IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

INDEPENDENT VOTERS IF ILLINOIS INDEPENDENT PRECINCT ORGANIZATION, and AVIVA PATT,)	
Plaintiffs,)	**No. 09-CH-28993**
v.)	**Honorable Richard K. Billik, Jr.**
AMER AHMAD, City of Chicago Comptroller, and CHICAGO PARKING METERS, LLC)	
Defendants.)	

PLAINTIFFS' COMBINED
REPLY BRIEF IN SUPPORT OF PLAINTIFFS' SUMMARY JUDGMENT
RESPONSE BRIEF TO CPM'S AND THE CITY'S
CROSS-MOTIONS FOR SUMMARY JUDGMENT

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I. SUMMARY OF PLAINTIFFS' ARGUMENT IN REPLY

The Defendants make bald attempts to obfuscate the reality of the parking meters concession agreement (attached hereto as Exhibit 1): a private company's purchase of the City's power to legislate and police in the public interest.

Taxpayer Standing Exists for All Claims Asserted Here. CPM's claim that taxpayers lack standing ignores clear, controlling Illinois precedent, that plaintiffs have both taxpayer and taxpayer derivative standing to assert challenges to illegal city spending. Further, CPM itself lacks standing to make this argument, and waived it by failing to raise the issue as a defense in its pleadings.

The Arguments that the City's Legislative Powers Have Not Been Sold or Illegally Conditioned, Ignore Both the Terms and Operation of the Concession Agreement. First, the claims that there has been no delegation of its "police" or legislative powers[1] because the City technically retains its ability to exercise its "reserved powers" and is limited only in having to compensate CPM for that exercise -- ignore both the nature, size and impact of that condition. Each exercise of reserved powers now requires the City to make an immediate payment in the amount of the aggregate value of revenue impact through 2084. The massive size of the compensation payment for each such change means that the City can no longer legislate in just the public interest, but in its financial ability to buy back these powers through compensation to CPM, an unusually large deterrent cash payment not faced in normal government decision-making in regulating the public way.

The Agreement thus fundamentally changes the cost-benefit analysis in which the City would normally engage in when deciding how to regulate the public way. The heart of

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[1] For these purposes, the "police power" is the "general power of governing". *Nat'l Fed'n of Indep. Bus. v Sebelius*, 11-393, 2012 WL 2427810 (U.S. June 28, 2012), slip op. at 7. Here, the two aspects of that police power are the City's authority to legislate in the public interest and to enforce the laws.

Plaintiffs' suit is that this change is an impermissible infringement on the City of Chicago's non-delegable police / legislative powers under Illinois law.

Contrary to the City and CPM's arguments that this Agreement is legitimized "analogously" by existing case law approving normal government debt-financing transactions, we will show that this Agreement is fundamentally different from the normal and proper municipal debt financing upheld in the leading cases, with vast protective benefits for CPM, never approved by any court, that dwarf the usual bondholders' rights, evades prudential limitations municipal indebtedness, and disguise, as much as possible, that the real quid pro quo for the purchase price was an unprecedented restriction on the use of the "Reserved Powers" in the exercise of the best judgment of elected officials for seventy five years to come.

The "Arbitration is a Normal Current Resolution Mechanism" Issue. The City's argument that the adjustment provisions enforceable by arbitration should be upheld simply because agreements to arbitrate issues are commonly accepted, ignores the fact that the arbitrator's decision can compel the City to actively legislate in a host of areas that are fundamental legislative issues, well beyond the usual arbitrable issues; could well require the City to legislate a host of matters not just to *rates*, but to legislative matters as well, such as: (i) the number of tickets to "boot" or suspend driving privileges (something beyond the City's control); (ii) permitting or prohibiting others from building new off-street parking garages or other future competition to open in the City; (iii) could well require the City to not only raise parking rates to ensure an ongoing 85% gross profit margin; but (iv) to raise penalties to ten-times such higher parking rates, and other matters clearly within the City's authority, as a home rule entity, to legislate its "Reserved Powers" in the public interest.

<u>The "Public Purpose" Issue.</u> The arguments that the expenditure of money to pay police to write tickets on people who don't pay CPM's meters just continues the enforcement of City traffic regulations ignores the difference between penalizing someone for occupying City spaces for excessive time, versus failing to pay a private concessionaire's meter.

<u>CPM's Purported Expert Opinion is Foundationally Deficient and of No Real Relevance to Any Issue Before the Court, and is Substantively Contradicted in its Conclusions.</u> CPM's purported expert opinion is of little real substance, self-refuted by its lack of foundation, and affirmatively refuted; by both actual published, rather than paid-for, independent analysis, which identifies serious structural flaws in this transaction, as well as CPM's own documents presented to its investors.

II. TAXPAYERS' STANDING TO ASSERT CLAIMS: PLAINTIFFS HAVE BOTH TAXPAYER AND DERIVATIVE STANDING TO CHALLENGE THE PAYMENTS TO CPM

CPM oddly asserts here (CPM's Memorandum in Support of Cross-Motion for Summary Judgment ("CPM-CMSJ"), at 14) that taxpayers have no direct standing to challenge the expenditures here (arguing that the money in the City's hands came from CPM, rather than taxpayers, and is in a fund that taxpayers cannot control), and no derivative standing, because, CPM asserts, if the deal is declared illegal, it will cost, rather than benefit the City.

First, CPM objects that the City's liability to CPM is limited to a portion of the purchase price – money paid by CPM, not the taxpayers – held in an allegedly contingent fund. Despite presenting no evidence that this fund is held in a trust account or in escrow and not in the City's name, CPM argues that no "taxpayer money" is at stake, ignoring that all money owned by the City is taxpayers' money. Thus, the short answer is that: (1) the money is the City's and hence the taxpayers' and (2) the Agreement does not limit the City's liability to the Stabilization Fund.

If there were a significant impairment of the Agreement for which CPM paid $1.15 billion, nothing in the Agreement limits recovery to the $348 million of the Stabilization Fund – which the City reserved the right to spend on whatever it desires under the very terms of the City CPM Agreement. Indeed, very little remains in the contingent fund, certainly less than what anyone expects CPM to claim the right to between now and 2084. The City CPM Agreement puts the full faith and credit of the City behind it – and the fair market value claimed by CPM in any breach or use of the City's Reserved Powers would be many times the $1.15 billion which CPM paid.

CPM's challenge to plaintiffs' derivative standing asserts that we cannot claim that we are suing to benefit the City because, CPM asserts, a declaration that the Agreement is illegal will trigger the Agreement's remedies and require the City to pay more than it received in the first place; arguably harming, rather than benefitting the City. We will address this herein in Section VI, in which we show that the result of a finding that the Agreement is illegal would never be to enforce its provisions; the most likely result would be that Illinois law would impose an *in pari delicto* result by which the City would regain the Parking system without owing anything to CPM.

Plaintiffs' Taxpayer Standing is Firm. CPM's argument also utterly ignores firm and longstanding Illinois declarations of taxpayers' direct and derivative standing. In *Scachitti v UBS Fin. Services,* 215 Ill.2d 484, 494, (2005), the Illinois Supreme Court was express that taxpayers have standing to bring cases either: (1) for themselves, as taxpayer actions against the illegal spending of the public treasury, or (2) as taxpayer derivative actions on claims belonging to the public body:

> A "taxpayer action" is brought by private persons in their capacity as taxpayers, "on behalf of themselves and as representatives of a

> class of taxpayers similarly situated within a taxing district or area, upon a ground which is common to all members of the class, and for the purpose of seeking relief from illegal or unauthorized acts of public bodies or public officials, which acts are injurious to their common interests as such taxpayers." See 74 Am.Jur.2d *Taxpayers' Actions* § 1 (2001), citing *State ex rel. Conrad v. Langer,* 68 N.D. 167, 277 N.W. 504 (1937); *Canton Farm Equipment, Inc. v. Richardson,* 501 So.2d 1098 (Miss.1987). Illinois law specifically provides taxpayers standing to enjoin a public officer's misuse of public funds. See 735 ILCS 5/11–301 *et seq.* (West 2000). Moreover, this court has recognized:
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> "It has long been the rule in Illinois that citizens and taxpayers have a right to enjoin the misuse of public funds, and that this right is based upon the taxpayers' ownership of such funds and their liability to replenish the public treasury for the deficiency caused by such misappropriation. The misuse of these funds for illegal or unconstitutional purposes is a damage which entitles them to sue." *Barco Manufacturing Co. v. Wright,* 10 Ill.2d 157, 160, 139 N.E.2d 227 (1956) (citing *Krebs v. Thompson,* 387 Ill. 471, 56 N.E.2d 761 (1944), and *Fergus v. Russel,* 270 Ill. 304, 110 N.E. 130 (1915)).
>
> A "taxpayer derivative action," on the other hand, is an action brought by a taxpayer on behalf of a local governmental unit to enforce a cause of action belonging to the local governmental unit. See *Feen v. Ray,* 109 Ill.2d 339, 345, 93 Ill.Dec. 794, 487 N.E.2d 619 (1985) (finding that a taxpayer who seeks to recover solely on behalf of school district brings the action derivatively). "The claimed injury [in a taxpayer derivative action] is not personal to the taxpayers, but rather impacts the governmental entity on whose behalf the action is brought." *Lyons,* 201 Ill.2d at 535, 269 Ill.Dec. 374, 780 N.E.2d 1098. See also *Feen,* 109 Ill.2d at 345, 93 Ill.Dec. 794, 487 N.E.2d 619 ("Where a taxpayer sets judicial machinery in motion in a derivative action, the direct injury to be remedied is not personal to the taxpayer. Rather, the right of action is that of the governmental entity. [Citation.]").

Scachitti, 215 Ill.2d at 494.

Finally, addressing CPM's assertion of a "demand" requirement for derivative standing, the City's defense of this case and its contractual obligation under the Agreement to defend this illegal agreement makes clear that a demand upon the City to sue would be futile. At any rate, we have passed that stage of the case and that threshold defense should now be deemed waived.

Plaintiffs here have standing under either theory. They have direct standing to challenge the use of public monies to satisfy unconstitutional and otherwise unlawful contract terms. They have derivative standing to bring the City's claim that the City CPM Agreement is unlawful and must be rescinded or reformed.

III. THE AGREEMENT IS AN ILLEGAL DELEGATION OF POLICE, LEGISLATIVE & RESERVE POWERS

Both CPM's and the City's arguments here rest on the false premise that the City's ability to exercise its Reserved Powers in the public interest can or should be viewed without considering the impact, both nature and amount, of the Agreement's imposing on the City the obligation to compensate CPM immediately for the aggregate revenue impact over 75 years of each contemplated change in the City parking system.

Euphemizing these payments as "true ups"[2] does not change their substance. However characterized, these "true ups" – accelerated payments from the City to CPM for any action that reduces the amount of available parking in Chicago – are nothing more than a contractual requirement that the City buy back the police and legislative powers it allegedly "reserved" , but which it had no right to sell or give away in the first place.

There is no meaningful way to distinguish "lawfully" compensating CPM for the *present value* of the change in its expected cash flow and "unlawfully" limiting the use of the Reserved Powers. The distinction has no substance in structure or operation, and is untenable.

