

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

BANK OF NEW YORK MELLON
TRUST COMPANY,

Intervenor

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

CIVIL ACTION

No. 2010 CV 11737 CV *file*

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TD BANK, NATIONAL ASSOCIATION
Plaintiff,

v.

PAUL P. WAMBACH,
TREASURER OF THE CITY
OF HARRISBURG, THE CITY OF
HARRISBURG, AND
THE HARRISBURG AUTHORITY,
Defendants

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

CIVIL ACTION

No. 2010 CV 11738 CV

**BRIEF OF DEFENDANTS THE CITY OF HARRISBURG AND THE TREASURER OF
THE CITY OF HARRISBURG IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR
MANDAMUS AND EQUITABLE RELIEF**

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INTRODUCTION

Fundamentally, for all the hoopla, this is a collection case. Like any other run-of-the-mill collection case, it is about money: money which the Harrisburg Authority borrowed and the City of Harrisburg guaranteed it would pay back if the Authority failed to do so. If neither the Authority nor the City paid the money back, then the burden fell to Dauphin County and an insurance company. In this case, both the County and the insurance company have had to make payments on the Authority's debt, and now they want their money back.

What sets this case apart, and makes it one of first impression, are the mandamus remedies made available by the Debt Act. Pursuant to Sections 8261 and 8283 of the Debt Act, 53 Pa.C.S.A. §§ 8261 and 8283, the Plaintiffs have asked the Court to order the City to take its next 67 million dollars of revenue -- a sum that substantially exceeds the City's annual general fund budget -- and pay it to them. In effect, Plaintiffs want the Court to shut the City down, to put it out of business, because the entry of the Order the Plaintiffs have requested would force the City to lay off all of its police officers, all of its firefighters, and suspend all City services. This result, a city without fire or police protection or any basic services, is not a result the General Assembly could have intended when it enacted the mandamus provisions of the Debt Act.

Fortunately for the people who live and work in the City of Harrisburg, Plaintiffs are not entitled to the relief they seek. The recent amendments to Act 47, the Municipalities Financial Recovery Act, make clear that mandamus relief should not be granted against a financially distressed city, like Harrisburg, which the Governor has declared to be in a state of fiscal emergency and the Commonwealth Court has placed into receivership. Additionally, to the extent that Sections 8261 and 8283 of the Debt Act would preclude the City from paying its

employees who are subject to the federal Fair Labor Standards Act, they are preempted by federal law and without effect.

Because most of the defenses raised by the City Defendants apply equally to both of the actions in which Plaintiffs have sought mandamus relief, for the convenience of the Court and the parties, the City Defendants have elected to file one brief. Under each argument heading, the City Defendants have identified the case to which the argument applies.

I. STATEMENT OF THE CASE

A. Procedural Background

Plaintiffs have in their briefs in support of their motions accurately summarized the procedural history of this matter -- at least until the time of the hearing conducted on September 22, 2011 -- with one exception: the City Defendants filed their motion for leave to file amended answers with new matter to Plaintiffs' complaints and motions for mandamus on September 14, 2011, not September 13.

Since the hearing of this matter, however, a number of events have occurred, including, most importantly, a significant substantive change in the law which precludes the entry of the mandamus and equitable relief which Plaintiffs seek. Specifically, on October 20, 2011, Governor Corbett signed into law Act 79 of 2011 (also known as Senate Bill 1151), which substantially amended the Municipalities Financial Recovery Act, 53 P.S. §11701.101, *et seq.*, commonly known as Act 47. Shortly thereafter, on October 24, 2011, using the new authority given to him by Act 47, as amended, the Governor declared "a state of fiscal emergency within the City of Harrisburg, Pennsylvania." (*Governor's October 24, 2011, Declaration of Fiscal Emergency*, p. 2).

Pursuant to his Declaration of Fiscal Emergency, the Governor directed the Secretary of the Department of Community and Economic Development (“DCED”) to develop, within 10 days, an Emergency Action Plan “to ensure that vital and necessary services are maintained within the City of Harrisburg during the state of the fiscal emergency.” *Id.* On November 3, 2011, DCED Secretary C. Alan Walker, in response to the Governor’s directive, issued an Emergency Action Plan (EAP”) to Mayor Thompson and then City Council President Gloria Martin-Roberts. The EAP requires the City to take certain steps with regard to its revenues and expenditures “to ensure that the City continues to receive sufficient revenues to support the unimpeded provision of vital and necessary services within the City during the state of fiscal emergency.” (*EAP*, p. 3).

On November 15, 2011, after the Mayor, City Council and creditors of Harrisburg did not develop a consent agreement to address the City’s fiscal difficulties, as required by Section 607 of Act 47, as amended, 53 P.S. §11701.607, the Governor directed Secretary Walker to petition the Commonwealth Court for the appointment of a receiver for the City. Secretary Walker filed a petition for the appointment of a receiver on November 18, 2011, which the Commonwealth Court docketed to No. 569 MD 2011. Pursuant to Section 702, the Secretary asked the Court to appoint David Unkovic, Esquire, as the Receiver for the City of Harrisburg.

The Commonwealth Court, by Senior Judge James R. Kelley, conducted a hearing on Secretary Walker’s petition on December 1, 2011. On December 2, 2011, the Court issued a Memorandum and Order granting the petition and appointing David Unkovic as Receiver for the City of Harrisburg. In its Order, the Court directed Mr. Unkovic, pursuant to Section 703 of Act 47, as amended, 53 P.S. §11701.703, to develop a recovery plan for the City within 30 days, and, pending the completion and approval by the Court of the recovery plan, to implement the EAP

developed by Secretary Walker. (*December 2, 2011, Memorandum and Order*, p. 7). The Court also directed the Mayor of Harrisburg to continue to perform her duties, “subject to and consistent with the provisions of the Emergency Action Plan, any Recovery Plan developed by the Receiver and approved by this Court, and Chapter 7 of Act 47 as amended.” *Id.*

Having requested and received an extension of time, the Receiver must now file a proposed recovery plan with the Commonwealth Court on or before February 6, 2012. The Court must then conduct a hearing on the plan within 30 days, and confirm or reject the plan within 60 days. 53 P.S. §11701.703(d). In short, the Receiver, subject to Act 47, as amended, and the Recovery Plan to be approved by the Commonwealth Court, now controls the finances of the City of Harrisburg.

On December 16, 2011, the Receiver filed a petition to intervene in this action. The Court thereafter conducted a conference with Counsel for the parties and Counsel for the Receiver in Chambers on December 20, 2011. After the conference, the Court issued Orders, dated December 22, 2011, which, *inter alia*: (1) granted the Receiver’s petition to intervene in the case docketed to No. 2010-CV-11737; (2) granted the Receiver intervenor status in the case docketed to No. 2010-CV-11738; and (3) directed the Receiver and the City Defendants to file briefs in opposition to the Plaintiffs’ motions for mandamus and equitable relief within 30 days.

The City Defendants now respectfully submit this brief in opposition to Plaintiffs’ motions for mandamus and equitable relief.

B. Factual Background

The facts relevant to the City Defendants’ defenses to Plaintiffs’ motion for mandamus and equitable relief may be summarized as follows.

