No. 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

BRIEF OF *AMICI CURIAE* FRANKLIN HIGH YIELD TAX-FREE INCOME FUND AND FRANKLIN CALIFORNIA HIGH YIELD MUNICIPAL FUND IN SUPPORT OF APPELLANT'S OBJECTION TO MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund are not corporations subject to disclosure pursuant to Federal Rule of Appellate Procedure 26.1.

Dated: June 15, 2015

/s/ James Johnston

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Amici curiae Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund (collectively, "Franklin") support appellant Michael A. Cobb's objection to the motion by appellee City of Stockton, California (the "City"), to dismiss this appeal as equitably moot.

INTEREST OF *AMICI CURIAE*

Franklin has a direct and distinct interest in this appeal. Like Cobb, Franklin is a creditor of the City. As with Cobb's claim, the City's plan of adjustment (the "Plan") provides for discharge of Franklin's unsecured claim through a payment of less than 1% of its allowed amount. The Bankruptcy Court overruled Franklin's and Cobb's objections to confirmation of the Plan. Like Cobb, Franklin has appealed the Bankruptcy Court's confirmation order.

However, unlike Cobb, who was authorized to appeal directly to this Court, Franklin's appeal is now pending before the United States Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP"). Briefing in Franklin's appeal before the BAP has not yet concluded. If the City persuades this Court that Cobb's appeal is equitably moot, the City may attempt to use that ruling in seeking dismissal of Franklin's own appeal. As a consequence, a disposition of the City's motion here is relevant to and may impact Franklin.

BACKGROUND

The City's Plan provides for a payment of less than 1% on Cobb's $4.2 million inverse condemnation claim and Franklin's $30.5 million unsecured claim for repayment of bonds.

Cobb and Franklin filed separate appeals of the Bankruptcy Court's confirmation order. Cobb's appeal is pending before this Court via direct appeal pursuant to 28 U.S.C. § 158(d). Franklin's appeal is pending before the BAP pursuant to 28 U.S.C. § 158(b). Final orders of the BAP are appealable to this Court pursuant to 28 U.S.C. § 158(d), meaning that issues now under consideration in Franklin's appeal may be considered by this Court in the future.

ARGUMENT

Equitable mootness is a "prudential" and "'judge-made abstention doctrine.'" *In re Mortgages, Ltd.*, 771 F.3d 1211, 1214 & n.2 (9th Cir. 2014) (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. Co.*, 517 U.S. 706, 716 (1996); *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (request to "decline to adjudicate . . . claim on grounds that are 'prudential,' rather than constitutional[,] . . . is in some tension with our recent reaffirmation of

the principle that 'a federal court's 'obligation' to hear and decide' cases within its jurisdiction is 'virtually unflagging'") (quotation omitted); *Bennett v. Jefferson Cnty., Ala.*, 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 presumptive position remains that federal courts should hear and decide on the merits cases properly before them." *Id.* at 326. Consequently, "[t]he party moving for dismissal on mootness grounds bears a heavy burden," *Mortgages, Ltd.*, 771 F.3d at 1214, and dismissal "should be 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.

In particular, the doctrine 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)).

Thus, an appeal of a confirmation order 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 Focus Media, Inc.*, 378 F.3d 916, 924 (9th Cir. 2004) (no equitable mootness 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) (no equitable mootness where court "not faced with a situation in which we have the impossible task of putting Humpty Dumpty together again").

Any measure of equitable appellate 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.*, *In re Pacific Lumber Co.*, 584 F.3d 229, 241 (5th Cir. 2009) (no equitable mootness even where "a creditor could not obtain full relief"); *In re Chateaugay Corp.*, 10 F.3d 944, 954 (2d Cir. 1993) (no equitable mootness where "fractional recovery" is possible).

Further, "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).

Equitable mootness is applied, if at all, "with a scalpel rather than an axe." *Id.* at 240.

Within that framework, Cobb's appeal of confirmation is not equitably moot for at least two independent reasons. First, the Court can fashion effective relief without unraveling the Plan merely by ordering the City to pay more than 1% on Cobb's claim, notwithstanding Cobb's failure to request a stay pending appeal. Second, as *Jefferson County* recently held, the doctrine of equitable mootness should not be extended to chapter 9 cases like the City's due to policy and prudential concerns unique to municipal bankruptcy.

