STATE OF MICHIGAN

IN THE SUPREME COURT

VAN BUREN CHARTER TOWNSHIP,	
Plaintiff-Appellant,	Docket No. 156018
v.	Court of Appeals No. 331789
VISTEON CORPORATION,	Wayne County Circuit Court LC No. 15-008778-CK
Defendant-Appellee,	Hon. Muriel D. Hughes

DEFENDANT-APPELLEE VISTEON CORPORATION'S ANSWER TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

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Should the Court deny leave to appeal, when the Court of Appeals applied well-established ripeness principles to affirm the trial court's determination that the hypothetical and speculative nature of the Township's claims concerning Visteon's *potential* obligations to the Township in the event of a bond payment shortfall *that has not yet occurred* (and that may never occur) meant that there was no "actual controversy" for purposes of the Township's request for declaratory relief, nor a ripe breach of contract claim?

The Court of Appeals would answer: Yes.

Visteon answers: Yes.

I. INTRODUCTION

The Court should deny leave to appeal because this case presents no issues of jurisprudential significance warranting this Court's review. Equally important, the Court of Appeals did not commit any error. On the contrary, the Court of Appeals, in a unanimous opinion, correctly affirmed the trial court's dismissal of the Township's breach of contract and declaratory judgment claims court on ripeness grounds. As both the trial court and Court of Appeals determined, the Township's claims are based on nothing more than a "projected" future bond shortfall that even the Township concedes will not occur until 2019, if ever, as well as the Township's speculation as to how Visteon *might* respond under the settlement agreement if and when a shortfall does occur. Until that time, there is simply nothing for a court to decide. By definition, the Township's claims are unripe.

Despite the Township's assertion that Visteon has already repudiated its obligations under the parties' settlement agreement, the Court of Appeals appropriately recognized that the agreement *does not require any action whatsoever* on Visteon's part unless there is first an actual bond shortfall, which there is not. Under the plain terms of the settlement agreement, only if there is an actual shortfall does Visteon have an obligation to "negotiate" with the Township, and, once negotiations determine the amount of the shortfall that is attributable to that portion of the bonds that were specifically used to help finance Visteon's headquarters facility (not the entire bond shortfall as claimed by the Township), Visteon then has an obligation to "assist" the Township by making a "non-tax payment, payment in-lieu-of ta[x] (PILOT)." Not only have these obligations not yet been triggered, they may never be triggered. The Court of Appeals' recognition of this obvious reality was not an improper "merits" determination.

In arguing that its claims are ripe for adjudication now, the Township relies entirely on a report from its expert, Public Financial Management, Inc. ("PFM"), setting out no fewer than

fifteen different "projected shortfall" scenarios. According to the Township, the PFM report supports that a shortfall in some amount is "inevitable." But as the Court of Appeals explained, that report – prepared in 2013 and projecting a bond shortfall in 2017 or 2018 – is speculative and has since been superseded and nullified by subsequent events that occurred after the Township's complaint and Visteon's motion for summary disposition were filed. These events included the Township retiring a portion of the bonds (using funds it received from Visteon) and refinancing the remainder, which resulted in the Township admitting that despite the conclusions in PFM's report, no bond shortfall would occur before 2019 at the earliest, if at all. Moreover, even if a bond shortfall were to occur at some point in the future, there is no way to know the amount, or what Visteon's obligation, if any, to make a PILOT payment might be. In short, without an *actual* shortfall, there is no ripe breach of contract claim, and no "actual controversy" for purposes of issuing a declaratory judgment.

In arguing that adjudication is necessary to guide its "future conduct" in planning and budgeting in an effort to avoid a bond shortfall, the Township misses the point of declaratory relief. It is not to assure a plaintiff of the correctness of its legal position with respect to a hypothetical future dispute so that the plaintiff can make contingent arrangements to deal with the potential outcome of such a dispute. When courts talk about issuing a declaratory judgment to "guide a plaintiff's future conduct," it is "'*to preserve his legal rights*.'" *Associated Builders & Contractors v Dir of Consumer & Indus Servs Dir*, 472 Mich 117, 125; 693 NW2d 374 (2005), overruled in part on other grounds by *Lansing Sch Ed Ass'n v Lansing Sch Dist Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), quoting *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978) (emphasis added).

Here, the trial court and Court of Appeals both understood that the Township does not need declaratory relief to "preserve [its] legal rights" with respect to its contractual relationship with Visteon. Under the parties' agreement, the Township is entitled to receive a specific payment from Visteon if and when certain conditions occur, triggered by an actual bond shortfall. In that event, and if Visteon does not comply with its obligations, then a ripe dispute will be presented. But until then, there are no "legal rights" for a court to adjudicate, and they are fully preserved for when there *is* a ripe dispute.

The Court of Appeals correctly decided the Township's appeal, and its opinion does not present any matters worthy of this Court's consideration. The Court should therefore deny leave to appeal.

II. COUNTER-STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

A. With the assistance of tax increment bonds and certain tax incentives, Visteon built its headquarters facility in the Township's "Local Development Finance Authority District."

In 2002, the Township established a 714-acre Local Development Finance Authority District ("LDFA District") in an effort to encourage economic development within the Township. (Visteon's Mot for Summ Disp at 1 (Ex 9 to the Twp's App for Lv)). In 2003, the Township issued what are known as "tax increment" bonds, in the amount of $28,199,656.35, to assist Visteon in constructing a new headquarters facility, known as "Visteon Village," in the LDFA District. (*Id*.). The bonds were to be paid from captured taxes on property in the district. (*Id*.). Visteon's own cost to build the facility was approximately $250 million. (*Id*. at 1-2).[1]

[1] In 2012, Visteon sold the facility (which was renamed the "Grace Lake Corporate Center") for approximately $81.1 million and leased a portion of the facility back. General Electric is another major tenant of the facility. (*Id*. at 2 n 1).

As part of its development agreement with the Township, Visteon also received certain property tax exemptions pursuant to the Plant Rehabilitation and Industrial Development Districts Act, MCL 207.551 et seq., which provides "a tax incentive to manufacturers to enable renovation and expansion of aging facilities, assist in the building of new facilities, and to promote the establishment of high tech facilities."[2] Visteon obtained an "Industrial Facilities Exemption Certificate" exempting Visteon's property from the general property tax, instead subjecting it to the lower tax on industrial facilities. (*Id*. at 2).[3]

B. During Visteon's subsequent bankruptcy, Visteon and the Township reached an agreement to resolve certain disputes between the parties.

