IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	)	
	)	
JEFFERSON COUNTY, ALABAMA,	)	**Case No. 11-05736-TBB**
a political subdivision of the State of	)	
Alabama,	)	**Chapter 9**
	)	
Debtor.	)	

OMNIBUS REPLY BRIEF IN SUPPORT OF PLAN CONFIRMATION

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Jefferson County, Alabama (the "County") files this omnibus reply (i) in further support of confirmation of the *Chapter 9 Plan of Adjustment for Jefferson County, Alabama (Dated November 6, 2013)* [Docket No. 2182], which made certain modifications to the *Chapter 9 Plan of Adjustment for Jefferson County, Alabama (Dated July 29, 2013)* [Docket No. 1911] (as it may be further supplemented, amended, or modified, the "Plan"[1]); and (ii) in response to the following objections to confirmation of the Plan:

- The objection filed by Andrew Bennett and certain purportedly similar ratepayers (the "Bennett Ratepayers") on July 30, 2013 [Docket No. 1920] (the "Original Bennett Objection"), and supplemented on October 10, 2013 [Docket No. 2132] (the "Supplemental Bennett Objection" and, together with the Original Bennett Objection, the "Bennett Objection"[2]);

- The objection filed by Charles Wilson and certain purportedly similar ratepayers (the "Wilson Ratepayers") on October 4, 2013 [Docket No. 2110] (the "Original Wilson Objection"), and amended on October 5, 2013 [Docket No. 2112] (the "Amended Wilson Objection" and, together with the Original Wilson Objection, the "Wilson Objection"); and

- Four one- to two-page filings – the objection filed by Charlotte Breece and Lillie Starks on October 6, 2013 [Docket No. 2116] (the "Breece/Starks Objection"), the letter objection filed by Betty J. Rodman on October 4, 2013 [Docket No. 2123] (the "Rodman Objection"), the letter objection filed by Frances E. Weems on October 7, 2013 [Docket No. 2124] (the "Weems Objection"), and the letter objection filed by Lucille Crawford on October 10, 2013 [Docket No. 2129] (the "Crawford Objection").[3]

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[1] Capitalized terms used but not otherwise defined in this omnibus reply have the meanings ascribed to those terms in the Plan.

[2] The Supplemental Bennett Objection was filed and received by the Court on October 10, 2013, three days after the October 7, 2013 deadline for objections to the Plan. On October 17, 2013, the Court entered an Order [Docket No. 2155] (the "Late Objections Order") ruling that the Supplemental Bennett Objection be stricken from the record as untimely filed.

[3] The Crawford Objection was received by Kurtzman Carson Consultants, LLC ("KCC"), the County's balloting agent, on October 10, 2013, and was filed on the docket by the County on the same day, which was three days after the October 7, 2013 deadline for objections to the Plan. The Late Objections Order struck the Crawford Objection from the record as untimely filed.

I. INTRODUCTION

The County's Plan should be confirmed. It is the result of extensive, arms' length, and good faith negotiations, and the Creditors have voted overwhelmingly in favor of the Plan. In addition to restructuring a substantial amount of general obligation, school warrant, and building authority indebtedness, the County's Plan slashes the outstanding sewer debt from approximately $3.2 billion to approximately $1.7 billion – a consensual reduction of nearly ***half*** of the outstanding principal. In addition to this reduction of the County's sewer debt, the Plan replaces the defaulted 1997 Sewer Warrant Indenture with a new financing that will give the County the flexibility it needs to make the substantial near-term capital improvements required by regulators while still retiring the debt in full in 40 years. By retiring the old debt and replacing it with the New Sewer Warrants in a reduced principal amount, the Plan ensures that the forgiven principal will never be reinstated or collectible while simultaneously making it possible for the County to refinance the lower principal amount on even more favorable terms if, as, and when circumstances permit.[4]

Although the Plan and its supporting materials span hundreds of pages, the County's path forward and out of bankruptcy is built on three basic principles:

Cost-Cutting by the County: The County Commission has made deep, structural changes to the County's operations and finances. In addition to hiring the County's first County Manager, this County Commission has cut over $100 million in General Fund expenditures by, *inter alia*, closing satellite courthouses, cutting staff and expenses in essentially every

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[4] Such circumstances might include, for example: (i) interest rates improving with the County's creditworthiness as the bankruptcy recedes into the past; (ii) lower-than-budgeted costs to comply with environmental regulations as technological advances lower the cost of compliance; and (iii) economic growth increasing sewer revenues without a correspondent increase in costs.

department, and drastically reducing services – including, in particular, closing inpatient services at Cooper Green Mercy Hospital. These measures fulfill a basic purpose of debt adjustment under chapter 9 – matching expenses to revenues. The County had to cut these costs because the County cannot generate additional revenue from new sources, given the lack of home rule and the State of Alabama's refusal to replace lost occupational tax revenue.

Concessions from the Creditors: Binding majorities of holders of all the County's long-term debt – including the Sewer Warrants, GO Warrants, School Warrants, and Bessemer lease trustee – voted to accept the reduction and restructuring of their debt. The County's sewer Creditors have agreed to write off nearly $1.5 billion in outstanding debt, with most retail investors giving up approximately 20 cents on the dollar, and the largest sewer creditor (JPMorgan Chase Bank, N.A.) writing off a significant amount of its investment (which concessions facilitated the greater than pro rata recovery by the other sewer creditors). These compromises offer the County and its Sewer System a "fresh start" from a history plagued by actual and potential litigations. In addition, the Plan restructures more than $1 billion of non-sewer debt by, among other things, converting risky variable-rate debt into fixed-rate debt and amortizing debt service to match revenues. The Plan provides for repayment in full of all non-sewer warrants on terms favorable to the County, which ultimately will help the County regain access to the capital markets.

Sustainable Sewer Rates: Finally, the Plan depends on a series of single-digit sewer rate increases that the County Commission – the only body constitutionally charged with the responsibility and obligation to fix sewer rates and charges – has determined, on the advice of a preeminent rate expert, to be reasonable, nondiscriminatory, feasible, and appropriate under the circumstances. These rates will generate the revenue the County needs to pay the three core

costs of operating the Sewer System: operations and maintenance ("O&M") expenses, capital expenditures ("CapEx"), and debt service on the New Sewer Warrants. No further payments will be made on the old sewer debt. That debt is being compromised and extinguished at approximately 54 cents on the dollar, a remarkable result for the County.

Two substantive objections to the Plan have been filed: the Bennett Objection and the Wilson Objection. (The other four objections are one- to two-page filings that raise no material objections to confirmation.) These objections pertain to the sewer-related portions of the Plan and take no issue with the remaining Plan terms. The objecting parties are individual ratepayers who speak only for themselves, not for ratepayers as a whole, and their collective objections boil down to a single, core complaint – that sewer rates are too high.

A permanent freeze on sewer rates is impossible. Among other things, simple inflation, ongoing capital requirements, and the good faith requirements of chapter 9 require future rate increases. The alternative to the gradual, single-digit rate increases provided for in the Plan is, using recent history as a guide, not lower rates but potentially a series of extreme rate spikes (perhaps 25% or more imposed by an unelected receiver), as well as possible loss of operational control of the Sewer System to either an agent of the creditors or to a federal receiver installed at the behest of the Environmental Protection Agency if the County does not have access to the capital budgets available under the Plan to comply with environmental laws. Thus, the real issue is not ***whether*** sewer rates will increase, but by how much they will increase and how rapidly. In the legislative judgment of the County's elected officials, the global settlement embodied in the Plan results in the lowest feasible level of sewer rate increases. Accordingly, the objectors' core complaint is without merit.

Also without merit are the various permutations of the objectors' basic argument – whether styled as challenges to the lawfulness of various Plan components, *see* 11 U.S.C. §§ 943(b)(4) (debtor must not be "prohibited by law from taking any action necessary to carry out the plan") & (b)(6) (debtor must obtain "any regulatory or electoral approval necessary under applicable nonbankruptcy law in order to carry out any provision of the plan"),[5] or feasibility, *see id*. § 943(b)(7) (plan must be "feasible"),[6] or any other legal requirement (applicable or otherwise).[7] As set out in more detail below, and as the evidence at the Confirmation Hearing will demonstrate, the Plan is lawful, *see* Point II, and feasible, *see* Point III, and is due to be confirmed notwithstanding any other complaints of the objectors, *see* Point IV. In addition to these substantive reasons why the objections are meritless, there is a further question of whether the Wilson Objection should even be considered on account of the participation of James White, an attorney and former fiduciary of the County, as a putative "expert" in support of the Wilson

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5 Most of the objections seem to fall into this category. *See, e.g.*, Original Bennett Obj. at 4-29 (myriad arguments under a heading claiming that the "acceleration and refinancing of sewer warrants" under the Plan is "prohibited by law"); Amended Wilson Obj. at 11-21 (host of state-law-based arguments concerning ratemaking and refinancing of warrant indebtedness).

6 Original Bennett Obj. at 34 (one-paragraph assertion that the County "has presented no economic data showing the rate increases are feasible based upon the projected Median Income of the service area are [*sic*] required by the EPA and common sense"); Amended Wilson Obj. at 25 (citing the feasibility standard of section 943(b)(7) and asserting "a glaring lack of evidence, information, or identification of any study, plan, market research, or cost projection the County has done or will do to determine" feasibility).

7 The bulk of the arguments in the various objections do not appear to relate to the prerequisites to plan confirmation specified in section 943(b). Rather, the arguments in this "catch-all" category concern issues such as notice, *see* Amended Wilson Obj. at 4-10, disclosure-statement-type complaints, *id*. at 20-25, and pro se objections that, for example, "[m]y water bills have been inflated," Rodman Obj. at 1; *accord* Crawford Obj. at 1 ("water bills are entirely too high"), or "I want my billing address restored to my home address," Rodman Obj. at 2, or that notices approved by the Court are "written in a manner that is purposefully non comprehensive [*sic*] to … an average reader," Weems Obj. at 1.

Objection. As detailed in Point V below, White's report (the "White Report") and affidavit (the "White Affidavit") should be disregarded.[8]

II. ALL COMPONENTS AND PROVISIONS OF THE PLAN ARE LAWFUL AND APPROPRIATE

The objectors' challenges to the legality of the Plan generally fall into three categories: (1) challenges to the Approved Rate Structure; (2) arguments concerning the refinancing incident to the Plan; and (3) miscellaneous procedural objections. Each category is addressed in turn below.

A. The Approved Rate Structure Is Lawful and Proper

1. The County Commission Is Vested with Full Operational and Ratemaking Authority Over the Sewer System As it Exists Today

The objectors fail to acknowledge this fundamental point of Alabama law: the County has broad discretion to fashion sewer rates and run the Sewer System. Amendment 73 vests the County Commission – not the objecting parties or anyone else – with operational and ratemaking authority over the Sewer System. Amendment 73 provides that the County Commission has "full power and authority to manage, operate, control and administer" the Sewer System, "and, to that end, [to] make any reasonable and nondiscriminatory rules and regulations fixing rates and charges, providing for the payment, collection and enforcement thereof, and the protection of its property." *Id.* *See also* 1900-1 Ala. Acts 1702 (original legislation giving the County the authority to build and operate a sanitary district in order to "protect and preserve the health of the inhabitants of Jefferson [C]ounty, Alabama"); Act 716, 1900-1 Ala. Acts 1722 (companion law

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[8] The White Report and White Affidavit were filed as Exhibits B and C, respectively, to the Amended Wilson Objection.

authorizing the governing body of the County to levy a tax and maintain the sewer with proceeds of the tax).

Without limiting the County's constitutional authority under Amendment 73, the Alabama Legislature expressly authorized the County to set rates and charge users of the Sewer System in Act 619.[9] *See* Act No. 619, 1949 Ala. Acts 954, *et seq.* Act 619 provides in relevant part:

> Section 3. Said county commission is hereby authorized to levy sewer rentals or service charges (in this act sometimes referred to as "service charges") upon, and collect such service charges from, the persons and property whose sewage is disposed of or treated by the sewer system of the county, whether such persons or property are served by the part of the sewerage system then being constructed, improved or extended or by some other part of the system.
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> * * *
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> Section 6. (a) The county commission shall prescribe and from time to time when necessary revise a schedule of such service charges which shall, in any event, be such that the revenues derived therefrom will at all times be adequate but not in excess of amounts reasonably necessary to pay all reasonable expenses of operation and maintenance of the sewerage system, including reserves and insurance, and to make any necessary or appropriate replacements, extensions and improvements thereto, and to pay punctually the principal of and interest on any bonds issued by the county pursuant to the Jefferson County Sewer Amendment and to maintain such reserves or sinking funds therefor as may be required by the terms of any contract made by the county commission to secure payment of such bonds an interest thereon.

Id. at 955–57.

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[9] While the Alabama Supreme Court in *Shell v. Jefferson County*, 454 So. 2d 1331 (Ala. 1984), struck down a portion of Act 619 as impermissibly attempting to limit the amount of the sewer charges the County was authorized to levy under self-executing Amendment 73, *see id.* at 1337, the remainder of the Act is valid and confers broad powers to levy sewer charges, *see Hilgers v. Jefferson Cnty.*, — So. 3d —, 2013 WL 3155015, at *4 (Ala. Civ. App. June 21, 2013).

The Alabama Supreme Court has held that Act 619 "delegates to the Jefferson County Commission the legislative power to set sewer service rates." *Jefferson Cnty. v. City of Leeds*, 675 So. 2d 353, 355 (Ala. 1996).

The Wilson Ratepayers incorrectly argue that the final paragraph[10] of Amendment 73 prohibits the County from levying sewer charges to pay debt service on any debt of the County other than original issue debt. *See* Amended Wilson Obj. at 14-15. In support of this argument, they assert that Amendment 73 "prohibits the imposition of sewer charges and rentals pursuant to the amendment to pay for principal or interest after the bonds [originally authorized by Amendment 73] have been retired." Amended Wilson Obj. at 14. In other words, they claim that Amendment 73 mandates a "pay as you go" approach to funding the capital expenses of the Sewer System, *see id.* at 15, and that the County Commission is disabled from addressing the realities of the Sewer System as it exists today, including by refinancing or refunding prior debt.

The objectors overlook a fatal problem with that argument: the Alabama Supreme Court has rejected this construction of Amendment 73. In *Shell*, 454 So. 2d 1331, the County's authority to issue bonds under Amendment 73 had expired, and the County proposed to issue bonds under a general act of the Alabama Legislature that applied to all counties (specifically, Section 11-81-160, *et seq.*, of the Alabama Code, which is commonly referred to as the "Kelly Act"). Among other arguments, the *Shell* defendants and intervenors asserted that Amendment

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[10] The final paragraph of Amendment 73 reads:

> The authority to issue bonds shall cease December 31, 1958. The authority to levy and collect sewer charges and rentals shall be limited to such charges as will pay the principal of and interest on the bonds and the reasonable expense of extending, improving, operating and maintaining said sewers and plants; and when the bonds shall have been paid off, service charges and rentals shall be accordingly reduced, it being the intent and purpose of this amendment that the expenses of needed improvements and extensions and maintenance and operation of the sewers and sewerage treatment and disposal plants and no other expenditures shall be paid from such service charges and rentals.

73 prohibited the County from issuing revenue bonds and setting sewer rates to cover debt service on the bonds. 454 So. 2d at 1333. The Alabama Supreme Court rejected the notion that "the language of the last paragraph of Amendment No. 73 refers to a sewerage system frozen in time." *Id.* at 1335-36. The court further stated that "Amendment 73 clearly authorizes the County to set rates for sewer services." *Id.* at 1337. *Shell* clarifies that Amendment 73 does not limit the means by which the County can borrow money – the County can issue bonds or warrants just like any other county in Alabama.[11] Therefore, *Shell* forecloses the Wilson Ratepayers' restrictive interpretation of Amendment 73.

2. The Approved Rate Structure Is Reasonable

The objectors are also off base in their contention that the Approved Rate Structure under the Plan is not reasonable. A prevailing theme in both the Bennett Objection and the Wilson Objection is that the rates embodied in the Approved Rate Structure are too high. Although this complaint is occasionally framed as a challenge to the Plan's feasibility, *see, e.g.*, Original Bennett Obj. at 36-44; Supp. Bennett Obj. at 7, the Bennett Ratepayers and Wilson Ratepayers also attempt to ground their argument in the "reasonableness" requirement of Amendment 73, *see* Supp. Bennett Obj. at 7-8; Amended Wilson Obj. at 23-24; White Report at 2-6.

Under Alabama law, utility rate-making is legislative in character. *See, e.g.*, *Ala. Metallurgical Corp. v. Ala. Pub. Serv. Comm'n*, 441 So. 2d 565, 570 (Ala. 1983) ("Regulation of

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[11] Subsequent Alabama Supreme Court decisions have affirmed *Shell*'s vitality. In *Lunsford v. Jefferson County*, 973 So. 2d 327 (Ala. 2007), the Alabama Supreme Court reaffirmed that Amendment 73 "[c]learly … does not contemplate the elimination of charges; in fact, it contemplates the continuation of the collection of service charges and rentals after the payment of the last of the bonded indebtedness." 973 So. 2d at 331. And just this year, the Alabama Court of Civil Appeals stated, "[t]he language our supreme court relied upon [in *Lunsford*] makes it clear that, even after the bonds issued under the Amendment [73] have been paid, Jefferson County could continue to levy and collect sewer-service charges to cover 'the expenses of needed improvements and extensions and maintenance and operation of the sewers and sewerage treatment and disposal plants.'" *Hilgers*, 2013 WL 3155015, at *4.

utility rates is purely a function of the legislature."); *Water Works & Sanitary Sewer Bd. v. Sullivan*, 69 So. 2d 709, 712-13 (Ala. 1953) ("Rate making for a public utility service is legislative in character …."). As this Court has previously concluded in an analogous context,[12] this is important because Alabama law affords significant deference to the legislative act of ratemaking, and rates enjoy a presumption of validity. *See, e.g.*, *Marshall Durbin & Co. v. Jasper Util. Bd.*, 437 So. 2d 1014, 1019 (Ala. 1983) ("The presumption is in favor of the legality of the rate established by the rate making authority." (citations and internal quotation marks omitted)); *Cont'l Tel. Co. of the S. v. Ala. Pub. Serv. Comm'n*, 427 So. 2d 981, 984 (Ala. 1982) ("Stated succinctly, 'this Court neither makes the rates nor substitutes its judgment for that of the legislative agency fixing rates.'" (quoting *Ala. Power Co. v. Ala. Pub. Serv. Comm'n*, 359 So. 2d 776, 778 (Ala. 1978))).

The extensive information-gathering process and deliberation reflected in the *Resolution of the Jefferson County Commission*, dated November 6, 2012 (the "2012 Resolution") and the *Resolution of the Jefferson County Commission*, dated September 23, 2013 (the "2013 Resolution," and, together with the 2012 Resolution, the "Resolutions") demonstrate that the Commission undertook the ratemaking process with great care and studied deliberation, reaching "a fair, enlightened and independent judgment in the light of all the relevant facts." *Birmingham Elec. Co. v. Ala. Pub. Serv. Comm'n*, 47 So. 2d 455, 460 (Ala. 1950). The multiple public hearings and robust evidentiary record compiled as part of the ratemaking process allowed the

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[12] *See* Tr. of Jan. 17, 2013 H'rg at 52:2–53:5 (approving order *in limine* to preclude the use of testimony of County Commission members with respect to their reasons for adopting resolutions and noting that "it is pretty clear under Alabama law that rate setting, whether it is by a County Commission, or a city water board or, indeed, the public service commission, has been held by the Alabama Supreme Court to be legislative and that the scope of inquiry is irrelevant and inadmissible and it is not even evidence"). *See also Order on Debtor's Motion in Limine and for a Protective Order* [Docket No. 1622].

County Commission to reach a result that is supported by "substantial evidence," *Marshall Durbin*, 437 So. 2d at 1024, and is not "'arbitrary or discriminatory,'" *id.* at 1019 (quoting *Benson v. City of Andalusia*, 195 So. 443, 445-46 (Ala. 1940)).

In addition to the deference afforded the County Commission in the exercise of its ratemaking authority, the Approved Rate Structure must be considered as one integral component of "a series of arms-length, and interlocking compromises and settlements, including with respect to numerous complex and interwoven issues concerning the operation and financing of the Sewer System, and such settlements will … fully and finally resolve more than five years of resource-consuming litigation and allow the County to exit bankruptcy by the end of 2013." 2013 Resolution Recital ¶ K. The Bennett Ratepayers and Wilson Ratepayers cannot disrupt this comprehensive settlement unless they can establish that it "fall[s] below the lowest point in the range of reasonableness." *Martin v. Pahiakos (In re Martin)*, 490 F.3d 1272, 1276 (11th Cir. 2007). The evidence presented at the Confirmation Hearing – including the testimony of the County's expert rate consultant – will confirm the reasonableness and appropriateness of the Approved Rate Structure.

Through James White, the Wilson Ratepayers argue that "the County has submitted no valuation or any other basis for determining whether the sewer system has a 'used and useful' value anywhere near the $2 billion approximate amount of proposed debt." White Report at 6. This assertion misunderstands how the County Commission set the County's rates. The County has not used the private utility model of which the "used and useful" test is a part. Instead, after obtaining nearly $1.5 billion in reduction to the principal amount of its sewer debt, the County has used a revenue requirements method to set rates. This traditional approach is well-accepted and is certainly not an abuse of discretion, arbitrary, capricious, or otherwise contrary to

standards governing legislative ratemaking. The County has control over the method it uses, and ratemaking – despite what White may assert – is not "determined with mathematical precision or the use of any set formula or formulae." *Birmingham Elec. Co.*, 47 So. 2d at 459.

Another of White's objections is that the sewer creditors are not taking a deep enough haircut because, even though principal is being reduced by nearly 50%, projected interest is higher. White claims that "there is for the County no difference between principal and interest insofar as the obligation of the County to pay is concerned." White Report at 4. But White is wrong. The County's new debt structure under the Plan allows it flexibility to refinance its debts without the need to reduce principal payments. The County may be able to reduce its interest obligations by refinancing as it puts this bankruptcy Case further behind it.[13]

But the greatest flaw in White's argument is the baseline from which it starts: "[P]roposed total debt service is $854 million more than the debt service contracted for as of September 30, 2013." *Id*. What debt service has been "contracted for as of September 30, 2013"? If White is referring to the debt service due under the current Sewer Warrant Indenture, then the comparison is grossly misleading. There is an outstanding money judgment against the County for more than $500 million, which judgment is immediately due and owing (save only for the pendency of this Case). In addition, outside of bankruptcy, the entire $3.2 billion in sewer debt is subject to acceleration. If accelerated, there would be no debt ***service*** payment obligation – only a contractual obligation to immediately tender $3.2 billion, which is no alternative at all. Indeed, even if the County could theoretically access the capital markets to

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[13] Moreover, a cramdown plan based on a non-consensual write down of the existing debt would still require the County to pay interest under section 1129(b)(2) of the Bankruptcy Code. White's hypothetical, conclusory, and unsupported allegation that principal should be lower does not account for the potentially higher interest costs to the County under a non-consensual plan.

borrow $3.2 billion in new sewer debt (which it cannot), such a further borrowing would necessitate market rates for the financing, which undoubtedly would be well in excess of the rates associated with the New Sewer Warrants and result in staggeringly more aggregate debt service over a 40-year term. In short, repaying $1.7 billion at a market rate of interest results in lower debt service (and thus lower sewer rates) than paying $3.2 billion at a market rate of interest. White's comparisons are of "apples to oranges" and have no basis in reality. Rather, what White really seeks to contrast the Plan with is a hypothetical alternative financing plan under which the County's creditors agree to even deeper concessions – or perhaps agree to just write off all $3.2 billion of sewer debt. That is an exercise in fantasy, not financial planning. And it is not grounds to deny confirmation of the Plan.

