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UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: CITY OF STOCKTON, CALIFORNIA, *Debtor*.	BAP No. EC-14-1550 Bankr. No. 12-32118 Chapter 9
FRANKLIN HIGH YIELD TAX-FREE INCOME FUND AND FRANKLIN CALIFORNIA HIGH YIELD MUNICIPAL FUND, *Appellants*, v. CITY OF STOCKTON, CALIFORNIA, *et al*., *Appellees*.	**APPELLANTS' OBJECTION TO MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT**

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Appellants (collectively, "Franklin") object to the *Motion To Dismiss The Appeal As Equitably Moot* [ECF 34] (the "Motion") filed by appellee City of Stockton, California (the "City").[1]

I. INTRODUCTION

Franklin has appealed confirmation of the City's plan of adjustment (the "Plan"), which reinstated $412 million of unfunded pensions, delivered recoveries of 52%-100% to creditors holding half a billion dollars in other claims, but discharged Franklin's $30.5 million unsecured claim by a payment of under 1%. A fundamental premise of this appeal is that the City can pay more to Franklin without altering recoveries of other creditors or otherwise unraveling the Plan.

The Plan became effective and was consummated in February 2015. Notwithstanding consummation, the City did not assert that Franklin's appeal was equitably moot when it filed its answering brief three months later, in May 2015. Only now, at the eleventh hour with the case ready for argument, does the City claim that the Court should dismiss the appeal without reaching the merits. The City states that Franklin forfeited the right to appeal because it filed a "pro forma" motion for stay that was denied by the Bankruptcy Court, and argues that the Court is powerless to fashion any effective relief in respect of the discriminatory and punitive Plan. This is both factually and legally incorrect.

[1] Citations below are to the Exhibits to the Motion ("Ex."), Franklin's Opening Brief ("OB") and Reply Brief ("RB"), and the Excerpts of Record ("ER").

To start, the City waived the mootness argument by not raising it previously. All facts alleged in the Motion were at the City's disposal months before it briefed the merits in May 2015. The City even moved to dismiss a confirmation appeal of another creditor who appealed directly to the Ninth Circuit, citing the exact same facts, *before* it filed its answering brief in this case. Apparently hoping for a preemptive ruling from the Ninth Circuit, the City withheld its mootness argument to this Court until the conclusion of briefing and the eve of argument. The City has forfeited any right to seek dismissal on "equitable" grounds.

Further, contrary to the City's claim, Franklin was not required to seek, much less obtain, a stay pending appeal on the facts here. In any event, Franklin diligently sought a stay well before effectiveness of the Plan, and the Bankruptcy Court concluded that effective relief ("more money for Franklin") would be available in the event of reversal without unraveling the Plan. The City does not dispute that finding or claim that it is unable to pay more to Franklin.

More basically, the equitable mootness doctrine should not be extended to municipal bankruptcy cases because it is based on prudential concerns that have no place in chapter 9. As the Bankruptcy Court recognized, a municipal debtor like the City cannot go out of business. In the event of reversal of confirmation, the City always will be able to provide at least some "fractional" relief without unduly or inequitably impairing the rights of others.

Finally, if there is any question about whether equitable mootness might bar this appeal, the Motion should be transferred to the merits panel for disposition (just as the Ninth Circuit did with the other pending appeal of the Plan). The issue presented by the Motion is whether "the bankruptcy court can fashion effective and equitable relief without completely knocking the props out from under the plan." Mot. at 14. A core issue on the merits is whether the City can pay more than 1% on Franklin's unsecured claim. Those issues are inextricably intertwined and should be considered by the same panel at the same time.

II. BACKGROUND

The Plan provided for a payment of approximately $285,000 (less than 1%) on Franklin's $30.5 million unsecured claim for bonds issued by the City in 2009. OB at 15-17. In contrast, the Plan provided for other unsecured claims to recover between 52% to 100%, while leaving more than $400 million in unfunded prepetition pension obligations unimpaired. *Id.* at 9-17.

Franklin objected to confirmation. Over the course of the five-day confirmation trial, Franklin established that the City had the ability to pay more than $285,000 on Franklin's unsecured claim, even if it did not impair pensions or alter the treatment of other creditors under the Plan. *Id.* at 17-21 and 34-39; RB at 10-17. Franklin argued that the Plan therefore violated the "best interests of creditors" requirement of section 943(b)(7) of the Bankruptcy Code and

improperly classified, disparately treated, and unfairly discriminated against its unsecured claim. OB at 25-76; RB at 5-37.

The Bankruptcy Court overruled Franklin objection in an oral ruling on October 30, 2014. OB at 5-6. Thirteen days later – before any written ruling, confirmation order, or consummation of the Plan – Franklin appealed and filed a motion for stay pending appeal. Ex. D (motion). Franklin noted that, "[a]bsent a stay of confirmation, the City undoubtedly will argue that Franklin's appeal is equitably moot," *id.* at 2, the risk of which would constitute irreparable injury for purposes of the stay analysis, *id.* at 10-11; *see also* Ex. F at 3 (reply).

Franklin, however, stated that it did "not believe that its appeal can or should be dismissed" because "there are many effective and equitable remedies that an appellate court can and will craft to protect Franklin's rights" and because the equitable mootness doctrine should not be applied in chapter 9. Ex. D at 10-11 (motion). Franklin explained that, "because the City will have sufficient future resources with which it can make payments that will provide Franklin with a reasonable recovery over time even if the Plan is consummated, there can be no equitable mootness." *Id*. at 11.

The City opposed a stay but refused to state whether it would try to dismiss Franklin's appeal on mootness grounds. Ex. E at 4 (objection). Notably, the City did not argue that Franklin should post a bond for a stay. To the contrary, it

claimed that "[t]here is *no bond* that could secure the City and other interested parties." *Id.* at 9 (emphasis added).

The Bankruptcy Court denied the request for a stay in an oral ruling on January 20, 2015. The Court agreed that effective relief – which "would involve more money for Franklin" – could be fashioned on appeal:

> The question is, could an []appropriate remedy be fashioned that would not require reeling back in, for example, all the payments to retirees, and *I have no difficulty perceiving the possibility of any number of likely solutions . . . in the event of a reversal on appeal*. Those solutions . . . would involve more money for Franklin . . . .
>
> . . . I am confident . . . that the City is going to be around, and it's still going to have the citizenry of a couple hundred thousand people. And with its finances on more stable footing, it's conceivable that some additional funds could be made available to Franklin if the appellate court put the matter back to me, and that could be done without disturbing in any way the payments to . . . other unsecured creditors.
>
> . . . [A]s I look at the possibilities of the "what if," *I'm not terrified of the potential consequences*, understanding that this is a financial situation in which the maximum exposure is right around $32 million.
>
> So I do not see that significant or irreparable harm would come to the Franklin entities without a stay. Entirely without a stay and it marched on through and the appellate court reversed, even if that reversal was five or six years from now, *the bankruptcy court, either I or my successor, could fashion a remedy that would amount to an adjustment that would take the reversal into account appropriately without having to upset too much of the compromises that have been reached*.

ER479-80 (emphasis added).

A month later, the Bankruptcy Court issued a written opinion on confirmation and entered a confirmation order, and the Plan became effective on

February 25, 2015. Mot. at 7. Pursuant to an agreed schedule [ECF 14], Franklin filed its Opening Brief on March 23, 2015, the City filed its Answering Brief on May 28, 2015, and Franklin filed its Reply Brief on June 25, 2015.

In the meantime, on May 18, 2015 – ten days *before* it filed its Answering Brief – the City moved to dismiss a separate appeal of the Plan taken by another creditor (Cobb) directly to the Ninth Circuit. *See* Mot. at 1 n.1; 9th Cir. Case No. 14-17269, ECF 19-1 (*Exhibit 1*). The City's motion, filed at the same time as and incorporated into its answering brief on the merits in the Cobb appeal, made the same arguments that the City now makes to this Court. *Id.* at 1. Among other things, the City claimed that, by May 2015, "virtually all of the Plan transactions [had] been accomplished." 9th Cir. Case No. 14-17269, ECF 30 at 2 (*Exhibit 2*).

The City, however, made no mootness argument in its Answering Brief filed ten days later in *this* case, despite its claim that all actions to consummate the Plan had been taken. Likely hoping for a favorable disposition by the Ninth Circuit in the Cobb matter, the City waited four more months – and more than seven months after the Plan had been consummated – to file its Motion here.

III. THE CITY WAIVED ITS MOOTNESS ARGUMENT

An appellee that fails to make an argument in its answering brief waives the right to raise the issue at a later date. *See, e.g.*, *Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1302 n.11 (9th Cir. 2014) (appellee waived argument not raised until

petition for rehearing); *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) ("where Appellees fail to raise an argument in their answering brief, they have waived it") (quotation omitted); *City of Thousand Oaks v. Verizon Media Ventures*, 69 F. App'x 826, 828 (9th Cir. 2003) (same).

The City did not argue in its Answering Brief that Franklin's appeal was equitably moot despite the fact that the Plan had been consummated three months earlier. The City cannot credibly assert that it was unaware of the equitable mootness doctrine or that new facts justify its belated attempt to raise the issue after the close of briefing. Equitable mootness was the centerpiece of Franklin's motion for stay pending appeal, and the City invoked the doctrine in moving to dismiss Cobb's appeal before it briefed the merits here. In fact, the declarations submitted with the Motion are virtually identical (almost word-for-word) to the declarations submitted with the City's motion to dismiss Cobb's appeal. Each points to payments made and transactions effected months before the City filed its Answering Brief here. *Compare* Exs. A-C (Carney, Schwarz, and Runner declarations) *with* Exhibit 1 at 17-38 (Burke, Schwarz, and Runner declarations).

