

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In re:	:	Chapter 9
	:	
CITY OF CHESTER, PENNSYLVANIA,	:	Case No. 22-13032
	:	
Debtor.	:	
	:	

**MEMORANDUM OF LAW IN SUPPORT OF STATEMENT OF QUALIFICATIONS
PURSUANT TO SECTION 109(c) OF THE BANKRUPTCY CODE**

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The City of Chester, Pennsylvania (the “City” or “Chester”), by its undersigned attorneys, hereby submits this Memorandum of Law in Support of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code (this “Memorandum”). The factual basis for this Memorandum is contained in the *Declaration of Michael Doweary in Support of the City of Chester, Pennsylvania’s Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code* (the “Doweary Declaration”) and the *Declaration of Vijay Kapoor in Support of the City of Chester, Pennsylvania’s Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code* (the “Kapoor Declaration”), filed contemporaneously herewith. For all the reasons stated herein, the City is eligible for relief under Section 109(c) of title 11 of the United States Code (the “Bankruptcy Code”).¹

I. INTRODUCTION

1. Chester is the oldest city in Pennsylvania, and was incorporated as a borough in 1701 and as a city in 1866. The City is a city of the Third Class under Pennsylvania law,² and prior to June 22, 2020 was operating under a Home Rule Charter.³

2. During World War I and World War II, the City thrived as an industrial and manufacturing community. However, since the mid-1950s, the City has been experiencing economic difficulties and facing several challenges, including, (i) a decreasing population, (ii) declining revenues, and (iii) high municipal expenditures. In 1995, faced with multi-million

¹ Applicable to cases under chapter 9 pursuant to [11 U.S.C. § 901\(a\)](#).

² Under Pennsylvania law, there are four classes of cities, the determination of a city’s class is based on its population. Act of June 25, 1895, P.L. 275, No. 188. Third class cities are those “containing a population under two hundred and fifty thousand and which have not elected to become a city of the second class A.” *Id.*

³ All Pennsylvania municipalities, except for cities and counties of the first class, can adopt a home rule charter, which is “a written document defining the power, structure, privileges, rights and duties of the municipal government and limitations thereon.” [53 Pa. Cons. Stat. §§ 2901, 2902](#). The Pennsylvania Constitution also recognizes that “[m]unicipalities shall have the right and power to frame and adopt home rule charters A municipality which has a home rule charter may exercise any power or perform any function not denied by the Constitution, by its home rule charter or by the General Assembly at any time.” Pa. Const. art. IX, §2.

dollar deficits and past due obligations, the City was designated as a distressed city under the Municipalities Financial Recovery Act of July 10, 1987, P.L. 246, No. 47 (“Act 47”) and subjected to financial oversight by the Commonwealth of Pennsylvania.

3. The City has been in some form of financial oversight by the Commonwealth for over 27 years, and unlike other cities who have rehabilitated and exited oversight, Chester’s financial situation has only worsened. Although the City’s economic hardship was exacerbated by COVID-19, the City’s problems existed long before the pandemic and will persist into the foreseeable future absent radical action. Even prior to the pandemic, the City’s general fund operated at seven- or eight-figure deficits in all but one year since 2013 for which the City has completed audits.

4. On April 13, 2020, Governor Thomas Wolf declared a fiscal emergency in the City under Act 47.

5. On June 22, 2020, the Commonwealth Court of Pennsylvania (the “Commonwealth Court”) determined that a fiscal emergency as defined by Section 602(A) of Act 47 continued to exist in the City and put the City in Receivership under Section 702(c)(2) of Act 47. The same day, the Commonwealth Court appointed Michael Doweary (the “Receiver”) as receiver for the City. Pursuant to an order entered by the Commonwealth Court on December 28, 2021, the City’s Receivership and Receiver’s appointment were extended for up to two years.

6. In August 2020, the Receiver submitted an initial Recovery Plan (the “Recovery Plan”), which was confirmed by the Commonwealth Court on October 19, 2020. The Recovery Plan represented the Receiver’s first steps toward an exit from financial distress and the stable provision of vital and necessary services to the City’s residents.

7. On June 7, 2021, the Commonwealth Court approved the Amended Recovery Plan (the "Amended Recovery Plan") that the Receiver submitted in April 2021. The Receiver worked diligently to implement the Amended Recovery Plan and improve the City's financial position by taking steps to reduce its expenditures, including making a significant reduction of its workforce, restricting overtime, implementing a hiring freeze, and limiting discretionary purchases.

8. Notwithstanding the Receiver's and the City's efforts to reduce spending and increase efficiencies, the magnitude of the City's financial problems caused the Receiver to request authorization to commence a chapter 9 case on behalf of the City on January 14, 2022 from Dennis M. Davin, then the Secretary (the "Secretary") of the Pennsylvania Department of Community and Economic Development (the "DCED"). By letter dated February 8, 2022, the Secretary provided the Receiver with written authorization to file a municipal debt adjustment action on behalf of the City under the Bankruptcy Code and Act 47 (the "Bankruptcy Authorization").

9. In accordance with the Bankruptcy Authorization, on November 10, 2022 (the "Petition Date"), the City commenced a case under chapter 9 of the Bankruptcy Code. In connection with the petition, the City also filed a statement of qualifications that certifies that the City has met each of the eligibility requirements contained in Section 109(c) of the Bankruptcy Code (the "Statement of Qualifications").

10. The Receiver has worked tirelessly to reduce excess spending and increase efficiencies toward the goal of balancing the budget. Notwithstanding these efforts, because of the City's consistently underfunded pension obligations, if no reorganization is undertaken, the City is projected to realize a \$46.5 million deficit in 2023, a \$3.6 million deficit in 2024, and a \$12.4 million deficit in 2025, with steadily increasing deficits each subsequent year corresponding to increased costs.

11. And further budgetary cuts alone will not make a dent in the substantial outstanding and ongoing pension obligations and retiree healthcare costs, and would put the provision of essential services to residents of the City at risk. Past efforts to bring much-needed revenue into the City have come at the expense of future economic development possibilities that could improve residents' quality of life and make Chester a more desirable place to live. Moreover, even if monetization of the City's primary significant asset, the water system, is realized, it will not address the ongoing systemic issue of the City's annual expenses significantly outpacing its annual revenues. Economic sustainability can only be achieved by balancing the budget through an adjustment of the City's obligations.

12. The residents of Chester have borne too much burden for too long, and the City can no longer afford to mortgage its future to pay for past and present financial peril. The Receiver authorized the City to commence this Chapter 9 bankruptcy case to utilize the tools available under the Bankruptcy Code to restructure and renegotiate the City's obligations, maximize its assets to achieve a balanced budget, and confirm a plan of adjustment. The Receiver's goal in authorizing this case and seeking to confirm a plan of adjustment is not only to reach financial stability that allows for the continued provision of vital and necessary services to residents, but to enable the City to invest in capital projects and economic and cultural growth that will not just help Chester survive, but thrive.

II. DISCUSSION

13. To be eligible for relief under chapter 9, an entity must satisfy five statutory criteria. Specifically, the entity must demonstrate that it:

- (1) is a municipality;
- (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

- (3) is insolvent;
- (4) desires to effect a plan to adjust such debts; and
- (5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter; (C) is unable to negotiate with creditors because such negotiation is impracticable; or (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

11 U.S.C. § 109(c)(1) – (5).

14. The purpose of chapter 9 is to provide a municipality with a breathing spell and “temporary protection from debt collection efforts so that it may establish a plan of adjustment with its creditors.” *In re Valley Health Sys.*, 383 B.R. 156, 163 (Bankr. C.D. Cal. 2008). *See also In re County of Orange*, 183 B.R. 594, 608 (Bankr. C.D. Cal. 1995) (“[The] general policy of Chapter 9 is to give a debtor a breathing spell from debt collection efforts so that it can work out a repayment plan with creditors.” (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 263 (1977))). Unlike cases filed under other chapters of the Code, the filing of a voluntary petition under chapter 9 does not automatically constitute entry of an order for relief. Rather, a petitioner must meet certain criteria to be eligible for relief.

15. “Section 109(c)’s eligibility requirements are to be construed broadly to provide access to relief in furtherance of the Code’s underlying policies.” *In re Valley Health Sys.*, 383 B.R. at 163 (internal quotations and citation omitted)); *see also In re Barnwell County Hosp.*, 471 B.R. 849, 859 (Bankr. D.S.C. 2012) (same); *In re Pierce County Hous. Auth.*, 414 B.R. 702, 710 (Bankr. W.D. Wash. 2009) (same); *In re City of Wellston*, 42 B.R. 282, 284 (Bankr. E.D. Mo. 1984) (describing the eligibility requirements as “minimal” and finding that entity was eligible for chapter 9 relief based solely on statement of qualifications and limited testimony in support); *accord* H.R. Rep. No. 94-686, at 19-20 (1975), reprinted in 1978 U.S.C.C.A.N. 539, 557

(expanding “the applicability of Chapter IX as much as possible.”); S. Rep. No. 94-458, at 13 (1975) (“The provisions of [chapter 9] should provide ready access to the bankruptcy courts.”).

16. The burden of proving satisfaction of the section 109(c) eligibility criteria by a preponderance of the evidence is on the petitioner. *See Int’l Ass’n of Firefighters, Local 1186 v. City of Vallejo (In re City of Vallejo)*, [408 B.R. 280, 289](#) (B.A.P. 9th Cir. 2009) (rejecting objector’s argument for the application of a “more rigorous clear and convincing burden of proof . . .” to determine eligibility); *In re City of Stockton, Cal.*, [493 B.R. 772, 794](#) (Bankr. E.D. Cal. 2013) (“[I]t is straightforward that the § 109(c) eligibility elements are matters as to which the City has the affirmative burden to establish in all respects by preponderance of evidence . . .”). Proof by a preponderance of the evidence means that it is sufficient to persuade the finder of fact that the proposition is more likely true than not. *See, e.g., In re Winship*, [397 U.S. 358, 371](#) (1970); *Doe v. Princeton Univ.*, [30 F.4th 335, 347](#) (3d Cir. 2022) (“[A] party proves a fact by a preponderance of the evidence when he proves that the fact’s existence is more likely than not.” (quoting *Greenwich Collieries v. Dir., Off. of Workers’ Comp. Programs*, [990 F.2d 730, 736](#) (3d Cir. 1993))).