3. The Approved Rate Structure Is Non-Discriminatory

There is also no merit to the objectors' contention that the Approved Rate Structure is discriminatory. Amendment 73 requires that sewer rates and charges be "nondiscriminatory." The Wilson Ratepayers advance the novel and unsupported theory that the Approved Rate Structure unlawfully discriminates against future ratepayers because the debt service costs in the latter years of the 40-year period contemplated by the Further Amended Financing Plan are greater than the debt service costs in the initial years, and thus future ratepayers "pay substantially more than their pro rata share" of total debt service costs. Amended Wilson Obj. at 17.

This argument replaces the applicable legal requirement – "reasonable and nondiscriminatory rules and regulations fixing rates and charges," the standard under Amendment 73 – with a newly-invented requirement that each ***component*** of a particular rate must be static over time. *See* White Report at 7 ("An equitable, nondiscriminatory sharing of support for the sewer asset base would require ratepayers using those assets in any year to fund

1/40th of the total debt service incurred for those assets."). Unsurprisingly, the Wilson Ratepayers are unable to marshal any authority supporting their creative interpretation of Amendment 73 and rely totally on classic circular reasoning. The only citations in the pertinent portion of the Amended Wilson Objection are to the report of their "expert," James White, who appears to have simply copied and pasted this section of the Original Wilson Objection into his report.[14]

Nothing in Amendment 73 or Act 619 requires a level debt service approach. To the contrary, the case law on discriminatory rates is primarily concerned with whether, at any given time, there is uniformity and the absence of discrimination among rate classes. *See, e.g., Mobile v. Bienville Water Supply Co.*, 130 Ala. 379, 384-85 (1900) (in the context of a water supply company, discussing how "[a]ll persons are entitled to have the same service on equal terms and on uniform rates" because "[t]here must be equality of rights to all and special privileges to none, and if this is violated, … the humblest citizen has the right to invoke the protection of the laws equally with any other" (citations and internal quotation marks omitted)).

The rates embodied in the Approved Rate Structure are not discriminatory because they do not single out any ratepayer or class of ratepayer for unequal treatment. The evidence will further demonstrate that what James White pejoratively calls a "heavily back-loaded" debt structure, White Report at 11, is actually a carefully calibrated financing plan that will allow the County to make the substantial near-term capital improvements required by the Sewer System's NPDES permits without borrowing and using Sewer System revenues that under a level repayment plan would be required to service debt. Accordingly, the Plan does not "mimic[] the

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[14] On information and belief, White is not a rate consultant or an expert on rate structure. The County reserves all rights with respect to this issue.

financial strategy of earlier County Commissions who dealt with an overbuilt, overleveraged system by backloading debt service payments" to "kick[] the can down the road," as White claims. *Id*. at 7. To the contrary, the Plan provides for relatively level, predictable sewer rates by directing revenues in the near term to capital improvements and then shifting those same revenues to debt repayment once the County has complied with the stringent new environmental regulations that are coming into effect. In fact, given that the substantial near-term capital improvement requirements will benefit generations of ratepayers to come, rates sufficient to pay for those improvements ***plus*** level debt service would violate White's novel interpretation of the requirement that rates be non-discriminatory. But in any event, as the evidence at the Confirmation Hearing will show, the Wilson Ratepayers' interpretation of Amendment 73's non-discrimination provision is not consistent with any recognized theory of ratemaking.

4. The Approved Rate Structure Does Not Remove Ratemaking Authority From Future Commissions

The objectors' claim that the Approved Rate Structure intrudes upon the authority of future County Commissions also provides no impediment to confirmation. The Wilson Ratepayers argue that the 40-year schedule of contemplated rate increases embodied in the Approved Rate Structure "severely circumscribes future County Commissions from exercising their constitutional responsibility to" set rates. Amended Wilson Obj. at 18. *See also* White Report at 2 ("[T]he County has committed itself as a matter of contract to 40 years of rate increases prior to any public hearings or consideration of the rate resolution itself."). Similarly, the Supplemental Bennett Objection asserts that the Approved Rate Structure "locks in the County's future rate setting and spending decisions [in] violation of [Bankruptcy Code section] 904." Supp. Bennett Obj. at 20. These arguments evince a fundamental misunderstanding of the Plan and the Approved Rate Structure.

The Approved Rate Structure does not fix rates for the next 40 years. Rather, each year – after notice and a public hearing – future Commissions will use Adjusting Resolutions to increase or decrease the rates and charges specified in the 2013 Resolution, to implement some or all of the adjustments by means of the Non-Uniform Method, or to modify the existing categories of user charges. The only limitation on the ability of future Commissions to set rates is that the Sewer System must be self-sustaining; that is, the aggregate user charges must be sufficient to cover projected operating expenses, capital expenses, and debt service. If, in any given year, no increase in user charges is necessary in order to cover such costs, then the Commission need not implement any increase.

In this regard, the Approved Rate Structure is no different from the rate covenant that White supported in his 1983 testimony on behalf of the County in the warrant validation proceeding that would ultimately give rise to the Alabama Supreme Court's *Shell* decision. In that testimony, White opined that a rate covenant that obligated the County to maintain rates at a level sufficient to fund the System and pay debt service costs was a "customary" and "universal[]" requirement in revenue bond financings. *Transcript*, *Jefferson Cnty. v. Taxpayers & Citizens of Jefferson Cnty.*, Case No. CV-83-504-507-WAT (Jefferson Cnty. Circuit Ct. November 22, 1983), at 61:14-62:2, attached hereto as **Exhibit A**. Here, too, the requirement that the Sewer System remain self-sustaining – *i.e.*, that rates generate sufficient revenue to pay O&M, CapEx, and debt service – is appropriate and customary. Future County Commissions will retain full authority to determine ***how*** such rate revenue is generated (that is, the precise combination and amount of base charges, volumetric charges, and surcharges), subject only to the "customary" and "universal" requirement that the Sewer System support itself. That is neither unreasonable nor discriminatory.

B. The Refinancing Is Lawful and Proper

1. The Various Arguments of the Bennett Ratepayers Lack Merit

The Bennett Ratepayers present no meritorious arguments in their objection. The bulk of the Bennett Objection is devoted to arguing that approximately $1.6 billion in sewer indebtedness can be "voided" more than a decade after that indebtedness was originally incurred, and thus the County struck a bad deal by settling with the sewer creditors. Specifically, as of October 17, 2013, the Bennett Ratepayers' "obvious[ ]" position "is that [the County] left three hundred million dollars on the table." Tr. of Oct. 17, 2013 H'rg at 45:14-17. In more recent pleadings, they assert that their alleged claims will be redressed if the Sewer System debt is reduced to $2 billion. *See Motion to Alter or Amend or For Relief From a Final Judgment Pursuant to Rules 9023 and 9024 of the Bankruptcy Rules of Procedure* [Docket No. 2174] ¶ 3.

Notably, under either metric proposed by the Bennett Ratepayers – "three hundred million dollars left on the table" as of October 17, or a reduction of the total sewer debt to $2 billion – the County has surpassed what the Bennett Objection demands (which demands are thoroughly baseless in any event). Specifically, in the weeks following the October 17 hearing, the County secured an additional $300 million in creditor concessions necessary to make the Plan work with current interest rates. And upon consummation of the Plan, the Sewer System's indebtedness will be reduced to approximately $1.74 billion – the original principal amount of the New Sewer Warrants. Accordingly, the Bennett Objection can be overruled on the sole ground that it is moot – the relief sought has already been obtained.

But insofar as the Bennett Ratepayers' theories and calculations are moving targets, and without prejudice to the County's position that the Bennett Ratepayers lack standing (as discussed in Point III.C, *infra*), the County offers the following responses to the argument in the

Bennett Objection that $1.6 billion in debt can just be written off because it was allegedly incurred improperly:

First, the Bennett Ratepayers cite no authority for the proposition that any of the Sewer Warrants can be "voided" and unwound so long after they were issued – and certainly not without years of costly, risky litigation. As just one example of the hurdles that would be faced, "voiding" the warrants would require resurrection of the debts that existed before the warrants were executed and thus upending entire constellations of ancillary contracts (including, without limitation, municipal insurance contracts, other swaps, and standby warrant purchase agreements). Under far less onerous circumstances, courts have denied equitable relief out-of-hand.[15] Relatedly, the equitable defense of laches – which bars the assertion of claims when "the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties as to render it difficult if not impossible to do justice," *Ussery v. Darrow*, 188 So. 885, 888 (Ala. 1939) – would likely prevent any court from taking money from holders of previously-refunded Sewer Warrants, as would be required to "unwind" the warrants. This is especially true when, as here, the facts underlying the claim of invalidity were apparent as soon as the structure of the relevant warrants was made public more than ten years ago.

Second, the Bennett Ratepayers' arguments fail on the merits because they fail to state any legally cognizable cause of action. *See generally Jefferson County's Motion to Dismiss*

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[15] *See, e.g., In re Lukens Inc. S'holders' Litig.*, 757 A.2d 720, 728 (Del. Ch. 1999) (dismissing rescission claim seeking to undo a merger transaction without regard to the merits of the plaintiffs' claims); *McKesson HBOC, Inc. v. New York State Common Retirement Fund, Inc.*, 339 F.3d 1087, 1096 (9th Cir. 2003) (affirming denial of leave to amend complaint to add claims seeking to unwind a merger agreement four years after execution because "unscrambling this particular egg is virtually impossible"). The Bennett Ratepayers' invocation of *Brown v. Minor Heights Fire District*, 221 B.R. 849 (Bankr. N.D. Ala. 1998), ignores that the swap transactions are orders of magnitude more complicated to unwind than the real-estate transaction voided in that case.

Plaintiffs' Second Amended Complaint for a Declaratory Judgment and Injunctive Relief [Docket No. 68 in Adv. Proc. No. 12-00120-TBB]. In brief:

- Section 94 of the Alabama Constitution, which provides that "[t]he legislature shall not have power to authorize any county … to lend its credit … by issuing bonds or otherwise," is not violated by "ordinary commercial contract[s] with an individual or corporation whereby benefits flow to both parties and there is consideration on both sides." *Guarisco v. City of Daphne*, 825 So. 2d 750, 753 (Ala. 2002). *See also Rogers v. City of Mobile*, 169 So. 2d 282, 279 (Ala. 1964) (stating that Section 94 does not apply when a municipality's "obligations and the proposed agreements are expressly limited to revenues from the project and to moneys incidental thereto").

- The Bennett Ratepayers' reading of Amendment 73 is foreclosed by *Shell*, 454 So. 2d at 1335, which rejected the argument that Amendment 73 "refers to the authority to issue all sewer bonds" such that any debt having anything to do with the Sewer System is subject to a vote of the people.

- Section 222 of the Alabama Constitution is inapplicable because it applies to bonds, not warrants. *See O'Grady v. Hoover*, 519 So. 2d 1292, 1297 (Ala. 1987) ("For more than 80 years, this Court has consistently held that § 222 is not applicable to interest-bearing warrants.").

- The Bennett Ratepayers' arguments concerning Section 223 of the Alabama Constitution fail under *Oliver v. Water Works & Sanitary Sewer Board*, 73 So. 2d 552, 555 (Ala. 1954), which held that charging rates for the use of a sewer system was not forbidden by Section 223 even though the municipality intended to use the revenue generated by the rates to expand the sewer system.

- Section 224 of the Alabama Constitution does not apply to limited-obligation debts. *Norton v. Lusk*, 26 So. 2d 849, 854 (Ala. 1946).

The foregoing is not an exhaustive list of the deficiencies in the Bennett Ratepayers' legal theories, but it does suffice to demonstrate that the settlements embodied in the Plan – which reduce the sewer debt by nearly 50%, on a fully consensual basis – are far preferable to litigating the Bennett Ratepayers' various theories for years to come. Even assuming merits that the Bennett Ratepayers' arguments do not have, the Bennett Ratepayers have advanced no analysis under which their theories could achieve results more favorable to the County than the Plan. To

the contrary, if the County were to abandon the Plan and resort to litigation, sewer rates would likely increase sharply at the hands of an unelected receiver – either appointed by the state court at the behest of the creditors, or appointed by a federal court to remedy the violations of the Clean Water Act caused by the absence of capital expense funding that is available only under the Plan.

2. The New Sewer Warrants May Appropriately Have a 40-Year Term

The Wilson Ratepayers erroneously assert that Alabama Code Sections 11-28-2 and 11-28-4 prohibit the County from issuing refunding warrants with a maturity date beyond 40 years after the *original* issue date of the warrants being refunded. *See* Amended Wilson Obj. at 20-21; White Report at 7-8.

The New Sewer Warrants will be issued under Alabama Code Section 11-28-4, which states in relevant part that:

> Each county may at any time and from time to time issue refunding warrants for the purpose of refunding refundable debt then outstanding, whether such refunding shall occur before, at or after the maturity of the refundable debt to be refunded, and such refunding warrants shall be governed by the provisions of this chapter as and to the same extent applicable to warrants authorized in section 11-28-2.

Ala. Code § 11-28-4. The applicable maturity limitation for the refunding warrants, in turn, is provided in Section 11-28-2, which varies the permissible maturity limit depending on the size of the county:

> The warrants may … have a maturity or maturities not exceeding 30 years ***from their date***, except that in counties having a population of 98,500 inhabitants or more, … warrants … may have a maturity or maturities ***not exceeding 40 years***, may bear interest from their date at the rate or rates payable in the manner at the times, may be payable at the place or places within or without the State of Alabama, may be sold at the time or times and in the manner, whether publicly or privately, may be executed in the manner, and may contain the terms not in conflict with the provisions of this chapter, all as the county commission of the county may provide in

> the proceedings pursuant to which the warrants are authorized to be issued.

Ala. Code § 11-28-2 (emphasis added).

There is no ambiguity in this language, which clearly provides that the maturity limitation is measured from the date of the refunding warrants ("from their date" – with "their" referring to the refunding warrants) – not the date of the original warrants being refunded. In this regard, the statute is similar to the statute addressed by the Alabama Supreme Court in *Taxpayers & Citizens of Lawrence County v. Lawrence County*, 143 So. 2d 813 (Ala. 1962), which concerned a maturity limitation applicable to refunding warrants that was held not to be dependent on the issue date of the original warrants. The relevant statutory provision provided that "no contract for the construction or repair of any public roads, bridge or bridges, shall be made where the payment of the contract price for such work shall extend over a period of twenty years." *Id.* at 815. Lawrence County proposed to issue refunding warrants some of which had maturities more than 20 years after the issue date of the original warrants being refunded. The court held that "the county is not precluded from issuing refunding warrants even though some of them mature more than 20 years after the issuance of the outstanding warrants for which they are to be exchanged." *Id.* at 816. There is no meaningful basis on which to differentiate *Lawrence County* from the statutory provisions governing the permitted maturity of the warrants proposed to be issued by the County.

3. The Plan Appropriately Provides for the Incurrence of Indebtedness Under Bankruptcy Code Section 364

The Bennett Ratepayers at one point objected to the County's request that the issuance of New Sewer Warrants be approved pursuant to Bankruptcy Code section 364, *see* Original Bennett Obj. at 32-33, though they omitted that argument in the Supplemental Bennett

Objection. Regardless of whether the Bennett Ratepayers are still advancing this objection, it is meritless and should be overruled for several reasons.

First, the Bennett Ratepayers point to no provision of the Bankruptcy Code that precludes the County from seeking approval of financing under section 364 as part of a chapter 9 plan, and the statutory authorization for such a plan provision exists in section 1123(b)(6)'s broad invitation for a plan to "include any other provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6); *see also id.* § 901(a) (providing that sections 364(c), 364(d), 364(e), and 1123(b) apply in chapter 9); *In re Lehman Bros. Holdings, Inc*., 487 B.R. 181, 190 (Bankr. S.D.N.Y. 2013) ("Section 1123(b)(6) is a broadly-worded, open-ended invitation to the creativity of those who are engaged in drafting plan language …. This amounts to a green light for those engaged in plan negotiations. Just about anything can be included, provided that the terms of the plan do not run afoul of applicable bankruptcy law."). Because nothing in the Bankruptcy Code prohibits utilizing the protections of section 364 in the plan context, Bankruptcy Code section 1123(b)(6) permits it. Indeed, this would not be the first instance in which financing under section 364 has been sought and approved in conjunction with confirmation of a plan. *See, e.g.*, *In re Starbrite Props. Corp.*, 2012 WL 2050745, at *2 (Bankr. E.D.N.Y. June 5, 2012) (explaining that an exit loan was an integral part of plan insofar as it provided funding to satisfy creditor claims, and therefore "[t]he Confirmation Order specifically approved the Exit Loan under section 364(e) of the Bankruptcy Code").[16]

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[16] The cases cited by the Bennett Ratepayers are inapposite and have no bearing on this issue. The decision in *In re Kizzac Management Corp*., 44 B.R. 496, 504 (Bankr. S.D.N.Y. 1984), simply notes that a debtor *need not* utilize section 364 as part of financing under a plan and never suggests that a debtor *cannot* do so. The decisions in *In re Ames Dep't Stores, Inc*., 115 B.R. 34 (Bankr. S.D.N.Y. 1990), and *In re Temple Stephens Co*., 145 B.R. 975 (Bankr. W.D. Mo. 1992), are generalized section 364 financing opinions that never once discuss what may or may not be included in a plan.

Second, the Bennett Ratepayers are simply wrong when they suggest that the New Sewer Warrants will not be "preconfirmation financing." Original Bennett Obj. at 32. The successful issuance of the New Sewer Warrants is a condition to the Effective Date of the Plan. *See* Plan § 4.18(a)(v). Thus, the County will still be a chapter 9 debtor and the Case will still be pending in all respects at the point at which the New Sewer Warrants are issued. Incurring such indebtedness through the auspices of section 364 is entirely consistent with the potential use of section 364 at any other point in the Case.[17]

Third, providing protections to the good faith purchasers of New Sewer Warrants and other parties specified in Section 4.17 of the Plan under section 364(e) is entirely consistent with the validation process under section 944(b)(3). As the Collier treatise explains, section 944(b)(3) is designed to provide "extra assurance for those who might be skittish about the nature of the bonds being issued" while "removing any doubt concerning the matter, because the determination of the court on that issue should be binding in the future." 6 COLLIER ON BANKRUPTCY ¶ 944.03[1][b] (16th ed. rev. 2013). This is the same end that section 364(e) achieves by "encourag[ing] the extension of credit to debtors in bankruptcy [and] by eliminating the risk that any lien securing the loan will be modified on appeal." *In re Saybrook Mfg. Co.*,

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[17] The Bennett Ratepayers erroneously assert that section 364 deals only "with interim financing of operating costs not debt restructuring of existing debt." Original Bennett Obj. at 33. Financing under section 364 may be incurred for a variety of reasons during the pendency of a bankruptcy case, *including* for purposes of satisfying existing indebtedness in a fashion that creates value. *See, e.g.*, *U.S. Bank Trust Nat'l Ass'n v. Am. Airlines, Inc. (In re AMR Corp.)*, 485 B.R. 279, 287-88 (Bankr. S.D.N.Y. 2013) (considering motion to approve financing under section 364 for the specific purpose of repaying prepetition indebtedness and allowing the debtors "to take advantage of the current market conditions, so as to improve liquidity and achieve a competitive and sustainable cost structure"), *aff'd*, 730 F.3d 88 (2d Cir. 2013). Indeed, the City of Detroit recently filed a motion in its chapter 9 case that seeks approval of financing under section 364 for precisely this reason. *See Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay*, ECF No. 1520, *In re City of Detroit, Michigan*, Case No. 13-53846 (SWR) (Bankr. E.D. Mich. Nov. 5, 2013) (seeking approval of financing for the purpose of, among other things, satisfying certain pre-bankruptcy swap termination claims at a large discount).

963 F.2d 1490, 1493 (11th Cir. 1992). Given the importance of the successful issuance of the New Sewer Warrants to the Plan, it is entirely appropriate for the Plan to provide all lawful assurances, including pursuant to sections 364(e) and 944(b)(3), that the purchasers of the New Sewer Warrants will receive the benefit of their bargain and be protected against subsequent attacks by the Bennett Ratepayers or others.

In sum, there is no authority for the proposition that section 364 financing may not be utilized as one component of a chapter 9 plan. In fact, such a plan provision is permitted by section 1123(b)(6) and entirely consistent with the function of section 944(b)(3). To the extent the Bennett Ratepayers are still pressing this objection, it should be overruled in its entirety.

4. MSRB Rule G-23 Is No Bar to the Refinancing

The Wilson Ratepayers are incorrect in their suggestion that Municipal Securities Rulemaking Board ("MSRB") Rule G-23 ("Rule G-23") is a bar to Plan confirmation. They assert that the senior managing underwriter of the New Sewer Warrants, Citigroup Global Markets, Inc. ("Citigroup"),[18] has violated Rule G-23. *See* Amended Wilson Obj. at 21-23; White Report at 13-14. The Wilson Ratepayers contend that this alleged violation causes the County to run afoul of the good faith plan proposal requirements of Bankruptcy Code section 1129(a)(3). *See* Amended Wilson Obj. at 21. The Wilson Ratepayers' allegations are unfounded, but in any event they do not relate to the *proposal* of the Plan and thus do not trigger Bankruptcy Code section 1129(a)(3).

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[18] In addition to serving as lead underwriter on the offering of New Sewer Warrants, Citigroup has long been a holder of Sewer Warrants issued by the County and is a member of the institutions constituting the Supporting Sewer Warrantholders (by virtue of a joinder and supplement to the Supporting Sewer Warrantholder Plan Support Agreement Citigroup executed after June 6, 2013).