The City clearly made a tactical decision to wait, apparently hoping that the Ninth Circuit would rule in its favor in the Cobb appeal. In so doing, the City waived the right to seek an "equitable" dismissal of Franklin's appeal.

IV. FRANKLIN'S APPEAL IS NOT EQUITABLY MOOT

Equitable mootness is a "prudential" and "'judge-made abstention doctrine.'" *In re Mortgages, Ltd.*, 771 F.3d 1211, 1214 & n.2 (9th Cir. 2014) [*Mortgages I*] (quoting *In re SemCrude, L.P.*, 728 F.3d 314, 317 & n.2 (3d Cir. 2013)). It is a doctrine in "tension" with the "strict duty" and "virtually unflagging obligation" of federal courts "to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins.*, 517 U.S. 706, 716 (1996); *see Lexmark Int'l v. Static Control Components*, 134 S. Ct. 1377, 1386 (2014); *Bennett v. Jefferson Cnty.*, 518 B.R. 613, 634 (N.D. Ala. 2014).

The doctrine's "judge-made origin, coupled with the responsibility of federal courts to exercise their jurisdictional mandate, obliges [the Court] . . . to proceed most carefully before dismissing an appeal as equitably moot." *SemCrude*, 728 F.3d at 318. "The doctrine is quite rightly limited in scope and cautiously applied." *In re One2One Commc'ns*, __ F.3d __, No. 13-3410, 2015 WL 4430302, *4 (3d Cir. July 21, 2015) (quotations omitted).

"The presumptive position remains that federal courts should hear and decide on the merits cases properly before them." *SemCrude*, 728 F.3d at 326. "The party seeking to invoke the doctrine bears the burden of overcoming the strong presumption that appeals from confirmation orders of reorganization plans – even those not only approved by confirmation but implemented thereafter (called

'substantial consummation' or simply 'consummation') – need to be decided." *In re Tribune Media*, __ F.3d __, No. 14-3332, 2015 WL 4925923, *4 (3d Cir. Aug. 19, 2015). Consequently, "[t]he party moving for dismissal on mootness grounds bears a heavy burden," *Mortgages I*, 771 F.3d at 1214, and dismissal is "rare, occurring only where there is sufficient justification to override the statutory appellate rights of the party seeking review," *SemCrude*, 728 F.3d at 326-27.

Specifically, equitable mootness applies *only* "when a 'comprehensive change of circumstances' has occurred so 'as to render it inequitable for [the] court to consider the merits of the appeal.'" *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012) (quoting *In re Roberts Farms*, 652 F.2d 793, 798 (9th Cir. 1981)). "The question is whether the case 'presents transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply.'" *Id.* (quoting *In re Lowenschuss*, 170 F.3d 923, 933 (9th Cir. 1999)); *see, e.g.*, *One2One*, 2015 WL 4430302 at *3 ("Before there is a basis to avoid deciding the merits of an appeal, we must first determine that granting the requested relief is almost certain to produce a 'perverse' outcome – significant 'injury to third parties' and/or 'chaos in the bankruptcy court' from a plan in tatters. Only in such circumstances is equitable mootness a valid consideration.") (citation omitted).

An appeal of confirmation is *not* equitably moot where, on remand, "the bankruptcy court can fashion effective and equitable relief without completely

knocking the props out from under the plan and thereby creating an uncontrollable situation." *Thorpe*, 677 F.3d at 881; *see, e.g.*, *In re Transwest Resort Props.*, __ F.3d __, No. 12-17176, 2015 WL 5332447, *7 (9th Cir. Sept. 15, 2015) ("most important[] consideration . . . is whether the bankruptcy court could fashion equitable relief without completely undoing the plan"); *In re Mortgages, Ltd.*, 771 F.3d 623, 629 (9th Cir. 2014) [*Mortgages II*] ("most importantly, we look to whether the bankruptcy court on remand would be able to fashion an equitable remedy") (quotation omitted); *In re Focus Media*, 378 F.3d 916, 924 (9th Cir. 2004) (not moot where appellate relief "would not require the bankruptcy court to unravel a complicated bankruptcy plan") (quotation omitted); *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1352 (9th Cir. 1994) (not moot where not "a situation in which we have the impossible task of putting Humpty Dumpty together again").

Any measure of equitable relief is sufficient to defeat a claim of mootness. "Where equitable relief, though incomplete, is available, the appeal is not moot." *Thorpe*, 677 F.3d at 883; *see, e.g.*, *Transwest*, 2015 WL 5332447, at *7 (same); *In re Pacific Lumber Co.*, 584 F.3d 229, 241 (5th Cir. 2009) (not moot even where "a creditor could not obtain full relief"); *In re Chateaugay Corp.*, 10 F.3d 944, 954 (2d Cir. 1993) (not moot where "fractional recovery" is possible).

Also, "equitable mootness applies to specific claims, not entire appeals. In exercising its discretionary power to dismiss an appeal on mootness grounds, a

court cannot avoid its obligation to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole." *Pacific Lumber*, 584 F.3d at 241 (quotation omitted); *see, e.g.*, *Transwest*, 2015 WL 5332447, at *4 ("the equitable mootness analysis must be applied separately to each objection"). Equitable mootness is applied, if at all, "with a scalpel rather than an axe." *Pacific Lumber*, 584 F.3d at 240.

A. The Court Can Fashion Effective And Equitable Relief Without Unraveling The Plan.

At trial, Franklin established that the City could pay more than 1% on Franklin's unsecured claim without impairing unfunded pensions or altering the treatment of other creditors. OB at 17-21 and 34-39; RB at 10-17. On appeal, Franklin seeks relief based on that premise: "Franklin requests that this Court reverse and remand with directions that the City provide fair, reasonable, and nondiscriminatory treatment to Franklin's unsecured claim. The Bankruptcy Court concluded that such relief would be available upon reversal without disturbing the balance of the City's Plan, and justice demands that it be ordered here." OB at 84; RB at 3 ("That is all that Franklin asks.").

None of the declarations attached to the City's Motion claim that the City could not pay more money on Franklin's unsecured claim. At most, the declarations purport to establish consummation of the Plan. But consummation is "not . . . the end of the inquiry." *Thorpe*, 677 F.3d at 882 n.7. The Court must

"still assess whether effective relief might be given without fully impairing the prior plan and other pertinent circumstances." *Id.*; *see id.* at 883 ("we expect that there are many options open to the bankruptcy court other than complete plan reversal that can remedy some of Appellants' claims if proved valid").

Accordingly, there is no *evidence* to support the foundational premise of the Motion. The relief that Franklin seeks on appeal – greater payment from the City – would not impact any other constituent, and there is no evidence that the City cannot afford to pay any additional amount to Franklin.

The Ninth Circuit recently held that a confirmation appeal was not moot where the appellant might be awarded *even one additional dollar* on its claim. *Transwest*, 2015 WL 5332447, at *8 ("we see no reason why, if the court were to devise a remedy that required Reorganized Debtors to pay Lender one dollar, for example, the plan would be undone"). It repeatedly has refused to dismiss appeals in which payment of money, with no material impact on a confirmed plan, provided an effective remedy. *E.g.*, *Thorpe*, 677 F.3d at 883 (not moot where court "could require Appellees to contribute more"); *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9th Cir. 2002) (same); *see In re Cascade Rds., Inc.*, 34 F.3d 756, 760 (9th Cir. 1994) ("we can fashion effective relief merely by ordering the trustee to repay the judgment"); *In re Spirtos*, 992 F.2d 1004, 1007 (9th Cir. 1993) (same); *In re International Envtl. Dynamics*, 718 F.2d 322, 326 (9th Cir. 1983) (same).

Similarly, the Ninth Circuit and this Court routinely reject equitable mootness challenges where, as here, relief would not involve disgorgement of funds received by creditors. *See, e.g.*, *In re Loop 76, LLC*, 578 F. App'x 644, 646 (9th Cir. 2014) (not moot where appellant "is not asking for third-party claimholders to disgorge payments they received under the plan"); *In re Dunlap Oil Co.*, No. AZ-14-1172-JuKiD, 2014 WL 6883069, *10 (B.A.P. 9th Cir. Dec. 5, 2014) (same); *In re Villalobos*, No. NV-13-1179-JuKiTa, 2014 WL 930495, *7 (B.A.P. 9th Cir. Mar. 10, 2014) (same).

Moreover, the Plan contemplates payments to creditors over the next three decades. Adjustment to future payments can be an effective, equitable appellate remedy. *See, e.g.*, *In re Dynamic Brokers, Inc.*, 293 B.R. 489, 494 (B.A.P. 9th Cir. 2003) (not moot where "future payments could be adjusted if [the appellant]'s claim must be paid in full"); *In re Tucson Self-Storage, Inc.*, 166 B.R. 892, 896 (B.A.P. 9th Cir. 1994) (same); *see also Tribune*, 2015 WL 4925923, at *9 (not moot where the court could alter future payments from a litigation trust).[2]

[2] The City's reliance on *Tribune* is misplaced. Mot. at 15-16. In that case, one appellant (Aurelius) sought "revocation of the Settlement in the DCL Plan," which would "recall the entire Plan for a redo." *Tribune*, 2015 WL 4925923, at *7. Unlike Franklin, the appellant "[p]ropose[d] no relief that would not involve reopening the" settlement. *Id.* In contrast, another appellant proposed more limited relief – including alteration of future plan distributions – and was entitled to appellate review on the merits. *Id.* at *9-*10.

