EXHIBIT 3

Brief

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re	:	Chapter 9
CITY OF DETROIT, MICHIGAN,	:	Case No. 13-53846
Debtor.	:	Hon. Steven W. Rhodes
AMBAC ASSURANCE CORPORATION,	:	Chapter 9
Plaintiff,	:	Adv. Pro. No. 13-05310
v.	:	Hon. Steven W. Rhodes
THE CITY OF DETROIT, MICHIGAN, KEVYN D. ORR, individually and in his official capacity as the EMERGENCY MANAGER, JOHN NAGLICK, individually and in his official capacity as FINANCE DIRECTOR, MICHAEL JAMISON individually and in his official capacity as DEPUTY FINANCE DIRECTOR, and CHERYL JOHNSON, individually and in her official capacity as TREASURER,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF THE CITY OF DETROIT'S
MOTION TO DISMISS

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Defendant the City of Detroit files this memorandum of law in support of its motion, pursuant to F. R. Civ. P. 12(b)(6), made applicable to this proceeding by Fed. R. Bank. P. 7012(b), to dismiss the complaint of Ambac Assurance Corporation ("Ambac").

I. BACKGROUND

A. Unlimited Tax Obligation Bonds

A municipality's issuance of debt is regulated by the Michigan constitution, various statutes, and the particular municipal bond resolutions enacted for each individual bond issue.[1] Generally, Article IX, § 6 of the Michigan Constitution imposes limitations upon the *ad valorem* taxes the State and its political subdivisions could impose. However, there is an exception for "taxes imposed for the payment of principal and interest on bonds approved by the electors … which taxes may be imposed without limitation as to rate or amount … ." Pursuant to the foregoing exception, the City issued four series of Unlimited Tax General Obligation Bonds ("UTGOs") in 2004 in an aggregate principal amount of $109.6 million. Compl. Ex. G, Appx. E.[2]

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[1] The relevant Michigan statutes ate the Revised Municipal Finance Act, Act 34 of 2001, MCL §§ 141.2101 *et seq.*, the Unlimited Tax Election Act, Act 189 of 1978, MCL §§ 141.161 *et seq.,* and the Home Rule City Act, Act 279 of 1909, MCL §§ 117.1 *et seq.*

[2] This motion refers to various bond resolutions and other documents relating to the issuance of the bonds at issue here, all of which were appended to

The issuance of each series of the UTGOs was approved by a voter referendum that authorized the City to incur this debt and also to impose additional *ad valorem* taxes to fund the payment of interest and retirement of principal of the bonds. Compl. Ex. A. To actually issue each series of bonds, the Detroit City Council enacted a resolution (a "bond resolution") authorizing the issuance of the bonds on specified terms and conditions and obligated the City to take the steps necessary to impose the *ad valorem* taxes that had been approved by the voters. The bond resolutions pertinent to Plaintiff's claims (the "Bond Resolutions") are attached to the Complaint as Exhibit D.

Each bond resolution contained provisions in which the City pledged "to pay the principal and interest on the Bonds from the proceeds of an annual levy of ad valorem taxes on all taxable property on the City without limitation as to the rate or amount for the payment thereof." Compl. Ex. D, § 301.

(continued…)

and are integral to Ambac's complaint. "As a general rule, a district court, in ruling on a motion to dismiss, should look only to the allegations of the complaint. A document referred to or attached to the pleadings, and integral to plaintiff's claims, may also be considered without converting a motion to dismiss into one for summary judgment." *Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F. 3d 327, 336 (6th Cir. 2007).

B. Limited Tax Obligation Bonds

The Revised Municipal Finance Act also provides for a second category of *ad valorem* bonds generally known as Limited Tax Obligation Bonds ("LTGOs"). LTGOs, unlike UTGOs, may be issued by the City without obtaining voter approval. However, in that event, payment of the principal and interest on the LTGOs is not tied to the proceeds of a particular *ad valorem* tax. Instead, the City is required to pay the bonds' principal and interest from the levy of *ad valorem* taxes "subject to applicable charter, statutory, or constitutional rate limitations." RMFA, § 701(3). Put differently, the taxes levied to pay principal and interest for LTGOs is subject to the existing limits upon municipal taxation – which is why the bonds are "limited" – while the City is obligated to levy taxes above and beyond those limitations to raise the funds necessary to service the UTGOs.

