

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

**In the Matter of the Request for the
Removal of Kwame M. Kilpatrick
from the Office of Mayor of the City
of Detroit**

**No. EO-2008-004-LO
Hon. Jennifer M. Granholm**

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**COUNCIL'S REPLY TO RESPONDENT'S IN RESPONSE IN OPPOSITION TO
PETITIONER'S MOTION FOR A HEARING ON THE MERITS**

**A. Respondent Has Failed to Set Forth a Persuasive Basis for the Governor
to Exercise Her Discretion in Favor of a Stay of Proceedings**

Respondent's request for a stay raises issues that this forum must seriously

consider. Any thoughtful look at the law will reveal that, while courts view this as a discretionary question, there are a variety of considerations that are brought to bear in deciding how to exercise that discretion.

First, there is no absolute right to a stay or similar relief merely because there is a pending criminal action, notwithstanding the absolutist assertions of the Respondent. Nor is there, it is widely acknowledged, any constitutional right to such a remedy. *See Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C.Cir., 1980), *cert. denied*, 449 U.S. 993, (1980). Indeed, as the United States Supreme Court has advised, courts should be cautious lest "the privilege from the shield against compulsory self-incrimination . . . (be converted) . . . into a sword." *United States v. Rylander*, 460 U.S. 752, 756 (1983).

Were this Respondent a simple police officer about to be removed for simple and straightforward misconduct, it is highly unlikely that he would be allowed to even hope for a stay. See, for example,

Petitioner, a police officer with respondent Jamestown City Police Department (Police Department), commenced this . . . proceeding seeking, *inter alia*, judgment prohibiting respondent City of Jamestown and its Police Department from proceeding with the . . . disciplinary hearing against petitioner until the related criminal charges were resolved . . . "[A] criminal defendant has *no right* to stay a disciplinary proceeding pending the outcome of a related criminal trial" . . . (citations omitted) . . . We reject the contention of petitioner that a stay is required in order to protect his constitutional rights . . .
Watson v. City of Jamestown, 27 A.D.3d 1183, (NY,2006) (emphasis added).

If there is a likelihood that a criminal defendant's right to due process in the criminal case will be prejudiced, courts have been more inclined to grant stays. However, in these cases the Respondent must at least *specify* how his rights to a fair trial

in the underlying criminal case will be prejudiced, courts have been far more reluctant to grant such stays:

The very fact of a parallel criminal proceeding, however, [does] not alone undercut [claimant's] privilege against self-incrimination, even though the pendency of the criminal action "forced him to choose between preserving his privilege against self-incrimination and losing the civil suit." This case hardly presents the type of circumstances or prejudice that require a stay (citations omitted). Claimant's failure to *indicate with precision* how he would be prejudiced if the civil action went forward while the criminal action was pending in state court further leads this Court to conclude that claimant was not entitled to a stay.

U.S. v. Certain Real Property 566 Hendrickson Blvd., Clawson, Oakland County, Mich., 986 F.2d 990, 996-97, (6th Cir. 1993) (emphasis added)

In exercising discretion in favor of a stay in these situations, courts look for 'special circumstances' to justify such a measure. In *U.S. v. Little Al*, 712 F.2d 133 (5th Cir. 1983) (relied upon by the Sixth Circuit in *Certain Property*, *supra*) the court addressed the issue of special circumstances and noted that the fact of a separate but parallel pending criminal action, alone, does not come anywhere near establishing 'special circumstances':

Such a stay contemplates "*special circumstances*" and the need to avoid "substantial and irreparable prejudice" The very fact of a parallel criminal proceeding, however, did not alone undercut Pollard's privilege against self-incrimination, even though the pendency of the criminal action "forced him to choose between preserving his privilege against self-incrimination and losing the civil suit." (citation omitted). This case hardly presents the type of circumstances or prejudice that requires a stay.

U.S. v. Little Al, *supra*, at 136 (emphasis added)

Finally, as we have previously noted¹, the reasons cited by respondent in favor of a stay, may be overridden by significant *state interests*, or as it is sometimes

¹ See *Baxter v. Palmigiano*, 425 U.S. 308 (1976) cited in Petitioner's earlier papers. Respondent dismisses *Baxter* because there were no pending criminal charges. Respondent conveniently ignores that it was not the current existence of such charges that was at issue. Rather, it was that the constitutional right in question, the 5th Amendment Right to protection against self incrimination, was at issue does not require a stay, whether or not there are *pending* charges. See cases cited *infra*.

characterized, the 'public interest:'

If delay of the noncriminal proceeding would not *seriously injure the public interest*, a court may be justified in deferring it.

Securities and Exchange Commission v. Dresser Industries, Inc., *supra*, at 1376 (emphasis added).