The City "failed to point out with any particulars or specifics why or how . . . paying more to [Franklin] would necessarily result in unwinding the entire plan." *In re Red Mountain Mach.*, 471 B.R. 242, 247 (D. Az. 2012). The City makes only the unsupported claim that greater payment would "disrupt the City's ability to resume normal, post-bankruptcy functioning." Mot. at 16. Speculation does not create equitable mootness. *See, e.g.*, *Red Mountain*, 471 B.R. at 247 (no mootness with hypothetical "domino effect on all other aspects of the Plan").

The Bankruptcy Court understood this. The Court denied Franklin's motion for a stay in part because the City could be ordered to pay "more money for Franklin" in the event of reversal without "reeling back in" payments made to other creditors or otherwise unraveling the Plan. The Court stated that "the City is going to be around . . . [a]nd with its finances on more stable footing, it's conceivable that some additional funds could be made available." Those undisputed findings undermine the City's entire mootness argument.

B. The Court Has The Power To Order Relief For Franklin.

Having failed to show that equitable relief is unavailable, the City tries to hide behind its status as a chapter 9 debtor, arguing that "a bankruptcy court has no power to direct a municipal debtor to pay money or modify an existing plan of adjustment." Mot. at 3; *id.* at 17-18. This is wrong in several ways.

To start, the City expressly "consent[ed] to jurisdiction" of the Bankruptcy Court, among other things, "over any matter . . . related to the Chapter 9 Case or [the] Plan," including "such orders as may be appropriate in the event the Confirmation Order is for any reason stayed, revoked, modified, reversed, or vacated." ER293 (Plan Article XII). Consistent with section 945(a) of the Bankruptcy Code, the City also agreed that, "[i]f any term or provision of [the] Plan is held . . . on appeal . . . to be invalid, void, or unenforceable," the Bankruptcy Court "shall have the power to alter and interpret such term or provision to make it valid or enforceable." ER297 (Plan § XIV.B); *see* 11 U.S.C. § 945(a) ("The court may retain jurisdiction over the case . . . as is necessary for the successful implementation of the plan.").

Disregarding that consent, the City asserts that "a bankruptcy court in a chapter 9 case cannot rewrite or modify a plan" and only "may deny the plan or dismiss the case." Mot. at 18. But that is no different than a chapter 11 case. Nothing in chapter 11 authorizes a bankruptcy court to "rewrite or modify" a plan. Following reversal of confirmation, what a bankruptcy court *can* do – both in chapter 9 and chapter 11 – is put the debtor to the *choice* of complying with the mandate of the appellate court (*e.g.*, by providing Franklin with a fair, equitable and nondiscriminatory recovery) or electing to start over with a new plan. That happens all the time, including in chapter 9 cases. *See, e.g.*, *American United Mut.*

Life Ins. v. City of Avon Park, 311 U.S. 138, 149 (1940) (reversing confirmation and remanding "for proceedings in conformity with this opinion"); *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943) (same).

There is not a single case anywhere that supports the City's breathtaking assertion that a chapter 9 plan can never be subject to appellate review because federal courts are powerless to remedy a defective or illegal plan provision. Perhaps that is why, until now, the City never disputed the Bankruptcy Court's finding that relief would be available to Franklin on remand.[3]

In any event, now is not the time to speculate about hypothetical limits on the scope of the Bankruptcy Court's authority on remand. As this Court recently held, "anticipatory mootness" is not a basis for a dismissal on equitable mootness grounds. *Villalobos*, 2014 WL 930495, at *8 ("What affect a Plan reversal will have is only speculative. As it stands, effective relief is still available.").

C. Franklin Diligently Sought A Stay.

The City also makes a procedural argument, claiming that Franklin forfeited the right to appellate review because the Bankruptcy Court denied what the City describes as Franklin's "pro forma" motion for a stay pending appeal. Mot. at 9-12. Here again, the City is wrong on the facts and the law.

[3] The Bankruptcy Court's opinion regarding Bankruptcy Rule 9019 is not to the contrary. Mot. at 17 n.6. In that opinion, the Court noted that, with respect to the City's settlements, "the day of reckoning comes at the plan confirmation hearing." *In re City of Stockton*, 486 B.R. 194, 199 (Bankr. E.D. Cal. 2013).

To start, Franklin's motion was not "pro forma" – Franklin "made a serious argument in favor of obtaining a stay," *id.* at 12, specifically citing the risk that the City would invoke the equitable mootness doctrine.[4] The City asserts that Franklin was obliged to appeal to "this Court . . . and, if necessary, the Ninth Circuit for relief," *id.* at 10, but that misstates applicable law. As shown below, there is no absolute requirement that the appellant seek a stay from the bankruptcy court, much less appeal the denial of a stay when refused.

More importantly, the City ignores the reason *why* the Bankruptcy Court denied a stay. The Court held that it *could* fashion effective relief – "more money for Franklin" – even if the Plan was consummated. Given that finding, an appeal of the stay motion would have been pointless because Franklin's appeal on the merits was not at risk of equitable mootness. Franklin exercised diligence to the point at which it was informed by the Bankruptcy Court that it would have a viable remedy on appeal. Nothing else was required.

Indeed, there was no requirement to *seek* (much less obtain) a stay on the facts here. The Ninth Circuit and this Court have held that appellants need not

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[4] The City claims that Franklin did "not really want[] to 'win' a stay" because it "would have [been] required . . . to post a hefty appeal bond." Mot. at 2. That is specious. The City never asked for a bond, arguing that "no bond that could secure the City" against harm claimed from a stay. Even if a bond had been requested, ordered and not posted, Franklin would have been diligent. *See, e.g.*, *Mortgages II*, 771 F.3d at 628 (appellant diligent even where unable to obtain a stay "because of the high cost of the bond necessary to secure the appeal").

even ask for a stay in all circumstances. *See, e.g.*, *Blixseth v. Yellowstone Mountain Club, LLC*, 609 F. App'x 390, 392 (9th Cir. 2015) (despite failure to seek a stay, "not equitably moot because it is apparent that one or more remedies is still available"); *Sylmar*, 314 F.3d at 1074 (not moot despite failure "to seek or obtain a stay"); *Spirtos*, 992 F.2d at 1006-07 (same); *In re Sonora Desert Dairy, LLC*, No. AZ-13-1471-KiDJu, 2015 WL 65301, *10 (B.A.P. 9th Cir. Jan. 5, 2015) (same); *In re Irish Pub-Arrowhead, LLC*, No. AZ-13-1024-PaKuD, 2014 WL 486955, *6 (B.A.P. 9th Cir. Feb. 6, 2014) (same).

The Ninth Circuit certainly has not conditioned appellate relief on a *successful* application for a stay, as the City implies. *See, e.g.*, *Thorpe*, 677 F.3d at 881 ("failure to obtain a stay does not require a conclusion of equitable mootness where parties use due diligence in seeking the stay"); *Suter v. Goedert*, 504 F.3d 982, 990 (9th Cir. 2007) (not moot despite failure to obtain a stay); *Focus Media*, 378 F.3d at 924 (same); *Lowenschuss*, 170 F.3d at 933 (same); *Baker & Drake*, 35 F.3d at 1351 (same); *International Envtl.*, 718 F.2d at 325-26 (same).

Rather, "it is obligatory upon the appellant . . . to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order . . . *if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from*." *Mortgages I*, 771 F.3d at 1215-16 (quoting *Roberts Farms*, 652 F.2d at 798) (emphasis added). As this Court observed in synthesizing the

caselaw, "[t]he rule discussed in *In re Mortgages, Ltd.* is subject to the same condition explained in *Roberts Farms, Inc.*, *Lowenschuss*, and *Thorpe Insulation*, that there must *also* be some subsequent event that would render consideration of the issues on appeal inequitable, and thereby trigger an equitable mootness analysis." *In re Zuercher Trust of 1999*, No. NC-13-1299-PaJuKu, 2014 WL 7191348, *7 (B.A.P. 9th Cir. Oct. 23, 2014) (emphasis added); *see id.* at *8 (not moot despite "no satisfactory explanation for the failure" to seek a stay).

V. THE COURT SHOULD NOT EXTEND THE DOCTRINE OF EQUITABLE MOOTNESS TO CHAPTER 9

Finally, the City has not shown that equitable mootness even applies in a municipal bankruptcy case under chapter 9. The District Court for the Northern District of Alabama recently considered the question and held that "equitable mootness does not apply to challenges to a Confirmation Order in Chapter 9 proceedings." *Jefferson Cnty.*, 518 B.R. at 635; *contra In re City of Detroit*, No. 13-10036, 2015 WL 5697779 (E.D. Mich. Sept. 29, 2015).