As a threshold matter, the Wilson Ratepayers lack standing to raise this issue. There is no private right of action to enforce the MSRB rules. *See, e.g., Prager v. FMS Bonds, Inc*., 2010 WL 2950065, at *6-7 (S.D. Fla. July 26, 2010); *Charter House, Inc. v. First Tenn. Bank, N.A.*, 693 F. Supp. 593, 595-97 (M.D. Tenn. 1988); *Redstone v. Goldman Sachs & Co.*, 583 F. Supp. 74, 77 (D. Mass. 1984). Authority for enforcing compliance by broker-dealers (such as Citigroup) with Rule G-23 lies solely with the Securities and Exchange Commission (the "SEC") and the Financial Industry Regulatory Authority ("FINRA"), not the County's ratepayers.[19] Counsel for the County and the SEC have been in contact – both before and after this issue arose – and the County has agreed the Plan and Confirmation Order do not preclude the SEC from exercising its enforcement powers under any law or regulation. *See* Plan §§ 4.13(d) and 6.2. As a result, the Plan and the proposed Confirmation Order will preserve the SEC's right to determine whether any investigation or action on any issue may proceed after the financing is completed (there can be no violation of Rule G-23 until an underwriting occurs). But this has no impact on the Plan or its implementation, which is the focus of the Confirmation Hearing.

Even putting aside the Wilson Ratepayers' lack of standing, their objection also fails to raise a viable issue under Bankruptcy Code section 1129(a)(3). A finding of good faith under section 1129(a)(3) requires only that the Plan's *proposal* comply with applicable non-bankruptcy law. *See, e.g., Kaiser Aerospace & Elec. Corp. v. Teledyne Indus. (In re Piper Aircraft Corp.),*

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[19] The authority for enforcing the MSRB rules is granted by the Securities Exchange Act of 1934, as amended from time to time (the "1934 Act"). Section 15B(c)(1) of the 1934 Act provides that the violation of an MSRB rule is a violation of federal securities law. *See* 15 U.S.C. § 78o-4(c)(1). Section 3(a)(34)(A)(iv) of the 1934 Act defines the SEC as the "appropriate regulatory agency" for a municipal securities dealer that is not a commercial bank. 15 U.S.C. § 78c(a)(34)(A)(iv). Additionally, section 15B(c)(7)(A)(i) of the 1934 Act provides that periodic examinations to determine compliance with MSRB rules by municipal securities dealers that are members of a "registered securities association" – such as FINRA – are to be conducted by that registered securities association. 15 U.S.C. § 78o-4(c)(7)(A)(i).

244 F.3d 1289, 1300 (11th Cir. 2001) (finding that focus of good faith inquiry is the manner by which the plan is proposed); *In re Gen. Dev. Corp.*, 135 B.R. 1002, 1007 (Bankr. S.D. Fla. 1991) ("Section 1129(a)(3) requires only that the plan's proposal, as opposed to the contents of the plan, be in good faith and in compliance with all nonbankruptcy laws."); *In re Klosterman Dev. Inc.*, 2013 WL 4605451, at *7 (Bankr. N.D. Ohio Aug. 29, 2013) ("[T]he focus of a determination under § 1129(a)(3), including the second prong – that a plan is not proposed by any means forbidden by law, is the *proposal* of the Plan, as opposed to the contents of the Plan."). Courts have uniformly held that subsection (a)(3) does not require that each term and provision of a plan comply in all respects with non-bankruptcy laws and regulations. *See Gen. Dev. Corp.*, 135 B.R. at 1007 (citing authorities); *In re 20 Bayard Views, LLC*, 445 B.R. 83, 96 (Bankr. E.D.N.Y. 2011) (finding that section 1129(a)(3) "does not require the bankruptcy judge to determine whether the ends achieved in the plan contravene non-bankruptcy law").

The Wilson Ratepayers have not raised any objection to the County's *proposal* of the Plan or stated any basis for why the County's *proposal* of the Plan is inconsistent with applicable non-bankruptcy law. To the contrary, the record reflects that the County Commission acted in accordance with all applicable laws in formulating, approving, and proposing the Plan. The Wilson Ratepayers refer only to the conclusory opinion of James White that "it would be an *apparent* violation of G-23 for *Citibank* to purchase the proposed bonds" (emphasis added).

In the alternative, and without waiver of the threshold argument that the Wilson Objection premised on Rule G-23 is legally irrelevant, the allegations supporting the contention

are based on incomplete and incorrect statements of fact.[20] The purpose of Rule G-23 is to preclude a broker-dealer providing financial advisory services to a governmental issuer with respect to a proposed financing from later underwriting such financing. But Citigroup was never a financial advisor to the County. In fact, the record shows that throughout the relevant time periods that are the subject of the Wilson Objection the County was represented by one or more financial advisors under contract to the County, including Public Resources Advisory Group, Public Finance Management, and White's own firm. The SEC regards the presence of another firm as the issuer's financial advisor as a key factor in determining whether a future underwriter has provided financial advice to the issuer. *See, e.g.*, 17 C.F.R. § 240.15Ba1-1(d)(3)(vi) (exempting from definition of municipal advisor persons engaging in advisory activities where municipal entity otherwise represented by municipal advisor with respect to the same matter); SEC Rel. No 34-64564 (May 27, 2011) (presence or absence of another firm serving as financial advisor informs the determination of whether an underwriter has provided advisory services under Rule G-23). In sum, there has not been and will not be any violation of Rule G-23 in connection with Citigroup underwriting the New Sewer Warrants, the Wilson Ratepayers' arguments are mistaken, and accordingly as a matter of both law and fact, provide no basis to deny confirmation of the Plan.

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[20] The County does not waive its argument that the Court lacks jurisdiction to hear a challenge to Citigroup's actions under Rule G-23. As noted above, the SEC and FINRA are charged with enforcing G-23, and these agencies' initial decision whether or not to bring an enforcement action is not subject to judicial review. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (noting that decisions not to prosecute, whether made by executive or administrative agency, are not judicially reviewable); *Kixmiller v. SEC*, 492 F.2d 641, 645 (D.C. Cir. 1974) (holding that the 1934 Act permits the SEC to make investigations as it deems necessary and that the SEC's "decision to refrain from an investigation or an enforcement action is generally unreviewable."); *Gordon v. SEC*, 1980 WL 1435 (N.D. Ga. 1980) (granting motion to dismiss endorsing the view that: "The defendants have argued that the securities acts authorize the SEC to conduct in its discretion such administrative investigations as it deems necessary to aid it in effectuating the purposes of the federal securities laws. These sections, and similar sections, have consistently been interpreted to mean that the SEC's decision to refrain from conducting an investigation is not subject to judicial review.").

C. Complaints of Procedural Irregularity

1. The Plan May Settle, Moot, or Otherwise Eliminate the Ratepayer Claims

The Bennett Ratepayers broadly oppose the global compromises and settlements that are contained in the Plan (collectively, the "Plan Settlements") and contend that the Plan Settlements do not "go far enough and should be better." Supp. Bennett Obj. at 6. As detailed more fully in the County's separate motion for approval of the Plan Settlements [Docket No. 2183], the settlements attacked by the Bennett Ratepayers form the very foundation of the Plan. Yet, much of the Bennett Objection revolves around the premise that the County should not have entered into the Plan Settlements and that the Bennett Ratepayers have better global settlement solutions. *See*, *e.g.*, Original Bennett Obj. at 6 (urging the Court to determine if the Plan Settlements are fair); *id.* at 9-11 (proposing an "Alternative Financing Plan" in lieu of the Plan Settlements); Supp. Bennett Obj. at 19 (arguing the County is not justified in accepting the financing under the Plan when the so-called Alternative Financing Plan of the Bennett Ratepayers provides better value). And although the Wilson Ratepayers do not explicitly attack the County's entry into the Plan Settlements, the Wilson Objection also repeatedly questions the County's settlement decisions and authority. *See*, *e.g.*, Amended Wilson Obj. at 24-26 (questioning the detail, validity, and feasibility of the Plan Settlements). However, the Bennett Objection and Wilson Objection ignore that the Sewer System ratepayers' claims settled through the Plan Settlements, including with respect to all claims asserted in the Bennett Action and Wilson Action (collectively, the "Ratepayer Claims"), rightfully belong to and can be brought and settled only by or on behalf of the County. Efforts by the ratepayers to dictate the terms of the County's settlements or to pursue alternative settlements through litigation violate sections 362(a)(3) and 941 of the Bankruptcy Code. The County has the exclusive right to assert possession and control over the Ratepayer Claims and to compromise them through a chapter 9 plan.

As a preliminary matter, the underlying Ratepayer Claims asserted in the Bennett Action and Wilson Action and resolved through the Plan belong to the County and not the ratepayers. The Ratepayer Claims in the Bennett Action and Wilson Action derive from the Sewer Warrant Indenture and effectively seek to either have monies returned to the County or obtain declarations concerning the County's liabilities or lack thereof. However, the ratepayers are not parties to the Sewer Warrant Indenture or any related Sewer Warrant contracts implicated in the Bennett Action or Wilson Action, and therefore do not have the right to assert the Ratepayer Claims. *See, e.g.*, *Bernals, Inc. v. Kessler–Greystone, LLC*, 70 So. 3d 315, 319 (Ala. 2011) (holding that "one not a party to, or in privity with a contract, cannot sue for its breach"); *Dunning v. New Eng. Life Ins. Co.*, 890 So. 2d 92, 97 (Ala. 2003) (holding standing to sue under a contract requires plaintiff to be in privity or an intended third-party beneficiary); *Russell v. Birmingham Oxygen Serv.*, 408 So. 2d 90, 93 (Ala. 1981) ("A third person has no rights under a contract between others unless the contracting parties intend that the third person receive a direct benefit enforceable in court." (citations omitted)).

Furthermore, there is no reference in any of the contracts relevant to the Bennett Action and the Wilson Action to ratepayers as third party beneficiaries. *See Zeigler v. Blount Bros. Constr. Co.*, 364 So. 2d 1163, 1166 (Ala. 1978) (finding that ratepayers were not third-party beneficiaries to utility's contract to build a dam because, among other things, there was "[n]o reference in those agreements to any third parties" and "nothing … in the[] contracts which suggests … concern[] with the amount of money subscribers for electrical power would be charged each month"). Where, as here, "a cause of action alleges only indirect harm to a creditor (*i.e.*, an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate."

Schertz-Cibolo-Universal City v. Wright (In re Educators Grp. Health Trust), 25 F.3d 1281, 1284 (5th Cir. 1994), cited with approval, *Bond Safeguard Ins. Co. v. Wells Fargo Bank, N.A.*, 502 Fed. Appx. 867, 869 (11th Cir. 2012) and *Mennen v. Onkyo Corp.*, 248 Fed. Appx. 112, 113 (11th Cir. 2007).

Finally, the ratepayers have no direct liability on the Sewer Warrants.[21] Accordingly, the ratepayers lack standing to pursue the Ratepayer Claims, which are property of the County. *See Riley v. Pate*, 3 So. 3d 835, 839 (Ala. 2008) (holding that a taxpayer had no standing to sue to compel the trustees of a state trust to move interest back into the trust fund because the taxpayers were not liable for the replenishment of any shortfall in the trust fund and the "absence of any such liability defeats a claim of taxpayer standing"); *S. Ry. Co. v. Curry*, 194 So. 523, 524 (Ala. 1940) (holding that a purchaser of slag had no standing to seek a declaratory judgment to determine whether the sale of slag was subject to a sales tax imposed on sellers because the purchaser "is in no position to have that question determined for the person against whom the tax is [actually] levied"). As such, the County is the only party that can choose to prosecute or settle them, as is achieved through the Plan Settlements.

The Bennett Ratepayers nonetheless contend that they have standing to put forth their Alternative Financing Plan based upon the potential derivative impact of the settlement upon them. Original Bennett Obj. at 5-6. Pursuant to Bankruptcy Code section 1109(b), made applicable through section 901(a), parties in interest may raise, appear, and be heard on any issue. 11 U.S.C. §§ 901(a), 1109(b). But section 1109(b) does not give the Bennett Ratepayers

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[21] The Court has previously noted that, for example, the Sewer Warrant Trustee could not enforce its lien against the property of the ratepayers. *See* Tr. of Aug. 6, 2013 H'rg at 66:16–67:20 (explaining, among other things, that a lien against the property of a ratepayer would be a "lien … for nonpayment of [the ratepayers'] sewer charges. It is not for nonpayment of the debt, and that is really the point of this discussion").

the right to control prosecution or settlement of any claim that belongs to the County. *See, e.g.*, *Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 181 (2d Cir. 2005) (right to control and settle cause of action distinguished from right to appear and be heard pursuant to section 1109(b)). Instead, a debtor in bankruptcy is allowed to pursue and settle claims that belong to or are asserted against the debtor without undue pressure from other parties in interest and over the objections of such parties. *See In re Kaiser Aluminum*, 339 B.R. 91, 95 (D. Del. 2006) (affirming the debtor's settlement with respect to a claim despite a creditor's outstanding objection to the same claim, and noting that "[the objecting creditor's] argument contradicts well-established bankruptcy principles recognizing that the debtor is charged with fiduciary responsibilities to all creditors to resolve claims in the best interest of the estate."); *In re Heritage Org., L.L.C.*, 375 B.R. 230, 284-86 (Bankr. N.D. Tex. 2007) (explaining that a debtor is allowed to settle a claim without the need for a court's ruling on the merits of an objection of another party in interest). The Bennett Ratepayers can object to the reasonableness of the proposed Plan Settlements using the proper procedure, but they cannot hijack the County's Plan by making irrelevant arguments about their Alternative Financing Plan.[22]

Even if the ratepayers had standing to pursue the Ratepayer Claims, the County has the ability to settle these claims. A debtor is permitted to settle claims even if another party is

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[22] By enacting Bankruptcy Code section 926(a), Congress specifically limited the instances where a chapter 9 debtor's causes of action could be pursued by creditors or other third parties. Even if the Bennett Ratepayers sought derivative standing in violation of section 926(a) – which they have not attempted – they would fail to satisfy the strict standard applicable to such requests. *See Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 553-54 (3d Cir. 2003) (requiring a creditors' committee to first obtain permission of the court by demonstrating (1) that the debtor is neglecting its fiduciary duty and (2) that the proposed suit will maximize the value of the estate); *In re McGuirk*, 414 B.R. 878, 880 (Bankr. N.D. Ga. 2009) (endorsing *Cybergenics* standard and noting that "[d]erivative standing is granted to benefit the estate as a whole, not merely to benefit the creditor bringing the claim"). In addition, the Court is limited by Bankruptcy Code section 904(2), and could not order the County to take particular action if the Bennett Ratepayers recovered any funds through pursuit of the Ratepayer Claims. *See In re New York City Off-Track Betting Corp.*, 2011 WL 309594, at *6 (Bankr. S.D.N.Y. Jan. 25, 2011).

pursuing those claims in a separate proceeding. *See Official Comm. of Equity Sec. Holders v. Official Comm. of Unsecured Creditors (In re Adelphia Commc'ns. Corp.)*, 544 F.3d 420, 423 (2d Cir. 2008) ("[A] court may withdraw a committee's derivative standing and transfer the management of its claims, even in the absence of that committee's consent, if the court concludes that such a transfer is in the best interests of the bankruptcy estate."); *In re Exide Techs.*, 303 B.R. 48, 66-67 (Bankr. D. Del. 2003) (stating that a debtor can settle an adversary proceeding brought by a creditors' committee with derivative standing, even when the debtor is not a party to that adversary proceeding); *In re BBL Grp., Inc.*, 205 B.R. 625, 637 (Bankr. N.D. Ala. 1996) (allowing the settlement of a state court action under a plan and noting that "[i]n approving the proposed compromises the Court need not try the lawsuits"). The reason for this rule is that even if other parties have standing to pursue a debtor's claims, such standing cannot effectively grant "a veto over both the court and the debtor-in-possession." *Adelphia Commc'ns Corp.*, 544 F.3d at 425.

Thus, even when an objecting party has theoretical standing and rights to pursue its own litigation in the absence of a settlement (as in the case of claim objections, where any party in interest may object to a claim under Bankruptcy Code section 502(a)), the bankruptcy process nevertheless allows such potential litigation to be resolved and mooted through settlement. *See, e.g., Kaiser Aluminum*, 339 B.R. at 95 (affirming bankruptcy court's finding that party's claim objection was moot "after proceeding to evaluate the settlement which was meant, at least in part, to resolve that objection"); *Heritage Org.*, 375 B.R. at 285 (detailed discussion of why bankruptcy court could approve settlement that mooted ability of objecting party to pursue a claim objection). Because the Plan provides for the binding allowance of certain sewer debt claims as one component of the Plan Settlements, *see* Plan § 5.12, any litigation seeking to

challenge the amount of those claims against the County (including in the Bennett Action and the Wilson Action) will be rendered moot by confirmation of the Plan.

Therefore, even if the Bennett Ratepayers and/or Wilson Ratepayers had standing to pursue the Ratepayer Claims, the Plan Settlements have resolved the Bennett Action and Wilson Action, and all possible claims are mooted. The Bennett Ratepayers and Wilson Ratepayers cannot proceed when there are no Ratepayer Claims left unresolved, nor can they prevent the County from entering into the Plan Settlements simply because of a mistaken conviction that they have a better solution.

In summary, all of the Ratepayer Claims belong to and can be settled by the County. Even assuming the Bennett Ratepayers or the Wilson Ratepayers have causes of action that they have standing to pursue, the Plan will either moot those claims (much like the settlement of a claim objection) or redress the underlying harm (much like the resolution of a fraudulent transfer or similar claim that might have been brought by many parties but can be resolved only once). The necessary conclusion is that the Plan can and does appropriately resolve all Ratepayer Claims and bars any party, including the Bennett Ratepayers and the Wilson Ratepayers, from pursuing those claims post-confirmation.[23]

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[23] At a hearing on October 17, 2013, the Court disallowed the Bennett Ratepayers' purported claim against the County. Subsequently, the Bennett Ratepayers filed a Motion for Clarification [Docket No. 2160] (the "Motion for Clarification"), asking the Court to clarify the "precedential value" of three cases cited at the hearing. Motion for Clarification at 1. Each of the cited cases fits directly with the County's position that the Ratepayer Claims belong to the County and can be exclusively prosecuted and settled by the County. In *Bond Safeguard*, 502 Fed. Appx. 867, the Court of Appeals for the Eleventh Circuit determined that causes of action belonging to a bankruptcy estate can only be properly pursued by the estate and not by individual creditors. Analogously, as explained herein, the Ratepayer Claims belong to the County and can be resolved through the Plan Settlements by the County. The County's ability to control its claims process is further reinforced by *In re Smart World*, which squarely rejects the attempts of creditors "to usurp the debtor-in-possession's role as legal representative of the estate." 423 F.3d at 182. The Bennett Ratepayers fail to recognize that the Plan Settlements are the product of precisely the type of control exclusively given to a chapter 9 debtor in bankruptcy proceedings. Finally, *In re Educators Group Health Trust* properly states that an estate's creditor can bring a cause of action only if that action belongs "solely" to the creditor; in all other cases, control over litigation and settlement of the

2. Bankruptcy Rule 7001

The Bennett Ratepayers raise a procedural objection to the Plan, asserting that the County would deny them "the Protection of Part II [*sic*] of the Rules By Mooting AP Case 120 Claims with Plan Confirmation Hearings" in supposed violation of Rule 7001. *See* Supp. Bennett Obj. at 20-23.

This objection proceeds from the mistaken premise that the Plan seeks to *adjudicate* "the validity and/or priority of a lien" in a fashion that would otherwise require an adversary proceeding. *See id.* at 22. But the Plan does not adjudicate or determinate the validity, priority, or extent of any lien asserted by any holder of Sewer Debt Claims. Rather, the Plan expressly *settles and compromises* such disputes, *see* Plan § 4.8(a)(ix), so they never need to be determined through costly litigation. The Federal Rules of Bankruptcy Procedure do not require an adversary proceeding to effect a settlement of underlying disputes that might necessitate an adversary proceeding to resolve on the merits. *See, e.g.*, *In re Wash. Mut., Inc.*, 442 B.R. 314, 325-45 (Bankr. D. Del. 2011) (approving global plan-based settlement of issues that had been and could be raised in numerous adversary proceedings); *In re Tennol Energy Co.*, 127 B.R. 820, 827-29 (Bankr. E.D. Tenn. 1991) (approving compromise of adversary issues based on Rule 9019 motion); *In re Holland*, 70 B.R. 409, 411 (Bankr. S.D. Fla. 1987) (explaining that a "mutually agreed settlement of the disputed claim may be confirmed by an order of court, as was done in this case, without the necessity of filing additional proceedings under [Rule] 7001" and that if it were necessary to file an adversary proceeding to approve a settlement, "then the law would truly be an ass").

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action is exclusive to the debtor. 25 F.3d at 1284. The Bennett Ratepayers do not own the Ratepayer Claims directly or indirectly – those claims belong to the County and can be litigated or, as in this case, settled exclusively by the County.

The Bennett Ratepayers misapprehend the relationship of the Plan to the Bennett Action. The Plan does not determine or decide any of the issues raised in the Bennett Action on either side. To the contrary, the Plan settles those issues or otherwise resolves *the County*'s claims in a fashion that also settles, moots, or otherwise disposes of the Bennett Action for the reasons discussed in Point II.C.1, *supra*. It would be nonsensical to require that a settlement of disputed issues be effected through the same full-blown adversary litigation that would be required if there were no settlement, and nothing in the Federal Rules of Bankruptcy Procedure or any other authority supports such a distorted process.

III. THE PLAN IS FEASIBLE

Both the Bennett Ratepayers and the Wilson Ratepayers object to confirmation on the erroneous ground that the Plan is not feasible under Bankruptcy Code section 943(b)(7). *See* Original Bennett Obj. at 34; Supp. Bennett Obj. at 7-11; Amended Wilson Obj. at 1, 4-5, 25, 28-30.[24] For the Court to find that the Plan is feasible, the County need not prove that success is guaranteed; rather, section 943(b)(7)'s requirement will be satisfied if the evidence allows the Court to conclude that the Plan offers a "reasonable prospect" of success and is workable. *See, e.g.*, *Prime Healthcare Mgmt. v. Valley Health Sys. (In re Valley Health Sys.)*, 429 B.R. 692, 711

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[24] Both the Bennett Ratepayers and the Wilson Ratepayers also suggest that the Plan fails the "best interests of creditors" test in section 943(b)(7), although neither says why. *See, e.g.*, Supp. Bennett Obj. at 1, 18; Amended Wilson Obj. at 1, 4-5, 25. Since neither the Bennett Ratepayers nor the Wilson Ratepayers are creditors of the County, they have no basis to object to whether the Plan maximizes the recovery available for the County's legitimate creditors. Indeed, both sets of ratepayers are attempting to *reduce* the recovery the Plan provides to the holders of Sewer Debt Claims and other creditors. *But see* Supp. Bennett Obj. p. 14 (asserting in a header that the County has not sincerely attempted to *maximize* creditors' recovery). Because the Plan is a better alternative to what legitimate creditors could otherwise receive from the County, it readily meets the "best interests of creditors" standard. *See, e.g.*, 6 COLLIER ON BANKRUPTCY ¶ 943.03[7][a] (16th ed. rev. 2013); *In re Connector 2000 Ass'n*, 447 B.R. 752, 765-66 (Bankr. D.S.C. 2011); *In re Mount Carbon Metro. Dist.*, 242 B.R. 18, 33-34 (D. Colo. 1999). *Accord W. Coast Life Ins. Co. v. Merced Irr. Dist.*, 114 F.2d 654, 679 (9th Cir. 1940) (affirming confirmation of plan under municipal debtor provisions of Bankruptcy Act of 1898 when the plan payments were "all that could reasonably be expected in all the existing circumstances").