Furthermore, the Agreement's present-value compensation provisions go well beyond just setting parking rates or eliminating a parking space for a day or a month. As pointed out in

[2] As if these were minor corrections to keep the contract operating correctly.

our opening brief, (Plaintiffs' Memorandum in Support of Summary Judgment, ("PMSJ"), at Index of the Concession Agreement's Challenged Sections, p. i, attached hereto as Exhibit 3), compensable events include (a) the city's increasing the number of tickets before a car is "booted" or towed, (b) the State's increasing the number of unpaid tickets before suspending one's driving privileges, (c) permitting the opening of competing off-street parking[3], (d) reduction of spaces, as well as the actual usage of handicap-exempt privileges, even security closings for the recent NATO summit, and a host of future situations to come, each one of these events costing tens, even hundreds of millions of City dollar outlays. At the rate that these are accumulating, the City will almost certainly have to pay back more than the $1.159 billion it received in the first place.

Properly viewed, the Agreement's Section 14.3, Reserved Powers Adverse Actions, and 14.3 (c) Compensation provision, are nothing more than a penalty provision for the City's exercise of its police/legislative powers. Each time the City, or any alderman, over the next 75 years, considers or proposes exercising some aspect of its legislative powers, the City must evaluate not only whether the change is in the public interest, but also whether it is willing and able to "compensate" CPM by paying it the present value of that change's 75 years cash flow impact. Worse, events could arise that were not subject to meaningful political deliberation, or outside the City's control at all (since the City is required to pay compensation for "adverse" actions by other governmental units, such as the State of Illinois; as well as the security closings for the recent NATO summit).

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[3] The magnitude of this particular provision recently became public when the Chicago Sun-Times revealed the arbitration claim by CPM's sister Morgan-Stanley entity, which bought the City's four Loop/Millennium Park garages 9000 spaces for $563 million, and is now demanding $200 million compensation for the City's allowing the new AQUA condominium building to open with a 1,200 space public garage. *See* Chicago Faces $200 million claim over Aqua Parking Garage, Chicago Sun-Times, April 16, 2012, http://www.suntimes.com/news/watchdogs/11840471-452/parking-blues-city-of-chicago-faces-200-million-claim-over-aqua-garage.html (July 6, 2012).

Correctly viewed for what it is, the CPM Agreement is an unprecedented lease of a core local government function -- the regulation of the public way -- to a private operator, with financial prohibitions on changes for generations. Unlike a bond, it is not for a fixed or variable rate of return, but for whatever profit CPM can make from it.[4] Also unlike even a revenue bond, whose indenture trustee can require the City to take action when the revenue stream is impaired in violation of the indenture, this provision requires the City to purchase back its rights to legislate, at a "market value" that has no cap.[5]

But, just as principles of representative government would preclude an open-ended turnover of the City property tax system, or the State's income tax systems for decades to come, *with no ability of elected officials and later generations of citizens to have control of these systems*, so too does Illinois law prevent the City from taking on such limitations in regulating the public way. Again, this is not a case about private property – it is about the City's regulation of the public way. No group of elected officials can lawfully deprive the City's future elected officials from these inherent governmental powers. While Cities and States routinely float "revenue" bonds, secured by the receipts from specific revenue sources, these bonds are for fixed amounts at fixed rates of interest, with limited protection of the revenue streams for interest coverage and principal repayment, the city and State issuers still retain real control of the revenue sources, and the power to otherwise legislate changes, regardless of their impact on the

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4 CPM keeps the entire profit for itself; euphemistically labeling this as a "PPP" or "Public Private Partnership" ignores that the City has no "partner" stake; its function is simply its obligation to protect CPM's profit maximization, and has to compensate CPM for virtually anything that might diminish parking in the City or CPM's revenue stream in any way.

5 While revenue bond purchasers would be able to enforce protections against City actions impairing the debt coverage (principal and interest), CPM (the holder of this security, merely an investment vehicle for Abu Dhabi's Sovereign Fund, Allianz Insurance, and a host of Morgan Stanley partnerships) has the right to force the City to compensate it for all movements in the Security's total market value. This quarterly "mark to market" provision is more like a commodity futures contract than a municipal bond.

total "market value" of the bond. The bondholders do not get to dictate specific rates of tax, or the subjects, exemptions, etc.

Approval of this transaction would invite the City or the State to address their current financial/pension challenges by identically "leasing" either the City's property tax or the state's income tax systems for a one-time payment of billions of dollars, with a similar 50-75-99 year protection compensation provision, that would preclude the City or State from changing tax policy or rates or exemptions except by similar aggregate compensation payments. That would be utterly unthinkable. So is this one. The Agreement here is an unprecedented lease of an entire tax system to a private vendor for whatever return it can get.[6]

A. The Bare Retention of "Reserved Powers" Does Not Reflect the Real Conditioning that the Agreement Imposes on the Exercise of Those Powers

The City (City's Memorandum in Support of Cross-Motion for Summary Judgment ("City-CMSJ"), at 7) and CPM (CPM-CMSJ at 33) alternatively argue that the Agreement retains the City's right to exercise its "Reserved Powers" despite the need to make compensation for exercising that right because the exercise of Reserved Powers was never cost- free in the first place. But the Agreement does require large upfront payments for the use of the Reserved Powers and it "monetizes" the decisions so as to discourage the City from acting in the public interest.[7]

First, this "Reserved Powers"' argument acknowledges that the imposes a fundamentally new kind of restraint or constraint on the City's exercise of its legislative powers -- indeed, the

[6]The closest comparison would be the purchase of charter in feudal Europe – an exchange of an up-front payment to a politician in exchange for extracting ever-increasing rents from the public. We do not live in feudal Europe.

[7]Viewed in the lens of the recent *NFIB v Sebelius, supra* p. 1, note 1, decision as to whether a forced payment is merely a regulatory tax on the City's exercise of its reserve powers, or a preclusive economic penalty, neither one is an acceptable constraint on the City's exercise of its legislative powers.

City boasts that its payments to CPM constitute a "good" restraint on the Reserved Powers. (City-CMSJ at 15). One can imagine an Alderman exclaiming, "thank goodness the true costs of holding a parade are now clear!" And, while CPM disputes the substance of most every asserted Material Fact about the exercise of this cost-benefit analysis, it does not (and cannot) dispute that this cost-benefit analysis (at CPM's total contract value pricing) now weighs on virtually every decision the City makes, certainly with respect to parking and traffic flow on the streets. Thus, decisions on environment, congestion, zoning, handicapped parking, NATO meeting security closures, bike lanes, Fourth of July parades, Veterans' Day parades ... everything, must not only be weighed by what is in the public interest, but what we will have to pay CPM, as the present value of the change over 75 years, i.e. until 2084. And that is substantially different from one city council imposing a change that another city council can reverse or amend in the future.

For 75 years, through 2084 AD, more than four generations of Chicago citizens, taxpayers, residents and politicians this structure is the given, carved in granite, except at massive cost to repurchase the right to make each and every change. Future City Councils, should they wish to discourage public parking in general, or in the loop, or surrounding areas, whether for public safety, environmental, energy or even to increase traffic flow by reducing street parking, all the usual public interest concerns that legitimately drive legislative parking policy, will only be able to do so by paying hundreds of millions of dollars that may simply not be available.

The case law Defendants cite does not legitimize this transaction, not even "analogously". CPM's (CPM-CMSJ at 33) and the City's (City-CMSJ at 8) argument that the Agreement is "analogously" supported by decisions approving usual debt-finance transactions ignores that this is a fundamentally different transaction, never addressed, let alone approved by any court, with provisions that cannot be legally approved.

First, there are fundamental differences between Revenue Bond financing and this deal. If the City had issued a $1.159 billion revenue bond, secured by parking meter revenues (whose cash flow of $83-84 million in 2011[8] and beyond, is well more than sufficient to amortize a 30 year $1.4 billion[9] mortgage at the City's current 4.0% long term revenue bond borrowing rate), then the bondholders might well have protective provisions to require the City to take rate-hike or expense-reduction actions if the revenue stream was impaired. They would also expect to be repaid the principal at the end. But they (i.e., the bondholders, by their indenture trustee) would not be entitled to have the City pay for interim swings in overall estimated value of the bond; not from mere rate reductions in particular neighborhoods, nor for changes in the parking ticket penalty rates, or new garages opening in the City, and certainly not for changes beyond the City's control, such as changes that the State might make to the number of unpaid tickets before suspending someone's Illinois driving privileges. And throw in the fact that the Illinois Constitution of 1970 Art. VII, §6(d) might question the legality of a revenue bond with a greater than 40 year maturity, or engaging in this non-sale, not really a lease, even for a home rule unit.

Thus, the City and CPM's repeated refrain that the City "retains" the Reserved Powers, is a euphemism or outright fiction, which does not square with its actual operation. In fact, the City has sold the right to use the Reserved Powers -- the power not just to fix the meter rate but any other power that might affect CPM's revenue. What the City has in return is a "buy back"

[8]See attached Chicago Parking Meters, LLC Financial Statements for 2010 and 2011, attached hereto as Exhibit 2.

[9]The calculations of Principal (P), Payment (PMT), for such a mortgage are readily done on most financial calculators or Excel spreadsheet.

provision, a right to "buy back" the "Reserved" (but not really) Powers -- though not on the City's terms but only upon consent by CPM or as set by a third party in arbitration.

No one knows what it costs to buy back a particular use of the Reserved Power in a particular instance because there is no defined sum, only reference to a "fair market" value. Furthermore, the fair market value is not for a piece of private property, as in a taking case – rather, it is the fair market value of CPM's right to have the police power used or not used in a way that maximizes the meter revenue. The whole notion that the Agreement benignly establishes a "fair market" value of the exercise of the City's police power is a dubious proposition – there is no such thing as a "market price" for the use of a City's police or legislative powers because such a "market" would be unlawful. *Cf.* 720 ILCS 5/33-1.

In reality, then, under the guise of a sophisticated contract, the City has sold the Reserved Powers

The fact that the city thinks it got a lot of money for selling its home rule powers does not make it legal. The Argument (City-CMSJ at 8); (CPM-CMSJ at 5) that CPM would never have paid this much $1.15 billion if the City could just turn around thereafter and eliminate meters without restriction, is certainly an "the ends justify the means", or an admission that the City has indeed sold its home rule authority, but justified by the fact that it got a lot of money from it. Whether any of this supports the legality of selling the City's home rule authority is doubtful. And while we have not presented this case as a valuation dispute, CPM's reported cash flow (totaling nearly $100 million annually at this point) strongly supports the views that the City was indeed taken for a ride by Morgan Stanley, who has undoubtedly profited greatly from the previous City administration's perceived need for fast cash.

The cited case law does not legitimize this transaction, not even "analogously". Analysis of the cases cited by both the City (City-CMSJ at 8) and CPM (CPM-CMSJ at 34) shows that they do not support the transaction, not even "analogously" To begin, the conditions imposed on the City's exercise of its "Reserved Powers" are far beyond anything "analogously" supported by the decisions in *U.S. Trust Co. v. New Jersey,* 431 U.S. 1 (1977) or *Poole v. Kankakee,* 406 Ill. 521 (1950). Indeed, it is a restraint not just on one but a whole galaxy of possible uses of the City's sovereign right to legislate or otherwise exercise its police power over the public streets.

