those years. Stipulation, ¶¶ 20-21. Further, the City stipulated that it has failed to make any payments due under the City Guarantees from late 2009 through the present day. Stipulation, ¶19. Section 8261 permits any holder of the lease rental debt or guaranty to bring suit. Plaintiffs are TD and M&T in their capacities as Indenture Trustees and Statutory Trustees pursuant to 53 Pa.C.S.A. §8263(a) and Assured in its capacity as Bond Insurer and as

Statutory Trustee pursuant to 53 Pa.C.S.A. §8263(a). The Indenture Trustees are parties to each of the Guaranty Agreements at issue in this litigation and therefore are “holders” of those guarantees. See Complaint, Exhibits E-H. The Guaranty Agreements are expressly “for the benefit of the . . . Bond Insurer” and Assured, as Bond Insurer, is “entitled to enforce performance and observance . . . by the City to the same extent as if . . . [it was] signatory hereto.” Complaint, Exhibits E-G, § 3.13. In their capacities as Statutory Trustees, Plaintiffs are authorized to obtain a mandamus order to enforce the rights of the bondholders and noteholders. 53 Pa.C.S.A. § 8263(b)(1). Accordingly, in each of their capacities, Plaintiffs are “holders” of the Guaranty Agreements and entitled by law to the issuance of a mandamus order.

## **II. Entitlement to Relief Under Section 8283 of the Debt Act**

Plaintiffs have also met their burden under section 8283 of the Debt Act, which is an alternate basis for relief, related to the City’s guaranty of periodic payments due under the Swap Documents under the City Swap Guaranty. Section 8283(a) provides:

[If]. . . a local government unit fails or refuses to budget for any fiscal year a periodic scheduled payment . . . due in that year pursuant to the provisions of a qualified interest rate management agreement; and . . . payable from the general revenues of the local government unit . . . [t]he other party to the interest rate management agreement may bring an enforcement action in the court of common pleas. . . After a hearing held upon notice to the local government unit as the court may direct, if the court finds a failure or refusal . . . the court may, by order of mandamus require the treasurer of the local government unit to pay to the other party out of the first tax money or other available revenue or money thereafter received in the fiscal year by the treasurer the periodic scheduled payments due pursuant to the provisions of the qualified interest rate management agreement.

53 Pa. C.S.A. § 8283(a).

A review of the evidence supporting the statutory elements of proof under section 8283 establishes that Plaintiffs have met their burden of proof. Plaintiffs have established that the City

has failed to budget for the Swap payments guaranteed under the Guaranty Agreements for the years 2010 – 2011. Stipulation, ¶¶ 20-21. Pursuant to the Swap Documents, Assured is an “express third party beneficiary . . . entitled to enforce the Agreement and the terms of any such Insured Transaction against such party.” Complaint, Exhibit D, Schedule to the 1992 Master Agreement, Part 5, no. 15(iv). Further, the Swap Documents provide that each of the agreements contained in them “is expressly made to and for the benefit of the Swap Insurer.” *Id.* at Schedule to the 1992 Master Agreement, Part 5, no. 15(iii).

Moreover, Plaintiffs have also established that the City has preferred other creditors by paying them in full while failing to make any payments under the City Swap Guaranty. Under the circumstances presented here where the City has refused to budget for the amounts due and to pay Plaintiffs, but has paid other equally situated creditors in full to the detriment of the bond and noteholders represented by Plaintiffs, Plaintiffs are also entitled to a mandamus order under section 8283 directing the City Treasurer to pay for the amounts previously due but unpaid to Plaintiffs under the City Swap Guaranty.