1. Facts Relating to the Impact of Mandamus Relief on the City of Harrisburg

The City of Harrisburg employs 467 people, including 160 police officers and 71 firefighters, and is party to collective bargaining agreements with: (1) Local 521 of the American Federation of State County and Municipal Employees, District Council 90 ("AFSCME Local 521"), which sets forth the wages and working conditions for the City's non-uniform employees; (2) Local 428 of the International Association of Fire Fighters ("IAFF Local 428"), which sets forth the wages and working conditions for the firefighters employed by the City; and (3) the Fraternal Order of Police, Capital City Lodge No. 12 ("FOP Lodge No. 12"), which sets forth the wages and working conditions for the police officers employed by the City. (N.T., p.p. 102-103, 117-118; Exh.'s D-4, D-5 and D-6).¹

In addition to providing police and fire protection, the City's employees enforce the City's codes, clean the City's streets, operate the water and sewer systems, pick up the trash, collect the taxes, issue permits and licenses - in short, they perform all of the services necessary to enable the people who live and work in the City to go about their daily lives safely and efficiently. (N.T., p.p. 100, 102, 106-107).

Those of us who live or work in the City often take these essential services for granted. We assume that when we turn the spigot, water will flow out; that when we put the trash on the curb at night, it will be gone in the morning; that when we need help, a police officer or firefighter will come. The individuals who do these jobs, however, expect and deserve to be paid, and paying them takes money. The City's principal source of money is its revenue stream, which consists primarily of taxes, license and permit fees, and administrative service charges

¹ Citations to "N.T." are to the Notes of Testimony of the hearing conducted on Plaintiffs' motions for mandamus and equitable relief on September 22, 2011. Citations to "Exh." are to the exhibits admitted into evidence at the hearing.

received for operating the sewer and water systems. (N.T. p. 99-101). In very real terms, the City's revenue stream is its lifeblood.

The entry of the mandamus relief sought by the Plaintiffs would cut off that lifeblood's flow. As the City's Finance Director, Robert Kroboth, testified, the entry of a mandamus order would put the City out of business:

Q: [By Mr. Beckley] [T]he Plaintiffs between them have asked the Court to enter an order in mandamus directing the City to pay its next \$67 million in revenue to debt service on the Authority's -- on the incinerator debt.

If the Court were to enter that order, what would the impact be on the City?

A: [By Mr. Kroboth] The City wouldn't be able to make payroll obligations, pay health benefits, pay insurance, pay remaining debt service, pay remaining utilities, equal to the amount of revenue that would be captured, if you will.

Q: Would the City be able to pay its police officers?

A: No.

Q: Its firefighters?

A: No.

* * *

Q: [I]f the Court were to enter the mandamus order which the Plaintiff seeks, would the City be able to meet its obligations under [its] collective bargaining agreements?

A: No.

* * *

Q: [I]f a mandamus order was entered, would you be -- would the City be able to make its obligations in 2012?

A: No.

Q: No payroll?

A: No.

Q: No services?

A: No.

Q: No debt payments?

A: No.

Q: In short, the City would be out of business?

A: Yes.

(N.T., p.p. 116, 118, 120-121).

2. Facts Relating to the 2003 Retrofit Bond and Swap Guaranties (Case No. 2010-CV-11737-CV)

The City of Harrisburg and Dauphin County guaranteed payment of both the Series D and E of 2003 Revenue Bonds (hereinafter referred to collectively as the “Retrofit Bonds”) issued by the Harrisburg Authority to help finance improvements to the Incinerator, and the Swap agreements entered into by the Authority in connection with the Series D Retrofit Bonds. The City did so by executing a City Bond Guaranty Agreement (the “City Retrofit Guaranty”) dated December 1, 2003. (*Joint Stipulation of Facts*, ¶13; *11737 Complaint*, Exh. G), and a City Swap Guaranty Agreement (“City Swap Guaranty”), also dated December 1, 2003. (*Joint Stipulation of Facts*, ¶15; *11737 Complaint*, Exh. II). The County did so by executing a County Bond Guaranty Agreement (the “County Retrofit Guaranty”) dated December 1, 2003 (*Joint Stipulation of Facts*, ¶24, Exh. V), and a County Swap Guaranty Agreement (the “County Swap Guaranty”), also dated December 1, 2003. (*Joint Stipulation of Facts*, ¶25, Exh. W).

When the City and the County executed their respective Guaranties of the Retrofit Bonds and the Swap agreements, they at the same time entered into a Reimbursement Agreement, dated

December 1, 2003 (the “2003 Reimbursement Agreement”), between the City, the County and the Harrisburg Authority. (*Joint Stipulation of Facts*, ¶26, Exh. X). The parties entered into the 2003 Reimbursement Agreement in order to set forth their respective rights and obligations in the event that either the City or the County was called upon to make a payment under its Guaranty:

[T]o induce the City to execute and deliver the City Guarantees and the County to execute and deliver the County Guarantees, the parties desire to enter into this Reimbursement Agreement to provide for, among other things, their respective rights and obligations, including without limitation, repayments to the City and the County for amounts paid by each of them under their respective Guarantees plus other amounts specified in this Reimbursement Agreement....

(*Joint Stipulation of Facts*, Exh. W, p. 8). In each of their Guaranty agreements, the City and the County acknowledged that “in the [2003] Reimbursement Agreement the Authority, the County and the City define their respective rights and obligations, including reimbursements with respect to obligations incurred under their respective guarantees....” (*Joint Stipulation of Facts*, Exh. W, p. 8) (*Joint Stipulation of Facts*, Exh. V, p. 8; *11737 Complaint*, Exh. G, p. 8).

When the Authority and the City found themselves unable to make the debt service payments due on the Retrofit Bonds and the Swap agreements, the County advanced funds pursuant to the County Retrofit and Swap Guaranties. Through September 16, 2011, Dauphin County had made payments of \$8,540,543.02 under the County Retrofit Guaranty, and payments under the County Swap Guaranty of \$3,033,568.16. (*Joint Stipulation of Facts*, ¶30).

3. Facts Relating to the 2007 Notes and Guaranties (Case No. 2010-CV-11738-CV)

In order to help finance the completion of the improvements to the Incinerator, the Authority in 2007 issued two series of Notes, Series C and Series D (the “2007 Notes”), under a Trust Indenture dated December 15, 2007. (N.T., p. 48; *11738 Complaint*, Exh. A). The 2007

Notes carried a maturity date of December 15, 2010, and a stated value at maturity of \$34,685,000. (N.T., p. 55; *11738 Complaint*, Exh. A, p. 10).

The City of Harrisburg and Dauphin County guaranteed the payment of the 2007 Notes. The City did so by executing a City Guaranty Agreement (the “2007 City Guaranty”) dated December 15, 2007. (*11738 Complaint*, Exh. B). The County did so by executing a County Guaranty Agreement (the “2007 County Guaranty”), also dated December 15, 2007. (*Joint Stipulation of Facts*, ¶33, Exh. Y).

Like they did in connection with their Guaranties of the Retrofit Bonds and the Swap agreements, the City and the County entered into a Reimbursement Agreement relating to their Guaranties of the 2007 Notes dated November 27, 2007 (the “2007 Reimbursement Agreement”), between the City, the County and the Harrisburg Authority. (*Joint Stipulation of Facts*, Exh. Z). As they had done in the 2003 Reimbursement Agreement, the parties entered into the 2007 Reimbursement Agreement to set forth their respective rights and obligations in the event that either the City or the County was called upon to make a payment under its Guaranty:

[T]o induce the City to execute and deliver the City Guaranty and the County to execute and deliver the County Guaranty, the parties desire to enter into this Reimbursement Agreement to provide for, among other things, their respective rights and obligations, including without limitation, repayments to the City and the County for amounts paid by each of them under their respective Guaranty plus other amounts specified in this Reimbursement Agreement....

(*Joint Stipulation of Facts*, Exh. Z, p. 4). Again, as they had done in 2003, in each of their 2007 Guaranty Agreements, the City and the County acknowledged that they would “enter into a Reimbursement Agreement dated as of even date herewith, pursuant to which the parties thereto will define their respective rights and obligations.” (*Joint Stipulation of Facts*, Exh. Y, p. 5) (*See also 11738 Complaint*, Exh. B, p. 4).

