STATE OF MICHIGAN

IN THE SUPREME COURT

VAN BUREN CHARTER TOWNSHIP,

Plaintiff-Appellant,

v.

VISTEON CORPORATION,

Defendant-Appellee,

Docket No. 156018

Court of Appeals No. 331789

Wayne County Circuit Court
LC No. 15-008778-CK
Hon. Muriel D. Hughes

VISTEON CORPORATION'S SUPPLEMENTAL BRIEF IN OPPOSITION TO VAN BUREN CHARTER TOWNSHIP'S APPLICATION FOR LEAVE TO APPEAL

DICKINSON WRIGHT PLLC
Michael C. Hammer (P41705)
Robert F. Rhoades (P28160)
Phillip J. DeRosier (P55595)
Doron Yitzchaki (P72044)
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

Attorneys for Defendant-Appellee Visteon Corporation

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"[W]hether the Court of Appeals: (1) properly determined that a declaratory judgment was not ripe under MCR 2.605; and (2) properly interpreted the contract to determine that 'defendant is not obligated to perform [under the contract] until . . . a shortfall has occurred, and . . . property taxes paid by defendant are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village.'"

The Court of Appeals would answer:	Yes.
Visteon answers:	Yes.
Van Buren Township answers:	No.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The ripeness doctrine is well established in Michigan, and the lower courts correctly applied it here in determining that a declaratory judgment is not ripe under MCR 2.605. There is no "conflict," nothing to "clarify," no "struggl[e]" by the Court of Appeals, and no Court of Appeals decisions to "overrule."

The foundation for the Township's position is the misconception that this Court in *Lansing Sch Ed Ass'n v Lansing Sch Dist Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), changed the standard for determining ripeness in a declaratory judgment action. It did nothing of the sort. To be sure, *Lansing Schools* relaxed the standing requirement so that it is a "prudential" consideration only, as opposed to being constitutionally-based. *Lansing Schools* also held that "whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Id*. at 372.[1] But *Lansing Schools* did not change the ripeness requirement that has long been considered a necessary condition for obtaining declaratory relief.[2]

On the contrary, *Lansing Schools* reaffirmed the ripeness rule encompassed within MCR 2.605's "actual controversy" requirement. Not only that, *Lansing Schools* expressly adopted the ripeness test set out in *Associated Builders & Contractors v Dir of Consumer & Indus Servs Dir*,

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[1] See also *Duncan v Michigan*, 300 Mich App 176, 192; 832 NW2d 761 (2013) ("[O]ur Supreme Court in [*Lansing Schools*] reinstituted Michigan's prior 'prudential' standing test . . . . 'Under this approach, a litigant has standing whenever there is a legal cause of action' or the requirements of MCR 2.605 to seek a declaratory judgment are satisfied.").

[2] As this Court explained in *Michigan Chiropractic Council v Comm'r of Office of Fin & Ins Services*, 475 Mich 363; 716 NW2d 561 (2006), overruled in part on other grounds by *Lansing Sch*, 487 Mich 349, "standing and ripeness address different underlying concerns. The doctrine of standing is designed to determine whether a particular party may properly litigate the asserted claim for relief. The doctrine of ripeness, on the other hand, does not focus on the suitability of the party; rather, ripeness focuses on the timing of the action." *Id*. at 378-379.

472 Mich 117; 693 NW2d 374 (2005), overruled in part on other grounds by *Lansing Sch*, 487 Mich 349.[3] As the Court summarized in *Associated Builders & Contractors*:

> This Court has held that 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 . . . .
> >
> > This requirement . . . prevents a court from deciding hypothetical issues.
>
> This Court has emphasized that although the actual controversy requirement precludes a court from deciding hypothetical issues, "a court is not precluded from reaching issues before actual injuries or losses have occurred." The essential requirement of the term "actual controversy" under the rule is that plaintiffs "plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised."[4]

This is the *exact* same standard that the Court of Appeals panel in this case used in finding the Township's request for declaratory relief to be unripe:

> An actual controversy exists when a declaratory judgment is necessary to guide the plaintiff's future conduct in order to preserve his legal rights. *Shavers v Kelley*, 402 Mich 554, 588-589; 267 NW2d 72 (1978). "It is not necessary that 'actual injuries or losses have occurred'; rather, 'plaintiffs plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised.'" *Kircher v City of Ypsilanti*, 269 Mich App 224, 227; 712 NW2d 738 (2005), quoting *Shavers*, 402 Mich at 589.[5]

Thus, there is no merit to the Township's assertion that the Court of Appeals "applied the wrong standard for ripeness" (Twp's Supp Br at 3), despite the Township's best efforts to muddy things by engaging in an irrelevant discussion of the distinction drawn in the federal system between "constitutional" and "prudential" ripeness considerations.

