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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re: CITY OF STOCKTON, CALIFORNIA, Debtor.	Case No. 12-32118 D.C. No. JD-1 Chapter 9 **FRANKLIN'S REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL OF CONFIRMATION ORDER** Hearing: December 10, 2014 Time: 11:00 a.m. Dept: C, Courtroom 35 Judge: Hon. Christopher M. Klein

Franklin agrees with the Stockton Police Officers Association – "if no stay is issued, Franklin will not be irreparably harmed, because, based on Franklin's own argument, the City will have the ability to pay Franklin more money – up to payment in full of Franklin's approximately $[32.5] million unsecured claim – if the appellate court requires it."[1] For reasons summarized in the Motion, Franklin's appeal of confirmation is not equitably moot by any reasonable assessment.

Unfortunately, the City will not acknowledge that fact, choosing instead to play coy with respect to its intentions.[2] As a result, the Court must assume that the City will try to deprive Franklin of any appellate review. The prospect of dismissal before review – no matter how remote – constitutes the irreparable harm against which the requested stay pending appeal would protect. Because that harm outweighs the speculative countervailing harm identified by the City and the other objectors, the Court should exercise its discretion to stay effectiveness of the Plan pending review of the Confirmation Order by a tribunal capable of rendering binding precedent on the important issues implicated by Franklin's appeal.

Irreparable Harm To Franklin

Franklin concedes that, in describing the factors considered in the preliminary injunction context, it misstated the threshold necessary for a showing of irreparable harm, mistakenly relying on outdated Ninth Circuit authority. The City correctly notes that, at least for purposes of a preliminary injunction, the movant must show a likelihood of irreparable injury.[3] This, however, does not mean that Franklin must establish that the City actually will prevail in mooting Franklin's appeal. That would put appellants like Franklin in the impossible position of arguing against themselves.

Courts recognize that, because "[t]he ability to review decisions of the lower courts is the guarantee of accountability in our judicial system[,] . . . the ability to appeal a lower court ruling is

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[1] SPOA Obj. at 5 (emphasis in original). The SPOA erroneously described Franklin's unsecured claim as a $31 million claim.

[2] City Obj. at 4 ("Whether or not the City holds a different view of the prospects of mootness is not the issue here.") ("This bridge, of course, is one for the BAP or the Ninth Circuit to cross if and when circumstances take those courts there.").

[3] City Obj. at 3.

a substantial and important right." *In re Adelphia Commc'ns Corp.*, 361 B.R. 337, 342 (S.D.N.Y. 2007) (footnote omitted) ("no single judge or court can violate the Constitution and laws of the United States, or the rules that govern court proceedings, with impunity, because nearly all decisions are subject to appellate review"). As a consequence, "loss of appellate rights is a quintessential form of prejudice . . . [and], where the denial of a stay pending appeal risks mooting any appeal of significant claims of error, the irreparable harm requirement is satisfied," at least in the context of appeals from a bankruptcy confirmation order. *Id.* at 348 (emphasis in original) (quotations and footnote omitted).

It is the risk, not the likelihood, of mootness that is the key. Franklin faces that risk unless the City agrees that it will not seek to dismiss Franklin's pending appeal. That is sufficient for purposes of the flexible "balancing" approach that continues to apply in the Ninth Circuit. *E.g.*, *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) ("If anything, a flexible approach is even more appropriate in the stay context . . . [because] stays are typically less coercive and less disruptive than are injunctions.") (emphasis in original) (citations omitted); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another."); *see id.* at 1132 (balancing approach "survives *Winter*").

Lesser Harm To Others

The City and other objectors argue that a stay will cause them various harm and injury. Many of the identified harms are speculative, nebulous, and unquantifiable. The employee unions, for example, claim that their members "have suffered anxiety" and fear that a stay would cause a "return to the state of uncertainty" regarding pensions.[4] The City parrots that concern, complaining that "officers believe their pensions are at risk while the City remains in bankruptcy" and that a stay "would squander [the] feeling" of relief resulting from confirmation.[5] The City also worries that a

[4] SPOA Obj. at 2, Union Obj. at 2, 5-6.

[5] City Obj. at 6-7.

stay would produce a "letdown from [the] high hopes and expectations" and "degrade the recent uptick in confidence" of the "Stockton business community."[6]

While uncertainty may be unpleasant and undesirable, the fact is that the City has assumed the unions' collective bargaining agreements, the union members have received every dollar owed to them under those agreements, and the City has made (and, even during a stay, would continue to make) all required pension contributions to employees and retirees alike. Moreover, to the extent that there is "anxiety" regarding pensions, the uncertainty will remain whether or not a stay is granted, as the City's disparate treatment of pensions (full payment) and Franklin's unsecured claim (1% payment) will be a primary issue and subject to reversal on appeal. Similarly, as it has done over the course of the last two-and-a-half years, the City is free to foster economic development and implement its "strategic plan to promote the growth of business and business revenue in the City" (none of which will be shared with Franklin under the Plan as confirmed).

