No. 15-11690

United States Court of Appeals for the
Eleventh Circuit

ANDREW BENNETT, ET AL.,
Appellees,
v.
JEFFERSON COUNTY, ALABAMA,
Appellant.

On Certified Interlocutory Appeal from the United States District Court for the Northern District of Alabama (Case No. 2:14-cv-00213-SLB), Reviewing a Plan Confirmation Order Entered by the United States Bankruptcy Court for the Northern District of Alabama (Case No. 11-05736-TBB)

RATEPAYERS' RESPONSE TO APPELLANT'S OPPOSITION TO APPELLEES' MOTION TO SUPPLEMENT THE RECORD ON APPEAL—REQUEST FOR JUDICIAL NOTICE UNDER FED. RULE OF EVIDENCE 201(a)

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CERTIFICATE OF INTERRESTED PERSONS AND NOTICE THAT APPELLANT'S CIP IS CORRECT AND COMPLETE, WITH ADDITIONS.

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1-1, counsel for the Appellee's/Ratepayers' Andrew Bennett, *et al.* (the "Ratepayers") hereby certifies that such Ratepayers are all individuals with no stock or affiliated entities. Counsel further provides notice pursuant to Eleventh Circuit Rule 26.1-1(a)(3) that the Appellant's CIP set forth in their Opposition (Filed 1/19/2017) is correct with the addition of the following persons and entities which are interested in the outcome of this case:

The Committee to Save Jefferson County

Councilor Shelia Tyson, City of Birmingham

General George Bowman, Commissioner,
Jefferson County Alabama

Counsel for the Ratepayers is not aware of any other entity that is an active participant in the bankruptcy case, or any other entity whose stock or equity value may be substantially affected by the outcome of the case.

s/ Calvin B. Grigsby
Calvin B. Grigsby
Counsel for County Ratepayers

RATEPAYERS' RESPONSE TO APPELLANT'S OPPOSITION TO APPELLEES' MOTION TO SUPPLEMENT THE RECORD ON APPEAL— REQUEST FOR JUDICIAL NOTICE

The crux of the County's opposition appearing on pages 32 and 33 of the Opposition is as follows:

> **"Had a Stay Been Sought and Granted, It Would Have Stopped the Sale of $1.8 Billion in New Sewer Warrants.**
> The Motion's first substantive heading reads: "The refinancing warrants were sold three days before the confirmation order making a request for stay impossible." Mot. at 3. That is not true and, unsurprisingly (given its lack of merit), has never been raised before, either in the bankruptcy court, the district court, or this Court. This contention is based on a misreading of the Warrant Purchase Agreement (the "WPA"), which is the document whereby the securities would be sold from the County to the underwriters of the transaction – not directly "to the public," as the Motion incorrectly asserts. *Id*.***
>
> The indisputable (and, prior to the Motion, undisputed) fact is that the Ratepayers could have promptly sought a stay of the Confirmation Order, and had they persuaded a court to issue a stay before the Closing Date, the County's sale of
> $1.8 billion in new warrants through the public markets would have been scuttled."

That the bond sale [here called warrants] could have been "stopped" after the Syndicate wire went out on November 19, 2013, and after the purchase contract was executed on November 20, 2013, by a stay issued after the confirmation order of November 22, 2013 is a misstatement of fact and incorrect as a matter of law. Municipal Securities Rulemaking Board ("MSRB") Rule G-

11 relating to Primary offerings, like all MSRB Rules must be approved by an order of the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder and has the force of federal law. The panel may take judicial notice of this Rule G-11 approved by SEC Order under Fed. R. of Evidence §201 at any stage in a proceeding. (Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1277 (11th Cir. Ga. 1999). Rule G-11(a)(ii) states specifically when a bond sale is deemed consummated. (See, Exhibit A, p. 1), as follows:

> "(ii) The term "date of sale" means, *** in the case of negotiated sales, the date on which the contract to purchase securities from an issuer is executed."

The Opposition concurs that the date on which the contract to purchase was executed is November 20, 2013, 12:57 pm, two days before the confirmation order was issued on November 22, 2013. Therefore, the date that the bonds were sold was November 20, 2013, as a matter of law. Moreover, under Rule G-11(g) within 24 hours of the sending of the commitment wire which the facts indisputably show was November 19, 2013, a complete the allocation of securities must be made by the lead underwriter to purchasers in the syndicate so they can confirm the purchases with the ultimate buyers. (Exhibit A, p. 4).

The date of the confirmation of the Chapter 9 was November 22, 2013. The bonds were sold prior to confirmation. Since the bonds were sold prior to

confirmation, there was no possibility to apply for a stay of the confirmation.

Equitable mootness cannot apply because Ratepayers did not have any opportunity to object to sale of the bonds before the bonds were sold because Ratepayers only learned of the sale after the sale was consummated and the Confirmation was done.

Numerous other claimed facts in the oral hearing and this Opposition such as "mischaracterization of the record by the Sixth Circuit" and that the Ratepayers never raised the fact that the bonds were sold before the confirmation order below are also materially inaccurate. *See, for example*, Exhibit B hereto "*Appellants Andrew Bennett, et al.'s, Memorandum of Law in Surreply to Jefferson County's Motion for Partial Dismissal*, DC Doc 26, p. 14) ("What the County has failed to share with the Court is that it "priced" the New Sewer Warrants the day before the Bankruptcy Court entered[1] its Confirmation Order.)