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

Cobb objected to the Plan on the ground that impairment of his claim for just compensation – through 1% payment under the City's Plan – would be an unconstitutional violation of the Fifth Amendment. There are two basic forms of appellate relief the Court could grant if it determines that the Bankruptcy Court erred in overruling Cobb's objection: it could order that Cobb's claim (asserted in a disputed amount of $4.2 million) cannot be impaired and thus "rides through" the City's bankruptcy case unimpaired; or it could order the City to make a payment of more than 1% on the claim.

Neither remedy would unravel the Plan. The City could make payments to Cobb without recovering or impacting distributions already made to any other

creditors under the Plan. Evidence adduced at the trial on confirmation established that the City will generate millions of dollars with which it could pay impaired claims over the coming decades (the period in which the City is paying other pre-bankruptcy creditors under the Plan). That is a core premise of Franklin's appeal, and Franklin summarizes the relevant evidence on pages 17-21 and 34-39 of its opening brief before the BAP, an excerpt of which is attached as Exhibit A.

The Bankruptcy Court understood this. As Cobb notes in his objection, the Court denied Franklin's motion for a stay pending appeal 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, "having to upset too much of the compromises that have been reached," or otherwise unraveling the Plan. The Court stated that it was "not terrified of the potential consequences" of reversal because "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." Cobb Obj. at 15-17 (quoting Bankruptcy Court).

None of the declarations attached to the City's motion state that the City could not pay more money to Cobb or that reinstatement of Cobb's claim would be problematic. 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 ("[W]e 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. Therefore, we hold that this appeal is not equitably moot.").

Accordingly, there is no evidence to support the foundational premise of the City's motion. And this Court repeatedly has refused to dismiss bankruptcy appeals in which payment of money, with no material impact on a confirmed plan, provided an effective remedy. *E.g.*, *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9th Cir. 2002) ("Even if the plan has been substantially consummated, because Platinum's claim is only for monetary damages against solvent debtors, this is not a case in which it would be impossible to fashion effective relief."); *Thorpe*, 677 F.3d at 883 (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) ("We can fashion effective relief by ordering Debtor, who is a party to this appeal, to return the money to the estate."); *In re International Envtl. Dynamics, Inc.*, 718 F.2d 322, 326 (9th Cir. 1983) (same).

II. Cobb Was Not Required To Seek Or Obtain A Stay Under The Circumstances Of The City's Case.

The City argues that Cobb forfeited his right to appellate relief because he did not seek a stay pending appeal. Mot. at 1, 7-8. (Franklin did seek a stay). Bankruptcy appeals, however, are not a game of "gotcha." There is no requirement to seek (much less obtain) a stay under facts like those here.

This Court has held that appellants need not seek a stay in all circumstances. *See, e.g.*, *Mortgages, Ltd.*, 771 F.3d at 1215 (describing instances in which "an appeal is not equitably moot despite the failure to seek a stay"); *Sylmar*, 314 F.3d at 1074 (no mootness despite failure "to seek or obtain a stay"); *Spirtos*, 992 F.2d at 1006-07 (because "effective and equitable" relief may be fashioned, no mootness despite failure to seek a stay).[1]

Rather, as stated in the case on which the City primarily relies, "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

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[1] The Court definitely has not conditioned appellate relief on a successful application for a stay. *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) (appeal not moot despite failure to obtain a stay); *Focus Media*, 378 F.3d at 924 (same); *Lowenschuss*, 170 F.3d at 933 ("Because we can fashion effective relief for events that transpired as a result of the bankruptcy court's refusal to grant Selnick's request for a stay, Selnick's appeal is not equitably moot."); *Baker & Drake*, 35 F.3d at 1351 ("Failure to obtain a stay, standing alone, is often fatal but not necessarily so."); *International Envtl.*, 718 F.2d at 325-26 (appeal not moot despite failure to obtain a stay).

creates a situation rendering it inequitable to reverse the orders appealed from." *Mortgages, Ltd.*, 771 F.3d at 1215-16 (quoting *Roberts Farms*, 652 F.2d at 798) (emphasis added). As the BAP observed in synthesizing this Court's mootness jurisprudence, "[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*, BAP No. NC-13-1299-PaJuKu, 2014 Bankr. LEXIS 5061, at *19 (9th Cir. BAP Oct. 23, 2014) (emphasis added); *see id.* at *20 (appeal not moot despite no effort to seek stay, with "no satisfactory explanation for the failure to do so").

There is no evidence that an order directing that the City pay more than 1% on Cobb's claim would be inequitable. As a result, Cobb need not have sought or obtained a stay as a condition to appellate review of his objection to the Plan.