17. As demonstrated herein, the City satisfies each of these requirements for eligibility under chapter 9.

A. Chester Is a Municipality

18. The City is a municipality. The Bankruptcy Code defines “municipality” as a “political subdivision or public agency or instrumentality of a State.” [11 U.S.C. § 101\(40\)](#). “Certainly, the term ‘municipality’ should not be narrowly construed.” *In re County of Orange*, [183 B.R. at 601](#).

19. Chester is the oldest city in Pennsylvania, and was incorporated as a borough in 1701 and as a city in 1866. [Dowery Declaration, at ¶ 10]. The City is a city of the Third Class

under Pennsylvania law⁴ and operates under a Home Rule Charter. [Dowery Declaration, at ¶ 18]. All Pennsylvania municipalities, except for cities and counties of the first class, can adopt a home rule charter, which is “a written document defining the power, structure, privileges, rights and duties of the municipal government and limitations thereon.” 53 Pa. Cons. Stat. §§ 2901, 2902. The Pennsylvania Constitution also recognizes that “[m]unicipalities shall have the right and power to frame and adopt home rule charters A municipality which has a home rule charter may exercise any power or perform any function not denied by the Constitution, by its home rule charter or by the General Assembly at any time.” Pa. Const. art. IX, §2.

20. Accordingly, the City is a “political subdivision” of the Commonwealth of Pennsylvania and, thus, a “municipality” within the meaning of section 101(40) of the Bankruptcy Code, satisfying the requirement of Section 109(c)(1) of the Bankruptcy Code.

B. Chester Is Specifically Authorized By the Commonwealth to Be a Debtor.

21. Pursuant to Section 109(c)(2), a municipality must be “specifically authorized” to be a debtor under State law. 11 U.S.C. § 109(c)(2).

22. Under Act 47, as amended, the Receiver possesses the sole power to file a municipal debt adjustment action under chapter 9 of the Bankruptcy Code. 53 P.S. § 11701.706(a)(9). However, a receiver may only exercise this power upon the written authorization of the Secretary (the “Secretary”) of the DCED. *Id.* Once the Secretary provides written authorization, the Receiver “shall consult with the [Act 47 municipal financial recovery] advisory committee” prior to filing the municipal debt adjustment action. *Id.* § 11701.711(e).

⁴ Under Pennsylvania law, there are four classes of cities, the determination of a city’s class is based on its population. Act of June 25, 1985, P.L. 275, No. 188. Third class cities are those “containing a population under two hundred and fifty thousand and which have not elected to become a city of the second class A.” *Id.*

These are the only express limitations upon a receiver's power to file for bankruptcy on behalf of a distressed municipality under Pennsylvania law.

23. Although Section 706(a)(9) of Act 47 provides no other specific guidance or procedures that the Secretary must follow once he or she receives a request from a receiver to file an action under chapter 9, another section of Act 47 does provide guidance when reviewing a municipality's request to file a bankruptcy action which may prove useful or persuasive when reviewing a receiver's request. Section 261(a) of Act 47 allows a municipality to apply to the Secretary for written authorization to file a chapter 9 bankruptcy action if it is faced with one of the following conditions:

- a. imminent jeopardy of an action by a creditor, claimant or supplier of goods or services which is likely to substantially interrupt or restrict the continued ability of the municipality to provide health or safety services to its citizens;
- b. one or more creditors of the municipality have rejected the proposed or adopted [recovery] plan, and efforts to negotiate resolution of their claims have been unsuccessful for a ten-day period; or
- c. a condition substantially affecting the municipality's financial distress is potentially solvable only by utilizing a remedy exclusively available to the municipality through chapter 9.

Id. § 11701.261(a)(1)-(3). Application of Section 261(a)(3) of Act 47 requires a two-part analysis: first, whether the request has identified a condition substantially affecting the City's financial condition; and second, whether this condition is potentially solvable only by utilizing a remedy exclusively available to the City through the Bankruptcy Code.

24. On January 14, 2022, the Receiver submitted a written request (the "Request") to the Secretary for authorization to file a municipal debt adjustment action on behalf of the City. *See* Exhibit A to Statement of Qualifications. Based on the City's precarious financial condition, as described in the Request, on February 8, 2022, the Secretary determined that the City's pension and post-retirement health obligations are "potentially solvable only by utilizing a remedy exclusively available to the municipality" through the Bankruptcy Code, and provided the

Receiver with the Bankruptcy Authorization, consistent with [53 P.S. § 11701.706\(a\)\(9\)](#). *See* Exhibit B to Statement of Qualifications. Further, on September 13, 2022, the Receiver consulted with the Municipal Financial Recovery Advisory Committee (“MFRAC”)⁵ regarding the City’s severe financial problems and the reasons the City may need to seek relief under the Bankruptcy Code, and made a powerpoint presentation to MFRAC, a true and correct copy of which is attached to the Doweary Declaration as [Exhibit C](#). [Kapoor Declaration, at ¶ 5]. Pursuant to the authorization received from DCED and after consulting with MFRAC, the Receiver issued an Order Authorizing the Filing of a Case Under Chapter 9 of the Bankruptcy Code and Related Actions on November 10, 2022.

25. Accordingly, the City has been specifically authorized to be a debtor under chapter 9 of the Bankruptcy Code, thus satisfying the eligibility requirement of Section 109(c)(2).

C. Chester Is Insolvent.

26. Section 109(c)(3) of the Bankruptcy Code provides that only an “insolvent” municipality is eligible to be a debtor under chapter 9 of the Bankruptcy Code, but the insolvency standard applicable in chapter 9 differs from that used in other chapters of the Bankruptcy Code. [11 U.S.C. § 109\(c\)\(3\)](#). Section 101(32)(C) of the Bankruptcy Code provides that “with reference to a municipality,” “insolvent” means a “financial condition such that the municipality is – (i) generally not paying its debts as they come due unless such debts are the subject of a bona fide dispute; or (ii) unable to pay its debts as they become due.” [11 U.S.C. § 101\(32\)\(C\)\(i\) & \(ii\)](#). Accordingly, the Bankruptcy Code sets forth a discrete definition of municipal insolvency that

⁵ MFRAC is an advisory committee established under Act 47 to meet and consult with the Receiver. The sole function of MFRAC is to provide non-binding recommendations and feedback to the Receiver on the implementation of the Recovery Plan. The MFRAC consists of four members appointed as follows: (1) the Chief Executive Officer, if any, of the distressed municipality or a designee, (2) the president of the governing body of the distressed municipality or a designee, (3) one member appointed by the County Council of the county where the distressed municipality is located, and (4) one member appointed by the Governor.

differs from the familiar “balance sheet insolvency” test applicable in chapter 7 and 11 cases.⁶ The theme underlying the two alternative definitions of municipal insolvency in § 101(32)(C) is that a municipality must be in bona fide financial distress that is not likely to be resolved without use of the federal exclusive bankruptcy power to impair contracts. “While the test under § 101(32)(C)(i) looks to current, general nonpayment, the test under 101(32)(C)(ii) is an equitable, prospective test looking to future inability to pay.” *In re McCurtain Mun. Auth.*, No. 07-80363, [2007 Bankr. LEXIS 4160](#), at *3 (Bankr. E.D. Okla. Dec. 4, 2007) (internal quotation marks omitted).

27. “The insolvency must be real and not transitory.” *Stockton*, [493 B.R. at 788](#), and is determined based on the debtor’s financial condition as of the petition date. *In re City of Bridgeport*, [129 B.R. 332](#), [336-37](#) (Bankr. D. Conn. 1991).

28. Critically, a municipality is not required to wait until it runs out of money, fails to pay its employees, or defaults on its debts before it can be deemed insolvent. *Bridgeport*, [129 B.R. at 338](#). Addressing this issue, the *Bridgeport* Court noted that:

Cities cannot go out of business. On the contrary, Chapter 9 is intended to enable a financially distressed city to “continue to provide its residents with essential services such as police protection, fire protection, sewage and garbage removal, and schools . . . , while it works out a plan to adjust its debts and obligations.” A construction of § 101(32)(C) under which a city would not be able to seek chapter 9 protection unless and until it was actually not paying its bills could defeat that purpose, as actually not paying bills could lead to the non-delivery of services.

Id. at 336-37 (internal citations omitted).

29. The City’s financial issues are deep, intertwined, and complicated. They undercut the City’s ability to provide vital and necessary services to the people who live in, work in, or visit Chester. [Kapoor Declaration, at ¶ 6]. They put City government in the position where it takes

⁶ Compare [11 U.S.C. § 101\(32\)\(C\)](#) (cited above) with [11 U.S.C. § 101\(32\)\(A\)](#) (defining “insolvent” for non-partnership, non-municipal entities as “financial condition such that the sum of such entity’s debts is greater than all of such entity’s property at a fair valuation . . .”).

actions to ensure its own fiscal survival, rather than being a proactive and creative partner in addressing the economic, social, and other broader challenges the community faces. [Kapoor Declaration, at ¶ 6]. As demonstrated below, Chester is insolvent because it is not paying its debts as they come due and is unable to pay its debts as they come due.

1. Chester Is Insolvent Because It Is Not Paying Its Debts as They Become Due.

30. The most severe deferred obligations the City has not been paying relate to the City's three defined benefit pension plans established for the City's employees: the Police Pension Plan ("PPP"), the Paid Firemen's Pension Plan ("FPP"), and the Officers and Employees Pension Plan ("OEP") (collectively, the "Pension Plans"), which covers eligible employees not in the PPP or FPP. [Kapoor Declaration, at ¶ 14]. Under Pennsylvania law, each year the City is required to pay by December 31 at least the minimum amount to cover the cost of benefits for current and future retirees as determined by actuarial analysis, which amount is called the minimum municipal obligation ("MMO"). Until 2021, the City had not made the full MMO contribution to the Pension Plans since 2013. [Kapoor Declaration, at ¶ 14]. From 2014 to 2016, the City only transferred pension aid received from the Commonwealth into the Pension Plans, and that aid covered a third or less of the total due. [Kapoor Declaration, at ¶ 14]. The City made additional contributions beginning in 2017, but those contributions did not meet the actuary's annual MMO calculation between 2014 and 2020. [Kapoor Declaration, at ¶ 14].

