

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C. ALAN WALKER, in his capacity)
as Secretary for the Department of)
Community and Economic)
Development,)

Petitioner,)

v.)

CITY OF HARRISBURG,)

Respondent.)

) Docket No. 569 MD 2011

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
2013 OCT - 3 P 3:40

RESPONSE OF THE RECEIVER
TO OBJECTIONS TO PLAN OF RECOVERY

William B. Lynch, Receiver for the City of Harrisburg (the “Receiver”), by and through McKenna Long & Aldridge LLP, counsel to the Receiver, respectfully submits the following Response to the Objections to Plan of Recovery (the “Objection”) filed by Daniel C. Miller, City Controller (the “City Controller” or “Mr. Miller”).¹

¹ This response addresses solely procedural defects and other non-substantive objections to the City Controller’s Objections. The Receiver does not here address Mr. Miller’s substantive objections to the Plan, but, rather, by way of separate application (“Application”), filed contemporaneously herewith, the Receiver asks this Court to allow him to separately submit a

I. Background

On February 6, 2012, the Receiver filed with this Court a preliminary recovery plan for the City (“Preliminary Plan”). On or about February 28, 2012, Mr. Miller and certain others, in their capacity as officials of the City of Harrisburg, filed through their counsel objections to the Preliminary Plan and asked the Court to enjoin the Receiver from proceeding with the implementation of the Preliminary Plan. At a hearing on the Preliminary Plan, conducted on March 1, 2012, the City Controller was permitted to participate. The Preliminary Plan was subsequently confirmed by order of this Court, entered on March 9, 2012 (“Preliminary Plan Order”). In accordance with the statutorily prescribed standard, this Court found that the Preliminary Plan was neither arbitrary nor capricious, and that it was not wholly inadequate to alleviate the fiscal emergency of the City. In addition, the Court denied the request for injunctive relief by Mr. Miller and his co-filers, dismissing them as premature.

substantive response to the Objection (the “Substantive Response”). In his Application, the Receiver asks the Court to permit him to submit his Substantive Response subsequent to the Court’s consideration of and ruling on these procedural objections, and only if the Receiver is unsuccessful in defeating the City Controller’s Objection with these procedural objections.

For now, with respect to the substance of the Objection, the Receiver simply makes the following observations: First, whether resulting from a lack of understanding of the Plan and its component parts or otherwise, the Objection is replete with unsupported and/or inadmissible opinions and contains fundamental mischaracterizations of the Plan. Second, the City Controller makes his untimely objections regarding a Plan that has received the support of virtually all major creditor constituencies, City Council and the Mayor, as well as this Court’s approval.

On August 26, 2013, the Receiver filed his modified recovery plan (the "Harrisburg Strong Plan" or "Plan"). Dauphin County ("County"), certain municipalities known as the "Suburban Communities" and Assured Guaranty Municipal Corp. ("Assured Guaranty") each filed motions to intervene, which motions were granted by the Court. Twenty-four (24) days after filing it, a hearing on the Harrisburg Strong Plan was conducted on September 19, 2013 (the "Hearing"). The Defendant City and the intervenors were each permitted to be heard at the Hearing, as well as City Council, whose various approvals of significant aspects of the Plan were required as a material condition to the Plan's confirmation. Each of these parties voiced support for the Harrisburg Strong Plan. This Court approved the Plan at the Hearing. The order approving the Plan was entered on September 23, 2013 ("Plan Approval Order"). At the outset of the September 19 Hearing, the Court announced from the bench that no objections to the Harrisburg Strong Plan had been filed and that, as such, none would be entertained at the Hearing.