III. The Court Should Not Extend The Doctrine Of Equitable Mootness To Chapter 9 Cases.

Finally, the City has not shown that the doctrine of equitable mootness applies in a municipal bankruptcy case under chapter 9. The District Court for the Northern District of Alabama recently considered this exact 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.

That court noted that the doctrine is "based on Chapter 11 concepts that may be inapplicable to or inappropriate for this Chapter 9 case." *Id.* 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 in the purposes of Chapter 9 and Chapter 11 reorganizations alter analysis of whether equitable considerations should factor into this court's decision to hear the [] appeal." *Id.* at 636 (quotations omitted).

In denying Franklin's motion for a stay, the Bankruptcy Court touched upon this distinction. Unlike a corporate debtor, the City cannot go out of business. Unlike an individual debtor, the City cannot die. As the Bankruptcy Court recognized, the City will exist for the foreseeable future, and it always will be able to provide at least some modicum of "fractional" relief to Cobb in the event of a reversal on appeal without unduly or inequitably impairing the rights of others.

CONCLUSION

For all of these reasons, Cobb's appeal is not equitably moot. The Court should deny the City's Motion and proceed to hear the merits of the appeal.

Respectfully submitted,

June 15, 2015

/s/ James O. Johnston

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as made applicable by Fed. R. App. P. 29(d), because the brief contains 2,491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: June 15, 2015

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STATEMENT REQUIRED BY FRAP RULE 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici curiae* Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund (collectively, "Franklin") confirm that (A) no party's counsel authored any part of Franklin's *amicus* brief; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting Franklin's amicus brief; and (C) no person – other than Franklin, its members, or its counsel – contributed money that was intended to fund the preparation and submission of Franklin's *amicus* brief.

Dated: June 15, 2015

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EXHIBIT A
(Excerpts Of Franklin's Opening Brief)

CASE NO. EC-14-1550

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re CITY OF STOCKTON, CALIFORNIA, *Debtor.*

FRANKLIN HIGH YIELD TAX-FREE INCOME FUND and
FRANKLIN CALIFORNIA HIGH YIELD MUNICIPAL FUND, *Appellants*,

v.

CITY OF STOCKTON, CALIFORNIA, *Appellee*.

Appeal from the United States Bankruptcy Court for the Eastern District of California, Case No. 12-32118

OPENING BRIEF OF APPELLANTS

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Dated: March 23, 2015

(Class 15) *separately* from retiree *health benefit* claims (Class 12). Knowing that retirees would vote in favor of the Plan due to the promise of unimpaired pensions, the City then classified Franklin's unsecured claim *together* with the health benefit claims in Class 12. At the same time, the City separately classified all other material unsecured claims (including the other bonds with "similar structures" and identical underlying ratings) so that it could provide the more favorable treatment it had negotiated for them.

Ultimately, as the City intended, Franklin's "no" vote in Class 12 was swamped by "yes" votes of 1,100 retirees who had been promised full pensions.[55]

5. The City's Ability To Pay.

Faced with a recovery of less than one cent on the dollar of its unsecured claim, Franklin objected to confirmation. In May and June 2014, the Court held a confirmation hearing that included live testimony from thirteen fact and expert witnesses (plus an additional seven via written declaration). At trial, as summarized in greater detail in Section VI.A.3, Franklin established that the City had the ability to pay much more than $285,000 on Franklin's unsecured claim, even without impairing pensions or otherwise altering the negotiated treatment of other creditors under the Plan. Among other things –

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[55] DI1380 (Nownes-Whitaker) at 5 and Ex. B.

The Long-Range Financial Plan. During the bankruptcy case, City residents voted for an increase in the City sales tax rate from 8.25% to 9% ("Measure A") and an advisory measure ("Measure B") directing the City to use 35% of new sales tax revenue to fund ongoing expenses, including payments to creditors in bankruptcy.[56] Building on that anticipated new revenue, the City prepared a thirty-year forecast known as the "Long-Range Financial Plan," or "LRFP," which was the "financial underpinning of the Plan."[57]

The City designed the Long-Range Financial Plan to be a "conservative" forecast in which "variances are somewhat more likely to be 'good news' than 'bad news.'"[58] Thus, the City used "discounted" revenue projections,[59] prepared at the trough of the "Great Recession," that were well below historical average growth rates[60] and not reflective of the economic recovery already underway in the City.[61] The Long-Range Financial Plan modeled an "upside" scenario establishing that, if the City exceeded the discounted revenue projections by just a half-percent (0.5%),

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56 ER584 (DS); ER420 (10/30/14 Tr.).