First, the Agreement itself sets, and controls, for 75 years, the fixing of the meter rate – a telling distinction with *Poole.* But it also applies and controls any exercise of the police/legislative power to relieve traffic congestion or have alternatives like bike and bus lanes – not "unreasonable" use but *any* use if it impacts revenue to CPM. For seventy-five years, the City is prohibited from any use of the police power to reduce access to the metered parking controlled by CPM. Indeed, CPM's own financial reports for the 2+ years through December 2011, CPM asserts that the City must pay CPM over $50 million, just for annual compensation for handicapped spaces plus routine street closures (*See* CPM's Financial Statements for 2010 2011 at 8, attached hereto as Exhibit 2), plus another liability of over $25 million just for security closures during the recent NATO summit – and the public uproar over just this one "true up"[10] is understandable. But every day, in smaller amounts, the City faces a bewildering array of potential financial impacts from the routine use of the police power to have a street fair, relieve congestion at a corner, expand a cross walk for children.

Thus, the term "Reserved Powers" in this Agreement is a misnomer. The powers are not "reserved," as they were in *Poole*. Section 14.3 is a bald restriction on their use. It is true

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[10] The use of euphemisms, such as "true up", (as if this were some kind of mid-course correction payment, rather than "compensation payments for exercising police/legislative powers" should not divert the court from their true nature.

enough that Section 14.3 is meant to "reimburse" CPM for its purchase of the Reserved Powers. But CPM is not entitled to be reimbursed, because these Reserved Powers cannot be sold in the first place, especially as they are applied to the public way. Accordingly, the Agreement is illegal and void, since the economic reality of it is nothing but a sale of the Reserved Powers.

Further, the City (City-CMSJ at 8) and CPM's assertion (CPM-CMSJ at 34), that *Poole* and *U.S. Trust*, permit some restraints on the police power as constitutional, ignores both cases' declarations that such restraints as these are *unconstitutional.* In *U.S. Trust, supra,* the Court cites the "reserved powers" doctrine, and distinguishes between a restraint on the police power – which is illegal under "earlier decisions" – and a restraint on the spending power – which by contrast is normally legal.

> In deciding whether a State's contract was invalid ab initio under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the State. Thus, the *police power* and the power of eminent domain were among the powers that could not be "contracted away," but the state could binding itself in the future exercise of the taxing and spending powers. Such formalistic distinctions perhaps cannot be dispositive, *but they contain an important element of truth.*

U.S. Trust, supra, 431 U.S. 23-24 (emphasis added).

In *U.S. Trust*, the Court went on, in effect, to apply the" reserved powers" doctrine, distinguishing restraints on the police power from other restraints, as set out in the decisions, which plaintiffs cited in the opening brief. In *U.S. Trust,* in contrast to the case at hand, New Jersey agreed to a contractual limit not on its police power (as the City has done here) but to a covenant in a bond not to divert that particular stream of bond revenue to another purpose; there, for mass transit projects. New Jersey and New York had issued these bonds to build bridges between the states. However, unlike this case, the bond covenant posed no restraint on the police power, or reserved powers. The two states – and the Port Authority- remained free to use the police power, without charge, in any way they liked. For example, unlike this case, New Jersey and New York remained free to raise or lower the bridge tolls, restrain traffic on the bridges, and exercise the police power over the bridges *without any restraint* from the covenant upheld by the Supreme Court. The bond issued was for a transparent known sum supported by the toll revenue. Because these revenue bonds had no effect on the "reserved powers" – and did not even mention the "reserved powers" – the Supreme Court upheld the covenant which required the revenue to go first for the repayment of a fixed and specific loan, i.e., not just an open ended stream of revenue as in this case.

By *U.S. Trust's* standards, the City CPM Agreement is an unlawful restraint. It applies directly to the use of the "reserved powers," the very powers that according to the Supreme Court in *U.S. Trust*, no government can contract away. Section 14.3 pulls the "Reserved Powers" into the Agreement and prohibits the use, except under the "buy back" provision.

Accordingly, in contrast with legitimate revenue bond municipal debt, which routinely carry protections for revenue stream's debt coverage, principal and interest at a fixed or set-variable rate, this Agreement protects the structure of the revenue stream, with immediate mark-to-value payments for legislative and other changes, without limit in amount, and as an unlimited obligation of the City, personally. So viewed, this is a new breed of municipal debt security, combines unlimited benefits and protections for CPM, and the worst of unlimited obligations for the City. In contrast, *U.S. Trust* dealt with a routine form of public finance, used on countless occasions by state and local governments. Here – unlike a revenue bond - the City-CPM agreement freezes the use of the Reserved Powers, to fix a meter rate, to refrain from controlling traffic, solely to maximize CPM's revenue without any cap or limit. Thus, the City must protect CPM's unlimited upside, and pay for any downside, without participating in any upside, but bearing full unlimited general obligation liability for any downside.[11] Thus, Section 14.3's use of the term "reserved powers" is a misnomer; since these powers have *not* been reserved, unless a payment is made to CPM. This is a flat out violation of the "reserved powers" doctrine, which the Supreme Court approved and applied in the *U.S. Trust* case.

No less ironic is the Comptroller's and CPM's citation to *Poole v. Kankakee, 406 Ill. 521 (1950),* upholding that city's authority to purchase land, on which to build and operate a public garage. Indeed the City's quote from that opinion identifies just a few of the ways that the City CPM Agreement is unlawful:

> "It is apparent that the city has reserved until itself a wide discretion in the matter of location, regulation and control, and that, while it has pledge itself to fix and collect reasonable fees and charges, it has not bound itself to fix any specific *unalterable* amount of fee or charge… (*Poole v. Kankakee*, *supra,*406 Ill, at 535-6, emphasis supplied)

In other words, the City of Kankakee could remove the parking meters without constraint – without any payment to anyone. In City-CPM Agreement, the very opposite is true, a use of a "Reserved Power" requires a payment. Furthermore, unlike the *Poole* case, the City has in fact "bound itself to fix… [a] specific unalterable fee or charge." For that reason alone, the City-CPM Agreement would be unlawful under *Poole,* which states that "a city has no authority to bargain away its governmental powers…"

Finally, the City (City-CMSJ at 10) cites *Cherry v. Rock Island,* 8 Ill.2d 97 (1956), but the Court found that the off street parking covenant there was just like one considered in *Kankakee,* and it likewise involved none of the restrictions on the police power that apply in this case.

CPM (CPM-CMSJ at 35) also relies on *People ex rel. Bransom v. Walsh,* 96 Ill. 232 (1880). CPM does not cite *Bransom* for its unremarkable holding – that one municipal body

[11] Calling this a "Public Private Partnership", or "PPP", insults the term partnership, which commonly connotes participation in some way in both directions.

(i.e., Chicago) may delegate a police power to another municipal body (i.e., the Park District). Rather CPM cites *Bransom* for this piece of dictum: "Even where private parties are invested with a franchise to *build* and control a toll bridge or toll road, the legislature may authorize the franchise to be taken and condemned for public use, upon making just compensation."

Citing this dictum, CPM says that any use of the Reserved Powers under Section 14.3 is like a "taking" of a franchise to build and control a toll bridge. But there are enormous differences between a "taking" by a municipal entity, as in *West River Bridge*, *see generally* 47 U.S. 507, versus the municipality's transferring away, or paying for its use of a Reserved Power under Section 14.3 to compensate CPM for closing off a street for a neighborhood fair – or to host a NATO summit – or any other exercise of the police/legislative power. First, Section 14.3 applies not to a complete taking as in *West River Bridge* but to *any* financial impact from the exercise of a "reserved power." It is well settled that a city does not owe compensation for use of a police power unless the entire property interest affected has been completely "vitiated" or "confiscated." *See, e.g., Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1924) (Holmes, J.).

Section 14.3 provides for the very compensation of every use of the police power that hundreds of cases have made clear the government does not owe – certainly not under the Fifth or Fourteenth Amendments' takings clause. Second, CPM's citation here begs the question at the heart of this case – whether CPM can even have a "property interest" in the use of the police power to fix a "specific, unalterable" meter rate, which is the subject matter of the City-CPM Agreement. Unlike the franchisee in *West River Bridge,* CPM has no "property interest" in limiting the City's police power. The City's exercise of its legislative power is not a "taking", for which it is, or can be, obligated to compensate or buy back its Reserved Powers, which are simply not legally for sale, in the first place. *CPM has no lawful "property interest" in the first* *place, in the City's exercise of its Reserved Powers.* By contrast, in *West River Bridge*, a private party had actually constructed and built what was originally a *private* road or bridge, private property over which the government initially had no control or relationship– here, by contrast, CPM is claiming a protectable property interest in controlling the City's power to regulate the streets and public ways, public property to which CPM has no rights at all.

Accordingly, the entire City CPM Agreement is illegal and void as a sale or limitation of the Reserved Powers as set out in Article VII and Section 14.3, and not legitimized by any reported case law.

B. The Concession Agreement's Continuing Control/Limitation Over the City's Decisions to Exercise its "Reserved Powers"

The Concession Agreement imposes a continuing effect on the City's decisions to use the Reserved Powers. The City claims *both* that the financial impact of Section 14.3 has *no* effect on its decisions – *and* that it *does* indeed have an effect and that's a good thing. Even without the admission, the City would have to consider financial cost of every use of the Reserved Power, i.e., whether to hold a street fair or host a NATO summit. In plaintiffs' opening brief, emails show what anyone would expect – city officials and aldermen worrying about the costs under Section 14.3 of handicapped parking, right turns on red. In this case, the undisputed record fact is that the true up payments are not hypothetical possibilities, as they might have seemed at the time of filing. Every year the City is making very large true up payments to CPM to buy back the Reserved Power. In the 2010 true ups, CPM demanded $2,062,992 from the city. For 2011, CPM claims $14,134,842. *See* attached Chicago Parking Meters, LLC Financial Statements for 2010 and 2011, at 8, attached hereto as Exhibit 2). In 2012, the City is in litigation with CPM over its liability for the hosting of the NATO summit.

At any rate, the City has given up at least one factual basis for opposing plaintiffs' motion for summary judgment. Referring to plaintiffs' examples in the opening brief, the City actually boasts that that the City-CPM Agreement affects its decisions: "In fact each example cited [by plaintiffs' motion] merely illustrates the fact that the Agreement has encouraged the City to do something that any modern government should do, which is to act in a scientific manner and measure (i.e., quantify) the anticipated financial impact of the proposals brought before it. In this way, it can then consider the anticipated financial impact along with all other pertinent factors when making its decisions…." (City-CMSJ at 14).

First, this begs the real question – whether a mere *private contract* should require the City to pay CPM anything at all. In plaintiffs' view, it is illegal for the City ever to "buy back" the reserved power, and under an illegal contract, the City has no *obligation* to pay anything to CPM at all. Second, it begs another question – whether Section 14.3 changes the cost benefit calculation that the City would otherwise make if it had retained its Reserved Powers intact. The City claims that had it not sold the Reserved Powers to CPM – if it did not have to repurchase each use under Section 14.3 – it would still have to consider the loss of revenue from taking out a meter against the benefit to the public. According to this argument, there is no difference between the City's pre-Agreement loss of revenue from taking out a meter and the payment to CPM for taking out a meter. For that reason, the City claims, the Agreement makes a difference – but only in that it promotes "better" decisions.