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[3] *Lansing Schools* overruled *Associated Builders & Contractors* only to the extent it followed the more restrictive federal test for standing.

[4] *Id*. at 126, quoting *Shavers v Attorney General*, 402 Mich 554, 588–589; 267 NW2d 72 (1978).

[5] COA Op at 4, Appx 288a.

Finally, there is no merit to the Township's challenge to the Court of Appeals' straightforward ripeness analysis in this case. Far from reaching "the merits of the Township's claims," the Court of Appeals simply applied the plain language of the parties' settlement agreement to determine that there is nothing yet for courts to decide because there has been no bond shortfall, and thus nothing for the parties to "negotiate" over.

Notwithstanding the Township's unsupported assertion, the agreement's requirement that Visteon assist the Township in making "timely" bond payments in the event of a shortfall does not obviate the plain contractual requirement for there to be a shortfall in the first instance. Indeed, how can the parties even begin to negotiate over a specific, and complex, "non-tax payment, payment in-lieu-of ta[x] (PILOT)"[6] to be made in connection with a bond shortfall that has not yet occurred, and may never occur?

And even if a shortfall of some amount is certain to occur at some point, how does a court determine when that will happen, what the shortfall will be, and what Visteon's obligation, if any, to make a PILOT payment might be? After all, Visteon is not responsible for making up the entire shortfall, but rather the amount attributable to the "portion of the bonds that were used to help fund [Visteon's headquarters, named Visteon Village]." That is the only amount that would be relevant to any potential future negotiation.

The Township asserts (again without support) that it has no remaining options to avoid a shortfall, but even if that were true, it still does not solve the problem that there is nothing to

[6] As discussed in Visteon's answer to the Township's application for leave to appeal (see page 5 n 4), a PILOT payment 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). In addition, because the bonds at issue are tax-exempt municipal bonds, care must be taken to protect that status. Among other things, this means that any payment made by Visteon cannot exceed the amount of taxes that would otherwise be due. See Treas Reg 1.141-4(e)(5)(i).

negotiate over right now. As the Court of Appeals observed, "[n]o reasonable person" reading the parties' agreement could "find that [Visteon] is obligated to engage in negotiations prior to the shortfall." (COA Op at 5, Appx 289a).

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

II. ARGUMENT

A. The Court of Appeals properly determined that this case was not ripe for declaratory judgment under MCR 2.605.

1. The Court of Appeals applied the right standards for ripeness.

Despite the Township's claim, there is no "conflict" between *Lansing Schools* and the Court of Appeals' published decisions when it comes to determining the ripeness of declaratory judgment actions. *Lansing Schools* recognized that in order to meet MCR 2.605(A)(1)'s "actual controversy" requirement,[7] a litigant must, as set out in *Associated Builders & Contractors*, "'plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.'" *Id*., quoting *Associated Builders & Contractors*, 472 Mich at 126 (additional citation and internal quotations omitted). That is the essence of the traditional ripeness requirement that has *always* been part of MCR 2.605. See *Associated Builders & Contractors*, 472 Mich at 125 ("[T]he rule requires that there be 'a case of actual controversy' and that a party seeking a declaratory judgment be an 'interested party,' thereby incorporating traditional restrictions on justiciability such as standing, ripeness, and mootness.").

[7] See MCR 2.605(A)(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 seeking a declaratory judgment, whether or not other relief is or could be sought or granted.").

As the Court in *Associated Builders & Contractors* explained, 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 & Contractors*, 472 Mich at 126, quoting *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). The actual controversy requirement "prevents a court from deciding hypothetical issues," although "a court is not precluded from reaching issues before actual injuries or losses have occurred." *Id*., quoting *Shavers*, 402 Mich at 589. The "essential requirement," the Court observed, is that the plaintiff "'plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.'" *Id*., quoting *Shavers*, 402 Mich at 589.