### **III. Entitlement to an Order Under Section 8104(b) of the Debt Act and Section 3.05 of the Guaranty Agreements Requiring the City to Budget for Amounts to Come Due Under the Guarantees in Future Fiscal Years**

Pursuant to 53 Pa.C.S. § 8104(a)(1), the City is required to “covenant” that it will “[i]nclude the amount of debt service, or the amounts payable in respect of its guaranty . . . for each fiscal year in which the sums are payable in its budget for that year.” The covenant “shall be specifically enforceable.” 53 Pa. C.S.A. § 8104(b). In accordance with its statutory obligations, the City agreed in the Guaranty Agreements to include in its budget for every year amounts equal to the deficiency between the amounts in the Debt Service Account and the Debt Service due in the next fiscal year and to “appropriate such amounts from its general revenues for payment to the . . . Trustee of its obligations” under the Guaranty Agreements, and to “duly and punctually pay or cause to be paid

from any of its revenues or funds to the . . . Trustee such amounts” as are payable under the Guaranty Agreements.<sup>1</sup> 737 Complaint, Exhibits E-H, § 3.05. Section 3.05 also states that the covenant to budget is “specifically enforceable against the City.” 737 Complaint, Exhibits E-H, § 3.05. At the end of 2009 and 2010, respectively, the Trustees provided notice to the City of the amounts that were required to be included in the 2010 and 2011 budgets. See Stipulation, Exhibits T, U. The Mayor included those amounts in the proposed budgets for each of those fiscal years, but City Council struck them from the budget (Plaintiffs’ Exhibit 5, TR 72-73 (Kroboth)). As a result, the City failed to include any funds in those budgets for payment of its obligations required by the City Guaranty Agreements.

The Guaranty Agreements also require that when money is not available in the City’s budget to make the payments due under the guaranty, and if the City cannot “incur debt lawfully” in the current fiscal year to pay the debt or otherwise satisfy its obligations, “the City shall include any amounts so payable in its budget for the next succeeding Fiscal Year and shall appropriate such amounts to the payment of such obligations and . . . punctually shall pay or shall cause to be paid the obligations incurred hereunder . . . and for such budgeting, appropriation and payment the City does pledge its full faith, credit and taxing power.” Complaint, Exhibits E-H § 3.05. Thus, the City is obligated to include in each budget not only the amounts coming due in the fiscal year but also any amounts not paid in prior years. Accordingly, the City should have included in its 2010 budget the amounts coming due in 2010 and those not paid in 2009, and similarly, in 2011 those amounts not paid in 2010 (including the unpaid amounts from 2009) and coming due in 2011. Plaintiffs are entitled to an Order from this Court specifically enforcing the City’s obligation to budget for

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<sup>1</sup> The City’s obligations for budgeting and payment are similar under the Swap Guaranty, which requires that the City include “the Periodic Payments payable in respect of this City Swap Guaranty for each Fiscal Year in which such sums are payable in its budget for that Fiscal Year . . . and appropriate such amounts from its general revenues for payment of its obligations hereunder.” 737 Complaint, Exhibit H, § 3.05.

amounts coming due in future fiscal years and unpaid amounts from prior fiscal years. Cty. of Dauphin v. City of Harrisburg, 24 A.3d 1083 (Pa. Commw. Ct. 2011).

#### **IV. The Defenses Raised by the City are Insufficient to Defeat Plaintiffs' Right to Relief Under the Debt Act**

For the reasons set forth above, Plaintiffs are entitled to the relief they seek under the provisions of the Debt Act. In its Amended Answer to the Motion for Mandamus, the City has raised a number of defenses, none of which are provided for in the Debt Act. For the reasons discussed below, none of the defenses raised by the City are sufficient to defeat the Plaintiffs' entitlement to relief under the provisions of the Debt Act.

##### **A. The City has Waived all Defenses**

Each Guaranty Agreement provides that the City's obligation to make payments and to include funds in its budget to pay its obligations is "absolute, irrevocable and unconditional." Complaint, Exhibits E-H, § 3.08. The Guaranty Agreements state that the absolute, irrevocable and unconditional guaranty shall be "irrespective of any other agreement or instrument to which the City shall be a party" and shall not be "affected, modified, diminished or impaired upon the happening . . . of any event", including "[t]he voluntary or involuntary . . . receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization . . . or other similar proceedings relating to the City . . .", or "[a]ny other defense normally available to a guarantor." Complaint, Exhibits E-H, §§ 3.08, 3.08(N), 3.08(T).

