

CASE TYPE: 10 (OTHER CIVIL)

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

)
)
In re Petition for Instructions to)
 Construe Basic Resolution 876 of)
 The Port Authority of the City of)
 Saint Paul)

Court File Nos. CS-06-200031
C2-02-2000043
CX-04-20070

**THE PORT AUTHORITY OF THE CITY OF ST. PAUL'S
 MEMORANDUM IN OPPOSITION
 TO THE OBJECTING BONDHOLDERS' RULE 60 MOTION
 ON REMAND FROM THE MINNESOTA SUPREME COURT
 TO DETERMINE WHETHER MOTION WAS BROUGHT
 WITHIN A REASONABLE TIME**

INTRODUCTION

The Court should deny the Objecting Bondholders' Rule 60.02 motion to vacate orders this Court entered in 2002 and 2004. The Minnesota Supreme Court has remanded this matter to the district court for a determination whether, considering all attendant circumstances, the Objecting Bondholders' motion to vacate was brought within a reasonable time, as required by Rule 60.02. *In re Petition for Instructions to Construe Basic Resolution 876*, 772 N.W.2d 488, 496 (Minn. 2009). This Court will hear evidence on Wednesday, February 24, 2010.

The Objecting Bondholders have the burden of proof, but they have not and cannot meet that burden. The Objecting Bondholders apparently elected to rest on the existing record and do not propose to offer witnesses or exhibits at the hearing. While the Minnesota Supreme Court held the 2002 and 2004 orders void due to lack of subject matter jurisdiction, that court eschewed the Objecting Bondholders' motion to vacate those two orders. 772 N.W.2d at 495.

Instead, it remanded for a determination by this Court. The Court has already received evidence showing that the 2002 and 2004 orders *both* fulfilled the Basic Resolution's guiding principle that bondholders be treated equally and ratably *and* conferred substantial benefits on all bondholders. Additionally, the bondholders and the Port Authority relied on those orders.

After proper notice to all bondholders and a full hearing on the merits, this Court determined in 2002 and 2004 that what the Port Authority requested benefitted the bondholders and rested on a sound factual basis. Simply stated, the Objecting Bondholders' Motion to vacate the 2002 and 2004 order came too late. Their motion was filed years after the orders were final and years after they had notice of each of the petitions, hearings, and orders. They have offered no excuse for their failure to oppose the Port Authority's motions that led to the 2002 and 2004 orders and, even assuming such an excuse is offered now, no evidence of due diligence or of a reasonable excuse justifies the years they delayed in seeking to vacate. The time to appeal the 2002 and 2004 orders has long since passed, and a motion to vacate is not an alternative to a direct appeal.

Additionally, since the orders were entered, thousands of bondholders, the financial marketplace, and the Port Authority have acted in good faith reliance on those orders. Two tender offers occurred and interest payment dates were aligned to benefit all bondholders. Substantial prejudice will result to bondholders and the Port Authority if the 2002 and 2004 orders are vacated. Transactions have occurred that simply cannot be undone.

Relying on the 2002 order, nearly 2000 bondholders offered to sell; following the 2004 order, nearly 1600 bondholders offered to sell. After the 2004 order, those bondholders who did not tender, some 2300, were placed on an equal footing by realignment of interest payment dates. Even if it were possible to unwind events approved in 2002 and 2004, doing so would prejudice

the bondholders who participated in the tender offers and place the 876 Fund in even worse financial condition. In short, after balancing the interests of finality and validity intrinsic to deciding a Rule 60 motion, the motion to vacate must be denied. Finally, the Objecting Bondholder's motion should be denied as moot because this Court cannot grant meaningful relief. The Court's 2002 and 2004 orders are and should remain final.

BACKGROUND

In 2002, the Port Authority filed a petition for instructions in Ramsey County District Court seeking permission to conduct a tender offer and confirmation that it had properly administered the 876 Fund. (Ex. 2: Order.) At the hearing on the matter, the Court took testimony about the tender offer and administration of the 876 Fund. (Ex. 1: Transcript.)¹

On October 8, 2002, the Court issued an order and ruled that the tender offer would benefit both those bondholders who participate – “by having their bonds purchased” – and bondholders who do not participate – “because there will be proportionately more Net Revenues available to remaining 876 Bondholders.” (Ex. 2: Order at 11, 13.) Therefore, “[i]t would be in the best interests of the bondholders for the Petitioner to proceed with its tender offer.” (*Id.* at 14.) After examining the evidence, the Court also confirmed and approved the Port Authority's administration of the 876 Bond Program. (*Id.* at 15.) The Court further determined that the Port Authority had adequately and timely notified all 876 Bondholders of the petition and hearing as required by law. (*Id.* at 15.)

