STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Henry Saad, Hon. Patrick Meter and Hon. Cynthia Stephens

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VAN BUREN CHARTER TOWNSHIP,

Plaintiff-Appellant,

v

VISTEON CORPORATION,

Defendant-Appellee.

Supreme Court Case No. _____
Court of Appeals No. 331789
Trial Court Case No. 15-008778-CK
Trial Court Judge: Hon. Muriel Hughes

APPELLANT VAN BUREN CHARTER TOWNSHIP'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM AND INDICATING THE RELIEF SOUGHT

Pursuant to Const 1963, Art VI, § 4, MCR 7.303(B)(1) and MCR 7.305, this Court may grant leave to appeal after decision by the Court of Appeals. Pursuant to these authorities, Plaintiff/Appellant Van Buren Charter Township (the "Township") respectfully seeks this Honorable Court's leave to appeal the Court of Appeals' Opinion dated May 16, 2017 (Exhibit 1), which affirmed the trial court's grant of summary disposition in favor of Defendant-Appellee Visteon Corporation ("Visteon") on ripeness grounds. This application is timely pursuant to MCR 7.305(C)(2)(a) because the Court of Appeals issued its opinion on May 16, 2017, and this Application was filed on or before June 27, 2017, which is within 42 days later.

For its relief, the Township seeks an order: (1) granting its application for leave to appeal or an order or per curiam opinion peremptorily reversing the opinion of the Court of Appeals (and the order of the Trial Court) which dismissed the Township's complaint on ripeness grounds, and (2) remanding the case to the Trial Court to proceed on the merits.

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals err when it held that there was no ripe controversy sufficient to render a declaratory judgment, yet actually adjudicated the substantive merits of the parties' contract dispute, which violated the rule prohibiting an adjudication on the merits when deciding threshold issues of justiciability and which deprived the Township of an appeal of appeal of right as to the interpretation of the contract?

The Township answers:	Yes.
Visteon answers:	No.
Trial Court answered:	No.
Court of Appeals answered:	No.
This Court should answer:	Yes.

II. Did the Court of Appeals err when it held that the Township's Declaratory Judgment claim was not yet ripe for adjudication simply because the injury under the parties' contract was not scheduled to occur until a future date, where it: (i) applied the wrong standard of review, (ii) misinterpreted the contract language, (iii) ignored controlling Michigan Supreme Court precedent holding that prospective breach and prospective injuries are sufficient to invoke a declaratory action and emphasizing that a key purpose behind a declaratory action is to enable parties to have their differences settled in advance of any actual injury?

The Township answers:	Yes.
Visteon answers:	No.
Trial Court answered:	No.
Court of Appeals answered:	No.
This Court should answer:	Yes.

III. Did the Court of Appeals err when it held that the Township's Breach of Contract claim was not ripe—despite the doctrine of anticipatory repudiation which gives a plaintiff the immediate right to sue if the opposing party states its intent that it will not perform the contract when the time for performance arrives—where the Court of Appeals based its holding solely on a single self-serving statement by Visteon's counsel at oral argument (which is not admissible evidence) and ignored the admissible record evidence before it in which Visteon repeatedly stated in writing that under no circumstances would Visteon make a payment under the parties' contract?

The Township answers:	Yes.
Visteon answers:	No.
Trial Court answered:	No.
Court of Appeals answered:	No.
This Court should answer:	Yes.

IV. Did the Court of Appeals err in applying the applicable standards of review—particularly here, where the case was at the initial pleading stage—when it held in favor of Visteon under MCR 2.116(C)(10), despite the fact that: (i) Visteon did not carry its initial burden as the moving party to properly support its motion with admissible evidence and instead presented mere attorney argument, and (ii) the court repeatedly failed to view the evidence in a light most favorable to the Township as the non-moving party, including going to so far as to *sua sponte* rule that the expert report attached to the Township's complaint was insufficient evidence to support the Township's claimed damages, even though the expert concluded that a shortfall was "certain" and "inevitable," Visteon admitted in its discovery responses that it had no "objections" to the report, and Visteon did not support its Motion to Dismiss with a contrary expert report on damages?

The Township answers:	Yes.
Visteon answers:	No.
Trial Court answered:	No.
Court of Appeals answered:	No.
This Court should answer:	Yes.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Township seeks leave to appeal the Court of Appeals' Opinion *Van Buren Charter Twp v Visteon Corp*, __ Mich App __; __ NW2d __; 2017 WL 2131517 (May 16, 2017) (Dkt. No. 331789) (the "Opinion"), which affirmed the trial court's grant of summary disposition in Visteon's favor on ripeness grounds. The Opinion (which is set for publication) should be reversed, as it runs afoul of long-standing Michigan precedent regarding ripeness, declaratory judgments, and anticipatory repudiation, and it violates the most basic rules relating to standards of review.

This is a time sensitive contract dispute over a settlement agreement entered into between the Township and Visteon (the "Agreement") in 2010, when Visteon was struggling financially and was in bankruptcy. Visteon's world headquarters, known as "Visteon Village," are located in the Township. In 2003, the Township, through its Local Development Financing Authority ("LDFA"), issued municipal bonds for the exclusive purpose of financing the construction of Visteon Village. The property taxes collected for Visteon Village are crucial to the Township and the LDFA, as those taxes are earmarked to cover the debt service on the municipal bonds. In the Agreement, the Township gave Visteon a drastic property tax reduction which the parties knew would leave the Township unable to meet future payment obligations on the bonds and would eventually create a payment shortfall in excess of $30 million. As a result, in exchange for the tax reduction, Visteon promised it would later make additional payments to the Township to ensure the Township could cover any payment shortfalls on the bonds.

With the bond payment shortfall date calculated by the Township's expert rapidly approaching, Visteon now claims it has *no* financial obligations whatsoever to the Township under the Agreement, despite its express obligation under the Agreement to assist the Township in making "timely" payments on the bonds. Due to Visteon's repudiation of its obligations under the Agreement, the Township sued Visteon for breach of contract and also sought a

declaratory judgment. As its first responsive pleading, Visteon filed a motion for summary disposition arguing that the Township's claims were not ripe (the "Motion") because the payment shortfall had not yet occurred. The Trial Court agreed with Visteon that the case was not ripe and dismissed the Complaint without prejudice and the Township appealed. On appeal, despite the narrow scope of the ripeness inquiry before it, the Court of Appeals went beyond the issue of ripeness and adjudicated certain substantive rights and obligations under the Agreement (something the Trial Court did not even do, as the only issue was whether the dispute was ripe so that it could *eventually* proceed to an adjudication of the parties' respective contractual obligations). The Opinion contains several points of error.

First, the Court of Appeals violated the basic rule that when determining threshold issues of justiciability—such as standing, ripeness, mootness—a court should not reach the actual merits of the parties' case.

Second, in finding the Township's declaratory judgment claim unripe, the Court of Appeals ignored decades of case law holding that a declaratory judgment action can (and should) be initiated prior to any breach or injury. In fact, requiring present breach and present harm would be antithetical to the very purpose behind declaratory judgments, which is "to enable the parties to obtain adjudication of rights *before an actual injury occurs,* to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *UAW v Cent Mich Univ Trustees*, 295 Mich App 486, 495, 815 NW2d 132, 138 (2012) (emphasis in original).

Third, the Court of Appeals improperly found that the Township's breach of contract claim was not ripe. The Agreement imposes two contractual obligations on Visteon: (1) to negotiate with the Township to determine the amount of the bond payment shortfall; and (2) to

assist the Township in making timely payments on the bonds. The Township's contract claim is ripe because Visteon has breached its first obligation—the duty to negotiate—by failing to negotiate the amount of the impending shortfall. Further, Visteon has anticipatorily breached its payment obligation by taking the position that it owes nothing under the Agreement. In the Opinion, the Court of Appeals erroneously relied on a single self-serving, inadmissible statement by Visteon's counsel at oral argument, while ignoring a half dozen admissions where Visteon admitted that under no circumstances would it make a payment to the Township.

Fourth, the Court of Appeals played a role of fact-finder and *sua sponte* found the Township's unrefuted expert report to be invalid on its face and ruled that the expert report failed to credibly establish that a shortfall would even occur. Again, the standard of review and procedural posture at the time the Motion was decided are critical—this was a motion on whether the case could move forward to discovery, not a summary disposition motion under (C)(10) at the close of discovery or a *Daubert* motion. Moreover, even reviewed under a (C)(10) standard, Visteon presented *no* contrary admissible evidence to refute the Township's report.

GROUNDS FOR GRANTING LEAVE TO APPEAL

An application for leave to appeal to the Michigan Supreme Court must satisfy at least one of the grounds enumerated in MCR 7.305(B) to warrant this Court's review. This Application for Leave to Appeal ("Application") satisfies at least three of the enumerated bases.

