No.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re CITY OF STOCKTON, CALIFORNIA, DEBTOR

MICHAEL A. COBB,

Objector and Appellant,

v.

CITY OF STOCKTON, CALIFORNIA,

Debtor and Appellee.

Appeal from the Order of the
United States Bankruptcy Court for the
Eastern District of California

PETITION OF MICHAEL A. COBB FOR PERMISSION TO APPEAL

Bradford J. Dozier SBN 142061
ATHERTON & DOZIER
305 N. El Dorado St., Suite 301
Stockton, California 95202
Telephone: (209) 948-5711

Counsel for Objector and
Appellant MICHAEL A. COBB

Pursuant to 28 U.S.C. § 158(d) and 8001(f) of the Federal Rules of Bankruptcy Procedure, Michael A. Cobb (hereafter "Cobb") respectfully petitions this Court to authorize a direct appeal from the order of the United States Bankruptcy Court for the Eastern District of California entered in *In Re City of Stockton, California, Debtor*, case number 12-32118, permitting petitioner Michael A. Cobb's claim for inverse condemnation against the debtor City Of Stockton, California (hereafter "the City"), to be treated as a general unsecured claim. In support of this petition, Cobb respectfully represents:

1. This Court has jurisdiction to hear a direct appeal of this order of the bankruptcy court pursuant to 28 U.S.C. § 158.

2. The factual and procedural background necessary to understand the question presented, FRAP 5(b)(1)(A), is as follows. These facts are drawn from a Joint Stipulation of Material Facts filed before the bankruptcy court.

Andrew C. Cobb, the father of Creditor Michael A. Cobb, was the owner of a parcel of land located at 4218 Pock Lane in Stockton, California, San Joaquin County Assessor's Parcel Number 179-180-07 (the "Parcel"). On August 10, 1998, the

Stockton City Council issued Resolution No. 98-0353 determining that the public necessity required the condemnation of a strip of land across the Parcel for purposes of building a public road.

In conformance with the procedures set forth in California Civil Procedure Code § 1255.010, the City had an expert appraiser conduct an appraisal of the strip of land for purposes of determining the amount of compensation believed to be just, and produce a summary of the basis for the appraisal. The appraisal valued the land at $90,200.00. On October 23, 1998, consistent with § 1255.010, the City deposited that amount with the California State Treasurer Condemnation Deposits Fund.

On October 23, 1998, the City initiated eminent domain proceedings in the Superior Court of California, County of San Joaquin (the "Eminent Domain Action") to condemn a permanent easement over the strip of land. On October 17, 2000, the Stockton City Council issued Resolution No. 00-0505 recognizing that the planned road over the Parcel had been completed and accepting that improvement. In November 2000, Michael A. Cobb, owner of the Parcel by operation of state probate and trust succession following the death of Andrew C. Cobb, withdrew the

City's deposit of probable just compensation in the amount of $90,200.00, subject and pursuant to California Civil Procedure Code § 1255.260.

On October 9, 2007, the Superior Court in the Eminent Domain Action dismissed that action because it had not been brought to trial within five years of its commencement. On March 14, 2008, Cobb initiated an action in the Superior Court of the State of California, County of San Joaquin (the "Inverse Condemnation Action"), seeking relief pursuant to a claim of inverse condemnation.

On June 28, 2012, while the Inverse Condemnation Action was still pending, the City petitioned for bankruptcy under chapter 9. On August 16, 2013, Cobb filed a Proof of Claim in the chapter 9 case. Cobb listed the total amount of his claim as $4,200,997.26, consisting of $1,540,000.00 as the principal of his claim; $2,282,997.26 as interest on the principal of his claim; $350,000.00 as attorney's fees and litigation expenses; $13,000.00 as costs of suit; and $15,000.00 as real estate taxes, maintenance costs, and insurance costs. Cobb did not indicate on his Proof of

Claim that the claim was secured or that the claim was entitled to priority under 11 U.S.C. § 507(a).

On November 15, 2013, the City filed the First Amended Plan for the Adjustment of Debts of City of Stockton, California. The City designated 19 classes of claims. Cobb's claim was included in Class 12 as a General Unsecured Claim. On February 3, 2014, the City filed its Memorandum of Law in Support of Confirmation of the First Amended Plan. On February 11, 2014, Cobb filed the Objection of Creditor Michael A. Cobb to Plan and Confirmation Thereof. Cobb objected on the ground that treating his claim as a general unsecured claim violates the Takings Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution.

On May 7, 2014, the bankruptcy court overruled Cobb's objection.