The City issued seven series of LTGOs in 2004 and 2005, totaling $161.1 million. Compl. Ex. G, Appx. E. Issuance of the LTGOs was authorized by resolutions of the Detroit City Council. The LTGO resolutions, like those for the UTGOs, specified that the resolution was a contract "between the City, the Paying Agent, the Bond Insurer, if any, and the Bondowners." Compl. Ex. D § 1120.

C. The Revised Municipal Finance Act

Since 2001, the City's issuance of bonds has been regulated by the Revised Municipal Finance Act, Act 34 of 2001, MCL §§ 141.2101 *et seq*. ("RMFA").

Section 701 of the Act, § 141.2701, establishes requirements for levying taxes to pay the principal and interest on municipal debt. As to municipal securities that were authorized by the municipality's voters -- that is, UTGOs -- the municipality "shall levy the full amount of taxes required .. for the payment of the municipal securities without limitation as to rate or amount." § 701(3). On the other hand, if the municipal securities were not approved by the voters, then the municipality was required only to "set aside each year from the levy and collection of ad valorem taxes as required by this section as a first budget obligation for the payment of the municipal securities," but "subject to applicable charter, statutory, or constitutional rate limitations." *Id*.

D. This Lawsuit

On October 1, 2013, the City defaulted upon its obligations to make interest payments of over $9.3 million on the UTGOs and $4.3 million on the LTGOs. Compl., ¶ 8. Ambac alleges that it had insured $1,994,281 of the interest payments on the UTGOs and $2,266,586 of the LTGOs. It paid claims in these amounts, and thus became subrogated to the rights of the bondholders. *Id*., ¶¶ 8, 25.

On November 8, Ambac brought this action for declaratory judgment and injunctive relief against the City and four of its officers under the RMFA and the City's various bond resolutions. As to the UTGOs, Ambac alleges that the *ad valorem* taxes were "restricted funds" that the City could use for no purpose other

than paying the principal and interest on the bonds. Compl., ¶ 7. In particular, Ambac maintains that the RMFA and the bond resolutions require the City to set aside *ad valorem* tax revenues as they are received, deposit them into the applicable Debt Retirement Fund, account for the funds separately, and use the funds solely to retire the bonds for which the *ad valorem* taxes were authorized. Compl., ¶¶ 40-42.

Ambac's claims are different with respect to the LTGOs. There, Ambac argues that the RMFA compels the City to take the first *ad valorem* taxes it collects each year within the constitutional limit and use those taxes to "pay the Limited Tax Bonds before any other general obligations are paid from them. *Id*., ¶ 46. According to Ambac, "[n]othing in chapter 9 or elsewhere in the Bankruptcy Code allows the City to disregard the state law restrictions imposed on the Restricted Fund and use the funds for a non-authorized purpose." *Id*.

Ambac obviously brought this action to compel the City to make payments to Ambac with respect to the bonds. However, to avoid various defenses Ambac anticipates the City will raise, it crafted its Complaint to seek only declaratory and injunctive relief as to certain provisions of the RMFA. In particular, Ambac seeks decrees stating that the City must deposit its *ad valorem* tax revenues into certain Debt Retirement Funds (Compl., ¶¶ 57-59), requiring the City to segregate and to not commingle the ad valorem tax revenues with the City's other funds (*id.,* ¶¶ 60-

62), prohibiting the City from using its ad valorem tax revenues for any purpose other than repaying bondholders (*id.,* ¶¶ 63-65), and barring the City from granting super-priority status or any other interest to any other creditor or person that would impair Ambac's interests (*id.,* ¶¶ 66-68). Finally, Ambac requests injunctive relief enjoining the City to comply with any declaratory relief Ambac is granted (*id.,* ¶¶ 69-70).