Notwithstanding the Court's announcement at the Hearing, on the following day, September 20, 2013, the City Controller attempted to file, *pro se*, his Objection. Because the City Controller was represented of record by counsel, the Prothonotary of the Court did not permit the September 20 Objection to be entered onto the docket until October 1, 2013, after a motion to withdraw by Mr. Miller's

counsel had been filed and approved by the Court. According to his Objection, despite the fact that he had failed to file any response to the Plan or otherwise indicate of record in advance of the Hearing his desire to participate thereat, Mr. Miller complains that this Court unfairly denied him an opportunity to be heard at the Hearing. In his Objection, Mr. Miller specifically asserts that he was not provided with “an adequate opportunity to file these objections.” Objection at 1, ¶ 2. As such, Mr. Miller objects “on due process grounds” to this Court’s denial of his purported right to be heard; and he boldly contends that he and others were “denied a full and fair opportunity to file objections to the referenced plan.” *Id.* To somehow bolster his right to be heard on his Objection, Mr. Miller observes that he was permitted to be heard on the Preliminary Plan in March, 2012 and, as such, he ought without any further notice be permitted to be heard on the Harrisburg Strong Plan, because, as he alleges, it is, “merely an amendment to the original plan.” *Id.* at 1-2, ¶3. He also seems to ground the legitimacy of his failure to submit a timely written objection on the fact that he had opposed the Harrisburg City Council’s ratification of the Plan on September 16, 2013. *Id.* at 1-2, ¶ 3. Finally, Mr. Miller maintains, without elaboration, but as a purported basis to buttress his late-filed Objection, that he “believes that he has 30 days from the date of the confirmation of the Plan in which to file objections to the plan, or

alternatively, that he had 30 days from the date the plan was filed” to object to the Plan. *Id.* at 1, ¶ 2.²

II. Argument

This late-filed and procedurally defective attempt by the City Controller to voice objections to the consensual Plan that has been approved by the Court should be rejected as untimely and procedurally defective. Setting aside whether Mr. Miller should have taken separate action to first establish his *right* to be heard at the Hearing based on this Court’s Case Management Order entered on September 4, 2012 (the “Case Management Order”) and other applicable rules,³ he failed to

² The Receiver is authorized to state that the Ambac Assurance Corporation, a significant Creditor of the City, and Intervenor Assured Guaranty Municipal Corp., joins in the Response and that the Intervenor Suburban Communities concurs with the relief herein requested. The Receiver has also been advised that Dauphin County and the City of Harrisburg intend to separately submit their own responses to Mr. Miller’s Objection.

³ Prior to the Hearing, at no time did Mr. Miller make any attempt to establish or assert a *right* to appear and be heard at the Hearing. As a threshold matter, under the Rules of Civil Procedure, in order to intervene in an action, the would-be intervenor must file a petition with the Court, “in the form of and verified in the manner of a plaintiff’s initial pleading in a civil action.” Pa.R.C.P. 2328(a). In such petition, the movant must set forth, “the ground on which intervention is sought and a statement of the relief or the defense which the petitioner desires to demand or assert.” *Id.* (emphasis added). A motion to intervene that does not meet these requirements is insufficient to support a request to intervene. *Valentino Motors Corp. v. Grillo*, 22 Pa. D. & C.2d 252 (C.P. Cambria 1960); see also, *Keystone Auto Club Casualty Co. v. Sell*, 13 Pa. D. & C.2d 215 (C.P. Montgomery 1957).

In addition, pursuant to the Case Management Order, “[a] person or entity not named as a respondent on an application that has a direct and substantial interest in the particular matter put at issue by the filing may request leave to intervene by application” pursuant to Pa.R.A.P. 123. Mr. Miller failed to ever attempt to establish his right as an intervenor to be heard in opposition to the Plan, notwithstanding that the Case Management order had been issued and made applicable to this case almost a year prior to the filing of the Harrisburg Strong Plan. As such, Mr. Miller has no basis on which to argue that he has a *right* to be heard in opposition to the

file any objection or response to the Plan within the prescribed time which: (a) this Court had clearly and expressly set forth in its Case Management Order – an order that has appeared in its entirety on the docket of this Case for more than a year; and (b) which is otherwise the applicable period for filing a response or opposition under the Rules of Appellate Procedure that govern proceedings before this Court. Simply put, Mr. Miller’s delinquent attempt to be heard to object to the Plan should be rejected as untimely and defective based on his failure to file any opposition to the Plan within the prescribed and required timeframe.