However, it takes only a very little reflection to see that the pre-Agreement loss of meter revenue is quite smaller or different in nature from an upfront payment to CPM under Section 14.3. In the pre-Agreement era, the City would weigh the *short term* or *immediate* loss of meter revenue against the *short term* or *immediate* gain in clean air, or less congestion, or some other hard to quantify benefit. Had the Reserved Powers not been sold, the City could make these decisions incrementally. If the City took out a meter to allow right turn on red, the *immediate* short term cost would be small: the loss of revenue from one meter for one year. So while the immediate benefit in terms of traffic congestion may be small, the cost is small as well. The immediate cost and immediate benefit are symmetrical or roughly equal. But the Agreement *raises* the threshold cost for using the Reserved Power. Now the City has to make a single lump sum payment to CPM – that is, pay to CPM up front the entire long term "fair market value" of removing the meter for the seventy five year duration of the Agreement (unless the City replaces the meter). Section 14.3 creates strong disincentives against the use of the Reserved Power. Cost and benefit are no longer symmetrical. Under the Agreement, the City is locked in to pay the entire cost up front without any certain knowledge as to what the public benefit will be.

Furthermore, while the Agreement shifts all the long term costs of a meter's removal to taxpayers in 2012, those taxpayers will not receive the entire long term benefit. That is, they pay *now* in 2012 to make up a 75 year loss of revenue, but citizens in 2052 end up receiving the benefit. Far from making government decision more sensible, the Agreement distorts the cost-benefit analysis – based on short term incremental costs and benefits – and discourages the City from taking actions in which long term benefits really do outweigh short term costs. Even in cases where the benefit is huge compared to the cost, the City may be too cash strapped in the short term to pay the entire cost up front under Section 14.3 while the loss of one year's revenue from a single meter would be no bar to the action at all. In short, there is a significant change in the cost benefit calculation that the City must make when it has to repurchase the fair market value of a Reserved Power it sold to the CPM. At the same time, under Section 14.3 the parties created a complicated formula for reimbursement to CPM, so that the City does not *know* what it may have to pay CPM – for the NATO summit, for example – until the matter is resolved in litigation. Again, this "litigation" model for determining cost and benefit has a chilling effect on any use of the Reserved Power at all.

Furthermore, in equating the cost of taking out a meter with the cost of buying out CPM, the City is mixing apples and oranges in yet another way. Section 14.3 is not a determination *only* of the cost of taking out a meter, but reimbursement to CPM for a loan, albeit a loan at an undetermined, even usurious rate of interest, if one looks at what CPM is receiving every year. Indeed, the City CPM Agreement does not represent the City's best judgment of the meter rate most suitable for the public convenience and safety but the meter rate that is able to pay back the loan. This is just one reason why a contractual "freeze" on the police power over the public streets and ways to pay back a loan is so inimical to the public interest. The restriction on the meter rate – by itself -commits the City to use the police power for a purpose it was never intended – and to disregard or scant the reasons for which this constitutional power exists. In short, it is one thing to owe a large debt to CPM through a straightforward loan, which the City could have done – it is quite another to have CPM have an operational role in running the public streets, i.e, to sell CPM control over the City's Department of Transportation.

The City claims that plaintiffs have not identified uses of the Reserved Powers "that clearly should have been adopted" but were not. Furthermore, the plaintiffs do not have the burden of showing that the City *should* exercise any Reserved Power in any particular way. Rather, plaintiffs have shown here that the sale of the Reserved Powers interferes with the ability of elected officials to continue using their best judgment, without restriction, just as they were able to do in *Poole v. Kankakee, supra.* Accordingly, for all the foregoing reasons, the sale of the Reserved Powers under the City CPM Agreement makes the entire City CPM Agreement void and illegal.

IV. NO PUBLIC PURPOSE FOR METERS OWNED BY A PRIVATE PARTY TO ENFORCE EXPENDITURES

Conceptually no different than if the City had sold a shopping center property to Macy's and promised to enforce the previously public meters thereafter by police tickets to those who have overstayed their meters (the enforcement issue), boot customers' cars for failing to pay five Macy meter tickets, suspend customers' driving privileges for failing to pay Macy's, and for 75 years promised to compensate Macy's for changes to permitted store sales hours (the legislative issue), the City and CPM's arguments are all simply wrong diversions to inapt analogies.

V. CPM'S PROFFERD EXPERT OPINION IS OF NO VALUE OR RELEVANCE AND REFUTED BY PUBLISHED EXPERTS AND CPM'S OWN FINANCIAL STATEMENTS

Professor Strong's analysis is pretty much beside the point, and lacking in real foundation. In summary, Professor Strong's opinion is that this transaction is the current state of the art, and that there are four benefits to it: (1) Increased Capital Investment in new parking technology (2) transfer of investment costs and "schedule" risk, i.e. maintenance, (3) "reallocation of demand risk" , and (4) "improvements in pricing efficiency". Even without deposing Mr. Strong, we will show that his foundation is minimal, his conclusions are merely marketing puff, and belied by the terms and financial results of the Agreement to date.

A. Professor Strong's Opinion is of Little Relevance to the Issues Here

Even the foundation of Professor Strong's opinion that this transaction is the current state of the art, so to speak, is embarrassingly slim, and belied by his non-analysis of the substantive terms of the transactions. Indeed, Strong's opinion is essentially; (Strong at 9), based on only seven deals, only four of which have actually gone through; and three of those being this deal, the Morgan-Stanley predecessor Chicago Millennium Park Garages deal[12]—both with the same parties, the Chicago Skyway transaction, and only one deal from anywhere else, the Indianapolis parking transaction. All the rest of the deals have either failed to close, and crashed, or simply have not reached fruition.

Even then, Strong ignores the substantial differences between Indianapolis' and this deal[13], and has entirely ignored transactions recently done by conventional means, such as Boston's 2011[14] creation of a separate public parking authority that financed its acquisition of the City's parking meter system by issuing a revenue bond with maturities out 30 years, with interest yields of 3.5 to 5.04%, substantially less than CPM's interest on its taxable Senior Secured Notes bond, when CPM recovered more than half its cash back in November 9, 2010, selling off a $600 million 18-year bond carrying 5.489% interest.[15] The significance of this is threefold: first, that Mr. Strong's foundation is only the limited sampling of this deal and its few relatives; second, that it failed to analyze the different terms of the other purported PPP transactions; third, ignored transactions at the same time that were done by conventional financing; fourth, did not consider

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[12] The recent disclosures that Morgan Stanley's Single-purpose entity-Chicago Loop Parking LLC ("CLP") is currently demanding a $200 million compensation payment for the City's allowing the AQUA condominium building to open with its own 1200-space public garage, substantially eviscerating the benefit of the $563 million upfront payment the City received on that deal. (See Chicago Loop Parking, LLC v. City of Chicago, 51 115 Y 00231 11 (Am. Arb. Assoc.) (Statement of Claim), attached hereto as Exhibit 3). We are finalizing, and will shortly file, a similar challenge to that transaction.

[13] The Indianapolis transaction actually operates like a partnership, sharing revenues between the City and the Concessionaire 30/70 up to $583,000 monthly revenue, after which the split switches to 60/40 for the City. And, although the deal is nominally for 50 years, there is a right to terminate each ten years, with one year's notice. (See attached excerpts from the exhibit attached to Professor Strong's opinion, attached hereto as Exhibit 4).

[14] See Metropolitan Boston Transit Parking Corp., Senior-Lien parking System Revenue Bond Series 2011, Standard & Poor's Global Credit Portal – Ratings Direct, at 1, attached hereto as Exhibit 5. Full copies of the latter will be happily supplied.

[15] See Chicago Parking Meters, LLC Senior Secured Note Offering Memorandum, Draft at July 19, 2010, attached hereto as Exhibit 6. CPM refuses to produce the final Offering memorandum, but CPM's 2011 financial statements provide the financial terms of these notes under its Balance Sheet liabilities.

whether this deal, as structured, was legal , was structured in a way to increase its cost to the city, and undoubtedly greater profits for the Morgan Stanley packager, and its supporting cast of lawyers, accountants and financial advisors.[16]

Consequently, Mr. Strong's opinion rests on a foundation that is flimsy at best. To date, most other governments that have considered even briefly the City CPM model have rejected it or simply failed to close. Thus, the proffered expert testimony misleadingly presents the City CPM Agreement as a "type," when in fact there is only one example in the country-this and its sister deal, the Millennium Park Garages.

<u>Mr. Strong's Opinion has No Bearing on the Constitutional Issue.</u> The proffered expert testimony that the sale of the parking meters somehow is a good deal for the City should also be disregarded. It has no bearing on the constitutional issue, and even if "other cities do it," that would have no relevance unless there were case law upholding those restrictions on the reserved powers. In fact, there are no jurisdictions in which such a contractual restriction would be legal. *See* Municipal Corporations, §§ 29.10, 29.11. Contracts prohibited – Contracts limiting legislative powers, and, contrary to Professor Strong's assertion that this form of "Public Private Partnership" or "PPP" is the current state of the art, we will show that this transaction is fundamentally different from all the others, in fundamental ways.

Indeed, from Strong's own exhibit, only one other city (Indianapolis) has actually implemented a "privatization" of its on street meter system. And, as the ParkIndy documents attached to Professor Strong's report show, the differences are important. First, that one,

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16 Indeed, the wildly profitable financial results for CPM, coupled with its ability to issue even a fully taxable $600 million revenue bond at 5.489% suggests that William Blair & Co.'s work as "lead independent third-party financial advisor to the City" in connection with the transaction, was woefully deficient, and their June 30, 2009 "Transaction Summary and Valuation Analysis" (attached hereto as Exhibit 7) posted on the City's website after the criticism of the deal started flowing woefully underestimated the Year 5 (2014) revenue, and way overstated the discount rate (at 10 to 14%). Correcting the discount rate to the city's revenue bond borrowing rate would have brought the value up to more than $2 billion (present value discounting $100 million annual cash flow, at 4% = $2,368,040,834.25 present value.)

reflecting a "partnership" gives the City a share of revenues (City/Concessionaire division, 30/70 up to $583,000 in monthly revenues, 60/40 for revenues above that) and thus a share of any revenue improvements. In contrast, the City of Chicago gets zero share of ongoing revenues, and no return from improvements to the parking system. This is a substantial amount of money that accrues only to CPM. According to CPM's own presentation to investors, the revenue enhancements are essentially three-increased rates, 9% increase in effective number of spaces (because the absence of designated spaces under the "pay & display" system, which the City had already begun in a limited way, the effective number of parking spaces increased by 9%), and elimination of subsequent parkers' ability to use a preceding parker's unexpired time. In contrast to the transactions[17] that can actually claim to be "partnerships", because they do share revenues, this transaction is simply not a partnership at all. Any benefits of efficiency, flexibility, profit enhancement, that are produced, now or in the future, belong only to CPM. While the usual structure to protect the governmental nature of the operation would seem to require majority ownership by the governmental entity, the City of Chicago's revenue share, including any improvements in it, belong 100% to CPM, alone. In short, this is not a "PPP" like anything else, because it is not a "Partnership" at all

No American court decisions have analyzed this type of transaction[18]. And, this Court can take judicial notice of the loud chorus of law professors and city officials and editorial writers who have denounced the City CPM Agreement. Upon analysis, Prof. Strong's opinion is not really an expert opinion at all; at best an academic's evaluation from the outside, at worst

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[17] *See* "Project Magee", William Blair & Co.'s April 22, 2008 Summary of Preliminary Valuation, attached at Exhibit 8 submitted to the City, describing the different approaches used by other Cities, both foreign and domestic, in which *all* either hire an outside entity, such as LAZ (the operator here), ACS (the ParkIndy operator), or Lockheed (DC), to operate the government's retained system, or created a new municipal parking entity, or engaged in a partnership *with revenue sharing* ("These arrangements commonly provide a revenue sharing structure between the municipality and the operator—aligning the incentives of each stakeholder in a public-private partnership.") Blair/Magee at 8.

apologist puffery using the very language of the Wall Street bankers' carnival that periodically comes through town to raid the municipal treasury. He is regularly hired to opine on things transportation-related, but has not participated in a parking deal, nor has he been recognized as an expert in this field.

