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 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, Case No. 12-32118
(Hon. Christopher M. Klein, United States Bankruptcy Judge)

APPELLANT MICHAEL A. COBB'S OPENING BRIEF

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I. INTRODUCTION

Michael A. Cobb ("Cobb"), a landowner within the City of Stockton, California ("City"), challenges the order of the United States Bankruptcy Court for the Eastern District of California in the City's chapter 9 bankruptcy ruling that Cobb's claim for compensation against the City for inverse condemnation of a roadway could be treated as a mere unsecured creditor within the bankruptcy laws. Under the City's now recently-confirmed bankruptcy plan of adjustment, unsecured creditors will receive a cents-on-the-dollar distribution of their allowed claims in discharge of the City's debt to them. In a case of first impression, Cobb maintains that claims for inverse condemnation, being protected by the Fifth Amendment, cannot be treated in any way other than to afford the affected landowner "just compensation." As such, Cobb urges this Court to reverse the order of the bankruptcy court and require the plan to provide just compensation to claims in the nature of Cobb's or to except the claim from the effects of discharge altogether.

II. JURISDICTIONAL STATEMENT

This bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334 over the City of Stockton bankruptcy case.

This Court has jurisdiction pursuant to 28 U.S.C. § 158(a) and 158(d) to hear an appeal from a final decision of a bankruptcy court. The decision of the bankruptcy court is final insofar as "it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." (*Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 836 (9th Cir. 2008), quoting *In re Lewis*, 113 F.3d 1040, 1043 (9th Cir. 1997)); see also *Wiersma v. Bank of the West (In re Wiersma)*, 483 F.3d 933, 939 (9th Cir. 2007); *Saxman v. Educ. Credit Mgmt BJR Corp. (In re Saxman)*, 325 F.3d 1168, 1171-72 (9th Cir. 2003).) The bankruptcy court order appealed from finally determines whether Cobb's claim may be treated as an unsecured claim under the City's bankruptcy plan and as such is appealable. (See also *Brown* v. *Wilshire Credit Corp. (In re Brown)*, 484 F.3d 1116, 1120 (9th Cir. 2007) ["A disposition is final if it contains a complete act of adjudication, that is, a full adjudication of the issues at bar, and clearly evidences the judge's intention that it be the court's final act in the matter."] (quotations omitted); *Slimick v. Silva (In re*

Slimick), 928 F.2d 304, 307 fn.1 (9th Cir. 1990) ["[I]n bankruptcy, a complete act of adjudication need not end the entire case, but need only end any of the interim disputes from which appeal would lie."]).

With respect to the timeliness of the appeal, the bankruptcy order at issue was dated May 7, 2014 and filed May 8, 2014 (E.R., Vol. 1, pp. 1-2), and appellant's notice of appeal was filed May 21, 2014 (E.R., Vol. 2, pp. 14-15), within the fourteen days prescribed by rule 8002(a) of the Federal Rules of Bankruptcy Procedure and 28 U.S.C. § 158(c)(2).

On June 3, 2014, pursuant to 28 U.S.C. § 158(d) and Federal Rule of Bankruptcy Procedure 8006(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.

Upon petition of Cobb for permission to appeal, this Court accepted the direct appeal of the bankruptcy court's order on November 14, 2014.

III. STATEMENT OF THE ISSUES FOR REVIEW

1. Does the Fifth Amendment's mandate that any governmental taking of private property be subject to the payment of just compensation endure a municipality's chapter 9 bankruptcy plan of adjustment treating an inverse condemnation claimant as an unsecured creditor to be paid ratably with all unsecured creditors?

2. Does the bankruptcy court's sanctioning of the treatment of Cobb's claim as an unsecured creditor claim subject to only a cents-on-the-dollar distribution and discharge require reversal?

IV. CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant constitutional provisions and statutes are set forth in Appellants' Statutory Addendum herewith bound to the brief at the end.