First, the case has "has significant public interest and the case is one by or against the state or one of its agencies or subdivisions" under MCR 7.305(B)(2). The Township is a municipality which qualifies as a subdivision of the state, and there is intense public scrutiny surrounding this case, as thousands of Township residents will be impacted if the Township loses this appeal and is left with no choice but to await Visteon's breach, default on the bonds, and

then either seek a millage from its citizens or face a judgment levy to pay the multi-million dollar bond shortfall. Due to the magnitude of the shortfall, the Township urgently needs Visteon's liability decided now in order for it to plan appropriately and avoid financial catastrophe.

Second, the issues in the Application involve "legal principles of major significance to the state's jurisprudence" (MCR 7.305(B)(3)) with respect to the proper standard of review to be applied to a ripeness question, for which there is currently conflicting case law and confusion, as acknowledged in the Opinion. (Ex. 1, Opinion, p. 2). For example, in May 2016, the Court of Appeals issued a decision holding that MCR 2.116(C)(4)—one of the subrules that the Motion was brought under—is not the proper rule to apply when reviewing a ripeness motion; instead, it held that ripeness analysis should be undertaken pursuant to MCR 2.116(C)(10). *Broz v Plante & Moran*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2016 (Docket No. 325884 at 4-5) (Ex. 2). Five months later, the court issued *Heritage Sustainable Energy, LLC v Heritage Wind Leasing*, *LLC*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 20, 2016 (Docket No. 331279 at 2-3) (Ex. 3), in which the court also rejected the notion that MCR 2.116(C)(4) was the proper standard to apply to a ripeness motion, but held that MCR 2.116(**C)(8)** was the proper standard. In the Opinion (which is set for publication), the Court of Appeals acknowledged this conflict, noting "the parties contest the propriety of dismissal pursuant to MCR 2.116(C)(4)" but determined "[a]lthough we acknowledge inconsistencies between published decisions of this Court and more recent unpublished decisions regarding whether subrule (C)(4) supports dismissal for failure of justiciability grounds such as ripeness . . . we need not address the conflict here" because any error in applying the wrong standard of review was "harmless." (Ex. 1, the Opinion, p. 2) The Township vigorously disagrees that the error is harmless. The review performed when analyzing a (C)(10) motion versus a (C)(8) motion is drastically different and can

easily change the outcome of a motion. That is particularly true here, where the ripeness motion was filed as the first responsive pleading prior to full discovery. Clarity from this Court is needed on this issue.[1]

Third, the Opinion is "clearly erroneous and will cause material injustice" under MCR 7.305(B)(5)(a) and "conflicts with a Supreme Court decision or another decision of the Court of Appeals" under MCR 7.305(B)(5)(b). For example, (i) a declaratory action is clearly permitted under Michigan Supreme Court precedent before an injury or an actual breach of contract occurs yet the Court of Appeals refused to permit the Township to go forward; (ii) the Court of Appeals improperly adjudicated the substantive merits of a plaintiff's contract claim under the guise of merely adjudicating a threshold issue of justiciability, such as ripeness; (iii) the Court of Appeals, in finding no basis for an anticipatory repudiation claim, ignored record evidence and instead relied *solely* on an inadmissible statement made by counsel at oral argument; and (iv) the Court of Appeals improperly assumed the role of fact finder and *sua sponte* deemed the Township's expert report unsubstantiated and invalid on its face when the admissibility or reliability of the expert report was not even at issue in the underlying motion, the Trial Court never ruled upon that issue, and the report was unrefuted.

These errors violate Michigan published precedent and, to make matters worse, the Opinion is set for publication. For these reasons, the Township respectfully requests that this Court grant it leave to appeal the Opinion, or, alternatively, peremptorily reverse the Court of Appeals and remand this case to the trial court for discovery, and ultimately, an adjudication on the merits.

[1] Although some of the conflicting case law is unpublished and not binding for purposes of stare decisis, guidance from this Court is still needed due to the state of confusion.

STATEMENT OF FACTS

A. CONSTRUCTION OF VISTEON VILLAGE AND THE ISSUANCE OF THE BONDS

(1) The 2003 Bonds

Visteon is a global automotive parts supplier whose world headquarters (known as "Visteon Village") are located in the Township.[2] (Ex. 4, Complaint and all exhibits thereto (Exhibits A-E) (the "Complaint") at ¶ 1-2). In 2003, the construction of Visteon Village was financed through a combination of public and private financing, including via certain tax-exempt Tax Increment Bonds, Series 2003, which were issued on August 6, 2003 (the "2003 Bonds"). The 2003 Bonds consisted of $21,610,000 of current interest bonds and $6,589,656.35 of non-callable capital appreciation bonds. *Id.* at ¶ 12. Payments for the 2003 Bonds were funded by tax revenues captured from Visteon Village. *Id.* at ¶ 13. To pay for the 2003 Bonds, the Township planned to use property tax payments from those assessed on the taxable value of Visteon Village. *Id.* at ¶ 14.

At the time of the 2003 Bond issuance, payment schedules (the "Schedules") were developed by the Township to illustrate projected future property tax valuations and to provide potential investors and ratings agencies with comfort that tax revenues would be sufficient to meet the debt service obligations for the 2003 Bonds. (Ex. 4, Complaint, ¶ 15). In developing the Schedules, it was assumed by the Parties that the value of Visteon Village would increase over time and that it would grow to a value of $300 million, which would generate $150 million in taxable value and sufficient revenue to meet the debt service on the bonds. *Id.* at ¶ 16. Quickly after the issuance of the 2003 Bonds and the completion of construction of Visteon Village, however, Visteon began negotiations with the Township seeking to ***reduce*** the taxable value of Visteon Village. *Id.* These negotiations resulted in two reductions in Visteon Village's

[2] Visteon and Township will periodically be referred to as the "Parties" in this brief.

taxable value in exchange for lump-sum payments from Visteon. *Id.*

(2) The 2006 Bonds

By 2006, tax revenues from the Visteon Village already failed to meet the original projections, so the Township restructured the current interest bond portion of the 2003 Bonds to alleviate projected shortfalls. (Ex. 4, Complaint, ¶ 18). On June 15, 2006, Tax Increment Revenue Refunding Bonds, Series 2006 (the "2006 Bonds") (collectively with the 2003 Bonds, the "Bonds") were issued to advance refund the current interest portion of the 2003 Bonds. *Id.* This refunding delayed the repayment of a portion of the 2003 Bonds, thereby temporarily alleviating projected shortfalls. *Id.*

B. VISTEON'S BANKRUPTCY & THE PARTIES' SETTLEMENT AGREEMENT

On May 29, 2009, Visteon filed for bankruptcy (the "Bankruptcy"), and the Township filed a general unsecured claim based, in part, on Visteon's failure to comply with the terms of certain Tax Abatement Agreements entered into in 2003. (Ex. 4, Complaint, ¶¶ 20-21). At the time of the Bankruptcy filing, the Township valued Visteon Village at approximately $165 million, but Visteon argued that Visteon Village was worth much less due to declining property values in the real estate market. *Id.* at ¶ 22. As a result, in September 2009, Visteon sought yet another a reduction of the assessed value of Visteon Village and threatened legal action if the Parties could not reach an agreement on a reduced value. *Id.* at ¶ 23.

Ultimately, Visteon and the Township settled their various disputes and entered into an "Agreement and Mutual Release," dated January 25, 2010 (the "Agreement"). (Ex. 4, Complaint, ¶ 24; Ex. 4(A), the Agreement). In the Agreement, the Parties resolved three principal disputes: (i) they agreed upon an assessed value for Visteon Village for property tax purposes; (ii) they agreed upon a damages figure for Visteon's breach of the Tax Abatement Agreements; and (iii) they

agreed that Visteon would assist the Township to meet its payment obligations for the Bonds, since the Parties knew that the projected tax revenue for Visteon Village would not be enough to support the bond payments and would result in a shortfall. (Ex. 4, Complaint, ¶ 27). Visteon's commitment to assist the Township with the shortfall is set forth in Paragraph 3 of the Agreement, which states:

> Visteon acknowledges that the Township assisted Visteon in the construction of the village through the issuance by the Township of certain bonds supported by the full faith and credit of the Township, the proceeds of which were used to help construct the Village. To the extent the property tax payments made by Visteon to the Township pursuant to Section 2.2, are inadequate to permit the Township to meet its payment obligations with respect to that portion of the bonds that were used to help fund the Village, *Visteon hereby agrees to negotiate with the Township in good faith to determine the amount of the shortfall with respect to those bonds and make a non-tax payment, payment in-lieu-of tax, (PILOT) to the Township to assist the Township in making timely payments on the bonds.* [Ex. 4(A), Agreement, ¶ 3 (emphasis added).]

Thus, under the terms of Paragraph 3 of the Agreement, Visteon has two distinct contractual obligations: (1) to negotiate with the Township in good faith to determine the amount of the shortfall, and (2) to assist the Township in making "timely" payments on the Bonds. (Ex. 4, Complaint, ¶ 31).