(Bankr. C.D. Cal. 2010); *In re Corcoran Hosp. Dist.*, 233 B.R. 449, 453-54 (Bankr. E.D. Cal. 1999). *Accord United States v. Haas (In re Haas)*, 162 F.3d 1087, 1090 (11th Cir. 1998) (adopting standard for "feasibility" test in chapter 11 context that "[t]he plan itself must offer a reasonable prospect of success and be workable"); *In re IPC Atlanta Ltd. P'ship*, 142 B.R. 547, (Bankr. N.D. Ga. 1992) ("There is certainly no guarantee of a successful reorganization in this case, but the Bankruptcy Code does not require such a guarantee. … [T]he Court will look to see whether the Debtor can realistically carry out the provisions of the plan, and whether the plan offers a reasonable prospect of success.").

The evidence presented at the Confirmation Hearing will demonstrate that there is a reasonable prospect that the Plan will succeed. Without limitation, the County's evidence will demonstrate that the New Sewer Warrants can be issued on the terms necessary to fund the Plan, and Eric Rothstein, the County's utility rate consultant, will testify that the Approved Rate Structure will produce revenues sufficient to repay the New Sewer Warrants. This evidence shows that the financing structure, and the Plan as a whole, is feasible. *Cf. In re Sanitary & Improv. Dist. #7*, 98 B.R. 970, 975 (Bankr. D. Neb. 1989) ("The evidence before this Court presented by the debtor and its two expert witnesses is that this plan is feasible with regard to the issuance of the bonds and the other debt instruments. It is feasible with regard to the payoff over time of the bonds and the partial payment of the warrants. The debtor is able to raise sufficient revenues on an annual basis to fund full payment of the face amount of the newly issued bonds plus five percent interest plus some payment to warrantholders on an annual basis. It, therefore, meets the feasibility test of Section 943(b)(7) of the Code as amended in 1988.").

The fact that there is a reasonable prospect for the County to successfully repay the New Sewer Warrants is further confirmed by outside market checks, including the commitments or

expected commitments of market participants to buy the New Sewer Warrants. It would be irrational for market participants to buy securities that are unlikely to be repaid. The actions of independent market participants confirm that the Plan is reasonably likely to succeed, and undermine the litigation-driven views of James White and the objectors' counsel. *See, e.g.*, *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631-34 (3d Cir. 2007) (crediting "objective evidence from the public equity and debt markets" over subjective testimony by "expert" witnesses); *In re Boston Generating, LLC*, 440 B.R. 302, 325-26 (Bankr. S.D.N.Y. 2010) (same); *Statutory Comm. Of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283, 293-94 & 346-49 (Bankr. S.D.N.Y. 2007) (same).

IV. THE REMAINING ARGUMENTS ARE MERITLESS

A. Classification

The Bennett Ratepayers assert that the Plan's classification scheme is improper, both with respect to particular series of the Sewer Warrants and with respect to the purported claim asserted by the Bennett Ratepayers. *See* Supp. Bennett Obj. at 17-20. These classification-based objections fail for several reasons.

First, as a threshold matter, the Bennett Ratepayers hold *no* Sewer Warrant Claims and should not be permitted to object to a classification system that (a) does not directly affect their interests and (b) is supported by those Creditors who *are* directly affected by it.[25]

Second, the Bennett Ratepayers' objections regarding the classification of Sewer Warrant Claims are beside the point. As the final certified voting results will demonstrate, the holders of Class 1-B Claims unanimously voted to accept the Plan, and the holders of Class 1-A Claims voted overwhelmingly to accept the Plan (with the holders of over $2.146 *billion* voting to accept, and the holders of only $12.43 *million* Claims voting to reject, a ratio of more than 175-to-1). Based on these voting results, no conceivable classification scheme could alter the outcome – whether classified as set forth in the Plan or in any other permutation of separate classes, all of the applicable classes would be impaired accepting classes. Given this basic

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[25] *See, e.g.*, *In re Evans Prods. Co*., 65 B.R. 870, 874 (S.D. Fla. 1986) ("[D]ebtors lack standing to raise the rights of wrongly classified creditors as a means to attack the overall reorganization plan."); *Holywell Corp. v. Bank of N.Y.*, 59 B.R. 340, 349 (S.D. Fla. 1986) (finding that "the issue of whether [certain claims] have been wrongly subordinated (or classified) is one which the debtors/appellants in the instant appeal lack standing to assert because they are not parties actually injured by this classification"); *In re New Midland Plaza Assocs*., 247 B.R. 877, 892 (Bankr S.D. Fla. 2000) ("Coolidge is attempting to assert the right to object to classification of the claim of the City, which it does not hold. Coolidge does not have standing to do so."); *In re Quigley Co*., 391 B.R. 695, 706 (Bankr. S.D.N.Y. 2008) (noting that one party cannot "object to the Plan based on how it affects the rights of third parties" and explaining that "[i]ssues relating to classification, treatment, solicitation and voting come immediately to mind" as issues that may be raised only by the affected creditors); *In re A.P.I. Inc*., 331 B.R. 828, 861 (Bankr. D. Minn. 2005) (concluding that insurers lacked standing to object to plan's classification scheme when they lacked claims in the subject class and "have no stake or claim to the assets to be parceled out to the members of that class, as the plan defines them").

reality, debates about alternative classification schemes are entirely academic and beside the point.[26]

Third, the Bennett Ratepayers' objections regarding the classification of their asserted claim are similarly beside the point. The Bennett Ratepayers did not return a ballot voting on the Plan and the Court disallowed their purported claim against the County. Because they have no allowable claim against the County, there is no reason to consider classification issues raised by the Bennett Ratepayers.

In summary, the Plan's classification scheme is entirely proper and consistent with Bankruptcy Code section 1122. Even if that were not the case, the Bennett Ratepayers have no claim against the County or its property, and thus have no standing or grounds to raise any classification issues.

B. Notice

The Wilson Objection raises a litany of complaints about the form of notice that the County elected to send to all customers of the System (the "Ratepayer Notice"[27]) to provide the

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[26] *See, e.g.*, *In re Red Mountain Mach. Co*., 451 B.R. 897, 907 (Bankr. D. Ariz. 2011) (explaining that "even if there is a technical legal question as to the propriety of the classification, it makes no practical difference and is therefore harmless error"); *In re ARN, Ltd. Ltd. P'ship*, 140 B.R. 5, 10 (Bankr. D.D.C. 1992) (finding that question of proper classification was "not a germane issue" when voting outcome would have been the same regardless of how claims were classified); *In re Eagle Bus Mfg*., 134 B.R. 584, 595 (Bankr. S.D. Tex. 1991) (determining that plan's classification of claims arising from different types of securities in a single class was appropriate, but also observing that "any error with respect to the classification of such Claims is harmless because the evidence shows clearly that even if separately classified, all classes [resulting from the different securities] would have accepted the Plan"); *In re 11,111, Inc*., 117 B.R. 471, 477 (Bankr. D. Minn. 1990) (holding that alleged classification error was harmless because had the claims been separately classified, "the result would simply have been two rejecting classes rather than one"). *Accord Kane v. Johns-Manville Corp*., 843 F.2d 636, 647 (2d Cir. 1988) ("The harmless error rule has been invoked in the bankruptcy context where procedural irregularities, including alleged errors in voting procedures, would not have had an effect on the outcome of the case.").

[27] The form of Ratepayer Notice is attached as Exhibit D to the *Affidavit of Service* of Karen M. Wagner [Docket No. 2056 and the unredacted version filed with the Court under seal]. In addition to providing individualized written notice to over nearly 140,000 parties, broad publication notice was provided in *The Wall Street Journal*, *The Bond Buyer*, and *The Birmingham News*. *See* Docket No. 2051. Furthermore, the County's bankruptcy

ratepayers with actual written notice of the Plan, the Confirmation Hearing, and related deadlines. *See* Amended Wilson Obj. at 5-11. These complaints fall short in many different respects; the Ratepayer Notice constituted good and sufficient notice by the County.

First, despite their assertion that the Plan should not "have any preclusive affect over themselves," Amended Wilson Obj. at 5, it is clear that the three Wilson Ratepayers and their counsel received adequate notice and opportunity to be heard. The Wilson Ratepayers have actually appeared through counsel, filed a lengthy objection to confirmation of the Plan, and will be heard at the Confirmation Hearing. Thus, any arguments about the purportedly inadequate notice to the Wilson Ratepayers are irrelevant.[28]

The Wilson Ratepayers took full advantage of their right to object and be heard, and will undoubtedly be bound by the confirmed plan. *See, e.g., United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1376-80 (2010); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-55 (2009); *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 171-77 (1938).

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case, the Plan and Confirmation Hearing, and even the Ratepayer Notice have been extensively covered in the local press. *See, e.g.*, Barnett Wright, *Don't panic JeffCo ratepayers. Here's why you're getting those letters about a Nov. 12 court hearing*, Al.Com (Sept. 24, 2013, 5:51 PM; updated Sept. 24, 2013, 7:18 PM), http://blog.al.com/spotnews/2013/09/dont_panic_jeffco_just_wants_t.html (entire article devoted to the Ratepayer Notice, with embedded PDF copy of the notice itself available for any reader to download). Actual and constructive notice of the Plan, the Confirmation Hearing, and related deadlines was extensive, and far beyond any notice requirement contained in the Federal Rules of Bankruptcy Procedure.

[28] *See, e.g.*, *Hobson v. Travelstead (In re Travelstead)*, 227 B.R. 638, 747-48 (D. Md. 1998) (finding any violation of notice rule to be harmless error when party filed objections to plan and disclosure statement, appeared at confirmation hearing, and had opportunity to present evidence and be heard at confirmation hearing); *Bayoud v. Med. Ctr. Hosp. (In re Am. Dev. Int'l Corp.)*, 188 B.R. 925, 934 (N.D. Tex. 1995) (affirming holding that party had notice of hearing to approve settlement and injunction when party filed pleadings in advance of the hearing and then "presented testimony, exhibits, and argument in opposition to approval of the settlement and imposition of an injunction"); *In re Toth*, 61 B.R. 160, 164-66 (Bankr. N.D. Ill. 1986) (concluding that confirmation order would have preclusive effect notwithstanding any technical violation of notice requirements because affected party was aware of pertinent provisions and had reasonable opportunities to object).

Second, the Wilson Ratepayers argue about the allegedly inadequate notice to *other* ratepayers, but the Wilson Ratepayers do not act for or represent anyone other than themselves. As such, they lack standing to raise concerns about the notice the County provided to other parties.[29]

Third, the record demonstrates that other ratepayers received the Ratepayer Notice, understood the Ratepayer Notice, and exercised their right to object to confirmation of the Plan. *See* Docket Nos. 2056, 2116, 2123, 2124 & 2129; *see also* Docket Nos. 2050, 2055, 2085, 2111, 2121, 2122, 2127, 2159, 2167, 2176, 2185 & 2192 (additional affidavits evidencing broad publication notice and notice to all Creditors in this Case). Thus, individual ratepayers – none of whom are represented by the Wilson Ratepayers or the Wilson Ratepayers' counsel – could and *did* pursue confirmation objections after reviewing the Ratepayer Notice.

Fourth, the Wilson Ratepayers' barrage of complaints about the form of the Ratepayer Notice, the color of the envelope, the nature of the KCC website, the process for objecting to confirmation of the Plan, and the like are as meritless as they are unsubstantiated.[30] Neither the

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[29] *See, e.g.*, *Gentry v. Siegel*, 668 F.3d 83, 95 (4th Cir. 2012) (finding "that the Named Claimants do not have standing to assert the due process rights of others" by attacking bankrupt debtor's notice of bar date, and declining "their invitation to evaluate the adequacy of notice provided to the nonparty unnamed class members because the Named Claimants lack standing to raise the issue"); *Advantage Healthplan, Inc. v. Potter*, 391 B.R. 521, 548-49 (D.D.C. 2008) (holding that individual creditor lacked standing to object to form of notice given to other parties, or to otherwise claim a violation of those parties' due process rights, in connection with approval of bankruptcy settlement), *aff'd*, 586 F.3d 1 (D.C. Cir. 2009); *In re Seatco, Inc.*, 257 B.R. 469, 478 n.3 (Bankr. N.D. Tex. 2001) (noting that individual creditor had no standing to object to procedural aspects of plan confirmation process on behalf of other creditors).

[30] The Wilson Ratepayers not only fail to cite *any* legal authority to support their demands for "neutral" websites and colored envelopes, but also rely on many dubious assertions unsupported by evidence or explanation. *E.g.*, Amended Wilson Obj. at 6 (asserting without citation that "[m]ost courts" require more notice than is contemplated by the Federal Rules of Bankruptcy Procedure, "with 60-90 day preferred"); at 7 (positing unexplained conclusion that "the website secondary to the Notice is cumbersome, complicated, difficult to access, and only provides documents written in complex legal terms well beyond the likely comprehension of many, or most, lay sewer customers"); at 8 (contending that "junk mail" is commonly "delivered in plain envelopes … not adequately designed to stand out"); at 9 (referencing unspecified "overly burdensome hurdles

Bankruptcy Rules nor due process require notice of the sort demanded by the Wilson Ratepayers; rather, the requirement is only to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Ratepayer Notice is substantially similar to the form of Confirmation Hearing notice that this Court approved (which form resembles the sort of notice forms used in many large bankruptcy cases), and it (1) sets forth in plain English information about the Plan, Confirmation Hearing, and relevant deadlines; (2) quotes particularly relevant portions of the Plan verbatim; and (3) includes multiple telephone numbers, internet addresses, and mailing addresses through which further information may be obtained or requested. These features provide ample due process for all ratepayers. *See, e.g.*, *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999) ("In our case the mailed notice provided a reasonable summary of the stakes of the litigation, and class members could easily acquire more detailed information . . . through the telephone number that was provided. Due process requires no more."). The Ratepayer Notice directly and plainly informs each ratepayer that a "matter is pending" and allows each to "choose for himself whether to appear or default, acquiesce or contest" confirmation of the Plan or to request more information. *Cf. Mullane*, 339 U.S. at 314. The Wilson Ratepayers cite no precedent and provide no examples of notices from other bankruptcy cases (or from *any* other cases) utilizing notices of the scope and nature they describe; case law makes clear that such notices are not required.[31]

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for sewer customers to file an objection" with the Court); at 11 (arguing that the Plan Supplement "materially and substantively affects the Plan" without explaining how or why).

[31] *See, e.g.*, *In re Nat'l Steel Corp.*, 316 B.R. 510, 517-18 (Bankr. N.D. Ill. 2004) (finding notice of bankruptcy bar date sufficient when it alerted party to pending proceeding and thus provided opportunity for party to explore,

Fifth, apart from the actual notice provided through the Ratepayer Notice, all ratepayers also received notice of the County Commission's sewer rate-related hearings in accordance with Alabama law. More specifically, section 6(a) of Act 619 provides that a sewer rate and charge schedule shall be "from time to time revised by the county commission only after public hearing or hearings thereon which shall be held by the county commission at least seven days after such published notice as the county commission may determine to be reasonable." In accordance with the requirements of Act 619, the County:

- Published notice of the September 23, 2013 public rate hearing in the Sunday, September 15, 2013 edition of *The Birmingham News*;
- Posted a PDF copy of the proposed October 2013 Rate Resolution on http://www.jeffcosewerhearings.org at least seven days prior to the September 23, 2013 public hearing; and
- Posted PDF copies of the updated Record on http://www.jeffcosewerhearings.org at least seven days prior to the September 23, 2013 public hearing.[32]

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investigate, and respond); *In re Rodgers*, 180 B.R. 504, 505-06 (Bankr. E.D. Tenn. 1995) (concluding that plan confirmation notice, even if not "a model of clarity," was nevertheless "adequate to apprise [the objecting party], or any prudent person exercising reasonable diligence, about" the pendency and potential effects of the plan). *Accord Mangone v. First USA Bank*, 206 F.R.D. 222, 231-34 (S.D. Ill. 2001) (rejecting litany of attacks on class action notice analogous to those pressed by the Wilson Ratepayers here); *US West, Inc. v. Bus. Discount Plan, Inc*., 196 F.R.D. 576, 584-85 (D. Colo. 2000) (holding that class action settlement notice was adequate because it "provided the information necessary, including where and how to obtain further information, for proposed class members to make a reasonably rational and informed decision"). Given the complexity of the County's bankruptcy case and the Plan, a notice such as the Ratepayer Notice inevitably will include "multiple sentences and some legalese" in order to provide a complete description to the reader. *Cf. Anderson v. Nextel Retail Stores, LLC*, 2010 WL 8591002, at *11 (C.D. Cal. Apr. 12, 2010) (noting that objecting party failed "to identify authority that lengthy sentences and legal jargon necessarily violate due process").

[32] These further Record materials included an *Affidavit of Eric Rothstein*, R-004538 – R-004539, which disproves White's assertion that Mr. Rothstein's "testimony was not made available to the public prior to the hearing." White Report at 3.

These steps provided all ratepayers with additional notice and an opportunity to be heard at a public hearing (an opportunity that nearly two dozen people took advantage of, including counsel for the Wilson Ratepayers) in precisely the fashion contemplated by Alabama law.

Sixth, pursuant to Alabama Act No. 2010-519, the County has provided public notice and disclosure related to the issuance of the New Sewer Warrants. In accordance with the foregoing law, the County will convene a public hearing on the financing on Friday, November 15, 2013.

In summary, the active participation of the Wilson Ratepayers and their counsel in this bankruptcy case generally and in the confirmation process in particular demonstrates that the Wilson Ratepayers received ample notice of the Plan and an opportunity to pursue their objections. The Wilson Ratepayers have no standing to object to the notice provided to other parties, but their attempted objections to the Ratepayer Notice fail in any event. The form of Ratepayer Notice complies with the requirements of due process set forth in *Mullane* and its progeny, and the County's distribution of the Ratepayer Notice operated to provide due, adequate, and sufficient notice of the Plan, the opportunity to object to the Plan, the opportunity to be heard at the Confirmation Hearing, and the other contents of the Ratepayer Notice.

C. Disclosure Statement

The Wilson Ratepayers regurgitate various purported disclosure issues that they previously raised as objections to approval of the Disclosure Statement. *See* Amended Wilson Obj. at 21-23. *See also Objection of Charles Wilson (and Those Similarly Situated as Rate Payers) to Disclosure Statement* [Docket No. 1929] at 3-12 (similar list of unsubstantiated complaints).

As the Court ruled previously, these objections are baseless. The Wilson Ratepayers are not creditors with standing to object to the content of the Disclosure Statement. In any event, the Wilson Ratepayers provide no authority supporting the various additional disclosures they

demand, and much of what they request is in the municipal feasibility study prepared by Mr. Rothstein. There is no basis in law or fact for "the Plan" to provide the disclosures or explanations listed by the Wilson Ratepayers, and nothing about their list of complaints provides any reason for the Court not to confirm the Plan.

D. Remaining Objections

Finally, four one- to two-page objections have been filed:

The Breece/Starks Objection complains that "the County's commitment to sewer creditor's and bondholders impairs claimants' … rights to refunds from future or past ad valorem revenue and/or rights to property redemptions and/or rights to damages pursuant to 5th and 14th Amendment's to the U.S. Constitution, the Alabama Constitution, state common law and Alabama Code Sections 40-7-9.1 and 40-10-160." Breece/Starks Objection at 1-2. This objection fails because the Plan does not propose to use ad valorem tax revenues, or the General Fund, to pay *any* sewer related claims. *See* Plan §§ 2.3(a)-2.3(f), 2.3(t).

The Rodman Objection is a *pro se* letter that objects to any increase of sewer rates, as well as to the discharge and injunction provisions contained in the Plan. The Rodman Objection also requests the return of a surety deposit fee that the objecting party was charged with in January 2013. For the reasons set forth above, the Approved Rate Structure is lawful, and the releases and injunctions proposed in the Plan are critical to the Plan and permissible under the Bankruptcy Code. To the extent the objecting party has a deposit with the County, any rights with respect to such deposit are unimpaired under the Plan. *See* Plan § 2.3(v) ("Deposit Refund Claims" are not Impaired under the Plan).

The Weems Objection is a *pro se* letter that objects to the Ratepayer Notice on the basis that an average reader cannot understand the Ratepayer Notice. As set forth above, the Ratepayer Notice provided reasonable and appropriate notice under the circumstances.

The Crawford Objection is a *pro se* letter that objects to any increase of sewer rates, as well as to the discharge and injunction provisions contained in the Plan. The Crawford Objection also demands a refund on *water* bills that the objecting party perceives as too high. As set forth above, the Approved Rate Structure is lawful, and the releases and injunctions proposed in the Plan are critical to the Plan and permissible under the Bankruptcy Code. To the extent the objecting party seeks a refund from the County, Crawford failed to present a claim to the County Commission under state law or timely file a proof of claim in the County's bankruptcy case.

V. THE OPINION OF JAMES WHITE, WHICH FORMS MUCH OF THE BASIS FOR THE WILSON OBJECTION, SHOULD BE DISREGARDED

In addition to the substantive reasons why the objection of the Wilson Ratepayers should be overruled, this Court should also overrule that objection because it is based on the affidavit and report of James H. White, which should be disregarded. White has been on multiple sides of issues concerning the County's Sewer System, and his opinions have varied according to who hired him. White worked first for the County as its financial advisor, then for certain of the County's sewer creditors, then for the County's contract counterparty, and now for the Wilson Ratepayers. Having worked for the County in the past, there is a serious question whether his fiduciary obligations permit him to offer his current testimony. But, in any event, the flip-flop nature of his opinions should lead this Court to conclude that his current views are entitled to no weight whatsoever.

As an initial matter, there is a serious question whether White's testimony should even be allowed against the County. The Court "has the inherent power to disqualify an expert" who seeks to offer testimony against a party with whom the expert formerly had a confidential relationship and from whom the expert received confidential information. *Wyatt v. Hanan*, 871

F. Supp. 415, 419 (M.D. Ala. 1994); *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va. 1991). *See also Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444-45 (11th Cir. 1998) (inappropriate for expert to testify regarding "confidential work product of [the former client's] attorneys" or "the [former client's] litigation strategy"); *Richard v. Lennox Indus., Inc.*, 574 So. 2d 736, 739-41 (Ala. 1990) (plaintiff's counsel's former law clerk prohibited from testifying against plaintiff concerning information acquired while working for plaintiff's counsel). "This power exists in furtherance of the judicial duty to protect the integrity of the adversary process and to promote public confidence in the fairness and integrity of the legal process." *Wang Labs.*, 762 F. Supp. at 1248.[33]

White's relationship with the County dates back to the late 1970s. *See* White Aff. ¶ 3. Over the past four decades, White has "been engaged … on numerous occasions on a voluntary or professional basis in a variety of projects relating to the Jefferson County [Sewer System]." *Id.* These projects ranged from forecasting capital expenditures and sewer rates in the 1980s to analyzing various interest rate swaps entered into by the County in the late 1990s. *Id.* White testified on the County's behalf in the 1983 sewer warrant validation proceeding that ultimately culminated in *Shell v. Jefferson County*, 454 So. 2d 1331 (Ala. 1984). Most recently, White served as financial advisor to the County in 2007 and 2008, during which time he advised the County in its "attempt[] to deal with the disruption to its outstanding sewer financings caused by failure of bond insurance companies and disruption in the worldwide financial markets." White

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[33] The disqualification may well reach beyond the expert to the lawyer and thus to the entire objection. *See Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 43 F.3d 1439, 1440 (11th Cir. 1995) (retention and payment of former employee privy to confidential information as "trial consultant" results in counsel disqualification); *Shadow Traffic Network v. Superior Court*, 29 Cal. Rptr. 2d 693, 700-05 (Cal. App. 1994) (law firm hiring of expert witness who had been interviewed but not retained by opposing party results in disqualification of entire law firm).