B. Strong's Benefit Assertions Are Refuted by CPM's Own Documents

Strong's four points of public benefit are utterly disproved by CPM's own financial and offering documents.

As explained by CPM (CPM-CMSJ at 7), Strong identifies five (arguably) public benefits of the transaction:

> 1. Additional investment in new or expanded infrastructure, often accompanied by introduction of new technologies or capacity-enhancing investments faster than would be possible with constrained public financing.
>
> 2. Transfer of investment costs and schedule risk from the public to the private sector.
>
> 3. Transfer of demand risk from the government to the private sector.
>
> 4. Increased efficiencies and reallocation of costs from the general public to specific transportation users.
>
> 5. Development of new public funding sources by monetizing assets or services previously operated by the public sector.

For each of these, we will now show that there is nothing about this transaction that accomplishes something that the City could not have done itself, at less cost, and retained full control over its parking system.

First, the investment in the new parking system, approximately $35 million Fixed assets on CPM's books[19], was not done by CPM, which is just a financing vehicle. Rather, it was done by paying parking operator LAZ[20], something the City had already begun[21] could easily have done itself, perhaps even without any bond issue whatsoever. Moreover, any enhanced revenues, decreased operation or enforcement costs from this all accrue to CPM, not the City.

Second, this "transfer of investment costs and schedule risk" , as Professor Strong lays it out (Strong at 10) just declares that a private entity is more likely to make improvements and keep labor and operating costs under control. Whether or not this is true, as opposed to political prejudices, there is no doubt that CPM, which is little more than paper, contracting out LAZ to operate the system, and with the ability to claim arbitration to force the city to raise rates if operating margins fall below 85%, is in probably less powerful position to accomplish this task than the City would be, in contracting the operations out to LAZ directly.

Third, on the issue of the transfer of "demand risk" from the government to the private sector, there are two responses. First, the Agreement precludes the City from doing anything itself to reduce demand for street parking, makes the City responsible for anything that other government entities might do that would reduce demand, and, as laid out in Desman Associates Market Due Diligence Review, which CPM included in soliciting investors to buy its Senior

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19 . *See* Chicago Parking Meters, LLC Balance Sheets for December 31, 2011 and 2010. Exhibit 2 hereto, at 2.

20 *See* CPM's Senior Secured Notes Offering Memorandum, Exhibit 6 hereto, at 10. We have requested CPM to produce the actual final Offering Memorandum for the November , 2010 Note sale, which obviously differed in that CPM was able to sell even more, $600 million, recovering more than half its original cash outlaw. Although CPM (actually Mr. Sperling and Ms. Dahlin) refused, we expect that the aspects we cite, such as the Desman Due Diligence Report, and the explanation of how CPM actually performed by just hiring LAZ did not change in the final Offering Memorandum.

21 According to Blair's Project Magee, the City had already installed 128 "park & display" terminals around the City, which it could have, like CPM, just contracted for LAZ to complete, at essentially the same cost.

Notes[22], the risk of "parking demand decline" is essentially nil, projecting that "future parking demand across the System will increase by 1.1% annually between 2010 and 2034", that the LAZ-installed system effectively increases the number of spaces by about 9%, and, due to a variety of factors, that there exists an "inelasticity of parking demand", such that "the System will most likely not experience significant decreases in demand related to future rate increases", such that the system is projected to exceed Blair's Best Performance Year 5 projection of $130 million annual revenue, apparently even with a 25% potential adverse demand impact from patrons deciding to find alternatives. Compare Blair Opinion at 5, with Desman Due Diligence Projections, at A7-8, and A36-37. In short, there is little demand risk to be shifted.

Fourth, repricing the parking space rates was done by the contract and the City Council's adopting ordinance. This obviously could have been done by the City on its own (with the revenues actually coming to the City).

Fifth, the idea that this created some new funding source ignores a number of items; such as, that the City could have raised the same amount by selling a revenue bond, and retaining control over the City's parking system. As well, it would not have become obligated to make compensation payments back to CPM every time that the City wanted to make a policy change, now or in the future, or to raise or lower rates in particular places to attract or deter parkers to particular places in the City. Indeed, the Agreement's fixing of rates for every single meter in the City, through 2014, with Cost of Living Adjustments thereafter, seems rather to cast the system in a frozen, rather than flexible mode, through 2084.

22 *See* Desman Associates, Financial Review of the Long-Term Concession and Lease of the Chicago Metered Parking System – Revenue Analysis, attached hereto as Exhibit 9. The Revenue analysis was attached to CPM's Senior Secured Notes solicitation, July 2010 draft attached; CPM has refused to produce the final November 2010 Offering Memorandum.

Indeed, the compensation payments, whether the true-up or the reserve payments, whether for periodic adjustments to the system, compensation for exempt handicapped parkers, or just security provisions for the recently concluded NATO summit, already total a staggering $30-50 million per year; suggesting that over the term of the agreement, CPM will, in addition to its greater than 20% cash on cash return, that it will actually receive back an *additional* more than three times what it originally paid the City. (i-$50 million x 75 years =$3.75Billion, ii-CPM's annual cash flow, being its $50 million reported net profit, plus adding back $24 million in noncash deductions for amortizing the original cost and depreciation, divided by a numerator of the $1.159 Billion original payment, less the $600 million CPM received from selling bonds secured by its parking transaction.)

C. Similar Analysis by Others Who Have Analyzed the Transaction Refute Both the Legality and the Benefits of the Transaction.

In contrast with Professor Strong's paid-for puffery, we offer the unbiased published evaluations by experts of real substance, UCLA's acknowledged parking expert Professor Donald C. Shoup, and University of Chicago Law School's Municipal law expert, Professor Julie A. Roin, whose analysis and criticism of the Chicago Parking Meter Agreement comes from their published works.

i. Professor Donald C. Shoup's Analysis[23]

For example, Donald C. Shoup, the nationally recognized expert on the academic analysis of parking issues, and prime advocate for dynamic parking innovations, perhaps the best able expert on the current state of the art, disparages the Chicago parking meter lease deal as not

[23] Donald C. Shoup, Urban Planning Distinguished Professor, Department of Urban Planning, Luskin School of Public Affairs, University of California, Los Angeles, Los Angeles, CA 90095-1656; recently named an Honorary Professor of the Beijing Transportation Research Center.

a "partnership" at all (because the City has no share in any ongoing, future, or improved revenue); rather more like burning your furniture to heat your home through the winter: (from Shoup, *The High Cost of Free Parking*, American Planning Association, 2011, at 687, attached hereto as Exhibit 10):

> Chicago's meter rates before the privatization were probably far too low. In 2008 they were only $3 an hour in the loop, $1 an hour in the rest of the CPD, and from $.25-$.75 an hour elsewhere. The concession contract sets The Meter Rates in 2013 at $6.50 an Hour in the Loop, Four Dollars an Hour in the Rest of the CPD, and Two Dollars an Hour Everywhere Else in the City Footnote 13. From 2014 Two 2084, the Meter Rates Can Increase Only at the Rate of Inflation. Chicago Thus Privatized Its Parking Meters without Using Prices to Manage the System Properly.
>
> Chicago also failed to get the highest possible upfront payment, because limiting meter rate increases after 2013 to the inflation rate must have limited what bidders were willing to pay for the 75-year concession. Even with the price caps, however, winning bid was $1.1 6 billion for the 36,000 metered spaces. The parking spaces are thus worth at least $32,000 apiece.
>
> Rather than setting future meter rates, a City can set Performance Goals for a Privatized System. For example, the Contract could require the Concessionaire to set meter rates so that the current occupancy rate remains between 75% and 95% on every block for at least a certain number of hours every day, with penalty payments for failure to meet the occupancy goals. If professional operators can manage Performance Parking more effectively and at a lower cost than the City staff can, privatization with appropriate performance goals may turn out to be a good way for a City to charge the right prices for Curb Parking.
>
> Like burning the furniture to stay warm on a cold night, selling assets to pay current expenses is a bad idea. Some Cities are considering more farsighted Parking Concessions that share the annual revenue rather than maximize the upfront payment. A Concession with a Professional Operator who meets performance goals and shares the resulting revenue with the city can give the city two big advantages: (1) a well-managed parking system, and (2) a perpetual stream of income.

Accordingly, this deal falls far short on a state-of-the-art basis, because it is a sale to a *financial*[24] company, not a parking operator; carves in granite a fixed upfront amount, with no revenue share for the City, no benefits from improvements, no upside potential for the city, no objective standards for the operator, yet an obligation for the city to "compensate" the operator for any adverse changes the city makes, or which occur in its parking system over the next 75 years.

ii. Professor Julie A. Roin – A Manipulation to Evade the Controls for Public Debt

Municipal Law Expert, University of Chicago Law School professor, Julie A. Roin's excellent treatise, "Privatization and the Sale of Tax Revenues", 95 Minnesota L.Rev. 1965 (June 2011), a copy attached hereto as Exhibit 11, focuses on both the flawed structure and the financial failings of these transactions for any city, deeply critical of this transaction, views it as a device created to circumvent the protections and limitations on municipal debt,

In contrast with Strong's championing of this structure, Roin lays out the three current forms of privatization; (i) letting the business be conducted by private parties with rate regulation; (ii) hiring outside contractors to run City facilities; (iii) this transaction, in which the first year's taxpayers get cash upfront for transferring an asset for a period of time. In this structure, the fundamental fairness, or not, is determined by whether future taxpayers get some benefit, or are just saddled with just generations, of payments and constraints:

> The third option is for the government to collect the present value of the future, or expected, profits up front, in the form of a one-time sale, franchise, or commission fee. ... This option, unlike the others, leaves future residents paying higher fees while providing current residents additional cash (because they pay lower taxes) or additional governmental services (purchased with the cash the

[24]CPM LLC is, as contemplated by the Agreement, a single-purpose vehicle, created solely for the purpose of owning the Concessionaire interest and collecting revenues. Agreement § 3.6. The actual creation of the new parking system, and its operation was and is all done by a contracted entity, LAZ Parking

> government received from the private enterprises). From a cash-flow perspective, the third option is identical to a conventional debt transaction: cash is received up front and then repaid through higher charges levied on future residents. The only change is in the terminology; in a debt arrangement, the funds are initially provided by the purchasers of bonds, who are then repaid with funds raised through taxes paid to the government; in the concession arrangement, the initial funds come from the concessionaires in the form of fees and are repaid when their customers pay higher prices for the goods and services those concessionaires provide. The choice between regulating rates, splitting ongoing fees, and extracting an upfront concession fee implicates the temporal fairness question raised earlier. Which set of ratepayers is entitled to the government's share of the return: those present at the time the concession agreement is entered into or those present as the agreement runs its course? (Roin, at 1992-3).