31. As a result, as of July 31, 2020, the PPP (which is the most severely underfunded of the City's three Pension Plans) had only \$1.75 million in assets, an amount sufficient to pay a mere three months' worth of benefits to current retirees. [Kapoor Declaration, at ¶ 15]. The PPP spends approximately \$500,000-\$550,000 per month, mostly on retiree benefits. [Kapoor Declaration, at ¶ 15].

32. Because of the Receiver's actions, including collecting revenue from a new 1% distressed pension tax that was expanded, as required by law, to be applied to City residents (in addition to commuters), the City was able to pay the 2021 MMO in full, and the PPP finished 2021 with \$4.6 million in assets (or approximately nine months' worth of benefits required to be paid to current retirees), and is projected to have \$6.7 million in assets as of December 31, 2022 (approximately thirteen months' worth of benefits required to be paid to current retirees), including full payment of the 2022 MMO. [Kapoor Declaration, at ¶ 16]. The distressed pension tax is in addition to the 2.75% earned income tax City residents already paid and, as a result, City residents are paying a 3.75% earned income tax, the second highest resident earned income tax rate in Pennsylvania, behind only Philadelphia.

33. Even with the Receiver's actions and the substantial tax burden imposed on City residents, the aggregate unpaid MMO owed to the Pension Plans totaled \$39.8 million as of December 31, 2021, and interest accrues on this amount at the rate of the assumed return on investments by the PPP (approximately 7.5% per annum). [Kapoor Declaration, at ¶ 17]. The \$39.8 million in prior year MMO represents approximately 69% of the City's entire 2022 general fund budget. [Kapoor Declaration, at ¶ 17]. Further, fully funding the Pension Plans will require an additional \$87.4 million, on top of the outstanding MMO's of \$39.8 million (to account for missing interest). [Kapoor Declaration, at ¶ 17]. Thus, the total contribution required to fund the City's three Pension Plans in full is at least \$127,200,000. [Kapoor Declaration, at ¶ 17]. The City is unable to pay the deferred MMOs in full even though it is legally required to do so. *New York City Off-Track Betting Corp.*, [427 B.R. 256, 272](#) (Bankr. S.D.N.Y. 2010) (finding deferral of payment of obligations to creditors in order to fund operations as evidence of debtor's insolvency).

34. Furthermore, the City has not been paying other obligations as and when they come due. The Internal Revenue Service has asserted the City owes it approximately \$750,000 for withholding taxes that were not paid and related interest and penalties [Dowery Declaration, at ¶ 43], and Prospect Crozer has asserted a claim against the City in the amount of \$340,530.49 plus interest for a real estate tax refund and pursued litigation against the City [Dowery Declaration, at ¶ 19 n.5].

35. Because the City has not been, and currently is not, paying bona fide obligations as they have come due (and, with respect to its pensions, has not been doing so for nearly a decade), the City is “insolvent” within the meaning of section 101(32)(C)(i) of the Bankruptcy Code.

2. Chester Is Insolvent Because It Is Unable To Pay Its Debts as They Come Due.

a. Legal Standard

36. Even if the City’s nonpayment of its existing past-due obligations did not render it “insolvent” within the meaning of Section 101(32)(C)(i),⁷ the City’s inability to pay its debts as they come due independently renders the City insolvent within the meaning of Section 101(32)(C)(ii). A municipality’s inability to pay is known as “cash insolvency” and the test for municipal insolvency set forth at section 101(32)(C)(ii) of the Bankruptcy Code as the “cash-flow test.” *Bridgeport*, 129 at 337.

37. Notably, Section 101(32)(C)(ii) does not require a municipality to wait until it completely exhausts all available cash before it is deemed to be “cash insolvent” and, thus, eligible to seek chapter 9 relief. *See, e.g., id.* at 339 (“[A] city should not have to wait until it runs out of money in order to qualify for bankruptcy protection.”). Rather, courts have recognized that the

⁷ Proof of actual non-payment of debts has itself been characterized as proof of a municipality’s inability to pay. *See* 6 COLLIER ON BANKRUPTCY ¶ 900.02[2][c][ii] (Alan S. Resnick and Henry J. Sommer eds., 16th ed. rev.) (In most circumstances, proof of nonpayment may amount to proof of inability, for municipalities, invested as they are “with the public trust, will generally cease paying only in circumstances in which they are unable to pay or if the debts are in bona fide dispute.”).

“cash-flow test” looks forward, gauging the City’s prospective ability to pay its debts in the near future rather than on the petition date. The *Stockton* Court noted:

The language “unable to pay as they become due” in the municipal insolvency definition implicates the notions of time and projections about the future. Statutory construction rules likewise point to a temporal aspect as the § 101(32)(C)(ii) phrase “as they become due” must mean something different than its § 101(32)(C)(i) partner “generally not paying its debts.” The consequence of the § 101(32)(C)(ii) temporal definition of insolvency is that a municipality need not be actually out of cash before it is cash insolvent.

Stockton, 493 B.R. at 788; see also *Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares (In re Hamilton Creek Metro. Dist.)*, 143 F.3d 1381, 1384 (10th Cir. 1998) (“While the test under § 101(32)(C)(i) looks to current, general non-payment, the test under 101(32)(C)(ii) is an equitable, prospective test looking to future inability to pay.”) (quoting *In re Sullivan County Reg’l Refuse Disposal Dist.*, 165 B.R. 60, 80 (Bankr. D.N.H. 1994)); *Bridgeport*, 129 B.R. at 336-37 (finding that Section 101(32)(C)(ii) of the Bankruptcy Code “requires a prospective analysis,” that interpretations to the contrary would render subsection (C)(ii) nothing more than a subsection of (C)(i) (and thus surplusage), and that a “prospective analysis also comports with the purpose of chapter 9”).

38. Although courts have not settled on how far into the future such a prospective analysis should reach, there is consensus that a projected exhaustion of cash within the municipality’s current or succeeding fiscal year will serve to demonstrate cash insolvency. See *Stockton*, 493 B.R. at 789 (“[W]hen a municipality lacks the funds to pay its contractual obligations within the current or the next succeeding fiscal year, it is unable to pay its debts as they become due within the meaning of § 101(32)(C)(ii).”); *Pierce County Hous. Auth.*, 414 B.R. at 711 (finding that the debtor had demonstrated its cash insolvency when, among other things, the debtor’s financial expert “properly evaluated the current fiscal year and the next fiscal year”); *Bridgeport*, 129 B.R. at 338 (“[T]o be found insolvent a city must prove that it will be unable to pay its debts

as they become due in its current fiscal year or, based on an adopted budget, in its next fiscal year.”).

39. Moreover, a determination of cash insolvency may be informed by budget insolvency and service delivery insolvency. *Stockton*, 493 B.R. at 789. “When considering [Section 101(32)(C)(ii)], courts take into account broader concerns, such as longer term budget imbalances and whether the City has sufficient resources to maintain services for the health, safety, and welfare of the community.” *In re City of Detroit*, 504 B.R. 191, 262 (Bankr. E.D. Mich. 2013). An inquiry into “service delivery insolvency” focuses on a municipality’s ability to provide basic municipal services—especially those required to maintain public safety—to its residents. *Stockton*, 493 B.R. at 790 (identifying spiking crime rates as a “paradigm example of service delivery insolvency” demonstrating that the debtor’s cash insolvency was not a technical or “chimer[ical]” default). “Budget insolvency” analyzes a municipality’s ability to draft a balanced budget and generate sufficient revenue to cover expenses in the absence of restructuring initiatives. *Id.* (determining that the debtor was “budget insolvent” where steady-state projections demonstrated budget imbalances that would persist for decades).

40. The concepts of “budget insolvency” and “service delivery insolvency” are intended to inform a court’s determination of cash insolvency by demonstrating the systemic and intractable nature of a municipality’s financial crisis. *See id.* at 789 (“While cash insolvency—the opposite of paying debts as they become due—is the controlling chapter 9 criterion under § 101(32)(C), longer-term budget imbalances (budget insolvency) and the degree of inability to fund essential government services (service delivery insolvency) also inform the trier of fact’s assessment of the relative degree and likely duration of cash insolvency.”).

41. Moreover, a municipality is not required to defy fiscal prudence and exhaust all possible opportunities for revenue generation (*e.g.*, tax increases; asset sales) prior to seeking relief under chapter 9 solely to satisfy the insolvency requirement of Section 109(c)(3). A municipality can be cash insolvent without having tapped every available resource, especially where short term or short-sighted revenue generation would ultimately exacerbate the municipality's financial crisis. *See Vallejo*, 408 B.R. at 293 (affirming bankruptcy court's rejection of unions' argument that debtor was solvent because it could "pillage[] all of its component agency funds . . . to subsidize its General Fund"; affirming bankruptcy court's finding of insolvency where raiding Vallejo's other funds to satisfy short term cash needs "would leave Vallejo more debilitated tomorrow than it is today"); *Detroit*, 504 B.R. at 264 ("When the expenses of an enterprise exceed its revenue, a one-time infusion of cash, whether from an asset sale or a borrowing, only delays the inevitable failure, unless in the meantime the enterprise sufficiently reduces its expenses and enhances its income."); *Stockton*, 493 B.R. at 790 (rejecting objectors' arguments that the debtor was ineligible for relief for failure to have sought tax increases prior to filing where raising taxes was subject to numerous practical and legal obstacles and may not have produced the desired revenue in any event); *McCurtain*, 2007 Bankr. LEXIS 4160, at *4; *In re Villages at Castle Rock Metro. Dist. No. 4*, 145 B.R. 76, 84 (Bankr. D. Colo. 1990) (noting that creditor's argument that taxes could theoretically be raised would not render the municipality solvent and would result in a "death spiral"); *In re Pleasant View Util. Dist. of Cheatham County., Tenn.*, 24 B.R. 632, 639 (Bankr. M.D. Tenn. 1982) ("[T]he mere contingency that the District could improve its financial situation by increasing its rates does not alter the fact that at the present time the District cannot meet its debts as they mature.").