This same notion has been characterized from the opposite perspective as "public prejudice." This is delineated in *DeVita v. Sills*, 422 F2d 1172 (3rd Cir., 1970), where the Court rejected a blanket assertion of prejudice and noted that such an idea:

applies with equal force to every situation where civil and criminal proceedings may arise out of the same factual pattern. If, for example, the charge against an attorney was embezzlement of a client's funds, acceptance of plaintiff's position would require that the wronged client await the completion of a criminal trial before he sought a civil recovery, because of the possible compulsion of the risk of a judgment. The same would be true of every defendant in a wrongful death action; of many taxpayers; of most antitrust defendants . . . No authority has come to our attention for so broad a reading of the Fifth Amendment, and the countervailing possibilities of prejudice to civil litigants militates against any such extension of constitutional doctrine. Indeed, *serious public prejudice* would occur in this case by a delay in the determination of the plaintiff's status . . . [t]his consideration may well have been the reason for the prompt hearing ordered by the New Jersey Supreme Court

supra, at 1178 (emphasis added).

In light of these broad principles and limitations, the following pertinent questions arise:

1. Will a denial of the requested stay, i.e. proceeding promptly with the related civil matter, prejudice the Respondent's rights at the criminal trial; and, if so, specifically how will that prejudice manifest itself?
2. Can the Respondent defend himself in the civil proceeding, in this case a removal proceeding, without being forced to testify?
3. Are there "special circumstances" in this case, *beyond* the fact that there is a "parallel criminal proceeding," that would justify a stay of proceedings?

4. Is there a substantial "public interest" in proceeding with the civil matter expeditiously and avoiding delay so as to avoid "public prejudice"?

In short, the answers to these questions appear to be as follows:

- A. As the cases cited above note, the respondent must provide specificity as to how the proposed civil proceeding will prejudice his rights in the *criminal* proceeding. In this case, counsel for Respondent has issued a blanket objection that Respondent will be "compelled" to testify in the removal hearing, without articulating any specific injury that will arise in his *criminal* case. Indeed, it cannot be claimed that the Mayor will be prejudiced in his criminal case because there is no harm that will result in that case, if he does not testify in this one. If, on the other hand, the Mayor does decide to testify in the Removal proceeding, he still has failed to specify wherein he is prejudiced.
- B. As for the removal case, the Mayor, here again, has failed to *specify* or make a serious showing (even through the facts alleged by his attorney) that his testimony is necessary to an effective defense to these removal proceedings. It is clear, even from the Respondent's papers in this proceeding, that there are numerous defenses, most of which do not require the Mayor's testimony – e.g. "this kind of settlement is always done this way" and "the Council is never informed;" and "the Mayor simply did what he always does in these settlements and merely follows his lawyers' advice." All of this and much more can be readily proved through other witnesses (e.g. McCargo, Johnson, McPhail, Mitchell, Colbert-Osamuede). Indeed, since the Petitioner's case is largely documentary, it is similarly reasonable to assume and believe that the Respondent can effectively put forth his case through documents, as well as witnesses.

However, this is not to claim, and we do not claim, that the Mayor may not be hampered to some degree in defending himself at this removal hearing. Clearly it would be preferable, were he able to testify in his own defense.² However, his inability to testify, in and of itself, does not end the inquiry, as Respondent would have you believe. There are other questions that must be answered.

- C. Other than the fact that this proceeding is of great importance to the Mayor, he can point to no "special circumstances" that would compel the staying of this proceeding and it is of great significance that he has not done so.³

² In passing, the Council is also hampered by the Mayor's possible unwillingness to testify. It could well be that were he truly compelled to testify on his own behalf, he may provide essential information for the Petitioner's case.

³ Many of the facts relied upon by the Mayor in his response are either irrelevant or simply false. A good example, and it is merely *one* example, is his claim that the City Council "initiated" charges against the

D. Finally, there is clearly, a profound "public interest" that this matter proceed promptly, at this time and there is "serious public prejudice" that will result if these proceedings are stayed. This community desperately needs prompt resolution of this crisis and a decision of the Council's Removal Petition, in order to move forward, end the paralysis of city government and the public tragedy that this personal tragedy has engendered.

In light of these considerations, Respondent's request has not been justified, nor can it be justified. The competing demands, when carefully weighed and balanced, strongly favor moving ahead as quickly and expeditiously as possible.

B. The "Settlement Agreement" that was Prepared and Signed on October 17, 2008 was a Valid Contract and Not a Mere Draft, as Respondent Contends

Respondent argues that the "Settlement Agreement" dated October 17, 2007 was not a final settlement agreement, but a mere "draft." (*Respondent's Memorandum in Response and in Opposition to Petitioner's Motion*, p. 4). He takes this position, presumably, to justify his failure to disclose the Agreement, along with its confidentiality provisions, to the Council or the public. This is both factually disingenuous and legally incorrect. A standard definition of contract is found in *Williston*:

"A contract is a promise, or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

Samuel Williston, *A Treatise on the Law of Contracts* § 1, at 1-2 (3d ed. 1957).