The Port Authority conducted a 2002 and 2004 tender offer pursuant to this order. The 2002 tender retired a par amount of bonds of \$70,235,000 using reserves of \$54,046,700 for a discount from par of \$16,188,300. (*See* Ex. 14.) The 2004 tender retired a par amount of bonds

¹ All evidence and prior orders referred to in this memorandum are attached to the Affidavit of Laurie J. Hansen. It is also the Port Authority's understanding that prior testimony and admitted exhibits remain before the Court on the motion to vacate.

of \$21,715,000 using reserves of \$18,240,000 for a discount of \$3,475,000 payable from revenues of the 876 Fund. Both tenders reduced the ongoing debt service. (*Id.*) The 876 Bonds have an average interest rate of 9.25% at the time of the 2002 and 2004 tenders. As a result, the 2002 tender reduced the ongoing annual 876 Fund debt service interest payments by approximately \$6,496,000. The annual debt service reduction resulting from the 2004 tender was approximately \$2,008,000. Adding together the two tenders, over 2400 bondholders participated in reliance on the court orders. (*Id.*)

In 2004, the Port Authority filed another petition for instructions in Ramsey County District Court seeking approval to adjust the interest payment dates for outstanding 876 Bonds so that interest is payable on June 1 and December 1 of each year, rather than scattered throughout the year. (Ex. 4: Order.) At the hearing on the matter, the Court took testimony about the interest payment adjustment and administration of the 876 Fund. (Ex. 3: Transcript.)

On October 22, 2004, the Court issued an order and found that “the current practice of paying principal and interest on some of the outstanding 876 Bonds on the first day of each month will undermine the ‘pooled’ concept of the 876 Fund, either by benefiting or harming the holders of 876 Bonds, solely by virtue of the principal and interest payment dates arbitrarily chosen for their bonds at issuance, and the dates on which revenue flows into the 876 fund.” (Ex. 4: Order, p. 12-13.) The Court concluded that the proposed adjustment of interest payment dates “would be in the best interests of the bondholders.” (*Id.* at 16.) The Court again confirmed the Port Authority’s fund administration. (*Id.* at 17.) The Court also determined that the Port Authority had adequately and timely notified all 876 Bondholders of the petition and hearing as required by law. (*Id.* at 16.)

The bondholders had complete notice of what the Port Authority was seeking in 2002 and 2004 and what the 2002 and 2004 orders provided. (Exs. 5, 6, 7, 8, 17 and 18.) None of the 876 bondholders challenged either the 2002 or 2004 order on appeal and the time to appeal the orders has long passed.

In June 2006, the Port Authority petitioned for further instructions, again providing notice to all bondholders. On October 20, 2006, a minority of the bondholders (“the Objecting Bondholders”) filed a motion to vacate the 2002 and 2004 orders. In 2009, the Objecting Bondholders finally succeeded in overturning this Court’s 2006 order approving instructions to the Port Authority regarding the 876 Basic Resolution and denying the motion to vacate the 2002 and 2004 orders. *In re Petition*, 772 N.W.2d at 495. Specifically, the supreme court held that this Court “had no authority pursuant to chapter 501B, and its 2002 and 2004 orders are void because there were rendered without in rem jurisdiction over the 876 Bonds.” *Id.* The supreme court did not vacate the 2002 and 2004 orders because “the question of whether appellant’s motion to vacate was made within a reasonable time is better addressed by the district court because this record is not sufficient for us to properly determine all attendant circumstances.” *Id.*

STATEMENT OF RELEVANT FACTS

A. The Port Authority’s Public Purpose Is Economic Development

The Port Authority is a public agency created under Minn. Stat. § 469.049 and its predecessor provisions. It is charged with promoting economic development in Saint Paul and the East Metro area. (Ex. 9 at T.280.)² The agency is managed by a professional staff experienced in economic development, property management and finance. (Ex. 10 at p. 3.)

Created in 1932, the Port Authority initially focused its activities on the Mississippi River, where the Port Authority owns a number of properties that it leases to various third

² References to testimony from the trial following the 2006 Petition are indicated as “T. ___.”

parties. In addition, the Port Authority collects tonnage charges based on the quantity of commodities shipped through some of these parcels. (Ex. 9 at T.229, 755.) The Port Authority also controls riparian rights in the Mississippi River, which it leases for barge fleeting. (Ex. 9 at T.229-30.)

B. Creation Of The 876 Fund In 1974

In the 1970s, the Port Authority broadened its focus to include economic development throughout Saint Paul. The Port Authority used revenue bonds to finance these expanded activities. (Ex. 9 at T.282-83.) State law defines a revenue bond as a municipal bond repaid *solely* from specifically defined revenues, *see* Minn. Stat. § 469.162; ordinarily, those revenues come from the facility the revenue bonds financed. (Ex. 9 at T.283.) Revenue bonds *cannot* be paid from the issuer's general revenues or taxing powers. Minn. Stat. § 469.155, subd. 14. (Ex. 10 at p.3-4; Ex. 9 at T-289; Ex. 11.) State law also mandates that the expenses associated with managing revenue bond financed projects be paid out of project revenues. *See* Minn. Stat. § 469.155, subd. 14.³

As part of its expanded program, in 1974 the Port Authority adopted Basic Resolution No. 876 ("Basic Resolution"), which created a common bond fund and established terms for financing development projects and covenants for managing the fund. (Ex. 11.) Through this common bond fund, the Port Authority issued individual series of 876 bonds from 1974 until 1991 to finance 139 development projects. (Ex. 10 at p. 2.)

When the Port Authority issued 876 bonds, it was not issuing debt on its own behalf, but as a "conduit issuer" for various development projects. Bond proceeds were loaned to the developer of the project being financed, who became in effect the borrower obligated to repay

³ Under Minn. Stat. § 469.155, subd. 14(2), the issuer may advance the costs to enforce any remedies available under a revenue agreement, to be repaid from any recovery.

the debt. When a borrower finished repaying the debt, it typically acquired the title to the project.