CONCLUSION

The sale date which drives the issue of the stay is not just a matter of legal characterization by Appellant's counsel, it is a matter of law. Ratepayers counsel recognizes that misstatements of the record are serious charges. But given the

[1]Referring to final day of confirmation hearings.

complete support for these charges in the record and in the law of what is a "sale date" which is uniformly followed in thousands of municipal issues annually, the record must be corrected before a decision is handed down in this case. The panel may take judicial notice of the law at any stage of this proceeding. The Motion should be granted.

Respectfully submitted,

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Dated: January 20, 2017

CERTIFICATE OF COMPLIANCE

I certify that this response to a motion complies with the type-volume limitations set forth in Fed. R. App. P. 27(d)(2). According to the word-count function of Microsoft Word, the document contains 1,371 words.

I further certify that this document complies with the typeface requirements set forth in Fed. R. App. P. 32(a)(5) and the type-style requirements set forth in

Fed. R. App. P. 32(a)(6). The document was prepared in Microsoft Word 14-point Times New Roman type.

s/ Calvin B. Grigsby
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Counsel for Jefferson County, Alabama

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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MSRB
Municipal Securities Rulemaking Board

Rule G-11 Primary Offering Practices

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Printable MSRB Rule Book

Download a PDF of the MSRB's Rule Book. The PDF is updated on a quarterly basis.

View previous editions of the MSRB Rule Book.

(a) *Definitions*. For purposes of this rule, the following terms have the following meanings:

(i) The term "accumulation account" means an account established in connection with a municipal securities investment trust to hold securities pending their deposit in such trust.

(ii) The term "date of sale" means, in the case of competitive sales, the date on which all bids for the purchase of securities must be submitted to an issuer, and, in the case of negotiated sales, the date on which the contract to purchase securities from an issuer is executed.

(iii) The term "group order" means an order for securities held in syndicate, which order is for the account of all members of the syndicate on a pro rata basis in proportion to their respective participations in the syndicate. Any such order submitted directly to the senior syndicate manager will, for purposes of this rule, be deemed to be the submission of such order by such manager to the syndicate.

(iv) The term "municipal securities investment trust" means a unit investment trust, as defined in the Investment Company Act of 1940, the portfolio of which consists in whole or in part of municipal securities.

(v) The term "order period" means the period of time, if any, announced by a syndicate or, when no syndicate has been formed, a sole underwriter, during which orders will be solicited for the purchase of securities in a primary offering.

(vi) The term "priority provisions" means the provisions adopted by a syndicate governing the allocation of securities to different categories of orders.

(vii) The term “retail order period” means an order period during which orders that meet

the issuer's designated eligibility criteria for retail orders and for which the customer is already conditionally committed will be either (i) the only orders solicited or (ii) given priority over other orders.

(viii) The term "syndicate" means an account formed by two or more persons for the purpose of purchasing, directly or indirectly, all or any part of a new issue of municipal securities from the issuer, and making a distribution thereof.

(ix) The term "qualified note syndicate" means any syndicate formed for the purpose of purchasing and distributing a new issue of municipal securities that matures in less than two years where:

> (A) the new issue is to be purchased by the syndicate on other than an "all or none" basis; or

> (B) the syndicate has provided that:
>
> > (1) there is to be no order period;

> > (2) only group orders will be accepted; and,
> >
> > (3) the syndicate may purchase and sell the municipal securities for its own account.

(x) The term "affiliate" means a person controlling, controlled by, or under common control with a syndicate member or, when no syndicate has been formed, a sole underwriter.

(xi) In the case of a primary offering for which a syndicate is formed for the purchase of municipal securities, the term "related account" includes a municipal securities investment portfolio of a syndicate member or an affiliate, an arbitrage account of a syndicate member or an affiliate, a municipal securities investment trust sponsored by a syndicate member or an affiliate, or an accumulation account established in connection with such a municipal securities investment trust. In the case of a primary offering for which a syndicate has not been formed, the term "related account" includes a municipal securities investment portfolio of the sole underwriter or an affiliate, an arbitrage

account of the sole underwriter or an affiliate, a municipal securities investment trust sponsored by the sole underwriter or an affiliate, or an accumulation account established in connection with such a municipal securities investment trust.

(xii) The term “selling group” means a group of brokers, dealers, or municipal securities dealers formed for the purpose of assisting in the distribution of a new issue of municipal securities for the issuer other than members of the syndicate.

(b) *Disclosure of Capacity*. Every broker, dealer or municipal securities dealer that submits an order to a sole underwriter or syndicate or to a member of a syndicate for the purchase of municipal securities held by the syndicate shall disclose at the time of submission of such order if the securities are being purchased for its dealer account or for a related account of such broker, dealer or municipal securities dealer.

(c) *Confirmations of Sale*. Sales of securities held by a syndicate to a related account shall be confirmed by the syndicate manager directly to such related account or for the account of such related account submitting the order. Nothing herein contained shall be construed to require that sales of municipal securities to a related account be made for the benefit of the syndicate.