42. Similarly, a municipality need not adopt every possible cost-cutting measure to conserve cash as a prerequisite to demonstrating cash insolvency under Section 101(32)(C)(ii). Certainly, spending cuts that impair the basic functioning of a municipality and jeopardize the health and safety of its residents are not required for purposes of chapter 9 eligibility. *See Vallejo, 408 B.R. at 294* (city was insolvent where further funding reductions would threaten its ability to provide for the basic health and safety of its citizens); *see also* H.R. Rep. No. 100-1011, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 4115, 4116 (stating that chapter 9 is intended to enable a financially distressed city to “continue to provide its residents with essential services such as police protection, fire protection, sewage and garbage removal, and schools . . .”).

b. The City Has Run Deficits for Over a Decade and Is Projected to Do So Through 2025 and Past Efforts to Drive Economic Development and Revenue Growth Have Failed

43. For years, the City’s obligations have exceeded revenue from taxes and other sources available to it, and the City has borrowed and deferred paying certain obligations, and relied on one-time federal rescue money to survive fiscally.⁸ [Kapoor Declaration, at ¶ 9]. The City’s five-year baseline general fund projections, developed by the Receiver as of September 13, 2022, and attached to the Kapoor Declaration as Exhibit B, show a \$46.5 million deficit in 2023, followed by a \$3.6 million deficit in 2024, a \$12.4 million deficit in 2025, a \$14.4 million deficit in 2026, and a \$16.3 million deficit in 2027. [Kapoor Declaration, at ¶ 28]. The \$46.5 million deficit in 2023 includes \$39.8 million for the City’s past due legally required pension payments.

⁸ In December 2021, DCED issued a TRAN advance to the City in the amount of \$5 million, which was critical to the City’s ability to meet general fund obligations this year before bi-annual property tax revenues were collected. [Kapoor Declaration, at ¶ 9]. Without the 2022 TRAN advance, the City would have run out of cash during 2022, and the draft 2023 budget relies on receipt of a similar \$5 million TRAN advance the City expects to receive in December 2022 or early January 2023. [Kapoor Declaration, at ¶ 9].

However, even without that contribution, the City is still projected to have a \$6.7 million (or approximately 10%) deficit in 2023. [Kapoor Declaration, at ¶ 28].

44. Even if the City were somehow able to address the 2023 and 2024 deficits, it would face another nearly insurmountable \$12.4 million deficit in 2025 due to the expiration of federal rescue plan funding and another federal grant which funded eight (8) of the City's firefighters. [Kapoor Declaration, at ¶ 29].

45. Contributions to the City's severely underfunded defined benefit pension plans, debt repayment, and other post-employment benefits ("OPEB") (namely retired employee medical and prescription insurance), consume a disproportionate and increasing share of the City's annual budget. [Kapoor Declaration, at ¶ 9]. These expenses will increase dramatically in 2023 and beyond. [Kapoor Declaration, at ¶ 9]. The City's residents are already subject to a heavy tax burden and, with the exception of an adjustment to the real property tax rate that the Receiver supports to restore revenue from real property taxes to the levels that existed prior to a reassessment that took effect in 2021, should not be required to pay more. [Kapoor Declaration, at ¶ 9]. Moreover, after years of being unable to do so, the City needs to start the process of repairing and improving its infrastructure and investing in economic development. [Kapoor Declaration, at ¶ 11]. The City's inability to pay its debts as they come due will reach a tipping point in 2023 when the various and creative measures the Receiver has taken to date to barely keep the lights on will no longer prevent the City from running out of cash. [Kapoor Declaration, at ¶ 11].

46. The City has been running at a deficit for many years. At one point, the City's fiscal situation temporarily improved as several economic development initiatives came online, most notably the opening of Harrah's Philadelphia Casino and Racetrack in 2008 after which the City began receiving annual host fees. [Dowearly Declaration, at ¶ 13]. Subaru Park opened to

much fanfare on June 27, 2010. Subaru Park seats approximately 18,500 fans, is the home of the Philadelphia Union, and is considered a world-class soccer stadium. [Dowery Declaration, at ¶ 13].

47. However, the infusion of new revenues provided only temporary respite. Gaming host community revenues declined while other major revenue sources showed little or no growth without tax rate increases. [Dowery Declaration, at ¶ 13]. Subaru Park has similarly failed to provide a catalyst for economic development in the City. [Dowery Declaration, at ¶ 13].

c. The City Is Unable to Pay the MMOs.

48. As discussed above, funding the pension plans in full, including payment of all past due MMOs, would require a payment of \$127.2 million by the City. The City patently lacks the funds necessary to make such a payment within the 2022 or 2023 budget, and thus is unable to pay the legally-required MMOs in full.

d. The City is Unable to Pay OPEB Obligations

49. In addition to the severely underfunded pensions, the City's OPEB obligations cost the City over \$5.5 million per year. [Kapoor Declaration, at ¶ 18]. According to valuations from the City's actuary, the City's total OPEB liability for all retirees at the end of 2018 was \$232.9 million. [Kapoor Declaration, at ¶ 18]. Some retired employees are covered through a Medicare supplemental plan for which the City allocated \$1,124,000 in 2022. [Kapoor Declaration, at ¶ 18]. With the exception of the Medicare supplemental plan, the City is self-insured for active and retiree health care costs. [Kapoor Declaration, at ¶ 18].

50. Retirees covered by the City's self-insured arrangement are covered by one of four plans. [Kapoor Declaration, at ¶ 19]. Most police retirees fall into the Select Point of Service Plan ("Select POS") which has 90 retirees enrolled in it as of June 1, 2022. [Kapoor Declaration, at ¶ 19]. Most fire retirees are covered by the Select Exclusive Provider Plan ("Select EPO") which

has 34 retirees enrolled in it as of June 1, 2022. [Kapoor Declaration, at ¶ 19]. The Exclusive Provider Buy-up Plan (“EPO Buy-up”) and Point of Service Plan (“POS”) have 24 and 3 retirees respectively enrolled in them as of June 1, 2022. [Kapoor Declaration, at ¶ 19].

51. Retiree contributions toward the cost of their insurance coverage are minimal or non-existent. Like other Pennsylvania municipalities, Chester does not pre-fund its OPEB liability. The City does not set aside money to cover future costs of retiree health insurance. Instead, the City covers these costs on a pay-as-you-go basis with money flowing out of the City’s general fund to cover claims as they are received. [Kapoor Declaration, at ¶ 20]. The City lacks the resources to continue to pay OPEB at the level it has done to date.

52. The OPEB benefits that City retirees receive are extremely costly. The Select POS and Select EPO plans, which most City retirees receive, have no deductible, very low out of pocket maximums (\$500/\$1,000) and extremely low primary care/specialist co-pays of \$5, \$1 co-pays for generic drugs, and \$3 co-pays for all other drugs including specialty. [Kapoor Declaration, at ¶ 21]. The 2022 premium equivalents for a retiree and spouse for the Select POS and the Select EPO plans were \$35,246.52 and \$34,046.76 respectively. [Kapoor Declaration, at ¶ 21]. For reference, in 2020, the median household income in Chester was \$32,867.00.⁹

53. The City spends more for retiree health care than it does for active employee health care. In 2021, the City spent \$4,012,392 for medical and prescription costs for the Select POS and Select EPO plans, which are only offered to retirees. [Kapoor Declaration, at ¶ 22]. Over that same period, it spent \$3,628,817 for the other two plans, which also included some retirees. [Kapoor Declaration, at ¶ 22]. Thus, in 2021, the City spent at least \$383,575 or 10.6% more on retiree health care than active health care. [Kapoor Declaration, at ¶ 22]. This amount does not

⁹ This statistic can be found in the U.S. Census Bureau Quick Facts available at: <https://www.census.gov/quickfacts/chestercitypennsylvania>.

include the premium costs for the Medicare supplemental plan, which would only add to the total retiree health care costs. [Kapoor Declaration, at ¶ 22].

e. The City Has Significant Long-Term Debt Obligations

54. The City also has significant and burdensome long term debt obligations. A summary of the City’s outstanding debt is set forth in the following table.

<u>Issue</u>	<u>Purpose</u>	<u>Outstanding</u>	<u>Rate</u>	<u>Maturity</u>
Series 2010B Guaranteed Revenue Note	Education	\$972,855	2.605%	2/1/2025
Series 2017A Guaranteed Revenue Bonds	Unfunded Debt	\$9,149,375	7.50%	8/15/2027
Series 2017B Guaranteed Revenue Bonds	Refunding	\$6,107,250	7.50%	8/15/2027
Series 2019 (Delaware County)	Economic Development	\$5,961,525	2.13%	7/15/2039
DCED Act 47 Loan	Deficit Funding	\$1,200,000	0.0%	5/1/2027
Series 2021 Notes	Streetlight Financing	\$774,410.64	1.5%	12/31/2028

55. The City’s largest long-term debt obligations were incurred in 2017 in connection with two series of bonds the City issued to resolve nearly \$28 million in unpaid obligations, including past due MMOs, health insurance premium payments, vendor payments, and workers compensation premiums. [Dowearly Declaration, at ¶ 34]. The Series 2017A Bonds in the original amount of \$12 million were used to pay certain unfunded general liabilities and to fund required reserves. [Dowearly Declaration, at ¶ 34]. The Series 2017B bonds in the original amount of \$7,210,000 were used to finance the acquisition of certain property leased by the City, effectively refinancing debt originally issued by the Chester Economic Development Authority. [Dowearly Declaration, at ¶ 34].

56. The Series 2017 Bonds are limited obligations of the City, payable from certain purportedly pledged revenues, including an asserted subordinate pledge of Covanta Host fees (as described below), an asserted subordinate pledge of Harrah’s Casino slots revenue, an asserted

subordinated pledge of Harrah’s Casino table gaming revenues, and an asserted pledge of additional consideration between the City and Harrah’s Casino directly deposited with the trustee as pledged revenues under the trust indenture executed and delivered in connection with the 2017 Bonds. [Dowery Declaration, at ¶ 35]. The current indenture trustee of the Series 2017 Bonds is U.S. Bank, National Association, and, upon information and belief, all or substantially all of the Series 2017 Bonds are held by Preston Hollow Community Capital (“Preston Hollow”).¹⁰ [Dowery Declaration, at ¶ 35]. The City asserts the Series 2017 Bonds are unsecured because the purportedly pledged revenues are not special revenues and the written direction letters and financing statements are insufficient to create or perfect a security interest in such revenues.

57. The monthly payments on account of the 2017 Bonds consist of principal and interest, with the amount of principal to be repaid increasing materially each year between now and maturity as set forth in the table below.