Aff. ¶ 3. In his capacity as a financial advisor, White admits that he acted as a "fiduciar[y] who owe[d] [his] loyalty and first allegiance to" his client, the County. *See* White Report at 13. Finally, although on "July 8, 2008 [White was] dismissed by a majority of the County Commission from most of [his] job as financial advisor and resigned from the rest," *id.* at 14, White continued to advise then-Commissioner Carns[34] into 2010, *see id.*[35]

Since leaving the County's employ, White has repeatedly lent his support to parties adverse to the County. First, White undertook to represent at least one of what he termed the "clean" liquidity banks – financial institutions that, "clean" or otherwise, were at the time squarely adverse to the County. In this capacity, White gave a presentation at a January 2012 meeting of the Turnaround Management Association in which he posited that it would not be "fair and equitable to make debt holders, who are otherwise blameless, assume the County's burden under the Consent Decree." *See Challenges to a Reorganization Plan for Jefferson County TMA Presentation* (Jan. 26, 2012), attached hereto as **Exhibit B**. Rather, White

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34 Under the County's then-existing governance structure, Commissioner Carns was the Commissioner in charge of the County's Environmental Services Department (the "ESD").

35 The White Report seems to reveal privileged and confidential information of the County in support of the Wilson Ratepayers' contention that the Plan impermissibly extends the maturity of the sewer debt beyond 40 years in violation of Alabama Code Section 11-28-2. The White Report admits that this argument rests on "the personal knowledge of [White] when acting as financial advisor to the County during the first six months of 2008." Amended Wilson Obj. at 20; White Report at 7. White discloses the internal deliberations and legal analysis of the County's legal team – information that White only had access to by virtue of his fiduciary status. Specifically, White claims that in 2008 it was the "legal position" of the County's lawyers "that Section 11-28-2 controlled the term of refunding warrants in such a way that the maximum term of the refunding warrants was 40 years, measured from the date of the original issue of warrants being refunded" – exactly the "legal position" advanced in the Wilson Objection. *See* White Report at 7-8. Then he states that "consideration was given by the lawyers working on the problem to amending Section 11-28-2 to provide for a 50 year maximum term" in order to get around the "problem" allegedly presented by Section 11-28-2. White Report at 7. White's implication – that the County's present construction of the statute is erroneous because other County lawyers in the past allegedly construed the statute differently – is no different than, for example, a disgruntled expert consultant to a defendant in a civil action testifying (in support of the plaintiff) that even the defendant's lawyers disagree with the defendant's position. In other words, the White Report discloses deliberations of the County's attorneys and then attempts to hold those deliberations against the County. White offers no explanation as to how his fiduciary status can permit him to disclose privileged information of this variety.

suggested that "principles of fairness and equity" might "require that the County (and the State) make available additional taxes for debt service." *Id.* In other words, White at least strongly implied that the County could and should make non-sewer revenues available for satisfaction of non-recourse sewer debt. This new position contrasted to White's prior statement in a law review article that "it would not be a miscarriage of justice" if the County repaid ***none*** of the sewer debt. *See* James H. White, III, *Financing Plans for the Jefferson County Sewer System: Issues and Mistakes*, 40 Cumb. L. Rev. 717, 754 (2010) ("In fact, it would not be a miscarriage of justice if J.P. Morgan and other Wall Street players were required to assume responsibility for the entire $3.2 billion outstanding debt.").

More recently, having failed to secure payment in full of the sewer debt for his liquidity bank clients, White next appeared on behalf of the Water Works Board of the City of Birmingham ("BWWB"), lending his support to BWWB's objection to the County's Disclosure Statement.[36] The gist of BWWB's claimed standing to object – that increases in County sewer rates would make it harder for BWWB to collect water and sewer bills – demonstrates that BWWB was appearing and objecting in its capacity as a contract counterparty of the County, in opposition to the County's efforts to emerge from bankruptcy.

Now White has switched to yet another side, offering an affidavit and putative "expert" report in support of the Wilson Objection. The fact that the Wilson Ratepayers filed the Original Wilson Objection on October 4, 2013, and then filed an "amended and supplemented" objection the next day, reveals the extent of White's involvement. The Original Wilson Objection made

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[36] *See The Water Works Board of the City of Birmingham's and the City of Bessemer's Objection to Disclosure Statement Regarding Chapter 9 Plan of Adjustment for Jefferson County Alabama*, Ex. B [Docket No. 1916-5]; *The Water Works Board of the City of Birmingham's and the City of Bessemer's Objection to Revised July 29 Disclosure Statement Regarding Chapter 9 Plan of Adjustment for Jefferson County, Alabama*, Ex. A [Docket No. 1927-1].

no mention whatsoever of White, the White Affidavit, or the White Report. Comparing that pre-White Original Wilson Objection to the post-White version[37] reveals that White made substantial contributions to the Wilson Objection.

Because White has switched sides multiple times and because his opinions have varied wildly according to who was paying his bills, White's credibility is fatally compromised, and this Court should disregard his latest opinions. The Wilson Ratepayers' heavy reliance on White's non-credible opinions provides yet another basis for overruling their objection.

[remainder of page intentionally left blank]

[37] For the convenience of the Court, the County has attached as **Exhibit C** hereto a redline highlighting the differences between the Original Wilson Objection and the Amended Wilson Objection.

VI. CONCLUSION

For all the reasons set out above, and based upon the evidence and argument to be presented at the Confirmation Hearing, the County respectfully requests that the Court enter an order overruling each of the objections and confirming the Plan.

Respectfully submitted this 13th day of November, 2013.

/s/ J. Patrick Darby

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EXHIBIT A

IN THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA

JEFFERSON COUNTY, ALABAMA A COUNTY UNDER THE LAWS OF ALABAMA, et al.,	)	
Plaintiff	)	CIVIL ACTION
VS.	)	NO. CV-83-504-507-WAT
THE TAXPAYERS AND CITIZENS OF JEFFERSON COUNTY, ALABAMA,	)	
Defendants.	)	

PROCEEDINGS

BEFORE:

Eileen Cook and Tami Smith, Commissioners

November 22 & 23, 1983

Honorable William A. Thompson

APPEARANCES:

Mr. Vastine Stabler, Attorney at Law, and Mr. Robert Walston, Attorney at Law, Cabaniss, Johnston, Gardner, Dumas & O'Neal, 1900 First National-Southern Natural Building, Birmingham Alabama 35203; appearing on behalf of Jefferson County, the Plaintiff.

Mr. Edwin A. Strickland, County Attorney, Jefferson County Courthouse, Birmingham, Alabama 35263; appearing on the behalf of Jefferson County, the Plaintiff.

Mr. Edward Still, Attorney at Law, Suite 400, 2027 First Avenue North, Birmingham, Alabama and Mr. H. Powell Lipscomb, III, Attorney at Law, 210 North 18th Street, Bessemer, Alabama; appearing on the behalf of the following:

Francis E. Shell, Caroline Lipscomb, Elizabeth R. Still, Barbara Houts, City of Birmingham, City of Bessemer, Joe P. Bell, Jay Hoyt Hall, J. I. Cobb, and Jim Cooley.

Mr. Don Russell, Attorney at Law, District Attorney Office, Jefferson County Courthouse, Birmingham, Alabama, 35263; appearing on the behalf of the Taxpayers, the Defendants.

Mr. Robert Posey, Attorney at Law, District Attorney Office, Jefferson County Courthouse, Birmingham, Alabama, 35263; appearing on the behalf of the Taxpayers, the Defendants.

I N D E X

E X H I B I T S

NUMBER:		DESCRIPTION:	MARKED:	REC'D:
Plaintiff's	1	Minutes, 5/11/82	6	9
"	2	" 12/14/82	6	9
"	3	Affidavit-Publication	6	9
"	4	Minutes, 9/13/83	6	9
"	5	" 9/20/83	6	9
"	6	Bond Issue Advert.	6	9
"	7	Resolution 10/18/83	6	9
"	8	Improve. Plan	86	87
"	9	Projection	87	
"	10	Map	89	90
"	11	Map	90	90
"	12	Project List	123	123
Defendant's	1	Finan. Statement, '82	27	27
"	2	Committee Report	76	

Q Has not.

MR. LIPSCOMB: Okay. I believe that is all.

THE COURT: Thank you.

I think that is all, Mr. Gamble.

MR. STABLER: Call Mr. Jim White.

MR. JIM WHITE,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STABLER:

Q What is your name and address, please, sir?

A My name is James H. White, III. I reside at 2836 Shook Hill Road.

Q What is your occupation?

A I am in the investment banking business.

Q Now, do you have a relationship with the county, a business relationship?

A Yes. I am the Financial Advisor to the county in connection with sewer finance programs and, in particular, the thirty-five million-dollar sewer financing presently proposed by the county.

Q What does a Financial Advisor do?

A A Financial Advisor assists the county or assists the issuer in assessing it's financing needs; evaluating it's ability to repay indebtedness; and structuring or deciding upon the terms and conditions, pursuant to which indebtedness might be issued; and anticipating the reaction of the market, in particular

bond purchases to that financing; and endeavoring to propose terms and conditions for the financing which are at the same time acceptable to the issuer; within it's ability to pay, hopefully, at the best interest rate obtainable; and also acceptable in the market.

Q I take it that these duties that you are talking about not only refer to what may have been done at this time in terms of structuring the deal; but you would also give them assistance at the time it is let out for bids and marketed, at least, to be sure that it is marketed properly?

A Yes. We have given advice on some of the financial covenants and terms and payments and technical terms in the proceedings already taken by the county. In approving this issue, we will assist the county in preparing and offering documents which will be initially distributed to bond rating agents for their review. We will assist them in securing a rating on the bonds and distributing the offering document to potential purchasers, receiving bids, and awarding the bonds to the bidder offering to require the lowest interest payments.

Q What has been done up to now in connection with the bond issue?

A We, together with citizens, volunteers and county staff and the Commissioners, have surveyed the needs in Jefferson County for sanitary sewer improvements.

The County Commissioner, with the assistance of his staff, has determined the size of sewer improvement program that it deems advisable, the timing for those improvements, and the portion of those improvements which the Commission finds advisable to pay out of current revenues, and the portion that it finds advisable to pay through indebtedness to be repayed subsequently.

Once the size and the timing of the expenditures has been determined, then, a size and timing for the debt issuance was determined based on efficiencies in the volumn of bonds that should be sold and the timing for the need of the money.

Once that was determined, we advised on the specific terms and conditions that ought to be included in the bond authorization, and the issue was presented to this Court for validation.

Q Now, the bond indenture, which has been attached to the Petition, has it actually been executed?

A No. It has not been executed.

Q All right, sir. Have you received authorization to proceed to do what is necessary to get it executed?

A Subject to -- I believe the proceedings authorize the issuance of bonds including the execution of appropriate documents, subject to validation.

Q All right, sir. And we are here at the validation process at this point?

A That's correct.

Q Now, the document, then, the indenture, is actually prepared by, or on behalf of, the county; is that correct?

A That's correct.

Q That is to say, there is no borrower who is out there negotiating with the county on terms, as you might do if you had to go to a bank to borrow money; is that correct?

A That's correct.

Q Now, there are restrictions, are they not, on the county that are contained in the indenture?

A Yes. There are.

Q And I am going to ask you in a few minutes about some of them; but I would just like to ask you in a general way, what considerations are they as to why a borrower, such as the county, would put restrictions on itself in documents which it is unilaterally preparing?

A Well, the county will -- or the proceedings contemplate that the county will advertise these bonds for public sale. The most important reason why there are restrictions in the documents is they want someone to enter a bid for the purchase of the bonds.

It would be possible to draft the documents in such a way that no one would submit a bid.

Beyond that, it is desirable to receive a bid that represents as low a rate of interest as is feasible; and in order to do that, one has to anticipate what bond purchasers will require in the way of covenants, financial

covenants, as a condition of purchasing the bonds, and hopefully, one anticipates the type of covenant that, on the one hand, will permit the county to operate the system in an efficient manner for the benefit for it's citizens; but on the other hand, will induce as low a rate of interest as possible.

Now, there has grown, over the years, I guess, a custom resulting from the experience of issuers and bond purchasers in a number of different situations relating to what types of financial covenants it is customary to include in an issue. If they are not there, people ask questions or may not submit a bid for the purchase of the bonds. Furthermore, those customary terms and conditions are looked for by rating agencies.

I mentioned a few minutes ago that these bonds will most likely be submitted to, at least, two of the major rating agencies that customarily put a rating on a bond; and those rating agencies will look for these covenants; and the rating that they give the bond will be dependant, at least, in part, on their evaluation of the financial document and the financial covenants.

Q So, our audience is not just the bond purchaser. It is also the rating agencies; and the bond purchasers, themselves, will pay attention to what the rating agencies say in their report and the rating that they assign in determining what interest rate or what price they are willing to pay for the bonds. As a general rule the better the rating, the lower the interest rate you would

have to pay?

A That's correct.

Q All right, sir. Now, in your job as Financial Consultant, does that include advising the county as to how to present a bond issue to try to hold the interest rate down and take into consideration these factors?

A Yes. That's our principal job.

Q All right, sir. You know, I really hadn't asked you to. Maybe we should tell the Court just in general what your educational background is and what your work experience background is, too.

A I'm a college graduate. I have a law degree. I'm a member of the Bar of this state. I practiced law in the public finance and securities area for several years with a Birmingham law firm. Following that I was Legal Counsel to the University of Alabama in Birmingham.

Q So, Jim, I realize we don't allow you to use those words in our presence, usually; but you can tell. You were with Bradley, Arant, weren't you?

A Yes. I was an associate with Bradley, Arant.

While at the University, I was responsible for, from a legal standpoint, for the financing at the Birmingham campus as well as the Huntsville and Tuscaloosa campuses. I have been in the investment banking business since approximately 1973, when I left the University and joined J. H. Shannon and Company.

Then, I formed my own firm in about 1975. We have acted as financial advisors and managing underwriters to, among others, the City of Birmingham, the Water Works Board of the City of Birmingham, Jefferson County and other public issuers.

Q All right, sir. How long have you been a Financial Advisor for the county?

A Since approximately August of 1982.

Q Now, I want to ask you about some specific provisions. I believe there has already been some testimony concerning the Reserve Fund which is in Section 6.4 -- do you have a copy of the indenture -- I believe the testimony is that that Reserve Fund is a reserve for the purpose of or equal to one year's debt service at whatever the highest year is; and that the fund would be accumulated over five years at the rate of 1/60th of that amount per month.

I believe there is also testimony that at the moment we do not know how much that is because we do not know what the interest and principal is going to be.

A Correct.

Q Now, I would like to ask you, first, please, sir, as to the purpose of that fund, what purpose does it serve?

A The experience in municipal financing, unfortunately, from time to time issuers find themselves temporarily unable to meet debt service on a bond issue. In most instances that temporary inability can be remedied in

a matter of a few months or a relatively short period of time; but if there are no funds set aside in reserve to make the principal and interest payments, then, the financing becomes due and payable and creates -- disrupts the financial circumstances of the issuer and can affect it, not to speak of the bond holder who may want the benefit of his bargain. It makes it difficult for the issuer thereafter to sell securities in the market. So, over the years there has been developed the practice, particularly in revenue obligations such as that proposed here, to establish a reserve fund to approximately the maximum annual debt service on the issue so that, if adverse conditions should occur or some technical reason should emerge, that the county or the issuer cannot make the debt service, there is a fund available to pay principal and interest until the situation can be remedied. The establishment of the Reserve Fund is customary in this type of issue. It is necessary for it's marketability.

Q You have about answered the question I was about to ask you; but I am going to ask you to be sure.

Do you have an opinion as to whether this fund -- and at the moment, as to the amount -- in the amount of one year of your maximum annual debt service cost is usual and customary in the business; and secondly, I would ask you whether it is reasonable in amount?

Do you have an opinion as to those issues?

A In my opinion it is usual and customary; and if

it were not included, it would make the bonds either impossible to sell or saleable only at a much higher interest rate than would otherwise be obtainable.

Q In your opinion is the one-year amount a reasonable amount for this kind of fund?

A The one-year amount is a reasonable amount. It is universally accepted. I can't recall any sewer revenue bond issues that have had less than that.

A feature in this indenture -- indeed, in most instances, the maximum debt service is deposited at the time of the issue.

Q Well, I want to ask you about that second.

A All right.

Q The provision dealing with the 1/60th -- in other words, they are going to raise this money out of revenues over a five-year period of time?

A Correct.

Q All right, sir. Now, as to that, what is it's impact on the county as opposed to simply just putting up the entire reserve at the beginning?

A Well, if the entire reserve were to be put up at the beginning, the size of the bond issue would have to be increased either to create the reserve itself or to pay for the improvements to which the funds would otherwise be applied. That would increase the principal and interest payable by the county over time.

Q All right, sir. The provision, then, of delaying it or putting it over five years, would that be, from an

economic standpoint more or less favorable to the county?

A I believe it is more favorable to the county than paying it up-front and would permit the county either to have lower sewer rates than would otherwise be the case or to pay to buy more improvements, whichever way you want to look at it.

Q Now, do you have an opinion as to whether this provision of collection of the fund over a five-year period is usual, customary, and reasonable?

A I would say that it is the longest period of time that would deem -- would be deemed to be usual or customary or reasonable. I have never seen a longer period of time for a build-up of a Reserve Fund to maximum annual debt service.

Q All right, sir. Now, I want to ask you about the Replacement Fund, please, sir, which I believe is Section 6.5.

Let me ask you, first, please, sir, what the Replacement Fund, what purpose it serves?

A The bond holder is looking to the ability of the system to generate revenues in order to have his bonds and his interest paid; and in turn, the system has to be in good operating condition in order to be able to generate revenues. The Replacement Fund is a mechanism to insure that funds will be set aside on a regular basis to be available if emergencies should occur requiring the rapid expenditure of money in order to put

a plant or a sewer line back in condition. It is, if you will, a method of enforced financial discipline and it is customary in all municipal revenue financing involving fixed assets in plants to have such a fund.

Q All right, sir. Now, is this the only fund out of which, or only place you can get money for improvements, betterments, or extensions to the system?

A No. The assumption -- I think the bondholder's assumption would be that that fund is in the nature of an emergency fund and that the ordinary renewals and replacements would be made out of other funds of the county or out of the balance remaining after payment of all of the required debt service.

Q That would be surplus revenues in terms of --

A That is correct, or the operation revenues that are payable after debt service.

Q All right, sir. Now, do you have an opinion -- I am going to ask you first about the million dollar figure -- the Replacement Fund is in the amount of $1,000,000; is that correct?

A That's correct.

Q I suppose I should ask you, first, would a larger amount in the Replacement Fund be more or less favorable to the county vis-a-vis the bondholder?

A Can you rephrase that question? Am I looking at it from the standpoint of the county or the bond-holder?

Q From the standpoint of the county at this point.

In other words, if you had, say, 2 or 3 or $4,000,000 tied up in the Replacement Fund, would that be more or less favorable to the county?

A It would be less favorable.

Q All right, sir. Why would that be, please, sir?

A Because it would have to raise rates to a larger extent or defer capital expenditures in order to deposit those funds in an idle account.

Q All right, sir. Now, I will ask you, first, please, sir, if you have an opinion as to the reasonableness of the $1,000,000 amount being placed in the Replacement Fund?

A In my opinion it is, by comparison, a relatively low amount. It is also, in my opinion, acceptable from the standpoint of the bondholder because the county has other revenues, has other revenue sources other than operating revenues available to it. If the county were wholly dependant upon sewer service charges for it's revenues, or if the county were not in good financial condition, I believe that the bondholder would require a larger replacement reserve than is contemplated here.

Q All right, sir. Now, this also has a provision whereby the Replacement Fund can be accumulated over five years.

A Correct.

Q I ask you your opinion, please, sir, as to the reasonableness of the five-year period for the collection of funds to get up to the million dollars for the

Replacement Fund?

A From the standpoint of the county, I think that is a reasonable period; and indeed, I have not seen a longer period of accumulation in any issue.

Q All right, sir. In your opinion is that acceptable in terms of the bond market?

A Yes, sir. That is acceptable.

Q All right, sir. Now, let me refer you, please, sir, to Section 7.5 and ask you, if you would, tell the Court in a general way what this provision refers to. This is the rate covenant; is it not, sir?

A That's correct.

Q What does it refer to in a general way?

A It is customary in revenue financing to have the issuer commit contractually to maintain rates sufficient to pay operating expenses, get service, and to make the deposits into the Reserve Fund and the Replacement Fund that are required by the instruments.

If the county isn't obligated, since the bondholder is looking to the revenues from the system as his source of repayment, if the governing body of the county does not review it's rates on a regular basis and make appropriate increases when and if inflation and/or other factors cause the moneys to be available for the system and for the debt service to be sufficient, then, the bondholder is jeopardized. So, there is universally in revenue bond issues a requirement that rates be increased in order to provide funds sufficient

to pay debt service to maintain and operate the system and to maintain Reserve Funds at required levels.

Q Now, as to Paragraph -- the first paragraph of Section 5, Subheadings A, B, C, and D. Am I correct that A corresponds to the Gross Revenue Account; B corresponds to the Bond Account; C refers to the Debt Reserve Account; and D refers to the Replacement Fund?

A You said that A referred to the Gross Revenue Account?

Q No. I am off one. I'm sorry.

A I believe that A refers to the Bond Fund, out of which principal and interest are to be paid.

Q That's right. And B would be the Operation Fund?

A B is the Operation Fund; C is the Bond Principal and Interest Reserve Fund; and D is the Capital Improvement Reserve Fund.

Q Replacement Fund?

A Replacement Fund.

THE COURT: That's the trouble, Mr. Stabler, with leading the witness when he knows a lot more about it than you do.

MR. STABLER: Judge, that's the only kind you are to ever lead.

I was checking him out to see if he knew what he was doing.

Q (By Mr. Stabler) All right, sir. Then, there

is a second provision which is the second paragraph; is that right?

