

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

IN RE: JEFFERSON COUNTY, ALABAMA, DEBTOR.)))))	Case No.: 11-05736-TBB-9 Chapter 9 Proceeding
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**WILSON RATE PAYERS' INITIAL REPLY TO OMNIBUS REPLY BRIEF IN
SUPPORT OF PLAN CONFIRMATION**

COME NOW Charles E. Wilson, David Harris, III, Mike Agnesia (three Jefferson County, Alabama sewer rate payers) (“*Wilson Rate Payers*” or “*Rate Payers*”), and submit this Initial Reply to the Omnibus Reply Brief in Support of Plan Confirmation filed by Jefferson County (“the County”) on November 13, 2013.¹ Rate Payers are real parties in interest, have filed a Claim,² and each is a special tax payer pursuant to 11 U.S.C. Section 1109(b). In a transparent effort to disregard the merits of the Rate Payers’ objections, they County has resorted to attacking the messenger, rather than the message. Specifically, the County attacks the credibility, ethics, and veracity of Rate Payers’ expert and consultant, James H. White (“White”). As will be discussed herein, no argument advanced by the County serves as a basis for disqualification of White or his opinions, and no violation of any MSRB, SEC, or legal rule or regulation has taken place that would serve to disqualify White or counsel for the Rate Payers. In support of this filing, Rate Payers state as follows:

I. THE COUNTY’S GENERAL OBJECTIONS TO WHITE’S REPORT AND AFFIDAVIT

The County’s objections and argument related to the opinions and testimony of White boil

¹ Rate Payers herein expressly reserve their right to supplement this filing with additional materials, evidence, and or arguments.

² Currently pending before this Court is Rate Payer’s Motion for New Trial, or the Alter or Amend its Judgment on Rate Payers’ Claim (Doc. 2164).



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down to two points: (1) weight and credibility issues, not issues of admissibility, and (2) claims that his opinion on the 40-year maturity period of the bonds is precluded as being “privileged and confidential information of the County” by virtue of White serving as a financial advisor to the County during the period when such maturity periods were discussed. (Doc. 2203, pp. 46-50, fn. 35, p. 48).

It is important to point out that the County cites NO legal authority for the exclusion of White or his opinions other than those based on disclosure of allegedly “privileged and confidential” information related to the 40-year bond maturity period. Indeed, no *Daubert* challenge is raised, nor is any case law cited which sets forth any legal bases for a limitation on or exclusion of White’s opinions outside of alleged confidentiality. Indeed, every argument raised against White (i.e., claims that he has “switched sides,” or “flip-flopped” his position) are ones which go to the weight and credibility this Court should accord his opinion, not issues of admissibility. *See e.g., Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988) (“[W]eakness in the underpinnings of the expert’s opinion go to its weight rather than its admissibility.”) The County has not raised any precedent which would serve as a bases for the preclusion of White or his testimony, and as such, any argument related to weight and credibility, rather than issues of admissibility, is due to be rejected and is without merit.

II. WHITE WAS NOT UNDER ANY BINDING CONFIDENTIALITY AGREEMENT AND DID NOT DISCLOSE PROTECTED, PRIVILEGED, OR CONFIDENTIAL INFORMATION.

Contrary to the assertions of the County, White was not legally bound under any existing confidentiality agreement which prevented him from disclosing any information contained in his affidavit or the report prepared by Porter, White & Company, Inc. The County has not cited to

any confidentiality agreement which would have precluded White from discussing or disclosing information he learned during his tenure as a financial advisor to the County during 2007 and/or 2008. Indeed, the County's filing is nothing more than "Since we don't like the message, let's attack the messenger" – heaping scurrilous allegations on White due to the fact that he has pointed out serious potential legal and factual deficiencies with the plan which may serve as bars to confirmation. The County has not produced any documented evidence which would serve as a preclusive effect to White's opinions, and only claims that he was acting as a "fiduciary," which allegedly would prevent him from disclosing the information related to the County's deliberations on the 40-year bond maturity period. (Doc. 2203, p. 48, fn. 35 – alleging that the only "privileged and confidential" information disclosed relates to legal opinions supposedly issued by the County's attorney's on whether the maturity of the sewer debt can be extended beyond 40 years).