(d) *Disclosure of Group Orders*. Every broker, dealer or municipal securities dealer that submits a group order to a syndicate or to a member of a syndicate shall disclose at the time of submission of such order the identity of the person for whom the order is submitted. This section shall not apply to a qualified note syndicate as defined in subsection (a)(ix) above.

(e) *Priority Provisions*.

(i) In the case of a primary offering for which a syndicate has been formed, the syndicate shall establish priority provisions and, if such priority provisions may be changed, the procedure for making changes. For purposes of this rule, the requirement to establish priority provisions shall not be satisfied if a syndicate provides only that the syndicate manager or managers may determine in the manager's or managers' discretion the priority to be accorded different types of orders. Unless otherwise agreed to with the issuer, such priority provisions shall give priority to customer orders over orders by members of the syndicate for their own accounts or orders for their respective related accounts, to the extent feasible and consistent with the orderly distribution of securities in the offering. Notwithstanding the preceding sentence, a syndicate may include a provision permitting the syndicate manager or managers on a case-by-case basis to allocate securities in a manner other than in accordance with the priority provisions, if the syndicate manager or managers determine in its or their discretion that it is in the best interests of the syndicate. In the event any such allocation is made, the syndicate manager or managers shall have the burden of justifying that such allocation was in the best interests of the syndicate.

(ii) In the case of a primary offering for which a syndicate has not been formed, unless otherwise agreed to with the issuer, the sole underwriter shall give priority to customer orders over orders for its own account or orders for its related accounts, to the extent feasible and consistent with the orderly distribution of securities in the offering.

(f) *Communications Relating to Issuer Requirements, Priority Provisions and Order Period*. Prior to the first offer of any securities by a syndicate, the senior syndicate manager shall furnish in writing to the other members of the syndicate and to members of the selling group, if any, (i) a written statement of all terms and conditions required by the issuer, (ii) a written statement of all of the issuer's retail order period requirements, if any, (iii) the priority provisions, (iv) the procedure, if any, by which such priority provisions may be changed, (v) if the senior syndicate manager or managers are to be permitted on a case-by-case basis to allocate securities in a manner other than in accordance with the priority provisions, the fact that they are to be permitted to do so, (vi) if there is to be an order period, whether orders may be confirmed prior to the end of the order period, and (vii) all pricing information. Any change in the priority provisions or pricing information shall be promptly furnished in writing by the senior syndicate manager to the other members of the syndicate and the selling group, if any. Syndicate and selling group members shall promptly furnish in writing the information described in this section to others, upon request. If the senior syndicate manager, rather than the issuer, prepares the written statement of all terms and conditions required by the issuer, such statement shall be provided to the issuer for its approval. An underwriter shall promptly furnish in writing to any other broker, dealer, or municipal securities dealer with which such underwriter has an arrangement to market municipal securities that includes the issuer's new issue, all of the information provided to it from the senior syndicate manager as required by this section.

(g) *Designations and Allocations of Securities*. The senior syndicate manager shall:

(i) within 24 hours of the sending of the commitment wire, complete the allocation of securities; provided however, that, if at the time allocations are made the purchase contract in a negotiated sale is not yet signed or the award in a competitive sale is not yet made, such allocations shall be made subject to the signing of the purchase contract or the awarding of the securities, as appropriate, and the purchaser must be informed of this fact;

(ii) within two business days following the date of sale, disclose to the other members of the syndicate, in writing, a summary, by priority category, of all allocations of securities which are accorded priority over members' take-down orders, indicating the aggregate par value, maturity date and price of each maturity so allocated, including any allocation to an order confirmed at a price other than the original list price. The summary shall include allocations of securities to orders submitted through the end of the order period or, if the syndicate does not have an order period, through the first business day following the date of sale;

(iii) disclose, in writing, to each member of the syndicate all available information on designations paid to syndicate and non-syndicate members expressed in total dollar amounts within 10 business days following the date of sale and all information about

designations paid to syndicate and non-syndicate members expressed in total dollar amounts with the sending of the designation checks pursuant to section (j) below; and

(iv) disclose to the members of the syndicate, in writing, the amount of any portion of the take-down directed to each member by the issuer. Such disclosure is to be made by the later of 15 business days following the date of sale or three business days following receipt by the senior syndicate manager of notification of such set asides of the take-down.

(h) *Disclosure of Syndicate Expenses and Other Information*. At or before the final settlement of a syndicate account, the senior syndicate manager shall furnish to the other members of the syndicate:

(i) an itemized statement setting forth the nature and amounts of all actual expenses incurred on behalf of the syndicate. Notwithstanding the foregoing, any such statement may include an item for miscellaneous expenses, provided that the amount shown under such item is not disproportionately large in relation to other items of expense shown on the statement and includes only minor items of expense which cannot be easily categorized elsewhere in the statement. The amount of discretionary fees for clearance costs, if any, to be imposed by a syndicate manager and the amount of management fees, if any, shall be disclosed to syndicate members prior to the submission of a bid, in the case of a competitive sale, or prior to the execution of a purchase contract with the issuer, in the case of a negotiated sale. For purposes of this section, the term "management fees" shall include, in addition to amounts categorized as management fees by the syndicate manager, any amount to be realized by a syndicate manager, and not shared with the other members of the syndicate, which is attributable to the difference in price to be paid to an issuer for the purchase of a new issue of municipal securities and the price at which such securities are to be delivered by the syndicate manager to the members of the syndicate; and

(ii) a summary statement showing:

(A) the identity of each related account submitting an order to which securities have been allocated as well as the aggregate par value and maturity date of each maturity so allocated;

(B) the identity of each person submitting a group order to which securities have been allocated as well as the aggregate par value and maturity date of each maturity so allocated except that this subparagraph shall not apply to the senior syndicate manager of a qualified note syndicate as defined in subsection (a)(ix) above; and

(C) the aggregate par values and prices (expressed in terms of dollar prices or yields) of all securities sold from the syndicate account. This subparagraph shall not apply to a qualified note syndicate as defined in subsection (a)(ix) above.