Pursuant to Federal Rule of Bankruptcy Procedure 8001(f)(5) and Federal Rule of Appellate Procedure 5(b)(1)(E)(i), attached hereto as Exhibit A is a copy of the order, decree, or judgment complained of and any related opinion or memorandum (transcript of decision stated at hearing).

On May 21, 2014, Cobb filed a notice of appeal with the

bankruptcy court and a statement of election to have the appeal heard by the United States District Court for the Eastern District of California.

On June 3, 2014, pursuant to 28 U.S.C. § 158(d) and Federal Rule of Bankruptcy Procedure 8001(f), Cobb and the City of Stockton, constituting a majority (all) of the appellants and appellees regarding the issue raised by and decided adversely against Cobb, jointly certified to the bankruptcy court that a circumstance specified in 28 U.S.C § 158(d)(2)(A)(i) – (iii) existed, namely that, the "the judgment, order, or decree involve[d] a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States."

On July 15, 2014, after the appeal was docketed with the United States District Court for the Eastern District of California, Cobb and the City of Stockton, continuing to constitute a majority (all) of the appellants and appellees regarding the issue raised by and decided adversely against Cobb, renewed the joint certification before the district court that a circumstance specified in 28 U.S.C § 158(d)(2)(A)(i) – (iii) existed, namely that, the "the

judgment, order, or decree involve[d] a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States."

By order dated August 6, 2014, and filed August 7, 2014, the district court certified this appeal to this Court. Pursuant to Federal Rule of Bankruptcy Procedure 8001(f)(5) and Federal Rule of Appellate Procedure 5(b)(1)(E)(ii), attached hereto as Exhibit B is a copy of the order stating the district court's finding that the necessary conditions are met for a direct appeal to be considered.

3. Pursuant to Federal Rule of Appellate Procedure 5(b)(1)(B), the question itself may be appropriately phrased as whether a bankruptcy claimant asserting a right to payment arising from a state law inverse condemnation action may be treated under a municipal organization bankruptcy plan as a general unsecured creditor consistent with the Takings Clause of the Fifth and Fourteenth Amendments.

4. Pursuant to Federal Rule of Appellate Procedure 5(b)(1)(C), the relief sought under this petition is for this Court to grant permission to Cobb for a direct appeal of the bankruptcy

court's order overruling his objection contending that as an inverse condemnation claimant he must be separately classified in the City of Stockton's bankruptcy claim and be paid "just compensation" under the state and federal constitutions rather than as a general unsecured creditor " subject to a ratable distribution. The ultimate relief sought by Cobb at the appellate level is reversal of that order and a remand requiring the City of Stockton to amend its bankruptcy plan to separately classify Cobb as an inverse condemnation claimant to be paid "just compensation" under the state and federal constitutions or to have the bankruptcy case dismissed if its fails to do so.

5. Pursuant to Federal Rule of Appellate Procedure 5(b)(1)(D), the reasons why the appeal should be allowed generally include that the order of the bankruptcy court appealed from involves important constitutional issues of apparent first impression concerning the interplay between the ability of the bankruptcy laws to adjust the debts of a municipal debtor, on the one hand, and the requirement that no governmental authority make take private property without payment of just compensation, on the other hand, and that the direct appeal of

these issues would materially advance the progress of the case or proceeding in which the appeal is taken due to the necessity of the City of Stockton to proceed with a bankruptcy plan of adjustment free from the uncertainty attendant to whether the appropriate classification to an inverse condemnation claimant in such a plan has been made. These reasons are discussed in further detail as follows:

A. The issues on appeal involve a question of law as to which there is no controlling decision of this (or any other) Court of Appeals or of the United States Supreme Court and involve a matter of public importance.

This appeal directly confronts the question of whether Congress' power to make bankruptcy laws (U.S. Const., Art. I, Sect. 8, Clause 4 [Congress may "establish . . . uniform laws on the subject of Bankruptcies throughout the United States"]) permits a municipality proceeding under Chapter 9 of the Bankruptcy Code to make provision in its plan of adjustment of debts to pay inverse condemnation claimants something less than "just compensation," which compensation would otherwise be required outside of bankruptcy (U.S. Const., Fifth Amend. ["nor shall private property

be taken for public use, without just compensation"]). Neither the appellant Cobb, nor the City of Stockton, were able to locate and present to the bankruptcy court any controlling decision of the Supreme Court or of any circuit Court of Appeals that addressed this issue at all. With the Chapter 9 provisions of the Bankruptcy Code dealing solely with the adjustment of debts of a municipality having been rarely invoked, yet now becoming significantly prevalent (e.g., City of Vallejo, City of San Bernardino, City of Stockton, and the largest of all, the City of Detroit), this issue is one of importance to the public at large and has no direct precedents really at any level to guide the lower courts.