V. STATEMENT OF THE CASE

Cobb's objection to the plan was submitted entirely on an agreed factual stipulation to which were attached relevant documents. Rather than set forth the factual background in a selective method, Cobb includes it below:

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"). (Excerpts of Record ("E.R."), Vol. 2, p. 17, ¶ 1.)

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. (E.R., Vol. 2, p. 17, ¶ 2; pp. 24-30.)

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 State Treasury Condemnation Fund. (E.R., Vol. 2, p.17, ¶ 3; pp. 32-33.)

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. (E.R., Vol. 2, p. 17, ¶ 4; pp. 35-39.)

On December 1, 1998, the Superior Court issued an Order for Prejudgment Possession -- Action in Eminent Domain in favor of the City. That order found that the City "has made a deposit of the probable just compensation and filed a Summary of the Basis for Appraisal Opinion, both of which meet the requirements of Code of Civil Procedure section 1255.010." (E.R., Vol. 2, p. 17, ¶ 5; pp. 41-42.)

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. (E.R., Vol. 2, pp. 17-18, ¶ 6; pp. 44-45.)

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. (E.R., Vol. 2, p. 18 ¶ 7.)

On July 2, 2007, Michael A. Cobb deposited with the California State Treasurer Condemnation Deposits Fund the sum of $90,200.00. On October 24, 2007, the California State Treasurer returned that amount to Michael A. Cobb. On December 6, 2007, Michael A. Cobb tendered the sum of $90,200.00 by way of a cashier's check to the attorneys for the City of Stockton. On December 10, 2007, the City of Stockton returned the tendered check. On May 15, 2008, the attorneys for Michael A. Cobb advised the attorneys for the City of Stockton that Michael A. Cobb had deposited the sum into an interest-bearing trust account. On May 21, 2008, the attorneys for the City of Stockton indicated that the City of Stockton had no interest in the

amount. (E.R., Vol. 2, p. 18, ¶ 8; pp. 47-56.)

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. (E.R., Vol. 2, p. 18, ¶ 9; pp. 58-59.)

On March 14, 2008, Michael A. 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. (E.R., Vol. 2, p. 18, ¶ 10; pp. 61-65.)

On July 11, 2008, Cobb filed his First Amended Complaint in the Inverse Condemnation Action, again seeking relief based only upon a claim of inverse condemnation. (E.R., Vol. 2, p. 18, ¶ 11; pp. 67-98.)

The City demurred to Cobb's First Amended Complaint. On September 11, 2008, the Superior Court sustained the City's demurrer on the ground that the inverse condemnation claim was time-barred. (E.R., Vol. 2, p. 19, ¶ 12; pp.100-102.)

On September 11, 2008, Cobb filed his Second Amended Complaint in the Inverse Condemnation Action, adding claims to

quiet title, declaratory relief, and ejectment. (E.R., Vol. 2, p. 19, ¶ 13; pp. 104-115.)

The City demurred to Cobb's Second Amended Complaint. On November 24, 2008, the Superior Court sustained the City's demurrer as to all claims. The Superior Court concluded, *inter alia*, that the inverse condemnation claim was barred by the statute of limitations, and that the quiet title and ejectment claims were barred by the doctrine of intervening public use. The Superior Court granted Cobb leave to amend his complaint with respect to all but his inverse condemnation claim. (E.R., Vol. 2, p. 19, ¶ 14; pp. 117-120.)

On December 23, 2008, Cobb filed his Third Amended Complaint advancing claims of quiet title, ejectment, trespass, and declaratory relief. (E.R., Vol. 2, p. 19, ¶ 15; pp. 122-195.)

The City demurred to Cobb's Third Amended Complaint. On April 3, 2009, the Superior Court sustained the City's demurrer as to all claims. It found, *inter alia*, that Cobb's quiet title, ejectment, and trespass claims were barred by the doctrine of intervening public use. The Superior Court dismissed the action without leave to amend. (E.R., Vol. 2, p. 19, ¶ 16; pp. 197-199.)