(i) *Settlement of Syndicate or Similar Account.* Final settlement of a syndicate or similar account formed for the purchase of securities shall be made within 30 calendar days following the date the issuer delivers the securities to the syndicate.

(j) *Payments of Designations.* All syndicate or similar account members shall submit the allocations of their designations according to the rules of the syndicate or similar account to the syndicate or account manager within two business days following the date the issuer delivers the securities to the syndicate. Any credit designated by a customer in connection with the purchase of securities as due to a member of a syndicate or similar account shall be distributed to such member by the broker, dealer or municipal securities dealer handling such order within 10 calendar days following the date the issuer delivers the securities to the syndicate.

(k) *Retail Order Period Representations and Required Disclosures*. From the end of the retail order period but no later than the Time of Formal Award (as defined in Rule G-34(a)(ii)(C)(1)(a)), each broker, dealer, or municipal securities dealer that submits an order during a retail order period to the senior syndicate manager or sole underwriter, as applicable, shall provide, in writing, which may be electronic (including, but not limited to, an electronic order entry system), the following information relating to each order designated as retail submitted during a retail order period:

(i) whether the order is from a customer that meets the issuer's eligibility criteria for participation in the retail order period;

(ii) whether the order is one for which a customer is already conditionally committed;

(iii) whether the broker, dealer, or municipal securities dealer has received more than one order from such retail customer for a security for which the same CUSIP number has been assigned;

(iv) any identifying information required by the issuer, or the senior syndicate manager on the issuer's behalf, in connection with such retail order (but not including customer names or social security numbers); and

(v) the par amount of the order.

The senior syndicate manager may rely on the information furnished by each broker, dealer, or municipal securities dealer that provided the information required by (i)-(v) unless the senior syndicate manager knows, or has reason to know, that the information is not true, accurate or complete.

(l)(i) *Prohibitions on Consents by Brokers, Dealers, and Municipal Securities Dealers.* No broker, dealer, or municipal securities dealer shall provide bond owner consent to amendments to authorizing documents for municipal securities,

either in its capacity as an underwriter or remarketing agent, or as agent for or in lieu of bond owners, provided that this prohibition shall not apply in the following circumstances:

(A) the authorizing document expressly allows an underwriter to provide bond owner consent and the offering documents for the existing securities expressly disclosed that bond owner consents could be provided by underwriters of other securities issued under the authorizing document;

(B) such securities are owned by such broker, dealer, or municipal securities dealer other than in its capacity as underwriter or remarketing agent;

(C) all securities affected by such amendments (other than securities retained by an owner in lieu of a tender and for which such bond owner had delivered consent to such amendment), are held by the broker, dealer, or municipal securities dealer acting as remarketing agent, as a result of a mandatory tender of such securities;

(D) the broker, dealer or municipal securities dealer provides consent solely as agent for and on behalf of bond owners delivering written consent to such amendments; or

(E) such consent provided by a broker, dealer or municipal securities dealer, in its capacity as an underwriter on behalf of prospective purchasers, would not become effective until all bond owners of securities affected by the proposed amendments (other than the prospective purchasers for whom the underwriter had provided consent) had also consented to such amendments.

(ii) For purposes of this section, the term “authorizing document” shall mean the trust indenture, resolution, ordinance, or other document under which the securities are issued. The term “bond owner” shall mean the owner of municipal securities issued under the applicable authorizing document. The term "bond owner consent" shall mean any consent specified in an authorizing document that may be or is required to be given by a bond owner pursuant to such authorizing document.

No. 2:14-CV-00213-IPJ

IN THE UNITED STATES DISTRICTCOURT FORTHE NORTHERN DISTRICT OF ALABAMA,

SOUTHERN DIVISION

Andrew Bennett, *etal.*,

Appellants,

v.

Jefferson County, Alabama,

Appellee.

On Appeal from the United States Bankruptcy Court for the Northern District of Alabama, No. 11-05736-TBB

APPELLANTS ANDREW BENNETT, ET AL.'S, MEMORANDUM OF LAW IN SURREPLY TO JEFFERSON COUNTY'S MOTION FOR PARTIAL DISMISSAL

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STATE CONSTITUTION

The Ratepayers appeal the Bankruptcy Court's Confirmation Order that denied their claims that Jefferson County's issuance and execution of roughly $3.2 billion in Series 2002C, 2003B and 2003C sewer warrants used to purchase interest rate swaps (the "Swap Warrants") are void *ab initio*, because the County issued the Swap Warrants in violation of Alabama constitutional and statutory law. The County argues that this portion of the appeal is moot, and should be dismissed on constitutional, statutory, and equitable grounds, because its Plan of reorganization has been substantially consummated and the implementing transactions cannot be undone. The County's mootness argument is fundamentally flawed in several respects.