There have been several Supreme Court cases that have made somewhat sweeping statements potentially protecting a creditor such as Cobb, stating such things as "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment" (*Louisville Joint Stock Land Bank* v. Radford, 295 U.S. 555, 55 S.Ct., 854, 863 (1935)) and that Congress' constitutional bankruptcy power "is subject to the Fifth Amendment's prohibition against taking private property without compensation" (*U.S. v. Security Indus. Bank*, 459 U.S. 70, 75

(1982)), but in those cases no municipality nor any condemnation or inverse condemnation claims were involved. However, the effect of the bankruptcy laws on a creditor who holds a claim that the debtor municipality took his property without payment of just compensation for it has never been dealt with in any case that the petitioner has been able to locate. Indeed, in this case, the bankruptcy court found that the Fifth Amendment *does not* require Cobb to be paid just compensation, despite the broad pronouncements set forth above.

This Court has authorized direct appeals where the matter met either or both of the question-of-law-as-to-which-there-is-no-controlling-decision factor or the involves-a-matter-of-public-importance factor under 28 U.S.C. § 158(d)(2)(A)(i). (See, e.g., *Blausey v. U.S. Trustee,* 552 F.3d 1124, 1128 (9th Cir. 2009).) That the dispute (like here) involved a matter of first impression has also been cited as a basis for authorizing a direct appeal. (*Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d 1045, 1047 (9th Cir. 2009).)

The Fifth Circuit has also noted with respect to 28 U.S.C. § 158 that "[t]he twin purposes of the provision were to expedite

appeals in significant cases and to generate binding appellate precedent in bankruptcy, whose case law has been plagued by indeterminacy." (*In re Pac. Lumber*, 584 F.3d 229, 241-242 (5th Cir. 2009).) When the statute was proposed by the House of Representatives, the committee report stated its recommendation that the Court of Appeal take up direct appeals where the certification circumstances exist. (See H.R. Rep. 109-31, at p. 148 (House Judiciary Committee Report by Rep. Sensenbrenner) (April 18, 2005) [stating that "[t]he courts of appeals are encouraged to authorize direct appeals in these circumstances [where grounds for certification exist]"].)

Accordingly, because this appeal presents issues of first impression that involve significant questions important to municipality debtors and to their creditors, petitioner seeks for this Court to authorize a direct appeal to it to settle these questions for which no precedents exist and which involve significant issues of public importance.

B. A direct appeal to this Court would materially advance the progress of the case or proceeding by reducing delay associated with a two-level appeal and enable the City of Stockton to have certainty with respect to

its plan of adjustment and enable Cobb to have protection against a possible equitable mootness determination made as to his constitutional claim.

This appeal arises from bankruptcy court proceedings. By their very nature, bankruptcy cases must progress with some speed so as to enable the debtor to deal with its debts and move toward a "fresh start." (See Barbara B. Crabb, *In Defense of Direct Appeals: A Further Reply to Professor Chemerinsky*, 71 AM. BANKR. L.J. 137, 144 (1997) ["Bankruptcy matters proceed at a pace entirely different from most of the litigation that comes before district courts. Many of the questions that arise must be dealt with immediately if the ongoing businesses are to be kept operating."].) Further, an appeal under section 158(d) "does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective [court] . . . issues a stay of such proceeding pending the appeal." (28 U.S.C. § 158(d)(2)(D).)

Here, the creditor Cobb, having suffered an adverse ruling that his claims for inverse condemnation may be treated as general unsecured debts subject to a ratable distribution instead

of mandatory payment of "just compensation," needs to avoid a lengthy (possibly two-step) appeal process where the debtor City of Stockton continues to seek confirmation of its plan of adjustment that treats inverse condemnation claimants no differently from general unsecured creditors. So too, the City of Stockton also needs to avoid a lengthy (possibly two-step) appeal process where the legal foundation for a confirmed plan of adjustment may be called into question.