As noted above, pursuant to the Agreement, the Parties agreed to a market value of Visteon Village at $60 million, which yielded a taxable value of $30 million. (Ex. 4, Complaint, ¶ 28). However, this taxable value was only 20% of the original taxable value used to create the payment Schedules for the bonds. *Id.* Therefore, sufficient funding for all of the bond payments was a known mathematical impossibility. *Id.* Given this drastic disparity between the property tax value assumption ($300 million) used to develop the Schedules and the agreed upon value under the Agreement ($60 million), the Parties knew at the time they entered into the Agreement that the captured taxes would be insufficient to make the required bond payments and Visteon's assistance would be needed.

C. APPROVAL OF THE AGREEMENT BY THE BANKRUPTCY COURT AND VISTEON'S ADMISSION THAT THE SHORTFALL WILL OCCUR

Visteon submitted the Agreement to the Bankruptcy Court for approval on January 27, 2010. (Ex. 5, Debtor's Motion for Entry of an Order Approving Settlement Agreement). While Visteon now claims in the current litigation that a payment shortfall may never occur in its motion to approve the Agreement, *Visteon admitted that it expected a shortfall to occur and that it expected the precise shortfall date would depend on certain economic factors*: "although dependent on a number of factors, Visteon expects no shortfall with respect to the Township Bonds to arise until, at its earliest, 2015."[3] *Id.* at p. 5, n. 4. Thus, at the time the Agreement was entered into, the Parties understood that the shortfall would occur and it was never thought of as "speculative" or a mere "hypothetical."

D. THE PFM REPORT & THE IMMINENT BOND PAYMENT SHORTFALL

As fully expected by the Parties, the property tax payments are in fact insufficient to support the bond payments. In 2013, the Township engaged Public Financial Management, Inc. ("PFM"), one of the nation's foremost public finance investment advisers, to analyze the Township's ability to meet its debt service obligations under the Bonds and to calculate the projected date of any shortfall. (Ex. 4, Complaint, ¶¶ 35-36). PFM ran a "Base Scenario" and fourteen other scenarios using projected taxable values and other economic factors to test the Base Scenario and ascertain when a shortfall on the Bond debt service payments is most likely to arise. Under each and every scenario

[3] At the time the parties executed the Agreement, the shortfall was expected to occur in 2015. However, this calculation did not consider the Township's use of the settlement proceeds from its tax abatement claim, which extended the shortfall date. Thereafter, in an effort to mitigate its damages in this lawsuit, in 2015, the Township retired a portion of its outstanding 2006 Bonds and then refinanced the remaining portion of the outstanding 2006 Bonds resulting in future debt service savings. This refinance transaction delayed the shortfall so it is now scheduled to occur in 2019. (Ex. 6, 2/2/2016 Hrg. Trans., pp. 20-22, 26-30.) Notably, there are no further refinancing options that the Township can undertake in advance of the shortfall date.

run by PFM, a payment shortfall occurred ranging in amount from $23.7 million to $36.4 million. *Id*. at ¶ 37-41. PFM memorialized these findings in a written report dated September 6, 2013 (the "PFM Report"). *Id.* at ¶ 38; *see also* Ex. 4,(C) the PFM Report.

Based on its findings, PFM concluded: "since the current Taxable Values . . . are significantly lower than the original projections in 2003, a cash flow shortfall is *inevitable* if new revenues are not introduced." (Ex. 4, Complaint, ¶ 39) (quoting the PFM Report at 20) (emphasis added). Thus, PFM opined that it is "*certain* that without a substantial increase in the captured taxes, or the influx of additional funds by 2017 or 2018, the Township *will not have sufficient funds to meet the debt service obligations*[.]" *Id.* at ¶ 40 (quoting PFM Report at 21) (emphasis added).

E. VISTEON'S REFUSAL TO NEGOTIATE THE AMOUNT OF THE SHORTFALL

On September 9, 2013, the Township delivered a copy of the PFM Report to Visteon and issued a demand letter requesting that Visteon engage in the mandated negotiation process set forth in the Agreement "to determine the amount of the shortfall" under the Bonds. (Ex. 4, Complaint, ¶ 42). Despite a lengthy letter-writing campaign and a handful of in-person meetings, Visteon never presented a counter-analysis to the PFM Report and refused to negotiate the "amount" of the shortfall owed under Paragraph 3. *Id*. at ¶ 51.

In fact, to this day, the PFM Report is still unrefuted. In response to written discovery in this case, Visteon admitted that it had not retained any consultants to analyze the shortfall. (Ex. 7, Visteon Discovery Responses at Int. No. 4.) Further, when asked to identify all "inaccuracies, disputes with . . . and reasons why you object, if at all, to the PFM Report[,]" Visteon responded that, over two years after having first received it, it "***has not yet studied the PFM Report for computation errors or other objections***." *Id.* at Int. No. 10 (emphasis added). Notably, despite Visteon's lack of objection, the Court of Appeals found this report to be incapable of supporting

the Township's claimed damages.

F. VISTEON'S REPUDIATION OF ITS CONTRACTUAL OBLIGATION TO PAY THE SHORTFALL

In response to the Township's good faith attempts to negotiate, Visteon has unequivocally stated that it has no financial obligations to the Township under the Agreement. Through correspondence and limited discovery prior to the hearing on the Motion to Dismiss, Visteon has denied that it has any obligation to pay the shortfall:

- Prior to commencing this action, the Township received correspondence from Visteon in which Visteon announced: "*Visteon . . . has consistently denied that it is obligated to pay whatever shortfall may occur*." (Ex. 8, May 7, 2014 Letter from Visteon at 2) (emphasis added).[4]

- Visteon continued its denial of any obligation to pay in its Motion to Dismiss: "*there is simply no amount left to be paid which could be accurately characterized as a PILOT*." (Ex. 9, Visteon's Motion to Dismiss at p. 5) (emphasis added).

- Visteon retracted its prior offer to contribute a *de minimus* amount of $6,125.06 toward any shortfall: "the Township quotes one letter in which Visteon estimated the maximum amount of any outstanding PILOT payment, if any, totals $6,125.06 at most. This was corrected by Visteon in later correspondence to reflect that *no amount is due*." *Id.* at p. 5, n. 3 (emphasis added).

- In response to the Township's discovery requests, Visteon answered: "*Visteon admits that it disputes the Township's claim that Visteon has an obligation to pay in full the Shortfall* that the Township projects to occur with respect to the Bonds." (Ex. 7, Visteon Discovery Responses at Req. to Admit No. 4.)

- When asked to identify the "maximum" amount owed under the Agreement, Visteon answered: *"There is no payment due pursuant to Paragraph 3 of the 2010 Agreement . . . nothing more is owed under the 2010 Agreement*[.]" *Id.* at Int. Nos. 8-9.

At oral argument before the Trial Court on the Motion, Visteon's counsel once again confirmed its position:

THE COURT: Counsel for defendant, is it your position that, *even if a shortfall*

[4] This exhibit was included in the Trial Court record as an exhibit to the Township's Response.

> *does occur . . . that the defendant is not obligated to pay any of that shortfall?*
>
> MR. HAMMER (Visteon's counsel): *That would be the conclusion if you reviewed the defenses we have in this matter . . .*
>
> THE COURT: That's not an answer to the question. Are you claiming that, *if it is determined with certainty that there is a shortfall*, *that under the provisions of the contract, your position is, your obligation could be zero*?
>
> MR. HAMMER: *If – if – yes.* [Ex. 6, 2/2/2016 Hrg. Tr. 45-47 (emphasis added)]

G. PROCEDURAL HISTORY — MOTION TO DISMISS AND COURT OF APPEALS DECISION

Due to Visteon's refusal to honor the Agreement, the Township sued Visteon for breach of contract and sought a declaratory judgment. On August 10, 2015—as its first responsive pleading—Visteon filed the Motion pursuant to MCR 2.116(C)(4) and (C)(8) arguing that the case was not ripe for adjudication. The Motion was supported by no evidence of any kind; the only exhibits attached were a copy of the Township's Complaint and some unpublished cases. (Ex. 9, the Motion). Due to various judicial reassignments, the hearing on the Motion did not occur until February 2, 2016. (Ex. 6, 2/2/2016 Hrg. Tr.) On February 11, 2016, the Trial Court ruled from the bench but offered little analysis other than to note that she was granting Visteon's motion because the case was not ripe for adjudication for the "reasons in Visteon's motion" and because the shortfall is "hypothetical and contingent." (Ex. 10, 2/11/2016 Hrg. Tr. at 5).

The Trial Court entered an order dismissing the case without prejudice on February 18, 2016. (Ex. 11, Dismissal Order) At the time the Trial Court dismissed the case, discovery had only just begun and the case was in its infancy. The parties had exchanged an initial set of written discovery, but no depositions of any kind had occurred (neither fact nor expert witnesses), nor had the parties even completed document production.