1. Pooled Concept

A central feature of the Basic Resolution was the Common Revenue Bond Fund, into which all borrower repayments were deposited. Consequently, the holders of each series of revenue bonds issued under the Basic Resolution looked to one collective source for repayment. (Ex. 11 at p. 2, 29-30; Ex. 10 at p.4; Ex. 9 at T.320-21, 764-65.) Because 876 Bond debt service was paid from the 876 Fund, repayment of any one series of 876 Bonds did not depend solely on the success of the specific project financed by that series of 876 Bonds, but on the collective performance of all projects financed by 876 Bonds. Section 5-8 of the Basic Resolution reinforced this pooled concept, providing that:

All General Revenue Bonds [876 Bonds] shall be equally and ratably secured by and payable from the [876 Fund], without priority of one such General Revenue Bond over any other,

(Ex. 11 at p. 35.) In this context, the term “ratably” means “proportionately.” (Ex. 9 at T.761-62.) Similarly, in section 4-7, the Basic Resolution provided “the Authority has made the covenants and agreements herein for the equal and proportionate benefit of all Holders of the General Revenue Bonds [876 Bonds].” (Ex. 11 at p. 19.)

2. 876 Bonds Are Not A General Obligation

Consistent with state law, 876 Bonds are *not* a general obligation of the Port Authority or the City of Saint Paul. Section 4-7 of the Basic Resolution was explicit: “The General Revenue Bonds [876 Bonds] may not be payable from or be a charge upon any of the funds of the Authority other than the revenues pledged to the payment thereof” (Ex. 11 at p. 19.)

The 876 Fund also has a limited life. The purpose of the 876 Fund was to fund loans for development projects. Individual series of 876 Bonds were issued to generate capital for those

loans. The revenue agreements between the Port Authority and borrowers were structured such that loan repayments would pay the principal and interest due 876 bondholders within the term of the loan, which was limited by statute. Minn. Stat. § 469.061 (establishing 30-year maturity limit for non-housing revenue bonds). The principal and predominate revenue stream for payments to 876 bondholders – payments by borrowers of 876 Bond proceeds – stops when the last individual repayment obligations ends. (Ex. 10 at p. 10; Ex. 9 at T.285-88.) The Basic Resolution functionally ends September 1, 2022, the last scheduled 876 Bond payment date under state law and the terms of the Basic Resolution. (Ex. 9 at T.285, 363, 793.)

C. Excessive Borrower Defaults Made It Impossible To Pay 876 Bonds In Full

The 876 Fund is currently unable to pay debt service in full and, looking ahead, will never again be able to do so. This circumstance results from economic events that occurred long ago. This shortfall is not the fault of the Port Authority, but is due to market forces that the Port Authority could not foresee or control.

In the late 1980s and early 1990s, there was a serious downturn in the real estate market, both nationally and especially in Saint Paul. (Ex. 9 at T.293-94, 746.) Ultimately, 37 of the 139 876 Bond-financed Facilities defaulted – over 25 percent of all 876 projects. (Ex. 10 at p. 3.) Since many of these projects were non-recourse financings, borrowers often found it more expedient simply to turn over the properties to the Port Authority. (Ex. 9 at T.293-94, 746.) While the Port Authority worked to market those properties for sale or lease, economic conditions prevented it from generating rental income or sales proceeds equal to the debt service or outstanding principal of the associated 876 Bonds. (Ex. 10 at p. 7-8; Ex. 9 at T.294, 746.)

The Port Authority also could not raise lease payments on performing 876 Bond-financed Facilities because an individual borrower's payments had been fixed in an amount sufficient only

to amortize repayment of the related series of 876 Bonds issued to finance that particular project. The revenue agreements did not allow the Port Authority to increase the charges on performing 876 Bond-financed Facilities. (Ex. 10 at p. 7-8; Ex. 9 at T.291-92.) Similarly, the Port Authority was not entitled unilaterally to raise rents on existing leases of the Non-Revenue Bond Facilities. While these rents, which were pledged to repayment of the 876 Bonds, were negotiable when the leases came up for renewal or rent resetting, there were significant economic limitations on what the Port Authority could seek as rent from tenants. (Ex. 9 at T.291-92, 717-18.)

The annual shortfall between 876 Fund revenues and the debt service obligations on the pool of 876 Bonds grew to as much as \$15 million. (Ex. 9 at T.745-46.) As of May 31, 1990, there were over \$77.6 million in reserves pledged to the 876 Fund. (Ex. 13.) Even that amount could not cover a shortfall in revenues of the magnitude experienced. (Ex. 12 at p. 21.) By 2004, all reserves had been depleted to purchase or pay 876 Bonds. (Ex. 2 at p. 5; Ex. 9 at T.745.) On-going revenues pledged to the 876 Fund became and remain insufficient to even pay interest in full, much less principal. Approximately \$51 million in principal currently remains outstanding. (Ex. 10 at p. 3; Ex. 9 at T.749.)

D. Facing Impending Depletion Of Reserves, The Port Authority Conducted Tender Offers In 1996, 2002, And 2004, And Saved The 876 Fund Over \$23 Million

The Basic Resolution provides that Prepaid Net Revenues and Special Funds may be used to purchase 876 Bonds. (Ex. 11 at p. 31-32.) Prepaid Net Revenues are the funds received from borrowers who pay off their 876 Bond-related debt early. (Ex. 11 at p. 5.) Special Funds are the net proceeds from selling repossessed 876 Bond-financed Facilities. (Ex. 11 at p. 6.) These prepayments and sale proceeds are deposited in the 876 Fund. (Ex. 11 at 31-32.) Since 1996, the Port Authority has conducted three tender offers using Prepaid Net Revenues and Special Funds to repurchase 876 Bonds. (Ex. 9 at T.371.)