In addition to the City, Ambac also has sued four City officials in their official and also in their personal capacity. Ambac relies upon a provision of the RMFA that makes officials "*personally liable* to the municipality or to a holder of a municipal security for loss or damage arising from his or her failure." Compl., ¶ 47 (emphasis supplied by Ambac).

II. ARGUMENT

Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7012(b), requires dismissal of a complaint that fails to state a claim on which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "[C]ourts may no longer accept conclusory legal allegations that do not include specific facts necessary to establish the cause of action." *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1050 (6th Cir.

(*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007)). Nor is it enough that well-pleaded factual allegations "are consistent with" or suggest a "possibility of misconduct." *Iqbal*, 556 U.S. at 679 & 681. Rather, the facts alleged in the complaint must show that, if true, "the pleader is entitled to relief." *Id*. at 677-78 (quoting Fed. R. Civ. P. 8(a)(2)). "To state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *Han v. Univ. of Dayton*, 2013 U.S. App. LEXIS 22788, *6-7 (6th Cir. 2013) (citation omitted). Ambac's Complaint fails to meet this standard.

A. Ambac's Complaint Must Be Dismissed Because There Is No Private Right Of Action Under The Revised Municipal Finance Act

At the outset, Ambac's complaint should be dismissed because there is no private right of action against the City or the individual defendants under the Revised Municipal Finance Act. The RMFA clearly states that it is to be enforced by the Department of Treasury and, under Michigan law, absent clear indications to the contrary, private parties have no standing to sue.

1. The RMFA May Only Be Enforced by the Department of Treasury

When it was enacted in 2001, the RMFA created a new financial and regulatory scheme for municipal financing and describes in detail how it is to be enforced. Section 201(a) of the Act provides that Department of Treasury "is

authorized and directed to protect the credit of this state and its municipalities, and to enforce the provisions of this act." Specifically, the Department of Treasury is given the sweeping authority to:

> enforce compliance with any provision of this act or with any provisions of any law, charter, ordinance, or resolution with respect to debts or securities subject to its jurisdiction, including the levy and collection of taxes and the segregation, safekeeping, investment, and application of money for the payment of debt. The department may institute appropriate proceedings in the courts of this state, including those for a writ of mandamus and injunctive relief.

MCL § 141.2201(d); *see also* MCL § 141.2802(2) (specifying the Department of Treasury's responsibilities in the event of municipal debt defaults).

"[W]here a statute creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer," the Michigan courts have found that a private right of action cannot be inferred. *Claire-Ann Co v Christenson & Christenson, Inc.*, 566 N.W.2d 4, 6 (Mich. Ct. App. 1997) (citations omitted). Here, the RMFA clearly provides a comprehensive mechanism entrusting the Department of Treasury with the responsibility for determining whether, when and how to enforce the law. Indeed, the Department is charged with enforcing the very rights Ambac raises here for "the segregation, safekeeping, investment, and application of money for the payment of debt." MCL § 141.2201(d); c*ompare* Compl., ¶¶ 57-68.

This is especially true because the RMFA creates new statutory rights, and imposes new statutory duties, which did not exist at common law. The Michigan Supreme Court has explained that "where a new right is created or a new duty is imposed by statute, *the remedy provided for enforcement of that right by the statute for its violation and nonperformance* ***is exclusive***." *Fisher v. W.A. Foote Mem'l Hosp*., 703 N.W.2d 434, 436 (Mich. 2005) (emphasis added). Thus, the Department of Treasury has exclusive jurisdiction to enforce the rights and duties created under the RMFA, and Ambac cannot do so.

2. There Is No Private Right of Action Under the RMFA

Nor does the RMFA confer a right of action for private enforcement of the provisions of the Act. It is well settled in Michigan that

> [i]f the common law provides no right to relief, and the right to such relief is instead provided by statute, then plaintiffs have no private cause of action for enforcement of the right unless: (1) the statute expressly creates a private cause of action or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions.