Series 2017A	Principal	Interest	Total Debt Service
12/31/2023	\$1,190,000.00	\$551,625.00	\$1,741,625.00
12/31/2024	\$1,260,000.00	\$462,375.00	\$1,722,375.00
12/31/2025	\$1,305,000.00	\$367,865.00	\$1,672,865.00
12/31/2026	\$1,700,000.00	\$270,000.00	\$1,970,000.00
12/31/2027	\$1,900,000.00	\$142,500.00	\$2,042,500.00
Total	\$7,355,000.00	\$1,794,365.00	\$9,149,365.00

¹⁰ The City believes Preston Hollow holds a controlling majority share, if not the entirety, of the Series 2017 Bonds.

Series 2017B	Principal	Interest	Total Debt Service
12/31/2023	\$900,000.00	\$372,375.00	\$1,272,375.00
12/31/2024	\$950,000.00	\$304,875.00	\$1,254,875.00
12/31/2025	\$1,065,000.00	\$233,625.00	\$1,298,625.00
12/31/2026	\$1,015,000.00	\$153,750.00	\$1,168,750.00
12/31/2027	\$1,035,000.00	\$77,625.00	\$1,112,625.00
Total	\$4,965,000.00	\$1,142,250.00	\$6,107,250.00

58. In 2009, Delaware County issued its General Obligation Bonds, Series 2009, in the principal amount of \$28,950,000 as part of the overall financing to build Subaru Park in Chester. [Dowery Declaration, at ¶ 37]. Delaware County refinanced the Series 2009 Bonds in 2019, reducing the annual debt service. Pursuant to the Contribution Agreement, dated February 15, 2009, between the City and Delaware County, Chester has agreed to an annual payment to the County representing 25% of the annual debt service incurred by the County. [Dowery Declaration, at ¶ 37]. The annual obligation totals approximately \$343,483. [Dowery Declaration, at ¶ 37].

59. The Series 2009 Bonds are limited obligations of the City, payable from certain purportedly pledged revenues, including an asserted subordinated pledge of Harrah’s Casino gaming host community revenues, and an asserted pledge of additional consideration between the City and Harrah’s Casino directly deposited with the trustee as pledged revenues under the indenture executed and delivered in connection with the 2017 Bonds. [Dowery Declaration, at ¶ 38]. The City asserts the Series 2009 Bonds are unsecured because the purportedly pledged revenues are not special revenues and the written direction letters and financing statements are insufficient to create or perfect a security interest in such revenues.

60. In 2010, the City issued its Series 2010B Bonds in the principal amount of \$3,985,000 to meet the obligations associated with allowing the Chester Upland School District to become a sponsoring district for Delaware County Community College. [Dowery Declaration, at ¶ 39]. The sponsorship required an upfront \$4 million payment in addition to annual membership payments. The debt service on the 2010B Bonds is purportedly secured by the table gaming revenue guaranteed to Chester by Harrah's Casino as a casino host community. Annual debt service is approximately \$320,000 and the borrowing matures in 2025. [Dowery Declaration, at ¶ 39].

61. In January 2017, DCED issued an emergency, unsecured \$2 million no-interest loan to the City to help with its cash flow needs. [Dowery Declaration, at ¶ 40]. The City is paying DCED \$200,000 per annum to repay the loan, which matures in 2027. [Dowery Declaration, at ¶ 40].

62. In August 2021, the City issued Series 2021 Notes in the amount of \$750,000 to Delaware County in order to finance necessary repair and maintenance to streetlights in the City. [Dowery Declaration, at ¶ 41]. The current outstanding amount on the Series 2021 Notes is \$774,410.64. [Dowery Declaration, at ¶ 41]. The Series 2021 Notes are unsecured obligations, subject to annual appropriation of funds from the City's general or liquid funds fund. [Dowery Declaration, at ¶ 41].

f. The City's Revenues Are Insufficient to Pay Its Obligations

63. The City's revenues are insufficient to pay its pension, OPEB, long-term debt, and operational liabilities on a go-forward basis. The City was able to make it through 2021 and 2022 without running out of cash only as a result of approximately \$30.4 million in funding provided by the federal government under the American Rescue Plan Act ("ARPA"), and the actions taken by the Receiver to reduce headcount, remove operational inefficiencies, lower the current OPEB

obligation by moving certain retirees to a Medicare supplement plan, and paying only the current year MMO, rather than the accrued unpaid MMO. [Kapoor Declaration, at ¶ 26]. Moreover, the funding under ARPA is restricted and can only be used to pay certain of the City's expenditures. [Kapoor Declaration, at ¶ 26]. Further, the City's 2021 budget also relied on \$5 million of emergency funding from DCED to bridge a cash shortfall early in the year before real property tax revenue was collected. [Kapoor Declaration, at ¶ 26]. Without the ARPA funding, decisive action by the Receiver, and the DCED emergency bridge loan, the City would have run out of cash during 2021. [Kapoor Declaration, at ¶ 26].

64. Throughout much of 2022, the City remained perilously close to running out of cash and the City's current cash projections and draft 2023 budget, attached to the Kapoor Declaration as Exhibit A, show that if the City does not receive the 2023 TRAN advance before the end of the year, the City will only have \$2,851,000 in cash on hand on December 31, 2022, which is approximately 19 days of operating expenses. General purpose governments, regardless of size, are recommended to maintain a minimum unrestricted budgetary fund balance in their general fund of no less than regular general fund operating expenses, or \$9,151,841.¹¹ The City's unrestricted budgetary fund balance in 2018, the last year for which audited financial information is currently available, was deeply negative, at -\$21,005,368.

65. The City's primary revenue sources are real estate taxes, earned income taxes, a contractual share of slot and gaming table revenues generated by Harrah's Casino, and a hosting fee it receives from Covanta Delaware Valley, L.P. ("Covanta"), the owner of the Delaware Valley Resource Recovery Facility (the "Incinerator Facility"), a waste incineration plant constructed on the City's waterfront in 1992. [Dowery Declaration, at ¶ 44]. Prior efforts to drive revenue and

¹¹ Based upon the Fund Balance Guidelines for the General Fund published by the Government Finance Officers Association, available at: <https://www.gfoa.org/materials/fund-balance-guidelines-for-the-general-fund>.

economic development led to construction of Harrah's Casino, the Incinerator Facility, and Subaru Park, but these projects failed to generate sufficient revenue for the City and failed to spur additional economic investment in the City. [Dowearly Declaration, at ¶ 44]. Currently, Chester's waterfront area includes a state prison, a toilet paper manufacturing facility, a soccer stadium, a trash incinerator, and a wastewater treatment facility. [Dowearly Declaration, at ¶ 44].

g. Monetization of the City's Assets Does Not Solve the City's Problems

66. Further, with the exception of the City's potential right to monetize the assets of the Chester Water Authority ("CWA"), which is the subject of significant litigation and uncertainty and which may take years the City does not have to realize, and the City's parking revenue potential, the City's assets are limited in number, suffer from years of deferred maintenance, and have little market value.¹² [Kapoor Declaration, at ¶ 32]. These assets include land, City Hall, two fire stations, and a police station. [Kapoor Declaration, at ¶ 32]. All of the City's buildings fail to meet the applicable building codes. [Kapoor Declaration, at ¶ 61]. The City's public works building needs repairs to its fire suppression systems, roof, and bathrooms. [Kapoor Declaration, at ¶ 61]. City Hall similarly is in disrepair and has a hole in its roof which is in the process of finally being repaired. [Kapoor Declaration, at ¶ 61]. The two fire department buildings and the police building are old and have outlived their useful life. [Kapoor Declaration, at ¶ 61].

67. Even if the City could sell some or all of them and continue to provide essential services to its citizens (which it cannot), the proceeds of the sales would be insufficient to solve the City's severe and growing financial problems. [Kapoor Declaration, at ¶ 32]. Using one-time revenues to pay for recurring costs does not solve the City's fundamental problem of recurring costs exceeding recurring revenues.

¹² A description of revenues received by the City in connection with Harrah's Casino and Covanta can be found in the Dowearly Declaration.

68. While the City may like to monetize the water system (the “Water Assets”)—its largest asset—the ongoing litigation makes such monetization legally and factually impossible. The City is precluded from closing on a sale of the Water Assets until all issues are litigated to conclusion in the pending appeal before the Pennsylvania Supreme Court and all underlying actions in the Court of Common Pleas, which are currently stayed pending the outcome of the appeal.¹³

69. It is clear that the Water Assets represent hundreds of millions of dollars of contingent and potential value to the City that, if realized, would permit it to address the underfunded Pension Plans and invest in much needed improvements for the City. [Kapoor Declaration, at ¶ 45]. However, the outcome of the pending appeal to the Pennsylvania Supreme Court is uncertain and, if the City prevails, the City will still have to repossess the Water Assets and then engage in a sale process. [Kapoor Declaration, at ¶ 45]. There almost certainly would be further litigation in the Court of Common Pleas (and, potentially, further appeals) before the Water Assets could finally be monetized. [Kapoor Declaration, at ¶ 45].

70. Furthermore, even if the City were somehow able to monetize the Water Assets, “[w]hen the expenses of an enterprise exceed its revenue, a one-time infusion of cash, whether from an asset sale or a borrowing, only delays the inevitable failure, unless in the meantime the enterprise sufficiently reduces its expenses and enhances its income.” *Detroit*, 504 B.R. at 264. Thus, the mere existence of a possible asset that could be monetized does not resolve the City’s insolvency. Moreover, a comprehensive resolution of the water system litigation is unlikely to be reached in the near term, leaving the City’s present intractable financial situation intact.

¹³ A complete description of the Water Assets litigation can be found in the Kapoor Declaration.

71. The City’s ability to capture parking revenues has been similarly fraught and subject to ongoing claims and litigation. Recently, the Receiver received a judgment in the Receivership Action in the Commonwealth Court finding that the Parking Agreement entered into prior to the receivership on April 25, 2018, by which PFS VII LLC (the “Parking Manager”) agreed to finance, construct and install equipment and improvements to manage the City’s parking assets (as amended on September 5, 2018, the “Parking Agreement”) was void for failure to comply with the advertising and competitive bidding requirements of the Third-Class City Code and upholding the Receiver’s authority to terminate the Parking Agreement pursuant his authority under Section 706(a)(6) of Act 47. [Kapoor Declaration, at ¶¶ 46-51]. Based on the Commonwealth Court’s ruling, on September 28, 2022, the Receiver’s counsel sent a letter to the Parking Manager advising that the Parking Agreement would terminate at 12:00 a.m. on October 1, 2022. [Kapoor Declaration, at ¶ 52]. The Parking Manager has since notified the City that it believes it is entitled to payment of a \$12 million “buyout” pursuant to the Parking Agreement, which the Receiver disputes. [Kapoor Declaration, at ¶ 53].