A Correct.

Q And what does that provide for?

A That provides that the county shall cause rates to be in effect sufficient to provide for the payment of debt service, that is principal and interest on the bonds, an amount equal -- that is the maximum amount of debt service at any time that the bonds are outstanding -- an amount equal to -- and that is after the payment of operation and maintenance of the system -- an amount equal to 1.10 times that maximum annual debt service figure.

In other words, the county should have, from revenues, an amount to pay the operating expenses of the system leaving over one, an amount equal to 1.10 times the maximum annual debt service on the system.

Q Now, during the first five years, when you are building up these funds, would you expect the covenant in the first paragraph of 7.5 or the covenant in the second paragraph to be more demanding financially on the county?

A I think that the covenants in the first paragraph might well be the most demanding because, in addition to debt service, the funds remaining after operation and maintenance have got to be sufficient to make the monthly payment into the Reserve Fund and into the Replacement Fund; and it is possible that those two

payments might exceed 10 percent of the maximum annual debt service.

Q Okay. After the five years, and assuming all goes well and those funds are not depleted --

A After the first five years, assuming the funds have been built up and have not been depleted, then, the second paragraph should be the tougher standard to meet.

Q All right, sir. Now, this 1.10 times the maximum amount payable is principal or interest. Is this a term -- is this type of term usual and customary in bond issues?

A Yes. It is usual to require rates which will produce an amount equal to the maximum annual debt service plus a slight margin of safety.

Q All right, sir. In your opinion is that a reasonable type provision?

A Yes. That is a reasonable type of provision because it is very difficult to predict in advance what the operating results, with precision, what the operating results of a revenue producing entity will be. Thus, one has to plan with a margin of safety.

Q All right, sir. Now, as to the specific figure, here, which is 1.1, is that a reasonable margin in your opinion?

A In my opinion it is a reasonable margin.

Again, it is a lesser margin than is found in a number of other sewer financings. I would not want

to recommend a lesser ratio than 1.1 to 1.

MR. STABLER: All right, sir.

I think that is all.

THE COURT: Mr. Strickland?

MR. STRICKLAND: No questions.

THE COURT: Mr. Posey?

MR. POSEY: Yes, sir.

CROSS-EXAMINATION

BY MR. POSEY:

Q Mr. White, I have a question about redemption, Section 4.3 of the indenture. There is a statement in there that the redemption prices that are set forth in this document are not allowed under the present enabling law.

Is it required to have prices that are higher than the law allows for marketability? What is the purpose of that?

A The function of a redemption premium is to protect the bondholder in the event of a drastic rise in interest rates and, thus, a decrease in the value of his bonds -- excuse me -- of a substantial decrease in the interest rate, and, thus, a corresponding increase in the value of his bonds. If he were to call the bonds at that time, which the county might deem advisable to do in order to reissue new bonds at a lower interest rate, then, the bondholder loses the value of the bargain he makes right now. Thus, to compensate him to some extent for that possibility, it is customary

to include a redemption premium or a penalty in the event that the bonds are called.

Now, the difficulty with the particular act under which these bonds are being issued is that the act prohibits a redemption premium that would cause the actuarial yield on the bonds to be in excess of 6 percent.

The effects of that is to prohibit a redemption premium at all. In other words, we cannot have a redemption premium under the law as it presently exists; and the result of that will be, that unless we are able to amend the law, a bondholder would require a higher rate of interest than would otherwise be the case if a customary redemption price were included in the proceedings. In my opinion these redemption prices are usual and customary under the current market conditions.

We are hopeful that the Legislature will amend the act applicable to these bonds prior to their issuance so as to permit us to include these redemption prices in the proceedings. If it does not, then, we will not be able to include any redemption price.

Q Okay. There is some bill pending now to your knowledge?

A There is not a bill currently pending. I am informed that there will be one introduced in the near future.

Q In the event that doesn't happen or that the law is not amended, what effect, other than raising the

interest, would there be?

Can this be issued in it's present form without that amendment?

A Yes. They can be issued. The county will pay an interest penalty, a quarter, half of percent, something of that sort.

Q Okay. Would you have an opinion as to whether or not these bonds, if issued, would represent a general debt of the county under any circumstances?

A You mean under the constitution?

Q Under the constitution or under this enabling act?

A In my opinion they would not be regarded as general obligations of the county within the meaning as that phrase is generally -- for purposes of our debt limit or any other provision of which I am aware.

Q But the bondholders are -- is there some security for the bondholder other than the revenues?

A There is no security for the bondholders other than the revenues to be derived from the system and the good name and reputation of Jefferson County.

MR. POSEY: I don't have any further questions.

CROSS-EXAMINATION

BY MR. STILL:

Q Isn't there a statutory mortgage lien created by this indenture, here, which would have an effect against the property created by this bond issue?

A My recollection is that that is a non-foreclosable

statutory mortgage; and that it's purpose is to enforce the interest of the bondholders and the revenues from the system, and that the bondholder cannot look to the sale and dismemberment of the system for the return of his money.

Q But he could look to the trustee taking over the system, couldn't he?

A Yes; but as a practical matter, the only thing the trustee is going to have is the revenues from the system.

The statutory mortgage merely replaces the management of the system in the event that the operations don't produce enough income to pay debt service.

Q Well, assuming a default happened, the trustee could step in and, essentially, displace the County Commission as the operators of the system; and the trustee would take over, and the trustee could set rates sufficient under the indenture, under 7.5; is that right?

A I believe that's correct.

Q What is your best estimate as to the amount that will be required in the Reserve Fund if the interest rate on the bonds is around 10 percent?

A Approximately two and a-half million dollars.

Q You mentioned the Citizens Committee that had looked into the sewer system.

Are you referring to the Waste Water Facility Development Committee?

A Yes, I was.

Q That was the one that was headed, I believe, by Elton B. Stevens?

A Correct.

Q What part did you play in assisting that committee?

A Initially, I was a member of the committee. When I was asked by the Commission to serve as Financial Advisor -- the Commission asked us to work with the committee along with the First National Bank of Birmingham and, subsequently, Hendrix, Mohr, and Yardley in their deliberations.

Q Did you continue to attend meetings of the committee after you became the Financial Advisor?

A I attended meetings of the Finance Committee, Subcommittee. I rarely attended meetings of the full committee thereafter.

Q The Finance Committee, I believe, consisted of General Royal Hatch and Harry Miller; is that correct?

A Yes, in most instances. Quite frequently Mr. Stevens, and, in addition, Mr. Jack Neal met with the Finance Committee.

Q As a part of the work that you participated in of the committee, did they receive information concerning the projected construction costs of a number of projects?

A Yes.

Q Did they also receive projections as to the amount of additional operating and maintenance costs for those projects once they were operational?

A Yes.

Q Where did they receive those figures as to the construction costs and additional, what's called, O&M costs?

A The numbers were estimated, I would say, jointly, by the staff of the Public Works Department and by consulting engineers retained by the county to assist the county and the committee. Those were estimates based on, in some instances, detailed engineering drawings and other general descriptions of the capacity of the plants, the prospective plants and improvements and their locations and configurations.

Q Did the committee also receive information about the number of potential users for each one of these projects?

A Yes.

Q Where did they get that information?

A The potential-user information came, partly, from the Community Development Department of the county and from the Public Works Department. Then, it was subjected to a test of reasonableness by the committee, itself, and others working with it.

Q I believe in the committee report there is the term "ERU potential"?

A Correct.

Q Are you familiar with that term?

A I believe it means equivalent residential unit, and it is an attempt to define the total demand on a

sewer system in terms -- whether it be an office building, a hospital, or an industrial plant -- in terms of the number of equivalent mean residences that that demand would represent.

Q So, wherever in the report it shows ERU potential, you have taken industrial complexes and shopping centers and businesses and turned them into individual houses; is that right?

A Correct.

Q And you say that information came from the Community Development and Public Works Department of this county; is that right?

A No. I said that they supplied the raw data. It was then evaluated by others working on the project, and it was evaluated in the context of being used as forecasts to do a very major financing on it. Thus, the emphasis was on conservatism because the Finance Committee, at least, felt it had to have units that it could count on if it were to a near certainty, if it were going to recommend the issuance of bonds and reliance upon those equivalent residential units actually developing over a period of time.

I cannot tell you, because I don't recall, whether the estimates that the Community Development Department came up with were higher than those published; but I doubt that they were the same in all instances.

Q Was this committee appointed by the county government?

A It was initially appointed by Chriss Doss, Commissioner Doss, who was then Public Works Commissioner; and it was subsequently reappointed by Commissioner Moore, who succeed Commissioner Doss in that capacity.

Q Is it your understanding from the trust indenture that all sewer user fees are to be paid into the, I believe it is called, the "Gross Revenue Fund" or the "Revenue Fund" under this indenture?

A It is all revenues to be derived from the operation of the system. That would include -- I would interpret that to include all user fees.

Q And also impact fees or hook-on fees as they are variously called?

A Yes, but I would distinguish impact fees from payments made by contractors in order to induce the county to put in lines that it would not otherwise put in. Those might be treated under a separate agreement.

Q There is going to be no segregation of funds within that account; is that right, as to their source?

A From my reading of the document, that's correct.

Q There is going to be no segregation as to their geographical source?

A That is correct.

Q Has your firm or this committee, The Waste Water Treatment Facility Committee, or any other body that you know of, made an analysis of this project to see whether

the new construction that's going to be developed will generate enough users so that it alone could pay the debt service on this $35,000,000?

A Will you repeat that question again?

Q All right. Have you done any surveys or do you know of any that would tell us whether the users added to the system as a result of the new construction paid for out of the bond issue will generate enough revenue to pay the debt service on the bond issue?

A First, I know of no studies in the sense of an organized carefully done analysis. I would say that there probably does not need to be a study done because I believe most people who have been associated with the project would say that the improvements will not generate sufficient revenues in the early years to pay the debt service that will be allocable to improvements.

In making that statement, though, there are several difficulties. First, it is very difficult to determine which improvements are for new users and which are for the benefit of present users. Indeed, that may not be determinable because a great deal of the money is being used to remedy deficiencies at existing plants; but I would strongly suspect that there is, at least, some money being spent that will not provide an immediate return. I would hasten to add that it is certainly the anticipation of the people that worked on the committee, that over the life of the bond issue, the overall return to the county will

exceed the cost of the improvements by a substantial margin.

Q Over the life of the bond issue, 30 years?

A Correct.

Q And that -- is that based on any kind of figures?

A No. That is based on the general perception that, if you are to have economic growth in an area, then, you have got -- have to provide adequate utility services. It is a question of the chicken and the egg. Are you not going to have new construction unless you have got sewers? It is impossible to go out and get bonding commitments to put in new plants and new houses before you build the sewers. You have got to take the risk and build the sewers and hope, and reasonably expect, that the improvements will come. If you don't build these sewers, then, there is no hope that you are going to have that sort of development.

Q Insofar as there is a project that is going to build a plant where there hasn't been a plant before and build a trunk line and tie on to, perhaps, cap sewers and replace completely a septic tank system in an area, that is going to be serving some new users, right?

A Correct.

Q Insofar as there is a replacement to an existing line which is crumbling and falling apart with no increase in the capacity of that line, we can

pretty well identify that as being a replacement and not new construction in the sense that I just asked you about?

A That is correct.

Q Now, with regard to the large and very old plants that we have got, such as Village Creek and Valley Creek, there is going to be new construction there which is going to upgrade the plant; is that correct?

A I don't have the detailed facts concerning those plans, you know, in my head. I would rather -- I don't think I am competent to answer that question.

Q Did you receive a copy of the report of the committee --

A Yes, sir.

Q -- when it came out?

A Yes, I did.

Q Have you made any estimate as to the amount of revenue that will be generated by the new additions to the system, some five or six or ten years down the road, how much additional revenue over and above what we are getting from existing users, we might be able to expect?

A Are you talking about the plan as recommended by the Blue Ribbon Committee or the plan that was subsequently approved by the Commissioners?

Q Either one, if you know of any study of either one?

A I believe that there are revenue assumptions in the Blue Ribbon Committee study from new users. I am unaware of new -- I am unaware, although, I can't state that there are not any, of any revenue assumptions on the smaller plants.

MR. STILL: Your Honor, we would like to -- I am going to have Mr. White identify this. I am confident he can.

This is the entire Blue Ribbon Committee Report. I am interested only in the cover page and Pages 53 through 100, which is all I have got xeroxed here, if that's agreeable with Mr. Stabler that we introduce just those pages of the report. We can introduce anymore that you want to at any other time. Those are the ones xeroxed so far. That is the committee's project list.

MR. STABLER: What is the relevance of this?

MR. STILL: I am going to tie it up with another witness. I want him to identify the -- he's just been testifying about those analyses that they made such as the ERU potential, O&M cost and Capital cost.

MR. STABLER: (Nodding head affirmatively.)

(Defendant's Exhibit 2 marked for identification.)

Q (By Mr. Still) Mr. White, let me show you what has been marked as Defendant's Exhibit 2.

Do you recognize that as being a portion of the

report of the Waste Water Facility Development Committee that you were first a member of and then advised?

A Yes. This appears to be a portion of the report.

MR. STILL: Your Honor, we move the introduction of this exhibit.

MR. STABLER: I would like to object to it at this time. Mr. Still says he is going to tie in the relevancy of it. Until it is done, until it is established, the relevance, I would object to it's introduction.

The testimony is that -- this is not the plan of the county's. If he cannot show it's relevance, I don't think it ought to go in.

THE COURT: Suppose it was a study by, we'll say, a knowledgeable group who made recommendations to the county upon which the county then later made it's decision and acted, would that not go to the question of reasonableness of what the County Commission did; or underlying all of this, these issues, aside from what I call the "purely statutory issues," because it may be the arbitrary capriciousness of the County Commission.

MR. STABLER: I think if that could be shown, then, it would be, could be introduced. I don't think he can show that.

THE COURT: It may be evidence to the contrary.

MR. STABLER: I don't understand the last statement, Your Honor.

THE COURT: Perhaps it is evidence that they were not arbitrary and capricious.

MR. STABLER: Oh, I think it would be, if they acted on it. I don't think there is any testimony that they did act on it, and I don't believe there will be. That's why I question it's relevance.

THE COURT: All right. Do you have some profer that this was made available to the County Commission either as a commission or individually, and considered by them?

MR. STILL: Yes, sir. I will wait and tie it up with an additional witness. We will have it introduced at that time. I will be glad to do that.

MR. STABLER: He has authenticated it through him, obviously.

THE COURT: At this point your objection is one of relevance?

MR. STABLER: Yes, sir.

THE COURT: Well, Mr. Still has offered to withhold it to show a subsequent profer or predicate evidence. Then, we will just leave it where it lay.

Q (By Mr. Still) Did your -- well, not your committee -- the Waste Water Facilities Development Committee also include in it's financial model a projection of the increased operation and maintenance costs from the various projects they had proposed?

A I believe the word "projection" is a -- is correct, yes.

Q As a matter of fact, don't they show that for the first several years the operation and maintenance costs is going to greatly exceed the new revenue generated by the system, that is, the new revenue from new users?

A Well, the operation and maintenance costs of the system presently, of the present system, exceed the present revenue. So, I think it is clear that the operation and maintenance costs of the increased system is going to clearly exceed -- I don't know whether the study shows that or not, to be frank. It shows increasing revenues or increasing operation and maintenance expenses; but the cause of those increases is by no means clear to me that they are attributable solely to new users. There are new plants, more sophisticated plants. There are high levels of treatment requiring more chemicals, greater expenditure of electricity. I do not think that the study, that one can draw from the materials I have seen, or attribute that increased cost to the new users. It is very difficult to separate out what portion of this sewer improvement program is attributable either from a capital point of view or from an operating point of view to new users. There are certain lines that you can clearly identify; but the operation costs are largely in two areas, at the plant level and at the level of

upgrading or repairing and maintaining the existing lines, which are very old.

So, I cannot say that this study demonstrates precisely where those, on it's face, precisely where those operating costs come from.

Q Do you have any kind of rough estimate as to -- under Commissioner Moore's proposed capital plan, what percentage of that money is going to be used clearly for development of new lines so that new users will be added to the system?

MR. STABLER: Do you mean the money that was recommended in the committee or money in the plan? You are talking about apples and oranges.

MR. STILL: No. I asked him about Commissioner Moore's plan, which is the plan referred to in the trust indenture.

MR. STABLER: All right, sir. Okay.

Q (By Mr. Still) I am now back to the trust indenture.

A I cannot speak to the decision between the new users and existing users in the plan.

MR. STILL: Okay. That is all the questions I have.

CROSS-EXAMINATION

BY MR. LIPSCOMB:

Q Mr. White, you said that the present operating expenses had exceeded it's costs.

Are you talking about when the rate was 48¢ per

100 cubic feet?

A I am talking about the rates in effect prior to November 1st of '83.

Q All right. Now, do you know how much revenue the old rate, the ones before November the 1st, '83, were producing annually?

A I can only give you an order of magnitude figure on the order of 11 or $12,000,000.

Q And do you know what the expenditures were running at that time?

A I believe that we estimated that the expenditures for the fiscal year ending December -- I mean, September 30, 1983, at the time the study was done, was that they would be on the order of 13 or $14,000,000.

Q Have those been broken down anywhere? Are those available?

A That question should be addressed to Mr. Gamble.

Q All right. Now, when we are going up to -- by increasing the rate, how much revenue do you anticipate producing at that point?

A There will be an approximate doubling of rates. There are some new -- it is difficult to assess precisely because the County Commission included some special prices that the impact of which we don't know; but we are anticipating approximately a doubling of revenues.

Q All right. And, well, let me ask you this: You have inspected and are familiar with the system, this study --

A I have inspected certain parts of it and am generally familiar with it, yes, sir.

Q And the book value of the system is some $91,000,000? That's what is carried on the books as being valued, as I understand it?

A Again, I would have to defer to Mr. Gamble's statement for that figure.

Q Do you have a judgment as to what the value of the system is, though, as far as what it would cost to replace it, or what is the thing worth?

A I am sure the replacement -- I'm sure a replacement cost is a minimum of $91,000,000, probably way in excess of that.

Q Would it be closer to a billion dollars?

A I can't say.

Q And there is nothing owed on it?

In other words, what bonds they have got outstanding, they have already got reserves set aside that will pay them off?

A I don't believe that is correct. I believe there was a refunding issue in 1978 and that those warrants are still outstanding and remain to be paid. I do not have the precise principal amount of the warrants outstanding, but I am sure it is one of those documents, here.

Q That is to be paid out of the ad valorem tax?

A That is where they are presently. That is where debt service is presently being paid, yes.

Q Is that a proper place to be paying that from?

A Yes, sir.

Q That's not a revenue bond, is it, the one we are talking about, the reissue bond?

A It is called a Special Tax Bond. Namely the principal security is -- a portion of the county sales tax is pledged for the payment of the bonds as sort of a collateral pledge; but it's not actually being applied to debt service. In fact, it is being used for jails and other things, which is perfectly proper.

In terms of flow of funds, if you want to know what the county counts on to pay that debt service, it is that .7 mill ad valorem tax.

Q That is strictly for sanitary purposes?

A That is correct.

Q Now, the only thing that is being pledged is the anticipated revenue from the sewer fee, sewer user fee or impact fee, whatever?

A With regard to the $35,000,000 authorized issue, that is correct.

Q Now, you said something a while ago, earlier, I really don't understand. You talked about the county, something about bond rates, discount rates or interest rates and the good credit of the county, or something like that. What were you talking about, sir?

A The question was asked as to the source of payment, what would the bondholder expect to be paid out of. I said -- or why would they expect to be paid. I believe my

response was that they would expect to be paid out of sewer revenues and would expect to be paid because they have pledged for the payment of principal and interest; and moreover, they would expect to be paid because Jefferson County has a reputation of paying it's bills.

MR. LIPSCOMB: I believe that is all.

THE COURT: Mr. Stabler?

MR. STABLER: Nothing further.

THE COURT: Mr. Strickland?

MR. STRICKLAND: Nothing.

THE COURT: Mr. Posey?

MR. POSEY: Nothing.

THE COURT: Thank you, Mr. White.

MR. STABLER: Your Honor, Jim wants to be somewhere else; but he would be, I am sure he would be on call.

THE COURT: Will you be in town?

MR. WHITE: Yes, sir. I will be in town. I will not be here Monday and Tuesday.

THE COURT: I don't know whether we will be or not. I am making no speculation on that.

All right.

Thank you, Mr. White.

At this time we will take a 15 minute recess.

(Court recessed at 3:15 p.m.)

(Court reconvened at 3:35 p.m.)

THE COURT: Court will be in session.

EXHIBIT B

Porter, White & Company

Challenges to a Reorganization Plan for Jefferson County

Memorandum

January 26, 2012

The following concepts appear in the bankruptcy code in connection with approval of reorganization plans under Chapter 9, particularly where consent of all creditors is not obtained:

- regulatory or electoral approval,
- feasible,
- fair and equitable,
- retention of liens securing claims to the extent of the allowed amount of such claims.

1) Reasonableness of sewer rates to be determined by courts construing constitutional language or indirectly by legislature should it choose to legislate in the area.

2) Feasibility of financial structure and operating plan:
   a. Level debt service vs. "power curve" debt service.
   b. Decline in utilization from rate shock (including increases in water rates), more efficient plumbing fixtures, and water conservation.
   c. Does the plan accommodate likely capital expenditures?
   d. Is State guaranty of debt service available in order to make possible low interest rates?
   e. Jefferson County's inadequate financial and management information system: You cannot manage what you cannot measure.
   f. Does the County personnel system, in court for more than two decades, produce employees competent to run the County?
   g. Is Jefferson County a kleptocracy, as the Eleventh Circuit has stated, and thus unfit to run the sewer system? Is a change in form of government required?
   h. Does the consent decree need to be modified?

3) Debt incurred to finance sewer improvements that the County was generally obligated to make, and the State was contingently obligated to back, under provisions of the Consent Decree. Is it fair and equitable to make debt holders, who are otherwise blameless, assume the County's burden under the Consent Decree when officials and employees engaged in improvident and criminal conduct? Do principles

of fairness and equity require that the County (and the State) make available additional taxes for debt service?

4) Assuming that the allowed amount of secured creditor's claims is dependent upon the value of the sewer system, then the value of the secured creditor's claims is largely dependent on the level of interest rates, which in turn is greatly influenced by whether the State provides credit support. Will the State provide credit support?