First, the relief the Ratepayers seek does not require that the entire Plan be undone. The Plan involved three different categories of warrants – the Swap Warrants and a couple hundred million dollars of fixed rate warrants, the Lease non-sewer warrants of less than $100 million, and half of the County's general obligation ("GO") warrants in the amount of about $100 million.[1] The only warrants at issue here are the Sewer warrants. Those portions of the Plan involving

[1] In its original filing the County stated that the School Warrants were not a part of meeting the insolvency test of 11 U.S.C. 101 (32)(C) because "the County is current on all scheduled payments related to the School Warrants." (Doc 1 Resolution p. 4) Nor were the Bessemer Lease Warrants a factor in the alleged insolvency: "The County has no direct obligation under the Lease Revenue Warrants but is party to a long-term lease pursuant to which it leases the Warrant-Financed Facilities." Id.

the County's Lease warrants and general obligation warrants (and School warrants added after the case was filed) are not in any way implicated by Ratepayers' claims.[2]

Furthermore, Ratepayers are not seeking to undo any completed transactions of parties who were not before the Bankruptcy Court and were not related to the sewer debt. The sewer fees that the County levies against Ratepayers (under threat of service shut-off and ultimately foreclosure of liens against their homes for failure to pay the fees) are the sole source for repayment of the County's sewer debt.[3] If the County had not issued the Swap Warrants in violation of Alabama

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[2] Both the $800 million of School Warrants and the $200 million in GO warrants are backed by dedicated taxes where the County has sufficient available funds in hand to pay when due—which is much different from the Swap Warrants that were issued in 2002 and 2003 and now are being refinanced with increased total escalating debt service, even though no funds were available when the County issued the Swap Warrants and the wealth levels and population levels of the sewer system user base were, and still, are declining.

[3] There can be no question that, under federal law, the sewer fees are a tax against Ratepayers' property interests. (See, Doc 2414, pp.9-15 (filed after and not a part of original transcript and attached Exhibit A)). Therefore, by definition, Ratepayers' claims do not belong to the County and cannot be released or settled by the County through a Plan of reorganization worked out by the very parties against which Ratepayers are asserting their claims. Firefighters v. Cleveland, 478 U.S. 501, 529-30 (1986) ("parties who choose to resolve litigation through settlement may not dispose of the claims of a third party").

Ratepayers' federal due process claims under the Fifth and Fourteenth Amendment are not precluded by the mootness doctrine. Jefferson County v. Richards, 805 So. 2d 690, 706 (Ala. 2001) (a taxpayer is entitled to a hearing "to prevent the State from subjecting him to a levy in violation of the Federal Constitution").

law, the sewer warrants refinanced with the Swap Warrants as of the date of the bankruptcy filing would have been approximately $1.57 billion. The sewer fees levied and collected[4] against Ratepayers ballooned as a result of the illegally issued Swap Warrants and, it is universally agreed that the burgeoning sewer warrant holder claims prompted the County to seek the protection of the Bankruptcy Court. (See, e.g. Jan. 6 Memo Opinion, Doc 509, p.3)

The County has now refinanced that Swap Warrants by issuing $1.8 billion initial period principal in New Sewer Warrants, plus principal appreciation and junk bond interest rates that increase the principal and interest to more than $6.6 billion over the course of the Bankruptcy Court's 40-year enforcement and supervision of the Plan. The mere fact that the Swap Warrants have been retired by the New Sewer Warrants does not moot Ratepayers' claims.

In order for the Court to restore the parties to their prior positions, the equitable relief to which Ratepayers are entitled is both a declaration that the Swap Warrants are void *ab initio* and a reduction in the amount of the current new sewer

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[4] As the County and Warrant Holder Trustee argued to the Bankruptcy Court on numerous occasions, the sole, exclusive authority for the County to levy and collect sewer fees and charges comes from Amendment 73 of the Alabama state constitution. The Adversary Complaint in AP-120, the dismissal of which Ratepayers have appealed, alleges that Amendment 73 must be read as a whole to require the County to comply with the plain language in Amendment 73 that ***before levying and collecting*** any sewer fees and charges from Ratepayers, a majority of the voters must approve the proposed levy.

debt from $1.8 billion in principal (requiring repayment of over $6.6 billion in debt driven by high interest rates and deferred principal "step-ups" or escalations) today, to the Pre-Swap Warrant level of $1.57 billion.[5] This can be accomplished without undoing any transactions completed pursuant to the Plan and not secured by the unconstitutional and invalid Swap Warrant lien on Ratepayers' sewer fees, and without implicating any third parties to the Swap Warrant transactions, with one limited exception.[6] The Court need merely: (a) order the Swap Warrant creditors (e.g., JP Morgan Chase, the hedge funds, bond insurers and standby bond purchaser banks)[7] to disgorge $230 million of the amounts they reaped from the

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[5] The County mischaracterizes Ratepayers' claims when it asserts that they are seeking to have funds "redirected" to them. See County's Reply Memo at 8. Ratepayers do not seek money damages or a payment for themselves. (See, Doc 101) Rather, they followed 11 U.S.C. §101(5)(B), and filed a timely proof of claim that was in the nature of an adversary proceeding to seek equitable relief. Ratepayers seek the required hearing on the merits of their Section 101(5)(B) claim. Ratepayers are a class of taxpayers subject to rate relief from a declaratory judgment eliminating the excess sewer debt attributable to the Swap Warrants the County issued in violation of Alabama law – debt for which the County levies sewer fees against Ratepayers as the ***sole source of repayment***.