N. Warehousing v. State, 2006 Mich. App. LEXIS 2595, *4-6 (Mich. Ct. App. 2006) (citing *Long v. Chelsea Community Hosp.*, 219 Mich. App. 578, 583 (Mich. Ct. App. 1996)); see also *Forster v. Delton School Dist.*, 440 N.W.2d 421, 423 (Mich. Ct. App. 1989).

Nothing in the text of the RMFA provides an express private cause of action that would permit Ambac to sue to enforce its terms. And, in the absence of an

express grant, a private right cause of action may only be inferred when the statutory remedy is plainly inadequate – which is not the case here, where the statute includes a robust enforcement mechanism by the Department of Treasury. *Forster*, 440 N.W.2d at 423.

Even if Ambac were to try to re-cast its Complaint as one predicated solely on its contractual rights, the Complaint would still have to be dismissed. In an analogous case, the Michigan Court of Appeals found that a plaintiff cannot "get around" the lack of a private right of action under a statute by arguing that there was a breach of contract based on a violation of that statute:

> In its brief on appeal, plaintiff states that it "does not claim a private right of action under [the RSC or UCA] for enforcement of either statute. Instead, plaintiff claims breach of contract facilitated through a violation of the RSC and UCA." However, in plaintiff's first amended complaint, Count II alleges a "VIOLATION OF THE URBAN COOPERATION ACT." Plaintiff goes on to allege that defendants have "materially and substantially violated the requirements" of the UCA in various ways. Thus, as before us on the record, plaintiff has alleged a violation of the UCA and we agree with the defendant that plaintiff cannot prevail on the merits of such a claim as no private right of action exists.

N. Warehousing 2006 Mich. App. LEXIS 2595. Similarly, the Complaint here alleges violations of the RMFA and seeks enforcement of the RMFA's provisions. Since the RMFA provides no private right of action and one cannot be inferred, the Complaint must be dismissed.

B. Ambac's Declaratory Judgment Action Is An Improper Attempt To Circumvent The Bankruptcy Code's Provisions For Adequate Protection

Relying on its interpretation of state law, Ambac seeks to force the City to put money into a separate account and not use it for any other purposes than to repay bondholders. *See* Compl. pp. 24-27. In actuality, though, Ambac is making a request for adequate protection, which is governed by the federal bankruptcy law.[3] But as an unsecured creditor, Ambac is not entitled to seek this relief. And the Supremacy Clause prohibits Ambac, as an unsecured creditor, from using state law to subvert the bankruptcy scheme by obtaining the rights of secured creditors.

1. Under The Bankruptcy Code Holders Of Secured And Unsecured Claims Have Different Levels Of Protection

Section 506(a) of the Bankruptcy Code, applicable to a Chapter 9 bankruptcy under 11 U.S.C. § 901(a), defines a "secured claim" as "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an 11 U.S.C. § 506(a). It is well established that "a claim cannot be a 'secured claim' for purposes of section 506(a) unless it is secured by a 'lien' on some specific item

[3] The plaintiff has not sought payment of its claims with the proceeds of the *ad valorem* taxes, although that clearly would seem to be its intent in seeking to have the City segregate those taxes. However, because the plaintiff has not sought payment, the City is not moving at this time to dismiss the Complaint on the basis that the Michigan statutes that may require payment of the plaintiff's claims with *ad valorem* taxes are pre-empted by the Bankruptcy Code. The City reserves its right to assert this position at the appropriate time.

of property in which the estate has an interest, or, alternatively, is a claim that is subject to a right of setoff." 4 Collier on Bankruptcy ¶ 506.03 ("Collier"). As the Supreme Court explained in construing section 506: "[T]here are two types of secured claims: (1) voluntary ... secured claims, each created by agreement between the debtor and the creditor ..., and (2) involuntary secured claims, such as a judicial or statutory lien ... which are fixed by operation of law and do not require the consent of the debtor." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989) (citations omitted).