On May 28, 2009, in the face of an unforeseen and severe economic downturn in the automotive industry, Visteon filed for Chapter 11 bankruptcy. (*Id*.). During the course of Visteon's bankruptcy, a number of disputes arose between the parties concerning the value of Visteon's property for tax purposes, as well as Visteon's inability to meet certain its personnel commitments under its tax abatement agreements with the Township. (*Id*.; see also "Agreement and Mutual Release," Ex A to the Twp's Complaint (attached as Ex 4 to the Twp's App for Lv)).

On January 25, 2010, the parties reached a settlement. At issue here is paragraph 3 of the parties' "Agreement and Mutual Release," in which Visteon agreed that

> [t]o the extent that the property tax payments made by Visteon to the Township . . . 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,

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[2] See "Industrial Facilities Exemption," located at <http://www.michigan.gov/taxes/0,4676,7-238-43535_53197-213175--,00.html> (accessed July 17, 2017).

[3] As the Township notes at pages 6-8 of its application, the taxable value of Visteon's property was later reduced by the tax assessor. But that simply suggests that the Township had overvalued the property. Pursuant to MCL 211.27a(1), "property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963." Further, intentional overassessment or underassessment is both a crime (MCL 211.116) and subjects the assessor to personal liability (MCL 211. 119(1)).

> 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."

In other words, in the event of an actual bond shortfall (i.e., if Visteon's "property tax payments . . . are inadequate to permit the Township to meet its payment obligations"), Visteon agreed that it would "negotiate" with the Township over the "amount of the shortfall" and the extent to which it is attributable to that portion of the bonds "that were used to help fund the Village." Only then would Visteon have an obligation to assist the Township by making a "PILOT" payment to the Township, which is a specific payment made "to compensate a local government for some or all of the tax revenue that it loses because of the nature of the ownership or use of a particular piece of real property." See 14 McQuillin Muni Corps, § 38:5 (3d ed).[4]

Visteon also agreed not to object to a claim that the Township filed in the bankruptcy in the amount of $9,831,427.66, which included $7,054,936.88 to cover all of the taxes that Visteon owed under the tax abatement agreements, both retroactively and prospectively. (Visteon's Mot for Summ Disp at 2, citing Agreement and Mutual Release at ¶ 2.1). Visteon emerged from bankruptcy on October 1, 2010.

[4] Beyond the general usage, and municipal law definition referenced above, in the context of agreements concerning tax-exempt municipal bonds, the term "PILOT" is defined in federal treasury regulations and has important tax exemption implications. See, e.g., Treas Reg 1.141-4(e)(5)(i) (which is described in Visteon's Mot for Summ Disp at 5, n 2). Since the settlement agreement addresses certain municipal bonds sold as tax-exempt bonds, the agreement's use of the term "PILOT" payment, consistent with the treasury regulations, means that any such payment cannot exceed the tax revenue lost due to Visteon's property tax exemption (i.e., the payment cannot exceed the amount of the taxes that would be otherwise be due). If it does, the bonds' tax-exempt status could be jeopardized. Under those same treasury regulations, a guaranty of full payment of any shortfall would not be a PILOT, and such a commitment would also jeopardize the tax-exempt status of the bonds (because instead of being a public-finance transaction based on the full faith and credit of the municipality, which is what confers the special tax-exempt status, the transaction instead would be viewed as a private commercial transaction and would not be entitled to special tax treatment).

C. After receiving projections of a future shortfall in tax revenues necessary to make its bond payments (and despite the lack of any actual shortfall), the Township demanded that Visteon meet to determine Visteon's obligation to assist with those payments.

In 2013, the Township engaged an outside consultant, Public Financial Management, Inc. ("PFM"), to perform an analysis of the Township's ability to meet its payment obligations under the bonds. (*Id*. at 3). The PFM report set out fifteen different "projected shortfall" scenarios, ranging between $23.7 million and $36.4 million, and predicting that a shortfall would occur between 2017 and 2018. (See Complaint at ¶¶ 39-41 and Ex C ("Charter Township of Van Buren Local Development Financing Authority Cash Flow Review")). The report recognized that the occurrence of a bond shortfall, as well as the amount of any such shortfall, depended on various assumptions regarding future events that could affect property taxes in the LDFA District and other sources of revenue with which to pay the bonds. (*Id*.).[5]

On September 9, 2013, based solely on PFM's shortfall projections, the Township wrote to Visteon demanding that Visteon immediately meet and negotiate "the amount of the shortfall." (Complaint, Ex D). Visteon responded that any such meeting was "premature," and that while Visteon "intend[ed] to meet its obligations," it would not "extend or modify its obligations." (See October 8, 2013 letter to the Township's counsel (Complaint, Ex E)). Specifically, Visteon disagreed with the Township's position that it was required to pay the entire amount of any shortfall, as opposed to a specific, yet-to-be-determined PILOT payment:

[5] Throughout its application, the Township characterizes the PFM report as "unrefuted," but that is plainly inaccurate. First of all, Visteon has, throughout this case, repeatedly pointed out the speculative nature of PFM's analysis. Second, despite the Township's suggestion, Visteon had (and has) no obligation to "retai[n] any consultants" or "presen[t] a counter-analysis" outside of the ordinary litigation process. The settlement agreement does not require Visteon to supply any sort of pre-litigation analysis, and because the Township's lawsuit was dismissed solely on ripeness grounds in response to Visteon's first responsive pleading, the merits of PFM's "projected shortfall[s]" were never put at issue.

> [C]oncerning the amount of the assistance to be provided . . . the language of the Agreement does not require the payment that the Township seeks. . . . By describing the assistance payment as a PILOT, the Agreement limits any reasonable expectation on the part of the Township to an undefined portion of the tax which was caused to be exempt by the [industrial facilities exemption certificate], once the shortfall begins. . . . [*Id.*]

Nevertheless, Visteon agreed to meet to discuss the parties' respective positions concerning Visteon's obligations under the settlement agreement. (*Id.*). As the Township concedes, beginning on February 6, 2014, the parties met in person on at least three occasions, had numerous teleconferences, and corresponded in writing. (Complaint at ¶ 45). Throughout those discussions, Visteon maintained its view that, despite the Township's insistence, it was not obligated to simply pay "whatever shortfall may occur." (May 7, 2014 letter from Visteon's counsel to the Township's counsel (Ex 8 to the Twp's App for Lv)).[6]

D. When negotiations did not go as the Township had hoped, the Township sued Visteon for breach of contract and a declaration that Visteon was responsible for any bond shortfall.