On June 15, 2009, Cobb appealed the Superior Court's dismissal of the Inverse Condemnation Action to the California Court of Appeal, Third District. In his briefing, he challenged the dismissal of only his inverse condemnation claim on statute of limitation grounds. Cobb did not appeal the dismissal of the quiet title, ejectment, trespass, or declaratory relief claims. (E.R., Vol. 2, pp. 19-20, ¶ 17.)

On January 26, 2011, the Court of Appeal reversed the Superior Court's decision with respect to Cobb's inverse condemnation claim, finding that it is not barred by the statute of limitations. The Court of Appeal stated in its written decision that "plaintiff's only challenge is to dismissal of the inverse condemnation claim." (E.R., Vol. 2, p. 20, ¶ 18; pp. 201-214.)

On June 28, 2012, the City petitioned for bankruptcy under chapter 9. (E.R., Vol. 2, p. 20, ¶ 19.)

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). Attached hereto as Exhibit P is Cobb's Proof of Claim. (E.R., Vol. 2, p. 20, ¶ 20; pp. 216-230.)

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. (E.R., Vol. 2, p. 20, ¶ 21; Vol. 3, pp. 42-108.)

On February 3, 2014, the City filed its Memorandum of Law in Support of Confirmation of the First Amended Plan. (E.R., Vol. 2, p. 20, ¶ 22.)

On February 11, 2014, Cobb filed the Objection of Creditor Michael A. Cobb to Plan and Confirmation Thereof. (E.R., Vol. 2, p. 20, ¶ 23; Vol. 3, pp. 1-41.)

After further briefing by the parties, and the submission of the foregoing facts under a stipulation, on May 7, 2014, the bankruptcy court overruled Cobb's objection, in both oral and written form.

(E.R., Vol. 1, pp. 3-32; pp. 1-2.) This appeal followed. (E.R. Vol. 2, p. 14-15.)

VI. SUMMARY OF ARGUMENT

The City initiated ordinary eminent domain proceedings against Cobb to acquire portions of his property so as to construct a public road. In order to obtain possession prior to judgment, the City deposited $90,200 as "probable compensation" for the taking, which Cobb withdrew, all as permitted the California Eminent Domain Law. The City failed to diligently prosecute the eminent domain case, and it was dismissed under California's mandatory dismissal statutes requiring civil actions to be brought to trial within a certain time period.

Cobb thereafter initiated an action for inverse condemnation against the City, alleging among other things, that the City had taken his property and not paid just compensation for it as constitutionally required. While the inverse condemnation case was pending, the City filed for bankruptcy relief under Chapter 9 of Title 11.

In its bankruptcy plan of adjustment of its debts, the City proposed to treat Cobb's claim as "unsecured' and no differently than all other unsecured creditors that the City has, to be paid a fractional

portion of their allowed claims and any of their further rights against the City discharged and enjoined.

Cobb contends that the Fifth Amendment mandates the City to pay just compensation for the taking of his property interests for public purposes, regardless of how federal bankruptcy might otherwise treat ordinary creditors not having constitutional claims. The bankruptcy court's contrary ruling that Cobb's claim is unsecured and subject to reduction and a ratable distribution disregards the Fifth Amendment's mandate and must be reversed.

VII. ARGUMENT

A. Standard of Review

When reviewing an order, judgment or decree on appeal from the bankruptcy court, the appellate court reviews the bankruptcy court's legal determinations *de novo,* its factual findings for clear error and its exercise of discretion for abuse thereof. (See *In re United Healthcare Systems Inc.,* 396 F.3d 247, 249 (3d Cir. 2005).)