When the maturity date for the 2007 Notes arrived in December, 2010, neither the Authority nor the City could pay what was due. Consequently, on or about December 1, 2010, pursuant to the 2007 County Guaranty, the County paid to the Trustee of the 2007 Notes the full amount due at maturity, \$34,685,000.00. (N.T., p. 55-56; *Joint Stipulation of Facts*, ¶33). The holders of the 2007 Notes have been paid in full. (N.T., p. 63).

II. QUESTIONS PRESENTED

A. May the Court award mandamus and equitable relief under Sections 8104, 8261 and 8283 of the Debt Act against a financially distressed city which has been declared by the Governor of the Commonwealth, pursuant to the Municipalities Financial Recovery Act, to be in a state of fiscal emergency, and placed in receivership by Order of the Commonwealth Court, where to do so would render the city unable to provide vital and necessary services to its citizens, and preclude the implementation of a statutorily mandated recovery plan?

Suggested response: No.

B. Does Section 6 of the federal Fair Labor Standards Act preempt the "first-dollar" mandamus relief provided for in Sections 8261 and 8283 of the Debt Act where the entry of an award of mandamus relief would preclude the City from paying its employees their wages and benefits when due?

Suggested response: Yes.

C. Can the Plaintiffs assert claims for mandamus and equitable relief for amounts paid by Dauphin County pursuant to the County Retrofit Guaranty and the County Swap Guaranty?

Suggested response: No.

D. Can the Plaintiffs assert claims for mandamus and equitable relief for amounts paid by Dauphin County pursuant to the 2007 County Guaranty?

Suggested response: No.

E. Does this Court lack subject matter jurisdiction over Plaintiffs' request for "first dollar" mandamus relief because Plaintiffs have failed to join indispensable parties to this matter, namely the holders of the City's general obligation debt, and the unions representing the City's employees with whom the City has entered into collective bargaining agreements?

Suggested Response: Yes.

F. Should this Court should decline to exercise its discretion to grant the mandamus relief requested by Plaintiffs where granting the relief will require the City to lay off employees and place its citizenry at risk?

Suggested Response: Yes.

III. ARGUMENT

A. THE COURT SHOULD NOT AWARD MANDAMUS OR EQUITABLE RELIEF UNDER THE DEBT ACT AGAINST A FINANCIALLY DISTRESSED CITY WHICH THE GOVERNOR HAS DECLARED TO BE IN A STATE OF FISCAL EMERGENCY AND THE COMMONWEALTH COURT HAS PLACED INTO RECEIVERSHIP

(Case No.'s 2010-CV-11737-CV and 2010-CV-11738-CV)

Pursuant to Pa.R.Civ.P. 1019(g) and Dauphin County Local Rule 205.2(a)(1)(m), the City Defendants incorporate herein by reference the arguments relating to the impact of the recent amendments to the Municipalities Financial Recovery Act ("Act 47") on the availability of mandamus and equitable relief against a city declared to be in a state of fiscal emergency by

the Governor, and placed in receivership by Order of the Commonwealth Court, set forth in the Receiver's brief in opposition to Plaintiffs' motions.

For the reasons stated in the Receiver's brief, given the recent amendments to Act 47, the Court should interpret Sections 8104, 8261 and 8263 of the Debt Act as having no application to a distressed city, like the City of Harrisburg, which the Governor of the Commonwealth has declared to be in a state of fiscal emergency, and the Commonwealth Court has placed into receivership, and enter an Order denying Plaintiffs' motions.

**B. SECTION 6 OF THE FEDERAL FAIR LABOR
STANDARDS ACT PREEMPTS THE "FIRST DOLLAR"
MANDAMUS RELIEF PROVIDED FOR IN SECTIONS 8261
AND 8283 OF THE DEBT ACT**

(Case No.'s 2010-CV-11737-CV and 2010-CV-11738-CV)

***1. The City Defendants Have Not Waived Their Right To Assert Defenses Based
On Lack Of Subject Matter Jurisdiction Or Federal Statutory Preemption***

In their brief, Plaintiffs suggest that, pursuant to Section 3.08 of the various City Guaranty Agreements, the City Defendants have waived all of their defenses to Plaintiffs' claims. (*Brief of TD Bank/AGM*, p. 25). First, the City Defendants would note that the City Treasurer is not a party to the City Guaranty Agreements, and that, consequently, the Treasurer has not waived any defenses which he may care to assert. Second, Plaintiffs expressly acknowledge that the City Defendants have not waived defenses "directed to the Court's jurisdiction..." (*Brief of TD Bank/AGM*, p. 26).

The City Defendants will argue below that the Plaintiffs have failed to join indispensable parties to this case, which deprives the Court of subject matter jurisdiction to dispose of Plaintiffs' claims for mandamus and equitable relief. As Plaintiffs concede, a party cannot waive

the defense of a lack of subject matter jurisdiction. *See, e.g., Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 1244 (2006) (subject matter jurisdiction, “because it involves a court's power to hear a case, can never be forfeited or waived...Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party”); *Blackwell v. Commonwealth State Ethics Commission*, 523 Pa. 347, 358, 567 A.2d 630, 636 (Pa. 1989) (“As with any issue going to the subject matter jurisdiction of a court or administrative tribunal to act in a matter, this is an issue that cannot be waived by the parties nor can the parties confer subject matter jurisdiction on a court or tribunal by agreement or stipulation”). Consequently, Section 3.08 of the City Guaranty Agreements cannot preclude the City Defendants from arguing that the unions and the holders of the City’s general obligation bonds are indispensable parties.

The City Defendants will also argue below that Sections 8261 and 8283 of the Debt Act are preempted by Section 6 of the Fair Labor Standards Act (“FLSA”). Like subject matter jurisdiction, federal statutory preemption is neither a right nor a remedy which can be waived, “but a jurisdictional component of the legislative regulation of the state/federal dynamic.” *Yellow Transp., Inc. v. DM Transp. Management Services, Inc.*, 2006 WL 2871745 (E.D. Pa. 2006). “Pennsylvania courts have held that preemption is a question of subject matter jurisdiction and the competence of the court to reach the merits of the claim raised.” *Mastrocola v. Southeastern Pennsylvania Transp. Authority*, 941 A.2d 81, 87 (Pa.Cmwh. 2008) (court held that party could not waive preemption argument because it goes to subject matter jurisdiction). Accordingly, Section 3.08 of the City Guaranty Agreements does not prohibit the City Defendants from arguing that Sections 8261 and 8283 of the Debt Act are preempted by Section 206 of the FLSA.

Finally, the City Defendants' arguments relating to the impact of the recent amendments to Act 47 on the enforcement of Sections 8104, 8261 and 8283 of the Debt Act against a City placed into receivership by the Commonwealth Court, and to whether Plaintiffs can assert claims based on amounts paid by Dauphin County pursuant to the County Guaranty Agreements, are outside of the scope of the waiver contained in, and therefore not barred by, Section 3.08 of the City Guaranty Agreements. *See generally U.S. on Behalf of Small Business Administration v. Richardson*, 889 F.2d 37 (3rd Cir. 1989) (waiver must be clear and precise in order effectively to waive defense).

2. Plaintiffs' Claims For Mandamus Relief Are Preempted

Section 6(a) of the federal Fair Labor Standards Act ("FLSA") mandates that:

Every employer shall pay to each of his employees who in any workweek engaged in commerce or in the production of goods for commerce, wages at the following rates....