That court noted that the doctrine is "based on Chapter 11 concepts that may be inapplicable to or inappropriate for this Chapter 9 case." *Jefferson Cnty.*, 518 B.R. at 634. "The prudential concerns of a Chapter 9 plan are different from the prudential concerns of a Chapter 11 plan. Two policies underlying Chapter 11 are preserving going concerns and maximizing property available to satisfy creditors. The policy underlying Chapter 9 is not future profit, but rather continued provision

of public services. These major differences . . . alter analysis of whether equitable considerations should factor into this court's decision to hear the [] appeal." *Id.* at 636 (quotations omitted); *see Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 510 (1942) (core purpose of chapter 9 is preservation of future taxing power so that "the utmost for the benefit of the creditors is to be realized").

In denying Franklin's motion for a stay, the Bankruptcy Court touched upon this distinction, recognizing that the City will exist for the foreseeable future and always will be able to provide at least some "fractional" relief in the event of a reversal on appeal. Because the foundational premise of the equitable mootness doctrine is absent in chapter 9, this Court should not extend it here.

VI. IF THE MOTION IS NOT DENIED, IT SHOULD BE CONSIDERED BY THE MERITS PANEL

If, notwithstanding the foregoing, the Court has any question about whether equitable mootness might bar this appeal, the Motion should be transferred to the merits panel for consideration and disposition (just as the Ninth Circuit has done with respect to Cobb's appeal).[5] The question of whether and how the City can pay more to Franklin is inextricably intertwined with the question of whether there exists an effective equitable remedy on appeal. Those questions properly are considered in the context of the merits on appeal.

[5] 9th Cir. Case No. 14-269, ECF 31.

Dated: October 9, 2015

JONES DAY

By: */s/ James Johnston*
James O. Johnston
Joshua D. Morse

Attorneys for Appellants Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund

EXHIBIT 1

14-17269

In the United States Court of Appeals for the Ninth Circuit

IN RE CITY OF STOCKTON, CALIFORNIA,

Debtor.

MICHAEL A. COBB,

Objector-Appellant,

v.

CITY OF STOCKTON, CALIFORNIA,

Debtor-Appellee.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,
CASE NO. 12-32118, HON. CHRISTOPHER M. KLEIN

DEBTOR AND APPELLEE CITY OF STOCKTON, CALIFORNIA'S MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT

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CORPORATE DISCLOSURE STATEMENT

Debtor-Appellee City of Stockton is not a corporate party under Federal Rule of Appellate Procedure 26.1.

May 18, 2015

/s/ Robert M. Loeb

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I. Introduction

Debtor and Appellee the City of Stockton, California ("the City") respectfully moves this Court to dismiss the above-captioned appeal of Michael A. Cobb on the ground that it is now equitably moot.[1] "Equitable mootness occurs when a 'comprehensive change of circumstances' has occurred so 'as to render it inequitable for this court to consider the merits of the appeal.'" *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012) (quoting *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981)). In conducting an equitable mootness analysis, this Court "look[s] first at whether a stay [of an order confirming a plan of adjustment] was sought." *Id.* at 881. "When an appellant fails to seek a stay without giving adequate cause, we have held that we dismiss the appeal as equitably moot." *In re Mortgages Ltd.*, 771 F.3d 1211, 1215 (9th Cir. 2014).

The City's plan of adjustment ("the Plan") was confirmed on October 30, 2014, and Cobb failed to seek a stay from any court. The Plan went effective February 25, 2015, and, as explained below, has now been substantially consummated. Cobb's appeal is therefore equitably moot.

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[1] The City has contacted counsel for Objector-Appellant Michael A. Cobb, who indicates that Cobb opposes this motion.

II. Factual and Procedural Background

Cobb filed the objection to the Plan that forms the basis for this appeal on February 11, 2014. Dkt. 1261; 3ER 184.[2] After briefing and oral argument, the bankruptcy court overruled Cobb's objection on May 8, 2014. Dkt. 1479; 3ER 196. Cobb noticed an appeal to the district court on May 21, 2014. Dkt. 1520; 3ER 199. On November 14, 2014, upon Cobb's petition, this Court granted him permission to appeal pursuant to 28 U.S.C. § 158(d). Ct. App. Dkt. 1.

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[2] The City uses "Bankr. Dkt." to cite to filings in *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D. Cal.), the chapter 9 bankruptcy case underlying Cobb's appeal; and "Ct. App. Dkt" to cite filings in this Court. Parallel citations to Cobb's Excerpts of Record, filed March 15, 2015, at Ct. App. Dkt. 10, are designated by volume and page number, e.g., "3ER."

The City has also attached to this motion three declarations in support:

- Declaration of Vanessa Burke in Support of Debtor and Appellee City of Stockton, California's Motion to Dismiss the Appeal as Equitably Moot (Burke Decl.), Attachment 1.
- Declaration of Eric Schwarz in Support of Debtor and Appellee City of Stockton, California's Motion to Dismiss the Appeal as Equitably Moot (Schwarz Decl.), Attachment 2.
- Declaration of Micah Runner in Support of Debtor and Appellee City of Stockton, California's Motion to Dismiss the Appeal as Equitably Moot (Runner Decl.), Attachment 3.

The bankruptcy court confirmed the Plan in open court on October 30, 2014. Dkt. 1763; 3ER 215. After the oral ruling, one party that had objected to the Plan filed a pro forma motion asking the bankruptcy court to stay the effectiveness of its confirmation order pending appeal, Dkt. 1774; 3ER 216, which the bankruptcy court denied orally on January 20, 2015, Dkt. 1852; 3ER 221. No party sought further relief from any court in the form of a stay of the confirmation order.

The bankruptcy court filed an order confirming the Plan on February 4, 2015. Burke Decl. ¶ 2; Dkt. 1875; 3ER 222. The Plan went effective on February 25, 2015 ("the Effective Date"). Runner Decl. ¶ 2. The City filed a notice of the occurrence of the Effective Date in the bankruptcy court on March 6, 2015. Burke Decl. ¶ 2 & ex. A. Once the Plan went effective, the City began the process of effectuating the Plan's provisions.

As detailed in the declaration of Vanessa Burke, the City's Chief Financial Officer, Treasurer, and Director of the Administrative Services Department, the Plan required the City to make "a number of cash payments either on the date on which the Plan became effective or shortly thereafter." Burke Decl. ¶ 2. All told, the City made 11 wire transfers totaling approximately $13.1 million. These wire transfers included a $5.1

million payment in full satisfaction of the health care benefits of 1,100 City retirees, which the City sent to Rust Consulting/Omni Bankruptcy ("Rust Omni") as its distribution agent. Burke Decl. ¶ 3. It also included payments to the City's major institutional creditors, satisfying settlement agreements that "adjusted over $259 million in principal amount of claims against the City." Burke Decl. ¶ 4. The City also wired $4,337,227.53 in satisfaction of another institutional creditor's allowed claims of approximately $36 million. Burke Decl. ¶ 5.

According to Eric Schwarz, Executive Vice President of Rust Omni, on February 23, 2015, Rust Omni mailed distribution checks to 1,126 recipients totaling $4,143,068.14. Schwarz Decl. ¶ 7. "As of April 30, 2015, all but 28 of the 1,126 checks mailed on February 23 had been honored by the bank …." Schwarz Decl. ¶ 10. To comply with federal and state law, which imposed tax liability on the City the date the checks were distributed to retirees, the City instructed Rust Omni to withhold taxes where applicable. Schwarz Decl. ¶ 5. Rust Omni did so, reported this to federal and state taxing authorities, and on March 4, 2015, sent the withheld taxes to the United States Department of the Treasury and the California Employment Development Department. Schwarz Decl. ¶ 8.

Finally, according to Micah Runner, Director of the City's Economic Development Department, "[o]n and after the [Effective Date], the City implemented the provisions of the Plan for restructuring its obligations to National Public Finance Guaranty ("NPFG") and to the two affiliated Assured Guaranty entities (together, "Assured Guaranty"), two of the City's major institutional creditors. Runner Decl. ¶ 2. The settlement with NPFG restructured the City's liability so that "NPFG will receive lower payments over a longer period of time from parking revenues generated [by City parking facilities]." Runner Decl. ¶ 3. To accomplish this, the City "conveyed fee title to 17 separate parking lots and garages to the newly-created Stockton Parking Authority, assigned its leasehold interests in six additional parking lots to the Parking Authority, and transferred management control of all parking assets to the Parking authority—including approximately 1,700 parking meters." Runner Decl. ¶ 3. Day-to-day operation of the parking facilities was also transferred over to a new entity, which in turn hired new leadership and staff. Runner Decl. ¶ 4.

The settlement with Assured Guaranty involves an office building located at 400 East Main Street in the City. Runner Decl. ¶ 6. On the Effective Date, the City "conveyed an option to Assured Guaranty for its

purchase of … 400 East Main Street" and "control of the building was transferred to a receiver … for the benefit of Assured Guaranty, which receives the net rent from the building." Runner Decl. ¶ 6. The City, in turn, "executed an 8-year lease … for approximately 80,000 square feet" of 400 East Main Street. Runner Decl. ¶ 6. The City's IT department is currently housed in the building and could not be moved without "relocation expenses of a minimum of two million dollars." Runner Decl. ¶ 6. The City has also "begun the process of moving other governmental functions and services into the 400 East Main building." Runner Decl. ¶ 7.