72. While the Parking Agreement dispute was ongoing, the Receiver negotiated an agreement with Widener University, pursuant to which Widener University will pay the City \$325,000 per year for the next ten years in exchange for the City’s agreement not to install parking meters on Widener University’s campus. [Kapoor Declaration, at ¶ 54].

h. Further Budget Cuts Cannot Be Made While Maintaining Basic Services

73. The dramatic cost-cutting measures the City has imposed to date have led to predictable results (A) substantially diminished levels of core services to residents; (B) aging fleets of vehicles and equipment and lack of investment in infrastructure [Kapoor Declaration, at ¶ 62]; (C) obsolescence in information technology [Dowearly Declaration, at ¶ 26]; and (D) highly manual processes and inefficiencies in every day functions within City government [Dowearly

Declaration, at ¶ 6, n.1]. These consequences severely frustrate the City’s ability to provide vital and necessary municipal services to its citizens and implement a restructuring that promotes the long-term health and revitalization of the City. Further reductions in operating expenditures would not revive the City, they would only feed the crisis afflicting it.

74. In fact, further reductions in operating expenditures do *nothing* to address the crushing burden of the City’s pension and retiree benefit obligations, which obligations are consuming ever greater portions of the City’s revenues over time. It quickly becomes apparent that further reductions to the City’s operating expenditures would do little more than increase the risk to residents’ health, safety, and quality of life, while providing marginal benefits (at best) to its financial position. The City is not required to implement such essentially cosmetic (but potentially harmful) reductions in the likely vain hope of temporarily forestalling insolvency. *See, e.g., Vallejo, 408 B.R. at 294* (affirming bankruptcy court’s finding of insolvency where (a) the debtor (i) had already slashed its discretionary budget, (ii) reduced employee headcount, (iii) cut funding for recreational activities such as municipal parks and (iv) operated a vehicle fleet the majority of which was near or past its expected life and (b) “further funding reductions would threaten Vallejo’s ability to provide for the basic health and safety of its citizens”).

i. Taxes Cannot Viably Be Increased

75. As a practical matter, the City cannot meaningfully increase revenues by raising taxes. Citizens of Chester currently pay significantly higher taxes than citizens in other communities in Delaware County [Kapoor Declaration, at ¶ 30]. City residents were already paying 2.75% earned income tax, and the underfunding of the pensions led to a new 1% additional distressed pension tax paid by City residents (and commuters) and, as a result, City residents are paying a 3.75% earned income tax, the second highest resident earned income tax rate in Pennsylvania, behind only Philadelphia. [Kapoor Declaration, at ¶ 16].

76. As of July 1, 2021, the United States Census Bureau (the “Census Bureau”) estimated the City had a population of 32,535, a decline from 32,718 residents as of April 1, 2020, 33,972 residents as of April 1, 2010, and 66,039 residents in 1950.¹⁴ [Dowearly Declaration, at ¶ 16]. As of July 1, 2021, the Census Bureau estimates the median annual income of all households in the City was \$32,867 and the median per capita annual income was \$18,856 per year, with over 30% of the population living below the poverty line. [Dowearly Declaration, at ¶ 16]. For the period 2016-2020, the median annual income in all households in Pennsylvania was \$63,627, and in Delaware County the median annual income was \$76,238. Throughout Pennsylvania, approximately 10.9% of the population lives below the poverty line. [Dowearly Declaration, at ¶ 16]. The Census Bureau estimates just under 71% of the City’s population is black or African American, 10% of the population is Hispanic or Latino, and 16.3% of the population is white (non-Hispanic or Latino). [Dowearly Declaration, at ¶ 16]. The median home value from 2016-2020 was \$70,300, and only 37.1% of the population live in an owner-occupied housing unit. [Dowearly Declaration, at ¶ 16]. For this same period, the median home value in Pennsylvania was \$187,500 and in Delaware County was \$247,900. [Dowearly Declaration, at ¶ 16]. The City’s property values and residents simply cannot bear any meaningful tax increase.

77. For all of the foregoing reasons, the City cannot pay its debts as they become due, and thus is insolvent pursuant to Section 101(32)(C)(ii) in satisfaction of the requirement of Section 109(c)(3).

¹⁴ The statistics contained in this paragraph were derived from the U.S. Census Bureau Quick Facts available at: <https://www.census.gov/quickfacts/chester-city-pennsylvania>, <https://www.census.gov/quickfacts/delaware-county-pennsylvania>, and <https://www.census.gov/quickfacts/fact/table/PA/BZA210220>.

D. Chester Desires to Effect a Plan to Adjust Its Debts.

78. Section 109(c)(4) of the Bankruptcy Code requires that an entity demonstrate that it “desires to effect a plan to adjust [its] debts.” 11 U.S.C. § 109(c)(4). Courts have consistently noted that “no bright-line test for determining whether a debtor desires to effect a plan” exists because of the “highly subjective nature of the inquiry.” *New York City Off-Track Betting Corp.*, 427 B.R. at 272 (citing *Vallejo*, 408 B.R. at 295). A municipality need only show that the “purpose of the filing of the chapter 9 petition [is] not simply . . . to buy time or evade creditors.” *Vallejo*, 408 B.R. at 295 (quoting 2 COLLIER ON BANKRUPTCY ¶ 109.04[3][d] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev.)); *New York Off-Track Betting Corp.*, 427 B.R. at 272 (same).

79. In the *Vallejo* case, the Court held that Section 109(c)(4) was satisfied where the City of Vallejo submitted a Statement of Qualifications under penalty of perjury which stated that it desired to effect a plan to adjust its debts, attempted to negotiate with its creditors prior to filing but ran out of time due to an impending cash crunch, and submitted evidence post-petition of a pendency plan to adjust its debts. *Vallejo*, 408 B.R. at 295-96. Similarly, in *In re New York City Off-Track Betting Corp.*, the Court held that a statement by the municipality of its intent to implement a plan of adjustment coupled with evidence of actions taken or being taken by the municipality in furtherance of such intent should be sufficient to meet the statutory requirement. *New York City Off-Track Betting Corp.*, 427 B.R. at 272-73. See also, *Pierce County Hous. Auth.*, 414 B.R. at 710 (debtor satisfied section 109(c)(4) of the Bankruptcy Code where it had stated its intention to effect, and had begun negotiating and drafting, a plan of adjustment); *County of Orange*, 183 B.R. at 607 (finding that debtor’s proposal of a global settlement to its creditors months after the commencement of its chapter 9 case evidenced a desire to effect a plan of adjustment); *Sullivan County*, 165 B.R. at 76 (post-petition submission of a draft plan of adjustment met § 109(c)(4)); *Pleasant View Util.*, 24 B.R. at 639 (“Nor can there be any doubt that

the debtor desires to effect a plan to adjust its debts since the debtor has already submitted such a plan for the court's approval."). Evidence of intent to effect a plan includes "the reality that the City did not have enough money to pay all of its contracts and would need to impair contracts, voluntarily or otherwise, in order to achieve a balanced budget." *In re City of San Bernardino*, 499 B.R. 776, 788-89 (Bankr. C.D. Cal. 2013).

80. Here, the City filed its Statement of Qualifications under penalty of perjury, signed by the Receiver. *See* Statement of Qualifications. The Receiver commenced this chapter 9 bankruptcy case to utilize the tools available under the Bankruptcy Code to restructure and renegotiate the City's obligations, maximize its assets to achieve a balanced budget, and confirm a plan of adjustment. [Dowearly Declaration, at ¶ 9]. The City's desire to effect a plan to adjust its debts is also evidenced by the Receiver's Amended Recovery Plan, and its prepetition negotiations with the unions, bondholders, indenture trustees, Delaware County, and retirees, as discussed in more detail below. [Kapoor Declaration, at ¶¶ 63-70]. As further evidence, the City is presently developing a plan of adjustment,¹⁵ and is seeking mediation with its major constituencies to expedite and mediate a path towards such a plan of adjustments. [Dowearly Declaration, at ¶¶ 49-52]. Moreover, there is no evidence that the City is seeking the protection of chapter 9 to evade a particular creditor. *See Sullivan County*, 165 B.R. at 82. Instead, the City's decision to file bankruptcy was a logical and arguably inevitable result of a liability structure that it could no longer maintain. *See San Bernardino*, 499 B.R. at 788.

¹⁵ A municipality is not required to have proposed a plan of adjustment in a case in order for a court to determine that the municipality desires to effect a plan of adjustment. *In re City of Vallejo*, Case No. 08-26813-A-9, 2008 Bankr. LEXIS 4433, at *60 (Bankr. E.D. Cal. Sept. 5, 2008). This requirement was found in chapter 9's predecessor under the Bankruptcy Act, but was expressly not included in the analogous provision of the Bankruptcy Code. 2 COLLIER ON BANKRUPTCY ¶ 109.04[3][d] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev.)

81. For these reasons, the City desires to effect a plan for adjustment of its debts in satisfaction of Section 109(c)(4).

E. Chester Has Negotiated with Its Creditor Constituencies or Such Negotiations Are Impracticable.

82. The eligibility requirement of Section 109(c)(5) may be satisfied if a debtor has:

(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

11 U.S.C. § 109(c)(5). Importantly, since this section is written in the disjunctive, “a debtor has four options to satisfy the requirement for negotiation,” and satisfaction of any one is sufficient. *In re Ellicott Sch. Bldg. Auth.*, 150 B.R. 261, 265-66 (Bankr. D. Colo. 1992).¹⁶ The City has satisfied both Section 109(c)(5)(B) and (C).