The doctrine of "equitable mootness" becomes thus implicated by this appeal, where the bankruptcy court order, even if erroneous and depriving Cobb of his constitutional rights, might be upheld simply because the City of Stockton had proceeded under a confirmed bankruptcy plan of adjustment (even if erroneously permitting inverse condemnation claimants to be lumped in with all general unsecured creditors). The doctrine of equitable mootness allows an appellate court to deny an otherwise legitimate review of an appeal if an order (often a reorganization plan) has progressed to the point where granting relief would be inequitable or impractical. (See, e.g., *Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1038-39 (5th

Cir. 1994) ["In [bankruptcy proceedings], 'mootness' is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions."]; see also Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L. & PRAC. 33, 45-46 (2010) ["The equitable mootness doctrine constitutes a judicial anomaly in that it permits a federal court to voluntary [sic] refrain from exercising jurisdiction over an appeal that is indisputably ripe for adjudication simply on the ground that granting relief would be 'inequitable.'"].) Under the doctrine, if actions take place during the appeal that preclude the appellate court from providing the party with the requested relief, the appeal may be deemed moot and effectively extinguish a party's (particularly a bankruptcy creditor's) right to appellate review. (Cf. *In re Continental Airlines,* 91 F.3d 553, 567 (3d Cir. 1996) (Alito, J., dissenting), describing equitable mootness as "permitting federal district courts and courts of appeals to refuse to entertain the

merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief.")

Where the bankruptcy case of the City of Stockton remains moving forward, and a plan of adjustment presented and subject already to a confirmation trial, it is necessary in order to protect claims of constitutional and public importance to be addressed at the earliest stage and by an appellate court whose decision is not subject to further appeals as a matter of right. Petitioner urges that an appeal as here presented is entirely suitable for a direct appeal by this Court and is within the intention of Congress in enacting 28 U.S.C. § 158. (See Don Beskrone & Ricardo Palacio, *Interlocutory Direct Appeals Under BAPCPA: Questionable Role of the Bankruptcy Court*, AM. BANKR. INST. J., July–Aug. 2007, at p. 10 ["The legislative intent behind the new statute, embodied in 28 U.S.C. § 158(d)(2), was to facilitate the efficient resolution of bankruptcy appeals and reduce attendant cost and delay.") Moreover, the question presented in this appeal is starkly legal in nature, dependent only on agreed facts that the parties jointly presented to the bankruptcy court, and may be resolved by this

Court's legal analysis of the limits, if any, on the bankruptcy power in the face of a citizen's claim that the debtor municipality took his property without just compensation. This limited, yet undoubtedly important issue, makes this Court's direct handling and decision of the appeal appropriate. (E.g., *Weber v. United States Trustee* 484 F.3d 154, 158 (2d Cir. 2007) ["When a discrete, controlling question of law is at stake, we may be able to settle the matter relatively promptly."].)

Because of the risk to Cobb that the constitutional issue raised by this appeal could be rendered moot, and the risk to the City of Stockton that its bankruptcy plan might be constitutionally defective, and given that the narrow question presented is one that may be expeditiously determined by this high-level appellate Court, petitioner submits that a direct appeal ought to be authorized.

6. Also pursuant to Federal Rule of Appellate Procedure 5(b)(1)(D), the reasons why the appeal is authorized by a statute or rule is that 28 U.S.C. § 158(d) and Rule 8001(f) of the Federal Rules of Bankruptcy Procedure each authorize a direct appeal of an order of a bankruptcy court.

7. For the reasons set forth above, petitioner seeks for this Court to authorize a direct appeal in this matter.

Dated: September 4, 2014

Respectfully submitted,

ATHERTON & DOZIER

Bradford J. Dozier
Counsel for Objector and
Appellant MICHAEL A. COBB

Exhibit A

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:	Case No. 12-32118-C-9
CITY OF STOCKTON, CALIFORNIA,	
Debtor(s).	

ORDER OVERRULING OBJECTION TO CONFIRMATION OF PLAN OF ADJUSTMENT

Findings of fact and conclusions of law having been stated orally on the record in which this court chronicled the history of the condemnation and inverse condemnation actions that formed the basis of Michael Cobb's claims and noting that the decision of the California Court of Appeal regarding statute of limitations for the inverse condemnation action filed in 2007 by Michael Cobb (Cobb v. City of Stockton, 192 Cal. App. 4th 65, 120 Cal. Rptr. 3d 389, Cal. App. 3 Dist., January 26, 2011), dealt with only a narrow statute of limitations question that did not foreclose such other defenses as laches against Michael Cobb for having done nothing to pursue his claim for greater compensation, which was all that remained (pursuant to California Code of Civil Procedure § 1255.260) after he withdrew in November 2000 the $90,200 that the City had deposited in the state treasury as probable compensation, and that continues to restrict his remedies even after the initial condemnation action was dismissed

in 2007 on account of inaction (the majority of which inaction is ascribed to Michael Cobb who had the burden of going forward after withdrawing the deposit) and for the other reasons explained on the record,

IT IS ORDERED that the objection of Michael Cobb to confirmation of the pending plan of adjustment filed by the City of Stockton on account of his treatment as an unsecured creditor is OVERRULED.