Mr. Miller asserts, without elaboration or support, that he “believes that he has 30 days from the date of the confirmation of the Plan in which to file objections to the plan, or alternatively, that he had 30 days from the date the plan was filed and that he has not been provided with an adequate opportunity to file these objections.” Objections at 1, ¶ 2. This undeveloped and unsupported “belief” is not sufficient to establish the purported right claimed by Mr. Miller. Pursuant to both the Case Management Order of this Court and the applicable Rules of Appellate Procedure, requests for “relief” or “approval” from the Court are to be made pursuant to Pa.R.A.P. 123. Unquestionably, the Receiver’s request that this Court confirm the Harrisburg Strong Plan as compliant with the statutory requirements set forth under § 703(e) of Act 47 was a request for “relief” or

Plan; and the denial of his late attempt to orally request to be heard and participate at the Hearing should be overruled on this basis alone.

“approval” as contemplated by Pa.R.A.P. 123. Indeed, confirmation of a plan lies at the very heart of and is the anticipated goal of the relief or approval which a receiver would be expected to seek under the statute. It is that request for relief or approval which, in turn, triggers the requirement, clearly set forth under both the Case Management Order and Pa.R.A.P. 123 itself, that anyone seeking to oppose or respond to the requested relief must do so within fourteen (14) days.

In conformance with Pa.R.A.P. 123, the Receiver filed his Plan with the Court on August 26, 2013, and asked this Court to approve the Plan. He served his Plan that same day. Setting aside the question of whether Mr. Miller should have first affirmatively sought intervenor status, had he intended to be heard in any manner or participate in the proceedings, at a minimum he should have filed his objection to the Plan within fourteen (14) days of the service of the Plan as required by both the Case Management Order and Pa.R.A.P. 123. Mr. Miller failed to respond to the Receiver’s requested relief within fourteen (14) days of the date the Receiver served his Plan, and, in fact, did not attempt to respond at any time to the Plan prior to the date of the Hearing.⁴

Despite having failed to timely put of record his objections to the Plan, Mr. Miller believes that he should simply have been permitted to wait until the day of the Hearing to register his objections, without affording this Court, the Receiver or

⁴ Mr. Miller had some twenty-three (23) days between the date of the filing of the Plan and the date of the Hearing within which he might have attempted to respond or object to the Plan.

any other interested parties entitled to notice with *any* prior notice of his intent to object, let alone the substance of his objections. In a twist of logic, Mr. Miller appears to criticize this Court for denying him “due process” and for failing to afford him a “full and fair opportunity to file objections,” Objection at 1, ¶ 2, based on the Court’s disallowance of his opportunity to raise his objections for the first time at the Hearing. Mr. Miller’s attempt to convert his own lack of *due diligence* in timely submitting his objection into a myopic claim that this Court denied him *due process* should be summarily rejected.

In a strained attempt to avoid the repercussions of his own lack of diligence, Mr. Miller asserts that he should have been allowed to state his objections on the record at the Hearing because he had been allowed to oppose the Plan in March 2012. Disingenuously arguing that the Harrisburg Strong Plan is “merely an amendment to the original plan,” Mr. Miller maintains that, as such, he is free to complain about its modification at any time, in any way and without any notice in disregard of the timetable established by the Case Management Order.

The mere fact that this Court had permitted Mr. Miller to be heard at the hearing on the Preliminary Plan has nothing to do with whether Mr. Miller took the necessary steps to give notice of his request to be heard at the Hearing on the Receiver’s request for approval of the Harrisburg Strong Plan. First, as discussed above, had Mr. Miller wished to oppose the modified Plan, he was required to have