As the Court's heavy reliance on *Shavers* makes clear, these fundamental ripeness principles have long been a part of Michigan's declaratory judgment law, and they are the very same principles the Court of Appeals applied in this case. Moreover, there can be no question that these principles limit a court's exercise of its jurisdiction. Indeed, this Court has described the "actual controversy" requirement as a "necessary condition for judicial relief." *Associated Builders & Contractors*, 472 Mich at 125 (citation and internal quotations omitted). Thus, in the absence of "a genuine, live controversy between interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations, a court may not declare the rights and obligations of the parties before it." *Id*. (citation and internal quotations omitted). Or put another way, a declaratory judgment proceeding "may not be instituted in the absence of an

actual controversy." *Flint v Consumers Power Co*, 290 Mich 305, 309; 287 NW 475 (1939).[8] This is the very definition of a jurisdictional limitation.[9]

In taking issue with the Court of Appeals' formulation of the "actual controversy" requirement, the Township confuses the case law. The principles the Court of Appeals cited in this case are *exactly* the same as in *Associated Builders & Contractors*, and they have never changed. For example, the Court of Appeals did not "chang[e] th[e] test" in *Recall Blanchard Comm v Sec'y of State*, 146 Mich App 117; 380 NW2d 71 (1985), where it observed that although there are "some instances" in which "a declaratory judgment is appropriate even though actual injuries or losses have not yet occurred[,] . . . in such cases, an actual controversy will be found to exist only where a declaratory judgment is necessary to guide a litigant's future conduct in order to preserve the litigant's legal rights." *Id*. at 121.

Despite the Township's claim, this statement is totally consistent with this Court's observation in *Flint* that this is "at least one of the tests of right to resort to declaratory proceedings," and that a declaratory judgment may be appropriate to decide "future rights" if "special considerations" require it, or if the "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.'" *Flint*, 290 Mich at 310 (citation omitted). Reading the *Flint* decision in its entirety, as opposed to parsing isolated snippets as the

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[8] 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).

[9] "Jurisdiction" refers to a court's "authority . . . to hear and determine a case." *State Hwy Comm'r v Gulf Oil Corp*, 377 Mich 309, 312-313; 140 NW2d 500 (1966). A court's inability to "declare the rights and obligations of the parties before it" without an actual controversy readily fits that definition.

Township does, reveals that these are all just different ways of saying the same thing, i.e., that declaratory relief is unnecessary if the parties' legal rights will not be impaired by waiting to bring suit until after those rights have accrued. *Id*.

Indeed, the *Flint* Court concluded its analysis by finding "no present controversy in the sense that justifies resort to litigation looking to a declaration of rights," as there was "no threat to change the status of either party in a manner that would affect the rights of either or that would subject plaintiff to any actual or threatened loss or damage, or to any disadvantage in ultimately asserting and maintaining its legal rights." *Id*.[10] This is the same analysis that the Court of Appeals followed not only in *Recall Blanchard*, but in this case and others. See, e.g., *Bank v Michigan Ed Ass'n-NEA*, 315 Mich App 496, 504; 892 NW2d 1 (2016) ("While courts are not prohibited from reaching issues before actual injuries occur, declaratory relief is unwarranted if there is no threat that would subject the plaintiff to any disadvantage in ultimately setting forth and maintaining its legal rights."), citing *Shavers*, 402 Mich at 589, and *Flint*, 290 Mich at 310. As the Court of Appeals properly determined, the Township's rights are fully preserved, making declaratory relief wholly unnecessary:

> [P]laintiff's claim that it needs declaratory relief in order to preserve its legal rights under the contract is untenable, and its assertion that it will be unable to prevent damages without declaratory relief is irrelevant. 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. [COA Op at 6, Appx 290a.]

[10] See also 5 Longhofer, Michigan Court Rules Practice, Forms (2d ed), § 109:1, commentary ("It is now generally understood that an actual controversy exists if a declaratory judgment is necessary to guide a party's future conduct in order to preserve the party's legal rights.").

Nor did the Court of Appeals "misstat[e] the ripeness doctrine" in *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273; 761 NW2d 210 (2008), aff'd in result only 482 Mich 960 (2008), when the Court observed that "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Id*. at 282. This "formulation of the rule" comes right from *Michigan Chiropractic Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363; 716 NW2d 561 (2006), overruled in part on other grounds by *Lansing Sch*, 487 Mich 349, and is simply another way of expressing the well-established restriction against deciding purely "hypothetical or contingent" disputes. *Id*. at 371 n 14 (explaining that "[r]ipeness prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained").[11]

The Township makes much of this Court's observation in *Merkel v Long*, 368 Mich 1; 117 NW2d 130 (1962), that "it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening." *Id*. at 13 (citation and internal quotations omitted). But what the *Merkel* Court *also* said is that the "future happening" cannot be "so remote and speculative as to be hypothetical and abstract," and that courts are hesitant to "determine future rights in anticipation of an event that may never happen." *Id.* (citation and internal quotations 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.").