EXHIBIT C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE:	)	
	)	**Case No.: 11-05736-TBB-9**
JEFFERSON COUNTY, ALABAMA,	)	
	)	**Chapter 9 Proceeding**
DEBTOR.	)	

AMENDED & SUPPLEMENTED *IN TOTO* OBJECTION TO CHAPTER 9 PLAN OF ADJUSTMENT FOR JEFFERSON COUNTY, ALABAMA

COME NOW Charles E. Wilson, David Harris, III, Mike Agnesia (three Jefferson County, Alabama sewer rate payers) ("Rate Payers"), and submit this, their Amended and Supplemented *in toto* Objection to the Chapter 9 Plan of Adjustment for Jefferson County, Alabama, as supplemented ("Plan")[1]. [1] Rate Payers are real parties in interest, have filed a Claim, and each is a special tax payer pursuant to 11 U.S.C. Section 1109(b). Pursuant to 11 U.S.C. Section 943(a) each has a right to be heard with respect to this Objection. Further, pursuant to 11 U.S.C. Sections 1128 and 943(a) each has a right to object. Rate Payers respectfully request that the Court determine that the Plan is not feasible and is not in the best interest of creditors as required pursuant to U.S.C. Section 943(7) and, hence, the Plan should not be confirmed.

Recently, the Court and Jefferson County have challenged whether a class action is (1) proper in bankruptcy and (2) has any identifiable value in the bankruptcy estate or is legally permissible. At the outset, Rate Payers would state a class action is the ideal legal vehicle in a situation like the present – i.e., wherein the County seeks to do away with **all rate payers', both current and future**, ability to legally challenge the imposition of unreasonable and discriminatory rates. Indeed, the County seeks this Court's approval to legally bind all current and

[1] ~~Rate Payers herein expressly reserve their right to supplement this filing with additional materials, evidence, and or arguments.~~

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future rate payers, do away with their legal right to challenge the reasonableness of sewer charges, and circumvent well-settled Alabama case law and the Constitution of the State of Alabama. It is precisely because of these issues that the *Wilson* rate payers file this Objection to the Chapter 9 Plan of Adjustment. In support of this filing, Rate Payers submit and rely upon the following:

(1) the arguments and legal authorities cited herein;

(2) the Affidavit of James H. White, III and accompanying *Curriculum Vitae*, attached hereto as Exhibit "B;"

(3) the "Report on Plan of Adjustment and Disclosure Statement Filed by Jefferson County, Alabama in Case No. 11-05736-TBB9" prepared by Porter, White & Company, Inc. (hereinafter "PW&Co Report") attached hereto as Exhibit "C;" and

(4) any other objections filed and/or asserted by any other entity or individual objecting to confirmation of the Plan of Adjustment, as amended by the Plan Supplement.

In support of this filing, Rate Payers state as follows:

INTRODUCTION

Debtor's Chapter 9 Plan of Adjustment was originally filed on June 30, 2013 and was amended by submissions on July 29, 2013. It was additionally supplemented on September 30, 2013 with updated exhibits, including updated GO and sewer warrant indentures. The Plan of Adjustment ("the Plan") lacks adequate information, is not based or grounded in proper facts or law, is not feasible, and, therefore, should not be confirmed. While the United States Bankruptcy Court for the Northern District of Alabama, Southern Division ("Court") is constrained by the United States Constitution and the applicable separation of powers and related clauses, as incorporated within Chapter 9, the Plan presupposes that confirmation somehow could overrule applicable Alabama constitutional, statutory, and case authority.

BACKGROUND

Rate Payers filed suit in the Circuit Court of Jefferson County, which action was assigned

Case No. CV-2008-901907 (the "Wilson Litigation") alleging essentially two types of cause of action. Count I of the Wilson Litigation was removed to this Court on December 15, 2011, where it remains pending; Count II is stayed pursuant to 11 U.S.C. § 362(a) and § 922.

Before any part of the action was removed to this Court, various Defendants filed Motions to Dismiss premised, in part, upon allegations that the Plaintiffs lacked standing to pursue the action. Each of such Motions to Dismiss was denied, and a mandamus petition was submitted to the Supreme Court of Alabama with respect to such denied Motions. The action, both at the Circuit Court level and the Alabama Supreme Court level, has been stayed without further ruling, thereby leaving the determination of standing of the Rate Payers as held by the Trial Court. The action filed by Rate Payers ultimately seeks recognition as a class of sewer rate payers, potentially constituting all sewer customers who are subject to payment of sewer rates applicable to the sewer system of the Debtor.

Somewhat in recognition of the fraud, suppression, unjust enrichment and conspiracy conducted by members of its own Commission, Jefferson County brought its own suit against JPMS, J.P. Morgan Chase, Blount, Parrish & Company, Charles LeCroy, Douglas MacFaddin, Larry Langford, William Blount, and Albert LaPierre before the Circuit Court of Jefferson County, Alabama. Such action was assigned Case No. CV -2009-903641. Taken upon its face, it appears that the Debtor recognizes and alleges criminal misconduct by virtually every named Defendant in the action initiated by Rate Payers. The Wilson Litigation, however, is on behalf of the sewer customer rate payers and not on behalf of the County. It is not a derivative action. *See Water Works Board of Town of Parrish v. White,* 281 Ala. 357, 202 So.2d 721 (1967). Instead, Count I constitutes a stand-alone proceeding against many of the same individuals and Defendants, for many of the same allegations alleged by the County; whereas Count II seeks additional and totally different relief. A separate action initiated by Jefferson County (*Jefferson County, Alabama v. JP Morgan Securities, Inc., et al.,* CV-2009-903641) has not been removed to this Court but was stayed by consent of all

parties. No discovery into the actual or alleged misconduct was undertaken and, because of imposition of the mandatory stay in the Wilson Litigation, very limited discovery has been undertaken there. The actual conduct of the convicted defendants is known, but complicity by the balance of the parties remains hidden and will never be revealed except through continuation of the Wilson Litigation.

In determining whether a Plan of Adjustment should be confirmed, bankruptcy courts under Chapter 9 presumably rely upon many of the same case authority and elements/factors identified with respect to a Chapter 11 proceeding. The County has adopted § 1125 (a)(1) in acknowledging that "adequate information" is required ~~at the disclosure stage~~. Moreover, §943 addresses issues and factors necessary for Plan confirmation. In so doing, parties in interest who have a right to vote upon the Plan posed by the Debtor must be provided sufficient information to realistically and reasonably analyze the position of the Debtor and the proposed Plan. Logically, this entails that accurate, truthful, and credible information be presented to those parties such that a proper evaluation can be made and objection made at the confirmation stage. The information must be sufficient to enable creditors to make their own informed decision with respect to how to vote on the Plan. Section 943 also suggests that information must be fully and reasonably disclosed, necessary regulatory approval must be obtained, and the Plan must be feasible. Finally, it is the burden of the debtor to satisfy feasibility and confirmation requirements by a preponderance of the evidence. *In re Mount Carbon Metropolitan Dist.*, 242 B.R. 18, *31 (D. Colo. Bank. 1999). Among those requirements that must be met are that the "must be both in the 'best interests of creditors' and 'feasible.'" *Id.* (quoting 11 U.S.C. § 943(b)(7)). In the instant case, Rate Payers challenge both the best interest test and the feasibility of the Plan.

I. NOTICE[2]

[2] While Jefferson County will undoubtedly argue that issues surrounding the adequacy of notice have already been determined by this Court's approval of the Disclosure Statement, Rate Payers are not challenging the actual language of the Notice that has already been approved. Rather, the objection is that sufficient information has not been provided at to sewer customers and rate payers for a customer to formulate an objection (or make a decision not to

Jefferson County Alabama has recently mailed to, presumably, all customers of the Jefferson County Alabama sewer system, a notice announcing the pending bankruptcy plan and the confirmation hearing. Said notice came without the approval of this Court and was not set forth and announced as part and parcel of the Plan for bankruptcy filed by Jefferson County. It is presumed further that Jefferson County will and is attempting to have the financing, sewer rates and all other aspects of the bankruptcy plan become binding on all sewer customers via making them collaterally estopped from objecting to the sewer rates and other aspects of the subject Plan because, presumably, the customers received "notice" of the subject plan and were given an "opportunity to object." The above listed ratepayers object to any attempt to have the subject bankruptcy plan have any preclusive affect over themselves or other ratepayers with respect to objections to the subject plan. While there are many reasons for this objections, the main thrust of all arguments is that the "notice" that was mailed by Jefferson County to sewer customers runs afoul of well settled law and cannot have a preclusive affect upon any sewer customers.

a. Adequate Notice is required

It is well settled law that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Lack or inadequacy of notice of a bankruptcy prevents a claimant from having the opportunity to participate meaningfully in a bankruptcy proceeding to protect his or her claim. *See, 11 U.S.C.§342(a)*("There shall be given such notice as is appropriate . . . of an order for relief . . . under [the Bankruptcy Code]."). Therefore, "[inadequate notice is a defect which precludes discharge of a claim in bankruptcy." *Chemetron Corp. v. Jones*, 72 F 3d 341, 346 (3d Cir. 1995).

The Notice issued in this matter is not adequate because, inter alia, said Notice:

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object) at confirmation, and as such, adequate notice either needs to be remedied or the plan not confirmed.

1. There is inadequate time for recipients and sewer customers to act, nor are customers provided a copy of the Plan, its exhibits, or the Plan Supplement in order to formulate any objection. Upon information and belief, notices were mailed to sewer customers on or about September 19, 2013, but require the recipient to file a complicated, multi-step objection within less than twenty days. Most courts require that a minimum of thirty days is deemed necessary from completed dissemination before deadlines to file an objection, with 60-90 days preferred. The notice and artificially limited time within which to file an objection renders the notice inadequate and violates the due process rights of sewer customers and other recipients receiving the tardily issued notice. Given the importance of the proposed notice and the purported cutting- off of rights, this Court should require notice to be issued so as to provide sewer customers with adequate time to respond in a meaningful way.

2. The Notice does not provide easily obtainable key documents to be available for laymen and other sewer customers. At a minimum, an easily identifiable neutral website should be provided for sewer customers to access supplying plain language explanations of the putative rights to be cut-off by an approval of the Plan of Adjustment. At present, the website maintained secondary to the Notice is cumbersome, complicated, difficult to access, and only provides documents written in complex legal terms well beyond the likely comprehension of many, or most, lay sewer customers. Likewise, the Plan of adjustment is made available in electronic form which does not allow for sewer customers who neither have nor are acclimated to a computer or the internet access to the Plan which seeks to strap them with insurmountable debt and extinguish their rights to challenge that burden. To the extent that the Plan is made available in hard-copy form, a sewer customer must call El Segundo, California and await delivery of the document which (assuming the entire Plan is disclosed) is many hundreds of pages long, is written by attorneys, banking and finance professionals, and is, on its face, not comprehensible to any average layman (or many attorneys or other professionals for that matter). Moreover, there is no website address or any

other site at which any sewer customer can look at or review any feasibility study that was allegedly performed on the County's behalf. Indeed, no such study has ever been made available despite challenges to the Jefferson County Commission to make such a document available.

3. The Notices are not designed to come to the attention of lay persons, ~~like~~such as the vast majority of sewer customers. The notices are delivered in plain envelopes that appear to be no more than common "junk mail" and are not adequately designed to stand out to casual- reading recipients and sewer customers. The envelope containing the notice does not stand out as important or relevant, or even as a notice issued by a Court so as to adequately appraise sewer customers of its importance before disposing it with the other "junk mail" routinely received by most residents of Jefferson County. Indeed, even it became public knowledge that many customers were disposing of their notices as "junk" and/or were concerned that they were being sued, counsel for Jefferson County was quoted by the Birmingham News as telling sewer customers that they could "[r]elax" since the notices that were sent merely were telling sewer customers of an upcoming hearing. Mr. Klee never mentioned the fact that the both he and Jefferson County would also be seeking to extinguish any right of a sewer customer to object to the rates, the Plan, the warrants, or the bonds that are being refinanced. *See* Birmingham News, September 27, 2013.

4. The Notices are inadequate because they do not use plain language and are written so as to require a reading level equivalent to a college level education and, more likely, beyond. Upon information and belief, a significant number of sewer customers have no education beyond high school and the notice issued is likely inadequate to their reading level. *See, e.g.*, U.S. Census for Jefferson County and City of Birmingham (approximately 37.7% of City of Birmingham residents have no education beyond high school). Indeed, many sewer customers have interpreted the notice as something informing them that they are "being sued or may be in some legal trouble." *See* Birmingham News article by Barnett Wright, February 27, 2013.

5. The Notices purport to approve sewer rates, but no description of the proposed

sewer rates are contained in the notice; the notice fails to state in plain language the proposed sewer rates to be approved by the Court; the notice fails to provide a user-friendly method for recipients to find the sewer rates to be approved by the Court; and there is no clear and adequate notice that the Court will be asked to cut-off sewer customers' legal right to challenge the reasonableness of such proposed rates and to challenge the proposed rates as discriminatory.

6. The Notices require overly burdensome hurdles for sewer customers to file an objection.

7. In paragraph 3 of the notice, potential objectors are told any objection must be filed with proof of service with the Bankruptcy Court and all parties on the "Master Service List' but fails to adequately inform recipients and sewer customers of how to obtain a copy of the "Master Service List" and does not make such "Master List" available to recipients and sewer customers who do not have internet access.

8. In paragraph 5 of the notice, it states that it applies to persons having a claim against the county prior to the "Effective Date", but does not state what is meant by the term "Effective Date" so as to allow recipients and sewer customers to determine whether or not they may be effected by the Bankruptcy Court's approval of the Plan. Likewise, the sewer rates charged by Jefferson County have not been altered as of the date of the notice and will not be altered until, supposedly, after the October 7, 2013 cut-off date to file objections so sewer customers potential claims related to future alteration of sewer rates have yet to accrue such that the notice, by its own terms, excludes sewer customers who may wish to challenge the validity of the proposed new sewer rates. Here, Jefferson County's lead bankruptcy counsel has repeatedly stated, via media reports, that the Plan presented to this court is not feasible unless creditors make additional concessions. See, e.g., ("Bankrupt Jefferson County Says Creditors Need to Revise Plan," www.bloomberg.com, August 27, 2013). Because the proposed new sewer rates will only be implemented IF the Plan of adjustment is approved by this Court, this Court lacks jurisdiction to

adjudicate any proposed new sewer rates – just as current sewer customers lack standing to challenge the hypothetical and speculative "new sewer rate plan" alluded to by the Plan of Adjustment. *See, generally,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

9. In paragraph 6 of the notice, it indicates that the approved rate structure and rate resolution will be made binding, but fails to state or describe what is meant by the term "approved rate structure" or "rate resolution" so as to adequately inform recipients and sewer customers that their rights may be impacted by a decision of the Bankruptcy Court. In simple terms, the notice does not advise sewer customers if sewer rates will be changed, and if so, how sewer rates will be altered and, therefore, the notice is inadequate and violates the due process rights of sewer customers if this Honorable Court attempts to enjoin sewer customers from later asserting claims as to the legality of future sewer rates pursuant to Amendment 73 of the Alabama Constitution. In simple terms, the notice hints that sewer rates might be altered, but fails to clearly advise the recipient of basic information regarding the hypothetical new sewer rate plan – the Notice fails to even advise if rates might be increased or that rates might be decreased from the current rates.

10. The notice that was sent says absolutely nothing about the Plan Supplement filed on September 30, 2013, which included an additional nine (9) separate Exhibits, including, but not limited to Amended and Restated GO Warrant Indentures and New Sewer Warrant Indentures which serve as the basis for the proposed refinancing. No sewer customer who received the Notice was advised of this new filing that materially and substantively affects the Plan and yet all Ratepayers are expected, according to the Notice, to nevertheless file their respective objections in writing by October 6, 2013.

The notice issued is wholly inadequate in that it fails to advise sewer customers that the purported preclusive effect of any Plan approval upon rate payers' and customers' right to challenge any future changes to sewer rates is unconstitutional and violative of individual sewer customers' rights to due process under the U.S. Constitution. *See, e.g. Richards v. Jefferson County*, 517 U.S.

793 (1996); *Taylor v. Sturgell*, 533 U.S. 880 (2008).

II. AMENDMENT 73 DOES NOT AUTHORIZE DEBT SERVICE PAYMENT AS SET FORTH IN THE PLAN OF ADJUSTMENT

The Plan of Adjustment includes comprehensive and sweeping language validating the warrants proposed to be issued pursuant to the Plan, but neither the Plan nor the Disclosure Statement set forth the legal basis in Alabama law under which the Court is asked to validate the financing. The County has not met the burden of demonstrating that the financial plan is feasible from a legal point of view.

Properly viewed, constitutional, statutory and Alabama case law is uncertain about the authority of the County to issue the refunding sewer warrants. If there is decisional law embedded in validation suits not known to us or visible to the public, and not addressed by an appellate court, then we suggest that there are due process concerns about applying that decisional law without a full rehearing of the issues that may be applicable to current circumstances.

Jefferson County has issued sewer revenue debt under Chapter 28 of Title 11, of the Code of Alabama of 1975, which provides no authority for the levy of sewer service charges. Legal authority for Jefferson County to impose sewer service charges is found in Amendment 73 to the Constitution of Alabama of 1901.

Jefferson County has authority independent of Chapter 28, Title 11 and Amendment 73 to issue bonds and impose sewer service charges under the Kelly Act, Section 11-81-161 et. seq., but has chosen not to do so, perhaps because the Kelly Act imposes the inconvenient and embarrassing requirement that, ***prior to issuance of debt***, the governing body of the County is required to adopt and implement sewer service charges sufficient to pay for the life of the bonds debt service as it comes due as well as the expenses of operating the sewer system.[3]

[3] Note Justice Shores' reference in Shell v. Jefferson County 454 So. 2d 1331 (Ala. 1984), an appeal in a law suit brought, as stated in the opinion, to validate the issuance of bonds under the Kelly Act, "There are covenants in the bond indenture to maintain sewer rates sufficient to cover operating expenses, debt service, and certain other funds designated in the indenture. The sewer rates adopted in 1983 meet these requirements and have not been, are not being, and cannot

The use of sewer service charges levied under the Kelly Act to pay debt service appears to be limited to debt service on bonds issued under the Kelly Act. The first sentence of Section 11-81-184 provides, "Rates for services furnished by any such system or combined system shall be fixed precedent to the issuance of ***the bonds***." ~~[~~(Emphasis ~~supplied.]~~ added). Reference to "the bonds" is logically to the revenue bonds that are the principal subject of the Kelly Act and whose issuance requires satisfaction of conditions not present in Title 11, Chapter 28, namely that the governing body of the issuer must make a finding as to the total cost of the facilities to be acquired and that the term of the bonds will not exceed the useful life of the system. Further, as previously stated, it is a condition of levying sewer service charges under the Kelly Act that prior to the issuance of bonds the governing body is required to adopt and put in effect rates adequate to pay debt service for the life of the bonds as well as expenses of operation, maintenance and replacement. It is difficult to see how these provisions can be made to carry over to Title 11, Chapter 28. Adopting rate increases prior to authorizing debt, or even for a long time afterwards, was anathema to the Jefferson County Commission.

Recently, the County has cited Act No. 619 adopted at the 1949 Regular Session of the Legislature of Alabama, which purports to supplement Amendment 73, as authority for levying sewer service charges. However, the Supreme Court of Alabama has held that the legislature may not restrict or alter a self-executing constitutional provision. *Opinion of the Justices*, 287 Ala. 337, 251 So. 2d 755 (1971).

Amendment 73 includes the following provision, "This amendment is self-executing." Thus, one must look to Amendment 73, and not to Act No. 49-~~619~~619, which purports to "implement" it, for the authority Amendment 73 provides to levy sewer service charges. It is also true that Amendment 73 is not subject to amendment by legislative act.

Jefferson County's sewer warrants were issued under Chapter 28 of Title 11, which makes

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be used for any other purpose."

no provision for the adoption of sewer service charges by counties. Section 11-28-3 does authorize the County to pledge for payment of principal of and interest on revenue warrants sewer system revenues charged under other provisions of law "that are not required by the laws and Constitution of the state of Alabama to be devoted to other purposes. . . ." Based on the rate resolutions passed by the County on November 6, 2012 and on September 23, 2013, the County is relying on Amendment 73 for its authority to levy sewer service charges.

Amendment 73 authorizes sewer service charges, but not for debt other than the debt specifically authorized by Amendment 73, which debt was issued and has long been retired. The last paragraph of Amendment 73 provides as follows:

> The authority to issue bonds shall cease December 31, 1958. The authority to levy and collect sewer charges and rentals shall be limited to such charges as will pay the principal of and interest on the bonds and the reasonable expense of extending, improving, operating and maintaining said sewers and plants; and when the bonds have been paid off, service charges and rentals shall be accordingly reduced, it being the intent and purpose of the amendment that the expenses of needed improvements and extensions and maintenance and operation of the sewers and sewerage treatment and disposal plants and ***no other expenditures*** shall be paid from such services charges and rentals. ~~***[Emphasis supplied.]***~~

(emphasis added).

The "bonds" referred to in this paragraph are the bonds authorized by the amendment. The amendment prohibits the imposition of sewer charges and rentals pursuant to the amendment to pay for principal or interest after the bonds have been retired. In the words of Section 11-28-3 the proceeds of sewer service charges imposed under Amendment 73 are "required. . .to be devoted to other purposes," viz. "needed improvements and extensions and maintenance and operation of the sewers and sewerage treatment and disposal plants. . . ."

The limitation on use of sewer service charges embedded in Amendment 73 is no doubt a result of the fact that Amendment 73 was twice submitted to the vote of the people, once statewide upon its passage as a constitutional amendment, and again to the voters of Jefferson County because the amendment by its terms required a favorable vote as a condition of issuing bonds or exercising the other powers, including the power to levy sewer service charges, granted Jefferson County in the amendment. Jefferson County made a deal with the voters: give us limited power to borrow for sewers, full power to operate a sewer system and to levy sewer service charges, and we will reduce the sewer service charges when the debt is paid off and not use it for any purpose other than the expenses of extending, improving, operating, and maintaining the sewer system. In other words, Amendment 73 mandates a "pay as you go" approach to funding capital expenditures for sewers. To the extent that Jefferson County has used Amendment 73 as authority to levy sewer service charges for debt service other than on bonds authorized by Amendment 73, then Jefferson County has welshed on the deal it made with its citizens. And people from Wall Street wonder why Jefferson County citizens are reluctant to raise taxes.

As pointed out in *Shell v. Jefferson County*, supra, the Kelly Act is available to borrow for sewer purposes. (It may also be available to refund outstanding Title 11, Chapter 28 warrants.) As also discussed in *Shell v. Jefferson County*, from 1933 when the Kelly Act was adopted until 1982 when Section 222 was amended with regard to counties, the Kelly Act was, absent a constitutional provision such as Amendment 73, not generally available to finance improvements to county sewer systems already in existence and producing revenue, and thus no attempt was made to finance sewer improvements under the Kelly Act. This is because the Supreme Court had held that the issuance of sewer bonds must be submitted to a vote under Section 222 of the Constitution and, if the bonds were secured by revenues in place prior to the issuance of the bonds, the bonds were general obligation bonds under Section 224 of the Constitution. After the amendment to Section 222 in 1982 and the clarification of Amendment 73 in *Shell v. Jefferson County*, the way

was clear, and practically endorsed by Justice Shores in *Shell v. Jefferson County*, to employ the Kelly Act to finance Jefferson County sewers. Instead the County moved in a different direction.