What is lacking from the County's filing is candor. What is not disclosed to the Court is that financial advisors were not considered "fiduciaries" for purposes of the securities or financial industries until the passage of the Dodd-Frank Act in October 2010. As this Court is well aware, the business of providing financial advice to public entities is highly regulated at the federal level, by legislative acts, the Municipal Securities Regulatory Board ("MSRB"), and the Securities and Exchange Commission ("SEC"). Prior to the passage of Dodd-Frank, municipal advisors were not fiduciaries under federal statutes or regulations. Dodd-Frank amended Section 15B(c)(1) of the 1934 Act to provide that municipal advisors are fiduciaries. There was no grandfathering provision contained in Dodd-Frank which retroactively applied to create a confidentiality burden on the financial advisor for prior work. It is interesting to note that Dodd-Frank itself does not even speak to the meaning of a municipal advisor's fiduciary duty; however, such duty has been discussed (in

2011) by the SEC in its *Study on Investment Advisers and Broker-Dealers: As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*,” published in January 2011.³ In that study, the SEC stated the following:

Fundamental to the federal fiduciary standard are the duties of loyalty and care. The duty of loyalty requires an adviser to serve the best interests of its clients, which includes an obligation not to subordinate the clients’ interests to its own. An adviser’s duty of care requires it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information.

Id. at p. 22.⁴

In the instant case, no assertion has been made, nor can a credible one be asserted, that White has violated the best interests of a client or subordinated the clients’ interests to his own. Even IF a viable argument could be advanced on this issue, there was NO fiduciary relationship between White and the County in 2007 or 2008 when these meetings took place. As such, there can be no breach of privilege or confidentiality because a fiduciary relationship did not exist and no confidential relationship existed which would require White to keep such information confidential in perpetuity. No allegation or facts have been presented that White, or his company, were (1) hired for legal services; (2) held themselves out to be a fiduciary of the County or were ever regarded as such by the County or its employees; or (3) that there was any binding confidentiality agreement in place between the parties which would prevent White from disclosing such information some five to six years later. Without such facts, evidence, documents, or substantiated arguments, the County’s filing regarding White amounts to nothing more than a

³ It should be noted that both the passage of Dodd-Frank and the SEC study herein cited post-dated White’s tenure as a municipal advisor to the County by more than two (2) years and do not serve as a bar to White’s opinions in this bankruptcy proceeding.

⁴ A copy of said SEC study is publicly available at <http://www.sec.gov/news/studies/2011/913studyfinal.pdf>.

meritless and baseless attack on the messenger for a message which strikes too close to home for the County's liking. Based on the above cited total lack of evidence, exhibits, or any other bases for the County's requested exclusion of White, such request is due to be denied in its entirety.

Respectfully submitted this 15th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM-ECF system and served same in accordance with the Master Service List, attached hereto as Exhibit "A."

/s/ Joshua L. Firth
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EXHIBIT

A

Exhibit "A"

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Lara Swindle c/o Ann C. Robertson c/o H. Wallace Blizzard Wiggins, Childs, Quinn & Pantazis, LLC The Kress Building 301 Nineteenth Street North Birmingham, AL 35203 arobertson@wcqp.com hwb@wcqp.com	Charlotte Breece Lillie Starks On behalf of all similarly situated persons in Breece, et al v. Jefferson County Tax Collector c/o Lee Wendell Loder Loder, P.C. P.O. Box 13545 Birmingham, AL 35202 loderlawfirm@aol.com

<p>John Madison, IV, inmates and others similarly situated at the Jefferson County Jail c/o H. Doug Redd 5343 Old Springville Road Pinson, AL 35126 hdougredd@gmail.com</p>	<p>B.A.S. L.L.P. c/o Salem Resha, Jr. The Resha Firm 1516 20th Street South, Suite A Birmingham, AL 35205 sresha@reshafirm.com</p>
<p>CSX Transportation, Inc. A party-in-interest c/o James H. White, IV Baker Donelson Bearman Caldwell & Berkowitz, P.C. 420 20th Street North 1600 Wells Fargo Tower Birmingham, AL 35203 jwhite@bakerdonelson.com</p>	<p>Unisys Corporation Party in Interest c/o Dana S. Plon, Esq. Sirlin Gallogly & Lesser, P.C. 123 South Broad Street, Suite 2100 Philadelphia, PA 19109 dplon@sirlinlaw.com</p>
<p>James Pruitt Interested Party c/o Cynthia Forman Wilkinson, Esq. c/o Larry R. Mann, Esq. Wilkinson Law Firm, PC 215 N. Richard Arrington, Jr. Blvd., Ste. 811 Birmingham, AL 35203 wilkinsonefile@bellsouth.net</p>	<p>John Mason, IV c/o Dan C. King, III Stewart & Stewart, P.C. 1826 3rd Avenue North Suite 300 Bessemer, AL 35020 dking@stewartandstewart.net</p>
<p>James R. Crane c/o Steven D. Altmann c/o Charles L. Denaburg c/o Marvin E. Franklin Najjar Denaburg, P.C. 2125 Morris Avenue Birmingham, AL 35203 saltmann@najjar.com cdenaburg@najjar.com mfranklin@najjar.com</p>	<p>Owens & Minor, Inc. c/o Robert S. Westermann, Esq. c/o Sheila deLa Cruz, Esq. Hirschler Fleischer, P.C. P.O. Box 500 Richmond, Virginia 23218-0500 rwestermann@hf-law.com sdelacruz@hf-law.com</p>