In 1996, the Port Authority used \$28,148,000 of Prepaid Net Revenue and Special Funds to purchase 876 Bonds with a face value of \$31,815,000, providing an immediate \$3,667,000 savings in principal to the 876 Fund, plus future savings from eliminating interest payments on the principal retired. (Ex. 10 at p. 6; Ex. 14.) Following the 1996 tender, many 876 Bond-financed Facility borrowers prepaid their financing leases. Other 876 Bond-financed Facilities in default were sold with proceeds placed in the 876 Fund as Special Funds. (Ex. 10 at p. 6-7.)

In 2002, the Port Authority filed a petition for instructions for permission to conduct a tender offer using a “Dutch auction” methodology. (Ex. 10 at p. 7; Ex. 2 at p. 9-11.) In a Dutch auction tender, 876 bondholders would offer to sell their bonds to the Port Authority; the tender agent would then rank offers in order of the largest to smallest discount from par value. The district court authorized the Port Authority to proceed with the tender offer because it would immediately benefit those who took the tender offer and later benefit remaining bondholders with an increase in available net revenues and savings in principal and interest. (Ex. 2 at p. 15.) The Port Authority purchased \$70,235,000 in outstanding 876 Bonds for \$54,046,700, for a principal savings to the 876 Fund of \$16,188,300, plus future interest savings on the principal retired. (Ex. 10 at p. 7; Ex. 14; see also Ex. 2 at p. 9-10; Ex. 9 at T.641-42.)

The Port Authority also conducted another tender offer under the same terms as authorized in 2002. Following that 2004 tender, it retired \$21,715,000 in 876 Bonds for \$18,240,000, saving the 876 Fund \$3,475,000 in principal and again avoiding future interest payments on the amount retired. (Ex. 10 at p. 7; Ex. 14.)

In 2004, the Port Authority again petitioned the district court for instructions. (Ex. 4.) The district court authorized realignment of principal and interest payments for all series of 876 Bonds to the same semiannual payment dates and payment by the Fund of certain third-party

administration costs. (*Id.*) The district court authorized the Port Authority to realign principal and interest payment because doing so resulted in more equitable treatment for all bondholders. (Ex. 4, p. 12-13.)

In total, with these tender offers, the Port Authority retired \$123,765,000 in debt for \$100,432,000. The principal savings to the 876 Fund totaled \$23,330,300. The funds used in the tender offers have been disbursed, the 876 Bonds purchased have been retired, and the funds that would have been used to pay interest on the purchased bonds have been paid to other bondholders.

LAW AND ARGUMENT

I. The Rule 60.02 Motion Was Not Filed Within A Reasonable Time

Rule 60 regulates the procedures by which a party may obtain relief from a final decision of the district court. Rule 60.02 “balances the need for the judgment to reflect the merits” with “the interests inherent in preserving the finality of a judgment.” 2A David F. Herr and Roger S. Haydock, *Minnesota Practice: Civil Rules Annotated* § 60.01 (4th ed. 2005) [hereinafter “2A *Civil Rules Annotated*”]. Rule 60 is not a substitute for appeal. *Cox v. Wright-Hennepin Cooperative Electric Assoc.*, 281 Minn. 568, 161 N.W.2d 293, 293 (1968).

A party seeking to vacate an order under Rule 60.02(d) must bring the motion “within a reasonable time” “By including this limitation, the rule demonstrates an intent to limit the length of time within which a party may receive relief from a final judgment.” *Bode v. Minnesota Department of Natural Resources*, 612 N.W.2d 862, 869 (Minn. 2000). Courts enforce this limitation in recognition of the general desirability that judgments be final. *Id.* The reasonable time requirement achieves a balance between finality and validity. *Id.* at 870. Determining what is a reasonable time “varies from case and case” and is “determined in each

instance from the facts before the court.” *Id.* at 869 (quoting *Sommers v. Thomas*, 251 Minn. 461, 466, 88 N.W.2d 191, 195-96 (1958)).

To overcome the objective of finality, a party seeking relief under Minn. R. Civ. P. 60.02 has the burden to establish (1) a reasonable case on the merits; (2) a reasonable excuse for the failure to act; (3) action with due diligence after entry of judgment; and (4) lack of prejudice to the opposing party. *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). All four elements must be proven, although a strong showing on one factor may compensate for a weak showing on another factor. *Valley View, Inc. v. Schutte*, 399 N.W.2d 182, 185-86 (Minn. Ct. App. 1987).

Three of the four factors relate to the reasonable time element – reasonable excuse for failure to act, action with due diligence after entry of judgment, and lack of prejudice to the opposing party. *See Reid v. Strodman*, 631 N.W.2d 414, 419 (Minn. Ct. App. 2001). For each of these three, the Objecting Bondholders’ showing is non-existent or weak; additionally, there is no strong showing on any factor. Simply put, the Objecting Bondholders present argument but no evidence support the motion to vacate. Moreover, the prejudice to 876 Bondholders and the Port Authority is significant.