III. Cobb's Appeal Should Be Dismissed As Equitably Moot

A. The equitable mootness doctrine recognizes that "public policy values the finality of bankruptcy judgments because debtors, creditors, and third parties are entitled to rely on a final bankruptcy court order." *In re Thorpe Insulation Co.*, 677 F.3d at 880. "Equitable mootness occurs when a 'comprehensive change of circumstances' has occurred so 'as to render it inequitable for this court to consider the merits of the appeal.'" *Id.* (quoting *In re Roberts Farms, Inc.*, 652 F.2d at 798).

This Court has embraced a multi-factored test for deciding when a creditor's appeal can avoid dismissal based on equitable mootness. But a

gateway requirement to preserve a creditor's appellate rights, where a bankruptcy plan is going to go into effect, is to seek a stay. As this Court held in *In re Roberts Farms, Inc.*, "it is *obligatory* upon appellant … to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order." 652 F.2d at 798 (emphasis added).

This Court recently reiterated that before balancing the other relevant factors, it first examines whether the creditor satisfied the "requirement" of seeking a stay. In *In re Mortgages Ltd.*, the Court explained, "[o]ur requirement that a party seek a stay of a bankruptcy court order with which it disagrees before appeal is grounded in important principles of equity." 771 F.3d at 1216; s*ee id.* at 1215 ("When an appellant fails to seek a stay without giving adequate cause, we have held that we dismiss the appeal as equitably moot."); *In re Thorpe Insulation Co.*, 677 F.3d at 881 (court of appeals "look[s] first at whether a stay was sought"); *id.* ("A failure to seek a stay [of the implementation of a bankruptcy plan] can render an appeal equitably moot."). A creditor who disagrees with an order confirming a plan of adjustment is thus obligated to seek a stay from the bankruptcy court rather than sit back as the plan goes into effect and alters the status quo.

This is a mandatory, "clear bright-line rule that all litigants can understand." *In re Mortgages Ltd.*, 771 F.3d at 1217. Where there is a failure to seek a stay and a plan goes into effect, the "appeal[] *must* be dismissed." *Id.* (emphasis added).

As this Court phrased it in *In re Roberts Farms, Inc.*, Cobb "flunked the first step," 652 F.2d at 798. He never sought a stay. He did not seek a stay from the bankruptcy court, the district court, or this Court. He knew of the confirmation motions and hearings, and yet once the Plan was confirmed, he took no action to stay its implementation. While another appellant in a separate appeal did file a pro forma motion to stay before the bankruptcy court, that motion was promptly denied, and that party did not seek a stay from the Bankruptcy Appellate Panel, where its appeal is pending, or any other court for that matter. So even if an appellant in one case could somehow rely on an appellant in another case to satisfy its obligation to seek a stay (and there is nothing to suggest that it can), there is no such party in this case whose actions are a sufficient proxy for Cobb's obligation "to pursue with diligence all available remedies to obtain a stay of execution … (*even to the extent of applying to the Circuit Justice for relief*)." *Id.* (emphasis added). The effect of Cobb's failure is squarely

prescribed by *In re Mortgages Ltd.*, *In re Roberts Farms, Inc.*, and *In re Thorpe Insulation*: Because Cobb failed to meet the threshold gateway requirement of seeking a stay, the appeal is equitably moot and should be dismissed.

B. Even beyond Cobb's failure on this key threshold step, the other factors guiding an equitable mootness analysis also weigh in favor of mootness. Those other factors include (i) whether the plan has been "substantially consummated"; (ii) the effect of an appellate remedy on third parties not before the court; and (iii) whether the court can fashion effective relief "without completely knocking the props out from under the plan." *In re Thorpe Insulation Co.*, 677 F.3d at 881-82.

Absent a stay, the Plan went fully effective on February 25, 2015. Runner Decl. ¶ 2. As explained above, on the Effective Date, the City completed a flurry of transactions effectuating the Plan. *Supra* 3-6. The City made a wire transfer to Rust Omni of over $5 million in satisfaction of the claims for lost retiree health benefits and leave benefits for 1,126 former employees. Schwarz Decl. ¶ 7. All but 28 of those checks have now been cashed. Schwarz Decl. ¶ 10.

The City has also made wire transfers that consummate intricate and interdependent settlement agreements with three institutional bond holders, adjusting approximately $259 million in debts. Burke Decl. ¶ 4. To effectuate its settlement with NPFG, the City transferred its interest in what were once City-owned parking garages, parking lots, and other parking-related assets to the newly formed Stockton Parking Authority. Runner Decl. ¶ 3. With these transfers has come substantial turnover in supervision and authority over the parking facilities. Runner Decl. ¶¶ 4-5.

Also since the effective date, the City's favorable lease on 400 East Main Street, negotiated with Assured Guaranty and memorialized in the Plan, commenced. Runner Decl. ¶ 6. The City is in the process of moving its operations from a crumbling City Hall to space in 400 East Main Street, where it will join the City's IT department. Runner Decl. ¶¶ 6-7.

It is too late to undo the many transactions and operational steps the City has taken toward fully effectuating the Plan—this is precisely why this Court demands that an appealing creditor pursue a stay of the confirmation order. The egg has been broken and scrambled. Unscrambling the many transactions that the City has undertaken to consummate the Plan is simply not practicable, and cannot be done without

harming the interests of innocent third parties. Nor can Cobb's claim simply pass through bankruptcy, as he suggests, without jeopardizing the benefits of the Plan. The City's chapter 9 plan was carefully designed to usher in a new era of stability, flexibility, and good will. That new day has dawned, and the City and its citizens are moving forward. To permit creditors like Cobb to now undo the Plan, or to cast the City back into protracted litigation, would work a serious disruption, and one that should not be imposed in this context where the appellant did not even try to seek a stay and instead allowed the Plan to go into full effect.

IV. Conclusion

For the foregoing reasons, this Court should grant the City's motion and dismiss this appeal as equitably moot.

Dated: May 18, 2015

/s/ Robert M. Loeb

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 18, 2015, which will automatically serve all parties.

Dated: May 18, 2015

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14-17269

In the United States Court of Appeals for the Ninth Circuit

IN RE CITY OF STOCKTON, CALIFORNIA,

Debtor.

MICHAEL A. COBB,

Objector-Appellant,

v.

CITY OF STOCKTON, CALIFORNIA,

Debtor-Appellee.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,
CASE NO. 12-32118, HON. CHRISTOPHER M. KLEIN

DECLARATION OF VANESSA BURKE IN SUPPORT OF DEBTOR AND APPELLEE CITY OF STOCKTON, CALIFORNIA'S MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT

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I, Vanessa Burke, hereby declare:

1. I am the Chief Financial Officer, Treasurer, and Director of the Administrative Services Department (the "Department") for the City of Stockton, California ("the City" or "Stockton"). I make this declaration in support of the City's Motion To Dismiss The Appeal As Equitably Moot. As Chief Financial Officer, Treasurer, and Director of the Department, my responsibilities include, among other things, management of the City's finance, budget, revenue, and treasury functions. I was previously the Assistant Director of Administrative Services for the City, where my responsibilities included developing and administering the Department's budget, conducting financial analyses, and preparing a variety of reports relating to Department and City-wide financial activities.

2. On February 4, 2015, the United States Bankruptcy Court for the Eastern District of California entered its order approving the First Amended Plan for the Adjustment of Debts of City of Stockton, California (the "Plan"). The Plan required the City to make a number of cash payments either on the date on which the Plan became effective or shortly thereafter. The City, having made on the Effective Date the cash payments and completed the transactions that the Plan specified must occur on or

before the Effective Date, filed a notice of the occurrence of the Effective Date with the bankruptcy court on March 6, 2015. A true and correct copy of such notice is attached hereto as **Exhibit A**.

3. Among the payments the City was required by the Plan to make on or shortly after the Effective Date was $5.1 million in the aggregate to the approximately 1,100 retirees in satisfaction of their approximately $545 million in claims against the City for lost health benefits. Pursuant to the Plan, the City retained Rust Consulting/Omni Bankruptcy ("Rust Omni") as its distribution agent. The City's agreement with Rust Omni required the City to transmit adequate funds to Rust Omni to enable it to make the distribution to the health benefits claimants, along with funds sufficient to compensate Rust Omni for its service and to pay for a performance bond, and to pay the City's share of applicable taxes.[1]

4. The Plan included agreements between the City and Assured Guaranty Municipal Corp. and Assured Guaranty Corp. (together,

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[1] As described in the declaration of Eric Schwarz filed concurrently, Rust Omni also distributed payments in satisfaction of employment-related claims known as "Leave Buyout Claims." The distribution on account of the Leave Buyout Claims was several orders of magnitude smaller than the distribution to retirees. I have omitted details about the Leave Buyout Claims for simplicity.

"Assured") and the City and National Public Finance Guarantee Corporation ("NPFG"). Such agreements required the City to make certain cash payments on the Effective Date to Wells Fargo Bank, National Association ("Wells Fargo"), in its capacity as indenture trustee for the bonds insured by Assured and NPFG. In addition, the City's agreement with Ambac Insurance Corporation ("Ambac"), also memorialized in the Plan, required the City to make a cash payment to Ambac on the Effective Date. These were to be the first of many scheduled payments under these settlements, which provide for payments over several decades. These three settlements, which together adjusted over $259 million in principal amount of claims against the City, also required the City to make payments to CBRE, a real estate management company, for services related to the City's settlement with Assured, and to Mintz Levin, counsel for Wells Fargo, for certain of the Mintz Levin fees incurred in connection with the chapter 9 case.