57 ER790-827 (LRFP); ER586-87 (DS).

58 ER790-93 (LRFP).

59 ER660-61 (5/12/14 Tr.) (Leland).

60 ER601-02 (Moore Report); ER696-700 (5/14/14 Tr.) (Moore); ER917-19 (revenues).

61 ER590-97 (Chin Report); ER749-55 (5/15/14 Tr.) (Chin).

it would generate nearly an extra half billion dollars over the forecast period.[62] The City was so confident it would meet or exceed its intentionally conservative forecast that it did not bother to model any "downside" scenario.[63]

Even as conservatively forecast (including full payment of pensions and treatment of other claims as set forth in the Plan) the City projected that it would accumulate substantial cash with which it could have paid Franklin's claim in the future. The City projected that, by the end of the Long-Range Financial Plan, it would have $58 million in cash on hand *plus* $56 million in unused "contingency" funds – a total of $114 million potentially available to pay Franklin.[64] The City also forecast that, over the same period, it would spend $236 million of otherwise surplus cash on unidentified "mission critical" expenses[65] *plus* $123 million in subsidies for non-critical "entertainment venues" like the Stockton Arena, Ice

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62 ER792 (LRFP).

63 Financial results during the bankruptcy case confirmed this optimism. In the first year of the forecast (FY2012-13) the City's general fund revenues were $6.2 million higher and expenses were $9.7 million lower than budget – *a net positive swing of $15.9 million* in just one year. ER602 (Moore Report). Payment of that sum alone would have resulted in recovery of 52% of Franklin's unsecured claim. In the next year (FY2013-14), higher-than-anticipated property tax revenues prompted the City to increase projected revenues by $18.4 million over the first decade of the forecast. *Id.*

64 ER602-03 (Moore Report); ER719-21 (5/14/14 Tr.) (Moore); ER921 (cash generation).

65 ER920 (balances); ER706-14 (5/14/14 Tr.) (Moore); ER602-06 (Moore Report).

Rink, Ballpark and Theater,[66] resulting in another $359 million potentially available to make payments to Franklin.

Thus, the City's projections indicated that up to *$473 million* in cash might be available to pay Franklin over the forecast period. Extending the Long-Range Financial Plan to 2053 (the date to which the City restructured payments for the Pension Obligation Bonds) produced a projected cash balance of $179 million, $80 million in unused contingency funds, and $824 million in expenditures on unsubstantiated "mission critical" expenditures, resulting in more than a *billion dollars* of cash potentially available to pay Franklin's claim over time.[67] The Plan, however, provided for nothing to be paid to Franklin beyond the effective date.

Public Facility Fees. The City also could have paid Franklin over time from restricted public facility fees, which are not general funds (and hence not reflected in the Long-Range Financial Plan) but are legally available to pay Franklin's Bonds.[68] This was not a novel concept. The City sold the Bonds with the representation that PFFs would pay all of the debt service[69] and, as noted, proposed to pay Franklin with future PFF revenues during pre-bankruptcy mediation.

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66 ER609 (Moore Report); ER729-30 (5/14/14 Tr.) (Moore).

67 ER920 (balances); ER706-14 (5/14/14 Tr.) (Moore); ER605-06 (Moore Report).

68 ER547 (Ask); STOCKTON, CAL., MUN. CODE §§ 16.72.260(B)(1), (C) (2013).

69 ER635 (Official Statement).

Although diminished from their pre-recession peak, PFF revenues were projected to increase as the City's housing market recovered. The City's consultants forecast a sustained long-term average of 700 single family residence permits per year,[70] which would produce far more PFF revenue than needed to pay Franklin in full. Even with new home sales at existing levels, PFFs generated more than $1 million a year that could have been paid to Franklin.[71] The Plan, however, provided for none to satisfy Franklin's claim.

6. The Pension Ruling And Confirmation.

By any measure, the City's prepetition pension obligations were very large. Its total unfunded petition date pension liability was nearly $412 million on a market value basis.[72] The Long-Range Financial Plan projected that the City's annual pension payments would triple within a decade (from $14.1 million to $42.4 million) and then climb by another $12 million during the following decade.[73] Pension payments were projected to consume 18.5% of the City's general fund within eight years, with contributions to the safety plan comprising 57.1% of payroll, well above historical norms and peer city liabilities.[74]

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[70] ER831-34 (EPS Report); ER793 (LRFP).