Not satisfied with the progress of the parties' negotiations, the Township sued Visteon on June 30, 2015, alleging breach of contract (Count I) and seeking a declaration regarding the parties' rights under paragraph 3 of the settlement agreement (Count II). (Complaint, attached as

[6] It is thus misleading for the Township to assert that Visteon "denied that it had any contractual obligation to pay the tax shortfall," a claim that the Township seeks to support by quoting from Visteon's various communications, filings, and discovery responses, as well as comments that Visteon's counsel made at the hearing on Visteon's motion for summary disposition. (See the Twp's App for Lv at 10-12). Instead, Visteon disputed the Township's position that Visteon had to reimburse the Township for the entirety of any shortfall, and pointed out that any PILOT payment under the settlement agreement would have to account for any taxes Visteon had already paid the Township. As Visteon's counsel explained at the summary disposition hearing, trying to determine "if this, this and that occurs, then what will your position be" was precisely why "this case isn't ripe." (2/2/16 Hrg Tr at 48 (Ex 6 to the Twp's App for Lv)). Counsel then reiterated what Visteon had been saying all along – i.e., that although Visteon believed that "little, if anything would be due" in the event of a shortfall, it was Visteon's position "that we have a duty, if there is a shortfall[,] to negotiate in good faith the amount. And then to make a non-tax payment, payment in lieu of tax to the Township to assist the Township. That's our position." (*Id.*).

Ex 4 to the Twp's App for Lv).[7] The Township claimed that Visteon was in breach of its obligation to "negotiate" with the Township *now* concerning what the Township claimed was going to be an "inevitable" bond shortfall, and requested a declaratory judgment that Visteon was required to pay "the totality of the shortfall amount." (*Id*. at ¶¶ 40 and 49; see also ¶¶ 58 ("make up any shortfall") and 60 ("make up any projected shortfall")). The Township claimed that Visteon had an immediate obligation to "provide – or commit to provide – the Township with funds to pay for any shortfall," even though no shortfall had occurred, and according to its own expert was only "projected." (*Id*. at ¶ 61).[8]

E. The trial court agreed with Visteon that the Township's claims were not ripe and dismissed the Township's lawsuit.

In response, Visteon filed a motion for summary disposition on August 28, 2015, arguing that the Township's claims were not ripe for adjudication because they were based on allegations that the Township *may* experience a bond shortfall in the future. Visteon argued that the Township was only alleging theoretical future harm, and that because the Township was essentially seeking an advisory opinion regarding events that will not occur until 2018 (or 2019), and that may never occur at all, its claims had to be dismissed on ripeness grounds. (See

[7] The Township initially filed suit in the United States Bankruptcy Court of the District of Delaware, but the parties agreed to dismiss that lawsuit without prejudice because the bankruptcy court lacked jurisdiction. (See Visteon's Mot for Summ Disp at 4). The Township then refiled in Wayne County Circuit Court. (*Id*.).

[8] At page 8 of its application, the Township asserts that "the [p]arties 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." The Township, however, provides no support for that assertion. Visteon did not know there would be a shortfall, and as discussed further below, lots of things could happen to delay or prevent one altogether, including property value increases, a greater rate of return on the Township's investments, additional development in the LDFA District, and refinancing of the bonds (which the Township already did and could do again, notwithstanding its unsupported claim that "there are no further refinancing options" (see the Twp's Br App for Lv at 9 n 3)).

Visteon's Mot for Summ Disp at 7-14; see also Visteon's Reply Br in Support of Mot for Summ Disp (**Tab A**)).

On February 2, 2016, the trial court held a hearing on Visteon's motion for summary disposition. (See 2/2/16 Hrg Tr, attached as Ex 6 to the Twp's App for Lv). The trial court took the motion under advisement, and on February 11, 2016, issued its opinion from the bench. Contrary to the Township's assertion that the trial court offered "little analysis" in support of its decision, the court carefully summarized the parties' positions and the basis for its conclusion that the Township's claims were not ripe:

> Plaintiff alleges that it will experience a shortfall on certain bond debts, service payments due to the inadequate tax payments by Visteon. And that pursuant to the terms of the settlement agreement, Visteon is required to negotiate in good faith, the amount of the shortfall with respect to the bonds and assist the Township in making timely payments on the bonds.
>
> Defendant argues that the breach of contract claim is not ripe because it is based solely on theoretical future harm with the projected shortfall that is put forth in a report to occur in 2017 and the latest report, the predicted shortfall is in [2019].
>
> And defendant argues that the request for [declaratory] judgment fails to present an actual controversy under MCR 2.605. And is therefore not ripe for adjudication.
>
> * * *
>
> The Court agrees with the defendant that this case epitomizes why the ripeness doctrine exists, mainly to prevent courts from becoming prematurely embroiled in complex disputes involving hypothetical and contingent facts when, especially when the projected [shortfall] is estimated three years from now. [See 2/11/16 Hrg Tr at 4-5, attached as Ex 10 to the Twp's App for Lv.]

The trial court entered an order dismissing the Township's lawsuit "without prejudice" on February 18, 2016. (See Ex 11 to the Twp's App for Lv).

F. The Court of Appeals affirmed in a unanimous opinion.

On May 16, 2017, the Court of Appeals issued a unanimous opinion affirming the trial court's determination that the Township's claims are not ripe for review. (COA Op, attached as

Ex 1 to the Twp's App for Lv). The Court first addressed the trial court's rejection of the Township's request for declaratory relief, observing that Visteon is "not obligated to perform until after two conditions have been met: (1) a shortfall has occurred, and (2) property taxes paid by defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village." (*Id*. at 5). The Court reasoned that because "[t]his second condition cannot be met until after the shortfall has occurred and the parties have determined the amount due," there was no "actual controversy" for purposes of declaratory judgment. (*Id*.).

The Court of Appeals then addressed what it considered to be the "speculative" nature of the Township's alleged damages, agreeing with Visteon and the trial court that the "very language" of the PFM made it "apparent" that any shortfall projections were merely "hypothetical." (*Id*. at 6-7)

Finally, the Court of Appeals held that the Township's breach of contract claim was not ripe for review because Visteon "could not have breached its contract by failing to perform before the time of performance has even arrived":

> [T]he terms of the contract are unambiguous. Defendant is not obligated to engage in good faith negotiations to determine the amount of a bond payment shortfall it is required to pay until after the bond payment shortfall has occurred. At this time, the bond payment shortfall is still only a projection, and defendant could not have breached its contract by failing to perform before the time of performance has even arrived. Plaintiff's claim that defendant already breached the contract by failing to negotiate therefore fails. Without an actual injury resulting from a breach of contract, the trial court properly dismissed plaintiff's breach of contract claim as not ripe for adjudication. [*Id*. at 8.]