Dated: May 7, 2014.

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

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HON. CHRISTOPHER M. KLEIN
COURTROOM THIRTY-FIVE
DEPARTMENT C

In re: CITY OF STOCKTON, CALIFORNIA, Debtor.	Bankruptcy No. 12-32118-C-9 **AMENDED TRANSCRIPT**

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

held on

Wedneday, May 7, 2014

9:30 a.m.

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Reported by: ERIC L. THRONE, CSR No. 7855, RPR, RMR, CRR

A P P E A R A N C E S:

For the City of Stockton:

ROBERT M. LOEB, Esq.
Orrick, Herrington & Sutcliffe LLP
1152 Fifteenth Street
Washington, DC 20005

For Debtor Michael A. Cobb:

BRADFORD J. DOZIER, Esq.
Atherton & Dozier
305 N. El Dorado Street, Suite 301
Stockton, California 95202

For Franklin High Yield Tax Free Income Fund and Franklin California High Yield Municipal Fund:

JOSHUA D. MORSE, Esq.
Jones Day
555 South Flower Street, 50th Floor
Los Angeles, California 90071-2452

For Wells Fargo Bank:

ADRIENNE K. WALKER, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
One Financial Center
Boston, Massachusetts 02111

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declaratory relief is irrelevant because the relief of obtaining a property back is subsumed by the inverse condemnation claim. So the extent that ejectment was not appealed is nonetheless part of the relief that Mr. Cobb may get in inverse condemnation.

And we have cited the Frustruck case for that principal, which is a case cited by both sides, which holds that under California law if the full fair market value is not paid, then a judgment may lie to prevent even an intervening public use. So to that extent, it's duplicative.

With respect to their argument that even a contract right is determined to be protected by the due process clause, that's true. But there's rafts of cases that say the bankruptcy clause permits adjustment of contract rights.

So there's always been a long historical difference between property rights on the one hand and contract rights, one of which is protectable against the bankruptcy clause, one of which is not. And those are our comments.

THE COURT: All right. So I'm going to take a couple minute recess. I want to check something and come back and make a ruling.

MR. DOZIER: All right.

(Recess.)

THE COURT: All right. These are my findings of fact and conclusions of law on the question of the objection to

confirmation based on classification of the Cobb claim in the way it has been proposed.

I will start by noting that the key statute which is focused on is California Code of Civil Procedure, Section 1255.260, which states that if any portion of the money deposited to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law all claims and defenses in favor of the persons receiving such payment, except a claim for greater compensation.

The stipulated facts establish that the sum of $90,200 was deposited consistent with Section 1255.010 of the California Code of Civil Procedure, and that is the first section of Chapter 6 that is titled Deposit and Withdrawal of Probable Compensation, Possession Prior to Judgment. So that is this chapter that is referred to in 1255.260.

Those funds were deposited on October 23, 1998. On December 1, 1998, in the action to condemn a permanent easement over the strip of the relevant strip of land, the Superior Court issued an order for prejudgment possession in favor of the city, finding that the city had made a deposit of probable just compensation and filed a summary of the basis for the appraisal opinion, both of which meet the requirements of Code of Civil Procedure, Section 1255.010.

The road was built and was completed before October 17, 2000, which is the date in which the city council

issued its Resolution Number 00-0505, accepting the improvement.

In November, 2000, Michael Cobb withdrew the deposit of probable just compensation in the amount of $90,200, pursuant to California Code of Civil Procedure, Section 1255.260.

While the eminent domain action was still pending in 2007, Mr. Cobb attempted to return the funds to the State Treasurer Condemnation Deposit Funds, from which he had withdrawn, which effort was not successful. The California State Treasurer returned the amount.

And then on October 9, 2007, the Superior Court dismissed the eminent domain action because it had not been brought to trial within five years of its commencement, and thereafter the inverse condemnation action was filed, that is, in March, 2008.

That led to a demurrer and a series of complaints to which there were demurrers, that is, motions to dismiss on asserting various defenses and the final instance of that led to an appeal to the California Court of Appeal, Third Appellate District.

That was the appeal from the decision of the San Joaquin County Superior Court that concluded that the quiet title count, the ejectment count, and the trespass claims were all barred by the doctrine of intervening public

use, and in addition it treated it based on its prior express view, it treated the inverse condemnation action as time-barred.