5. The Plan also required the City to make a cash payment on the Effective Date of $4,337,227.53 to Wells Fargo, in its role as indenture trustee for bonds held by Franklin Advisers, Inc., Franklin High Yield Tax-Free Income Fund, and Franklin California High Yield Municipal Fund

(together, "Franklin"), in full satisfaction of the approximately $36 million in allowed claims against the City on account of these bonds. Unlike the Effective Date payments under the settlements with Ambac, Assured, and NPFG, the payment for the bonds held by Franklin was a one-time payment.

6. The City made the payments described above by wire transfer. Before the City made the wire transfers, I reviewed a summary of each transfer. When I was satisfied that the transfers were proper, that adequate documentation had been provided, and that adequate funds were available, I authorized the wire transfers.

7. Following my authorization, the City's bank made the following wire transfers:

Payee	Amount	Comment
Rust Omni	$5,156,867.05	February 18, 2015 initial payment for distribution to retiree health benefit and certain other unsecured creditors
Rust Omni	$10,600.37	February 24, 2015 supplemental payment for distribution to retiree health benefit creditors

Payee	Amount	Comment
Ambac	$278,347.40	Effective Date payment for legal fees and interest
Wells Fargo	$2,254,439.93	Scheduled payment for Assured settlement made on Effective Date
CBRE	$177,802.25	Effective Date payment to increase deposit and pay rent related to Assured settlement
NPFG	$104,811.99	Effective Date payment to "catch up" on delinquent debt service
Wells Fargo	$708,302.50	Scheduled payment for NPFG settlement made on Effective Date
Chicago Title Company	$20,566.00	Effective Date payment for title insurance related to NPFG settlement
Mintz Levin	$20,000.00	Effective Date payment for attorney fees related to Assured bonds
Wells Fargo	$4,337,227.53	Effective Date payment for claims arising from bonds held by Franklin
Mintz Levin	$80,000.00	March 18, 2015 payment for attorney fees related to miscellaneous bonds

8. Together, these payments total approximately $13.1 million.

Executed this 11th day of May 2015, at Stockton, California. I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Vanessa Burke

Exhibit A

3

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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re: CITY OF STOCKTON, CALIFORNIA, Debtor.	Case No. 2012-32118 Chapter 9 **NOTICE OF FEBRUARY 25, 2015 EFFECTIVE DATE**

TO ALL CREDITORS, PARTIES IN INTEREST, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 4, 2015, the United States Bankruptcy Court for the Eastern District of California entered the Order Confirming First Amended Plan For The Adjustment Of Debts Of City Of Stockton, California, As Modified (August 8, 2014) [Dkt. No. 1875] ("Order" confirming the "Plan"). The City's mailing agent sent you a Notice of Entry of Order on or around February 12, 2015. Such Notice included a CD containing PDF copies of the Order and the Plan, among other documents.

PLEASE TAKE FURTHER NOTICE that, pursuant to Sections VII through XIII of the Plan, on February 25, 2015, the City satisfied or waived the conditions precedent enumerated in

/ / /

Section XIII of the Plan. As defined in the Plan, the Effective Date occurred on February 25, 2015 ("Effective Date").

PLEASE TAKE FURTHER NOTICE that all proofs of claim for Other Postpetition Claims[1] arising on or after August 16, 2013, and requests for payment or any other means of preserving and obtaining payment of Administrative Claims that have not been paid, released, or otherwise settled, and all requests for approval of Professional Claims, must be filed with the Bankruptcy Court and served upon the City no later than 30 days after the date on which this Notice is served. Any proof of claim for Other Postpetition Claims, or request for payment of an Administrative Claim or a Professional Claim, that is not timely filed by such date will be forever barred, and holders of such Claims shall be barred from asserting such Claims in any manner against the City. For the avoidance of doubt, proofs of claim for Other Post-Petition Claims that arose before August 16, 2013 must have been filed by August 16, 2013 in order to be considered timely.

PLEASE TAKE FURTHER NOTICE that all distributions to any holder of an Allowed Claim were or shall be made at the address of such holder as set forth in the books and records of the City or its agents, unless the City has been notified by such holder of a different address in a writing that contains an address for such holder different from the address reflected in the City's books and records. All such notifications of address changes and all address confirmations should be mailed to: Rust Consulting/Omni Bankruptcy, 5955 DeSoto Avenue, Suite 100, Woodland Hills, CA 91367.

PLEASE TAKE FURTHER NOTICE that as of the Effective Date, the City assumed all executory contracts and unexpired leases to which it was a party, and assigned certain of those executory contracts as set forth in the Plan, except (i) for those unexpired leases and executory contracts specified in the following paragraph, and (ii) as otherwise provided in the Plan. The Bankruptcy Court shall resolve all disputes regarding (a) the amount of any cure payment to be made in connection with the assumption of any contract or lease (b) the ability of the City to provide "adequate assurance of future performance" within the meaning of 11 U.S.C. § 365 under

[1] All capitalized terms not defined herein have the definitions given to them in the Plan.

the contract or lease assumed, and (c) any other matter pertaining to such assumption and assignment. Any party to an executory contract or unexpired lease that the City assumed on the Effective Date that asserts that any payment or other performance is due as a condition of the proposed assumption shall file with the Bankruptcy Court and serve upon the City a written statement and accompanying declaration in support thereof, specifying the basis for its claim within 90 days of the Effective Date. The failure to timely file and serve such a statement shall be deemed a waiver of any and all objections to the assumption and any claim for cure amounts of the agreement at issue.

PLEASE TAKE FURTHER NOTICE that the City rejected the Golf Course/Park Lease Out and the Golf Course/Park Lease Back and the Office Building Standby Agreement on the Effective Date. No later than 120 days after the Effective Date, the City will file a Rejection Motion, in which it will seek authority to reject certain executory contracts and unexpired leases. Proofs of claim arising from the rejection of executory contracts or unexpired leases must be filed with the Bankruptcy Court and served on the City no later than 28 days after the date on which notice of entry of the order approving the Rejection Motion is served on the parties to the executory contracts and leases subject to the Rejection Motion. Any Claim for which a proof of claim is not filed and served within such time will be forever barred and shall not be enforceable against the City or its assets, properties, or interests in property. Unless otherwise ordered by the Bankruptcy Court, all such Claims that are timely filed as provided herein shall be classified into Class 12 (General Unsecured Claims) and treated accordingly.

For additional information, contact the City at Stockton@orrick.com, or by mail at the address in the upper left-hand corner of the first page of this Notice.

Dated: March 6, 2015

MARC A. LEVINSON
NORMAN C. HILE
PATRICK B. BOCASH
Orrick, Herrington & Sutcliffe LLP

By: *\/s/ Marc A. Levinson*
MARC A. LEVINSON
Attorneys for Debtor
City of Stockton

14-17269

In the United States Court of Appeals for the Ninth Circuit

IN RE CITY OF STOCKTON, CALIFORNIA,

Debtor.

MICHAEL A. COBB,

Objector-Appellant,

v.

CITY OF STOCKTON, CALIFORNIA,

Debtor-Appellee.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,
CASE NO. 12-32118, HON. CHRISTOPHER M. KLEIN

DECLARATION OF ERIC SCHWARZ IN SUPPORT OF DEBTOR AND APPELLEE CITY OF STOCKTON, CALIFORNIA'S MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT

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Attorneys for Debtor-Appellee

I, Eric Schwarz, hereby declare:

1. I am the Executive Vice President of Rust Consulting/Omni Bankruptcy ("Rust Omni"). I make this declaration in support of the City of Stockton, California's ("the City") Motion To Dismiss The Appeal As Equitably Moot.

2. As Executive Vice President of Rust Omni, which I joined in 2003, I am responsible for the day-to-day case administration of client engagements. During my tenure at Rust Omni, I also have served as the liquidating trustee and settlement trustee in several chapter 11 post-confirmation matters.

3. The City retained Rust Omni as its distribution agent to make payments by check to approximately 1,100 creditors following confirmation of the City's plan of adjustment. I coordinated the preparation and distribution of these checks. In so doing, I supervised the withholding and reporting of amounts withheld from the payments for federal and state taxes and benefits. I also coordinated Rust Omni's obtaining of a $5,182,000 surety bond in favor of the City to secure Rust Omni's performance of its disbursing agent duties.

4. Rust Omni distributed an aggregate $5,119,330.12 (less amounts withheld, as described in paragraph 7 below) to approximately 1,100 City retirees on account of their claims for lost health benefits ("Retiree Health Claims"). It also distributed an aggregate $5,480.80 to 25 former City employees on account of their claims for unpaid leave ("Leave Buyout Claims"). I coordinated the preparation and distribution of the 1,126 checks by which Rust Omni made these payments for the City.

5. On instruction from the City, Rust Omni withheld federal and state income taxes from payments to those recipients for whom such withholding was necessary. Rust Omni also withheld amounts for Medicare from payments to those recipients for whom such withholding was necessary, and withheld Social Security taxes from its payment to the one recipient for whom such withholding was necessary. After withholding these amounts, the net distribution to all recipients was $4,143,068.14. The applicable law that required withholding for federal and state income taxes also required the City to report the payments to federal and state taxing authorities. The City incurred the liability for these taxes on the date on which Rust Omni distributed the checks, rather than the date on which each check cleared.