"By its terms, § 506(a) of the Bankruptcy Code bifurcates claims into distinct secured and unsecured components." *In re Aubuchon*, CIV 09-56881-MM, 2010 WL 744806 (Bankr. N.D. Cal. Mar. 4, 2010). The Code confers upon holders of secured claims "a number of special rights and protections." Collier, ¶ 506.02. But, "[i]n each of these situations . . . the availability of the Code's special protections turns on the existence of a *secured* claim." *Id*. (emphasis added). Thus, the Code gives unsecured creditors lesser rights than secured creditors, and as explained below, adequate protection is one instance of such disparate treatment. *Id*.

2. "Adequate Protection" Is For Secured Creditors Only And Must Be Sought Through A Rule 4001 Motion

The basic purpose of adequate protection is to help ensure that a secured creditor is not negatively impacted by a debtor's use of its collateral during a

bankruptcy proceeding. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 207 (1983) ("At the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the [debtor's] power to sell, use, or lease property as are necessary to protect the creditor."). Adequate protection payments or other relief are designed to compensate a holder of a secured claim for any decline in the value of its collateral post-petition and pre-confirmation. *U.S. Savings Ass'n v. Timbers of Inwood Forest Ass'n Ltd*, 484 U.S. 65 (1988). *See also In re Deico Elecs., Inc.*, 139 B.R. 945, 947 (B.A.P. 9th Cir. 1992) ("Adequate protection prevents creditors from becoming more undersecured because of the delay that bankruptcy works on the exercise of their state law remedies"); *Metropolitan Life Ins. Co. v. Murel Holding Corp. (In re Murel Holding Corp.)*, 75 F.2d 941 (2d Cir. 1935) (L. Hand, J.) ("It is plain that 'adequate protection' must be completely *compensatory*") (emphasis added). Thus, it is a basic principle of bankruptcy law that "adequate protection" is mandated by certain provisions of the Code when requested "by an entity with an interest in property in which the estate has an interest." Collier, ¶ 361.02 (citing 11 U.S.C. §§ 362, 363, 364). All these sections speak of protection for secured creditors. *See, e.g.*, §§ 362(d); 363(e); 364(d).

Conversely, it is clear that "the concepts of adequate protection of an interest in property and the existence of an equity interest in property do not apply to unsecured claims." *In re Pioneer Commercial Funding Corp.*, 114 B.R. 45, 48

(Bankr. S.D.N.Y. 1990). *See also, e.g., In re Dairy Mart Convenience Stores, Inc*., 351 F.3d 86, 90-91 (2d Cir. 2003) (concluding that an unsecured creditor was ineligible to receive adequate protection under section because it protects only secured creditors) (citing, inter alia, Collier ¶ 506.03[4][a][iv] ("[S]ection 506(a) establishes the existence and extent of the creditor's secured claim for purposes of the adequate protection determination."); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs*., 484 U.S. 365, 371-72 (1988) (defining the value of an "entity's interest in property" that is entitled to adequate protection in light of the meaning of value of "creditor's interest" in property under section 506(a)); *In re Winthrop Old Farm Nurseries, Inc*., 50 F.3d 72, 74 (1st Cir. 1995) ("[A] valuation for § 361 purposes necessarily looks to § 506(a) for a determination of the amount of a secured claim.")); *In re Babcock and Wilcox Co*., 250 F.3d 955, 961 n.12 (5th Cir. 2001) (no adequate protection available to unsecured creditors); *In re Simasko Prod. Co.*, 47 B.R. 444, 448 (Bankr. D.Colo. 1985) (same); *In re Southern Biotech, Inc*., 37 B.R. 318, 324 (Bankr. M.D. Fla. 1983) (same).

Finally, it is clear under the Bankruptcy Code that the means of obtaining adequate protection is to file a motion under Bankruptcy Rule 4001, and not to bring an adversary proceeding for a declaratory judgment premised upon state law rights. "The procedure will depend in large part on the particular provision of the Code (automatic stay, use of property or borrowing) under which the issues arise . .

arise . . . and may be determined by agreement of the parties or by order of the court," but it is Rule 4001 that governs. Collier ¶ 361.05. That Rule sets forth specific requirements for the proper sequence of events associated with that including service, notice, hearings, and stay, as well as rules relating to contents of the motion and burdens of proof. *See* Bankr. R. 4001.