In reaching that conclusion, the Court rejected as "meritless" the Township's argument that Visteon had "anticipatorily repudiated its obligation to pay any amount of the bond payment shortfall":

> [E]ven when considered in a light most favorable to plaintiff, the evidence does not show that defendant ever unequivocally declared its intention not to perform under Paragraph 3 of the Agreement when the time of performance actually

> arrives. Despite plaintiff's argument to the contrary, none of the evidence it points to on appeal proves that defendant is unwilling to negotiate or to pay any amount of the bond payment shortfall. Defendant simply maintains its position that it is not obligated to negotiate until after the shortfall has occurred, that it is not required to pay any amount of the bond payment shortfall until after it has occurred, and that it is not required under Paragraph 3, in any case, to pay the full amount of the bond payment shortfall as claimed by plaintiff's projections. [*Id*.].

III. ARGUMENT

A. This Court reviews summary disposition and justiciability issues de novo, regardless whether MCR 2.116(C)(4) or (C)(10) applies.

Visteon agrees with the Township that this Court reviews de novo the trial court's decision to grant summary disposition in Visteon's favor. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). As it did in the Court of Appeals, the Township takes issue with whether a motion for summary disposition on ripeness grounds is properly evaluated under MCR 2.116(C)(4), which provides for summary disposition when "[t]he court lacks jurisdiction of the subject matter." (See the Twp's App for Lv at 28-32). This is a non-issue because the Township acknowledged in its Court of Appeals briefing that even if MCR 2.116(C)(4) does not apply, "the proper basis for Visteon's motion was a motion for summary disposition brought under MCR 2.116(C)(10)." (See the Twp's COA Br at 30, citing *Broz v Plante & Moran*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2016 (Docket No. 325884)).[9] Whether a ripeness challenge is evaluated under MCR 2.116(C)(4) or (C)(10), the applicable review standard is the same.

"In considering a motion challenging jurisdiction under MCR 2.116(C)(4), a court must determine whether the affidavits, together with the pleadings, depositions, admissions, and

[9] The Township makes much of the fact that the parties distinguished between MCR 2.116(C)(4) and (C)(10) during the hearing on Visteon's motion for summary disposition. Regardless, the fact of the matter is that while Visteon did bring its motion under MCR 2.116(C)(4) and (C)(8), the Township submitted matters outside of the pleadings in its response. As the Court of Appeals observed, that brought MCR 2.116(C)(10) into play. (COA Op at 2-3).

documentary evidence, demonstrate that the court lacks subject matter jurisdiction." *CC Mid West, Inc v McDougall*, 470 Mich 878; 683 NW2d 142 (2004). Similarly, "[i]n evaluating a motion for summary disposition brought under [MCR 2.116(C)(10)], a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" to determine whether "the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120. Under either standard, justiciability-related questions such as ripeness are questions of law that are reviewed de novo. *Michigan Chiropractic Council v Commr of Office of Fin & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006), overruled in part on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). For that reason, the Township's protestations about discovery being incomplete ring hollow. No amount of discovery was going to change the simple fact that the Township's lawsuit was premature.

B. The Court of Appeals did not decide the "merits" of the Township's claims in affirming the trial court's ripeness determination.

For its first argument, the Township claims that the Court of Appeals improperly "adjudicated the rights and obligations of the parties" in evaluating the ripeness of the Township's claims. (See the Twp's App for Lv at 15). It did no such thing. In concluding that the Township failed to present an "actual controversy" justifying declaratory relief or permitting a breach of contract claim to proceed, the Court of Appeals merely observed that the plain language of the settlement agreement did not support the Township's position that Visteon was required to "negotiate" the "amount" of a bond payment shortfall that had yet to occur. (COA Op at 4-6, 8). In reaching that common sense conclusion, the Court of Appeals hardly reached "the substantive merits of the case." On the contrary, the Court simply recognized that Visteon "could not have breached its contract by failing to perform before the time of performance has

even arrived." (*Id*. at 8). In other words, the Court expressly reserved the *merits* of the Township's claims for future determination.

The Township seems to think that if a court even looks at the provisions of the parties' contract in evaluating a ripeness issue, then it has improperly reached the "substantive merits" of the case. But if that were true, a court could never assess whether a breach of contract claim is ripe. In order to make such a determination, it is necessary to understand what the contract requires and whether a justiciable controversy exists. The federal court's decision in *Moynihan v West Coast Life Ins Co*, 607 F Supp 2d 1336 (SD Fla, 2009), provides a good example. The plaintiff in *Moynihan* filed a lawsuit for breach of contract seeking proceeds under a life insurance policy. The plaintiff claimed that "once the insured [was] deceased and a death certificate [was] presented, he [was] entitled to the policy's benefits." *Id*. at 1338. The court, however, found the dispute to not yet be "ripe for adjudication" because there was an incontestability provision "permit[ting] the Defendant to investigate and determine whether the policy should have issued in the first place if death occurs during the first two years of the policy's life." *Id*. The court observed that there had "not been any determination by the [insurer] as to whether the policy should have issued or how it plan[ned] to proceed," and concluded that "until it exercise[d] its rights under the policy to deny the claim, Plaintiff cannot maintain that there has been a breach or that his rights have been affected." *Id.* at 1339.

This case is no different. The crux of both the Township's declaratory judgment and breach of contract claims is its allegation that Visteon is responsible for any bond payment "shortfall":

COUNT I – BREACH OF CONTRACT

*** * ***

> WHEREFORE, the Township requests this Court enter judgment in its favor and against Visteon ***for the total amount of any shortfall*** on the Bond debt service payments pursuant to the Parties' Agreement. . . .
>
> **COUNT II – DECLARATORY JUDGMENT**
>
> *** * ***
>
> 71. WHEREFORE, the Township . . . respectfully requests the Court enter a declaration that Visteon is responsible for ***payment of any shortfall*** in the Bond debt service payments . . . . [See Township Am Compl at 14-15, **Exhibit A** (emphasis added).]