29 U.S.C.A. §206(a).

In *Council 13, American Federation of State, County and Municipal Employees, AFL-CIO v. Commonwealth of Pennsylvania*, 604 Pa. 352, 986 A.2d 63 (2009), the Supreme Court of Pennsylvania held that, by virtue of the Supremacy Clause of the United States Constitution, U.S. CONST., Art. VI, cl. 2, Section 6 of the FLSA, 29 U.S.C.A. §206, preempted Article III, Section 24, of the Pennsylvania Constitution. For the reasons articulated by the Pennsylvania Supreme Court in *Council 13*, Section 6 of the FLSA also preempts Sections 8261 and 8283 of the Debt Act, at least to the extent that the grant of the "first dollar" relief provided for therein would preclude the City from paying its employees.

Council 13 arose out of the Commonwealth's budgeting process, which the Supreme Court summarized as follows:

The Commonwealth's fiscal year begins on July 1st of each calendar year and ends on June 30th of the next calendar year. 71 P.S. §237(a). Article VIII, Section 12 of our Constitution directs the Governor to submit an annual budget for the General Assembly's consideration at a time set by law; Article VIII, Section 13 requires the General Assembly to adopt the budget for the ensuing fiscal year and to make operating budget appropriations. PA CONST., Art VIII, §§12, 13. Under Section 24, the General Assembly's budget appropriations are an essential prerequisite to expending money from the Commonwealth's Treasury; that is, without such appropriations, state monies, for the most part, may not be spent...[I]f the General Assembly does not enact a general appropriations act by July 1 of each year...Section 24 prohibits money from being paid out of the State Treasury to the Commonwealth's Executive, Legislative and Judicial branches, which consequently prevents the payment of wages to state employees.

Council 13, 604 Pa. at 358-360, 986 A.2d at 67-68.

The Commonwealth's 2007-2008 fiscal year was scheduled to end on June 30, 2008. In February, 2008, Governor Rendell submitted to the General Assembly a proposed budget for the 2008-2009 fiscal year. Anticipating that a new budget might not be agreed upon by June 30, however, "[t]he Governor also devised a plan as to what payments of wages and salaries to Commonwealth employees the State Treasury would or would not make in the event that the General Assembly did not enact a general appropriations act by June 30, 2008." *Council 13*, 604 Pa. at 360, 986 A.2d at 68. In short, the Governor divided the Commonwealth's employees into four categories: (1) FLSA-covered employees who performed "functions essential to protect the health, safety and welfare of the public;" (2) FLSA covered employees whose duties were important, but not critical to the protection of the public's health, safety and welfare; (3) employees who were exempt from FLSA coverage; and (4) employees whose positions were not funded by the General Appropriations Act. If a new General Appropriations Act for the 2008-

2009 fiscal year was not timely enacted, then the Governor planned to furlough the non-critical FLSA-covered employees. *Council 13*, 604 Pa. at 361-362, 986 A.2d at 68-69.

In response, several non-critical FLSA-covered employees and several unions representing the Commonwealth's employees, including Council 13 of AFSCME (hereinafter referred to collectively as "Council 13"), filed an action in the Commonwealth Court's original jurisdiction, seeking a declaration that "Section 6 of the FLSA preempts Article III, Section 24 of the Pennsylvania Constitution." *Council 13*, 604 Pa. at 363, 986 A.2d at 70 (footnote omitted). The Commonwealth Court, in a single-judge Opinion, rejected Council 13's argument, and declared that Section 6 of the FLSA did not preempt Article III, Section 24:

Article III, Section 24 of the Pennsylvania Constitution is not preempted by the federal Fair Labor Standards Act, 29 U.S.C. §§201-219; therefore, when state employees are required to work at the performance of their job duties after the pertinent fiscal year appropriation line item for their salaries and wages has been exhausted, the Governor is not required to pay, and is in fact prohibited from paying, those employees their regular salaries and wages from monies actually in the treasury but not yet appropriated by the General Assembly.

Council 13, 604 Pa. at 368-369, 986 A.2d at 73 (quoting *Council 13, American Federation of State, County and Municipal Employees, AFL-CIO v. Commonwealth*, 954 A.2d 706, 718 (Pa.Cmwlth. 2008)).

The Supreme Court reversed the judgment of the Commonwealth Court, and held that Section 6 of the FLSA does preempt Article III, Section 24 of the Pennsylvania Constitution. The Court first surveyed the relevant case law interpreting Section 6 of the FLSA, and concluded that the Commonwealth's "assertion that Section 6 does not contain a prompt payment requirement is unavailing and that Section 6 of the FLSA mandates that wages be paid in a

timely manner when the wages are regularly due to be paid." *Council 13*, 604 Pa. at 380, 986 A.2d at 80.²

Having determined that Section 206 of the FLSA requires employers to pay covered employees their wages on time when regularly due, the Supreme Court next turned to the preemption issue. After first observing that "[t]he principle of preemption is grounded in the Supremacy Clause of the United States Constitution, which, when applicable, subordinates the laws of the states to those of the federal government," the Court summarized the means by which courts can discern whether a particular federal statute preempts state law:

The Supreme Court has instructed that Congress' intention to displace state law may be demonstrated in several different ways. In express preemption, Congress sets forth its intent to preempt expressly in the language of the statute. In field preemption, Congress implies its intent to preempt by occupying the entire legislative area, leaving no room for supplementary state regulation. Finally, in conflict preemption, Congress' intent to preempt is inferred where there is an actual conflict between state and federal law. Such a conflict arises where compliance with both state and federal law or regulations is an impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Council 13, 604 Pa. at 381, 986 A.2d at 81 (citations omitted). The Court noted further that "[s]ince *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), it is axiomatic that 'state law that conflicts with federal law is "without effect.'"*"* *Council 13*, 604 Pa. at 380, 986 A.2d at 80 (quoting *Kuznik v. Westmoreland County Board of Commissioners*, 588 Pa. 95, 902 A.2d 476, 493 (2006)).

Although the Court found that Section 6 of the FLSA did not preempt Section 24 of Article III by virtue of either express or field preemption, the Court concluded that Section 6 and

² The Supreme Court also held that the preemption issue raised by Council 13 does not "implicate the political question doctrine and, thus, is justiciable." *Council 13*, 604 Pa. at 372, 986 A.2d at 76.

Section 24 "obviously conflict," because "[a]t the same time that Section 6 requires the prompt payment of wages to the Commonwealth's FLSA-covered employees, Section 24 prohibits the payment of monies out of the Commonwealth's Treasury in order to pay those wages." *Council 13*, 604 Pa. at 383, 986 A.2d at 82. Consequently, the Court held that, by virtue of the doctrine of conflict preemption, Section 6 of the FLSA preempts Article III, Section 24 of the Pennsylvania Constitution:

In these circumstances, it is impossible to comply with both Section 6 of FLSA and Section 24....Therefore, we conclude that through conflict preemption, Congress' intent for Section 6 of FLSA to preempt state law provisions such as Section 24 is manifest and clear, and that the presumption against preemption that the [Commonwealth] Parties rely upon to argue that Section 6 does not displace Section 24 is presently overcome. Furthermore, since Section 24 is preempted, Section 24 is without effect in this instance and thus, ceases to have legal significance. Accordingly, we hold that the [Council 13] Parties are entitled to the declaratory judgment they sought: that Section 24 did not prohibit the Commonwealth from continuing to employ and pay all FLSA nonexempt Commonwealth employees in the event that the Pennsylvania General Assembly failed to pass a budget by July 1, 2008.

Council 13, 604 Pa. at 383, 986 A.2d at 82.