responded to the Receiver's request for its approval within fourteen (14) days. Second, his objections to the specifics of the Harrisburg Strong Plan that he now wishes to assert are unquestionably directed to the details in that Plan, and not to the broad design and contours of a plan that were reflected in the Preliminary Plan. It is meritless for Mr. Miller to urge that the remarks made about the Preliminary Plan 18 months earlier should somehow supplant his need to file precise objections to the detailed terms of the Harrisburg Strong Plan that was put before this Court in August, 2013⁵; and the hollow nature of his contention that his comments about the Preliminary Plan should have served as sufficient notice is totally underscored by even a cursory review of his Objection, the entire thrust of which is directed to complaints about the specifics of the Strong Plan, not the Preliminary Plan. Finally the fact that Mr. Miller had voiced his objections to the Plan before City Council and outside the record of these proceedings is unavailing. This Court and the litigants before it are entitled to notice that objections are being raised in a judicial proceeding. Comments or criticisms made in public are a far cry from filing papers in a court, where litigants are subject to principles, rules and behavioral

⁵ Moreover, Mr. Miller's "presumption" that his "March, 2012 objection was still open, a [sic] it had not been resolved" and that the pendency of those objections gives rise to his right to be heard now without the need to file a new objection, is simply wrong. In the Preliminary Plan Order, the Court expressly denied the injunctive relief requested by Mr. Miller and his co-filers and *dismissed* their objections to the Plan.

guidelines governing, *inter alia*, not only what is admissible evidence, but also the conduct of those who appear before the Court.

III. Conclusion

As reflected in the record before this Court at the Hearing, time is of the essence in respect to matters relating to the Receiver needing to be in a position to consummate the Harrisburg Strong Plan as expeditiously as possible.

As such, the Receiver respectfully requests that this Court rule on Mr. Miller's Objection as soon as the Court is in a position to do so, and enter a written order denying and overruling it based upon the procedural grounds set forth in this Response.

Respectfully submitted,

McKenna Long & Aldridge, LLP

Date: October 3, 2013

By: *Joseph Krolikowski, by Christopher S. Salter, with express consent*
Joseph Krolikowski, Esq.
Pennsylvania Bar No. 26300
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
Tel: (404) 527-4000
Fax: (404) 527-4198
jkrolikowski@mckennalong.com

Mark Kaufman, Esq.
Georgia Bar No. 409194
B. Summer Chandler
Georgia Bar No. 120521
303 Peachtree Street, Suite 5300
Atlanta, Georgia 30308
Phone: (404) 527.4000
Fax: (404) 527.4198
mkaufman@mckennalong.com
schandler@mckennalong.com

**Attorneys for William B. Lynch, in his
official capacity as Receiver for the City
of Harrisburg**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, through counsel, William B. Lynch, in his capacity as Receiver for the City of Harrisburg, has this day caused true and correct copies of the foregoing RESPONSE OF THE RECEIVER TO OBJECTIONS TO PLAN OF RECOVERY to be served, via first class mail, postage prepaid upon the individuals identified on Exhibit A hereto at the addressees indicated on Exhibit A.

Respectfully submitted this 3rd day of October, 2013.

MCKENNA LONG & ALDRIDGE LLP

By: *Joseph Krolikowski, Esq.*
Joseph Krolikowski, Esq. *with express consent*
Pennsylvania Bar No. 26300303
Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
Phone: (404) 527-4000
Fax: (404) 527-4198
jkrolikowski@mckennalong.com

Attorneys for William B. Lynch, in his
official capacity as Receiver for the City
of Harrisburg

EXHIBIT A

Neil Anthony Grover
 Attorney at Law
 2201 N 2nd St
 Harrisburg, PA 17110
 (717) 260-9651
(Attorney for the Harrisburg City Council)

Kenneth W. Lee
 Post & Schell, P.C.
 17 North Second Street
 12th Floor
 Harrisburg, PA 17101
 (717) 612-6035
(Attorneys for the Mayor of the City of Harrisburg)

Jeffrey G. Weil
 Cozen O'Connor
 1900 Market St
 Philadelphia, PA 19103
 (215) 665-5582
(Attorneys for C. Alan Walker, DCED Secretary)