6. In advance of the distribution, Rust Omni received an initial payment of $5,156,867.05 from the City by wire transfer on February 18, 2015. The City wired a supplemental payment of $10,600.37 on February 24, 2015. The two wires totaled $5,167,467.42.

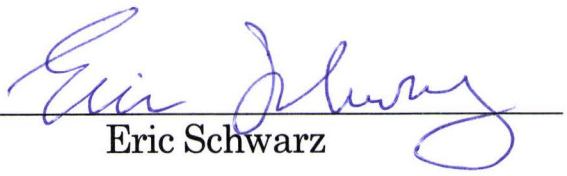
7. Rust Omni mailed the distribution checks on February 23, 2015. As noted in paragraph 5, the aggregate amount distributed to claimants via the 1,126 checks that Rust Omni mailed – i.e., the distribution net of amounts withheld for taxes and benefits – totaled $4,143,068.14.

8. On March 4, 2015, Rust Omni sent $697,408.28 representing the entire aggregate amount withheld for federal income taxes, Medicare, and Social Security to the United States Department of the Treasury via wire transfer. Also on March 4, Rust Omni sent $326,991.00 representing the entire aggregate amount withheld for state income taxes to the California Employment Development Department via wire transfer.

9. Rust Omni prepared a draft Internal Revenue Service Form 941 and provided it to the City. I am informed and believe that the City finalized the Form 941 and filed it with the Internal Revenue Service.

10. As of April 30, 2015, all but 28 of the 1,126 checks mailed on February 23 had been honored by the bank that Rust Omni instructed to send the wires. The cleared checks total $4,036,592.30. The 28 outstanding checks total $106,475.84.

Executed this 6th day of May 2015, at Woodland Hills, California. I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.



Eric Schwarz

14-17269

In the United States Court of Appeals for the Ninth Circuit

IN RE CITY OF STOCKTON, CALIFORNIA,

Debtor.

MICHAEL A. COBB,

Objector-Appellant,

v.

CITY OF STOCKTON, CALIFORNIA,

Debtor-Appellee.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,
CASE NO. 12-32118, HON. CHRISTOPHER M. KLEIN

DECLARATION OF MICAH RUNNER IN SUPPORT OF DEBTOR AND APPELLEE CITY OF STOCKTON, CALIFORNIA'S MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT

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I, Micah Runner, hereby declare:

1. I am the Director of the Economic Development Department (the "Department") for the City of Stockton, California ("the City" or "Stockton"). I make this declaration in support of the City's Motion To Dismiss The Appeal As Equitably Moot. As Director of the Department, I am responsible for the Central Parking District, the Economic Development Division, the Housing Division, and the Asset Management Division. I became the Director of the Department in December of 2014 after serving as the interim Director for three months.

2. On and after the February 25, 2015, effective date of the City's plan of adjustment (the "Plan"), the City implemented the provisions of the Plan for restructuring its obligations to National Public Finance Guaranty ("NPFG") and to the two affiliated Assured Guaranty entities (together, "Assured Guaranty"), which involved multiple transfers of interests in real property. In my capacity as Director of Economic Development, I was directly involved in the transactions described below.

3. With respect to the Plan treatment and settlement with NPFG, on the effective date, the City conveyed fee title to 17 separate parking lots and garages to the newly-created Stockton Parking Authority, assigned its

leasehold interests in six additional parking lots to the Parking Authority, and transferred management control of all parking assets to the Parking Authority – including approximately 1,700 parking meters. In turn, the Parking Authority entered into a three-year management agreement with a third party parking lot operator, SP+, under which SP+ will operate and manage these transferred facilities, as required by the settlement between the City, the Parking Authority and NPFG embodied in the Plan. The settlement provided, among other things, that NPFG will receive lower payments over a longer period of time from parking revenues generated by such assets in lieu of amounts previously due to be paid from the City's general fund. SP+ began operating all of these properties on April 1, 2015.

4. The City made many staffing changes as part of the transition to SP+ as the day-to-day operator of the parking facilities. A Parking District Supervisor, a Parking Attendant Supervisor and 31 Parking Attendants – each of whom was a City employee – were issued layoff notices as part of outsourcing this operation. The new parking operator hired 19 of the Parking Attendants, and the two Supervisors found employment in other City functions. SP+ has now moved into the offices

where the parking functions previously had been administered by City staff.

5. The settlement with NPFG also required that the parking enforcement functions be assumed by the new Parking Authority. That resulted in the Parking Authority hiring a new Parking Enforcement Supervisor on April 15, 2015. In addition, the Parking Authority is currently recruiting additional Parking Enforcement Officers with the goal of them starting on July 1, 2015.

6. Turning to the Assured Guaranty restructuring, on the effective date, Stockton conveyed an option to Assured for its purchase of the office building located at 400 East Main Street in the City. Shortly thereafter, control of the building was transferred to a receiver appointed by the Superior Court for the benefit of Assured Guaranty, which receives the net rent from the building. Also on the effective date, Stockton, as tenant, executed an 8-year lease (with four one-year extension options) for approximately 80,000 square feet of that building. The City's Information Technology function, including all of its main servers and associated equipment, are located at 400 East Main. No alternative location is currently available for the Information Technology function and, even if an

acceptable alternative location did exist, moving the IT function would entail relocation expenses of a minimum of two million dollars due to the complex nature of the equipment and associated support facilities such as chillers and cabling.

7. The City has already begun the process of moving other governmental functions and services into the 400 East Main building. Thus, in December 2014, the City issued a Request for Interest from architectural firms. On January 6, 2015, approximately 20 firms participated in the building walk-through. Six of the firms submitted responses that allowed the City to review specific qualifications and make a recommendation based on those qualifications, the timeliness of services, and cost. On February 24, 2015, the City Council approved a contract with LDA Partners to provide architectural services for the relocation to 400 East Main. LDA is preparing documents for a construction bid process, which we hope will begin in July 2015. The Information Technology function has already relocated many staff from other locations within Stockton, and expects additional staff to move in the near future into the space at 400 East Main that does not require new tenant improvements.

Executed this 11th day of May 2015, at Stockton, California. I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Micah Runner

EXHIBIT 2

14-17269

In the United States Court of Appeals for the Ninth Circuit

IN RE CITY OF STOCKTON, CALIFORNIA,

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MICHAEL A. COBB,

Objector-Appellant,

v.

CITY OF STOCKTON, CALIFORNIA,

Debtor-Appellee.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,
CASE NO. 12-32118, HON. CHRISTOPHER M. KLEIN

DEBTOR AND APPELLEE CITY OF STOCKTON, CALIFORNIA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT

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* The City cites its Motion to Dismiss the Appeal as Equitably Moot, Dkt. 19, as "Motion"; Cobb's Response, Dkt. 25, as "Response"; and the amicus filing of Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund as "Amicus."

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I. Cobb's Failure to Seek a Stay, Coupled with the Plan's Substantial Consummation, Warrants Dismissal

A. As explained in the Motion (at 6-9), the equitable mootness doctrine recognizes that "public policy values the finality of bankruptcy judgments because debtors, creditors, and third parties are entitled to rely on a final bankruptcy court order." *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012). This Court has recognized a "clear bright-line rule" for parties wanting to seek review of a bankruptcy plan. *In re Mortgages Ltd.*, 771 F.3d 1211, 1215, 1217 (9th Cir. 2014). It is a simple rule that "all litigants can understand": "When an appellant fails to seek a stay [of a confirmation order in a bankruptcy case] without giving adequate cause, … the appeal [i]s equitably moot." *Id.* at 1215.

Cobb concedes that he did not seek a stay of the consummation of the City's plan of adjustment ("the Plan"), Response 3. The status quo has now irreparably changed. After the bankruptcy court filed its order confirming the Plan on February 4, 2015, there was an immediate flurry of transactions consummating the Plan, and the Plan went fully effective on February 25, 2015. Motion 3-6, 9-11. Those transactions included the payment of millions of dollars to over one thousand creditors. Motion 9-10. One need only place the Plan documents and the declarations the City

submitted in support of its Motion side by side to see that virtually all of the Plan transactions have been accomplished. *Compare* Motion atts. A-C, *with* Modified Disclosure Statement with Respect to First Am. Plan for the Adjustment of Debts of City of Stockton, Cal., Nov. 21, 2013, *In re City of Stockton, Cal.*, 12-32118 (Bankr. E.D. Cal.), Dkt. 1215, at 73-77, 82, *available at* http://tinyurl.com/DisclosureStmt. Certainly Cobb identifies nothing remaining; so, contrary to his suggestion (at 6-7), there is no legitimate question as to whether the Plan has been "substantially consummated."[1]

Cobb's failure to satisfy the "obligatory" gateway requirement to seek a stay (even though aware of this Court's equitable mootness doctrine[2]), *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981)—coupled with the substantial consummation of the Plan—warrants dismissal.[3]

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[1] This Court should reject Cobb's invitation to delay resolution of the Motion until decision on the merits of Cobb's appeal. Response 18-20. The passage of time will only cause greater reliance on the new status quo, making relief even more impracticable.

[2] *See* Pet'n of Michael A. Cobb for Permission to Appeal, Sept. 5, 2014, *Cobb v. City of Stockton, Cal.*, 14-80121, Dkt. 1, at 13 (9th Cir.) (citing possibility of equitable mootness as reason for permission to appeal).