[11] There is no basis for the Township's conclusory assertion that this "formulation of the rule" conflicts with this Court's decisions in *Muskegon Hts v Danigelis*, 253 Mich 260; 235 NW 83 (1931), and *Breedsville v Columbia Twp*, 312 Mich 47; 19 NW2d 482 (1945). Declaratory relief was appropriate in those cases because there was nothing "contingent" about the claims at issue. In *Muskegon Hts*, it was the legality of certain municipal bonds. In *Breedsville*, it was a dispute over responsibility for repairing a bridge. Those were concrete disputes.

Finally, there is no merit to the Township's suggestion that *Lansing Schools* requires a different analysis. Calling ripeness a "prudential" concern, as opposed to a constitutional one, does not affect the determination of the ripeness of the Township's request for declaratory relief under MCR 2.605. The considerations are the same, and there is no need to "deviate from *Lansing Schools*." Indeed, this Court has continued to recognize the traditional ripeness requirements even after *Lansing Schools*. In *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), vacated on other grounds by *Davis v Michigan*, ___ US ___; 136 S Ct 1356 (2016), the Court held that a claim must involve "a real and immediate threat . . . as opposed to a hypothetical one," and that "in determining whether an issue is justiciably 'ripe,' a court must assess 'whether the harm asserted has matured sufficiently to warrant judicial intervention.'" *Id*. at 526-527 (citation and some internal quotations omitted). "Inherent in this assessment is the balancing of 'any uncertainty as to whether defendant[ ] will actually suffer future injury, with the potential hardship of denying anticipatory relief.'" *Id*. at 527 (citation omitted). These are the exact same ripeness considerations referenced in *Michigan Chiropractic Council*. See also *Haring Twp v City of Cadillac*, 490 Mich 987; 807 NW2d 163 (2012) (finding case to be "ripe for adjudication" because the claims were not "contingent or hypothetical").[12]

[12] At pages 15 and 28 of its supplemental brief, the Township notes that in *Michigan Chiropractic Council*, the Court followed the federal approach of viewing "[t]he ripeness doctrine [a]s supported by both constitutional and prudential principles," with the "prudential considerations" requiring "'that a court consider both 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Id*. at 381 n 47 (citation omitted). The Township contrasts those considerations with the "federal constitutional ripeness requirement," i.e., whether "the harm asserted has not matured sufficiently to warrant judicial intervention." *Id*. at 381. But as *Carp* demonstrates, this Court has not drawn such a distinction. And even in the federal system, courts often combine the "constitutional" and "prudential" ripeness considerations into one unified analysis of ripeness. This approach is nicely summarized in 13B Wright & Miller, Federal Practice & Procedure—Jurisdiction, § 3532 (3d ed):

2. The Court of Appeals correctly determined that the Township's request for declaratory relief is not ripe.

Viewing the Township's request for declaratory relief through the ripeness considerations that this Court has consistently expressed, it becomes clear that a declaratory judgment is not ripe under MCR 2.605. In reaching that determination, the Court of Appeals properly recognized that 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 its payment obligations with respect to that portion of the bonds that were used to help fund the Village." (COA Op at 5, Appx 289a). 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.*). Until that time, any dispute between Visteon and the Township remains abstract and hypothetical.

> Ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision. The determination is rested both on Article III concepts and on discretionary reasons of policy. The central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all. One of the famous formulations of ripeness principles is an abstract statement frequently quoted in declaratory judgment cases:
>
> > The test to be applied . . . is the familiar one . . . : "Basically, the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."
>
> A more practical formula is that
>
> > [R]ipeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." [Citations omitted.]