Thus, any refunding of the County's outstanding sewer warrants faces the issue of whether warrant holders have received debt service payments they are not entitled to because of the limitation in Amendment 73 on the use of sewer service charges, and also the issue of whether the warrants proposed to be refunded are validly issued because they have no legal source of payment.

III. THE APPROVED RATE STRUCTURE IS DISCRIMINATORY

Under Amendment 73 to the Constitution of the State of Alabama, rates and charges fixed for the Sewer System must be both "reasonable and ***nondiscriminatory.***" [**Emphasis added**.] The Plan violates Alabama law in that the system of escalating rates to service the New Sewer Warrants is discriminatory to future ratepayers. Revenues collected from Sewer System ratepayers are used primarily for three purposes: to pay current operating expenses of the system, to pay for capital improvements, and to pay annual debt service requirements. ~~Approximately~~As Exhibit 2 to the PW&Co Report shows, approximately 50% of sewer revenue is used to pay debt service in the Amended Financing Plan. (*See* Ex. 2, "Uses of Sewer Revenue"). The debt service payments are used to pay solely principal and interest due on the New Sewer Warrants issued under the Plan. Proceeds from the sale of the New Sewer Warrants were used to repay Sewer Warrants in settlement of Sewer Warrant Claims. The original Sewer Warrants were of course issued to fund capital spending requirements of the system, either directly or indirectly by refunding earlier Sewer Warrants that were issued to fund capital spending. These Sewer System assets were purchased and installed predominantly in the 1990s and the first decade of the 2000s, largely, it is assumed, to achieve Consent Decree compliance. Therefore, each ratepayer, both now and in the future, pays a pro rata share to fund the capital assets in service on the Effective Date. An equitable, nondiscriminatory sharing of support for the sewer asset base would require ratepayers using those

assets in any year to fund 1/40th of the total debt service incurred for those assets. There is no justification, nor has the County asserted one, for future ratepayers to pay a greater share of debt service costs.

Nevertheless, as seen in Exhibit 3 to the PW&Co Report, ratepayers using the system in the early years after the Effective Date pay substantially less than their pro rata share of debt service while ratepayers in the Sewer System in the latter years of the Amended Financing Plan's 40-year lifespan pay substantially more than their pro rata share. (*See* Ex. 3, "Debt Service Payments vs. Pro Rata Share"). The increasing revenues raised by the Approved Rate Structure are used to fund not only inflationary increases in operating expenses and capital expenditures, they are also vital to fund the heavily backloaded debt service structure (2/3rds of total debt service payments are made in the last 20 years).

Latter-year ratepayers are further disadvantaged vis-a-vis early-year ratepayers in that portions of the Consent Decree improvements are already nearing the end of their useful lives (Disclosure Statement dated July 29, 2013, Section III.B.5). Consequently, an unidentified portion of the system will no longer be in service 20, 30 or 40 years after the Effective Date. Nevertheless, latter-year ratepayers will not only be paying for assets for which they do not enjoy the benefit, they will be paying a greater burden than early-year ratepayers who did enjoy the benefit. This in the inevitable result of the design of the Plan which "kicks the can down the road," pushing the debt service and rate burden as far into the future as possible. Sadly, this mimics the financial strategy of earlier County Commissions who dealt with an overbuilt, overleveraged system by backloading debt service payments. (*See* Ex. 4 to PW&Co Report, "Comparison of Amended Financing Plan to 2007"). It is telling that the current Plan relies on an escalating debt service structure, which clearly indicates that even exiting bankruptcy the County Commission does not believe current ratepayers can reasonably support remaining system debt. Instead, their solution is to attempt to inflate their way to a solution and transfer the burden to future Commissions and

future ratepayers. This JP Morgan-backed financial strategy had tragic consequences in the past, and it will not work in the future. And as Exhibit 7 to the PW&Co Report vividly illustrates, this is not, for good reason, a financial strategy employed by the wastewater treatment industry. (*See* E. 7 to PW&Co Report, "Debt Service Comparison").

IV. THE PLAN UNLAWFULLY REMOVES RATEMAKING AUTHORITY FROM FUTURE COMMISSIONS AND IS VIOLATIVE OF THE ALABAMA STATE CONSTITUTION, AMENDMENT 73

The Plan is unlawful in that it severely circumscribes future County Commissions from exercising their constitutional responsibility to make, "reasonable and nondiscriminatory rules and regulations fixing rates and charges" for sewer service (Amendment 73 of the State of Alabama Constitution). Instead, under "circumstances now presented" (October Rate Resolution, Paragraphs VI., VII., VIII., IX., X., XI., and XII.) the current County Commission has purported to find annual rate increases of the Approved Rate Structure stretching 40 years into the future "reasonable and non-discriminatory." This is a County Commission whose lack of foresight produced a Financing Plan that stood for one month. This is a County Commission that produced a Financing Plan that it widely declares to be unworkable. This is a County Commission that is so dysfunctional that a federal judge has put its entire human resources operations under a receivership. Yet it now seeks to exercise unparalleled prescience to find that rates it established on September 23, 2013, will be reasonable on September 23rd, 2023 or 2033 or 2043 and beyond. In its unlimited arrogance, it seeks to preclude future County Commissions from independently determining under their particular "circumstances now presented" that a rate increase decision made 10, 20 or 30 years previously is unreasonable. Instead through the Plan it removes all such constitutional responsibility from future Commissions and assigns rate enforcement authority to the Bankruptcy Court. Furthermore, with the power of a consent decree, it precludes any collateral attack or other challenge by any Person on the validity and enforceability of the Approved Rate Structure and the Rate Resolution. Such inherently legislative functions and responsibilities cannot be legally

usurped by the proposed Plan.

The Alabama Supreme Court has previously spoken on the issue of the power of a current legislative body to bind future legislatures, and has clearly stated that "neither the State or [sic] any inferior legislative body can alienate, surrender or abridge its right or ability to function in the future." *Blue Cross and Blue Shield v. Hodurski*, 899 So. 2d 949, 957 (Ala. 2004) (quoting *Garrett v. Colbert County Board of Education*, 50 So. 2d 275, 279 (Ala. 1950)). The Court went on to enumerate further, quoting *Town of Brilliant v. City of Winfield*, 752 So. 2d 1192 (Ala. 1999) as follows:

> One legislative body cannot bind a succeeding legislature or restrict or limit the power of its successors to enact legislation, except as to valid contracts entered into by it[4], and as to rights which have actually vested under its acts, and no action by one branch of the legislature can bind a subsequent session of the same branch.

Town of Brilliant, 752 So. 2d at 1198 (quoting *Newton v. State*, 375 So. 2d 1245 (Ala.Crim.App. 1979) (quoting in turn 82 C.J.S. *Statutes* § 9 (1953)). Confirmation of this Plan cannot, as the County claims, bind the rate structure on all future Commissions for the 40 years maturity period of the bonds (tied directly to the 40 year rate structure adopted on September 23, 2013). This Court, nor the current Commission, has the legal authority to supersede the ~~constitutionallymandated~~constitutionally mandated authority and responsibility of future Jefferson County Commissions. To the extent the Plan attempts to do so, it is not only unfeasible~~,~~ – it violates Alabama law.

V. NEW SEWER WARRANTS IMPERMISSIBLY ~~EXTENT~~ EXTEND THE MATURITY OF SEWER INDEBTEDNESS BEYOND 40 YEARS FROM THE INITIAL ISSUANCE

The undersigned have been unable to locate any ~~disclosure~~citation or reference in the

[4] Of course, the County cannot enter into a contract that does away with or circumvents their Constitutionally mandated duties and functions to be the final authority in setting reasonable and non-discriminatory rates under

Disclosure Statement, the Plan, or the Plan Supplement ~~of~~to the statutory authority that the County is relying upon for the issuance of refunding warrants and assume that refunding warrants are proposed to be issued pursuant to Section 11-28-4 of the Code of Alabama of 1975. Section 11-28-4 allows for the refunding of warrants, but ties such refunding warrants to the dictates of Alabama Code Section 11-28-2 and its limitation that the repayment of the debt no exceed 40 years. Section 11-28-2 provides for the original issue of warrants by counties and limits the final maturity of original issue warrants to 40 years. Section 11-28-4 references Section 11-28-2 but does not otherwise give guidance on maximum maturity.

Based on the personal knowledge of Jim White, when acting as financial advisor to the County during the first six months of 2008, and on a close examination of all County refunding issue since 1997, the County has heretofore limited the final maturity of refunding warrants to 40 years from the date of the original issue of warrants being refunded. (*See* Ex. "C," p. 8). The application of this rule to the proposed refunding warrants would limit the maturity of approximately two-thirds of the principal amount to sometime in 2043, approximately 10 years prior to the final maturity of the proposed refunding warrants, and would limit the maturity of approximately one-third of the principal amount to earlier dates. Assuming interest rates and revenues available for debt service as projected in the Amended Financing Plan, the maximum amount of debt issuable with the shorter maturity dates is approximately $1.45 billion.

Reading Section 11-28-4 to permit refunding bonds with a 40 year maturity achieves the anomalous results that warrants can be issued with an infinite final maturity through the strategy of issuing new money warrants and then repeatedly refunding them. Perhaps this is what former Commission President and convicted felon Larry Langford meant when he is said to have commented that the sewer warrants might be paid off in 100 years.

VI. ~~ADDITIONAL OBJECTSION PREVIOUSLY ASSERTED BY THE WILSON RATE PAYERS~~THE PLAN VIOLATES RULE G-23 OF THE

Amendment 73.

MUNICIPAL SECURITIES RULEMAKING BOARD, AND THEREFORE, SHOULD BE FORBIDDEN BY LAW

Pursuant to 11 U.S.C. § 1129(a)(3)[5], the Plan proposed by the County must be "proposed in good faith and not by any means forbidden by law." The instant plan violates current securities law, and specifically, Rule G-23 of the Municipal Securities Rulemaking Board ("MSRB") by virtue the County's selection of Citibank ("Citi") as managing underwriter for the proposed sewer warrant refinancing. Specifically, Rule G-23 prohibits a municipal securities dealer who acts (or has acted previously) as a financial advisor to the issuer, from accepting the role of underwriter for that issuer at a later date. This rule became effective on November 28, 2011, six months after approval by the Securities and Exchange Commission ("SEC"). Both the MSRB and the SEC refused to grandfather any financial advisory relationships established before that effective date. *See* Securities and Exchange Commission, Release No. 34-64564, File No. SR-MSRB-2011-03, May 27, 2011. The reason for this rule is simple: the MSRB and the SEC regard it as a conflict for a municipal dealer to gain the trust and confidence of an issuer through a financial advisory relationship and then switch to an underwriting relationship where the financial rewards are potentially far greater. (Ex. "C," p. 13). With the adoption of Dodd- Frank in 2010[6], municipal financial advisors are now considered fiduciaries that owe their loyalty and first allegiance to the issuing client. *Id.* As noted by White in Ex. "C" "[a]n underwriter is not a fiduciary; an underwriter is not required to put the issuer's interests first." *Id.* at p. 13.

On Monday, July 15, 2013, Jefferson County selected Citibank as managing underwriter for the proposed sewer warrant refinancing.[7] As reported in the *The Bond Buyer*, "In the years before

[5] While § 1129 falls within the statutes applicable in a Chapter 11 bankruptcy, pursuant to the statutory notes and legislative statements accompanying 11 U.S.C. § 943, the standards of confirmation found in 11 U.S.C. § 1129 are "made applicable to chapter 9 by section 901 of the House amendment."

[6] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Title IX, Subtitle H, Sec. 975, amending Section 15B of the Securities Exchange Act of 1934.

[7] As reported in the following article: Shelley Sigo, "JeffCo Selects Citi to Lead $1.89B Sewer Refinancing," *The Bond Buyer*, August 7, 2013.

the county filed for bankruptcy, Citi consulted with officials on various structures for refinancing the sewer debt. It is not clear if the investment bank assisted the county after the Chapter 9 petition was filed." *Id.* (*see* fn. 6). As outlined more fully in Exhibit "C," based on the personal knowledge of Jim White, acting in the role of the County's financial advisor, Citi first began advising the County in the Spring of 2008, by and through its then Managing Director, David Brownstein. (Ex. "C," p. 14). Citi acted in the role of financial advisor, assisting White in attempting to find alternatives for solving the County's financial problems, including the possibility of arranging for a tender offer for outstanding bonds at a discount to face value. (Ex. "C," p. 14). Indeed, "Mr. Brownstein stated that he wanted to help, stating no other motive," and "at no time did Mr. Brownstein indicate, either orally or in writing, that he was seeking an underwriting relationship." *Id.*

Subsequently, on May 18, 2010, it appears that Citi prepared a financing plan very similar in nature and scope to the current financing plan disclosed by the County in Exhibit 9 to the Disclosure Statement. *Id.* It is clear that the May 18, 2010 plan "constitutes financial advice within the contemplation of G-23." *Id.* As such, unless Citi provided the County with a written document which clearly stated its intent to act as an underwriter before it prepared and provided the financing plan, "it would be an apparent violation of Rule G-23 for Citibank to purchase the proposed bonds" and to serve in an underwriter capacity for the proposed sewer warrant refinancing. *Id.*

As shown above, it would appear that the current Plan of Adjustment violates MSRB and SEC rules and regulations, as well as Dodd-Frank, and as such, is forbidden at law due to the unlawful participation of Citibank as an underwriter in the sewer warrant refinancing. As such activity is forbidden at law, 11 U.S.C. § 1129 prevents the confirmation of the Plan as presented.

VII. ADDITIONAL OBJECTIONS PREVIOUSLY ASSERTED BY THE WILSON RATE PAYERS

1. Objection is made to the extent this Plan does not disclose or explain any

methodology to determine the reasonableness of the rates that are called for as a result of this Plan. In point of fact, the information is so indistinct that the Wall Street Journal suggests that the "new debt" for the County may exceed the "old debt" of the County ($6 billion as distinguished from $4.2 billion). Apparently, the County Commission, itself, now has realized that its initial projections and analyses were "optimistic" and such rates or projections were adjusted or altered with the amended pleadings. (See footnote 16 to Disclosure Statement, p. 13 3.) Yet readers have no way to analyze whether these newly suggested rates are any better than those first suggested.

In the absence of stated and established criteria, stated and established factors, and transparency with respect to the analysis undertaken, the Court cannot confirm a plan where there is no way to know whether such rates will, in fact, be fair, non-confiscatory and non- discriminatory as required by Amendment 73 of the Constitution of Alabama, 1901. Whether the County Commission actually is considering "realistic," as distinguished from "optimistic" information, in its analysis cannot be ascertained.

2. Objection is made to the Financing Plan in that it fails to identify the assumptions made for its projection and likewise completely fails to disclose test outcomes under adverse conditions which, as is already well known to the County and others because of the current financial status of the County, are conditions that must be considered before any financing plan can be said to have any degree of financial certainty.

This Plan fails to explain with any amount of necessary detail what the capital expenditures and operating expenses of the sewer system will be on a moving forward basis. For example, there is nothing submitted from any independent consultant that sets forth what amounts will be necessary to maintain the sewer system, operate the sewer system, or comply with future regulatory changes. Furthermore, there is nothing contained in the Plan that reflects that the County has considered ~~in its future operating costs~~ that the sewer system is a depreciating asset in its future operating costs. Additionally, there is no identification of how much it will cost in capital

expenditures to expand the system or how much operating costs will be affected by any expansion. These glaring omissions call into serious question the feasibility of this Plan at all.

Pursuant to 11 U.S.C. § 943, the Plan of Adjustment can only be confirmed when it is shown that "the plan is in the best interests of creditors and is feasible." 11 U.S.C. § 943. There is a glaring lack of evidence, information, or identification of any study, plan, market research, or cost projection the County has done or will do to determine these issues. Without such information, the Court cannot make a determination that Plan confirmation is not only in the best interest of the Bankruptcy Estate, but is in the best interest of creditors and parties in interest. It is paramount, as a requirement for confirmation, that information such as this be provided in the Plan itself so that the Court can make a proper determination.

3. Objection is made to the Plan in that it fails to disclose or describe what roles the financing institutions played in the corruption that is described in III B (3) and that lead to the County's current financial state. Likewise, there is no disclosure of the fact that numerous employees and agent of those banks have already been convicted criminally and/or still face criminal charges. Furthermore, there is no full disclosure of what, if any, penalties, fines and/or fees were paid by the various banks and financial institutions as a result of investigations and/or charges were initiated by entities such as the Securities and Exchange Commission. The Rate Payers believe this information should be disclosed in detail in the Plan itself in order to determine confirmation. Additionally, and to the extent these same financial institutions are participating in the current financing of the Plan, the respective roles of each and every financial institution is not described. Likewise there is no disclosure of how or if there are or will be any checks and balances to ensure that there is no repeat of the same financial graft that has occurred previously and that lead to the enormous debt load borne by the Rate Payers of the sewer system.

Alleged "concessions" and factors supporting settlement are alluded to in pages 91-99 of the Disclosure Statement, but no dollar amount is identified for such purported concessions. How do

such concessions compare to dollars received illegally? Broad assertions found in Section V, without detailed data, are insufficient to support the Plan for confirmation. A mere four paragraphs found between pages 121 and 124 (without a single dollar amount mentioned, without any detail of how derived or why, really, such proposals are better than completed litigation) are conclusory at best.

4. Objection is made to the proposed Plan in that it fails to disclose any recent financial data from the County. Indeed the proposed Plan only includes financial data from 2011 and not beyond. There is no way of knowing whether any of the undisclosed assumptions made for the financial projections are either true, reasonable or reliable. Likewise, without such information there is no way of knowing whether the financial costs associated with this plan are accurate or even reliable given the absence of financial data from Jefferson County. Without the disclosure of updated financial data, there is no way to accurately predict whether any payments and future payments by the County are feasible. The County's fiscal year budget that is attached to the proposed Plan does not show or reflect whether said budget is on track for the contemplated expenditures or not. Finally, given the age of this litigation and the fact that Jefferson County has only disclosed outdated financial information and data after all this time, there is a no way of knowing whether the County can even produce any up-to-date financial information at all.

5. Objection is made to the extent this proposed Plan fails to disclose the identity of the various warrant holders and how much each warrant holder is to receive from the contemplated Plan. As the Court may be aware, some of the defendant banks and financial institutions hold the warrants (to what extent is unknown). Some of these same banks and financial institutions participated in the corruption referred to in the Disclosure Statement. This proposed Disclosure Statement should provide and disclose how much each said warrant holder is contemplated to receive if the Plan is confirmed. This one does not.

6. Objection is made to the proposed Plan in that it fails to disclose the applicable law

and methodology for validating any rate structure and or warrant. Rather, the proposed Plan sets forth that confirmation of the Plan is conclusive that such rate structure and any warrant complies with the manner provided by law. Such broad-sweeping generalizations are not only inaccurate, but are grossly prejudicial to the ratepayers of the sewer system when both Constitutional and legal requirements are ignored (as they are in the contemplated Plan).

7. Objection is made to the extent the proposed Plan fails to disclose the Sewer Warrant Trustees residual fee. There is no mention of the amount contemplated for this fee or even an estimate of said fee amount.

8. Objection is made to the extent this Plan does not identify the professionals who claim to have assisted the County with preparing the anticipated impact of this Plan as set forth in Section X B. It is unknown with current disclosures if the County obtained the assistance of outside consultants or whether the anticipated impact was derived via the work of the banks who stand to receive the substantial portion of Plan payments. If some independent authority was utilized in determining future operation expenses, such individual or entity should be made known so that their credentials properly can be analyzed. Additionally, said entity and/or individual's work product should also be disclosed in the Plan and prior to the Confirmation Hearing.

9. Objection is made to the extent that there is no disclosure of the conditions that Jefferson County must meet before it can issue additional parity obligations, in the event sewer revenues are not able to pay the obligations of the New Sewer Indenture as set forth in Exhibit 2 to the Plan Supplement filed on September 30, 2013.

10. Objection is made in that the Plan does not appear feasible. 11 U.S.C. § 943(b)(7). The Financing Plan does not contain language or terms to adequately disclose in sufficient detail the methodology by which rates are being derived, any realistic or tangible method by which a reader can verify the feasibility of the accepted rates and/or whether the Financing Plan actually will enable payment of the debts to the various creditors (some of whom are co-conspirators). There is no

conceivable way identified in the Plan or any existing Financing Plan for any Rate Payer to determine the likelihood or amount of any future rate increase, and if and when such rate increase could/would occur.

By way of example, Page 31 of the Disclosure Statement previously identifies the purported "Current Status of the System." It states that the Sewer System

> … is generally in good operational condition and fair to good physical condition. The Sewer System still experiences overflows .... The collection system, however, remains in need of continued rehabilitation and replacement. Moreover, portions of the major plant improvements made in the 1990s and early 2000s are beginning to near the end of their useful lives. Complying with new regulations, such as the new phosphorus discharge limits, will require large capital investments."

And yet, while Exhibit 9 identifies certain capital expenses which quite obviously are going to be required and will be "large" even for maintenance of the existing System, there is no spreadsheet or other identifiable information supplied to identify what the projected capital expense costs actually will be and, to the extent it is provided, what are the criteria by which some independent review could analyze the projections. Instead, one purported basis for an ability to pay the projected warrants and the like are estimates of anticipated growth. No information as to the actual projected operating costs for such growth, capital expenses and maintenance occasioned by such growth and the necessary basis by which such projections can be analyzed have been provided in the Disclosure Statement. Absent such information, it appears the Plan is not feasible but is, instead, a mere hope of the County.

Moreover, Exhibit 9 references a $167 million capital expense in calendar year 2019. There is no description for the basis of how that figure was derived, what engineering is required for such a large capital expenditure, and does it take into account the projected costs for 2019 as distinguished from today. Other capital expenditures shown in Exhibit 9 appear to go up and down, but there is no criteria identified that forms the basis for such

assumptions. Stated simply, there is no way to test the Plan and insufficient detail to determine if, in fact, it is feasible.

Potentially even more problematical is the Economic Development Agreements identified in Section 8 on page 59. To the extent tax abatements or other incentives are provided to new business, the net effect of such items results in existing Rate Payers paying for infrastructure provided to such new businesses without reimbursement. In other words, existing Rate Payers would be paying for such incentives without incumbent reimbursement for costs, thereby increasing the overall operating and capital costs without additional revenue.

11. Objection is made to this Plan to the extent it omits any mention or reference to any independent authority who has evaluated this Plan and who has offered any opinion whatsoever as to whether any predicted operating expenses will sustain the system in the future.

12. Rate Payers further adopt all grounds of Objection submitted by any other party in interest.

CONCLUSION

Based on the foregoing, Rate Payers contend that the Plan of Adjustment is deficient, unfeasible, is not grounded in sufficient fact or legal bases, and is cannot be confirmed as proposed. Rate Payers reserve the right to supplement this objection.

Respectfully submitted this 45th day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the ~~4~~5th day of October, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM-ECF system and served same in accordance with the Master Service List~~.~~, attached hereto as Exhibit "A."

/s/ *Joshua L. Firth*
OF COUNSEL