Turning her focus on this transaction, as an example of "unwise privatization, she rejects the asserted benefits, all of which could have been realized by the City doing the transaction alone:

> The prospect of unwise privatization, driven by governments' need for immediate cash, is hardly academic. In 2008, the City of Chicago "sold" its parking meters to a private company, Chicago Parking Meters, LLC. Chicago Parking Meters, denominated the "Concessionaire" in its agreement with the City, leased Chicago's parking meters for a seventy-five year period in return for a lump-sum payment of $1.156 billion. Few, if any, of the benefits of the agreement come from privatization per se; indeed, under the agreement, the Chicago Police Department retains primary authority for enforcing the parking rules. The agreement limits the private company's role to installing and maintaining new meters. The Concessionaire later contracted these tasks to a third party for a relatively small sum, something the City of Chicago could have done. In return, the Concessionaire became entitled to all of the parking meter revenues for seventy-five years. Obviously, the vast majority of this return will be attributable neither to the Concessionaire's investment in nor its servicing of those machines, but to the upfront cash payment accompanying the execution of the contract. From an economic perspective, the City of Chicago sold seventy-five years' worth of parking meter revenues for the upfront payment of $1.156 billion.
>
> Proponents of the parking meter transaction claimed that the City could not have raised equivalent revenues from its parking system in the absence of the privatization arrangement because of political

> constraints on raising parking fees; essentially, they argued that a private business party can be more ruthless in setting prices than governments (or at least the Chicago government) could be. Though this argument might be convincing in some contexts, it is less than plausible in this context since the city council could not enter into the contract without first passing legislation authorizing the rate increases. If it could raise parking rates for purposes of entering into the contract, surely it could have raised parking rates for other revenue-raising purposes.
>
> Further, some of the projected revenue is attributable to the replacement of the City's existing parking meters with new "pay-and-display" meters. It is unclear how much of that additional revenue should be attributed to the privatization agreement given that that modernization could have been effected without the privatization agreement or with a radically different agreement. The cost of purchasing and installing the new meters was estimated at $50 million. Assuming the City wished to pay off that $50 million loan with parking meter proceeds, it could have done so with a much shorter "lease" term, or even a lease term running until the $50 million and some stated interest amount was repaid. Essentially, the City used a $50 million upgrade of its parking meter system as camouflage for a much larger loan. (Roin, at 1994-6) (citations omitted).

Concluding the transaction should be viewed as a disguised loan transaction, structured to evade constraints on constitutional, statutory, and other constraints on municipal debt transactions:

> Economically, then, the parking meter transaction is best described as a loan transaction: the City of Chicago borrowed $1.156 billion, but rather than pay interest on the debt at a set rate, it agreed to pay a contingent rate of interest both measured and secured by seventy-five years of parking meter revenues. When characterized this way, the transaction is a variant of special funds indebtedness, the type of indebtedness that in some jurisdictions, including Illinois, escapes constitutional restrictions on debt. Further, it is the more questionable variant of special-funds indebtedness, because most of the parking meter revenues that will be used to pay back the debt are not revenues that will exist only because the Concession Agreement was entered into or to compensate for the costs of running the parking meter system. The City of Chicago could have generated most of the revenue alienated under the contract by raising parking meter rates and replaced its parking meters with pay-and-display meters, without entering into a $1.156 billion contract.

> Thus, the agreement exchanges future public revenues for present public funds, just like debt. And just like many debt arrangements, the parking meter deal will leave future ratepayers decidedly worse off. The City's expenses going forward will not change (except for the relatively modest cost of installing and servicing the parking meters), but it and its ratepayers will have to come up with a new source of revenue to fund those ongoing expenses. Future ratepayers will be doubly disfavored relative to current residents: they will have to pay higher taxes to maintain the same level of services, even as their disposable income is reduced by the extra parking fees mandated by the agreement. (Roin, at 1996-8) (citations omitted).

Addressing the differences from bona fide leases and sales of public assets, Professor Roin demolishes the arguments that this should be viewed as analogously benign:

> In some respects, Chicago's sale/lease of its parking meter revenues is no different from its sale or lease of any other piece of valuable governmental property that could be retained and rented out. It is hardly unusual for governments to dispose of unwanted or surplus property ranging from old police cars to unwanted office buildings, rather than keeping the property and trying to use it to generate income. Generally, the sort of privatization that motivates government to sell used vehicles rather than trying to engage in proprietary endeavors is lauded; the accepted wisdom is that governments will be worse at selling used cars at the retail level or renting them out than would the private sector. It would seem foolish to say that governments should be forbidden from ever disposing of property once acquired, even though the sums received from such sales could be traced to past tax contributions, and the future income foregone to future taxable years. Perhaps this is because most of these sales are recurring situations and in these recurring sale situations, the government's current expenditures on replacement cars and office buildings and schools likely exceed the amounts they receive from the sale of the older models. Such current acquisitions compensate future taxpayers for the losses they suffer from the alienation of the old property. They are not really being left worse off. Perhaps this is because the property being disposed of is viewed as truly surplus, not something of continuing financial interest to the city or its inhabitants. Perhaps the prospect of politicians spending the capital accumulated by former generations is sufficiently common to be beyond objection. Perhaps the sums involved are relatively trivial in the context of the entire governmental budget.

> These arguments, however, cannot be made to support the City of Chicago's parking meter deal. The politicians disposed of future revenues belonging to future residents (residents, it is worth noting, who will receive little if any recompense in the form of improved parking), not past, built-up capital which in some sense belonged to current (or past) residents. The use of the disposed-of property will not change, it will continue to be used by the same individuals for the same purpose, and there is no sense in which the parking spaces are surplus. Further, these politicians, for the most part, used the revenues alienated from future years to pay current expenses, which, in an ideal world, would have been paid out of the pockets (and taxes) of current residents, and not to purchase replacement assets that would benefit future residents. Moreover, the sum involved is huge. (Roin, at 1998-9) (citations omitted).

And this threat is not limited to parking assets, either. If the theory of selling or leasing a "revenue stream" with not just protections from affirmative changes for generations, but affirmative obligations of the City to protect the buyer's cash flow from others, as well, for 50, 75 or 99 years, there is no revenue stream which cannot be so sold or leased:

> Most importantly, the possibilities for extension of the concept to other portions of the state and local revenue bases are obvious. The former mayor of Chicago was eyeing the public water system. But every fee-based, or potentially fee-based, government service may be the target of a similar privatization arrangement. Governments can apply the arguments that were made to support parking meter privatization--that private businesses can carry out (some portion) of the activities as well as government, and that selling the right to engage in the activity for an upfront fee removes the government's risk that fees will fail to grow over time due to government timidity about raising rates or declines in interest in the activity -- to hunting fees, vehicle registration programs, sewage treatment facilities, and fire protection, for example, in order to collect the present value of these future fees in advance. Further, the smaller the operational responsibilities devolved on the private investor relative to the revenue expected from the activity, the larger the upfront payment to the government, and the larger the net burden placed on future ratepayers. The arguments made in favor of the parking meter transaction--that it raised more money for the City than it would have been able to raise had it kept the meters because

> it transferred the risk that future revenues will fall and that the City never would have been able to raise parking rates to the levels called for under the agreement --apply not only to other types of fees but also to taxes such as real estate turnover taxes, sales taxes, and the like. In short, the rationale would stretch to cover the sale of any portion (or indeed the entirety) of a jurisdiction's future tax revenues. (Roin, at 1999-2000) (citations omitted).

This is a shocking proposition! Applying the City and CPM's theory, any administration, City or Illinois, could sell or lease its most reliable and significant revenue streams-the City's property taxes, the State's income taxes—for a large upfront payment, and 50, 75 or100 years of constraints on amending tax rates, persons, exemptions, collection, enforcement, etc., except as government entity is willing or able to pay compensation to CPM on steroids. In the current City and State pension crises, these are not unreal fears.

> The history of constitutional and statutory limitations of governmental debt is one of avoidance and noncompliance, aided and abetted by courts and state legislatures. The current absence of controls on privatization fits that pattern, and may be seen as innocuous for that reason. However, as Part III of this Article argues, privatization is a uniquely dangerous technique for avoiding debt limitations because the problems it creates extend beyond merely creating excessive debt. (Roin, at 2000-1) (citations omitted).

Ms. Roin disassembles the compensation and buyout provisions as well:

> The Chicago parking contract similarly protects the private investor against loss not only by providing scheduled rate increases over the term of the contract but also by guaranteeing the number of parking spaces and their hours of operation. Further, Chicago must compensate the investors for any loss of parking demand attributable to the City's (or for that matter, "the County of Cook or the State of Illinois (or any subdivision or agency of any of the foregoing)") actions, though the scope of that responsibility is unclear. The contractual language is drafted broadly enough that it might give pause to politicians thinking about expanding public transportation or rezoning plans that might draw commercial traffic away from areas where the Concessionaire has parking meter rights.

> This sort of revenue protection makes financial sense whether one views the privatization deal as the functional equivalent of debt or the purchase of an ongoing business. Purchasers often obtain covenants not to compete in connection with their initial purchase agreement, and forbid the transfer of assets without payment of adequate compensation. Creditors want to get their money back, with interest, and often include protective covenants in debt agreements. And generally speaking, creditors do not forgive debt just because the debtor views repayment as inconvenient. However, the funds necessary to repay conventional government debt can come from a variety of revenue sources. An indebted municipality can choose to raise additional funds from any tax it is authorized to levy--be it a property tax, a sales tax, a transactions tax, or in some jurisdictions, an income tax. (Roin, at 2011-12) (citations omitted).

Professor Roin then demonstrates how these provisions utterly constrain the government's present and future ability to exercise its legislative functions in the public interest:

> By borrowing money in the form of a privatization agreement, localities lose that flexibility. They have to repay their constructive debt through parking or toll revenues, even if in the intervening years, the government decides it would prefer to raise revenues from a different tax or fee base. A government might legitimately decide, for example, that street parking should be subsidized with heavier property or income taxes, or, alternatively, it might decide to encourage public transportation by imposing almost punitive taxes on street parking. There is no reason to think that such intrusions in public policy decisions are, on the whole, beneficial. Indeed, the longer the term of such privatization agreements, the less likely it is that these policy constraints will be beneficial simply because the officials drafting the agreement will know less about future conditions and problems. It is worth noting that most covenants not to compete are, as a matter of law, extremely time limited. (Roin, at 2012-13) (citations omitted).

She then identifies the onerous buyout provisions these agreements then impose, in order to prevent legislative course-changes in the public interest:

> Chicago (and other governments) could, in theory, buy out its contractual partner if it wanted to finance this implicit debt from sources other than parking meter revenues. That is, it could borrow money from another source, pay off its contractual partner, and then use whatever funds it so desired to repay the new debt.