The Township immediately sought an expedited appeal, which was granted. On May 16, 2017, the Court of Appeals issued the Opinion, and under the guise of merely determining "ripeness," it actually interpreted the Parties' contractual obligations, finding that Visteon "is not

obligated to engage in good faith negotiations to determine the amount of a bond payment shortfall" until after the shortfall actually occurs. (Ex. 1, Opinion, p. 8). Next, the court improperly weighed the credibility of competing evidence presented on the issue of whether Visteon had anticipatorily breached, and incorrectly found that inadmissible oral argument by Visteon's counsel outweighed admissible written admissions and discovery responses by Visteon. Last, the court *sua sponte* attacked the credibility of the Township's expert report (without any *Daubert* hearing or any contrary expert report from Visteon), and made an improper factual finding as to the reliability of the Township's expert's conclusions. Interspersed among these legal errors were a plethora of inaccurate factual recitations, such as: (i) contending that (C)(10) would be the proper standard of review, allegedly because the parties had "conceded" that it was the proper standard when in fact *both* parties emphasized to the Trial Court that the Motion was not a (C)(10) motion aimed at adjudicating the merits; and (ii) contending that the Township's damages were impermissibly contingent because the Township was currently in the process of refinancing the Bonds, which could stave off the shortfall altogether (when in fact, this is an outright falsehood; the hearing transcript from the Trial Court clearly states that the Bonds are incapable of refinancing prior to a shortfall).

STANDARD OF REVIEW

Visteon filed its Motion to Dismiss pursuant to MCR 2.116(C)(4) on the grounds that the Trial Court lacked jurisdiction to hear the Township's claims because they were unripe and pursuant to MCR 2.116(C)(8) on the grounds that the Township lacked standing to bring its claims because they were unripe. A motion brought pursuant to MCR 2.116(C)(4) is entitled to de novo review by the Court of Appeals. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001) ("Jurisdictional questions under MCR 2.116(C)(4) are questions of

law that are also reviewed de novo."). Appellate review of a motion brought pursuant to MCR 2.116(C)(8) is also subject to de novo review. *Spiek v DOT*, 456 Mich 331, 337; 572 NW2d 201 (1998). Further, a trial court's ruling concerning the doctrine of ripeness is subject to de novo review. *City of Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008) (citing *Mich Chiropractic Council v Comm'r of the Office of Fin and Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006)) ("Questions pertaining to justiciability and ripeness comprise constitutional issues, which are also reviewed de novo."). Thus, all of the issues in this appeal are entitled to de novo review.

LEGAL ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE TOWNSHIP'S DECLARATORY JUDGMENT CLAIM ON RIPENESS GROUNDS

A. The Court of Appeals Erred in Reaching the Substantive Merits of the Case Under the Guise of Merely Deciding a Threshold Issue of Justiciability

Under MCR 2.605, "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment[.]" The "actual controversy" standard in MCR 2.605 "incorporates the doctrines of standing, ripeness, and mootness." *UAW*, 295 Mich App at 495. Justiciability doctrines such as standing, ripeness, and mootness are not intended to reach the substantive merits of the claim; instead, they exist merely to "ensure that cases before the courts are appropriate for judicial action." *Mich Chiro Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363, 371 n 12, 716 NW2d 561, 567 (2006).

Michigan courts have repeatedly held that courts should not adjudicate the merits in the process of determining justiciability issues. *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187, 190–91 (2010) ("Whether a case is moot is a threshold issue that a court addresses before it

reaches the substantive issues of the case itself."); *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 357; 792 NW2d 686, 691 (2010) ("Standing does not address the ultimate merits of the substantive claims of the parties") (citation omitted); *see also Hubbard v Bd of Trustees of Ret Sys*, 315 Mich 18, 22; 23 NW2d 186, 188 (1946) (where issue was whether an actual controversy existed under Declaratory Judgment Act, "[t]he circuit judge did not hear the case on the merits, nor did the court attempt to decide the issues on which the bill of complaint was filed. The court very properly declined to pass upon the merits of the controversy, on the hearing of the motion to dismiss."). In fact, this Court recently criticized the more rigorous standing doctrine applied by the federal courts, because it "has the effect of encouraging courts *to decide the merits of a case under the guise of merely deciding that the plaintiff lacks standing*, thus using standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits." *Lansing*, 487 Mich 349 at 370–71 (citation omitted).

Under the guise of determining whether the case was "ripe," the Court of Appeals unilaterally took the role of the Trial Court and adjudicated the rights and obligations of the parties under the Agreement (which the Trial Court knew to not do). The court lost sight of the singular issue it was asked to rule upon: whether the claims brought by the Township were ripe to permit the *Trial Court* to conduct discovery and, eventually, review the contract terms and issue a declaratory ruling as to what the Parties' respective rights and obligations were under the Agreement. The Court of Appeals was tasked with reviewing the Trial Court's opinion as to whether there was an "actual controversy"—not to *decide* that controversy.

Instead of reviewing the Trial Court's ruling as to ripeness, the Court of Appeals conducted an outright merits analysis and determined the Parties' substantive rights and obligations, ruling: "Plaintiff's rights, like defendant's obligations, under the contract are clear.

Defendant is not obligated to perform until after a shortfall, and Visteon is then is only obligated to 'assist' with a certain payment thereof." (Ex. 1, Opinion, p. 6). The court even concluded—albeit erroneously and without justification—that "[n]o reasonable person" could "find that defendant is obligated to engage in negotiations prior to the shortfall" and that with respect to the duty to negotiate, Visteon "is not obligated to engage in good faith negotiations to determine the amount of a bond payment shortfall" until after the shortfall actually occurs. *Id.* at 5, 8.

As a result, the Opinion is precisely the type of declaratory ruling the Township would eventually have sought (after discovery and after being fully and properly briefed) from the Trial Court. However, the Court of Appeals did not have original jurisdiction over the declaratory action since, as an appellate court, it functions only as an "error-correcting" court with limited jurisdiction to review the rulings of the lower court. *Mich Up & Out of Poverty Now Coal v State*, 210 Mich App 162, 168; 533 NW2d 339, 343 (1995) ("this Court functions as a court of review that is principally charged with the duty of correcting errors"). Because the Trial Court did not pass on the actual contract rights of either party, that issue was not properly before the Court of Appeals. *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606, 609 (2014) ("for an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court"); *Napier v Jacobs*, 429 Mich 222, 234–35; 414 NW2d 862, 867 (1987) (noting that the Court of Appeals is a court of limited authority and as a result, "[a]bsent proper motions in the trial court, there was no order or ruling of the lower court upon which to base normal appellate review under the court rules").

In addition, because the sole issue on appeal was the threshold issue of justiciability, which is to be decided without weighing on the merits of the case, the Court of Appeals should never have ruled upon the Parties' substantive rights and obligations. In so doing, the Court of

Appeals denied the Township the opportunity to properly support its claims with discovery and it deprived the Township of due process insofar as it deprived the Township of its "appeal of right" on that issue (as this appeal is obviously only permitted if leave is granted).

B. The Court of Appeals Erred In Its Interpretation of the Agreement

Assuming, *arguendo*, that the Court of Appeals could be the first court to adjudicate the Parties' substantive rights and obligations, it erred in this task. Clearly, the Parties' differing interpretations of the Agreement rest, in large part, over when they are obligated to negotiate and when Visteon must make its payment—either before the occurrence of a shortfall (as argued by the Township) or after (as argued by Visteon). In finding in Visteon's favor on this point, the Court of Appeals reviewed the language of the Agreement and concluded: "the tense of the verb is present, not future." (Ex. 1, Opinion at 5). Notwithstanding the Opinion's failure to explain the relevance of the preceding phrase in connection with the shortfall, the Court of Appeals ignored the Township's principal arguments: (1) in order for Visteon to "assist the Township in making *timely* payments on the bonds", the negotiation must occur in advance of a shortfall date; (2) if the negotiation was to occur after the shortfall date, no "negotiation" would be necessary, as the amount of the shortfall would already be known.

The Court of Appeals' analysis conflicts with basic rules of contract construction. A court must "give effect to *every word*, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468 (2003) (emphasis added). Further, when construing a contractual provision, "due regard must be had to the *purpose sought to be accomplished by the parties as indicated by the language used*, read in the light of the attendant facts and circumstances." *WO Barnes Co v Folsinski*, 337 Mich 370, 376-377; 60 NW2d 302 (1953)

(emphasis added). Contracts are enforced in accordance with their terms; when a term is not defined in the contract, it is accorded its commonly understood meaning. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 525 (2004). A word's plain and ordinary meaning is derived from its dictionary definition. *Id.*

In this case, Paragraph 3 of the Agreement states:

> To the extent the property tax payments made by Visteon to the Township pursuant to Section 2.2, are inadequate to permit the Township to meet its payment obligations with respect to that portion of the bonds that were used to help fund the Village, *Visteon hereby agrees to negotiate with the Township in good faith to determine the amount of the shortfall with respect to those bonds and make a non-tax payment, payment in-lieu-of tax, (PILOT) to the Township to assist the Township in making timely payments on the bonds*. [Ex. 4(A), Agreement, ¶ 3 (emphasis added).]

By ruling that Paragraph 3 "unambiguously" requires that the Township wait and default on the bonds before being able to bring suit against Visteon, the Court of Appeals violated a fundamental rule of contract interpretation—that every word be considered and no word be rendered surplusage or nugatory. *Klapp*, 468 Mich at 468. In this case, the Court read the word "timely" entirely out of the Agreement. It also ignored the word "negotiate," which clearly indicates that the Parties must arrive at an agreed upon shortfall amount, as the actual amount is not yet known because it has not yet occurred.