The Supreme Court's decision in *Council 13* teaches that "Congress' intent for Section 6 of FLSA to preempt state law provisions" which would prevent an employer, like the City of Harrisburg, from paying its FLSA-covered employees their wages when due is "manifest and clear," and that such state law provisions are "without effect" and cease[] to have legal significance."*Id.* As City Finance Director Robert Kroboth testified, the "first dollar" mandamus relief provided for in Sections 8261 and 8283 of the Debt Act would prevent the City from paying its FLSA-covered employees their wages when due.³ (N.T., p.p. 116, 118, 120-121). A

³ The Secretary of the Department of Community and Economic Development, in his December

mandamus order issued under the Debt Act directing the City Treasurer to pay every dollar of City revenue to Plaintiffs until the over 67 million dollars which Plaintiffs claim is owed is paid in full would force the City immediately to lay off its police officers, fire fighters and non-uniform employees because it could not pay them their wages. (*Id.*). This is precisely the result under state law which the Supreme Court held in *Council 13* that Section 6 of the FLSA preempts.

Not surprisingly, Plaintiffs neither attempt to distinguish nor even discuss the Supreme Court's decision in *Council 13* in their brief. Instead, they argue that no conflict exists between the "first dollar" mandamus relief afforded in Sections 8261 and 8283 of the Debt Act and Section 6 of the FLSA because "[t]he City's argument rests upon the incorrect assumption that the City must continue to employ persons when it cannot afford to do so." (*Brief of TD Bank/AGM*, p. 27). In other words, no conflict exists between the Debt Act and Section 6 of the FLSA because the City, according to Plaintiffs, can simply lay off all of its police officers, firefighters, and non-uniform FLSA employees.

The Supreme Court specifically rejected a similar argument, however, in *Council 13*. The Union plaintiffs in *Council 13* "did not challenge...the Governor's authority to furlough employees..." *Council 13*, 604 Pa. at 363, 986 A.2d at 70. Rather, they asked the Court to declare that Article III, Section 24 of the Pennsylvania Constitution did not provide the Governor with a legal basis for doing so:

The Union parties ask this Court to decide whether the Executive Parties and the Treasurer were correct in their view that Section 24 prevented the payment of wages to the Commonwealth's FLSA-

15, 2010, determination that Harrisburg is a "distressed municipality" pursuant to the Municipalities Financial Recovery Act, 53 P.S. §11701.101, *et seq.*, also concluded that: "The net effect of the issuance of writs of mandamus against the City would be to prevent the City from paying its administrative employees, its police personnel, and fire fighters." (*Exh. D-7*).

covered employees if the General Assembly failed to adopt budget appropriations by July 1, 2008, such that the Governor's decision was legally justifiable.

* * *

[A]s representatives of individuals who had been affected in their employment status by the Governor's reliance on Section 24 for his furlough decisions, the Union Parties filed a declaratory judgment action, asking the Commonwealth Court to construe Section 6 of the FLSA, consider its interaction with Section 24 of the Pennsylvania Constitution under preemption principles, and declare that Section 24 did not, as the Governor had asserted, prohibit their continued employment and the payment of their wages.

Council 13, 604 Pa. at 370, 373 986 A.2d at 74, 76.

The Supreme Court in *Council 13* could have adopted Plaintiffs' argument in this case, i.e. the Court could have held that no conflict between Article III, Section 24 and Section 6 of the FLSA existed because the Governor had the power to furlough the affected employees. Instead, however, the Court held that "Section 24 is preempted, Section 24 is without effect in this instance and thus, ceases to have legal significance," and that "Section 24 did not prohibit the Commonwealth from continuing to employ and pay all FLSA nonexempt Commonwealth employees..."*Council 13*, 604 Pa. at 383, 986 A.2d at 82.⁴

Pursuant to the Supreme Court of Pennsylvania's holding in *Council 13*, "Congress' intent for Section 6 of FLSA to preempt state law provisions such as" Sections 8261 and 8283 of the Debt Act, which purport to grant "first dollar" relief to creditors like Plaintiffs, is "manifest and clear," and, to the extent that they would prevent the City from paying its FLSA-covered employees their wages when due, Sections 8261 and 8283 of the Debt Act are "without effect in

⁴ Additionally, the City Defendants cannot believe that Plaintiffs contend seriously that a city the size of Harrisburg can carry out its duty to protect the safety and welfare of its citizens while at the same time eliminating its police and fire departments.

this instance" and thus cease "to have legal significance." *Council 13*, 604 Pa. at 383, 986 A.2d at 82. Accordingly, Plaintiffs' requests for mandamus relief should be denied.

**C. PLAINTIFFS CANNOT ASSERT CLAIMS FOR
MANDAMUS AND EQUITABLE RELIEF BASED ON
AMOUNTS PAID BY THE COUNTY PURSUANT TO THE
COUNTY RETROFIT GUARANTY AND THE COUNTY
SWAP GUARANTY**

(Case No. 2010-CV-11737)

As noted above, Dauphin County guaranteed the payment of both the Series D and the Series E Retrofit Bonds issued by the Authority, and the Authority's Swap obligations. By the time of the hearing on September 22, 2011, the County had paid \$8,540,543.02 under its Retrofit Guaranty and \$3,033,568.16 under its Swap Guaranty. In other words, Dauphin County has paid \$11,574,111.18 of the \$34,874,252.83 with regard to which Plaintiffs have requested the Court to enter an Order of mandamus relief.⁵

In the County Retrofit Guaranty, the County, the Authority and the Trustee (now TD Bank) agreed that:

To the extent that it makes any payments of Debt Service on the 2003D and 2003E Bonds, the County shall become subrogated to all right title and interest of the person receiving such payments. **The County's rights to reimbursement for payments of Debt Service shall be as set forth in the Reimbursement Agreement....**

(*Joint Stipulation of Facts*, Exh. V, §3.15(b) (emphasis supplied). Similarly, in the County Swap Guaranty, the parties agreed that, if the County made any payments pursuant to the Swap

⁵ Indeed, of the total amount sought by Plaintiffs, the Trustees, M&T Bank and TD Bank, have paid nothing, and the bond insurer, AGM has paid \$5,454,865.92. The remaining portion of the \$34,874,252.83, has been paid either by the County or out of the Debt Service and Debt Service Reserve Funds. (N.T., p.p. 60-61).

Guaranty, then the County would become subrogated to “all right, title and interest of the person receiving such payments,” and that “[t]he County’s rights to reimbursement” for any payments made “shall be as set forth in the Reimbursement Agreement...” (*Joint Stipulation of Facts*, Exh. W, §3.15(b)).

In its Guaranties, then, the County expressly agreed that, although it would be subrogated to the rights of the person receiving any payments made by the County -- meaning that the County now holds a claim for payment, *See, e.g., Holloran v. Larrieu*, 637 A.2d 317, 321 (Pa. Super. 1994) (Employer who pays employees medical expenses now “holds this particular claim” against malpractice defendants) - - the County’s rights to repayment would be governed by the 2003 Reimbursement Agreement entered into between the County, the City and the Authority. (*Joint Stipulation of Facts*, Exh. X).

In the 2003 Reimbursement Agreement, the parties stated that that they were entering into the Agreement “to provide for, among other things, their respective rights and obligations, including without limitation, repayments to the City and the County for amounts paid by each of them under their respective Guarantees plus other amounts specified in this Reimbursement Agreement.” (*Joint Stipulation of Facts*, Exh. X, p. 8). The parties incorporated their respective Guaranties into the 2003 Reimbursement Agreement (*Joint Stipulation of Facts*, Exh. X, §1), and provided that any failure by the City or the County to make a payment pursuant to its respective Guaranty would constitute a breach of the 2003 Reimbursement Agreement (*Id.*, §7). The 2003 Reimbursement Agreement then provides that:

The obligations of each party under this Reimbursement Agreement shall be absolute, unconditional and irrevocable, **and shall be fully performed strictly in accordance with the terms and conditions of this Reimbursement Agreement, under all circumstances whatsoever....**

(Joint Stipulation of Facts, Exh. X, §4) (emphasis supplied).