> However, buying one's way out of a privatization agreement is likely to be much more complex than refinancing a debt. A city cannot simply repay an amortized portion of the initial purchase price, perhaps with an interest-rate adjustment calculated with reference to market-established discount rates. Instead, investors may be entitled to receive the present value of their interest in the privatized function. That is the standard measure of contract damages, and it applies in many government contract situations. In the case of the Chicago parking meter agreement, this would mean an amount calculated with reference to then-current projections of parking demand and other variables. The contract specifies that third-party appraisers determine this value. In practice, the process of determining value is likely to be an expensive and fraught procedure given the pricing problems described above, thus posing a significant barrier to the use of the buyout provision.
>
> The underlying contract terms are not the only impediment to buyouts. Arranging a substitute debt transaction is neither a trivial nor cheap transaction. These costs discourage governments from changing course in midstream and switching from privatization debt to conventional debt. Further, when the actual cost of a privatization agreement is enormous, jurisdictions may be loathe to admit the exact size of the hole they dug for their constituents, as would be required should they convert the deal into conventional debt. It is generally easier to carry on with the original deal, for better or for worse. (Roin, at 2013-14) (citations omitted).

She then describes how the current U.S. deals differ substantially and detrimentally from the European "predecessors",

> The incentives for stasis are particularly troubling given the term of these privatization deals. The term of the average U.S. privatization agreement is twice the length of those in European privatization agreements. Tollway deals in the United States last for ninety years; similar deals in Europe last thirty or forty years. The Chicago parking meter deal runs for seventy-five years. Generally speaking, because of both uncertainty and the time value of money, lengthening the term of these contracts adds little economic value to the deal. For example, only seven percent of the sales price in the Chicago parking meter contract was attributable to years thirty-seven through seventy-five of the agreement. (Roin, at 2015-16) (citations omitted).

And the reason for the extraordinary length of this deal has nothing to do with public benefit.

Rather, the whole reason for such extraordinary time periods is to enable the buyer to obtain tax shelter for the revenues from the deal. That is, if CPM's lease-term ownership exceeds the projected useful life of the leased asset, then CPM can treat itself as an owner of the asset, and claim deductions for depreciation and amortization, reducing the amount of the payments subject to U.S. income tax:

> What the additional years may sometimes add is tax value--federal income tax value--which increases the value of the deal to the investors and thus the price they are willing to pay participating governments. Investors may claim generous depreciation deductions only with respect to property that they own; deductions with respect to leased property must be claimed by the lessor. If these privatization deals were classified as leases for tax purposes, the lessor would be a government that is not subject to federal income tax, and for whom the generous depreciation deductions therefore would provide no benefit. However, the IRS is willing to treat lessees/concessionaires as owners for tax purposes when the term of the lease exceeds the design life of the asset at the time of the transaction. In many situations, twenty or thirty years would not meet this standard, while seventy-five or ninety years would. Accordingly, by lengthening the terms of the contracts, the parties may gain access to a valuable tax benefit--a benefit that they can split between themselves by adjusting the stated purchase price. In sum, these privatization deals are not only a method of circumventing debt limitations, many of these deals are also tax shelters in that they shift the economic benefits of accelerated depreciation from a tax-indifferent party (state and local governments are not subject to the federal income tax) to a taxable party (the private investor). Unfortunately, one price some jurisdiction must pay to access the shelter is a contract with a term that lasts generations. (Roin, at 2016-17) (citations omitted).

As she points out, these distortions just add to the troubling aspects of these deals:

> These distortions are all the more troubling because they are all too often invisible to the voting public at the time that the public might be able to exercise some political control, before the deals have been enacted. As the next section shows, attaching the privatization label to these transactions all too often leads observers to miss the fact that they are a form of debt. (Roin, at 2018).

She then demolishes CPM's "special fund" argument (CPM at 15), that the money is going into, and the compensation coming out of, some non-general-fund reserve:

> The explanation given for maintaining these reserves, that their existence buttresses Chicago's credit rating and thus reduces the cost of newly issued public debt, suggests that even rating agencies might not understand the similarity between these deals and debt. Ordinarily, an enterprise does not improve its fiscal solvency by assuming more debt, even if the enterprise invests rather than spends the debt proceeds, because the accession to cash is counterbalanced by the repayment obligation. Perhaps the ratings increase resulted from the belief that the contractual prices were unjustifiably high, that the City was on the right side of the winner's curse. The most likely justification for the improvement in the City's credit ratings, though, is one that highlights the myopic nature of bond ratings: although the transactions may not substantially change the City's overall financial position (at least for the better), the maintenance of a reserve makes it less likely that the City will default on bonds maturing in the near future. It can use the reserve to pay off the early debt, thereby shifting the risk of nonpayment to later bondholders; those defaults would fall outside the time horizon covered by the current ratings. As later events showed, retention of the favorable bond rating depended on continued maintenance of the reserve. (Roin, at 2019-20) (citations omitted).

And she concludes, these are simply bad deals for taxpayers:

> The public's failure to recognize the equivalence between the privatization transactions and governmental debt, like its uncertainty as to the adequacy of the price received by the government in these transactions, reduces the political feedback required to ensure that the government neither overborrows nor overspends. If the public does not understand how these transactions mortgage future tax revenues, and instead views the cash received in these transactions as windfalls or gain, the public may be more accepting of political decisions to engage in the transactions in the first instance and to spend the transactionalproceeds on current needs or desires. Or it may not. The public might be as shortsighted as politicians, as eager to spend as much as creditors are willing to give them now and worry about the consequences later--or leave their children or grandchildren to worry about the consequences. It is impossible to predict with any certainty whether the general public would approve of these transactions if they fully understood them. The

> point, though, is that the power to approve or disapprove means nothing when that understanding is lacking. Casting loans in the form of privatization transactions reduces the likelihood that the public understands what their politicians are doing on their behalf.
>
> In sum, it is questionable whether the potential gains from privatization are worth their cost, or whether, given the inherent difficulties and opportunities for abuse in such deals, attempts should be made to discourage them and, instead, to try to force local governments to borrow using conventional debt formats. Of course, even if the answer to that question is "yes," the question remains whether it is possible to achieve that end. (Roin, at 2020-21).

Accordingly, bona fide expert views show this deal to be not only illegal, but a fundamentally bad deal as well, whose "public benefits" are mere window dressing for just another raid on the City's finances.

Accordingly, there is little room but to declare the transaction illegal.

Anticipating CPM's argument that this result triggers the contract penalty of forcing the City to buy the transaction back at its current purported value, something in excess of CPM's original purchase price, we will show in the following section that will not be the result.

VI. IF THE AGREEMENT IS ILLEGAL, THE COURT HAS MANY CHOICES, NONE OF WHICH WOULD BE ENFORCING THE ILLEGAL AGREEMENT'S BUY-OUT PROVISION.

Since the Concession Agreement between the City and CPM is an illegal contract it is *ultra vires* void and unenforceable. CPM, as a private party contracting with a city, is presumed to know the City's legal limitations -- CPM had the responsibility to know the City could not contract in the way it did. Further CPM bears the burden of loss on this illegal transaction. Both the City and CPM are left where they stand.

The remedy for an ultra vires agreement is governed by the doctrine of "in pari delicto", that the parties walk away without redress. The structure of this result is that a contract by which the City assigns, transfers or conditions its exercise of its police powers (i.e., legislative authority) is illegal because such a transaction is beyond its authority. Treating it as *void, ab initio* does not mean that the illegal/void contract's terms govern, nor are they ratifiable by the City. Rather, since everyone is presumed to know the limitations of the City's authority, the contract is ultra vires, and is cancellable by the city, without repayment. Alternatively, if the court chooses another equitable result, the repayment would be limited to what the city paid, less what CPM has received to date.

A. <u>The Concession Agreement was Entered into *Ultra vires*; Therefore, CPM does not have an Enforceable Interest in the Parking Meters and may not Recover any Benefits Conferred upon the City.</u>

Contracts which violate a rule of law are *ultra vires*, and where the parties to the contract are *in pari delicto* (i.e. at equal fault), the contract is deemed void and invalid *ab initio* and the contracting parties cannot recover monies or benefits conferred to the other pursuant to performance of the agreement in either contract (e.g. restitution) or *quantum meruit* (e.g. unjust enrichment or contract implied by law).

i. <u>*Ultra Vires* Contracts are Invalid *Ab Initio* and No Remedy May be had for Benefits Conferred Upon the Other Party Pursuant Thereto, Either in Contract or *Quantum Meruit.*</u>

In contrast with secondary ultra vires contracts[25], contracts which are *ultra vires* because they violate a rule of law (e.g. common-law principle, statute, ordinance, constitution), become unenforceable, the parties are left where they stand, and neither party (including a municipality) is required to return monies or benefits received from the other party pursuant to performance of

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[25] Contracts which are "within the general power of the corporation, but which are void because the power was irregularly exercised" or where only a portion of the contract exceeds the corporation's powers, are deemed *ultra vires* in the secondary sense and the "municipality or other political subdivision may become obligated to pay the reasonable value of benefits accepted or appropriated by it *as to which it has the general power to contract.*" *Allen v. Treat*, 72 Ill.App.2d 466 (4th Dist. 1966)(emphasis added).

the contract[26] This rule applies also to contracts that violate the public policy of the state[27]. Moreover, parties to a contract *ultra vires* for violating a rule of law are not only precluded from contractual remedies, but from relief under *quantum meruit* as well, because "[s]uch a recovery is founded on the implied promise of the recipient of services or material to pay for something which he has received that is of value to him. Such a principle can have no application in this case for the reason that the contracts were wholly void and created no rights and imposed no obligations ... To permit recovery of compensation in these cases on a quantum meruit would, in legal effect, give sanction to the giving of public funds to private use ..."[28] Here, the Concession

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26 *De Kam et al. v. City of Streator*, 316 Ill. 123, 132 (1925)(Plaintiff was hired to design new sewer system to remedy unsanitary conditions in the city. The city council, in haste, knowingly entered into a contract with the plaintiff without passing appropriations beforehand as required by statute. Plaintiff's contract was deemed void and he was unable to recover amounts due and owing to him for his work.); *Hope v. City of Alton*, 214 Ill. 102, 105 (1905)(Attorney who had been hired by city pursuant to illegal contract which violated an ordinance providing that the city could only compensate the legal services of the city attorney or corporate counsel, could not receive payment on the invalid contract.); *May v. City of Chicago*, 222 Ill. 595, 599-600 (1906)(City clerk could not recover wages for overtime work where his contract violated ordinance requiring municipal contracts to have monies appropriated beforehand.); *Arnold v. Village of Ina*, 244 Ill.App. 239, 241 (4th Dist. 1927)(Plaintiff seeking recovery from village for construction of culverts could not recover because contract was void *ab initio* for failure to record voting proceedings, pursuant to statute, under which contract was created.); *Allen*, 218 N.E.2d at 255 (distinguishing the two senses of *ultra vires*: "[T]he principle is now firmly established that the doctrine of ultra vires is not applied *(except in cases where the contract is prohibited by some rule of law)* where its enforcement would enable the municipality to obtain an unconscionable advantage of the other party to the contract...")(emphasis added); *Henry A. Keith v. City of DuQuoin ex rel. Parks*, 89 Ill.App. 36 (4th Dist. 1900)("Where a contract or other act is ultra vires by reason of a total lack of power, no rights accrue against a municipality no matter what benefit may have been conferred upon it...").