Courts interpreting similar clauses have concluded that an "absolute, irrevocable and unconditional" obligation results in a complete waiver of all defenses. See Meeting House Lane, Ltd. v. Melso, 427 Pa. Super. 118, 127-29, 628 A.2d 854, 858-59 (1993) (judgment in favor of guarantor reversed because "absolute", "irrevocable" and "unconditional" language required conclusion that all defenses had been waived in guaranty); Commercial Money Ctr. Inc. v. Ill.

Union Ins. Co., 508 F.3d 327, 343-44 (6th Cir. 2007) (similarly worded waiver provision waived all defenses, including fraud); MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 210-12 (3d Cir. 2005) (similarly worded waiver provision waived all defenses, including fraud). Accordingly, all defenses raised by the City other than those directed to the Court's jurisdiction are waived by the express language of the Guaranty Agreements.

B. The Fair Labor Standards Act Does Not Preempt the Debt Act

The City has proffered as a defense that the Debt Act's provisions regarding mandamus are in conflict with and preempted by the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* ("FLSA"). The FLSA protects the right of employees to be paid when they work. 29 U.S.C. § 206. The FLSA authorizes employees (but not employers like the City) to seek relief if they have been directed to work and are not thereafter paid. Bureerong v. Uvawas, 922 F. Supp. 1450, 1464 (C.D. Cal. 1996). See also Berrentine v. Arkansas – Best Freight Sys., Inc., 450 U.S. 728, 740 (1981).

The City's argument rests on the concept of "conflict preemption" in which a state statute as applied conflicts with a federal statute. Council 13, AFL – CIO ex rel. Fillman v. Rendell, 604 Pa. 352, 381, 986 A.2d 63, 81 (2009) ("Council 13"). In Dooner v. DiDonato, 601 Pa. 209, 971 A.2d 1187 (2009), the Pennsylvania Supreme Court laid out the test for determining the existence of "conflict" preemption:

[E]ven where Congress has not completely displaced state regulation in a specific area, *state law is nullified if there is a conflict between state and federal law (conflict preemption)*. Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995). Such a conflict may arise in two contexts. First, there may be conflict preemption where compliance with state and federal law is an impossibility. English, 496 U.S. at 79, 110 S. Ct. 2270. Furthermore, conflict preemption may also be found when state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress. Barnett Bank of Marion County v. Nelson, 517 U.S. 25, 31, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996).

601 Pa. at 219 -220, 971 A.2d at 1194 (emphasis supplied).

The City argues that the FLSA preempts the mandamus provisions of section 8261 because an order of mandamus, if granted, would impair the City's ability to pay its employees. The City's argument is mistaken because there is no conflict between the remedies under the Debt Act and the City's obligations under the FLSA. Nothing in the Debt Act purports to govern or regulate how or when employees of a municipality are to be paid. Similarly, no provision of the FLSA attempts in any way to regulate the payment of a municipality's debt obligations or the remedies for failure of a municipality to meet those obligations.<sup>2</sup> Further, while the FLSA protects the right of employees to be paid, it does not compel the City to have employees it cannot afford to pay.

The City's argument rests upon the incorrect assumption that the City must continue to employ persons when it cannot afford to do so. On the contrary, Pennsylvania law provides that when a City of the Third Class faces a financial crisis it can and should eliminate any employees it cannot afford to pay, including police and fire personnel. See, e.g., Fraternal Order of Police v. City of Johnstown, 140 Pa. Commw. 644, 649, 594 A.2d 838, 841 (1991) ("Because the Mayor lacked funds to pay the salaries of the police officers, he had no authority to allow the police officers to continue to work"); Essinger v. City of New Castle, 275 Pa. 408, 410-411, 119 A. 479, 480 (1923) (no obligation to maintain fire department); Steffy v. City of Reading, 37 Berks 91 (Ct. Com. Pl. 1945) aff'd, 353 Pa. 539, 46 A.2d 182 (1946) (same). The Third Class City Code also provides that a City of the Third Class may reduce the level of firemen, police and civil service employees for "the purposes of economy." 53 P.S. § 37001 (police demotions and discharge