A. Objecting Bondholders Cannot Meet Their Burden To Establish A Reasonable Case On The Merits

Although the Objecting Bondholders have succeeded in overturning the statutory authority for the 2002 and 2004 orders, they have not established that the Port Authority breached the Basic Resolution, nor can they. In both the 2002 and 2004 orders, the district court found that the instructions sought not only benefitted all bondholders, but also gave effect to the spirit and text of the Basic Resolution, which requires that all bondholders are treated equitably

and ratably. When the merits of the instructions are evaluated, the record supports the district court's findings of fact and conclusions of law in both 2002 and 2004.

B. Objecting Bondholders Cannot Meet Their Burden To Establish Reasonable Excuse For Their Failure To Act

The party moving to vacate a judgment as void must explain satisfactorily the reason for delay in challenging jurisdiction. *Bode*, 612 N.W.2d at 870 (holding motion not filed within reasonable time and concluding moving party did not “proffer[] any satisfactory reasons why this motion was not brought earlier”). Here, the Objecting Bondholders do not have a reasonable explanation for waiting to challenge jurisdiction until more than four years after the petition and resulting 2002 order and more than two years after the petition and resulting 2004 order. They were given notice of the 2002 and 2004 petitions, hearings, and orders, yet waited years to act.

Courts have approved delays of a few months, but rejected long delays, such as is evident here. For examples, *two months* may be a reasonable time. *Lyon Fin. Servs., Inc. v. Waddill*, 625 N.W.2d 155 (Minn. Ct. App. 2001). Delays of more than one year have been held unreasonable. *See, e.g., Gilmore v. Hinman*, 191 F.2d 652 (D.C. Cir. 1951) (motion brought 16 months after judgment); *Sunbeam Corp. v. Charles Appliances, Inc.*, 119 F.Supp. 492 (S.D.N.Y. 1953) (motion brought 29 months after injunction); *Osterhus v. King Constr. Co.*, 259 Minn. 391, 107 N.W.2d 526, 530 (1961) (motion brought 3 years after party aware of problem); *United States v. Manos*, 56 F.R.D. 655 (S.D. Ohio 1972) (motion brought 11 years after entry of judgment). For cases collected, *see 2A Civil Rules Annotated* § 60.27.

Beyond simply examining the number of months or years after entry of judgment, *Bode* teaches that the courts should consider the excuse offered for the failure to act. The moving party *must* provide a *satisfactory* reason why the motion was not brought earlier. *Bode*, 612 N.W.2d at 870. Here, the Objecting Bondholders' 2006 motion to vacate was not submitted in a

reasonable time because they delayed *two* and *four years* after entry of the 2002 and 2004 orders *and* they offer *no* good cause explaining the time lapse. Where no good cause supports the delay, courts have rejected the motion to vacate. *United States v. Karahalias*, 205 F.2d 331 (2d Cir. 1953) (holding a multiple year delay is reasonable where good cause exists to explain the delay). *See also Healthspan Services Co. ex rel. Price v. Vestal*, 2001 WL 1034565, *2 (Minn. Ct. App. Sept. 11, 2001) (Ex. 15) (holding delay of 2 ½ years was unreasonable where no reason given). The supreme court rejected the delay in *Bode* as unreasonable in part because no reason was offered. *Bode*, 612 N.W.2d at 870.

On the second factor, the Objecting Bondholders have presented no evidence and this Court's analysis could reject their motion outright because the law requires that the moving party make some showing on each factor. Even if the Objecting Bondholders had submitted evidence of good cause explaining their delay, they have *no* evidence showing due diligence after entry of judgment.

C. **Objecting Bondholders Cannot Meet Their Burden To Establish Action with Due Diligence After Entry of Judgment**

A moving party's delay in seeking relief from judgment is unreasonable when a party has notice of the problem yet fails to act. Due diligence is required, and is measured by asking if a party was diligent "after notice of entry of judgment." *Valley View, Inc. v. Schutte*, 399 N.W.2d 182, 184 (Minn. Ct. App. 1987). When a party is not diligent, then the motion to vacate should be denied. *See, e.g., Newman*, 271 Minn. 514, 137 N.W.2d at 186 (holding motion to vacate was untimely where parties waited 7 years after they were aware of issue); *Osterhus*, 259 Minn. 391, 107 N.W.2d at 530 (holding motion to vacate was untimely where defendant waited 3 years after notice).

Sommers v. Thomas, 251 Minn. 461, 88 N.W.2d 191 (1958) is instructive. There, the plaintiff received a default judgment against a defendant for conversion of personal property. *Id.* at 193. Thirteen months lapsed before plaintiff sought to garnish defendant's wages and collect the judgment. *Id.* Upon notice of garnishment, defendant immediately sought relief under Rule 60, 14 months after judgment was entered. *Id.* The district court denied relief, but the supreme court reversed because defendant established that he acted promptly after receiving notice. *Id.* at 193, 197. The defendant testified that he had never been served with the complaint and that the clerk failed to notify him of the entry of judgment. *Id.* at 196. Also, the court concluded that the record "tends to indicate" plaintiff waited to garnish wages to use the one-year limitation of Rule 60 to his advantage. *Id.*⁴ Because defendant presented "a good defense upon the merits and a reasonable excuse for delay," the supreme court held the judgment should be vacated. *Id.*

Applying *Sommers* to the facts in this case establishes that the Objecting Bondholders did not act with due diligence. Unlike the Objecting Bondholders, the defendant in *Sommers* provided a reasonable excuse for the delay because he did not receive notice of the complaint or the judgment. In contrast, the Objecting Bondholders were given proper and adequate notice of the petitions and hearings in 2002 *and* in 2004. The Objecting Bondholders also were given proper and adequate notice of the 2002 and 2004 orders.