[6] The one exception to this is a long dated warrant early prorated call of $230 million. Customarily issuers have good acceptance of a prorated extraordinary call in the early stages of a fixed income transaction to deal with unanticipated legal issues where the alternative is to call the entire deal.

[7] The Trustee and the Swap Warrant creditors urged the Bankruptcy Court to stay Ratepayers' Adversary Proceeding AP-120 so that they could enter into an agreement with the County via the Plan of reorganization without Ratepayers' claims being heard. If, as the County argues, Ratepayers are at fault for not securing a stay of the Confirmation Order, the County is equally at fault for

void Swap Warrant transactions,[8] and (b) order that the $230 million in disgorged funds be used to redeem the highest rate and longest term principal accretion New Sewer Warrants. This move would result in estimated savings of more than $1 billion in principal appreciation and interest over the life of the Plan and, thereby, result in Ratepayers securing meaningful (although not complete) relief. See e.g. United States Tr. v. Official Comm. of Equity Sec. Holders (In re Zenith Elecs. Corp.), 329 F.3d 338, 341 (3rd Cir. 2003) (appeal not equitably moot where disgorgement of professional fees would not unravel the reorganization plan); In re International Environmental Dynamics, Inc., 718 F.2d 322, 326 (9th Cir. 1983) (appeal not moot where "court could fashion effective relief by remanding with

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opposing a determination of the merits of Ratepayers' claims prior to seeking the confirmation. This Court could order on remand that the Bankruptcy Court reopen Adversary Proceeding AP-120 and grant Ratepayers the equitable relief legally required. In re International Environmental Dynamics, Inc., 718 F.2d 322, 326 (9th Cir. 1983).

While the Trustee (which represents the interests of the Swap Warrant creditors) is a party to Adversary Proceeding AP-120, it is not a party to this appeal of the Confirmation Order. Thus, the two appeals are not, as the County argues redundant. This is why the Court must deny the County's request to dismiss Ratepayers' appeals related to the Adversary Proceedings, as well as deny the County's Motion for Partial Dismissal of their appeal of the Confirmation Order. Rather than dismiss Ratepayers' appeals related to the Adversary Proceedings, this Court should consolidate the appeals.

[8] The Swap Warrant creditors can be ordered to disgorge a portion of their proceeds because, under Alabama law, warrants (unlike bonds) are non-recourse instruments, and are not subject to holder-in-due-course defenses.

instructions to the bankruptcy court to order the return of erroneously disbursed funds").

Ratepayers' Appeal Is Not Constitutionally Moot.

The cases that the County relies upon to support its constitutional mootness argument involved conduct by private parties that may engage in any conduct ***not prohibited by law***. In stark contrast, as a political subdivision of the State, the County may act pursuant to its governmental authority only where ***authorized by law***. If (as Ratepayers will establish at a hearing on the merits), the County issued the Swap Warrants in violation of Alabama constitutional and statutory law, then the Swap Warrants are void *ab initio*. Jefferson County v. Richards, 805 So. 2d 690, 706 (Ala. 2001) ("Counties, being political subdivisions of the state, have no inherent power of taxation but have only such taxing power as the Legislature delegates to them").

This is not a case where the court ***could not*** grant relief ***after*** a plan was consummated; this is a case where the court ***could have granted relief long before the plan was consummated*** if it had allowed Ratepayers to proceed with their adversary proceeding. When their adversary proceeding was stayed, Ratepayers were forced to sit in limbo and watch the County and cooperating creditors go behind closed doors and cut a deal to manufacture a claim that Ratepayers' stayed case was moot. See also, Martin v. Wilks, 490 U.S. 755, 773 (1989), where the

Supreme Court stated: "As we held in Firefighters v. Cleveland, 478 U.S. 501, 529-30 (1986): "Of course, ***parties who choose to resolve litigation through settlement may not dispose of the claims of a third party***, and *a fortiori*, may not impose duties or obligations on a third party, without that party's agreement." (Emphasis added). Ratepayers were denied a hearing on their equitable relief claim wrongfully and inequitably so that their adversaries could work in concert to rush through a settlement and a new sale of warrants to mimic the "pattern" of a mootness situation, when in fact there is no legitimate basis to support an assertion of mootness. This is because Ratepayers' equitable claims were effectively rendered moot at the point the stay of their adversary proceeding was entered and they were denied the right to intervene in the Trustee's then-pending adversary proceeding, almost a year before the Confirmation Order. Even though Ratepayers filed their claim or "case or controversy" with over 1000 pages of admissible documentary support, their claims were barred summarily. See also Iron Arrow Honor Soc. v. Heckler, 464 U.S. 67, 72 (1983); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); Greenwood Utilities Com'n v. Hodel, 764 F.2d 1459, 1462 (11th Cir. 1985); Weinberger v. Board of Public Instruction, 93 Fla. 470, 479-80 (Fla. 1927).