1. Chester Has Negotiated With Its Creditors in Good Faith.

83. The City has satisfied the eligibility requirement of Section 109(c)(5)(B) of the Bankruptcy Code because, despite the likely impracticability of reaching agreements with its many unions, retirees, and bondholders, it has still negotiated in good faith to the best of its ability with those of its creditors who are organized. Nevertheless, the City has not obtained the agreement of

¹⁶ The City concedes that it has not obtained the agreement of creditors holding at least a majority in amount of the claims of each class that it intends to impair under a plan in order to satisfy Section 109(c)(5)(A). The City continues to investigate, and reserves its right to assert, whether a creditor may attempt to obtain a transfer that is avoidable under Section 547 in satisfaction of Section 109(c)(5)(D). Nevertheless, as set forth, *infra*, the City satisfies Section 109(c)(5)(B) and/or (C).

creditors holding at least a majority in amount of the claims of each class that the City will have to impair under a plan of adjustment.

84. A municipality need not negotiate with every creditor within a given class, as negotiations with large or prominent blocs of creditors will suffice to render a city eligible for chapter 9 relief. *See, e.g., Vills. at Castle Rock*, 145 B.R. at 84-85 (municipality satisfied requirement of negotiating with creditors by consulting with large institutional bondholders, even though all series of bonds were not invited to participate in negotiations); *Pleasant View Util. Dist.*, 24 B.R. at 639 (municipality satisfied requirement through unsuccessful negotiations with large bondholders); *see also McCurtain Mun. Auth.*, 2007 Bankr. LEXIS 4160, at *4 (municipality satisfied requirement by making offers of settlement to creditor).

85. Prior to the commencement of this chapter 9 proceeding, the City engaged in extensive good faith negotiations with its various creditor constituencies.

86. Since the Receiver's appointment, Mr. Kapoor has had ongoing contact with representatives of the IAFF and FOP. [Kapoor Declaration, at ¶ 64]. During this time, they have discussed the City's financial condition, pension underfunding, changes necessary to the collective bargaining agreements, changes to the benefits provided to active employees and retirees, the Receiver's efforts to address the City's severe financial issues outside of bankruptcy, and the Receiver's efforts to monetize the Water Assets. [Kapoor Declaration, at ¶ 64]. Mr. Kapoor has been transparent during these communications about the difficulties the Receiver has encountered and the severity of changes that might be necessary. [Kapoor Declaration, at ¶ 64].

87. On September 16, 2022, shortly after making the September 13, 2022 presentation to MFRAC the Receiver presented term sheets to the IAFF and Teamsters, and on September 21, 2022, the Receiver presented a term sheet to the FOP. The term sheets proposed the terms on

which the City would be willing to enter into new collective bargaining agreements or amend existing collective bargaining agreements, detailing the proposed treatment of retirees' OPEB claims, and asking each union to confirm whether they are representing their respective retirees in connection with the City's restructuring. [Kapoor Declaration, at ¶ 65]. A copy of the MFRAC Presentation was submitted with each term sheet. [Kapoor Declaration, at ¶ 65]. The Receiver and Mr. Kapoor met with representatives of the FOP on September 21, 2022, the IAFF on September 16, 2022, and the Teamsters on September 16, 2022. [Kapoor Declaration, at ¶ 65]. Each meeting lasted approximately 60 minutes. During each meeting, the City invited questions and stressed that the City welcomed the unions' views. [Kapoor Declaration, at ¶ 65]. Each of the IAFF, FOP, and Teamsters took the position that they do not or could not represent their former members who are current retirees and would not negotiate on their behalf. [Kapoor Declaration, at ¶ 65]. As to the terms for current employees, each of the IAFF, FOP, and Teamsters were, understandably, unenthusiastic, but each stated that they would consider the proposals and did not yet have counterproposals.

88. Despite numerous follow-up inquiries by Mr. Kapoor as to the status of a response, no counterproposals have been received from any union. [Kapoor Declaration, at ¶ 66]. Specifically, Mr. Kapoor e-mailed the president of the IAFF on September 29, 2022, October 6, 2022, October 17, 2022, and October 28, 2022. [Kapoor Declaration, at ¶ 66]. On November 7, 2022, the IAFF responded and declined to counter the Receiver's proposal. [Kapoor Declaration, at ¶ 66]. Mr. Kapoor e-mailed the Teamsters' representative on October 6, 2022, October 17, 2022, October 28, 2022, and November 4, 2022, and has received no counterproposal. [Kapoor Declaration, at ¶ 66]. October 28, October 30, and November 2, 2022, Mr. Kapoor provided significant additional information related to historic healthcare costs to the FOP in response to

their request, in addition to the publicly-available information already included in the MFRAC presentation. [Kapoor Declaration, at ¶ 66]. On November 3, 2022, the FOP asked to schedule a follow-up meeting, which has not yet been scheduled. [Kapoor Declaration, at ¶ 66]. No counterproposal has been received from the FOP. [Kapoor Declaration, at ¶ 66].

89. The unions' position that they do not represent their former members (now retirees) left the Receiver without any centralized representatives to negotiate on the retirees' behalf. [Kapoor Declaration, at ¶ 67]. On November 9, 2022, the Receiver and Mr. Kapoor conducted a meeting with approximately 150 of the City's retirees in person at City Hall. [Kapoor Declaration, at ¶ 67]. All of the City's retirees were notified of the meeting via a letter mailed by the Receiver on October 14, 2022. Kapoor Declaration, at ¶ 67]. The purpose of this meeting was to inform retirees of the City's financial issues and explain the City's concept to address its financial problems, including the adjustment of OPEB for retirees. [Kapoor Declaration, at ¶ 67].

90. Shortly after the Receiver's appointment, Preston Hollow communicated proposals to the City and Receiver to restructure the Series 2017 Bonds in a way that would have modestly improved the economic terms while also correcting deficiencies in Preston Hollow's security interests. [Kapoor Declaration, at ¶ 68]. The Receiver ultimately declined to agree to Preston Hollow's proposals. [Kapoor Declaration, at ¶ 68]. In June 2022, Preston Hollow submitted a proposal to the Receiver that would have resulted in Preston Hollow being paid early (and in full) on account of the Series 2017 Bonds. [Kapoor Declaration, at ¶ 68]. After careful analysis, on October 11, 2022, the Receiver sent letters to Preston Hollow, Delaware County, and U.S. Bank explaining the City's basis for asserting that their claims are unsecured and proposing dates and times for a meeting to discuss. [Kapoor Declaration, at ¶ 68].

91. On October 17, 2022, the Receiver and Mr. Kapoor participated in a video conference with representatives from Preston Hollow to discuss the Receiver's letter and ways a potential plan of adjustment could modify the Series 2017 Bonds and the City's other obligations. [Kapoor Declaration, at ¶ 69]. On November 4, 2022, Preston Hollow rejected the Receiver's position and did not make a counteroffer. [Kapoor Declaration, at ¶ 69].

92. On October 24, 2022, the Receiver and Mr. Kapoor also met with representatives of Delaware County regarding the treatment of their claims against the City and, based on that meeting, the Receiver believes that a resolution with Delaware County might be achievable but only in bankruptcy. [Kapoor Declaration, at ¶ 70]. Notwithstanding the Receiver's impression, Mr. Kapoor continued to attempt to engage with Delaware County, sending a follow-up email to Delaware County on November 1, 2022. [Kapoor Declaration, at ¶ 70]. On November 2, 2022, Mr. Kapoor received a telephone call from the Delaware County Solicitor indicating that Delaware County was not willing to acquiesce to the Receiver's proposal and providing no counterproposal. [Kapoor Declaration, at ¶ 70].

93. Accordingly, the City has negotiated, or sought negotiations, with representatives of the various classes of creditors that it will seek to impair under a plan of adjustment, including the treatment such creditors' claims would receive under the City's plan of adjustment. *See, e.g., Vallejo*, 408 B.R. at 297 (noting that section 109(c)(5)(B) of the Bankruptcy Code is satisfied where the debtor conducts "negotiations with creditors revolving around a proposed plan, at least in concept . . . [that] designates classes of creditors and their treatment . . ."); *Detroit*, 504 B.R. at 267 (finding "that Section 109(c)(5)(B) requires municipalities not just to negotiate generally in good faith with their creditors, but also to negotiate in good faith with creditors over a proposed plan, at least in concept, for bankruptcy under Chapter 9") (quoting *WestAmerica Bank v.*

Mendocino Coast Rec. & Park Dist. (In re Mendocino Coast Rec. & Park Dist.), Case No. 12-cv-02591-JST, [2013 U.S. Dist. LEXIS 139697 at *5](#) (N.D. Cal. Sept. 27, 2013)); *New York City Off-Track Betting Corp.*, [427 B.R. at 274-75](#) (finding that debtor had satisfied section 109(c)(5)(B) of the Bankruptcy Code where it had “engaged in negotiations with creditors regarding the possible terms of a reorganization plan prior to filing,” stating that “talks need not involve a formal plan to satisfy section 109(c)(5)(B)’s negotiation requirement.”).

94. Although the City believes that (a) its discussion with its various creditor constituencies were constructive, (b) significant data was conveyed to creditors, and (c) the negotiations were conducted in good faith on the City’s part, the City ultimately has not been able to reach a comprehensive agreement for the restructuring of its outstanding obligations. [Kapoor Declaration, at ¶ 71]. Moreover, the feedback received from creditors to date has led the City to determine that such a comprehensive agreement is unlikely in the near term or without this filing. [Kapoor Declaration, at ¶ 71]. The City requires a centralized forum within which parties may negotiate and ultimately be bound. [Kapoor Declaration, at ¶ 71].

95. Ultimately, the City did not obtain the agreement of creditors holding at least a majority in amount of the claims of each class, but the negotiations satisfy the eligibility requirement set forth at section 109(c)(5)(B) of the Bankruptcy Code.

2. Negotiation with Chester’s Creditors Is Impracticable.

96. Section 109(c)(5)(C) is met if the City was unable to negotiate with all of its creditors because it was impracticable. In *Valley Health*, the Court stated:

“impracticable” means “not practicable; incapable of being performed or accomplished by the means employed or at command; infeasible.’ Webster’s New International Dictionary 1136 (3d ed. 2002). In the legal context, impracticability’ is defined as ‘a fact or circumstance that excuses a party from performing an act, esp. a contractual duty, because (though possible) it would cause extreme and unreasonable difficulty.’ Black’s Law Dictionary 772 (8th ed. 2004).”

