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11 UNITED STATES BANKRUPTCY COURT
12 EASTERN DISTRICT OF CALIFORNIA
13 SACRAMENTO DIVISION

14 CITY OF STOCKTON, CALIFORNIA

15 Debtor,

16 Case No: 2012-32118

17 Chapter 9

18 **OPPOSITION OF STOCKTON CITY
19 EMPLOYEES ASSOCIATION, OPERATING
20 ENGINEERS LOCAL NO. 3 AND STOCKTON
21 PROFESSIONAL FIREFIGHTERS LOCAL NO
22 456 TO FRANKLIN FUNDS’ MOTION FOR A
23 STAY PENDING APPEAL**

24 Date: December 10, 2014

25 Time: 11:00 a.m.

26 Hon. Christopher Klein

27 The Stockton City Employees Association, Stockton Professional Firefighters – Local
28 456 and Operating Engineers Local No. 3 (“Unions”) oppose the motion (Motion”) of the
Franklin Funds to stay the order confirming the plan of adjustment of the City of Stockton
 (“Confirmed Plan”).

29 **I. INTRODUCTION**

30 As the Court is aware, the Unions supported the Confirmed Plan, because it carried out
the compromises negotiated between the Unions (and other employee organizations) and the

1 City of Stockton (“Stockton” or “City”) whereby the employees, through their collective
2 bargaining organizations, agreed to substantial reductions in force, in compensation, in
3 benefits and in work rules in exchange for Stockton’s promise to propose a plan that did not
4 impair pensions.

5 The employees have lived with the unpleasant results of their side of the bargain over
6 the past several years, without ever having certainty that Stockton would be able in the end to
7 perform its part of the bargain. As a result, employee morale has been low with high attrition
8 rates among employees, as shown by testimony of City officials at various stages of the case
9 and the Declaration of Michael Eggener, filed and served herewith (“Eggener Dec.”). There
10 also was testimony and evidence that, if the pensions of Stockton employee were impaired as
11 also was testimony and evidence that, if the pensions of Stockton employee were impaired as
12 a result of the chapter 9 case, departures of employees, especially among public safety
13 officers, would accelerate.

14 Needless to say, the confirmation of the City’s plan that did not impair pensions came
15 as a great relief to Stockton’s employees, because it removed the uncertainty that has hung
16 over the City and its employees for years (Eggener Dec. ¶ 4). Most decidedly, however, a stay
17 pending appeal of the Confirmed Plan, which could delay its implementation for years, would
18 be a severe setback to the expectations of employees, who would thereupon return to the
19 state of uncertainty that previously existed (*Id.*). The Unions, as discussed below, therefore
20 oppose the motion for stay, because the Franklin Funds cannot show likelihood of irreparable
21 harm, that the stay will not cause harm to other parties or that the stay is in the public interest.
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24 **II. ARGUMENT**

25 In the Motion (Docket 1774) the Franklin Funds correctly state that they must satisfy the
26 four traditional elements for a preliminary injunction in order to obtain a stay pending appeal
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1 (Motion 3). The unions will address each of those elements, arguing that the Franklin Funds
2 have failed to meet at least three of the elements, especially the irreparable injury requirement
3 wherein the Franklin Funds erroneously state existing Ninth Circuit law.

4 **A. Likelihood of Success on the Merits**

5 The degree of likelihood of success on the merits appears to be somewhat of a
6 moving target. *E.g., Leiva-Perez v. Holder*, 640 F. 3rd 962, 966-968 (9th Cir. 2011).
7 Nevertheless, there is little question that the Court's findings and conclusions regarding the
8 pensions impairment issue are well-supported by the evidence and unlikely to be reversed
9 under any standard. It was essentially uncontroverted that, in order to impair pensions of its
10 employees, Stockton would have had to survive a gauntlet of challenges potentially resulting in
11 serious harm to the residents of the City through reduced public safety. Although the Court
12 ruled that Stockton could under chapter 9 reject its pension servicing contract with CalPERS,
13 that action in and of itself was potentially daunting. Then Stockton would either have to reject
14 or re-negotiate each of its at least nine collective bargaining agreements from which its
15 pension obligations emanate. That process of course would threaten all the non-pension
16 concessions Stockton had obtained from the unions over several years and potentially result in
17 cancelling out any savings from pension reductions. But, of equal importance, an assault on
18 pensions could result in an exodus of employees to other CalPERS employers, especially
19 police and fire employees, leaving Stockton exposed to crime and property damage.

20 No appellate court is likely to reject those well-supported findings and
21 conclusions. Therefore, Franklin's appeal on the core issue of the case has a very low
22 probability of success.

23 **B. Lack of Irreparable injury appears conceded.**

24 The Franklin Funds spend an inordinate amount of the motion arguing that they
25 only have to establish the *possibility* of irreparable injury to satisfy the second prong of the stay
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1 elements.¹ Unfortunately for the Franklin Funds, they rely on outdated Ninth Circuit law. For
2 many years the Ninth Circuit followed an approach to the injunction criteria that was referred to
3 as the “sliding scale” or “continuum” approach in which a strong showing on the merits could
4 reduce the second element to a mere possibility of harm. *Lopez v. Heckler*, 713 F. 2nd 1432
5 (9th Cir. 1983), cited by the Franklin Funds at page 4 of the Motion is typical. However, the line
6 of cases represented by *Lopez* was rejected in *Winter v. Natural Res. Def. Council*, 555 U.S. 7
7 (2008).