In order to determine whether that dispute was ripe for review, the Court of Appeals appropriately applied the plain language of the settlement agreement to conclude that without an actual "shortfall," there was nothing to "negotiate" and thus no "actual controversy" for purposes of the Township's declaratory judgment claim, nor a ripe breach of contract claim.[10] This was not a determination of the "merits" of the Township's claims.

C. The Court of Appeals properly determined that the Township's declaratory judgement and breach of contract claims are not ripe.

Moreover, the Court of Appeals' assessment of the ripeness issue is entirely correct. The doctrine of ripeness "prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Michigan Chiropractic Council*, 475 Mich at 371 n 14. Thus, "[a] claim is not ripe if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id*.

These ripeness principles are incorporated into MCR 2.605(A), which explicitly requires "a case of actual controversy" before declaratory relief may be granted:

> (1) 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

[10] The Township's attempt to read anything more into the settlement agreement is contrary to its unambiguous language. It goes without saying that "unambiguous contracts are not open to judicial construction and must be enforced as written." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 198; 747 NW2d 811 (2008) (citation omitted and internal quotation marks omitted).

> seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

As this Court has explained, the "actual controversy" requirement is "'a summary of justiciability as the necessary condition for judicial relief.'" *Associated Builders & Contractors v Dir of Consumer & Indus Servs Dir*, 472 Mich 117, 125; 693 NW2d 374 (2005), overruled in part on other grounds by *Lansing Sch Ed Ass'n v Lansing Sch Dist Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) (citation omitted). See also *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 2*, 309 Mich App 611, 624; 873 NW2d 783 (2015) ("The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief.") (citation and internal quotation marks omitted).

An "'actual controversy' under MCR 2.605(A)(1) exists . . . 'where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct *in order to preserve his legal rights*.'" *Associated Builders*, 472 Mich at 126, quoting *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978) (emphasis added). See also *Recall Blanchard Comm v Sec'y of State*, 146 Mich App 117, 121; 380 NW2d 71 (1985) (explaining that although there are "some instances" in which "a declaratory judgment is appropriate even though actual injuries or losses have not yet occurred," an actual controversy will only be found to exist in such cases "where a declaratory judgment is necessary to guide a litigant's future conduct *in order to preserve the litigant's legal rights*") (emphasis added). For example, courts commonly hold that a dispute is ripe for declaratory relief if an individual faces some imminent governmental action in violation of his or her rights if the individual engages in certain conduct. See, e.g., *UAW v Central Mich Univ Bd of Trustees*, 295 Mich App 486, 496-497; 815 NW2d 132 (2012)

(granting declaratory relief to public employees seeking to protect their statutory rights from being infringed by a university policy limiting employees' ability to engage in political activity).

The requirement of an "actual controversy" "prevents a court from deciding hypothetical issues," although "a court is not precluded from reaching issues before actual injuries or losses have occurred." *Associated Builders*, 472 Mich at 126 (citation and internal quotation marks omitted). The "essential requirement" is that the plaintiff "plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." *Id*. (citation and internal quotation marks omitted).

1. The Township's request for declaratory relief is not ripe.

The Court of Appeals properly applied these established ripeness principles in upholding the trial court's dismissal of the Township's request for declaratory relief. As the Court recognized, the parties' rights and duties under their settlement agreement hinge entirely on the potential of Visteon's future property tax payments being "inadequate to permit the Township to meet is payment obligations with respect to that portion of the bonds that were used to help fund the Village." (COA Op at 5, citing Agreement and Mutual Release, ¶ 3). Only then does Visteon have any obligation to "negotiate with the Township in good faith to determine the amount of the shortfall" and, if applicable, "make a [PILOT payment] to the Township to assist the Township in making timely payments on the bonds." (*Id*.).

As it did in the Court of Appeals, the Township maintains that it does not matter that there has not been an actual bond payment shortfall because a declaratory judgment can issue "before an actual injury occurs," and because such relief is necessary here to "guide" the Township's "future conduct" in planning and budgeting for a potential shortfall. (See the Twp's App for Lv at 22-23). The Township, however, misunderstands the purpose of declaratory relief

and when it is appropriate. While declaratory relief *can* be directed at prospective rights and duties – including contractual ones – in order to "guide a plaintiff's future conduct," it must be necessary to "preserve his legal rights." *Associated Builders*, 472 Mich at 126. Moreover, the rights in dispute, contractual or otherwise, may not be "'so remote and speculative as to be hypothetical and abstract.'" *Merkel v Long*, 368 Mich 1, 13; 117 NW2d 130 (1962) (citations omitted). See also *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000) ("Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist.").

Merkel illustrates the difference. In that case, three sisters received substantial inheritances, which were placed in trust, after their father died. An issue arose concerning the effect of certain provisions of their father's will on "what [would] happen to the corpus of their trusts at their deaths." *Merkel*, 368 Mich at 11. After reaching "an agreement to settle [the controversy]," the sisters sought approval of the chancery court. *Id.* at 4. In finding declaratory relief to be appropriate, the *Merkel* Court observed that "the question of interpretation of the will [was] not academic" because, simply put, the sisters would eventually die. *Id*. at 14. It was thus appropriate for the chancery court to provide "knowledge and certainty" as to how their trust funds would be distributed given that eventuality:

> Here, the question of interpretation of the will is not academic. Rights of parties to the agreement are affected directly. The question will not become moot. When the daughters die it must at all events be decided. It will be no different question then than now. . . . [*Id*. (citation omitted).]

Another good example is *City of Huntington Woods v City of Detroit*, 279 Mich App 603; 761 NW2d 127 (2008). At issue in that case was whether the City of Detroit could sell Rackham Golf Course to a private developer. The plaintiffs filed a lawsuit seeking a declaration that deed restrictions on the property precluded such a sale. At the time of the lawsuit, the property had

not been sold and no restrictive covenants had been violated, but the City of Detroit had begun soliciting bids. *Id*. at 616. The Court of Appeals concluded that these circumstances were sufficient to take the parties' dispute over the scope of the deed restrictions out of the "hypothetical" realm:

> Defendant is correct in its assertion that, when this litigation was initiated, there had been no violation of the restrictive covenants contained in the Rackham deed and the property had not been sold. However, even though a sale had not been effectuated, it was obvious that defendant was not only seriously considering sale of the property but had begun, through the issuance of a formal RFP, to solicit bids. Hence, the primary issue asserted by plaintiffs regarding the right or authority of defendant to sell the property, and pursuant to what terms, comprised an issue that was not hypothetical. . . . As a result, plaintiffs' request for declaratory relief properly seeks a determination regarding defendant's authority to sell the property. The trial court was not precluded from ruling whether the sale was authorized and under what conditions merely because a sale had not yet been effectuated. [*Id*. at 616-617.]