Valley Health, [383 B.R. at 163](#). “Impracticality is determined based on the facts of each case.” *Vallejo*, [2008 Bankr. LEXIS 4433, at *64](#). Courts recognize that Section 109(c)’s eligibility requirements “are to be construed broadly to provide access to relief in furtherance of the Code’s underlying policies.” *Vallejo*, [408 B.R. at 288](#); *Valley Health*, [383 B.R. at 163](#). Factors courts have found weigh in favor of impracticality are a debtor’s need to file a petition quickly to preserve its assets for all of its creditors,¹⁷ a large number of creditors in one or more classes,¹⁸ the need to act quickly to protect the public from harm,¹⁹ and the lack of a viable business plan that addresses the debtor’s ongoing financial problems.²⁰

97. Here, just like in the *Orange County* case and *Valley Health* case, given the City’s dire cash flow crisis and no expedient and viable way to remedy it other than by failing to pay creditors and thereby risking loss of the City’s assets, negotiations with all of the City’s creditors was impracticable. *Valley Health*, [383 B.R. at 165](#) (“Meaningful negotiation is infeasible, if not impossible, absent a plan of adjustment predicated upon a comprehensive business plan to return a municipality to profitability.”).

¹⁷ *In re Boise County*, [465 B.R. 156, 169](#) (Bankr. D. Idaho 2011) (County filed its petition to fend off what it perceived to be imminent execution on the County’s accounts). The County’s need to preserve its cash assets in order to maintain County operations uninterrupted for the benefit of its residents made further negotiations with impracticable.); *County of Orange*, [183 B.R. at 607-08](#) (“Additionally, the event that caused the filing was the demand of lenders for additional collateral, which the OCIP could not meet, and the threat of liquidation of its portfolio. The OCIP had no time to enter into negotiations with its participants before acting to protect its portfolio assets.”); *Valley Health Sys.*, [383 B.R. at 163](#).

¹⁸ *In re Connector 2000 Ass’n*, [447 B.R. 752, 759](#) (Bankr. D.S.C. 2011) (“In Debtor’s case, the number of bondholders is so large that it would be impossible for Debtor to have any type of negotiation with them, given that Debtor also does not even know the identity of the beneficial holders of the bonds.”); *County of Orange*, [183 B.R. at 607](#) (“Congress enacted § 109(c)(5)(C) specifically ‘to cover situations in which a very large body of creditors would render pre-filing negotiations impracticable.’”); *Vills. at Castle Rock*, [145 B.R. at 85](#) (“It certainly was impracticable for [debtor] to have included several hundred Series D bondholders in these conceptual discussions.”).

¹⁹ *Boise County*, [465 B.R. at 169](#) (citing *Valley Health*, [383 B.R. at 163](#)); see also *Vallejo*, [408 B.R. at 298](#) (“Petitioners may also show impracticability by their need to act quickly to protect the public from harm.”); *New York City Off-Track Betting Corp.*, [427 B.R. at 277](#) (“Courts also frequently find that negotiations are impracticable where pausing to negotiate before filing for chapter 9 protection would put the debtor’s assets at risk.”)

²⁰ *Valley Health*, [383 B.R. at 165](#).

98. The inability of a municipal debtor to negotiate with a natural representative of a numerous and far-flung creditor class (with the power to bind such class) also has been found to satisfy the “impracticability” requirement. *See, e.g., Stockton*, [493 B.R. at 794](#) (finding that it was “impracticable to negotiate with 2,400 retirees for whom there is no natural representative capable of bargaining on their behalf. A retiree committee to speak on behalf of the retirees can be appointed by the United States trustee, but only after entry of the order for relief.”).

99. The refusal of creditor constituencies to engage a municipality in good faith negotiations over the adjustment of debts may also render such negotiations impracticable. *See, e.g., Stockton*, [493 B.R. at 794](#) (finding that negotiations were impracticable where objecting creditors refused to engage the debtor prepetition; “[I]t is impracticable to negotiate with a stone wall.”); *cf. Pleasant View Util. Dist.*, [24 B.R. at 639](#) (finding that negotiations were impracticable where creditor that had rejected every proposal made by the debtor and threatened the debtor with litigation prior to the petition date).

100. Here, the City has approximately 268 retirees. The City’s three unions have taken the position that they do not or could not represent their former members who are current retirees and would not negotiate on their behalf. [Kapoor Declaration, at ¶ 65].

101. While, as described above, the City has conducted negotiations in good faith with as many of its creditors as possible, the numerosity and lack of centralized representation of the City’s creditors has made negotiations with the entire creditor body impractical. Courts have found negotiations impractical with similar creditor constituencies and capital structures. *See, e.g., Stockton*, [493 B.R. at 794](#) (finding that negotiations with 2,400 retirees was impracticable); *Pierce County Hous. Auth.*, [414 B.R. at 714](#) (negotiations were impractical where mailing matrix included over 7,000 creditors); *Valley Health*, [383 B.R. at 165](#) (negotiations impractical where City sent

notice of commencement of case to 2,775 creditors and other parties in interest); *County of Orange*, 183 B.R. at 607 (finding that “Section 109(c)(5)(C) is directly applicable here where the [debtor] has over 200 participants and hundreds of accounts with many complex accountings”); *Vills. at Castle Rock*, 145 B.R. at 76 (“It certainly was impracticable for District 4 to have included several hundred Series D bondholders in these conceptual discussions.”); *Pleasant View Util. Dist.*, 24 B.R. at 639 (finding that negotiations were impracticable where creditor that had rejected every proposal made by the debtor and threatened the debtor with litigation prior to the petition date).

102. Here, a consensual resolution with the City’s creditor constituency simply is not realistic. Negotiations with the City’s retiree constituency—which can assert approximately \$232.9 million in unfunded OPEB and \$127.2 million related to underfunded pension liability—have proven impracticable despite the City’s best efforts, and any such negotiations cannot bind any non-consenting retirees, meaning an out-of-court restructuring of the City’s crippling pension and OPEB obligations could only be achieved with unanimous approval from all retirees. Only in chapter 9 could a committee be formed to represent and bind all retirees. *See, e.g., Stockton*, 493 B.R. at 794 (finding that it was “impracticable to negotiate with 2,400 retirees for whom there is no natural representative capable of bargaining on their behalf. A retiree committee to speak on behalf of the retirees can be appointed by the United States trustee, but only after entry of the order for relief.”). Although the Receiver and Mr. Kapoor held a meeting with retirees on November 9, 2022 to inform them of the City’s financial issues and explain the City’s concept to address its financial problems, including the adjustment of OPEB for retirees, any true negotiations with retirees are impracticable outside of bankruptcy. [Kapoor Declaration, ¶ 67].²¹

²¹ The City intends to seek appointment of a committee to represent retirees following entry of the order for relief. *Stockton*, 493 B.R. at 794 (finding that “[a] retiree committee to speak on behalf of the retirees can be appointed by the United States trustee, but only after entry of the order for relief.”).

103. Further, the City has five outstanding series of bonds and notes. [Dowearly Declaration, at ¶ 33]. Although the City has engaged with each of these constituencies in good faith, at this point, the City has not reached the necessary agreement with any of its debt counterparties, has received no substantive counter proposals, and cannot practicably negotiate a consensual restructuring with any of its key constituencies in an out-of-court setting. [Kapoor Declaration, at ¶ 71]. *Stockton*, 493 B.R. at 794 (finding that negotiations were impracticable where objecting creditors refused to engage the debtor prepetition; “[I]t is impracticable to negotiate with a stone wall.”); *Pleasant View Util. Dist.*, 24 B.R. at 639 (finding that negotiations were impracticable where creditor that had rejected every proposal made by the debtor and threatened the debtor with litigation prior to the petition date).

104. Delaying a chapter 9 filing to allow for extended creditor negotiations was also impracticable where the City has simply run out of time and cash needed to prolong potentially futile negotiations. As set forth above and in the Dowearly and Kapoor Declarations, the City is in a state of financial emergency. As of the date of the filing, the City’s cash position is precarious, and is projected to be in a net negative cash position by the end of 2023. [Kapoor Declaration, at ¶ 27, Ex. A]. The City has been able to achieve these slim cash margins only through the non-payment or deferral of tens of millions in MMO obligations and use of emergency federal ARPA funding. [Kapoor Declaration, at ¶ 26]. Without such actions, the City would already be out of cash entirely. [Kapoor Declaration, at ¶ 26]. The public health and safety of the City’s residents currently are in jeopardy, and are further jeopardized every day that necessary restructuring and reinvestment is delayed. The City must preserve its ability to continue providing its residents uninterrupted services. It can no longer delay the measures necessary to secure that ability,

including the commencement of this chapter 9 proceeding, for the sake of additional negotiations with creditors—or to locate and negotiate with unknown or unidentified creditors.

105. Accordingly, for all of the foregoing reasons, it is impracticable for the City to continue negotiations with its creditors in light of its current circumstances and the City thus satisfies the eligibility requirement of Section 109(c)(5)(C) of the Bankruptcy Code.

III. CONCLUSION

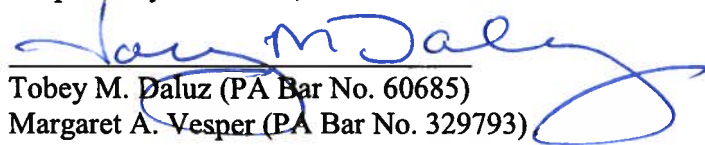
106. For all of the foregoing reasons, the City satisfies all elements of Section 109(c) and is eligible to be a debtor under chapter 9 of the Bankruptcy Code. The City is a municipality within the meaning of Section 101(40) of the Bankruptcy Code and obtained proper authorization to file pursuant to Act 47.

107. The City has been and remains insolvent. It has not paid its obligations when due, including but not limited to MMOs to the Pension Plans. It cannot pay its obligations in the remainder of 2022 and 2023, as the amounts owed massively exceed the City's annual budget. The City has narrowly avoided running out of cash through extraordinary measures, while the City's financial structure remains unsustainable.

108. The City has negotiated in good faith with its creditor constituencies, although those efforts have failed. Further negotiations with creditors are impracticable and futile. The City desperately needs chapter 9 relief to bring all constituencies together and utilize the unique powers available to it under the Bankruptcy Code to force parties to the table in a centralized forum to reach a resolution or litigate issues to conclusion and effect a plan of adjustment.

November 10, 2022

Respectfully submitted,



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(**Pro Hac Vice* motions to be submitted)

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