The Township nevertheless maintains that a declaratory judgment is ripe because the Township "need[s] to plan" for any shortfall in order to avoid "hardships" to its taxpayers. (Twp's Supp Br at 25-26). However, the cases it cites as support are easily distinguishable, as none of them involved the sort of hypothetical dispute involved in this one. And despite the Township's suggestion, it was not a mere "need to know" that made declaratory relief appropriate in those cases. It was that the issues presented were sufficiently developed to call for their "sharpening." In *Muskegon Hts v Danigelis*, 253 Mich 260; 235 NW 83 (1931), and *Breedsville v Columbia Twp*, 312 Mich 47; 19 NW2d 482 (1945), the disputes, unlike in this case, did not require any further factual development to become ripe. In *Muskegon Heights*, the city could either issue the bonds in question or it could not. In *Breedsville v Columbia Twp*, 312 Mich 47; 19 NW2d 482 (1945), the bridge repairs at issue had to be made, so it was necessary to determine which local government bore the financial responsibility for them.

The differences between *Haring Twp v City of Cadillac*[13] and *U S Aviex v Travelers Ins Co*[14] on the one hand, and this case on the other, are even more stark. In *Haring Twp*, the city of Cadillac said that it was not going to continue to provide wastewater treatment services under its contract once it expired—period. As a result, this Court agreed that the parties' dispute was not "contingent or hypothetical." 490 Mich 987. The fact that the contract was not set to expire for eleven years was irrelevant. Here, the nature and extent of Visteon's potential obligations to the Township, and thus the existence of a justiciable controversy, cannot possibly be known unless and until there is an actual bond shortfall. This case bares no resemblance to *Haring Twp.*

[13] *Haring Twp v City of Cadillac*, 290 Mich App 728; 811 NW2d 74 (2010), aff'd 490 Mich 987 (2012).

[14] *U S Aviex Co v Travelers Ins Co*, 125 Mich App 579; 336 NW2d 838 (1983).

The same can be said for *U S Aviex Co v Travelers Ins Co*, 125 Mich App 579; 336 NW2d 838 (1983). As the Court of Appeals later observed in *Bank*, 315 Mich App 496, the request for declaratory relief in *U S Aviex* was ripe because the plaintiff "was explicitly ordered [by the DNR] to [remediate contaminated groundwater] or it *would* be subjected to a lawsuit, even though no such lawsuit had materialized by the time of the trial." *Bank*, 315 Mich App at 505 (emphasis in original). Thus, there was a concrete dispute. The *Bank* Court contrasted that situation with the one before it, involving a claim that two teachers' unions had "contacted [the] plaintiff expressing the possibility that they might seek to collect" unpaid membership dues. *Id*. Acknowledging that a "*threat* is sufficient to warrant declaratory relief, even if the threat remains dependent on future contingencies," the Court held that the unions' communications did not "rise to that level" because there was nothing in the record "supporting more than the possibility that a collections action *could* be initiated." *Id*. (emphasis in original). The Court said that although it "appreciate[d] that it might be concerning to leave such possibility lurking," that was not enough. *Id*.

This case is far more like *Bank* than it is any of the cases the Township cites.[15] To begin with, the "future contingencies" are entirely speculative. Unless and until there is a bond shortfall, it simply is not possible to determine either the amount of any shortfall attributable to

[15] This also includes *UAW v Central Mich Univ Bd of Trustees*, 295 Mich App 486; 815 NW2d 132 (2012). As discussed in Visteon's answer to the Township's application for leave to appeal, *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. *Id.* 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. 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.

the portion of the bonds used to fund Visteon Village, or the amount of the PILOT payment, if any, Visteon *might* be required to make. Because these are "'contingent future events that may not occur as anticipated, or indeed may not occur at all'" (a 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).[16]

The Township responds that there is a "rea[l]" and "immediate" dispute because "the Township claims that Visteon owes it upwards of $30 million to cover the shortfall on the bond, and Visteon claims it owes nothing." (Twp's Supp Br at 29). That is pure hyperbole that the Court of Appeals properly rejected. Despite the Township's unsupported assertions, Visteon has never "promise[d] to breach" the settlement agreement. As the Court of Appeals observed, "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, Appx 293a). Rather, Visteon has simply stated its intent to rely on the plain language of the settlement agreement when the time comes (if ever) to negotiate. Thus, there is no "present, actionable breach of contract." See *Washburn v Michailoff*, 240 Mich App 669, 673-674; 613 NW2d 405 (2000) (holding that in order to invoke the doctrine of anticipatory breach, "it must

[16] Compare the situation here with *Merkel*, which Visteon discussed in detail at pages 17-18 of its answer to the Township's application for leave to appeal. In *Merkel*, the need to interpret a will to determine how certain trust provisions would operate in the event of the beneficiaries' eventual deaths was such that "the question of interpretation of the will [was] not academic":

> 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. . . . [*Merkel*, 368 Mich at 11 (citation omitted).]