Whether a valid contract exists is distinguishable from the question of whether there is a condition precedent to be fulfilled before any obligations arise under that contract:

Mayor's lawyers and the City's lawyers with the Attorney Grievance Commission. There is no evidence of this because it is simply an untrue and reckless charge. The grievance investigation was initiated by the Grievance Commission *before* the public hearings and the Council passed a resolution that, in light of the already pending investigation, its Special Council was to "provide" to the Commission a copy of his Report.

'A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance . . . (citations omitted). . . A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence . . . Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract.

Knox v. Knox, 337 Mich. 109, 118 (1953)

That there is a condition precedent in this agreement, (i.e. that the monetary terms of the agreement must be approved by the various parties within a particular number of days), does not diminish its validity as a contract to settle the case, a valid settlement agreement. It clearly was valid on October 17th when it was signed, on October 18th when the settlement was brought before the Internal Operations Committee of the Council and on October 23rd when the settlement was brought before the entire Council for its consent.

"An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts . . . 'The primary goal in the construction or interpretation of any contract is to honor the intent of the parties' . . . a 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor."

Mickonyk v. Detroit Newspapers, Inc., 238 Mich. App 347, 349 (1999)

Finally, as noted in an earlier brief, the "Settlement Agreement" of October was no "draft" as Respondent claims. This claim is another exercise in disingenuity, presumably to evade his responsibility to have disclosed the contents of this Agreement to the Council. It was *signed* to by all the parties (attorneys for Mayor Kilpatrick, the City, and plaintiffs Brown, Nelthrope, and Harris signed on behalf of their clients) with

their clients' approval.

Although apart from statute a signature is not necessary to the formation of a contract, it may serve as a manifestation of an intent to make a contract. Conversely, when one party presents a contract for signature to another party, the omission of that other party's signature is a significant factor in determining whether the two parties mutually reached an agreement."

Am Jur, Contracts § 174

Michigan courts agree: "Under contract principles, 'one who *signs* a contract cannot seek to invalidate it on the basis that he did not read it or thought its terms were different, absent a showing of fraud or mutual mistake.'" *Paterek v. 6600 Ltd*, 186 Mich. App. 445, 450 ... (1990)." *Sherman v. DeMaria Bldg Co, Inc*, 203 Mich. App 593, 599 (1994) (emphasis added). See also *Kloian v. Dominoes Pizza, L.L.C.* 273 Mich. App. 449, at 459 (an attorney's name at the bottom of an email message was determined to be a subscription amounting to an irrevocable acceptance of a settlement offer). This rule simply acknowledges common sense. A "draft" would never have been signed, since by designating it as a "draft" the parties acknowledge that the terms may, indeed probably will, change again, so that signing a "draft" is counterproductive to the intent of the parties.

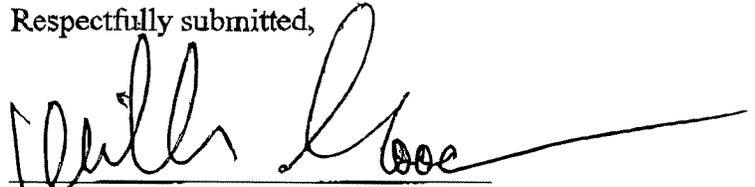
It is thus clear that on the "Settlement Agreement" of October 17th was a valid contract and definitely not a mere "draft," or any other kind of "draft."

Conclusion

Respondent argues that for the Governor to exercise her authority under MCL 168.327, it will set a bad precedent because she will then have to hold a hearing, weigh the evidence of official misconduct and consider the possibility of the removal of a major elected official. In fact the opposite is the case. The *failure* to act or delaying action will

set the dangerous precedent. This petition, filed by the City Council, claims that the Mayor settled these cases for his own personal and private benefit rather than for that of the public, that in so doing he concealed this fact from Council and the public and that these actions were unlawful. To say that the law that was enacted to address these very issues should, somehow, not operate to do so would be to undermine the rule of law and ultimately disrespect the people of this community. Further, failure to act in this matter will condone and give license to corrupt, unlawful and neglectful behavior by public officials. For these reasons, Petitioner respectfully requests that Respondent's motions be denied. Further, Petitioner's motions should be granted.

Respectfully submitted,



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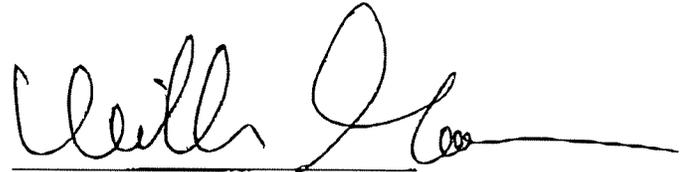
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DATED: August 25, 2008

CERTIFICATE OF SERVICE

WILLIAM H. GOODMAN certifies that on the 25th day of August, 2008, he hand delivered a copy of the DETROIT CITY COUNCIL'S REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR A HEARING ON THE MERITS, and this CERTIFICATE OF SERVICE upon counsel of record at the address listed above.

I declare that the statement above is true to the best of my information, knowledge and belief.



William H. Goodman (P14173)