The defendant in *Sommers* established due diligence, by acting promptly once he had received notice. In *Sommers*, the defendant "immediately contacted his attorney who sought relief from the court" less than one month after plaintiff commenced garnishment. 88 N.W.2d at 193. The defendant in *Sommers* sought Rule 60 relief 14 months after judgment and only one

⁴ Plaintiff argued that defendant could obtain relief only under Rule 60.02(a), for mistake inadvertence, surprise, or excusable neglect, and that the one-year limitation therefore applied. *Id.* at 195. The one-year limitation does not apply to Rule 60.02(d), which is the ground raised by the Objecting Bondholders.

month after notice. In contrast, the Objecting Bondholders took years before moving under Rule 60, not a few months, even though notice was repeatedly and properly provided. No due diligence exists in this case.

To hold otherwise would defeat the purpose of Rule 60.02, which is “to afford relief to those who are ignorant or inexperienced in business and legal affairs.” *Pilney v. Funk*, 212 Minn. 398, 403, 3 N.W.2d 792, 795 (Minn. 1942). The Objecting Bondholders are neither ignorant – they had full and proper notice in 2002 and in 2004 – nor are they inexperienced. The Objecting Bondholders not only knew about the 2002 and 2004 tenders, but the discovery responses of the Jensen bondholders show they actually traded in 876 Bonds after those tenders. Because Minnesota law holds that “to justify the court in granting such a motion [under Rule 60] ‘it must affirmatively appear that the application was made with reasonable diligence,’” the Objecting Bondholder’s failure to prove due diligence is fatal to their motion. *Id.* at 795-96 (quoting *National Council v. Canter*, 132 Minn. 354, 355, 157 N.W. 586 (1916).). This is “because a defaulting defendant ‘cannot play fast and loose’ in such circumstances. ... ‘he cannot acquiesce in the judgment and then later expect to be relieved from it.’” *Id.* (quoting same).

D. Objecting Bondholders Cannot Meet Their Burden To Show Lack of Prejudice To The Non-Moving Party

The moving party has the burden to establish that no substantial prejudice will result to the opposing party if relief from the judgment or order is granted. *Finden v. Klaas*, 268 Inn. 268, 128 N.W.2d 748, 750 (1964). In evaluating prejudice, the trial court must consider “all attendant circumstances”; *e.g.*, “intervening rights, loss of proof by or prejudice to the adverse party, the commanding equities of the case, the general desirability that judgments be final and other relevant factors.” *Bode*, 612 N.W.2d at 870 (quoting *Newman v. Fjelstad*, 271 Minn. 514, 522,

137 N.W.2d 181, 186 (1965)). In this case, the Objecting Bondholders fail to show lack of prejudice on two independent grounds: intervening rights and substantial reliance by bondholders, the financial marketplace, and the Port Authority; the great prejudice that would arise were the 2002 and 2004 orders vacated; and the commanding equitable interests. Taken together, this record supports the finality of the 2002 and 2004 orders.

1. Intervening Rights And Substantial Reliance By Bondholders And The Port Authority Support Denial Of The Motion

Actions taken in reliance on a final judgment weigh against reopening the order. *Bode*, 612 N.W.2d at 870. In previous cases, the appellate courts have held reliance to be a significant factor. *See, e.g., In re Default Judgment of PHI Financial Services*, 2002 WL 1050508, *2 (Minn. Ct. App. 2002) (affirming that appellant failed to file in a reasonable time because another party relied on judgment and assigned rights to another) (Ex. 16.) Here, several parties have relied upon the 2002 and 2004 orders: the bondholders, the financial marketplace, and the Port Authority.

The bondholders' reliance: When viewed together, the tender offers made in 2002 and 2004 resulted in the purchase and retirement of over \$90 million of 876 Bonds. (Ex. 4 at p. 99-10; Ex. 14.) The over 2400 bondholders who sold bonds in the two tenders offers each have a strong interest in finality and have vested rights premised on the sale. The Objecting Bondholders are a minority of the existing bondholders and are most likely not those bondholders who tendered bonds in the 2002 and 2004 tender offers. Consequently, this Court must separately consider the reliance interest of those who tendered in 2002 and 2004 and exercise great concern for their unrepresented interest.

The financial marketplace's reliance: Significantly, the 876 bonds are publicly-traded investments, trading on the market since their issuance and with market awareness of the 2002

and 2004 order and related tender offers. Transactions in the marketplace that relate to the 876 Bonds have been undertaken with knowledge of the existence of the events in 2002 and 2004 and have presumed the continuing validity of the 2002 and 2004 orders. The 2002 and 2004 orders therefore affected the value of the 876 Bonds in the marketplace. Articles in periodicals printed at the time of the 2002 and 2004 tender offers evidence awareness of the offer's impact. (Ex. 17, 18, 19, 20.)

The Port Authority's reliance: The Port Authority issued a tender invitation in 2002 by which it offered to use at least \$51,000,000 of Prepaid Net Revenues to purchase 876 Bonds tendered in a modified Dutch auction proceeding. At the conclusion of the 2002 tender, the Port Authority used \$54,046,700 of Prepaid Net Revenues in the Reserve Fund to purchase and retire \$70,235,000 of 876 Bonds. This purchase resulted in a principal savings to the 876 Fund of \$16,188,300 and removed future interest expense from the 876 Fund. (Ex. 10, ¶ 20; Ex. 4 at 11-15.)