So the dismissal was appealed. However, that's the appeal that was filed June 15, 2009, but the appeal was limited to the dismissal of the inverse condemnation action on statute of limitation grounds. There was not a dismissal of the appeal of quiet title count, the ejectment count, the trespass count or the declaratory relief claims.

The Court of Appeal in the decision that was interesting, in a couple of respects, concluded that from the standpoint of an inverse condemnation action the cause of action was not time-barred, because the city's occupation of the property before the dismissal of the condemnation action could not be regarded as wrongful.

The Court of Appeal's decision is significant, also, for noting that it regards the facts as unique and notes that it has not found cases that involved similar situations and that no doubt was a reason that it chose to publish its decision.

And the decision is very narrowly focused on the statute of limitations and stands for the proposition that an inverse condemnation claim does not accrue until the city's, the public entity's occupation of property became wrongful, and that does not occur and did not occur before the eminent

domain proceeding was dismissed.

Now that's a decision that does not conclude that the city's occupation is wrongful, it merely was treating the matter as a pleading matter in which it was holding open the possibility that it could be demonstrated that the action was wrongful.

It has been argued that the bankruptcy clause of the U.S. Constitution applies only to contract claims, it does not apply to property grounds. That is not my understanding of the way the constitutional analysis has occurred.

The bankruptcy clause is not limited solely to contract rights. Of course the takings clause of the Fifth Amendment requires due process of law. And to the extent the takings clause has been considered in connection with the bankruptcy clause, the bankruptcy clause and the statutes enacted pursuant to it is currently the United States Bankruptcy Code. And there were previous bankruptcy statutes beginning at 1800 that the view is that those statutes established the due process that was appropriate.

So to the extent property rights are adjusted in bankruptcy, it is regarded as complying with or consistent with the due process of law that's referred to by the Fifth Amendment. The contrary was argued and I reject that proposition.

The contention is that this is really only about money

and that is fully consistent with Section 1255.260. Now at this point I have to get into some basic civil procedure matters involving the first eminent domain action, that is, the city's action to condemn the easement.

Section 1255 provides a mechanism for withdrawing the funds that were deposited. That's the first half of it. But the second half is the withdrawal shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment, except a claim of greater compensation.

Now Mr. Cobb tried to back out of the consequences of that by attempting to return the funds, which effort was not successful, and it is significant that the California Court of Appeal did not address Section 1255.260 in the decision that it filed on January 26, 2011. It does not say what the consequence is of that.

But we know from the condemnation action that the road was built, the funds were deposited, the funds were withdrawn and the consequence of the withdrawal of the funds by Mr. Cobb was that he had waived, by operation of law, all claims and defenses he had, except a claim for greater compensation.

Now that withdrawal occurred in November of 2000, the year 2000. The action remained on the books of the Superior Court for another seven years or nearly seven years,

November, 2000, to July 2, 2007, before Mr. Cobb did anything with respect to the funds, and what he did was he tried to return them.

Well, as a matter of straightforward procedural law, the burden of proof, the burden of proof is substantive -- and the Supreme Court reminds us in Illinois Department of Revenue v. Raleigh -- the burden of proof is on the city in the action, that's the burden of proof that the compensation is correct in the long-run, and that the taking is authorized.

But the withdrawal reduced the matter just to the claim of greater compensation. The city had obtained an appraisal, it had an appraisal of establishing probable just compensation and pursuant to California law had deposited that fund into a California State Treasurer Condemnation Deposit Fund, a place from which it was withdrawn.

At that point, the road was built, the city had contended that probable compensation, the probable compensation was $90,200 and the owner of the parcel had accepted the probable compensation by withdrawing it but still had, in principal, a contention that more should be paid.

At that point, while the burden of proof did not shift, the burden of going forward did shift to Mr. Cobb. He's the one who wanted more money, he is the one with the

incentive to get it, and he sat on his hands for seven years.

It is significant to me that the Superior Court did not dismiss the eminent domain action until after Mr. Cobb had attempted to return the condemnation deposit funds or attempted to return the withdrawn funds to the California State Treasurer Condemnation Deposit Funds.

That tells me that he had decided that he wanted to pursue an inverse condemnation action. And from the size of the claim that is asserted in the bankruptcy case, it is apparent that that claim is over $4 million, $1,500,000 is alleged to be the basic condemnation amount.

It's apparent that he thinks that he's holding a winning ticket in the lottery, and I don't know whether in the end that would have worked out or not. But the most -- even in the subsequent action, as I understand the rules of preclusion, that he could obtain is just greater compensation for the taking that occurred back when the road was built and that is the taking of the easement.