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<sup>2</sup> While no court has addressed the specific issue raised by the City, it is instructive that various federal courts have found that the provisions of the FLSA do not impair creditors' state law rights or grant employees a priority in an insolvent employer's assets. Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 37-38 (1987) (FLSA provision permitting Secretary of Labor to prohibit shipment in interstate commerce of goods produced by employees not paid in conformance with FLSA "does not grant employees a priority . . . superior to that which a secured creditor has under state law."); In re USM Tech. Corp., 158 B.R. 821, 827 (Bankr. Ct. N. D. Cal. 1993) (employees of bankrupt company do not have priority over proceeds of goods produced by employees not paid in accordance with FLSA.).

covered by Civil Service Act); 53 P.S. § 39408 (Civil Service positions may be reduced “for purposes of economy”); 53 P.S. § 39871 (fire department may be reduced “for purposes of economy”). Indeed, as noted above, the City’s Finance Director testified that the City has already reduced its workforce to conserve money, that the reductions included police and firemen and other employees covered by collective bargaining agreements, that all of the City’s collective bargaining agreements recognize the City’s right to lay off or furlough employees, and that the FLSA has not affected or limited the City’s exercise of its right to lay off employees. (TR 125-26 (Kroboth).)

The lack of legal compulsion to bring city workers, firemen and policemen to work if the City lacks the resources to pay them not only defeats the factual premise underlying the City’s pre-emption argument, but also defeats the legal argument that “conflict preemption” should apply.<sup>3</sup> As the Supreme Court in Dooner noted, conflict preemption can only exist “where compliance with state and federal law is an impossibility” or “when state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress”. Dooner, 601 Pa. at. 219 -20, 971 A.2d at 1194. Here compliance with state and federal law is not impossible because the City is not obligated, and in fact is prohibited, under state law to bring employees to work if it cannot pay them. Further, neither the statutory language nor any of the cases interpreting the FLSA suggest that it imposes any obligation for employers to continue to employ workers when it cannot pay their wages. See, e.g., 29 C.F.R § 541.710(b) (FLSA does not require public agency employees to be paid during periods of “budget-required furlough.”) As a result, the issuance of the mandamus order does not put the City in a position where it unavoidably must breach any obligation under the FLSA in order to comply with state law. Under these circumstances, therefore, there is no conflict preemption.

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<sup>3</sup> The lack of statutory compulsion also obviates the City’s defense that the effect of the mandamus order is to put the City in conflict with the Third Class City law.

C. Other Creditors Of The City Are Not Necessary and Indispensable Parties

The City contends that City workers, police and firefighters and all general obligation municipal debt holders (“GO Debt”) are necessary and indispensable parties. The City’s contends that each of these classes of persons will be owed money in the future by the City and entry of a writ of mandamus under the Debt Act will preclude or impair the City’s ability to make payments to them when due. The City’s argument, equally applicable to any current or future creditor of the City, confuses a creditor’s economic interest with the legal interest that is required to find that a person is a necessary and indispensable party.

For a party to be indispensable, it must have legally enforceable rights that could be impaired by a decision. Perkasie Borough Auth. v. Hilltown Twp. Water & Sewer Auth., 819 A.2d 597, 600 (Pa. Commw. Ct. 2003) (determining that DEP was not an indispensable party to an action). As the Supreme Court stated in Sprague v. Casey, 550 A.2d 184 (Pa. 1988): “A party is indispensable when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. A corollary of this principle is that a party against whom no redress is sought need not be joined.” Sprague, 550 A.2d at 189 (internal citations omitted).

The rights at issue must be more than a mere economic interest or the rights of a competing creditor. In re: L.J., 456 Pa. Super. 685, 700, 691 A.2d 520, 527, allocatur denied sub. nom., In re Doe, 548 Pa. 681, 699 A.2d 735 (1997) (Table) (“The fact that the proceeding may, in some way, affect the proposed intervenor is not sufficient to invoke a ‘legally enforceable interest.’”); Marion Power Shovel Co. v. Fort Pitt Steel Casting Co., 426 A.2d 696, 702 (Pa. Super. Ct. 1981) (union’s economic interest insufficient to establish a legally enforceable interest); Neish v. Alliquippa Borough, 30 Pa. D. & C.2d 49, 51-52 (Ct. Com. Pl. Beaver Cnty. 1963) (a concern about the outcome of litigation is insufficient to comprise a “legally enforceable interest.”); Bank of Am. v.