If the County is called upon to make payments under either the County Retrofit Guaranty or the County Swap Guaranty, Sections 2(e) and (f) of the 2003 Reimbursement Agreement afford **to the County** the right to pursue an action to recover those payments directly against either the Authority or the City:

(e) The parties further agree that if the County pursuant to the County Bond Guaranty has made a payment into the Retrofit Debt Service Reserve Account on account of a Deficiency...among other remedies **the County may proceed** directly against the Authority and the City in any available action at law or equity to recover any Deficiency payment made by the County under the County Bond Guaranty.

(f) The parties further agree that if the County pursuant to the County Swap Guaranty has made a periodic payment under a Qualified Interest Rate Management Agreement...among other remedies **the County may proceed** directly against the City in any available action at law or equity to recover any periodic payment made by the County under the County Swap Guaranty.

(Joint Stipulation of Facts, Exh. X, §§2(e) and (f)) (emphasis supplied). Sections 6.B.(f) of the 2003 Reimbursement Agreement set forth the other remedies made available **to the County**, and Section 7 provides that, if an Event of Default under the Agreement occurs, then **an Affected Party**, i.e. one of the parties to the Agreement, may pursue a remedy for breach. *(Joint Stipulation of Facts, Exh. X, §§6.B.(f) and 7).* Significantly, the Agreement does not provide that the County may pursue mandamus relief under the Debt Act against the City.

In summary, then, to the extent that the County has made payments under the County Retrofit Guaranty or the County Swap Guaranty, the right to seek recovery of those payments now belongs to the County, not the Trustee of the Retrofit Bonds. *Holloran*, 637 A.2d at 321. *See also Molitoris v. Woods*, 618 A.2d 985, 989-990 (Pa. Super. 1992) (Insurer which has paid claim

to insured may assert insured's claim against Tortfeasor). By entering into the 2003 Reimbursement Agreement with the Authority and the City, the County agreed that it would exercise its right to seek repayment from the Authority and/or the City "strictly in accordance with the terms and conditions of this Reimbursement Agreement," and the Reimbursement Agreement does not afford to the County the right to seek mandamus relief under the Debt Act.

In fact, the County has sought reimbursement from the Authority and the City for payments made by the County pursuant to the County Retrofit Guaranty and the County Swap Guaranty in two separate lawsuits, docketed in this Court to No.'s 2010-CV-14071 and 2011-CV-1618. In the 14701 case, the County seeks damages in the amount of \$6,743,197.25, and in the 1618 case, the County seeks damages in the amount of \$675,761.78. Both these amounts are included within the amount for which the Plaintiffs seek "first dollar" mandamus relief in this case. Pursuant to the doctrine of *lis pendens*, Plaintiffs' claims should be dismissed. See generally *County of Dauphin v. City of Harrisburg*, 24 A.3d 1083, 1094, n.13 (Pa. Cmwlth. 2011) ("The purpose of the *lis pendens* doctrine is to protect a defendant from being forced to defend multiple suits on the same cause of action at the same time.")

The Plaintiffs in this case cannot seek mandamus relief under the Debt Act for payments made by the County. The right to seek reimbursement for those payments may be asserted only by the County, and then only in accordance with the terms of the 2003 Reimbursement Agreement. For these reasons, and pursuant to the doctrine of *lis pendens*, Plaintiffs' requests for mandamus and equitable relief relating to the \$11,574,111.18 paid by Dauphin County under the County Retrofit and County Swap Guaranties should be denied.

**D. PLAINTIFFS CANNOT ASSERT CLAIMS FOR
MANDMUS AND EQUITABLE RELIEF BASED ON
AMOUNTS PAID BY THE COUNTY PURSUANT TO THE
2007 COUNTY GUARANTY**

(Case No. 2010-CV-11738)

Dauphin County also guaranteed the payment of the 2007 Notes. When the 2007 Notes matured in December, 2010, the County paid to the Trustee of the 2007 Notes the full amount due, \$34,685,000.00. (N.T., p. 55-56; *Joint Stipulation of Facts*, ¶33). On or about December 15, 2010, the holders of the 2007 Notes were paid in full. (N.T., p. 63).

In the section 3.13(b) of the 2007 County Guaranty, the County, the Authority and the Trustee (now TD Bank) agreed that:

To the extent that it makes any payments of Debt Service...the County shall become subrogated to all right title and interest of the person receiving such payments. **The County's right to reimbursement for such payments...shall be as set forth in the Reimbursement Agreement.**

(*Joint Stipulation of Facts*, Exh. Y, §3.13(b) (emphasis supplied). As it did in the County Retrofit Guaranty and the County Swap Guaranty, in the 2007 County Guaranty the County expressly agreed that its right to repayment would be governed by the 2007 Reimbursement Agreement entered into between the County, the City and the Authority. (*Joint Stipulation of Facts*, Exh. Z).

In the 2007 Reimbursement Agreement, the parties stated that they were entering into the Agreement "to provide for, among other things, their respective rights and obligations, including without limitation, repayments to the City and the County for amounts paid by each of them under their respective Guaranty plus other amounts specified in this Reimbursement Agreement." (*Joint Stipulation of Facts*, Exh. Z, p. 4). The parties incorporated their respective Guaranties into the 2007 Reimbursement Agreement (*Joint Stipulation of Facts*, Exh. Z, §1), and

provided that any failure by the City or the County to make a payment pursuant to its respective Guaranty would constitute a breach of the 2007 Reimbursement Agreement (*Id.*, §7.1). Like the 2003 Reimbursement Agreement, the 2007 Reimbursement Agreement then provides that:

The obligations of each party under this Reimbursement Agreement shall be absolute, unconditional and irrevocable, **and shall be fully performed strictly in accordance with the terms and conditions of this Reimbursement Agreement, under all circumstances whatsoever....**

(*Joint Stipulation of Facts*, Exh. Z, §4) (emphasis supplied).

If an Event of Default, as defined in Section 7.1 of the 2007 Reimbursement Agreement, occurs, then the Affected Party to the Reimbursement Agreement, in this case the County, may pursue a remedy for breach. Like the 2003 Reimbursement Agreement, however, the 2007 Reimbursement Agreement does not provide that the County may pursue mandamus relief under the Debt Act against the City.

Because the County paid off the 2007 Notes, the right to seek recovery of the payment which it made pursuant to the 2007 County Guaranty belongs to the County, not the Trustee of the 2007 Notes. *Holloran, supra; Molitoris, supra*. By entering into the 2007 Reimbursement Agreement with the Authority and the City, the County agreed that it would exercise its right to seek repayment from the Authority and/or the City “strictly in accordance with the terms and conditions of [the] Reimbursement Agreement,” and the Reimbursement Agreement does not afford to the County the right to seek mandamus relief under the Debt Act.

In its brief, Plaintiff TD Bank suggests that it may bring a suit for mandamus relief on the County’s behalf because the County is subrogated to the rights of the holders of the 2007 Notes. (*Brief of TD Bank*, p.p. 22-25). This argument ignores, however, that the County agreed in the

2007 Reimbursement Agreement to assert its own subrogation rights pursuant to the terms set forth in the 2007 Reimbursement Agreement.