As noted above, the court must consider the "purpose sought to be accomplished by the parties as indicated by the language used[.]" *WO Barnes*, 337 Mich 370 at 376-77. Here, the Parties included the word "timely" as a modifier to the word payments; thus, the purpose sought to be accomplished was to require Visteon to make its payments to the Township *before* the bond payments were due, so that the Township's payments would be "timely." This comports with the plain meaning of the word "timely," which means "coming early or at the right time." Merriam-Webster Collegiate Dictionary, available at https://www.merriam-

webster.com/dictionary/timely, last accessed June 23, 2017. The Agreement does not state that the bond payments can be made in an "untimely" manner and then the Township can sue for damages later. Had the case proceeded, the Township was prepared (through documentary evidence and testimony) to demonstrate that Visteon clearly understood that negotiations were to take place in advance of a shortfall and that those discussions had even began between the Parties. Ironically, while noting that the "judiciary is not authorized to rewrite contracts[,]" the Court of Appeals literally rewrote the Agreement to mean that Visteon had to reimburse the Township *after* the shortfall (which is nowhere in the Agreement) rather than to contribute funds to the Township *before* the shortfall so the Township could make "timely payments on the bonds" (which is the exact language used in the actual Agreement). One simply cannot reconcile the requirement that Visteon assist the Township to make "timely payments on the bonds" with the court's holding that the Township must wait for a potential default on the Bonds before Visteon's duties under the Agreement to be triggered.

C. The Court of Appeals Erred by Ignoring Controlling Michigan Case Law

With respect to what constitutes an "actual controversy" under the declaratory judgment rule (MCR 2.605(A)(1)), Michigan courts have adopted a flexible approach. The "purpose" of the declaratory judgment rule is to "provide a broad, flexible remedy to increase access to the courts," thus, "in some instances a declaratory judgment is appropriate *even though actual injuries or losses have not yet occurred*." *Recall Blanchard Committee v Secretary of State*, 146 Mich App 117, 121; 380 NW2d 71 (1985) (emphasis added). Accordingly, prospective injuries are sufficient:

> [T]he rights to be determined by declaratory judgment or decree may and perhaps usually are rights not *in praesenti*, but rights which are to come into full fruition or which will be fully vested at some future time. If uncertainties and controversies arise between interested parties as to what their respective rights will be when such

> rights accrue or become vested, and to avoid needless hazards or possible losses, it is necessary presently to have decision of such uncertain or controverted rights, then there is actual need of and justification for declaratory adjudication. [*Merkel v Long*, 368 Mich 1, 11; 117 NW2d 130 (1962) (citation omitted).]

In fact, permitting parties to adjudicate their differences prior to a party suffering actual injury is a key feature of a declaratory action: "One great purpose [of declaratory judgments] is to enable parties to have their differences authoritatively settled *in advance of* any claimed invasion of rights, that they may guide their actions accordingly[.]" *Id.* at 13. Accordingly, to "carry out the purposes intended to be served by such judgments, it is sometimes necessary to determine rights *which will arise or become complete only in the contingency of some future happening*." *Id.*

In fact, requiring present breach or harm would be antithetical to the very purpose behind declaratory judgments, which is "to enable the parties to obtain adjudication of rights *before an actual injury occurs,* to settle a matter *before it ripens into a violation of the law or a breach of contract*, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *UAW*, 295 Mich App at, 495-96 (initial emphasis in original; later emphasis added). As a result, Michigan courts have repeatedly emphasized that undetermined, prospective injuries are sufficient (*Merkel*, 368 Mich at 11; *Village of Breedsville v. Columbia Twp,* 312 Mich 47, 54 (1945); *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978) ("a court is not precluded from reaching issues before actual injuries or losses have occurred")), and that a request for a declaratory judgment is appropriate when it is helpful to guide future conduct on behalf of the parties. *Shavers*, 402 Mich at 588 (an "'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights"); *Lansing Schools Educ Ass'n v Lansing Bd of Educ* (On Remand), 293 Mich App 506, 515; 810 NW2d 95 (2011) (citation omitted) ("an actual controversy exists when declaratory relief is needed to guide a plaintiff's

future conduct in order to preserve the plaintiff's legal rights"); *Breedsville*, 312 Mich at 53-54.

In this case, while specifically acknowledging case law holding that "[i]t is not necessary that 'actual injuries or losses have occurred," the Court of Appeals nonetheless required that an actual injury and a breach (*i.e.*, the shortfall and non-payment by Visteon) *must* first occur, and since they have not yet occurred, the Township's claim was not ripe. But as the case law above demonstrates, the mere fact that the shortfall has not yet occurred is irrelevant in evaluating ripeness on a declaratory judgment claim. A prospective breach is sufficient to initiate a declaratory action, as is a prospective injury. *UAW*, 295 Mich App at 496 (noting declaratory action is ripe for adjudication even "before it ripens into a . . . breach of contract").[5] The

[5] The *UAW* case relied upon by Visteon in the Trial Court supports a finding of ripeness. The issue in *UAW* was whether a policy issued by Central Michigan University ("CMU"), which prohibited certain conduct if its employees ran for public office, infringed on the rights of the CMU employees who may want to run for public office *in the future*. *UAW*, 295 Mich App at 490-92. The employees' union sued and admitted that while none of the CMU employees had actually run for office and had the policy applied to them (and hence, no actual injury), but argued there was a sufficient disagreement between the parties about whether the policy infringed on the employees' rights. *Id.* at 492-493. The trial court found that the employees suffered no injury because none of them "had attempted to become a candidate for public office since the University implemented the candidacy policy and because the University had not implemented the draft procedures." *Id.* at 493-94. The Court of Appeals reversed, and began its analysis by reiterating that a party does not need to suffer an actual injury for a declaratory judgment action to be ripe. *Id.* at 495. Specifically, the Court reasoned:

> MCR 2.605(A)(1) provides: In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted . . . *An "actual controversy" under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights.* The requirement prevents a court from deciding hypothetical issues. However, by granting declaratory relief in order to guide or direct future conduct, *courts are not precluded from reaching issues before actual injuries or losses have occurred.* The essential requirement of an "actual controversy" under the rule is that the plaintiff pleads and proves facts that demonstrate an "'adverse interest necessitating the sharpening of the issues raised.'" [*Id.* at 494.]

Agreement specifically states that the Township will be able to make a "timely" payment; thus, the Township interprets the Agreement to read that it does not need to wait until *after* the payment is due to initiate suit, which would be "*untimely*." Visteon disagrees. This is sufficient to create an actual controversy requiring declaratory relief. This action is precisely the type of case Michigan case law favoring declaratory relief is suited for. With appeals, litigation often takes years to wind its way through the court system. This case has been ongoing since 2015 and the Township remains without relief. It would be completely antithetical to the declaratory judgment case law in Michigan for the Township to have to wait until it has been injured (*i.e.*, after the shortfall occurs) to initiate legal action. This is particularly true here, since the Township is a municipal entity, with statutory budget requirements and concerned citizens that will be directly impacted by the outcome of this litigation.

As noted above, declaratory judgment actions are particularly useful where they are necessary to guide the parties' future conduct. In this case, the shortfall will be of the magnitude of tens of millions of dollars. A default on the Bonds will trigger the acceleration of the entire bond indebtedness.[6] If the shortfall occurs prior to a judicial resolution of this dispute, it will have a devastating impact on the Township's finances. The Township's initial expert report[7]

The Court of Appeals clearly stated that a declaratory judgment action has its own ripeness standard, and it is merely whether there is an "adverse interest necessitating the sharpening of the issues raised." The *UAW* Court then rejected CMU's argument that the case was not yet ripe because no union employee had attempted to run for office or been harmed by the new policy. *Id*. at 496.

[6] The complete depletion of the Township's reserves would occur quickly, exposing the Township to a default on the Bonds, the possibility of a judgment levy against the Township's taxpayers, and ultimately, possible imposition of an emergency financial manager. Thus, this is not a situation the Township should just "wait and see what happens," as Visteon suggests. Instead, the Township needs Visteon's liability decided now in order to guide its future conduct.