The Township and its expert can speculate all they want about the claimed eventuality of a bond shortfall, but it is far from certain.

be demonstrated that a party to a contract *unequivocally* declared the intent not to perform") (emphasis in original); *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).

Finally, the Township's claimed "need to plan" and "hardship" is not only speculative, but simply reaffirms the lack of ripeness here. Without an actual shortfall triggering the *potential* for Visteon to make a PILOT payment, there is no effective relief that can be granted to the Township. There is nothing even to "negotiate." In the meantime, whatever "legal rights" the Township has under the settlement agreement are fully preserved. The Township may prefer more certainty, but "ameliorating a Plaintiff's angst and uncertainty does not give rise to an [actual controversy]." *Moynihan v West Coast Life Ins Co*, 607 F Supp 2d 1336, 1339 (SD Fla, 2009).

Because any dispute over Visteon's obligations in the event of a bond shortfall is "far more hypothetical than real," the Court of Appeals properly affirmed the trial court's determination that there is no "ripe controversy" capable of being resolved by declaratory judgment. If nothing else, it cannot be said that the trial court abused its discretion in withholding such relief under the circumstances. While the Township asserts that the trial court "dismissed this action as unripe without engaging in any analysis," that is an unfair characterization of the court's decision. The trial court said everything it needed to in order to explain the ripeness problem in this case:

> 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. [Feb 11, 2016 Hrg Tr at 4-5, Appx 279a-280a.]

Thus, the Court of Appeals got it right when it found the trial court's "decision to decline to offer declaratory relief" to be "within the range of reasonable outcomes." (COA Op at 6, Appx 290a).

B. The Court of Appeals properly interpreted the parties' contract.

The Court's second question to the parties is whether the Court of Appeals "properly interpreted the parties' contract to determine that Visteon 'is not obligated to perform [under the contract] until . . . a shortfall has occurred, and . . . property taxes paid by [Visteon] are inadequate for plaintiff to pay that portion of the bonds that was used to fund the Village.'" Simply put, the answer is "yes."

As an initial matter, the Court of Appeals did not "improperly interpre[t] the merits of the Township's claims." (Twp's Supp Br at 31-33). First of all, the Court of Appeals acted well within its discretion in treating Visteon's motion for summary disposition as having been brought under MCR 2.116(C)(10).[17] As the Court of Appeals correctly noted, the Township

[17] That made it unnecessary for the Court of Appeals to decide whether MCR 2.116(C)(4) is, in fact, the proper subrule for raising a ripeness challenge. (COA Op at 2, Appx 286a, citing

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 Court of Appeals' Br at 29-30, Appx 043b-044b, citing *Broz v Plante & Moran*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2016 (Docket No. 325884) (holding that any error in addressing a ripeness challenge under MCR 2.116(C)(4) is "merely technical in nature because summary disposition on the issue of ripeness may be decided under MCR 2.116(C)(10)). The Township even cited the (C)(10) standard in its brief. (*Id*.). Thus, the Township can hardly criticize the Court of Appeals for relying on it.

The Court of Appeals was also right when it observed that the trial court considered materials outside the pleadings—providing yet another basis for reviewing Visteon's motion under MCR 2.116(C)(10). The Township claims that the trial court did *not* consider evidence beyond the pleadings, but the fact of the matter is that the Township itself submitted a May 7, 2014 letter from Visteon's counsel as part of its summary disposition response. (May 7, 2014 letter from Visteon's counsel to the Township's counsel, attached as Exhibit 7 to the Township's Response to Visteon's Motion for Summary Disposition, Appx 001b). That letter was most definitely not "attached to the pleadings."

Finally, treating Visteon's motion as if it had been brought under MCR 2.116(C)(10) did not involve a "merits" determination. In assessing the ripeness issue, 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, Appx at 288a-290a, 292a). In arriving at that

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Morales v Parole Bd, 260 Mich App 29, 32; 676 NW2d 221 (2003) ("[T]his Court generally does not address moot questions or declare legal principles that have no practical effect in a case.")).

common sense conclusion, the Court of Appeals hardly "reach[ed] the merits." It simply reviewed the parties' settlement agreement for the limited purpose of determining whether there was an "actual controversy." That was entirely permissible. See, e.g., *Michigan Chiropractic Council*, 475 Mich at 381-382 (evaluating the record in support of the petitioners' claims as part of a ripeness determination); *Moynihan*, 607 F Supp 2d 1336 (reviewing insurance policy language for the limited purpose of evaluating the ripeness of a claim for insurance proceeds).