Much of the harm identified by the objectors thus is the product of misinformation, apparently promulgated (or tolerated) by the City itself and much of it capable of being eliminated by dissemination of accurate (non-inflammatory) information regarding the actual state of affairs.[7] That is not the sort of cognizable, concrete harm that factors into the stay analysis.

Aside from anxiety and disappointment, the objectors have identified little concrete harm that might result from a stay. The Committee, for example, notes that 1,100 retirees would be delayed in receiving their *pro rata* share of the $5.1 million to be paid to them under the Plan.[8] Those one-time payments are small, averaging $4,636 per retiree (all of whom are receiving substantially-greater ongoing pension payments that are many multiples of the one-time payment on their Retiree Health Benefit Claims). In fact, the Committee's declarants, who are entitled to payments ranging from $3,334 (Milnes) to $5,995 (Schenck), each concede that "the City's one-time payment will only cover a small amount of my new health care expenses."[9] Nevertheless, to

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[6] City Obj. at 8.

[7] *See* City Obj. at 5-6.

[8] Committee Obj. at 2-3.

[9] Klemin Decl. ¶ 8; Tubbs Decl. ¶ 7; Schenck Decl. ¶ 7.

the extent that delay in receipt of those small payments causes hardship, there is nothing to prevent the City from making payments to the retirees in advance of effectiveness of the Plan, just as it has made millions of dollars of payments to hundreds of trade creditors and settling claimants during the bankruptcy case. In fact, as explained in Franklin's accompanying reply in support of its motion to alter or amend the Court's findings regarding the Retiree Health Benefit Claims, Franklin has no objection to the *pro rata* allocation of the $5.1 million payment amongst the retirees and would not oppose the City's distribution of that entire sum during Franklin's appeal. As established at trial (and noted by the police officers' union), the City has substantial additional resources with which to make a fair, non-discriminatory distribution on Franklin's unsecured claim.[10]

Likelihood Of Success On The Merits

Franklin and the City have said their piece (many times) regarding the merits of confirmation. There is no purpose served by responding to the City's rewarmed arguments (with which Franklin disagrees) at this stage. If the Court believes that Franklin has no prospect of success on appeal – notwithstanding the lack of controlling precedent and the wealth of evidence, expert testimony and persuasive authority marshaled by Franklin – then a stay should not issue.

The point to be made here is that, contrary to the City's implication, Franklin need not convince the Court that it erred or show that it is likely to prevail on appeal. "[T]o justify a stay, petitioners need not demonstrate that it is more likely than not that they will win on the merits." *Leiva-Perez*, 640 F.3d at 966. Rather, the question is whether there are "substantial grounds for a difference of opinion," which frequently can arise in cases where there is no controlling precedent:

> For the purposes of this motion, it does not matter whether this Court believes that Defendants should succeed on appeal. In considering the likelihood of success on the merits, it seems illogical to require that the court in effect conclude that its original decision in the matter was wrong before a stay can be issued. In fact, a court may grant a motion for a stay pending appeal even when it has confidence in the rectitude of its decision. This Court is confident that the December 13 Opinion is supported by the language of the Bankruptcy Code and case law. However, there is a significant issue in that opinion that to my knowledge has not been addressed in a reported opinion in the Third Circuit. . . .

[10] Similarly, Franklin does not oppose the City providing SPOA members with 22 hours of paid leave as provided for under the Plan. *See* SPOA Obj. at 3, 6.

> When a circuit court has not yet decided an issue of law, there may be substantial grounds for a difference of opinion within that circuit.

In re Genesis Health Ventures, Inc., 367 B.R. 516, 521 (Bankr. D. Del. 2007) (citations and quotations omitted).

For all the reasons set forth in the Motion and Franklin's confirmation objection, that standard is satisfied here.

Public Interest

This is a case of substantial importance and public interest. The intense media coverage of the confirmation decision demonstrates that the Court's ruling may have far-reaching impact, well beyond the parties to this case. It is in the public interest that the important questions raised by Franklin's appeal – including the propriety of disparate treatment of pension holders and bondholders – be heard and determined by an appellate tribunal, not only for guidance to the parties in the case but for purposes of establishing a uniform body of law that will guide future municipal debtors and creditors alike.

Conclusion

The City apparently will seek to strip Franklin of its right to review of the Court's confirmation decision. For all of the reasons set forth in the Motion and above, the Court should issue a stay pending appeal to prevent the City from trying to dismiss Franklin's appeal as equitably moot.

Dated: December 3, 2014

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