3. Plaintiffs Are Not Eligible For Adequate Protection Here As They Are Unsecured Creditors And the Supremacy Clause Forbids Using State Law To Circumvent The Bankruptcy Code

(a) Plaintiffs Have No Lien On Bonds Here, Making Them Unsecured Creditors

Plaintiffs do not have a lien to secure the UTGOs. The RMFA nowhere uses the word "lien" and does not purport to grant one. The Act uses the term "escrow" once, but only to authorize municipalities to engage escrow agents. RMFA § 141.518(7). The Act in various places uses the word "pledge," but only as a synonym for "promise."[4] The Act in a few places identifies certain funds as funds that may be used only for specified purposes, but in neither case speaks of a lien or a security interest. *See id*. at §§ 141.2411, 141.2607(3).

Similarly, the Bond Resolutions do not grant a lien against the *ad valorem*

[4] *See, e.g., id*. at § 141.2103(l)(iii) and (r); 141.2105(f), 141.2304(c), 141.2305(3)(c), 141.2308, 141.2317(4)(a), 141.2317(5), 141,2401, 141.2409, 141.2413(1) and (2), 141.2415(1), (2) and (3), 141.2513, 141.2601(6)(a) and (f), 141.2603(2), 141.2607(1) and (3), 141.2609, and 141.2611(2)(e).

taxes to anyone. Like the RMFA, the resolutions use the word "pledge," but again chiefly as a synonym for a promise. *See* Compl. Ex. D (Resolutions approving $45,000,000 general obligation bonds, Series 2004-A and $75,000,000 general obligation bonds, Series 2004-B §§ 301, and 307; Resolutions approving $65,000,000 self-insurance bonds Series 2004 3d Recital, §§ 301, 307, 920 and Ex. B Meeting Notice; Amended and Restated Resolutions authorizing the issuance of capital improvement bonds to finance the costs of an 800 Mhz Radio Communication System Sections 301, 307 Form of Bond, 1004, 1115, and Exhibit B). In sum, there is nothing in the documents amounting to a lien either by an agreement or by a judicial order or a statute.[5] Because Ambac has no lien, it is an unsecured creditor.

(b) Under The Supremacy Clause, Plaintiffs Cannot Rely On State Law And Contracts To Obtain Protection That The Bankruptcy Code Withholds

As explained above, the Bankruptcy Code does not provide the remedy of adequate protection for an unsecured creditor such as Ambac. The Supremacy Clause, furthermore, prevents plaintiffs from using state law to circumvent this rule to obtain the equivalent of adequate protection.

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[5] Indeed, Ambac itself does not claim that it was granted a lien under the Bond Resolutions; rather, Ambac suggests that it is an open question, subject to later determination, "whether the Restricted Funds are impressed with a statutory lien." Compl. n.1.

It is settled that individual states may not "pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." *International Shoe Co. v. Pinkus*, 278 U.S. 261, 263 (1929) (citing U.S. Const. art. VI, cl. 2). Thus, courts have held that where Congress incorporates state law into the Bankruptcy Code, it does so explicitly, and "[t]he absence of similar language indicates that Congress intended federal law, not state law, to control the application of [bankruptcy code sections]." *In re Spa at Sunset Isles Condominium Ass'n, Inc.*, 454 B.R. 898, 906-07 (Bankr. S.D. Fla. 2011) (citing *In re Welzel*, 275 F.2d 1308, 1315 (11th Cir 2001) ("When Congress intend[s] for state law to control in the bankruptcy context, it [says] so with candor.")).