Moreover, the Court of Appeals was correct in its assessment that without an actual "shortfall" there was nothing to "negotiate" and thus no "actual controversy." While "perhaps inartfully worded," as the Court of Appeals remarked, the disputed paragraph of the parties' settlement agreement is actually quite straightforward:

> To 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, 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.[18]

In contrast with the Township's tortured construction (going so far as to literally rewrite it), the Court of Appeals gave this language a plain reading,[19] concluding that two conditions have to be satisfied before Visteon is "obligated to perform": "(1) a shortfall has occurred, and (2) property taxes paid by [Visteon] are inadequate for [the Township] to pay that portion of the bonds that was used to fund the Village." (COA Op at 5, Appx 289a). The Court further concluded that the second condition "cannot be met until after the shortfall has occurred and the

[18] Settlement Agreement, ¶ 3, Appx 40a.

[19] Of course, 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 and internal quotations omitted).

parties have determined the amount due." (*Id.*). This interpretation is the only one that gives effect to the unambiguous language chosen by the parties.

The Township continues to maintain that the only way it can make "timely" bond payments is if it "receive[s] Visteon's financial assistance before the shortfall payments are due." (Twp's Supp Br at 35). Not only is that entirely speculative, it does not justify ignoring the conditions that are expressly set out in the settlement agreement. Moreover, the reality is that any payment obligation Visteon may have cannot even be determined without there being an actual shortfall, which has not happened (and may never happen).

The Township's answer is that this "necessarily requires the parties to estimate" the shortfall. However, the language of the settlement agreement says nothing about "estimating" a future potential shortfall.[20] The Township claims that this is what the agreement means by "negotiate" and "determine," but that takes those terms completely out of context. As the Court

[20] Thus, the fact that the Township secured a shortfall "projection" from PFM is irrelevant, along with the fact that Visteon "has not proposed an alternative projection." Visteon had (and has) no obligation to counter the PFM report, which the Court of Appeals properly characterized as "conjectural, speculative, and clearly 'dependent upon the chances of business or other contingencies'":

> [T]he factual uncertainty of plaintiff's damages is apparent from the PFM Report itself. First, the PFM Report contains 15 different projections for a potential bond payment shortfall amount, many of which are predicted to occur in varying years. As the report drafter makes clear, these projections indicate that, "a cash shortfall is inevitable if new revenues are not introduced." The drafter also acknowledged that "[b]ecause of the unpredictable nature of Taxable Value growth rates it is not possible to project the exact moment of [plaintiff's] initial cash shortfall with precise accuracy," and that a shortfall is certain only "without a substantial increase in the captured taxes, or the influx of additional funds by 2017 or 2018." [COA Op at 7, Appx 291a, quoting *Doe v Henry Ford Health System*, 308 Mich App 592, 601; 865 NW2d 915 (2014).]

Had the Township's lawsuit not been dismissed for lack of ripeness, Visteon would have presented its own analysis in the ordinary course of the litigation. But since the Township's lawsuit was dismissed solely on ripeness grounds, the merits of PFM's "projected shortfall[s]" were never put at issue.

of Appeals explained in rejecting the Township's strained interpretation, a plain reading of the settlement agreement supports the conclusion that the only thing to be "determine[d]" after "negotiation" is "which part of the shortfall can be attributed" to "the portion of the bonds that were used to help fund the Village." (COA Op at 5, Appx 289a). The Court of Appeals' interpretation of the settlement agreement was spot on, and fully supports its determination that the parties' dispute is not ripe.

III. CONCLUSION

The Court should deny leave to appeal because the Court of Appeals' decision reflects a proper application of established ripeness principles.

Respectfully submitted,

DICKINSON WRIGHT PLLC

/s/ Phillip J. DeRosier
By: _____
Michael C. Hammer (P41705)
Robert F. Rhoades (P28160)
Phillip J. DeRosier (P55595)
Doron Yitzchaki (P72044)
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

Attorneys for Defendant-Appellee Visteon Corporation

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DETROIT 26381-346 1465725