McCauley, 23 Pa. D. & C.2d 362, 366 (Ct. Com. Pl. Alleg. Cnty. 1961) (claims of competing creditors do not constitute a legally enforceable interest).

Further, the fact that any of these persons may be owed a payment in the future is insufficient to establish that a person is a necessary and indispensable party. A future or unproven liability is an insufficient basis on which to establish a legally enforceable interest. Luiziaga v. Psolka, 637 A.2d 645, 647 (Pa. Super. Ct. 1994); Bank of Am. v. McCauley, 23 Pa. D. & C.2d at 364 ( A “general creditor . . . merely has an inchoate right, not yet enforceable in law or equity, and . . . has no right to intervene in a legal proceeding entirely alien to [it], regardless of the fact that [it] has a claim against funds which might be reduced by a judgment in favor of another general creditor.”)

Accordingly, none of the groups identified by the City has an interest beyond that of a competing future general creditor and none of the interests identified by the City rise to the level of legal interest necessary to be an indispensable party under Pennsylvania law.

D. The DCED is Not an Indispensable Party

The City contends that the Department of Community and Economic Development (“DCED”) is a necessary and indispensable party.<sup>4</sup> As discussed above, to be indispensable, a party must have rights that would be impaired by a decision. Plaintiffs clearly do not seek any redress against DCED. The City does not identify any rights of DCED that could be impacted by this litigation. Rather, the City argues that DCED is indispensable because under Act 47 it is charged with recommending a financial plan for the City, and it would be more difficult to identify a viable plan if the City is required to honor its contractual and statutory duties. Nothing in Act 47, however, gives DCED any power to contest or modify any debt of a distressed municipality.

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<sup>4</sup> The City has also asserted that the mandamus proceedings will impair the Act 47 process, but that defense is moot since the City has rejected both the Act 47 coordinators’ plan and the Mayor’s Act 47 Plan.

Accordingly, there is no “right” of DCED that is impacted by this litigation and DCED is not an indispensable party. These are issues the Court previously considered when, by Order dated May 16, 2011, it denied DCED’s petition to intervene and the City’s Motion to Dismiss and/or Stay, both of which asserted that the DCED was an indispensable party.

E. TD, M&T and Assured Do Not Lack Standing

The City contends that Plaintiffs lack standing to seek an Order of Mandamus under section 8261. First, the City alleges that TD and M&T lack standing to sue under the Debt Act because the bondholders have been paid in full by guarantors, such as Assured, or through use of the Debt Service Reserve Funds. Section 8261 of the Debt Act, which provides for the mandamus relief at issue, expressly grants standing to pursue an order of mandamus to “the holder of any . . . guaranty.” As reflected in the opening paragraph of each Guaranty, the Guaranty is “between” the City and the relevant Trustee. 737 Complaint, Exhibits E-H. TD and M&T, as Indenture Trustees, and Assured, as Statutory Trustee, are the primary beneficiaries of the Guarantees and are holders of the Guarantees.

Further, section 3.15 of each Guaranty states that “the City’s obligation to make payments under this Guaranty shall not be reduced by transfers from the . . . Debt Service Reserve Account.” Thus, payments made by the County pursuant to the County Bond Guaranty do not diminish the City’s obligations under the City Guarantees, as those payments are made into the Debt Service Reserve Fund. 737 Complaint, Exhibit C, ¶6.03(d)(ii), TR 46 (Wallett). Similarly, all payments made by Assured provide no defense, as the Guaranty Agreements specifically provide that the City’s obligation shall not be diminished or impaired by “the payment by the Bond Insurer . . . “ 737 Complaint, Exhibits E – H, ¶3.08(R).