The dismissal of the action did not, that is of the condemnation action, that the precise effects are something that the California Supreme Court has not parsed out; but it's apparent that it is far too simple to say "Well, a dismissal restores everybody to the status quo anyway."

There were two irrevocable things that had occurred, that would not restore to the status quo: Number one, the

road was built; number two, Mr. Cobb, by withdrawing funds, had waived by operation of law all claims and defenses he had to a condemnation claim. Direct condemnation or inverse condemnation is the way I read the statute, so all he can do is claim more money.

At the time that the action was being dismissed for not having been brought to trial within five years of commencement. Of course when the Court is doing that in 2007 on an action that was commenced in 1998, part of the discussion that occurs as well is, "Are we going to get it to trial right away very promptly or not"?

Because obviously it's not an automatic five-year dismissal, it's by virtue of California law an action that has been pending for five years is not going to be allowed to remain on the books without good cause. Again, it's a very straightforward proposition of California law.

In addition, I come back to the Third Court of Appeal decision of January 26, 2011. And as I indicated, it's significant for what it does not say, as for what it does say. It focuses very narrowly on the question of statute of limitations.

Well that is not the only defense that flies off the page here from looking at these facts. We know, for example, that standard principles of estoppel apply in the inverse condemnation context.

You'll find that in a number of sources. A straightforward statement of it is in federal litigation, the United States District Court, in this district, is Sumner Pack Ranch Incorporated v. Bureau of Reclamation, which is recorded at 823 F. Supp. 715, a 1993 decision, at page 736. And that, of course, sites the California decision of Patrick Media Group v. The California Coastal Commission, reported at 9 Cal. App. 4th 592, a 1992 decision.

And we know that along the forms of estoppel and other equitable remedies or equitable defenses, those in California do apply in the -- can apply against the State of California or the California public entities in an inverse condemnation context.

You have the California Supreme Court doing exactly that in Jones v. The People, ex rel. The Department of Transportation, which is 1978 decision reported at 22 Cal. 3d 144, specifically the discussion at 170 -- yes, at page 171.

And reciprocally if it can be applied against the State of California, it can be applied against the other party in a condemnation action, but the point is that this applies to all parties in the relevant action.

So Mr. Cobb has a very steep hill to climb in his action for greater compensation in the California courts, and that's a matter for the California courts to litigate.

But it is apparent that all he is entitled to at this point is the right to contend that he was entitled to more than $90,200. If he's saying "Well, at this point it's, well the proof of claim is $4,200,997.26, which is the principal of the $1,540,000 -- I suppose that's above the $90,200 plus the 2.8, that is, $2.28 million in interest, and then to add attorney's fees of $350,000 in miscellaneous costs and so on.

And that brings us back to the treatment in the bankruptcy case. The treatment is as an unsecured claim, either as a general unsecured claim or the analysis would also apply for categorization as a tort claim.

And as I just indicated, I do not believe that the fact that this was rooted in a condemnation in these peculiar circumstances -- and I emphasize "peculiar circumstances" -- because that's exactly what the Third District Court of Appeal did in pointing out that it just could not find any cases dealing with the constellation of facts.

The bankruptcy clause does permit the adjustment of a debt for greater compensation. As soon as Mr. Cobb withdrew the funds and waived by operation of law all claims and defenses in his favor, except a claim for greater compensation, he had reduced himself just to a claim for money, that's a debt, and that is a debt that's capable of being adjusted. And if it were reduced to judgment, it would be a general unsecured debt at the moment the judgment was

issued.

Therefore, I am persuaded that the classification of the comp claim, as it has been classified in the plan, is appropriate. And therefore the objection to confirmation on that basis is overruled and I will issue an order to that effect.

MR. DOZIER: That's my question, Your Honor. The Court will be issuing a written order?

THE COURT: Yes, I will write a written order.

And of course under the Federal Rules of Civil Procedure, this is unlike the practice in the state court, the findings of fact and conclusions of law of a federal judge are entitled to be stated orally upon the record and left at that, it does not have to be further reduced to writing.

So anybody who wants a copy needs to order a copy of the transcript from the court reporter. And the court reporter's official transcript is the official record of the findings of fact and conclusions of law.

I hope I stated them accurately enough so that they are coherent for anybody who buys a copy of it. And I will prepare the order. And with that, we're adjourned.

MR. DOZIER: Thank you, Your Honor.

MR. LOEB: Thank you.

(Proceedings concluded.)