The Commonwealth Court, in its recent decision in *County of Dauphin, supra*, affirmed this court's holding (by Senior Judge Brown, sitting by special designation) that the County could not pursue mandamus relief under Section 8261 of the Debt Act based on the City's failure to make payments under the 2007 City Guaranty. While acknowledging that the County "paid the deficiency amount of \$34,684,998.67 on December 15, 2010, pursuant to the 2007 County Guaranty," the Court nevertheless held that the County could not pursue mandamus relief because it "is not a 'holder' [of the 2007 City Guaranty] permitted to seek mandamus relief under Section 8261 of the Debt Act." *County of Dauphin*, 24 A.3d at 1090, n. 9, 1093. If the County now "stands in the shoes" of the holders of the 2007 Notes, as TD Bank now argues, then the Court should have allowed the County to proceed with its mandamus claim. Instead, the Court affirmed the dismissal of the County's claim for mandamus relief.⁶

Pursuant to the 2007 Reimbursement Agreement, which defines the County's, the Authority's and the City's obligations with respect to the 2007 City and County Guaranties, the County must now assert whatever claims it has for repayment. Recognizing that it must itself pursue its claim for reimbursement, the County commenced an action in this Court relating to the 2007 Notes which has been docketed to No. 2009-CV-14921-EQ. This action was the subject of the Commonwealth Court's ruling in *County of Dauphin, supra*. Pursuant to the doctrine of *lis pendens*, Plaintiffs' claims in this case should be dismissed. *See generally County of Dauphin v.*

⁶ The Commonwealth Court did reverse the lower court's dismissal of the County's claim for specific performance under Section 8104(b) of the Debt Act of the City's obligations under the 2007 City Guaranty, in part based on contractual rights given to the County by the language of the City Guaranty itself. As noted previously, the 2007 City Guaranty was incorporated into the 2007 Reimbursement Agreement.

City of Harrisburg, 24 A.3d 1083, 1094, n.13 (Pa. Cmwlth. 2011) (“The purpose of the *lis pendens* doctrine is to protect a defendant from being forced to defend multiple suits on the same cause of action at the same time.”)

The Plaintiffs in this case cannot seek mandamus relief under the Debt Act for payments made by the County. The right to seek reimbursement for those payments may be asserted only by the County, and then only in accordance with the terms of the 2007 Reimbursement Agreement. For these reasons, and pursuant to the doctrine of *lis pendens*, Plaintiff’s motion for mandamus and equitable relief relating to the funds paid by Dauphin County under the 2007 County Guaranty should be denied.

**E. BECAUSE PLAINTIFFS HAVE FAILED TO JOIN
INDISPENSABLE PARTIES TO THIS ACTION, THE
COURT LACKS SUBJECT MATTER JURISDICTION OF
PLAINTIFFS’ CLAIMS FOR RELIEF UNDER THE DEBT
ACT**

(Case No.’s 2010-CV-11737-CV and 2010-CV-11738-CV)

A party is generally regarded to be 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.” *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 567, 838 A.2d 566, 581 (2003) (quoting *Sprague v. Casey*, 520 Pa. 38, 48, 550 A.2d 184, 189 (1988)) See also *IYK Construction Company, Inc. v. Smithfield Township*, 8 A.3d 1009, 1015 (Pa. Cmwlth. 2010); 21 A.3d 1195 (Pa. 2011) (same). “[T]he basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of” him or her. *City of Philadelphia*, 575 PA. at 567, 838 A.2d at 581 (quoting *CRY, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 640 A.2d 372, 375 (1994). As the Commonwealth Court reiterated recently in *IYK Construction*:

The relevant analysis is sometimes said to require examination of the following factors:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

HYK Construction, 8 A.3d at 1015 (quoting *City of Philadelphia*, 575 Pa. at 567, n. 11, 838 A.2d at 581, n. 11).

“The failure to join an indispensable party to a lawsuit deprives the court of subject matter jurisdiction.” *HYK Construction*, 8 A.3d at 1015. See also *In re 2005 Sale of Real Estate by Clinton County Tax Claim Bureau*, 915 A.2d 719 (Pa. Cmwlth. 2007); *Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495 (Pa. Cmwlth. 2002). “Whether a court lacks jurisdiction due to the failure to join an indispensable party may be raised at any time or *sua sponte*.” *HYK Construction*, 8 A.3d at 1015. “In undertaking this inquiry, the nature of the claim and the relief sought must be considered.” *Id.*

As noted above, the City of Harrisburg is party to three separate collective bargaining agreements with unions representing the City’s police, fire and non-uniform employees. The mandamus relief sought by Plaintiffs under Sections 8261 and 8283 of the Debt Act, would preclude the City from paying its employees. Consequently, the entry of an Order granting Plaintiffs “first dollar” mandamus relief would also preclude the City from complying with both its collective bargaining agreements and the FLSA, and would certainly lead to additional litigation between the City and the unions representing its employees. See generally *CRY, Inc. v.*

Mill Service, Inc. 536 Pa. 462, 468, 640 A.2d 372, 375 (1994) “[A] court should not adjudicate a case if an absentee was so closely related to the matters in dispute that further litigation would probably be required to define the position of the absentee or to protect the defendant.”(quoting *Action Coalition v. Allegheny County Institution District*, 493 Pa. 302, 311, 426 A.2d 560, 564 (1981).

Applying the criteria for determining whether a party is indispensable, in this case each of the City’s unions, AFSCME Local 521, IAFF Local 428 and FOP Lodge No. 12 (hereinafter referred to collectively as “the City Unions”) has a right or interest – their right to receive their wages under both their contract with the City and the FLSA – directly related to Plaintiffs’ claim that, under the Debt Act, Plaintiffs are entitled to be paid before any of the City’s employees, vendors or other creditors. The nature of the City’s Unions’ right is their members’ contractual and statutory right to be paid for the services which they perform for the people of Harrisburg. For this reason, justice cannot be afforded in this case without violating the City Unions’ due process right to protect their members’ contractual and statutory right to receive their wages and benefits.

Moreover, the City Unions’ presence in this case is necessary in order to avoid the likely scenario of the City having to try to comply with inconsistent judgments from different tribunals. For example, if this Court orders the City Treasurer to apply the first dollar of City revenue to any amounts owed to Plaintiffs, a federal court, in suits brought by the City Unions, would direct the City to comply with the FLSA by paying its employees, and may also order the City to pay the liquidated damages provided for by Section 16 of the FLSA. Similarly, the Pennsylvania Labor Relations Board, in response to unfair labor practice charges filed by the City Unions, would order the City to honor its collective bargaining agreements by paying its employees. The

City's employees' right to payment of their wages in relation to Plaintiffs' right, if any, to "first dollar" relief under the Debt Act, needs to be determined in the same action, in order to avoid serial litigation and inconsistent judgments with which the City could not comply.

For these reasons, the City Unions are indispensable parties to this action, and, because Plaintiffs have joined the City Unions as parties, the Court lacks subject matter jurisdiction over Plaintiffs' claims for relief under the Debt Act. *See, e.g., HYK Construction*, 8 A.3d at 1015; *In re 2005 Sale of Real Estate by Clinton County Tax Claim Bureau*, *supra*; *Polydyne, Inc. v. City of Philadelphia*, *supra*.

Likewise, the holders of the City's general obligation debt are also indispensable parties to this action, because the grant of "first dollar" mandamus relief to Plaintiffs would render the City unable to pay when due the debt service on its general obligation debt. Plaintiffs have not cited any authority which suggests that it was the intent of the General Assembly to prioritize one form of municipal debt subject to the provisions of the Debt Act over another, and yet that is what the grant of "first dollar" mandamus relief would do. In addition, it could expose the City to the risk of "serial" mandamus claims, when the holders of the City's general obligation debt come to realize that they are not being paid.⁷ The holders of the City's general obligation debt must be afforded an opportunity to protect their interests, and Plaintiffs' failure to join them or their trustees as parties to this suit deprives the Court of subject matter jurisdiction of Plaintiffs' claims for relief under the Debt Act.