Following the 2002 tender offer, and also pursuant to the 2002 order, the Port Authority issued a tender invitation in January 2004. Through the 2004 tender, the Port Authority used \$18,240,000 of Prepaid Net Revenues and Special Funds to purchase and retire \$21,715,000 of 876 Bonds. This purchase resulted in a principal savings to the 876 Fund of \$3,475,000 and removed future interest expense from the 876 Fund. (Ex. 10, ¶ 21.)

The 2004 order also directed the Port Authority to pay all costs of administering the 876 Fund from revenues of the 876 Fund. (Ex. 4 at 15, 17.) Since then, the Port Authority has relied on the 2004 order in its ongoing administration of the Fund in order to provide needed services and maximize revenue, as has been its practice. (Ex. 10, ¶ 28.) In addition, the Port Authority has continued to use rental income for its river maintenance fund since 2002, when its handling

of the 876 program was confirmed. Since then, the Port Authority has spent millions on maintenance and infrastructure of its river properties. These expenditures benefit 876 bondholders.

The Port Authority undertook the 2002 and 2004 tenders in reliance not only on the court orders but also on the fact that an opportunity for bondholder objection and appeal had been provided and waived. The Objecting Bondholders do not explain why the Port Authority's reliance was inappropriate. In other words, by failing to prove the Port Authority's reliance was unreasonable, the Objecting Bondholders seek to do exactly what courts have said it may not do. A party may not acquiesce in a court order by knowing inaction and then later expect to be relieved from the order under Rule 60. *Pilney*, 3 N.W.2d at 796.

On three levels – the bondholders, the financial marketplace, and the Port Authority – the 2002 and 2004 orders created intervening rights and substantial reliance that militate strongly against the Objecting Bondholders' motion.

2. *Great Prejudice Would Arise Were The 2002 and 2004 Orders Vacated*

The Objecting Bondholders' burden to prove a lack of prejudice should relief be granted cannot be overstated. In *Nelson v. Siebert*, 428 N.W.2d 394, 395 (Minn. 1988), the supreme court observed that the court of appeals appeared to have put the burden on the party opposing the motion to establish prejudice and specifically criticized that apparent requirement, although it agreed with the result reached by the court of appeals. Not only is it "imperative that the correct standard be applied," *id.*, but failure to meet the burden may justify denial of the motion to vacate. See, e.g., *Bentonize, Inc. v. Green*, 431 N.W.2d 579, 584 (Minn. Ct. App. 1988) (holding plaintiff failed to establish that defendants would not suffer substantial prejudice if action, which

was dismissed for failure to timely file note of issue/certificate of readiness, was reinstated; holding plaintiff precluded from seeking relief from judgment).

None of the actions taken by the bondholders and the Port Authority in reliance on the 2002 and 2004 orders can be undone. Certainly, the more than 2400 bondholders who redeemed bonds in the two tender offers would lose vested rights premised on the sale. Those who tendered in 2002 and 2004 would have to pay back their principal to the 876 Fund – an impossible task. (Affidavit of Don Sheff at ¶¶4-6.) And the 876 Fund would be left in an even worse financial predicament since the interest savings from those transactions would be charged back on the Fund. If the orders are vacated, the financial marketplace will also be affected. Unscrupulous and predatory traders will likely abuse the marketplace and unsophisticated bondholders, who lack factual guidance and may trade on rumor alone.

Moreover, before 2004 each 876 Bond issued had its own provisions regarding the date on which the semi-annual interest and annual principal payments were due. (Ex. 4, ¶ 32.) The effect of this was to allow some bondholders to collect more than a ratable and equitable share of funds, depending on when properties were sold or prepaid, and the resulting Special Funds and Prepaid Net Revenues were deposited into the 876 Fund. In order to provide equal and ratable distribution under the Basic Resolution, the 2004 order adjusted the interest payment dates for all outstanding 876 Bonds to June 1 and December 1 of each year. (Ex. 10, ¶¶ 26, 27.) To recalculate the interest payment dates and amounts as they were *before* the 2004 order is now impossible, as would be the collection of the overages and payment of the underages. (Affidavit of Dan Sheff at ¶7.)

More fundamentally, the Objecting Bondholders cannot meet their burden to show no substantial prejudice because vacating the 2002 orders and 2004 orders is neither fair and

equitable to the bondholders, nor consistent with the Basic Resolution. The Fund has a shortfall. To undo the benefits to the Fund that were accomplished in 2002 and 2004 is not only unfair, but also offends a central tenet of the contract with bondholders, that the pool of revenues pledged to the 876 Fund be shared “equally and ratably” among bondholders.

Incoming revenues are not sufficient to pay interest in full or any principal on an on-going basis. (Ex. 12 at p. 17.) This means that all 876 bondholders will not be paid equally and ratably required by sections 4-7 and 5-8 of the Basic Resolution. (Ex. 11 at p. 19, 35.) Instead, approximately one-third of bondholders would be paid in full – including an unknown percentage of the Objecting Bondholders – but the remaining bondholders would not see their equal and ratable share of principal or interest. (Ex. 9 at T.765, 881.) But if the 2002 and 2004 orders are vacated, the payout will be even worse and certainly not equal or ratable.