This case is different, as any "dispute" between Visteon and the Township is purely "academic" and "hypothetical." The occurrence of a shortfall, unlike the eventuality of the sisters' death in *Merkel*, is far from certain. And even if there were to be a shortfall, whether it would result in Visteon making a PILOT payment to the Township is pure speculation, as it would depend on whether the shortfall is attributable to "that portion of the bonds used to help fund the Village." See *Citizens*, 243 Mich App at 55 ("[P]laintiff's claim is based not on actual harm, but on its speculation concerning how the Secretary of State would have acted if called on to do so."). Because these are "'contingent future events that may not occur as anticipated, or indeed may not occur at all'" (as demonstrated by the bond refinancing that took place during the course of this very case), they do not give rise to an "actual controversy." *Michigan Chiropractic Council*, 475 Mich at 371 n 14 (citation omitted).

The Township asserts that because any assistance Visteon would provide is for the purpose of ensuring "timely" payments on the bonds, the Township "does not need to wait until

after the payment is due to initiate suit." (Twp's App for Lv at 22). But this ignores the fact that any payment obligation Visteon may have cannot even be determined without the existence of an actual bond payment shortfall, which has not happened (and may never happen). Under the express terms of the settlement agreement, the existence of a shortfall *is what triggers Visteon's obligations in the first instance*. Thus, the Court of Appeals properly determined that there is nothing for the courts to adjudicate until then:

> Contrary to plaintiff's assertion on appeal, the requirement that defendant negotiate in good faith to "determine the amount of the shortfall" does not force the implication that defendant must be required to negotiate prior to the occurrence of a shortfall. Plaintiff forgets that the provision contains qualifying language, requiring defendant to negotiate in good faith to determine the amount of the shortfall only "with respect to those bonds" that were "supported by the full faith and credit of [plaintiff], the proceeds of which were used to help construct the Village." Defendant is therefore clearly obligated to engage in negotiations once a shortfall occurs, to determine which part of the shortfall can be attributed to bonds it is obligated to assist plaintiff to pay. [*Id.* at 5.]

When the Township says that it needs a declaratory judgment to "guide its future conduct," it is referring not to *preserving its legal rights*, but rather to its internal budgeting and planning processes and the contingent arrangements the Township *might* need to make in the event of a bond shortfall, should Visteon not comply with its obligations under the parties' agreement. (Twp's App for Lv at 22-23). That is not a valid basis for seeking declaratory relief. As the Court of Appeals aptly explained, the Township does not need a declaratory judgment now in order to preserve whatever "legal rights" it may have under the settlement agreement in the event of a bond shortfall:

> Plaintiff's rights, like defendant's obligations, under the contract are clear. Defendant is not obligated to perform until after a shortfall, and then is only obligated to "assist" with a certain payment thereof. Plaintiff may take steps, as it should, to prevent loss and attempt to avoid excessive damage from the projected shortfall, and its remedy for any losses actually incurred lie in damages for breach of contract, if defendant fails to meet its obligations when the time for performance has arrived. [*Id*. at 6.]

In other words, whatever rights the Township thinks it has under the settlement agreement are fully preserved.

The Township predicts all sorts of "sky is falling" consequences if and when there is a bond shortfall, but it has failed to demonstrate how it would make any difference if the Township were to obtain a declaratory judgment now, or even a determination that Visteon has breached its obligation to "negotiate" with the Township. What is the trial court supposed to order? Without an actual shortfall triggering the *potential* for Visteon to make a PILOT payment, there is no effective relief the court could grant. There is nothing to "negotiate." The fact of the matter is that the Township was requesting the trial court to order Visteon to comply with yet-to-be-determined hypothetical obligations under the settlement agreement. But that is exactly the sort of "hypothetical and abstract" dispute that courts are supposed to refrain from entertaining. Until there is an actual bond payment shortfall (which may not occur as expected, as the events that unfolded after Visteon filed its motion for summary disposition show), there simply is no dispute under the settlement agreement – not even a potential one – for a court to decide.

It is well-established in this Court's decisions that courts "'will not determine future rights in anticipation of an event that may never happen.'" *Merkel*, 368 Mich at 13 (citation omitted). Yet that is precisely what the Township is requesting here, based on nothing more than attenuated forecasts of what *might* happen. But as the federal court in *Moynihan* explained in the context of the analogous federal declaratory judgment act, "ameliorating a Plaintiff's angst and uncertainty does not give rise to an [actual controversy]." *Moynihan*, 607 F Supp 2d at 1339.[11] Using similar reasoning in *Toto, Inc v Sony Music Entertainment*, 60 F Supp 3d 407 (SD NY, 2014), the court declined to issue a declaratory judgment because the parties' contractual dispute

[11] Like MCR 2.605, the federal declaratory judgment act requires that there be "a case of actual controversy" within the court's jurisdiction. 28 USC 2201(a).

was "far more hypothetical than real":

> SME is seeking declaratory relief on a dispute that is, at this point, far more hypothetical than real. Toto *might* sue SME for breach of [contract] *if* SME decided to cease distributing Toto records through *certain* (unnamed) retailers. SME's claim, based on three layers of contingencies, is not enough to present a "substantial" dispute of sufficient "immediacy" or "reality" to constitute a ripe controversy. [*Id*. at 418.]