Brian Allen Kint
 Cozen O'Connor
 1900 Market St
 Philadelphia, PA 19103
 (215) 665-4686
(Attorneys for C. Alan Walker, DCED Secretary)

Neal David Colton
 Cozen O'Connor
 1900 Market St
 Philadelphia, PA 19103
 (215) 665-2060
(Attorneys for C. Alan Walker, DCED Secretary)

Eric Louis Scherling
 Cozen O'Connor
 1900 Market St
 Philadelphia, PA 19103
 (215) 665-2042
(Attorneys for C. Alan Walker, DCED Secretary)

Scott T. Wyland
 Salzmann Hughes PC
 105 N. Front Street, Suite 205
 Harrisburg, PA 17101
 (717) 249-6333
(Attorneys for certain Suburban Municipalities)

Stephen Aaron Miller
 Cozen O'Connor
 1900 Market St
 Philadelphia, PA 19103
 (215) 665-2000
(Attorneys for C. Alan Walker, DCED Secretary)

<p>Nevin J. Mindlin 2550 N. 3rd Street Harrisburg, PA 17110 (717) 238-8705 <i>(Debt Watch Harrisburg)</i></p>	<p>Edward Lee Stinnett, II Salzmann Hughes PC 105 N. Front Street, Suite 205 Harrisburg, PA 17101 (717) 249-6333 <i>(Attorneys for certain Suburban Municipalities)</i></p>
<p>Markian Roman Slobodian Law Offices of Markian R. Slobodian 801 N 2nd St Harrisburg, PA 17102—3213 (717) 232-5180 <i>(Attorneys for Ambac Assurance Corporation)</i></p>	<p>Lee E. Morrison 420 Lamp Post Lane Camp Hill, PA 17011 (717) 761-9090 <i>(Attorney for Harrisburg City Council)</i></p>
<p>Howard B. Klein Law Office of Howard Bruce Klein, P.C. 1700 Market Street, Suite 3025 Philadelphia, PA 19103 (215) 972-1411 <i>(Attorneys for David Unkovic)</i></p>	<p>Marck Joachim Arent Fox LLP 1050 Connecticut Ave., NW Washington, DC 20036 (202) 857-6018 <i>(Attorneys for Ambac Assurance Corporation)</i></p>
<p>Daniel L. Sullivan Saidis, Flower & Lindsay Saidis Sullivan & Rogers 26 W High St Carlisle, PA 17013 (717) 243-6222 <i>(Attorneys for County of Dauphin)</i></p>	<p>Geoffrey R. Johnson Sprague & Sprague 1110 Wellington Road Jenkintown, PA 19046 (215) 490-7436 <i>(Attorneys for Mark D. Schwartz)</i></p>
<p>Ronald L. Finck Mette, Evans & Woodside 3401 N Front PO Box 5950 Harrisburg, PA 17110 (717) 232-5000 <i>(Attorneys for County of Dauphin)</i></p>	<p>Charles B. Zwally Mette, Evans & Woodside 3401 N Front St PO Box 5950 Harrisburg, PA 17110 (717) 232-5000 <i>(Attorneys for County of Dauphin)</i></p>

<p>Paul M. Hummer Saul Ewing LLP Centre Square West 1500 Market Street, 38th Floor Philadelphia, PA 19102-2186 (215) 972-7777 <i>(Attorneys for Assured Guaranty Municipal Corp.)</i></p>	<p>Matthew M. Haar Saul Ewing LLP Centre Square West 1500 Market Street, 38th Floor Philadelphia, PA 19102-2186 (215) 972-7777 <i>(Attorneys for Assured Guaranty Municipal Corp.)</i></p>
<p>James S. Gkonos Saul Ewing LLP Centre Square West 1500 Market Street, 38th Floor Philadelphia, PA 19102-2186 (215) 972-8667 <i>(Attorneys for Assured Guaranty Municipal Corp.)</i></p>	<p>Daniel C. Miller 10 N. Second Street, Suite 403 Harrisburg, PA 17101 (717) 255-3060 <i>(Pro se)</i></p>