As Ratepayers explain above, the Court may, in fact, grant them meaningful relief, even though the Plan has been substantially consummated on all grounds.

When Ratepayers' claims for equitable relief were stayed, their case or controversy was stayed, not rendered moot by intervening events. So long as some relief is available to Ratepayers, a claim or controversy exists and Ratepayers' claims are not constitutionally moot. As the court in Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.), 584 F.3d 229, 241 (5th Cir. 2009), explained:

> [A]ppellate review need not be declined when, because a plan has been substantially consummated, a creditor could not obtain full relief. If the appeal succeeds, the courts say, they may fashion whatever relief is practicable. After all, appellants "would readily accept some fractional recovery that does not impair feasibility or affect parties not before this Court, rather than suffer the mootness of [their] appeal as a whole." (citations omitted)

See also Isidor Paiewonsky Assoc. v. Sharp Props., Inc., 998 F.2d 145, 151 (3rd Cir. 1993) ("when a court can fashion 'some form of meaningful relief,' even if it only partially redresses the grievances of the prevailing party, the appeal is not moot") (internal quotation omitted).

Furthermore, the possibility that the County may engage in illegal conduct in the future also establishes that Ratepayers' claims are not moot. Secretary of Labor, U.S. Dep't of Labor v. Burger King Corp., 955 F.2d 681, 684 (11th Cir. 1992). In this case, the County's conduct during the bankruptcy proceedings demonstrates that the possibility of illegal conduct is not merely speculative. The County not only continued to levy and collect excessive fees from Ratepayers to

repay the sewer debt evidenced by the Swap Warrants issued in violation of Alabama law, the County exacerbated the situation by issuing the New Sewer Warrants in the same manner and using a similar "step-up" or escalating structure that it used to illegally issue the Swap Warrants and at a higher cost than the Swap Warrants, resulting in an increase of over 400% in the sewer fee rates that Ratepayers must pay under the threat of service shut-off and ultimately foreclosure of liens filed on their property if they fail to pay the fees.

In considering this gargantuan rate increase of over 400% that Ratepayers are now subject to under the Plan, it is noteworthy that the former State court-appointed receiver had gotten to the stage of only a 100% rate increase before he issued a report concluding that higher rates might be infeasible. Ratepayers recognize this issue must await the merits stage of these proceedings, but the grossly excessive size of the rate increases that Ratepayers are subjected to pursuant to the Plan shed light on the totality of the circumstances of this case that the Court must review in determining equitable mootness.

The threat of the County continuing to issue sewer debt in violation of Alabama law – and that could put the County back into bankruptcy – without some remarkable growth in median household incomes and wealth levels, is a very real one that negates the County's constitutional mootness argument.

Ratepayers' Appeal Is Not Equitably Moot.

The County attempts to make much of the fact that Ratepayers did not seek a stay of the Confirmation Order, so that the Plan has now been substantially consummated. What the County has failed to share with the Court is that it "priced" the New Sewer Warrants the day ***before*** the Bankruptcy Court entered its Confirmation Order. A pricing means that most of the buyers had already put in their firm order even though the closing with an actual transfer of funds and documents was a week to 10 days away. Consequently, for Ratepayers to secure a stay, they would have had to post a substantial bond to secure both the profits of the hedge funds who owned the Swap Warrants and the yields of the New Sewer Warrant holders – which the County knows Ratepayers (who are individual citizens without substantial financial resources) could not do. That is not what is meant by a "cramdown" which would be unavailable because Ratepayers' unique $1.6 billion claim under §101(5)(B) was ***not*** substantially similar (see §1122(a) to any of the other claims in the bankruptcy. See generally, 11 U.S.C. §1122-3.

Again, however, the fact that the Plan has been substantially consummated does not preclude the relief that Ratepayers seek. Ratepayers recognize that much of the professional fees and transaction fees from parties not before the Court can never be recovered. But all bond insurers, hedge funds and standby banks and counterparties involved in the Swap Warrant transactions appeared before the

Court in the Trustee's Adversary Proceeding (AP-16) and Ratepayers' Adversary Proceeding (AP-120), and assumed the risk that their carefully orchestrated mootness strategy to avoid Ratepayers' claims would work.

The presumption that an appellate court will not be able to fashion effective equitable relief is merely that -- a presumption. Even where a plan has been substantially consummated, the Court must still evaluate whether it can grant effective relief. Alabama Dep't of Econ. & Cmty. Affairs v. Ball Healthcare-Dallas, LLC (In re Lett), 632 F.3d 1216, 1225-26 (11th Cir. 2011) ("Even if substantial consummation has occurred, a court must still consider all the circumstances of the case to decide whether it can grant effective relief") (internal citation omitted); In re Combined Metals Reduction Co., 557 F.2d 179, 188-89 (9th Cir. 1977) (failure to obtain a stay moots the appeal only as it relates to sale of debtor property that has been liquidated, but since the plan still controls the actions of the trustee, "the appeal of the order of confirmation is not moot"). See also In re Condec, Inc., 225 B.R. 800, 803 (M.D. Fla. 1998) (despite the failure to obtain a stay and despite the fact that payments had been made under the plan, the court concluded that debtor had not "substantially consummated its reorganization plan to the extent that it [had] become [] legally and practically impossible to unwind that which [had] already been done").