This case is no different. Any dispute over Visteon's obligations in the event of a bond shortfall is "far more hypothetical than real." The Court of Appeals thus properly affirmed the trial court's determination that there is no "ripe controversy" capable of being resolved by declaratory judgment. See *Village of Breedsville v Columbia Twp*, 312 Mich 47, 54; 19 NW2d 482 (1945) ("A declaratory judgment may be resorted to only when circumstances render it 'useful and necessary'; where it will 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.' 'Where there is no necessity for resorting to the declaratory judgment, it should not be employed.'") (citations and some internal quotation marks omitted).[12]

2. The Township's breach of contract claim is not ripe either.

Nor can a court appropriately decide at this time whether Visteon has breached the settlement agreement. The Township asserts that Visteon has already breached its obligation to "negotiate" with the Township to "determine the amount of the shortfall." (See the Twp's App

[12] The Township cites the Court of Appeals' decision in *UAW* as supporting an award of declaratory relief here, but it is totally inapposite. *UAW* involved a dispute over whether Central Michigan University's "policies and procedures regarding university employees' candidacies for public office" violated the Political Activities by Public Employees Act, MCL 15.401 *et seq.* *UAW*, 295 Mich App at 489. Although no employee had yet run for office, the *UAW* Court concluded that declaratory relief was appropriate because the candidacy policy presented an immediate threat to the employees' rights "*by interfering with the employees' ability to engage in off-duty political activity*." *Id*. at 496-497 (emphasis added). That is not the case here, as the parties' respective rights and obligations under the settlement agreement cannot be determined without there first being a bond payment shortfall.

for Lv at 24). But as the Court of Appeals recognized, to say that Visteon has failed to negotiate over "the amount of the shortfall" *assumes the existence of a shortfall in the first place.* (COA Op at 5 (observing that Visteon's obligation under the settlement agreement is "to engage in negotiations once a shortfall occurs").

Yet according to the report of the Township's own expert, any shortfall is merely a *projection,* "rang[ing] from $23.7 million to $36.4 million dollars." (Complaint at ¶ 62 (Ex 4 to the Twp's App); see also PFM Report at 16-18 (Complaint, Ex C)). Indeed, the PFM report sets out *fifteen* different shortfall "scenarios," each of which depends upon a slew of different "variables" and "assumptions" concerning the Township's "projected" tax revenues, including "future projected Taxable Values," "[f]uture captured millage rates," and "[t]iming of placing facilities and equipment into service." (PFM Report at 10, 16-18). As discussed below, those assumptions turned out to be wrong when, shortly after Visteon filed its motion for summary disposition, the Township's LDFA used $4,516,000 that it received as part of the bankruptcy settlement with Visteon to retire a portion of the bonds and refinance the rest.[13]

In other words, whether and when a bond shortfall occurs (the Township now says it will be in 2019),[14] as well as the amount of any potential shortfall, depends on a litany of assumptions

[13] See the Township's application at page, footnote 3. As the Township concedes, this "delayed the shortfall" to 2019 – at the earliest. Although the Township claims that "there are no further refinancing options" available, that is an unsupported assertion by its attorney – made for the first time on appeal. There is no evidence to support it. The Township also fails to mention that at a July 21, 2015 meeting of the LDFA, the Township Supervisor, Linda Combs, discussed efforts the Township was undertaking to develop other properties, which would provide additional tax revenues. (See Visteon's Reply in Support of Mot for Summ Disp at 3) (Tab A). The point is that any number of things could further delay a shortfall, or prevent it altogether.

[14] The revised projections are apparently based on a new report from PFM that the Township's counsel referenced during the hearing on Visteon's motion for summary disposition, but that Visteon has yet to see. (See the Twp's App for Lv at 22 n 7; see also 2/2/16 Hrg Tr at 44-45 (Ex 6 to the Twp's App for Lv)).

regarding future events that cannot be known, and that may never materialize. (*Id*. at 14 (cautioning that "any projections prepared by PFM are estimates, and that actual captured values and resulting captured taxes will change based on the final valuations and captured taxes, as well as laws governing property taxes in the State of Michigan, and actual investment earnings")). Until then, nothing in the settlement agreement required Visteon to meet with the Township. Thus, even if Visteon had "failed to negotiate" as the Township claims, it hardly gives rise to a "fully-ripened contract claim," as the settlement agreement did not require Visteon to do *anything*.[15] Visteon cannot have breached or repudiated obligations that have not and may not ever arise.

In an effort to overcome this obvious reality, the Township relies on the doctrine of anticipatory breach to argue that it is "immaterial that the shortfall has not yet occurred because Visteon has unequivocally stated that, when the shortfall occurs, it will pay nothing." (Twp's App for Lv at 26). As an initial matter, this puts the proverbial cart before the horse because it assumes that there will in fact be a shortfall. But in any event, the doctrine has no application here. In order to invoke the doctrine of anticipatory breach, "it must be demonstrated that a party to a contract *unequivocally* declared the intent not to perform." *Washburn v Michailoff*, 240 Mich App 669, 673-674; 613 NW2d 405 (2000) (emphasis in original). "In determining whether a repudiation occurred, it is the party's intention manifested by acts and words that is controlling, not any secret intention that may be held." *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999).

[15] The Township's claim is also unsupported. As discussed previously, Visteon negotiated with the Township in three face-to-face meetings and numerous conference calls, e-mails, and letters for more than a year. It openly and candidly shared its analysis with the Township. The problem is not that Visteon refused to negotiate in good faith, but that the Township was just not satisfied with the outcome of those negotiations.

Contrary to the Township's assertions, Visteon has not unequivocally "repudiated any obligations under the [settlement agreement]." (Twp's App for Lv at 25). What Visteon *has* said is that its obligation is limited to that provided in paragraph 3 of the parties' settlement agreement. If there is a bond shortfall, Visteon has an obligation to negotiate with the Township to determine the amount of the shortfall, if any, that is attributable to that portion of the bonds that were specifically used to help finance Visteon Village (not the entire bond shortfall as claimed by the Township). To the extent there is such a shortfall, Visteon then has an obligation to assist the Township by making a PILOT payment to the Township.

As Visteon's counsel explained in its correspondence with the Township, given the unique nature of PILOT payments under the tax code, Visteon cannot be seen as having guaranteed the bonds, and under no circumstances would Visteon ever be required to pay more than what it would have owed in property taxes. (See May 7, 2014 letter to the Township's counsel, pp 3-4 (Ex 8 to the Twp's App for Lv)). While the Township has taken the position that Visteon is obligated to pay the full amount of any bond shortfall, not only would that jeopardize the bonds' tax-exempt status, it is not what the agreement says. Regardless, the fact that Visteon has expressed a different view of what the settlement agreement requires does not mean that Visteon has "repudiated" its contractual obligations. See *Convergent Group Corp v County of Kent*, 266 F Supp 2d 647, 656 (WD Mich, 2003) ("'[A]n offer to perform made in accordance with the promisor's interpretation of the contract, if made in good faith although it may be erroneous, is not such a clear refusal to perform as to constitute an anticipatory breach.'") (citation omitted). As the Court of Appeals summarized, "[i]t is clear that while [Visteon] disputes the amount due at this time, and asserts that its liability in the event of a shortfall may be

minimal, it has not unequivocally repudiated its obligation to pay any amount of the bond payment shortfall as required by Paragraph 3 of the Agreement." (COA op at 9).[16]