[71] ER607-08 (Moore Report); ER724-28 (5/14/14 Tr.) (Moore).

[72] Op. at 23 n.25. As noted, $289 million was attributable to existing retirees.

[73] ER822-27 (LRFP).

[74] ER613-16 (Moore Report); ER739-40 (5/14/14 Tr.) (Moore).

future revenues" for "satisfaction of creditors." *Kelley*, 319 U.S. at 420. The legislative history confirms that –

> The petitioner must exercise its taxing power to the fullest extent possible for the benefit of its creditors. *Fano v. Newport Heights Irr. Dist.*, 144 F.2d 563 (9th Cir. 1940). The court must find that the amount proposed to be paid under the plan was all that the creditors could reasonably expect under the circumstances.

H.R. Rep. No. 94-686, at 33 (1975), *reprinted in* 1976 U.S.C.C.A.N. 539, 571.

At the core, the test establishes "a floor requiring a reasonable effort at payment of creditors by the municipal debtor." *Pierce Cnty.*, 414 B.R. at 718 (quotation omitted). "*A plan that makes little or no effort to repay creditors over a reasonable period of time may not be in the best interest of creditors*." 6 COLLIER, *supra,* ¶ 943.03[7][a] (emphasis added); *see, e.g.*, *In re Barnwell Cnty. Hosp.*, 471 B.R. 849, 869 (Bankr. D.S.C. 2012) (debtor must prove that the plan "affords *all* creditors the potential for the *greatest economic return* from Debtor's assets") (emphasis added).

3. The Plan Fails The Best Interests Test.

The City knew this law. *After* emerging from bankruptcy, the City catalogued its "hard work" by explaining that "municipal bankruptcy does not erase or 'wipe out' debt."[86] Yet, that is exactly what the City's Plan did to Franklin. It wiped out Franklin's unsecured claim through a single payment of

[86] *Open Letter*, *supra*, at 2.

under 1%, despite overwhelming evidence that the City *could* have devoted much more than $285,000 to pay that claim over the thirty or more years the City agreed to pay the claims of other unsecured creditors.

Long-Range Financial Plan. For example, the City's own financial forecast – the "conservative" Long-Range Financial Plan that represented the "financial underpinning" of the Plan – predicts that the City will accumulate hundreds of millions of dollars of cash over the projection period, even while spending hundreds of millions more on unspecified "mission critical" expenses and "entertainment venues" *and* while making all payments to creditors called for under the Plan (including all pension payments).

The Plan, however, did not provide for any of those future revenues to be paid to Franklin. Instead, the City designed the Long-Range Financial Plan to be a "living" forecast that it could revise whenever "inspiration strikes."[87] The forecast was built to consume every surplus dollar through "mission critical" expenses that the City could not identify, much less quantify. The "mission critical" expense category was a plug number, representing every penny in excess of the City's cash reserve target (itself an arbitrary figure set far above the City's historical average and official reserve policy).[88] The City never itemized the alleged "mission

[87] ER652-53, 657-59 (5/12/14 Tr.) (Leland).

[88] ER654-56 (5/12/14 Tr.) (Leland); ER602-06 (Moore Report); ER706-17 (5/14/14 Tr.) (Moore); ER828-29 (general fund reserve policy).

critical" expenses, much less prepared a budget or forecast of them.[89] It just assumed that every extra dollar generated over the next thirty years would be spent on things other than repayment of Franklin.

Franklin's financial expert (Charles Moore) explained that, "[t]aken together, the inclusion of an annual contingency in the LRFP, the adherence to a 15% minimum cash balance when 10% is consistent with the City's stated recommended policy (which itself is well in excess of the City's past practice), the diversion of cash to so-called 'mission critical spending' once it reaches that 15% level, and the conservatism embedded in the City's LRFP obscure that *the City is actually hoarding cash in its LRFP*. That cash could be used to pay the City's obligations in respect of the Franklin Bonds."[90] Ultimately, Mr. Moore opined that, based solely on the Long-Range Financial Plan – *without need for further tax increases or expense cuts and while honoring all of its other obligations under the*

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[89] The City stated only that "[t]he City uses 23-year-old accounting and financial payroll systems that need desperately to be replaced; the City's workers' compensation funds are still running a deficit; and deferred maintenance is still millions of dollars a year. The City remains in a service-insolvent state for libraries, administrative support, and recreation." DI1712 (City post-trial rpy. br.) at 9-10 (quotations and citations omitted). The City never quantified any of those alleged needs.