[7] As noted at oral argument in the Trial Court and Court of Appeals after the refinancing of the Bonds in Spring 2016, the Township's expert prepared an updated report which corroborated its conclusions of a shortfall and established a slightly later shortfall date. Because briefing was

projects that the amount of the shortfall is approximately $30 million dollars and will occur in late 2018 or early 2019. A sum of money this large is not something the Township has on hand and, therefore, is not in any position to simply pay the shortfall amounts and later obtain and collect on a judgment sometime down the road—nor should it have to. As a charter township, it is not financially nimble like a private corporation; rather, it must adhere to the Charter Township Act, MCL 42.1, *et seq.*, which requires significant lead time in all aspects of its budgeting and financial planning. For example, the Township must prepare its annual budget four to five months *prior* to the next fiscal year and appropriations must be made and taxes levied prior to the commencement of the next fiscal year. *See* MCL § 42.24; MCL § 42.25; MCL § 42.27(1). Given the Charter Township Act, the Township's financial reporting obligations for 2018 are already starting, even though it is only the midpoint of 2017. By this time next year (2018), the Township will be budgeting for 2019. Accordingly, to meet its payment obligations on the bonds in a "timely" fashion and comply with its fiscal obligations as a charter township, the Township must act now and obtain an answer as to what Visteon's obligations are under the Agreement. Permitting further time to elapse without an adjudication of Visteon's ultimate liability will jeopardize the Township's financial credit rating, which will create additional damages to the Township that could be avoided if the court will adjudicate Visteon's duty to pay now, before further consequential damages are incurred. Visteon needs to negotiate with the Township now and Visteon should be forced—consistent with the Agreement's directive to make "timely payments"—to pay the Township prior to the actual shortfall date. Forcing the Township to wait to sue Visteon turns the Agreement on its head and is totally antithetical to the flexibility granted to courts in the declaratory judgment rule.

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closed, the supplemental report did not become a part of the Trial Court record, and neither report was challenged at the Trial Court level.

II. THE COURT ERRED IN FINDING THE TOWNSHIP'S BREACH OF CONTRACT CLAIM UNRIPE

The Court of Appeals' substantive interpretation of the Agreement and conclusion that a shortfall must first occur before a negotiation was its basis for determining the Township's breach of contract claims were not ripe. (Ex. 1, Opinion at 7-9). However, as set forth *supra*, that conclusion was flawed for several reasons. On a pure *ripeness* evaluation, in light of an actual controversy regarding the interpretation of the Agreement, the Township has stated a ripe claim.

A. Visteon Already Breached Its Duty to Negotiate; Hence, that Claim Is Ripe for Adjudication

The first contractual obligation that the Settlement Agreement imposes upon Visteon is the obligation to "negotiate with the Township in good faith to determine the amount of the shortfall with respect to those bonds." (Ex. 4(A), Agreement, ¶ 3). To date, Visteon has failed to negotiate with the Township in good faith to determine the amount of the shortfall.[8] The Township did its part and proffered the PFM Report, which contains a thorough and diligent analysis of the Township's finances and revenue projections in order to reach the conclusion, to a statistical

[8] "A consistent definition of 'negotiate' can be found in case law and dictionaries." *Wallace v Gator Fore*, unpublished per curiam opinion of the Court of Appeals, issued July 31, 2014, at 5 (Docket No. 314577) (Ex. 12). "In order to negotiate with another, there must be a purpose to . . . arrive at some kind of an understanding, bargain, or agreement." *Id.* (citing *People v Augustine*, 232 Mich 29, 35 (1925)). "Negotiate" has also been defined as: "to communicate with another party for the purpose of reaching an understanding" or "to bring about by discussion or bargaining" or "to bring about by discussion and settlement of terms." *Id.* at 5-6 (quoting Black's Law Dictionary (9th ed) and Random House Webster's College Dictionary (2005)). As the court in *Wallace* noted, all of these definitions "are consistent" in that they "all imply that for there to be a negotiation, there must be intent and action on behalf of *both* parties." *Id.* (emphasis added).

The Township is cognizant that under MCR 7.215(C)(1), an unpublished opinion is not precedentially binding and should not be cited for propositions of law for which there is published authority. However, the *Augustine* case analyzed the definition of negotiate as used in a statute and, therefore, is not as on point as the *Wallace* decision. Further, the *Wallace* decision compiled more definitions of the term "negotiate" than the Court did in *Augustine.* There appear to be no other published cases analyzing the term "negotiate."

certainty, that a shortfall will occur. (Ex. 4, Complaint, ¶¶ 39-41). Despite the Township's effort, Visteon refuses to acknowledge the accuracy of PFM Report, refuses to retain its own expert to analyze the shortfall, and refuses to set forth a competing cash flow analysis of its own so that the Parties can mutually "determine the amount of the shortfall," as required by the Agreement. Visteon just continues to reiterate that it owes zero. Thus, no negotiation has occurred here. Further, Visteon's present denial that a shortfall will even occur (contrary to its representations to the Bankruptcy Court in 2010), is clear evidence of a bad faith negotiation tactic. Thus, the Township's claim against Visteon for failure to negotiate in good faith is fully ripe.

B. Visteon Repudiated its Obligation to Pay the Shortfall, Creating a Present Breach and Giving Rise to an Immediate Right to Sue for Future Payments

The Court of Appeals improperly made a factual finding that Visteon had not repudiated the Agreement by citing a single, inadmissible and self-serving statement by Visteon's counsel at oral argument before the Trial Court to support its conclusion that Visteon "has not unequivocally repudiated its obligation to pay any amount of the bond shortfall." (Ex. 1, Opinion, p. 8). However, the Court completely ignored numerous unequivocal written admissions presented by the Township in support of its position that Visteon had repudiated any obligations under the Agreement and would not pay a dime toward a shortfall.

"Under the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Stoddard v Manufacturers Nat'l Bank*, 234 Mich App 140, 163; 593 NW2d 630 (1999). "[W]here there has been an anticipatory breach of a contract by one party . . . the other party may treat the entire contract as broken and may sue *immediately* for the breach." *Carpenter v Smith*, 147 Mich App 560, 564-65; 383 NW2d 248 (1985) (citations omitted)

(emphasis added). In fact, a plaintiff is entitled to sue even "long before" the actual time for performance under the contract. "Anticipatory repudiation creates an immediate right of action even though it takes place *long before* the time prescribed for the performance and before conditions have occurred." *Stanton v Dachille*, 186 Mich App 247, 252; 463 NW2d 479 (1990) (citing 4 Corbin, Contracts, § 959, p 853) (emphasis added).

Thus, an anticipatory breach is *a present and existing* breach giving rise to a ripe and justiciable controversy. *See Stoddard*, 234 Mich App at 163; *Carpenter*, 147 Mich App at 564-65; *Thompson v Auditor Gen*, 261 Mich 624, 634, 247 NW 360 (1933) ("If a valid contract is made and entered into, and one party thereto refused to perform it, such refusal amounts to a breach of contract. An action may lie to enforce it.").

"An anticipatory breach *satisfies prudential ripeness* and therefore enables the promisee to seek damages immediately upon repudiation . . . anticipatory breach is a '*doctrine of accelerated ripeness'* because it 'gives the plaintiff the option to have the law treat the promise to breach . . . as a breach itself.'" *Perry Capital LLC v Mnuchin*, 848 F3d 1072, 1113 (DC Cir 2017) (citation omitted) (emphasis added).

In this case, it is immaterial that the shortfall has not yet occurred because Visteon has unequivocally stated that, when the shortfall occurs, it will pay nothing:

- "*Visteon . . . has consistently denied that it is obligated to pay whatever shortfall may occur*." (Exhibit 8, May 7, 2014 Letter from Visteon at 2) (emphasis added).

- "*[T]here is simply no amount left to be paid which could be accurately characterized as a PILOT*." (Exhibit 9, Visteon's Motion to Dismiss at p. 5) (emphasis added).

- "the Township quotes one letter in which Visteon estimated the maximum amount of any outstanding PILOT payment, if any, totals $6,125.06 at most. This was corrected by Visteon in later correspondence to reflect that *no amount is due.*" *Id.* at p. 5, n. 3 (emphasis added).

- "*Visteon admits that it disputes the Township's claim that Visteon has an obligation to pay in full the Shortfall* [.]" (Exhibit 7, Visteon Discovery Responses at RTA No. 4.)

- *"There is no payment due pursuant to Paragraph 3 of the 2010 Agreement. . . nothing more is owed under the 2010 Agreement*[.]" *Id.* at Int. Nos. 8-9.

Despite these clear admissions, incredibly, the Court of Appeals found: "the evidence does not show that defendant ever unequivocally declared its intention not to perform under Paragraph 3 of the Agreement when the time for performance actually arrives." (Ex. 1, Opinion, p. 8). This was an error, as the "affidavits, together with the pleadings, depositions, *admissions,* and *documentary evidence* then filed in the action or submitted by the parties, *must be considered by the court* when the motion is based on subrule (C)(1)-(7) or (10)." MCR 2.116(G)(5) (emphasis added). Moreover, "[a]ll admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact." *USA Cash # 1, Inc v Saginaw*, 285 Mich App 262, 266 (2009). Here, the Court did not consider "all" the admissible record evidence and certainly did not view the evidence in a light most favorable to the Township.

Instead, the Court of Appeals concluded that Visteon's repudiation position is "best illustrated in its counsel's statement at the hearing on defendant's motion for summary disposition" where Visteon's counsel made a perfunctory comment that "we view our duty and obligations [as] what's stated in that paragraph." (Ex. 1, Opinion, p. 9) (quoting Ex. 6, 2/2/16 Hrg. Tr., p. 49). However, Visteon's attorney's statement is not admissible evidence. "Statements made by counsel are not to be considered as evidence." *Papke v Tribbey*, 68 Mich App 130, 137; 242 NW2d 38, 42 (1976) (citing *Dalm v Bryant Paper Co*, 157 Mich 550, 556; 122 NW 257 (1909)).