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Wells Fargo Bank, National Association, Indenture Trustee c/o Russell M. Cunningham, IV Cunningham Firm, LLC Landmark Center, Suite 600 2100 First Avenue North Birmingham, AL 35203 Russell@cunninghamfirmllc.com	Moore Oil Company Creditor c/o Brenton K. Morris Benton & Centeno, LLP 2019 Third Avenue North Birmingham, Alabama 35203 bmorris@bcattys.com
Innovation Depot, successor-in-interest to Entrepreneurial Center, Creditor c/o Russell M. Cunningham, IV Cunningham Firm, LLC Landmark Center, Suite 600 2100 First Avenue North Birmingham, AL 35203 Russell@cunninghamfirmllc.com	First Commercial Bank As Indenture Trustee c/o David B. Anderson c/o Deanna L. Weidner Anderson Weidner, LLC 505 20 th Street North Financial Center, Suite 1450 Birmingham, AL 35203-4635 dbanderson@andersonweidner.com dlweidner@andersonweidner.com
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Internal Revenue Service c/o Kenya Bufford 801 Tom Martin Drive M/S 126 Birmingham, AL 35211 Kenya.Bufford@irs.gov	UAB Health System c/o Kathleen Kauffman Legal Counsel 500 22 nd Street South, Suite 408 Birmingham, AL 35233 kkauffman@uasystem.ua.edu
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John A. Vos Esq., Interested Party c/o John A. Vos, Esq. 1430 Lincoln Avenue San Rafael, CA 94901 invalidemailecfonly@gmail.com	Alabama Department of Environmental Management c/o Tom Johnston, Esq. General Counsel 1400 Coliseum Blvd. Montgomery AL 36110 tlj@adem.state.al.us daf@adem.state.al.us
Environmental Protection Agency c/o Bill Weinischke U.S. Department of Justice Room 6028 Patrick Henry Bldg. 601 D Street, N.W. Washington, D.C. 20004 bill.weinischke@usdoj.gov	University of Alabama Health Services Foundation, P.C. Sirote & Permut, P.C. c/o Stephen B. Porterfield 2311 Highland Avenue South Birmingham, AL 35205 sporterfield@sirote.com

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National Public Finance Guarantee Corp. c/o Jennifer S. Morgan Hand Arendall LLC 30200 RSA Tower Post Office Box 123 Mobile, AL 36601 jmorgan@handarendall.com	Ad Hoc Sewer Warrantholders c/o Justin G. Williams, Esq. Tanner Guin & Crowell, LLC 2711 University Boulevard Tuscaloosa, AL 35401-1465 jwilliams@tannerguincrowell.com
City of Hoover c/o Leslie M. Klasing c/o April B. Danielson Waldrep, Stewart & Kendrick, LLC 2323 Second Avenue North Birmingham, AL 35203 Klasing@wskllc.com adanielson@wskllc.com	Depfa Bank PLC c/o Israel David c/o Gary L. Kaplan Fried, Frank, Harris, Shriver & Jacobson LLP One New York Plaza New York, NY 10004 israel.david@friedfrank.com gary.kaplan@friedfrank.com

VIA U.S. MAIL:

Shoe Station, Inc. Attn: Michael T. Cronin, Esq. Johnson Pope Bokor Ruppel & Burns, LLP 911 Chestnut Street Clearwater, FL 33576	Teklinks Inc. 201 Summit Parkway Homewood, AL 35209
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Morris & Dickson Co LLC 410 Kay Lane Shreveport, LA 71115	Augmentation, Inc. 3415 Independence Drive, Suite 101 Birmingham, AL 35209-8315
AMT Medical Staffing, Inc. 2 20 th Street North Suite 1360 Birmingham, AL 35203	Brice Building Co., LLC 201 Sunbelt Parkway Birmingham, AL 35211
John Plott Company Inc. 2804 Rice Mine Road NE Tuscaloosa, AL 35406	Laboratory Corporation of America 430 South Spring Street Burlington, NC 27215 Attention: Legal Department