COURT REPORTER'S CERTIFICATE

State of California)
) ss.
County of Sacramento)

I, ERIC L. THRONE, hereby certify that I am a Certified Shorthand Reporter and that I recorded verbatim in shorthand the proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and that pages 1 through 29, inclusive, constitute a complete, true, and correct record of said proceedings:

COURT: United States Bankruptcy Court
Eastern District of California

JUDGE: HONORABLE CHRISTOPHER M. KLEIN

CAUSE: In re: CITY OF STOCKTON, CALIFORNIA, Debtor.

Case No. 12-32118-C-9

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on the 7th day of May, 2014.

_____
ERIC L. THRONE, CSR No. 7855, RPR, RMR, CRR

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Exhibit B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

In re: **City of Stockton, California** Debtor. **Michael A. Cobb**, Appellant, v. **City of Stockton, California**, Appellee.	District Court Case Number NO. **2:14−CV−01272−KJM** Bankruptcy Court Case Number NO. **12−32118−C−9** **STIPULATION AND ORDER ON REQUEST FOR CERTIFICATION TO COURT OF APPEALS BY ALL PARTIES**

Appellant Michael A. Cobb and Appellee the City of Stockton (collectively, the "Parties"), through their respective counsel, hereby stipulate to the following:

1. On June 3, 2014, the Parties jointly filed their Official Form 24 – Certification To Court Of Appeals By All Parties [Bankr. Dkt. No. 1540] ("Certification Request") with the bankruptcy court. The Certification Request, a copy of which is attached hereto as Exhibit A, requests certification of this action to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 158(d).

2. Section 158(d)(2)(B)(ii) permits parties to a bankruptcy appeal to request certification to the court of appeals when they agree that circumstances warranting direct appeal

to the court of appeals are present. Upon such "request made by a majority of the appellants and a majority of the appellees," the court "shall make the certification" requested. *Id*. Certification in these circumstances is required and non-discretionary.

3. Federal Rule of Bankruptcy Procedure 8001(f)(3)(A) provides that the parties' request for certification "shall be filed . . . with the clerk of the court in which the matter is pending." For purposes of a request for certification of a bankruptcy appeal, Federal Rule of Bankruptcy Procedure 8007(b) provides that a matter is pending in the bankruptcy court until the record has been transmitted to the district court.

4. Although this action was pending in the bankruptcy court when the Parties filed the Certification Request, the record on appeal has now been transmitted to this Court with no action having been taken on the Certification Request. This Court is therefore now the court in which the matter is pending. The bankruptcy court clerk's Certificate Of Record To District Court Re: Bankruptcy Cases [Dkt. No. 3] is attached hereto as Exhibit B.

5. The undersigned respectfully renew their Certification Request before this Court, and request that the Court, pursuant to 28 U.S.C. § 158(d)(2)(B)(ii), and based on the information set forth in the Certification Request, enter the certification to the Court of Appeals for the Ninth Circuit.

/ / /

/ / /

Dated: July 15, 2014

MARC A. LEVINSON
ROBERT M. LOEB
Orrick, Herrington & Sutcliffe LLP

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

Dated: July 15, 2014

BRADFORD J. DOZIER
Atherton & Dozier

By: */s/ Bradford J. Dozier (as authorized on July 15, 2014)*
BRADFORD J. DOZIER
Attorney for Appellant
Michael A. Cobb

Based on the information set forth in the parties' certification request, and under 28 U.S.C. § 158(d)(2)(B)(ii), the court hereby certifies this action to the Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

DATED: August 6, 2014.

PROOF OF SERVICE BY FIRST-CLASS MAIL

1. I am over eighteen years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place.

2 My residence or business address is 305 N. El Dorado St., Suite 301, Stockton, CA 95202.

3. On September 5, 2014, I mailed from Stockton, San Joaquin County, California, the attached "PETITION OF MICHAEL A. COBB FOR PERMISSION TO APPEAL."

4. I served the document by enclosing it in an envelope and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid, first-class.

5. The envelope(s) was/were addressed and mailed as follows, with the following name(s) and address(es) of the person(s) served:

ORRICK, HERRINGTON & SUTCLIFFE, LLP
Marc A. Levinson
400 Capitol Mall, Suite 3000
Sacramento, CA 95814-4497

ORRICK, HERRINGTON & SUTCLIFFE, LLP
Robert M. Loeb
Columbia Center
1152 15th Street
Washington, D.C. 20005

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Date: September 5, 2014

Marcie R. Nishizaki

Atherton & Dozier
ATTORNEYS AT LAW
105 N. EL DORADO ST., STE. 301
STOCKTON CA 95202
Telephone (209) 948-5711