Because counsel's statement is not admissible evidence, it should not have been relied upon by the Court of Appeals. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Lastly, to the extent the Court of Appeals found it proper to rely on the statements made at oral argument by Visteon's counsel, it somehow ignored the following statement by Visteon:

> THE COURT: Counsel for defendant, is it your position that, *even if a shortfall does occur . . . that the defendant is not obligated to pay any of that shortfall?*
>
> MR. HAMMER (Visteon's counsel): *That would be the conclusion if you reviewed the defenses we have in this matter. . .*
>
> THE COURT: That's not an answer to the question. Are you claiming that, *if it is determined with certainty that there is a shortfall*, *that under the provisions of the contract, your position is, your obligation could be zero*?
>
> MR. HAMMER: *If – if – yes.* [Ex. 6, 2/2/16 Hrg. Tr. at 45-47 (emphasis added)]

This, along with Visteon's numerous other admissions, was a clear repudiation and, therefore, the Township presented a ripe claim for adjudication.

III. THE COURT OF APPEALS FAILED TO APPLY THE PROPER STANDARD OF REVIEW

A. MCR 2.116(C)(4) Is Not the Proper Subrule for a Ripeness Issue Related to the Court's Constitutional Jurisdiction

Visteon moved to dismiss pursuant to MCR 2.116(C)(4) and (C)(8). A motion brought pursuant to MCR 2.116(C)(4) may be brought where "[t]he court lacks jurisdiction of the subject matter." Motions under MCR 2.116(C)(4) are typically brought where the state court lacks jurisdiction to hear a particular claim, for example, when the claim is preempted by federal law or where another court has been granted exclusive jurisdiction.[9] Subject matter jurisdiction "concerns

[9] *See e.g., Calabrese v Tendercare of Mich, Inc*, 262 Mich App 256, 260; 685 NW2d 313 (2004) (holding the "trial court erred in denying defendants' motion for summary disposition under MCR 2.116(C)(4) because plaintiff's claims of wrongful discharge and tortious interference are preempted by the NLRA [National Labor Relations Act] under the preemption doctrine"); *Bock v Gen Motors* Corp, 247 Mich App 705, 709-710; 637 NW2d 825, 828 (2001) 247 (noting "[q]uestions regarding the exclusive remedy provision of the Michigan Worker's Disability Compensation Act (WDCA) are reviewed pursuant to MCR 2.116(C)(4) to determine whether the circuit court lacks subject-matter jurisdiction because the plaintiff's claim is barred by the provision").

a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of the case." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001) (quotation and citation omitted). There is no basis here to argue the Trial Court lacked jurisdiction of the "subject matter" here, which alleges declaratory judgment and breach of contract claim governed by state law.

Michigan case law on the issue of which standard of review applies to a motion for summary disposition on the grounds of ripeness is unclear. In *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157-160; 683 NW2d 755 (2004), the Court of Appeals applied MCR 2.116(C)(4) to a ripeness motion; however, that was a takings clause case and the ripeness argument related to the plaintiff's failure to exhaust administrative remedies which was more accurately an issue of subject matter jurisdiction, similar to the issues presented in *Calabrese* and *Bock, supra.*

Two recent decisions, however, have rejected MCR 2.116(C)(4) as the appropriate subrule when the ripeness issue arises in a case in which the trial court would otherwise have jurisdiction. In *Broz v Plante & Moran*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2016 (Docket No. 325884 at 4-5) (Ex. 1), the court held: "regardless of the validity of the trial court's analysis on ripeness, MCR 2.116(C)(4) was not the proper subrule for dismissal on that ground. . . Because ripeness falls under constitutional jurisdiction, not subject matter jurisdiction, the trial court erred in treating MCR 2.116(C)(4) as a proper ground for granting defendant summary disposition on the issue of ripeness." The *Broz* court continued: "if the trial court's ripeness analysis were otherwise correct, the error would be merely technical in nature because summary disposition on the issue of ripeness may be decided under MCR 2.116(C)(10)." *Id.* (emphasis added). Five months later, in *Heritage Sustainable Energy, LLC v Heritage Wind*

Leasing, *LLC*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 20, 2016 (Docket No. 331279 at 2-3) (Ex. 3),[10] the Court rejected the notion that MCR 2.116(C)(4) was the proper standard to apply to a ripeness motion but unlike *Broz*, held that (C)(8) was proper:

> Initially, we note that while we have reviewed disputes regarding ripeness of a zoning dispute under MCR 2.116(C)(4), see *Braun* . . . we question whether addressing ripeness issues under MCR 2.116(C)(4) is consistent with the Supreme Court's precedent on subject matter jurisdiction . . . In *Travelers*, the Supreme Court stated that the doctrine of subject matter jurisdiction was a distinct and separate doctrine from that of primary jurisdiction and found that the circuit court had erred in considering a motion based on primary jurisdiction under MCR 2.116(C)(4) . . . The *Travelers* Court also stated that the doctrine of primary jurisdiction, which it distinguished from subject matter jurisdiction, id., was similar to the doctrines of standing, mootness, and ripeness . . . Similarly, the lead opinion in *Mich Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, . . . concluded that justiciability doctrines such as ripeness concern "constitutional jurisdiction" that concern a court's authority to hear and decide a particular case and are doctrines distinct from that of subject matter jurisdiction. *We conclude that issues such as ripeness and finality are more appropriately addressed under MCR 2.116(C)(8) because they concern whether a specific plaintiff in a specific case has a viable cause of action against a specific defendant, not whether the circuit court has subject matter jurisdiction over the class of cases that are of a kind or character of the one pending.* (emphasis added).

The *Heritage* Court specifically noted that a dispute over which "specific sub-rule used to support and justify the motion is not dispositive", but only if the "substantive analysis and decision are not affected" by application of that standard of review. *Id.* (citing *Travelers*, 465 Mich at 205 n 18).

Six months after *Heritage*, the Court of Appeals issued the Opinion (which is set for publication), yet the Court of Appeals declined to clarify the proper standard of review. The court stated that "the parties contest the propriety of dismissal pursuant to MCR 2.116(C)(4)" but determined "[a]lthough we acknowledge inconsistencies between published decisions of this Court and more recent unpublished decisions regarding whether subrule (C)(4) supports dismissal for

[10] *Heritage* was issued after briefing was complete in the Court of Appeals and just two weeks before oral argument.

failure of justiciability grounds such as ripeness . . . we need not address the conflict here" because "[b]oth parties concede that summary disposition . . . is properly considered pursuant to MCR 2.116(C)(10)," and further, any error in applying the wrong standard of review was "harmless." (Ex. 1, the Opinion, p. 2-3). As set forth in the lower court's records, the Township vigorously disagrees on each of these points.

First, the Township did not concede that review under (C)(10) was proper. In fact, both parties emphasized to the Trial Court that this was not a motion under (C)(10). At the Motion hearing, the Township stated: "It's important to note that this motion is being brought under C4 and C8 under ripeness. It is not a summary disposition on (C)(10) . . . So it's very important to note that this a ripeness motion, not a C10 motion[.]" (Ex. 6, 2/2/2016 Hrg. Tr., p. 14-15). The Township also dedicated an entire section of its brief to the Court of Appeals to "The Trial Court Failed to Apply the Proper Standards of Review." (*See* Brief on Appeal at p. 28). Visteon's counsel also agreed that it was not moving under (C)(10) at the Motion hearing: "This is a C4 and a C8 motion. *This isn't a C10 and counsel brought up very clearly, it's not a C10."* (Ex. 6, 2/2/16 Hrg. Tr. at 48) (emphasis added). Despite this clarity from both parties, the Court of Appeals applied a (C)(10) standard.

Moreover, given that the context of the Motion was as an initial responsive pleading by Visteon, the Trial Court's application of the more deferential standard of review embodied in (C)(8) is critical. One example of the impact of the different standard is the Trial Court and Court of Appeals' finding that the Township's claims were not ripe due to the Township's damages were "hypothetical" and not "certain." Under a (C)(8) standard, the allegations set forth in the Township's complaint must be accepted as true. *Mich Ins Repair Co, Inc v Manufacturers Nat'l Bank of Detroit*, 194 Mich App 668, 673; 487 NW2d 517 (1992). All

factual allegations in support of the claims are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* This is a highly deferential standard, and if applied properly, the Court of Appeals should have concluded that, for the purposes of the Motion, the shortfall was "certain," not contingent, because the Township had met its pleading requirements.

By way of further example, the Court of Appeals' finding that there was "no evidence" to support the Township's claim of anticipatory repudiation is wholly improper under a (C)(8) standard, as there should not be any weighing of the evidence or credibility assessment at this stage. Rather, the Trial Court should have viewed all of the factual allegations in the complaint as true. Even if the Motion was being reviewed under a (C)(10) standard, it should have been denied, as the Motion had no support of any kind and, therefore, Visteon failed to meet its burden under (C)(10) to begin with. "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion ***are required*** . . . when judgment is sought based on subrule (C)(10)." MCR 2.116(G)(3) (emphasis added).