Finally, the City argues that the Plaintiffs lack standing to collect any amounts that could be collected under the Reimbursement Agreement between the City and the County. First, as noted

above, the City has waived all defenses and agreed that its obligations are “absolute, irrevocable and unconditional, *irrespective of any other agreement or instrument to which the City shall be a party...*” Complaint Exhibits E-H, § 3.08 (emphasis supplied.) Here the City’s defense attempts to assert that a different agreement entered into by the City limits its obligation, which defense it has unequivocally and expressly waived. Moreover, each City Guaranty specifically states that the City’s obligations under the guaranty is not affected by “[t]he validity, enforceability or termination of the Reimbursement Agreement or the . . . Indenture.” Complaint Exhibits E-H, § 3.08(D). Finally, the Reimbursement Agreement states that “nothing herein shall limit or alter the City’s or the County’s obligations under their respective Guarantees.”<sup>5</sup> (Stipulation, Exhibit X, ¶ 13.) Accordingly, Plaintiffs have standing to pursue the relief requested.

F. Traditional Principles of Equity Do Not Apply to Actions Under Section 8261

The City attempts to raise defenses that would apply traditional equitable principles to the Court’s consideration of Plaintiffs’ request for an order of mandamus under section 8261, including whether an adequate remedy at law exists and whether mandamus can be issued to a public official who has not refused to comply with an order or obligation. These defenses fail as a matter of law.

In Cty. of Dauphin v. City of Harrisburg, 24 A.3d 1083 (Pa. Commw. Ct. 2011), the Commonwealth Court concluded that the remedies provided by the Debt Act must, as a matter of law and public policy, be strictly enforced. The Court held that:

The Debt Act...protects those who invest in debts of the local government unit (1) by mandating the local government unit to covenant with the holders of bonds or notes that it will budget, appropriate and duly and punctually pay the amount of the debt service or guaranty, and to pledge its full faith, credit and taxing power, and (2) by making the

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<sup>5</sup> To the extent that this defense is aimed at avoiding a double payment to both the Trustees and the County, any amounts paid to the Trustees in excess of the amounts necessary to pay the obligations due to the bondholders would be either paid to the County or, in consultation with the Authority, returned to the City. See e.g., 737 Complaint Exhibit C, § 6.02(a)(iii) (excess funds paid over by the City pursuant to its Guaranty to be used to pay the County under the Reimbursement Agreement, and any excess to be paid back to the City.) The City may not, however, avoid its obligations as the primary guarantor of the bonds.

covenant “specifically enforceable,” Section 8104(b). The Debt Act “provides an exclusive and uniform system on the subjects covered by [the Debt Act].” Section 8001(d) of the Debt Act, *as amended*, 53 Pa. C.S. § 8001(d). Where, as here, a remedy is provided or a duty is enjoined by a statute, the directions of the statute must be strictly pursued.

24 A.3d at 1090. Section 8261 makes no provision for consideration of any of the traditional equitable principles the City attempts to raise. Instead, section 8261 provides that an order of mandamus “shall” issue upon proof that the City failed to include in its budget for each fiscal year, the amount of principal, interest and periodic payments due in that year under the Indentures and the Swap Documents, and/or that the City failed to appropriate and pay the amounts due during the fiscal year. The Court simply does not have discretion under the statute to consider the equitable principles the City attempts to raise.

G. The Mandamus Order Should Include All Past Due Amounts

Finally, the City contends that the amounts declared to be due in the mandamus order should be limited only to those payments that came due during the current fiscal year, 2011. Pursuant to the City Guarantees, the City is obligated to budget for and pay in each fiscal year the amounts due in that fiscal year. Where payments are not made by the City in a given fiscal year, then the amounts not paid are to be included in the budget for the next fiscal year and paid in that year.

Section 3.05 of the Guarantee Agreements states:

At any time when payments are required to be made by the City hereunder, to the extent that sufficient money shall not be available in the City’s then current budget, and if the City shall be unable to incur debt lawfully in the current Fiscal Year for the purpose of paying such Debt Service or to issue tax anticipation notes or otherwise to satisfy its obligations hereunder, the City shall include any amounts so payable in its budget for the next succeeding Fiscal Year and shall appropriate such amounts to the payment of such obligations and duly and punctually shall pay or shall cause to be paid the obligations incurred hereunder in the manner herein stated according to the true intent and meaning hereof and for such budgeting, appropriation and payment the City does pledge its full faith, credit and taxing power. As provided in the Debt Act, this covenant shall be enforceable specifically against the City.