27 *De Kam*, 316 Ill. at 131 ("[I]t is a well-established rule that where, from a consideration of all the provisions of the statute, the legislative intention clearly appears to declare an act unlawful no contract for the performance of that act can be enforced, and the rule applies to a contract to do an act contrary to the public policy of the state.") Nor can a private party recover for the reasonable value of the municipality's use of its property pursuant to an illegal contract. *Galion Iron Works & Mfg. Co. v. City of Georgetown*, 322 Ill.App. 498, 504-505 (3d Dist. 1944)(Plaintiff could not recover for reasonable value of city's use of its road grader which had been leased to the city pursuant to an illegal contract.)

28 *Ashton v. Cook County et al.*, 384 Ill. 287, 301-302 (1943)(Contract hiring attorneys to help State's attorney collect forfeited real estate taxes was void *ultra vires* because the attorneys' hires were beyond the scope of powers provided by the Illinois constitution and attorneys could not recover compensation for their services in either contract or *quantum meruit.*) The notion of *quantum meruit* encompasses equitable remedies, such as unjust enrichment. *In re Estate of Walsh*, 2012 IL App. (2d) 110938, *7 (2d Dist. 2012)("...a *prima facie* case on a claim sounding in *quantum meruit*, also described as unjust enrichment or contract implied in law."). Indeed, the notion that equitable considerations will not warrant a return of monies expended pursuant to an illegal contract is further supported by Illinois courts' unwillingness to consider the monetary loss a private party sustains in performance of an illegal contract. *Ad-Ex, Inc. v. City of Chicago*, 207 Ill.App.3d 163, 175 (1st Dist. 1990)(the City of Chicago

Agreement is *ultra vires* in the primary sense, because it violates a rule of law in the Illinois Constitution, and the legal and illegal parts of the Agreement are not severable – for the Agreement in its essence is a sale of the Reserved Powers. Thus, at its core, the contract is a promise that the Reserved Powers will not be exercised in a way which compromises the expected revenue derived from the parking meters without complete, front loaded compensation to CPM. Indeed, the promise that City buy back its right to exercise its own police powers over the city streets is so integral to the negotiated value and purchase price of the contract, that neither party can say that this promise is not essential to the contract. Accordingly, since the entire contract is illegal, no right to parking meter revenues (or other provision of the Concession Agreement) ever flowed from the contract to CPM and no party has a right to recovery of the benefits conferred upon the other pursuant to the illegal Concession Agreement.

ii. <u>CPM and the City are Viewed as Being *In Pari Delicto.*</u>

Under Illinois law, when a contract is illegal, there is a substantial burden on a party seeking enforcement to show that the party is not at equal fault:

> In pari delicto is a legal principle that, in some situations, permits the less culpable of various parties to obtain relief from otherwise illegal or tortious transactions or occurrences.... There is case law that indicates a court could grant relief if the parties are not in pario delicto. *Corti v. Fleischer*, 93 Ill.App 3d 517, 532 (1981).... There must be some pleading or evidence that plaintiff had no knowledge of the illegality and the defendants did...

O'Hara v. Ahlgren, Blumenfeld, & Kempster, 158 Ill.App.3d 562, 566 (1st Dist. 1987).

The appellate court's reasoning in *O'Hara* was affirmed and further elucidated on appeal to the Illinois Supreme Court:

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entered into an illegal contract and the appellate court declared the contract void and unenforceable. The city was not required to return any monies received pursuant to the contract to the private party, though the court was "mindful of [its] financial loss.").

> Generally where the parties to a contract against public policy are in pari delicto, or equally at fault, a court will not aide either party but will leave both parties where it finds them. *Staufenbiel v. Stuafenbiel* 388 Ill. 511, 519(1944). This rule is designed not to help any party but rather to protect the public. *Schnackenberg v. Towie* 4 Ill 2d 561, 565 (1954); *Vock v. Vock* 365 Ill 432, 435 (1937). It is believed that by refusing to enforce such contracts, courts will deter similar contracts in the future. S. Williston, A Treatise on the Law of Contracts, § 1630A (3d 1972).
>
> Although courts will generally not enforce contracts which are against public policy where the parties are in pari delicto, this is not to say a court *must* enforce an agreement when the parties are not in pari delicto. 'The interest of the public, rather than the equitable standing of the individual parties, is of determining importance.' *Parish v. Schwartz* 344 Ill. 563, 572 (1931); see also *Schnakenberg v. Towie*, 4 Ill. 2d 561, 569 (1954).
>
> ... As this Court has stated before, a party to a contract which is contrary to public policy is not precluded from raising its illegality as a defense. See, e.g., *Hall v. Woods* 325 Ill. 114, 135 (1927) *Lyons v.Schanbacher* 316 Ill. 569, 574 (1925).

O'Hara v. Ahlgren, Blumenfeld & Kempsters, 127 Ill.2d 333, 348 (1989).

Here, CPM cannot possibly show that it lacked knowledge of illegality of the Agreement and was therefore at lesser fault – indeed, the lawyers specifically drafted restrictions on the "Reserved Powers," and then contended that there were *no* restrictions. As the appellate court found in *O'Hara*, no party to an illegal contract has *any* right to recover anything. *See* 158 Ill.App.3d at 566 ("Since the contract was void as against public policy, the trial court should have... left both parties where it found them. Where enforcement of an illegal contract is sought, the courts will aid neither party, but will leave them where they have placed themselves, since the parties are *in pari delicto* and can recover nothing under the contract.") *affirmed O'Hara*, 127 Ill.2d at 348.

Moreover, fatal to any argument that the city and CPM were not *in pari delicto* is that in Illinois, a party contracting with a municipality is charged with knowledge of the laws limiting that municipality's authority to enter contracts.[29] From this presumption, it follows that parties to an illegal municipal contract are inherently presumed *in pari delicto*:

> But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.

Thomas v. City of Richmond, 79 U.S. 349, 356-357 (1870) (discussing the inherent difference in fault between a private corporation that illegally issues currency and a municipal corporation that does the same).

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[29] *De Kam*, 316 Ill. at132 ("[N]ot only is every one presumed to have known that the city and all of its officers were prohibited from making the contract, but the writing itself shows that the parties to it had this prohibition actually in mind at the time, for the writing expressly mentions the inability of the city to enter into the contract. This instrument was confessedly void, and being void was incapable of ratification."); *Hope*, 214 Ill. at 105 ("[p]ersons dealing with a municipal corporation are chargeable with notice of the ordinance in question ... To hold otherwise would be to expose the taxpayer to all the evils the statute or ordinances passed for his protection were designed to prevent."); *May*, 222 Ill. 595, at ("A person dealing with a municipal corporation is charged with knowledge of the limitations of the power of that corporation for any contract attempted to be entered into by any of its officials."); *Arnold*, 244 Ill.App. at 241 ("[E]veryone is presumed to know the extent of the powers of a municipal corporation, and it cannot be estopped to aver its incapacity, which would amount to conferring power to do unauthorized acts simply because it has done them and received the consideration stipulated for.").

Accordingly, CPM and the City are *in pari delicto*; not only is it clear that CPM had full knowledge of the "Reserved Powers" restrictions and was, in fact, at least equally at fault in entering into the illegal agreement with the City, but the law in the United States and Illinois specifically places the risk of such transactions upon the party contracting with the municipal corporation.

iii. **The Concession Agreement Cannot be Cured by Subsequent Ratifications Because the Agreement is Void From its Inception.**

Nor do City administrations' actions under the agreement ratify or cure the illegality. Any subsequent illegal action -- such as ratification or enforcement – cannot save the illegal contract from being void. A city lacking the power to agree to a contract's provisions makes the contract void and unenforceable. *See Ad-Ex, Inc. v. City of Chicago*, 207 Ill.App.3d 163, 175 (1st Dist. 1990) (the City of Chicago entered into an illegal contract and the appellate court declared the contract void and unenforceable). If an agreement is void from its inception, as is the case here, it cannot be ratified by the Corporation Counsel's having negotiated or not opposed the agreement, nor by City officials' subsequent conduct under the ultra vires agreement" *Id.* at 168.[30] In reversing the circuit court's denial of the City's motion to set aside the agreement for being void, the appellate court held, "[a] municipal contract which is legally prohibited or beyond the power of the municipality is absolutely void and cannot be ratified by later municipal action." *Id.* at 171. The City's cannot ratify the illegal contract and therefore, the Concession Agreement remains void.

30 The appellate court in *Ad-Ex* also noted that "there had been an absence of any direct attack upon the agreement by the corporation counsel or by the city council to disavow it." *Ad-Ex*, 207 Ill.App.3d at 675. The circuit court's concern in *Ad-Ex* should not be this Court's concern because the corporation counsel has challenged the terms of the Concession Agreement regarding true-ups via litigation.

B. Even if the Court Eventually Rules that CPM is Entitled to Recovery of Monies Expended Pursuant to the Illegal Concession Agreement, the Court May Order an Equitable Repayment Structure

Even if the City is required to reimburse CPM for its performance pursuant to the contract, the court is not required to plunge the City into insolvency, but may order the City to pay the CPM at a later date when it becomes economically feasible. *City of Chicago v. McCluer*, 339 Ill. 610 (1930)[31](where the city lacked sufficient funds to pay special assessments to property owners whose properties were seized to widen LaSalle street, the court stated: "[E]ven though the city has not on the day of the judgment order or at the end of the reasonable period following the judgment, that is, after the assessments have either been collected or are in default, sufficient money to pay the awards, the court will by proper action enforce judgment against the city. Non constat [sic] that because it does not now have the funds on hand, when the time comes to meet the liability it will not have sufficient funds derived from an authorized bond issue, from increased taxation or from some other source, to meet the same."). In fact, the court could allow the City to raise funds and repay the debt incrementally[32].

CONCLUSION

As shown in our opening brief, and response/reply in this brief, the CPM Concession Agreement constitutes an illegal, *ultra vires* delegation, transfer or condition, of the City's legislative and police powers.

WHEREFORE, this Court should grant Plaintiff's Motion for Summary Judgment, declare the Concession Agreement illegal and enter judgment against Defendants City of

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31 The page citations for the Illinois Reporter are not available for this case on Westlaw. Instead, the North Eastern Reporter Second citations are listed.

32 *Couch v. City of Villa Roca*, 203 F.Supp. 897 (N.D. Ga. 1962)(Court ordered insolvent municipality to pay back $64,940 in judgments over a period of subsequent years by raising its gas, water and sewage service charges until the judgment was fully satisfied.)

Chicago and Chicago Parking Meters, LLC, declaring that one or more of the following terms of the Agreement: §§ 3.2(e); 3.12; 7.5; 7.6(b); 7.8; 7.10; 7.11;14.3; and Art. 19, are illegal.

Dated: July 11, 2012

Respectfully submitted,

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<u>**CERTIFICATE OF SERVICE**</u>

I, Eli Korer, an attorney, certify I caused copies of the foregoing **Notice of Filing** and attached **Plaintiffs' Combined Reply Brief in Support of Plaintiffs' Summary Judgment / Response Brief to CPM's and the City's Cross-Motions for Summary Judgment** and **Appendix of Exhibits** to be served on the persons listed on the service list via U.S. Mail on July 11, 2012.

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