⁷ In this regard, the City Defendants note that they already face serial mandamus claims. Covanta, Inc. ("Covanta"), has brought suit against the City in a case docketed in this Court to No. 2010-CV-13120, in which Covanta, like the Plaintiffs in this case, seeks an Order granting it "first dollar" mandamus relief. Similarly, in cases brought by Dauphin County and Joseph and Jacalyn Lahr ("the Lahrs"), relating to the Retrofit Bonds, the Swap obligations and the 2007 Notes, and docketed in this Court to No.'s 2009-CV-9271-EQ and 2009-CV-14921-EQ, the Lahrs, again like the Plaintiffs in this case, seek mandamus relief under the Debt Act.

**F. THE COURT SHOULD REFUSE TO EXERCISE ITS
DISCRETION TO GRANT PLAINTIFFS "FIRST DOLLAR"
MANDAMUS RELIEF UNDER THE DEBT ACT**

(Case No.'s 2010-CV-11737-CV and 2010-CV-11738-CV)

The General Assembly enacted the Debt Act to implement Section 10 of Article IX of the Pennsylvania Constitution, as amended in 1968, which prescribes debt limits for municipal governments. The Debt Act includes a section of remedies which, according to the Local Government Commission which prepared the legislation, "are included to enable local government units to reduce interest costs as it is anticipated that resort to remedies will rarely occur." One of those remedies is §8261, which enacted a common law remedy that had been in use for at least 100 years before the adoption of the Debt Act. *See, e.g., Commonwealth ex. rel. Hamilton v. The Select and Common Councils of the City of Pittsburgh*, 34 Pa. 496 (1859). Generally, the 19th century cases in which writs of mandamus were sought against municipal officers deal with orders compelling them to assess and levy taxes to pay interest on bonds and retire them. *Id.*

The Select and Common Councils of the City of Williamsport v. Commonwealth ex rel. Bair and Shenk, 90 Pa. 498 (1879), involved a claim similar to that presented in this case. In a prior action, which had also reached the Pennsylvania Supreme Court, bonds issued by the City of Williamsport were held to be valid. The parties returned to the Court of Common Pleas, which, for nearly two years, was "constantly engaged in an attempt to enforce" the Supreme Court's decree. *City of Williamsport*, 90 Pa. at 502. Eventually, the Court ordered the Treasurer of Williamsport to show cause why "he should not apply the amount in his hands...in payment of overdue interest on the said bonds." *City of Williamsport*, 90 Pa. at 503. The Common Pleas Court, "after ascertaining that the withdrawal of the sum of \$8,000.00 from the treasury would

not embarrass, much less stop the wheels of the municipality for the fiscal year ending April 1, 1879," ordered the Treasurer to pay the overdue interest. *Id.* In affirming the Common Pleas Court, the Supreme Court endorsed the principle that mandamus "ought not to be enforced to the extent of withdrawing from the city treasury, the funds absolutely needed for the ordinary expenses of the city." *Id.*

To state this principle more generally, while a writ of mandamus compels the performance of a clear legal duty, courts nonetheless have the discretion not to issue the writ. The United States Court of Appeals for the Third Circuit elucidated this general principle in *City of Asbury Park, N.J. v. Christmas*, 78 F. 2d 1003 (3d Cir. 1935):

Assuming for present purposes the power of the court below in ordinary cases to issue a writ of mandamus upon a municipality to aid a judgment creditor in enforcing such judgment, it still remains the law, as stated by the Supreme Court of the United States in *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 211, 38 S. Ct. 99, 101, 62 L. Ed. 309, that: 'Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit.'

After due consideration, we are of opinion that sound judicial discretion does not warrant the exercise of such power at this time. In view of the efforts that are being made -- we assume in good faith -- by this municipality to provide to the limit of its power for the equity of treatment to all bondholders, we vacate the mandamus order granted, but direct the court to retain jurisdiction of the petition for the present.

Id.

This same general principle -- that the court should not exercise its discretion to enter an order in mandamus where to do so will work a public or private harm -- is the law in Pennsylvania. "The consideration of an order in a mandamus proceeding is discretionary, and if

the object sought to be obtained is oppressive, the courts will refuse to entertain the proceeding." *Sinking Fund Commissioners of Philadelphia v. Philadelphia*, 324 Pa. 129, 135 (citations omitted). More recently, the Pennsylvania Supreme Court has expressed the same general rule by noting that "although an action in mandamus lies on the law side of the court, equitable principles guide the issuance of the writ and any grant of incidental relief." *City of Pittsburgh v. Department of Transportation*, 490 Pa. 264, 269, 416 A.2d 461, 464 (1980). *See also Francis v. Corleto*, 418 Pa. 417, 429, 211 A.2d 503, 509 (1965) (same).

As noted above, in this case an order granting the "first dollar" mandamus relief sought by Plaintiffs under the Debt Act would work great harm to the citizenry of Harrisburg. Not only would the City immediately have to lay off its FLSA-covered police, fire and non-uniform employees, the City would also no longer be able to provide even the most public basic services, such as trash pick-up, the issuance of building and other permits, code enforcement and inspections, and the maintenance of City parks, streets and traffic control devices. As noted by the Secretary of DCFED in his December 15, 2010, determination that Harrisburg is a "distressed municipality" pursuant to the Municipalities Financial Recovery Act, 53 P.S. §11701.101, *et seq.*:

The net effect of the issuance of writs of mandamus against the City would be to prevent the City from paying its administrative employees, its police personnel, and fire fighters. Such an action would not simply diminish the City's ability to provide municipal services, it would eliminate the City's power to provide for the health, safety and welfare of its residents and workers.

(Exb. D-7).

When it enacted the Debt Act, the General Assembly could not have intended to create a framework for the payment of municipal debts that would elevate those debts, and the rights of the holders of those debts, above the rights of a municipality's residents to health, safety and

security. For these reasons, and because Plaintiffs and creditors like Plaintiffs possess a complete and adequate remedy at law by virtue of their ability to obtain and enforce a judgment against the City for any amounts which they are owed, the Court should refuse to exercise its discretion to award Plaintiffs "first dollar" mandamus relief.

IV. CONCLUSION

For the foregoing reasons, the City of Harrisburg and the Treasurer of the City of Harrisburg respectfully request the Court to enter an Order denying Plaintiffs' motions for mandamus and other equitable relief.

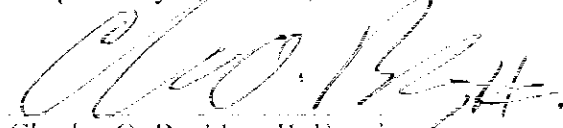
Dated: January 23, 2012

Of Counsel

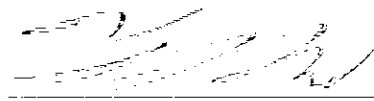
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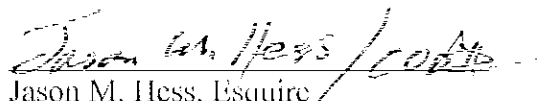
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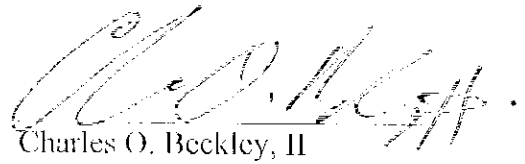
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