Complaint Exhibits E – H, § 3.05. As a result, any payments not made or budgeted in 2009 by the City should have been included in the City’s 2010 budget and paid in 2010. Any payments not made or budgeted for in 2010 (including those from 2009) should have been included in the budget for 2011 and paid in the 2011 fiscal year. The City’s Finance Director testified that the City’s Administration attempted to include those amounts in the 2010 and 2011 budgets, and intends to include them in the 2012 budget. (TR 72-73 (Kroboth).) Accordingly, under section 3.05 of the Guarantee Agreements, all amounts not paid in 2009 and 2010 should have been included in the 2011 fiscal year budget.

The language of section 8261 does not limit the ability to recover through the mandamus order to only the current fiscal year. Under section 8261 if the City fails to budget “in any fiscal year” for amounts due in that year under a guaranty and/or “fails to appropriate or pay moneys necessary in that year” for that guaranty, then upon suit of the holder of the guaranty, the Court “shall” issue a mandamus requiring the treasurer of a government unit to pay the first tax moneys or other available revenues or moneys thereafter received to the Plaintiffs. Under section 8261 the failure to budget or pay could be “for any fiscal year” and the failure to pay or appropriate in “that year” relates to “any fiscal year.” The payment of revenues under the mandamus order is to be for each series “for which provision has not been made”, which is not specific as to time, and therefore, relates to any payment not made in any fiscal year. Any other interpretation would be nonsensical, since it would require trustees to bring lawsuits for each fiscal year in which a default were to occur.

**V. Plaintiffs are Entitled to Costs and Expenses**

Each of the Guaranty Agreements provide that the City shall be liable for costs incurred by the Trustees and Assured in enforcing the Guaranty Agreement. Section 3.11 of each of the Guaranty Agreement provides:

The City agrees to pay all costs, fees and expenses, including, to the extent permitted by law, all court costs and reasonable attorneys fees and expense which may be incurred by the Noteholders, the Bond Insurer, or ...Trustee in enforcing or attempting to enforce this Guaranty against it, following any default on the part of the City hereunder, whether the same shall be enforced by suit or otherwise.

Complaint, Exhibits E-H, § 3.11. Further, section 8265 of the Debt Act provides that:

In any suit, action or proceeding by or on behalf of the holders of defaulted bonds or notes or a local government unit brought under this subpart, the fees and expenses of a trustee or receiver, including operating costs of a project and reasonable counsel fees, shall constitute taxable costs, and all costs and disbursements allowed by the court shall be deemed additional principal due on the bonds or notes and shall be paid in full from any recovery prior to any distribution to the holders of the bonds or notes.

53 Pa. C.S.A. § 8265. Therefore, Plaintiffs are entitled to an award of their expenses in seeking this mandamus order, which are to be treated as principal due under the mandamus order.

### CONCLUSION


Substantial uncontroverted evidence exists of the failure of the City to budget for and to pay its obligations under the Guaranty Agreements and that the City has waived all defenses. Pursuant to sections 8261 and 8283 of the Debt Act, and the terms of the Guaranty Agreements, Plaintiffs are entitled to the issuance of a mandamus order. Accordingly, Plaintiffs respectfully request that the Court issue an Order: (1) directing Defendant Paul P. Wambach to pay out of the first tax moneys or other revenues received by the City amounts due and unpaid under the Guaranty Agreements and for amounts yet to be paid in 2011; (2) directing the City to include in its budgets for future years amounts due under the Guaranty Agreements; and (3) directing Plaintiffs to submit

a bill of costs, including attorneys fees, within 14 days of the date of the Order. A proposed form of Order is served and filed herewith.

Respectfully submitted,

SAUL EWING LLP

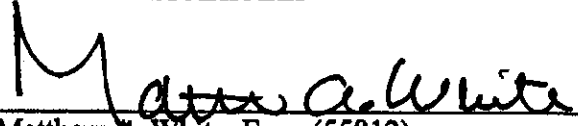
Dated: October 4, 2011

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 4th, 2011, I served a true and correct copy of the foregoing *Plaintiffs' Post-Hearing Brief on Motion for Order of Mandamus Pursuant to Sections 8261, 8283 and 8104 of the Local Government Unit Debt Act* upon the following persons by first class mail, postage prepaid:

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