Ambac cannot circumvent this limitation by styling its case as one merely for a declaratory judgment and injunctive relief. "The overarching principle is that the primacy of the bankruptcy laws may not be subverted by labels placed on obligations by the parties themselves." *In the Matter of Joseph*, 157 B.R. 514, 518 (D. Conn. Bankr. 1993). *See also, e.g.*, *In re Schafer*, 689 F.3d 601, 614 (6th Cir. 2012) ("Permitting assertion of a host of state law causes of action to redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve and would stand as an obstacle to the accomplishment and execution of the full purposes of Congress."); *In re Networks Electronic Corp.*, 195

B.R. 92, 97 (9th Cir. B.A.P. 1996) ("To the extent that [an unsecured creditor] argues that state law should prevail over the Bankruptcy Code, such is not the case under the Supremacy Clause, U.S. Const. art. VI, § 2. Federal law preempts a state law or order which 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.'").

Moreover, relying on state law in a complaint for declaratory and injunctive relief, as plaintiff does here, cannot substitute for a Rule 4001 motion and the requirement that Ambac comply with the Rule's procedural and substantive requirements. *See, e.g., In re Sharon*, 234 B.R. 676, 684 (6th Cir. B.A.P. 1999) (holding that continuation of the automatic stay may be conditioned by the bankruptcy court on the provision of adequate protection, but the procedural prerequisite is that the lien creditor must first "request" relief from the stay by motion to the bankruptcy court under Bankruptcy Rule 4001(a)).

C. The Relief Sought By Ambac Also Is Prohibited By Bankruptcy Code Section 904

Section 904 of the Bankruptcy Code provides that "unless the debtor consents or the plan so provides, the court may not . . . interfere with—(1) any of the political or governmental powers of the debtor; (2) any of the property or revenues of the debtor; or (3) the debtor's use or enjoyment of any income-producing property." 11 U.S.C. § 904. "By virtue of § 904, a debtor in chapter 9 retains title to, possession of, and complete control over its property and its

operations, and is not restricted in its ability to sell, use, or lease its property." *In re Valley Health Sys.*, 429 B.R. 692, 714 (Bankr. C.D. Cal. 2010).

Notwithstanding these protections, however, Ambac's Complaint seeks an order from this Court directing the City to divert certain revenues for their benefit. *See* ¶¶ 69-70 (seeking injunctive relief).[6] Section 904, on its face, prohibits this. Indeed, "§ 904 means that the City can expend its property and revenues during the chapter 9 case as it wishes." *In re City of Stockton, Cal.*, 486 B.R. 194, 199 E.D. Cal. 2013).

III. CONCLUSION

For the foregoing reasons, defendant the City of Detroit submits that the Complaint should be dismissed with prejudice.

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[6] In the Sixth Circuit, a party seeking a permanent injunction must show that "(1) it will suffer an irreparable injury absent an injunction; (2) legal remedies, such as money damages, provide inadequate compensation; (3) the balance of hardships warrants an injunction; and (4) the public interest would not be disserved by an injunction." *Lucky's Detroit, LLC v. Double L, Inc.*, 2013 U.S. App. LEXIS 16589 (6th Cir. 2013) (citation omitted). Ambac's Complaint is devoid of any factual allegations meeting these requirements. Accordingly, Ambac's request for injunctive relief is deficient on its face and must be dismissed.

Dated: December 9, 2013 Respectfully submitted,

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ATTORNEYS FOR THE CITY OF DETROIT

[7] National Public Finance Guarantee Corporation ("National") recently indicated to Jones Day its concern that Jones Day may have a conflict of interest in representing the City against National in Adversary Proceeding 13-05309, a companion to this adversary proceeding, which National brought against the City on November 8 and in which Jones Day has already appeared. (National is a Jones Day client in unrelated matters. National has consented to Jones Day's taking adverse positions in certain circumstances.) In the time available, Jones Day has not been able to complete its investigation into National's concerns. In an abundance of caution, Jones Day is not appearing as counsel of record in Adversary Proceeding 13-05309 until this issue is resolved. Jones Day has no conflict it is aware of in this adversary proceeding, and will continue to appear as counsel of record in this case.