IV. THE COURT OF APPEALS ERRED IN ITS FINDING THE SHORTFALL "HYPOTHETICAL" AND "CONTINGENT" BASED ON A FACTUAL ERROR BY THE COURT AND DUE TO THE IMPROPER DISREGARD OF THE TOWNSHIP'S EXPERT REPORT

A. The Township's Damages Were Not Contingent As There Is No Bond Refinancing Available to Prevent the Shortfall

The Court of Appeals made further reversible error when it affirmed the Trial Court by finding that the Township's "injury" and damages were too speculative and "contingent" to support a ripe claim. (Ex. 1, Opinion at 6-7). In the Opinion, the Court of Appeals found that the Township's damages depended on "multiple contingencies," and in support, claimed the Township "admitted at the hearing on defendant's motion for summary disposition that it was in the process of obtaining another bond restructuring agreement" and "*[t]his admission alone* illustrates the

contingent nature of plaintiff's alleged damages." *Id.* at 7 (emphasis added).

However, the Court of Appeals' assertion as to this "admission" by the Township's counsel is categorically incorrect. The Township clarified at oral argument that there is no option to refinance of the Bonds any further before the shortfall so there is no "contingency" that can still occur to prevent the shortfall:

> MR. KASHEF: On their face, the capital appreciation bonds cannot be refinanced . . . The Township cannot prepay that . . .
> THE COURT: And when can the capital appreciation bond be refinanced?
> MR. KASHEF: *Never*.

(Ex. 6, 2/2/16 Hrg. Tr., p. 20-21, 30; see also p. 28-29) (emphasis added). The Court of Appeals opined that the Township's damages were speculative on an erroneous assertion that a refinancing was in process which could prevent a shortfall. This assumption was inaccurate, and if corrected, the court's ruling that the Township's damages are wholly speculative is unsupported.

B. The Appellate Court Improperly Disregarded the Township's Expert Report

The Court of Appeals affirmed the Trial Court's findings that the Township's damages were "speculative" based, in part, on the fact that the Township's municipal finance expert report opined that a "cash shortfall is inevitable if new revenues are not introduced." (Ex. 1, Opinion, p. 7). As a threshold matter, Michigan law does not require a plaintiff's request for damages in the complaint be supported by an expert report or contain any level of certainty. A complaint must only contain:

> (1) A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend; and
> (2) *A demand for judgment for the relief that the pleader seeks.* If the pleader seeks an award of money, a specific amount must be stated if the claim is for a sum certain or a sum that can by computation be made certain . . . *Otherwise, a specific amount may not be stated,* and the pleading must include allegations that show that the claim is within the jurisdiction of the court. *Declaratory relief may*

> *be claimed in cases of actual controversy. See MCR 2.605.* Relief in the alternative or relief of several different types may be demanded. [MCR 2.111(B) (emphasis added)]

The Township went well beyond any minimum pleading standard and attached an expert report. Yet, the Court of Appeals' administered an unwarranted, unrequested and uneducated[11] analysis to reach the conclusion that the report was, on its face, incapable of supporting a claim for damages, even at the mere pleading stage of the case. Once again, the procedural posture of this case must be considered: no expert discovery had been conducted; Visteon had not retained an expert or produced a counter report; Visteon had not filed a *Daubert* motion to exclude the Township's expert. In fact, in response to the Township's first discovery requests, Visteon admitted that it had not retained any consultants to analyze the shortfall and, when asked to identify all "inaccuracies, disputes with . . . and reasons why you object, if at all, to the PFM Report[,]" Visteon responded that it "has not yet studied the PFM Report for computation errors or other objections." (Ex. 7, Visteon Discovery Responses at Int. No. 4, 10).

Since Visteon had not "studied the PFM Report for computation errors or other objections" nor had its expert to opine as to the validity of the PFM Report, Visteon's Motion was based on nothing more than its *attorney's* assertion (or, equally wrong, judicial opinion) that the shortfall was a mere "hypothetical." The Court of Appeals' usurpation of the Trial Court or jury is highlighted in the following excerpt from the Opinion:

> [Although] defendant has not provided any independent report or any document specifically refuting the findings contained within the PFM Report, defendant was not required to do so, as the factual uncertainty of plaintiff's damages is apparent from the PFM Report itself.

(Ex. 1, Opinion at 7). Any credibility concerns with the Township's expert should have been

[11] Neither the Trial Court nor the Court of Appeals had any foundation to conclude in any way—in favor or against—as to the credibility of or conclusions within the Township's expert's report. No *Daubert* hearing had been held, and there was no competing expert testimony submitted by Visteon.

addressed in the Trial Court; the Court of Appeals had no authority—particularly on a mere threshold justiciability issue—to reach any conclusions regarding the Township's expert report. The reliability or credibility of an expert report is a question of fact for trial. *See Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998) ("Critically, the court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition."); *Surman v Surman*, 277 Mich App 287, 309; 745 NW2d 802, 815 (2007) (noting a court's "doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility."); *City of Pomona v SQM North America Corp*, 750 F3d 1036, 1049 (CA 9, 2014) ("A factual dispute is best settled by a battle of the experts before the fact finder, not by judicial fiat. Where two credible experts disagree, it is the job of the fact finder, not the trial court, to determine which source is more credible and reliable.")

Even assuming the credibility and conclusions of the expert report were correctly within the authority of the Court of Appeals, its conclusions remain incorrect. As set forth in the report, the occurrence of a shortfall is a mathematical certainty. The amount of property taxes being collected by the Township *is 80% less than what was budgeted for* and is simply not enough to permit the Township to meet its payment obligations on the bonds. PFM concluded that a payment shortfall on the bonds was "certain" to occur, that the Township would "not have sufficient funds to meet the debt service obligations" on the bonds, and that a "cashflow shortfall is inevitable[.]" (Ex. 4, Complaint, ¶¶ 39-40 (quoting PFM Report, pp. 20-21). The PFM Report's conclusions in this regard are undisputed. Tellingly, the only people who have concluded that the expert analysis is "flawed" in some way are non-experts, who are not qualified to render opinions as to how to properly conduct financial analysis for municipal bond

payments. Essentially, without a counter-report or cross-examination, and in entirely the wrong context, the Court of Appeals has questioned the report and conclusions of one of the foremost experts in the field of municipal finance.

Respectfully, the judges of the Trial Court and Court of Appeals are not municipal finance experts, capable of unilaterally discerning what the proper methodology is for a municipal finance bond payment analysis. Reports like the PFM Report are commonplace in municipal finance disputes, as the Township's—and, likely, Visteon's—experts would have testified. Experts create financial projections based upon numerous assumptions and factors such as future revenue, property taxes, and other income streams for the municipality and opine within a reasonable degree of certainty what a municipality's future cash flows will be. *See e.g.*, *In re City of Detroit*, 524 BR 147, 224-244 (2014) (approving the credibility and admissibility of finance experts' testimony based upon projections of future revenue and property tax collections, including municipal finance projections 40 years into the future). Indeed, Visteon admitted that it was going to have its expert undertake the same analysis that PFM had performed. (Ex. 6, 2/2/2016 Hrg. Tr. at 53) (noting that Visteon's recently retained municipal finance expert was going to "do a full analysis over a 13-year period" of "finances and any variable that can happen"). In addition, in 2010, when Visteon sought approval of the Agreement in the Bankruptcy Court, Visteon admitted that it fully expected a shortfall to occur but acknowledged that its precise date was unknown, as it was "*dependent on a number of factors*[.]" (Ex. 5, Debtor's Motion for Entry of An Order Approving Settlement Agreement).

Nevertheless, the Court of Appeals' analysis went well beyond the narrow issue of ripeness and concluded that the Township's damages were speculative, despite the fact that Visteon failed to meet its burden to provide support for its Motion (if analyzed under a (C)(10) standard). Under *any*

of the potentially applicable standards of review—(C)(4), (C)(8) or (C)(10)—the Court of Appeals' critical review of the Township's expert report was improper.

CONCLUSION AND RELIEF REQUESTED

For the above-stated reasons, the Township respectfully requests that this Honorable Court enter an order: (1) granting its application for leave to appeal or an order or per curiam opinion peremptorily reversing the opinion of the Court of Appeals (and the order of the Trial Court) which dismissed the Township's complaint on ripeness grounds, and (2) remanding the case to the Trial Court to proceed on the merits.

Respectfully submitted,

CLARK HILL PLC

By: /s/ Kaveh Kashef

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PROOF OF SERVICE

I hereby certify that on June 27, 2017, I filed with foregoing Application for Leave to Appeal with the clerk of the Michigan Supreme Court using the TrueFiling E-File and Serve Program, which will send notification to all counsel of record. I further certify that the Notice of Filing Application for Leave to Appeal has been filed with the Wayne County Circuit Court and the Michigan Court of Appeals.

Respectfully submitted,

CLARK HILL PLC

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