8 In *Winter*, the Supreme Court curtailed the Ninth Circuit’s “sliding scale” approach, and
9 in particular, rejected the concept that a strong showing of likelihood of prevailing on the merits
10 signified that only a mere possibility of irreparable harm was required to be shown. Following
11 *Winter*, the Ninth Circuit clarified that “‘serious questions going to the merits’ and a balance of
12 hardships that tips sharply towards the plaintiff can support issuance of a preliminary
13 injunction, *so long as the plaintiff also shows that there is a likelihood of irreparable injury* and
14 that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3rd
15 1127, 1135 (9th Cir. 2011) (Emphasis added).² Moreover, more recently in *Leiva-Perez*, 640
16 F. 3rd 962 (9th Cir. 2011) [also incompletely cited by the Franklin Funds], the Ninth Circuit
17 reaffirmed the requirement *in all cases* to establish actual likelihood of irreparable injury as a
18 criterion for an injunction or a stay pending appeal. There the Ninth Circuit said at 640 F. 3rd
19 968:

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24 ¹ Indeed the very caption of this section of the Motion is entitled “There Is A Possibility Of
Irreparable Harm Absent A Stay” (Motion 10).

25 ² Although the Franklin Funds cite *Alliance for Wild Rockies v. Cottrell*, *supra*, at page 3
26 of the Motion, they notably failed to mention or quote the critical second half of the decision’s
27 holding cited above.

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2 While *Nken* did not affect *Abbassi's* likelihood of
3 success prong, it did overrule that part of *Abbassi* that
4 permitted a stay to issue upon the petitioner "simply
5 showing some 'possibility of irreparable injury.'" *Nken*,
6 129 S. Ct. at 1761 (quoting *Abbassi*, 143 F.3d at 514)
7 (emphasis added). Although *Nken* did not say what ought
8 to replace *Abbassi's* "possibility" standard, it quoted
9 *Winter* for the proposition that the " 'possibility' standard
10 is too lenient." *Id.* (quoting *Winter*, 129 S. Ct. at 375).
11 *Winter*, in turn, was clear in holding that "plaintiffs
12 seeking preliminary relief [are required] to demonstrate
13 that irreparable injury is likely in the absence of an
14 injunction." 129 S. Ct. at 375 (emphasis in
15 original).

16 By the Franklin Funds' own admission, they cannot establish the *likelihood of*
17 *irreparable injury*, but only the possibility of harm. Therefore, they have failed to establish the
18 second prong of the four-part test for a stay pending appeal.

19 **C. A stay pending appeal would harm other parties.**

20 In *Leiva-Perez*, 640 F. 3rd at 964, *supra*, the Ninth Circuit adopted the four-part
21 test for a stay pending appeal that includes the third element "whether issuance of the stay will
22 substantially injure the other parties interested in the proceeding...." The Franklin Funds argue
23 that a stay will not seriously harm the City or its other creditors, because the City is "free to
24 conduct 'business as usual'...." (Motion 11). What the Franklin Funds neglect to mention is
25 that "business as usual" for Stockton means low employee morale and high employee attrition
26 due to the uncertainties arising from the City's financial difficulties and its ensuing chapter 9
27 bankruptcy. A stay of the Confirmed Plan will only extend that uncertainty and its
28 manifestations for an additional extended period of time.

As stated in the Declaration of Michael Eggener, filed herewith:

"One of the reasons for low morale and high attrition is that members of
OE3 have given up substantial compensation and benefits in exchange for a

1 promise that pensions would remain intact. However, it has never been certain
2 throughout the bankruptcy process whether Stockton would be able to keep its
part of the bargain.

3 The information that the bankruptcy judge had approved Stockton's plan
4 of adjustment was very good news for our members, because it removed a lot of
5 uncertainty that has contributed to low morale. Among the most important
6 message from confirmation of the plan was that at least the members felt that
7 their pensions were now safe. If the Court stayed the order confirming the plan
pending an appeal, that would be seen as a step back to OE3 members,
because it would create uncertainty all over again. That would most likely lead to
further attrition of Stockton employees."

8 The real harm of a stay in this situation, of course, will be to the City and its residents
9 due to the low employee morale and loss of key employees, especially in public safety
10 positions. Nevertheless, the harm suffered by the employees from the continuing uncertainty
11 in their lives, stretching back several years, cannot be disregarded. Indeed, after the relief
12 employees enjoyed when learning the Plan was confirmed, granting a stay of the Plan's
13 effectiveness would be the equivalent of pulling a rug out from under the employees just when
14 they thought it provided them with firm footing. Thus, it cannot be said that granting a stay
15 pending appeal will cause no substantial harm to other parties, because it will.

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18 **D. A stay pending appeal is not in the public interest.**

19 In this case the final two elements of the requirements for a stay pending appeal
20 somewhat merge. The harm to the City's employees and the resulting harm to the City from
21 continuing uncertainty immediately affects the residents of Stockton --- the same residents who
22 voted to increase their taxes in order to help Stockton emerge from bankruptcy. Those
23 residents now deserve to enjoy the fruits of their sacrifice arising from the implementation of
24 the Confirmed Plan.

25 The Franklin Funds' argument that California municipalities and municipal
26 bondholders have an interest in Franklin's appeal is unsupported by any evidence. It is a

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