Since the Bankruptcy Court maintains supervision and control over the County's bankruptcy case for another 40 years, the case has not been completely consummated. The only putative assets of the County adjusted here are the very sewer fees that are the heart of Ratepayers' claims, and which the County sold and assigned to the Swap Warrant Holders back in 2002 and 2003. No County property has been sold. No County assets have been liquidated. No new debt has been issued for the benefit of the County's estate, other than the New Sewer Warrants. No new owners have come in and no employees have been transferred to an acquiring entity. From the time the State receiver was appointed and throughout the life of the bankruptcy proceeding, the "creditors" (which have included the County which takes operating expenses off the top) and the hard fought legal issues have been how to split up and reorganize and reallocate and justify more money coming from the Ratepayers not how to restructure the property and assets of the County which are outside the bankruptcy. This Bankruptcy, unlike cases in the Chapter 11 and 7 area cited improperly as precedents for mootness principles to be applied to the much different circumstances of this case, has always been about how to split up the challenged lien on sewer revenues by avoiding giving Ratepayers their equitable relief. None of the facts of any of the commercial cases cited by the County exist here. The only thing that has happened is that the lien on sewer fees that Ratepayers must pay,

subject to ultimate loss of their homes if they fail to pay, is now payable over 40 years rather than 30 years, and payable at a higher cost to Ratepayers, but with no additional benefit to them.

The County's levy and collection of net revenues to repay the excessive debt attributable to the illegal Swap Warrant transactions, and the amount and duration of the County's pledge of these tax revenues not only have not been completely consummated, this conduct will continue under Bankruptcy Court supervision and control for the next 40 years.

As the court In re Aov Indus., 792 F.2d 1140, 1148 (D.C. Cir. 1986) explained:

> exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligation to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole. "Substantial consummation" is not a blanket discharge of this judicial duty to examine carefully each request for relief.

As we explain above, Ratepayers are not seeking to unravel the Plan. No innocent third parties will be significantly impacted by the relief Ratepayers seek. The only parties adversely impacted would be the Swap Warrant Parties (most of which have made significant profits on these transactions) that would be required to disgorge a portion of their proceeds. The County would actually benefit from the requested relief by having less sewer debt and more money for local investment and economic growth, as well as fewer disgruntled consumers of sewer services.

Therefore, applying the Eleventh Circuit's test for determining equitable mootness outlined in In re Club Assocs., 956 F.2d 1065, 1069, n.11 (11th Cir. 1992), Ratepayers' appeal of the Confirmation Order is not equitably moot, just as it is not constitutionally moot.

Ratepayers' Appeal Is Not Statutorily Moot.

The County's reliance upon 11 U.S.C. §364(e) to support its mootness argument is misplaced. Since Ratepayers are not seeking to unwind the Plan, 11 U.S.C. §364(e), and the cases that the County relies upon, have no applicability here. Section 364(e) is not applicable for the additional reason that it applies only in instances where the debt at issue is secured by assets of the debtor or assets the debtor uses in its operations. The debt at issue in this case relates to the refinancing of pre-petition non-recourse warrants that are secured solely by sewer fees imposed upon Ratepayers, where the County did not receive any of the proceeds. It does not relate to assets of the debtor within the meaning of Section 364(e). ***All*** of the new post-petition loan proceeds of the New Sewer Warrants were used to repay pre-petition loans not contemplated by 11 USC 364 (c) and (d). See, In Re Saybrook Manufacturing (11 Cir 1992) *963 F.2d 1490* ("By their express terms, *sections 364(c)* & *(d)* apply only to future -- i.e., post-petition -- extensions of credit. They do not authorize the granting of liens to secure pre-petition loans.") The refinancing of a post-petition loan by paying it off is less

consistent with 364 (c) and (d) than granting a lien to leave the pre-petition debt more secure and outstanding. Pre-petition Swap Warrant holders getting cash up front is more conclusive case for denying 364(e) statutory mootness than getting a lien to secure prepetition debt which would clearly not be mooted by 364(e). 364(e)is supposed to be used to get money to help the debtor get a fresh start not help the fraudulent or even criminal transferees of debtor assets refinance them. In re FCX, Inc. (1985, BC ED NC) 54 BR 833.

Accordingly, Ratepayers' appeal is not statutorily moot, just as it is not constitutionally moot and not equitably moot.

CONCLUSION

The County has failed to meet its burden of proving that Ratepayers' claims are moot. In re Anderson, 349 B.R. 448, 454 (E.D. Va. 2006) (party asserting mootness bears the burden of persuasion). Accordingly, the County's Motion for Partial Dismissal on mootness grounds must be denied.

Additionally, since a hearing on the merits of Ratepayers' claims may only be accessed by via an adversary proceeding conducted under the Federal Rules of Civil Procedure, the Court should consolidate with this appeal Ratepayers' appeals related to their Adversary Proceeding AP-120 and the Trustee's Adversary

Proceeding AP-16 (in which Ratepayers originally sought to intervene), and allow the consolidated appeals to proceed to a determination on the merits.

Dated: May 8, 2014

Respectfully submitted,

__/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 8, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification and a copy of such filing to the following counsel of record for Jefferson County, Alabama:

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