[90] ER606 (Moore Report) (emphasis added); ER692-721 (5/14/14 Tr.) (Moore); ER921 (cash generation).

Plan – "the City can afford to pay Franklin a significant percentage, if not all, of the City's obligations in respect of the Franklin Bonds."[91]

The Court never mentioned this testimony, the Long-Range Financial Plan, or the City's ability to pay in its oral findings or published Opinion. It simply ignored all of the relevant evidence.

Public Facility Fees. The City also will generate tens of millions of dollars of restricted public facility fees over the course of the projection period. The PFFs are not general funds that could be used to pay other creditor claims, but are available to pay Franklin's claim. At the time it sold the Bonds to Franklin, the City represented that PFFs were the "anticipated funding mechanism" and would "be sufficient to pay the debt service" on the Bonds.[92] The Long-Range Financial Plan confirms that PFFs "were expected to be used as an internal source of funds as available" to pay the Bonds.[93]

Consistent with that fact, before bankruptcy the City proposed to pay Franklin with future PFF revenues that it valued as an aggregate recovery

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[91] ER600 (Moore Report); ER688-730 (5/14/14 Tr.) (Moore).

[92] ER900 (S&P presentation); ER635 (Official Statement).

[93] ER808 (LRFP). At trial, a City witness contradicted this record and claimed that no PFFs could be used to make payments on Franklin's claim. Ultimately, however, even that misinformed witness conceded that PFFs would be available after payment of certain short-term expenditures. ER675 (5/13/14 Tr.) (Chase).

of 54.5%,[94] and during the bankruptcy case City staff stated that *it would "be seen as a sign of bad faith" if the City failed to devote PFFs to payment of Franklin's Bonds*.[95] Yet, the Plan provided for *no* future PFFs to pay Franklin's claim. Instead, the City kept them all for itself.[96]

Even at current depressed levels, PFFs generate more than $1 million a year that could be devoted to payment of Franklin, which would make "a meaningful contribution to the Franklin Bonds debt service obligation . . . if the City chose to use them to satisfy that obligation."[97] Here again, the Court ignored this evidence.

* * *

In sum, the evidence showed that the City *could* spare additional cash to repay Franklin's unsecured claim over time. It just chose not to do so. This was confirmed after trial when the Court valued Franklin's collateral at $4,052,000, giving Franklin an allowed secured claim in that amount. After that ruling, the City amended the Plan to provide for full immediate payment of the secured claim. In other words, the City found an extra $4 million – in just the first year of its

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94 ER542-43 (Ask).

95 ER836 (FY2013-14 budget) (emphasis added).

96 Incredibly, the City used PFFs during the case to pay its bankruptcy lawyers, on the theory that expenses incurred in cramming down the Plan were legitimate "project costs" for properties funded by the Bonds (but repayment of Franklin was not). ER857-66 (FY2012-13 chapter 9 expenses); ER867-68 (FY2013-14 Chapter 9 expenses); ER644-45 (5/12/14 Tr.) (Burke).

97 ER608 (Moore Report); ER724-28 (5/14/14 Tr.) (Moore).

thirty-year forecast – to pay Franklin's secured claim, notwithstanding its prior claim of prolonged poverty as justification for not paying more than 1% of Franklin's entire claim.

The City exited bankruptcy with a bold declaration that "[o]ur future is bright as we move our city forward toward a vibrant and healthy future."[98] Given that bright, healthy and vibrant future, the City surely had the ability to wring more than $285,000 out of the "living" Long-Range Financial Plan over the next thirty years had it so desired. The City's duty as a chapter 9 debtor was to do just that, and the Court erred by concluding that the City did not need to make any further effort to pay Franklin a fair recovery.

4. The Court Improperly Lumped Together Franklin's Secured And Unsecured Claims.

Although not explicitly stated, the Court's conclusion that the Plan was "the best that can be done" seemingly was premised on its conclusion that Franklin's *total* recovery on its secured and unsecured claim represented an "overall return [that] is not so paltry or unfair as to undermine the legitimacy of classification in the plan or the good faith of the plan proponent."[99] The Court stated that "[i]t's not appropriate to say, well, Franklin Fund is only getting less than one percent on the

[98] *Open Letter*, *supra*, at 4.

[99] Op. at 54.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing amicus brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 15, 2015, which will automatically serve all parties.

Dated: June 15, 2015

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