[3] Cobb's assertion (at 14 n.6) that he had little chance of *obtaining* a stay is irrelevant, because an "appellant has a high obligation to seek a stay

B. The Response does not offer any "adequate reason" for Cobb's decision not to bother with the required stay request, *In re Mortgages*, 771 F.3d at 1215. Instead, Cobb—along with amicus Franklin—attacks the requirement itself.

Cobb accuses the City of "cherry-pick[ing] language" from this Court's equitable mootness cases. Response 10. His very first quotation (at 2), however, highlights the importance of seeking a stay of the implementation of a bankruptcy plan. He quotes *In re Thorpe*, 677 F.3d at 881. There, in the very passage Cobb quotes, this Court held that it "will look first at whether a stay was sought, for absent that a party has not fully pursued its rights. *If* a stay was sought and not gained, we *then* will look to whether substantial consummation of the plan has occurred." *Id.* (emphasis added).

Cobb suggests that a further examination of other factors "must be made in every case," regardless of whether the appellant sought a stay. Response 5. But that, of course, would eliminate the value of the "clear bright-line" threshold rule, *In re Mortgages*, 771 F.3d at 1215. This Court properly looks to those other factors only where a party *did* seek a stay to

---

pending appeal, even if the chances of success seem dim." *In re Mortgages*, 771 F.3d at 1216 (internal quotation marks and citation omitted).

determine whether meaningful relief can be granted without substantially harming third parties. *In re Mortgages*, 771 F.3d at 1216. This threshold "requirement" of seeking a stay "is grounded in important principles of equity." *Id.* at 1216. It ensures that all interested parties, whether they are before the bankruptcy court or not, can set expectations prior to a change in the status quo.

The threshold requirement is all the more vital in chapter 9 cases. It is not just that many irreversible transactions have taken place here and that Humpty Dumpty can't be put back together again. It is also that the bankruptcy court does not have *the power* even to try to unscramble the egg without the City's consent. In enacting chapter 9, Congress understood that state and municipal entities were different than private debtors. *See generally In re Desert Hot Springs*, 339 F.3d 782, 789-90 (9th Cir. 2003) (discussing "unique aspects" of chapter 9). Allowing a creditor or court to create and impose a plan upon an instrumentality of a state would raise serious Tenth Amendment concerns. *Id.* Congress therefore expressly specified that no order regarding the "property or revenues of the debtor" can be entered without the consent of the debtor. 11 U.S.C. § 904(2).

Consistent with § 904, Congress did not allow alternative plans to be submitted by creditors in a chapter 9 case. *Cf.* 11 U.S.C. § 1121(c) (permitting creditor plans in chapter 11 cases after expiration of exclusivity). Nor did it empower the bankruptcy court to convert the case to a chapter 7 liquidation. *In re Desert Hot Springs*, 339 F.3d at 789; *cf.* 11 U.S.C. § 1112 (permitting conversion in chapter 11 cases). The bankruptcy court is "strictly limited to disapproving or to approving and carrying out" the proposed plan of adjustment submitted by the City. *Leco Props. v. R. E. Crummer & Co.*, 128 F.2d 110, 113 (5th Cir. 1942).[4] Only the debtor can propose a plan or propose a modification to its plan. 11 U.S.C. §§ 941, 942. And the bankruptcy court "shall confirm the plan" if it meets all statutory requirements. 11 U.S.C. § 943(b). If not, it may deny the plan or dismiss the case. *Id.* at § 930(a)(4)-(5).

Contrary to Cobb's and Franklin's assumptions, what the court cannot do is simply rewrite or modify a plan. Although the bankruptcy court suggested in regard to another creditor—Franklin—that it "could fashion a remedy" because it is "conceivable that some additional funds

[4] For that reason, the bankruptcy court may not "merely … order[] the City to pay more … on Cobb's claim," as Franklin suggests without citation to authority. Amicus 5.

could be made available," Response 16, exh. C at 20-22 (quoting the bankruptcy court), the court lacks the power to modify the Plan it confirmed. Even attempting to unravel settlements and transactions, compel a new plan, or dismiss the case would generate the very havoc, affecting a multiplicity of interested parties, the equitable mootness doctrine seeks to avert.

Likewise, there is no merit to Cobb's suggestion (at 8) that the bankruptcy court could amend the Plan to exempt his claim from discharge under 11 U.S.C. § 944(c)(1). Section 944(c)(1) provides for discharge only for claims "excepted from discharge by the plan or order confirming the plan." Cobb's claim is not excepted from discharge by the Plan, and the bankruptcy court may not unilaterally except a claim from discharge under an order confirming a plan for the reasons explained above.

C. For much the same reasons, Cobb and Franklin are wrong to rely on a possible exception in chapter 11 cases noted by the *In re Mortgages* Court. Response 12-13; Amicus 7. That possible "narrow exception," derived from this Court's earlier ruling in *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9th Cir. 2002), applies only where the appellant seeks monetary relief and the bankruptcy court could "award [the appellant]

more money from a stable pool of available funds." *In re Mortgages*, 771 F.3d at 1217; *In re Sylmar*, 314 F.3d at 1074.[5] Under chapter 9, there is no additional "pool of available funds" for a court to award a creditor. As noted above, in a chapter 9 case, the court lacks the power to modify a plan to tap additional funds without the consent of the municipality. And, unlike in a chapter 11 case, creditors in a chapter 9 case cannot propose alternative plans seeking additional funds. *Compare* 11 U.S.C. § 1121, *with* 11 U.S.C. § 941.

Moreover, as a practical and legal matter, a municipal debtor *must* emerge from chapter 9 with sufficient reserve funds to continue to operate and save as a viable and functioning municipality. 11 U.S.C. § 943(b)(7) (a plan must be "feasible"). The absence of such funds is what drove the City into bankruptcy. And the funds the City retains under the confirmed Plan are based on detailed, long-term financial projections and budgeting that model a sustainable solvency. This financial framework formed the basis

[5] Despite recognizing the possibility of such an exception, the *In re Mortgages* Court makes clear that, at the very least, failure to seek a stay "weighs strongly towards equitable mootness." 771 F.3d at 1217. In resolving the case on the alternative ground that the mootness factors as a whole warranted dismissal, the Court nevertheless relied heavily on the appellant's failure to discharge its obligation to seek a stay. *Id.*

for the Plan and, very likely, the decisions of the vast majority of the City's creditors to vote to accept it. The funds it reserves to the City cannot be freely divvied up at the discretion of the bankruptcy court for the benefit of the small minority of creditors voting "No" without undermining the Plan's foundation. Indeed, doing so would violate the clear restrictions imposed by 11 U.S.C. § 904 on the court's authority in a chapter 9 case. The existence of such required funds is therefore irrelevant here.

D. Finally, Cobb and Franklin argue that equitable mootness should never apply in a chapter 9 case. Response 17-18; Amicus 9-10. This Court has, however, already recognized and applied the equitable mootness doctrine in a chapter 9 case, *In re City of Vallejo, Cal.*, 551 F. App'x 339 (9th Cir. 2013). Ignoring this Circuit's own ruling, Cobb instead cites to one from the District of Alabama that is currently on appeal to the Eleventh Circuit, *Bennett v. Jefferson County., Ala.*, 518 B.R. 613 (N.D. Ala. 2014). The reasoning of that district court cannot be squared with *In re City of Vallejo* and cannot, in any event, withstand scrutiny.

The *Jefferson County* district court thought application of the equitable mootness doctrine may be "in some tension with [the Supreme Court's] recent reaffirmation of the principle that a federal court's

obligation to hear and decide cases within its jurisdiction is virtually unflagging." 518 B.R. at 634 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)). As an attack on the equitable mootness doctrine in *all* contexts, this proves far too much.

Moreover, application of the equitable mootness doctrine to this appeal is not a declination by the federal courts to exercise the jurisdiction granted by Congress. Rather, it simply requires an appellant to take certain steps to preserve a right to appeal before a plan of adjustment is substantially consummated and the status quo changes. If, as here, the appellant fails to take the basic step of seeking a stay, it is his omission, not the court's abstention, that causes the appeal to be dismissed.

The *Jefferson County* district court also suggested that because "substantial consummation" initially arose in chapter 11 cases, it must somehow not apply in a chapter 9 case. *Id.* at 635. In fact, the case for application of the doctrine to the chapter 9 context is far stronger than the chapter 11 context. As discussed above, in a chapter 11 case, a court can adopt a modified plan proposed by a creditor. Moreover, there is always the alternative of conversion to a chapter 7 liquidation, 11 U.S.C. § 1112. This gives the court possible avenues to compel payment of additional

funds even after a plan is confirmed and consummated. That power simply does not exist in the chapter 9 context. Thus, the rationale for enforcing the doctrine in the chapter 9 context is far more compelling.

The *Jefferson County* district court further cited the concern that application of the equitable mootness doctrine to a chapter 9 case would "allow a non-Article III court to decide important constitutional questions that place substantial future obligations on the citizens of Jefferson County without representation." *Id.* at 637. Although that could possibly justify the issuance of a stay, allowing review of important legal issues prior to the implementation of a plan, it does not support the sweeping disqualification of an established and sound equitable doctrine.

II. Conclusion

For the foregoing reasons, this Court should grant the City's motion and dismiss this appeal as equitably moot.

Dated: June 26, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2015, which will automatically serve all parties.

Dated: June 26, 2015

/s/ Robert M. Loeb

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the appellate CM/ECF system on October 9, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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