3. *Commanding Equities Also Militate Against Granting Relief To The Objecting Bondholders.*

Bode and *Newman* instruct that a court must evaluate equitable interests in deciding a motion to vacate under Rule 60. *Bode*, 612 N.W.2d at 870 (quoting *Newman*, 137 N.W.2d at 186). In this case, the equities favor upholding the 2002 and 2004 orders as final. First, the Objecting Bondholders were chief among those who relied on and benefitted from the 2002 and 2004 tender offers and bondholders. The Jensen bondholders’ own disclosures show they purchased millions in 876 Bonds after the 2002 tender, with a significant portion purchased after the 2004 tender. Because both tenders benefitted those who were bondholders after 2004, this means that there are Objecting Bondholders who benefitted from the 2002 and 2004 orders. Well-established equitable principles do not allow this Court to vacate orders at the request of those who not only knew about the orders and failed to act, but who also benefitted from the orders and sought vacatur only after that option presented yet another benefit to them.

Second, and no less importantly, the Objecting Bondholders cannot seek to vacate only those portions of the 2002 and 2004 orders that they now claim will benefit bondholders, e.g., administrative costs paid pursuant to court approval in 2002 and 2004. Again based on clear equitable principles, it is appropriate for the 876 Fund to have paid for administrative costs that were incurred to benefit the bondholders, based on factual findings and legal conclusions issued by the district court in 2002 and again in 2004. Because the Objecting Bondholders very clearly received benefits from the 2002 and 2004 orders, they cannot now be allowed to undo them, or even part of them, without offending the precept that a party “who seeks equity must do equity.”

E. The Balance Between Finality And Validity In This Case Means that the Motion To Vacate Should Be Denied

In 2002 and 2004, the Port Authority presented evidence to the district court that supported the relief sought for the 876 Fund based on unanticipated financial circumstances. The district court in 2002 and 2004 conducted hearings, allowed an opportunity for objection with full notice to bondholders, and issued findings of fact and conclusions of law that fully supported approval of the ensuing tenders and administrative action by the Port Authority. Because the Objecting Bondholders were given notice of the petitions and the resulting 2002 and 2004 orders, the lack of this Court’s subject matter jurisdiction does not undermine the sound judicial judgment behind those orders. Significantly, no bondholder appealed either order. With each passing day, week, month, and then year, the time to vacate became more unreasonable. Based on the “intervening right, loss of proof by or prejudice to the adverse party, [and] the commanding equities of the case,” *Bode*, 612 N.W.2d at 870, the “general desirability that judgment be final” commands denial of the pending motion.

II. The Rule 60.02 Motion Should Be Denied As Moot

The Objecting Bondholders' effort to invalidate the 2002 and 2004 orders should also be denied on mootness grounds. *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (court must address mootness even if parties do not raise issue). An issue is moot if no effective relief is possible. *In re Inspection of Minn. Auto. Specialities, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984).

The 2002 and 2004 tender offers simply cannot be revoked, nor can the interest payment dates be recalculated back to 2004, nor can administrative decisions made in reliance on the 2002 and 2004 orders be reversed. (Sheff. Aff. ¶4-7.) The Minnesota Court of Appeals described appellants' request as "futile," in effect holding the issue was moot. *In re Petition for Instructions*, 2008 WL 2168643, *4 (Minn. Ct. App. May 27, 2008), *reversed*, 772 N.W.2d 488 (Minn. 2009). The court's opinion elaborated: "The 2002 and 2004 orders were, and remain, as a practical matter, exhausted, dormant, and beyond effective involvement in this litigation." *Id.* Indeed, the Minnesota Supreme Court has previously applied the mootness doctrine when it determined an order would be "futile." *In re Glendale Twp.*, 288 Minn. 340, 343, 180 N.W.2d 925, 927 (1970) ("[T]his court does not pass judgment which can have no practical effect."). This Court should deny the Objecting Bondholders' motion to vacate the 2002 and 2004 orders as futile or moot.

CONCLUSION

In this case, the interest in finality outweighs concerns about validity. "It would be inequitable and contrary to 'the general desirability that judgments be final' to vacate this judgment after such reliance over such a length period of time." *Bode*, 612 N.W.2d at 869-70. The Rule 60.02 motion was not filed in a reasonable time because the Objecting Bondholders delayed filing long after they had notice and without any evidence of due diligence or any excuse for the delay. Additionally, the bondholders, the financial marketplace, and the Port Authority

substantially relied on the 2002 and 2004 orders. Tender offers have been consummated and cannot be undone. Interest payment dates have been realigned and cannot be reversed. Administrative decisions have been made and cannot be unmade. Moreover, the Objecting Bondholders have failed to meet their burden to prove that no substantial prejudice will result if their motion is granted. To the contrary, the already-stressed financial resources to pay bondholders will be irreparably harmed by vacating this Court's prior orders. Also, the Basic Resolution's provision for equal and ratable distribution will be compromised if not defeated.

In conclusion, the Court should deny the Objecting Bondholders' motion to vacate the Court's 2002 and 2004 orders because the motion was not brought within a reasonable time, as required under Rule 60.02. Additionally, justiciability concerns support denial of the motion. Because of the passage of time and the nature of the instructions approved in this Court's orders, the Objecting Bondholder's request for relief is moot because no meaningful relief can be granted.

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