More importantly, Visteon's negotiating posture as it relates to a potential bond shortfall does not change the fact that even if Visteon is wrong in its interpretation of the settlement agreement, there is no way for the trial court to decide that issue *unless and until there is a shortfall*. Only at that point could a court conclusively determine (1) the amount of any shortfall attributable to the portion of the bonds used to fund the Village, and (2) the amount of the PILOT payment, if any, Visteon is required to make. Given that a shortfall may never occur, and that even if it does, the parties may negotiate an amicable resolution (as contemplated under the settlement agreement), "it would be improper and inappropriate to render any ruling on these speculative questions." *Green v Ziegelman*, 282 Mich App 292, 305; 767 NW2d 660 (2009) (holding that "speculative questions" concerning whether a judgment creditor was entitled to file a new, separate action against the shareholder of a defunct corporate debtor under a veil-piercing theory were not ripe because "this event has not occurred").

D. The lower courts properly viewed the Township's expert's report as projecting a "hypothetical" bond payment shortfall.

The Township argues that the Court of Appeals "improperly disregarded" the PFM report when it concluded (as did the trial court) that the Township's alleged damages as "hypothetical"

[16] The Township makes much of the Court of Appeals' reference to comments by Visteon's counsel at the summary disposition hearing concerning "Visteon's repudiation position." (See the Twp's App for Lv at 27-28). The irony of this complaint should not be lost on the Court. The Township itself relies on what Visteon's counsel said at the hearing, urging that it shows Visteon's "repudiation of its contractual obligations." (*Id*. at 11-12). Yet now the Township has a problem with the Court of Appeals revealing how the Township took those statements out of context. Despite the Township's suggestion, the Court of Appeals did not treat Visteon's counsel's statements as "admissible evidence." The Court simply cited them as encapsulating the point that Visteon has not repudiated its obligations under the settlement agreement. It just has a different view of what those obligations are. That *potential* dispute cannot be resolved unless and until there is an actual bond payment shortfall.

(See the Twp's App for Lv at 32-37), but there is no merit to that assertion. At the outset, it is important to keep in mind that while the Court of Appeals was apparently under the mistaken impression that the Township was "in the process of obtaining another bond restructuring agreement," this does not change anything. In affirming the trial court's determination that the Township's claims involve "hypothetical and contingent facts . . . especially when the projected [shortfall] is estimated three years from now," the Court of Appeals simply relied on the Township's own expert's report. (See COA Op at 7 (noting that "the factual uncertainty of plaintiff's damages is apparent from the PFM Report itself").

As discussed, PFM repeatedly characterized its shortfall calculations as "projected" and dependent on several variables. While the Township seizes on PFM's use of the terms "inevitable" and "certain," it takes what PFM said out of context. What PFM actually said was that a shortfall was "inevitable *if new revenues are not introduced*," and "certain . . . *without a substantial increase in the captured taxes, or the influx of additional funds by 2017 or 2018*." (PFM Report at 20-21 (emphasis added)). In other words, PFM's analysis was expressly conditioned on the assumption that there would be no substantial increase in "captured taxes" or "influx of additional funds." As the Court of Appeals understood, the trial court did not need a competing expert report from Visteon (which Visteon had no obligation to provide), let alone at the initial pleading stage of the case, to understand that PFM's "projections" were just that – projections. (See COA Op at 7 ("The very language of the report upon which plaintiff relies in making its claim for damages supports the fact that, at least at this point in time, plaintiff's alleged damages are conjectural, speculative, and clearly 'dependent upon the chances of business or other contingencies.'"), quoting *Doe v Henry Ford Health System*, 308 Mich App 592, 601; 865 NW2d 915 (2014)).

Not only that, but developments while this very case was pending revealed the PFM "projections" to be flawed. On August 18, 2015 – just eight days after Visteon filed its motion for summary disposition – the Township's LDFA retired a portion of the bonds and refinanced the rest, resulting in the possibility of a bond shortfall being pushed back to at least 2019. (See Visteon's Reply in Support of Mot for Summ Disp at 2).[17] Thus, while PFM's analysis assumed that there would be no "influx of additional funds," including through a refinancing, that is exactly what happened. PFM's assumptions were undermined again when the Township announced that it was undertaking other efforts to develop properties within the LDFA district, which would increase "captured taxes" available to pay off the bonds. (*Id*. at 3).

These developments alone show why the lower courts appropriately viewed the Township's claims as being dependent on "hypothetical and contingent facts." If events could occur that rapidly in such a short period of time that would undermine the Township's claims, contingent future events could occur between now and 2019 that would delay or eliminate any possibility of a bond shortfall. But even if the Township is right that a shortfall in some amount is "certain" to occur at some point in the future, when that might happen is simply unknown. More importantly, there is no way to know what the amount of any shortfall might be. Even PFM could do no more than "project" a range that varied by more than $10 million. (See Complaint, ¶ 62 (alleging that the claimed shortfall was "projected to range from $23.7 million to $36.4 million dollars")).

The Court of Appeals was thus entirely correct in recognizing that PFM's estimates do not demonstrate with any "certainty" when a future bond debt shortfall will occur, let alone the amount of any such shortfall. (See COA Op at 7 ("The hypothetical nature of plaintiff's claims

[17] See also page 9, footnote 3 of the Township's application.

was apparent after viewing plaintiff's own financial report, and even when viewed in the light most favorable to plaintiff, the projections of the PFM Report could not be interpreted to support the 'certainty' of plaintiff's alleged future damages.")).[18] Because the parties' settlement agreement provides that the existence of an actual shortfall is what triggers Visteon's obligation to "negotiate" with the Township concerning "the amount of the shortfall," which may or may not result in Visteon making a PILOT payment in some amount, the trial court properly determined that the Township's claims are not ripe, and the Court of Appeals correctly affirmed that decision.

IV. CONCLUSION AND RELIEF REQUESTED

There are no jurisprudentially-significant issues presented in this case. Instead, the Court of Appeals' decision reflects a proper application of established ripeness principles. Visteon therefore requests that the Court deny the Township's application for leave to appeal.

Respectfully submitted,

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[18] Visteon did not need to submit a competing expert report, or file "a *Daubert* motion," for this to be apparent. Nor did the Court of Appeals or trial court engage in a "credibility" determination. They simply took the PFM report at face value and recognized the obvious.