B. The Nature of Eminent Domain and the Fifth Amendment's Mandate of Payment of Just Compensation as a Condition to Governmental Taking of Private Property for Public Use

In 1998, the City condemned a road across Cobb's property. Ever since that time, except for a brief period between the dismissal of the City's eminent domain action and Cobb's filing of an inverse condemnation action, there has been pending in the superior court of the county in which the City is located a civil action to ascertain the just compensation to which Cobb is entitled for the taking of his property. Interrupted by the City's bankruptcy filing and now confirmed treatment of Cobb's just compensation claim as unsecured and dischargeable upon payment of a fractional portion of just compensation, the determination of, and payment of, just compensation will cease. As will be argued, this treatment violated the constitutional rights of the landowner Cobb.

i. Takings Require Compensation

In this case, the City initiated eminent domain to make way for a road to serve the area. Proceeding under the state condemnation laws, the City obtained possession after depositing "probable

compensation" and building a road, then dedicated to the City by act of its city council.

As a property owner whose land was involuntarily taken by a city, Cobb was, and is, constitutionally entitled to the payment of "just compensation," a not-precisely defined term subject to a great body of law as to its scope. (See, e.g., *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 6-8 (1949) ["The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent."]; see also *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950); *United States* v. *Cors*, 337 U.S. 325, 332 (1949) ["The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula."].) . Under the California Eminent Domain Law, the award of compensation is statutorily mandated and defined as "the fair market value of the property taken," being "the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing,

each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available." (Cal. Code Civ. Proc., §§ 1263.310, 1263.320.)

The just compensation requirement is found in both the federal and state constitutions. The Fifth Amendment provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." Its terms are applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment (see *Dolan* v. *City of Tigard*, 512 U.S. 374, 383-384 (1994)) and requires that the exercise of the power of eminent domain be only for a public use, and the owner of property taken compensated for his loss (see *Chicago, Burlington & Quincy R.R. Co.* v. *City of Chicago*, 166 U.S. 226, 241 (1897) ["[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment."]; see also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) [whenever the government authorizes a physical occupation, the Takings Clause generally requires compensation]).

The California Constitution, at Article I, section 19, provides: "Private property may be taken or damaged for a public use . . . only when just compensation . . . has first been paid to . . . the owner." This provision has been said to have even broader terms than the Fifth Amendment requirement (*Varjabedian* v. *City of Madera*, 20 Cal.3d 285, 298 (1977)), but for the most part has been noted to have overlapping reach (*City of Los Angeles* v. *Tilem*, 142 Cal.App.3d 694, 701-702 (1983).) The constitutional guarantee is self-enforcing and as such is neither dependent on legislative implementation, nor subject to legislative impairment. (*Rose* v. *State of California*, 19 Cal.2d 713, 721-723 (1942).)

A condemning governmental body has its choice of initiating eminent domain proceedings or just physically taking private property for public purposes without necessarily having to bring suit. In effect, it is permissible for the government to simply seize private property without prior process and say to the displaced owner "sue me." (*Stringer* v. *United States*, 471 F.2d 381, 384, fn. 10 (5th Cir. 1973) (accepting that the government may high-handedly just seize private property and require the affected landowner to bring suit for the loss), quoting *United States* v. *Herrero*, 416 F.2d 945, 947 (9th Cir. 1969).)

In the usual case (as here), where the government does proceed by an eminent domain action, under both federal and state condemnation principles, the governmental body may seize private property and its owners displaced before compensation is finally determined — a process known in eminent domain litigation as a "quick take." (See 40 U.S.C. § 3114; Cal. Code Civ. Proc., § 1255.410(a).)

Where the government does not proceed by eminent domain, or as here does not complete the action, the affected landowner may bring an action in inverse condemnation, which is a direct action against the governmental body for the taking and which seeks to compel compensation as if formal condemnation proceedings had been brought. (See *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 638 fn.2 (1981) (Justice Brennan dissenting); *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Agins v. City of Tiburon*, 447 U.S. 255, 258 fn.2 (1980); *Sheffet* v. *County of Los Angeles*, 3 Cal. App.3d 720, 732 (1970).) The principles of eminent domain and inverse condemnation are considered the flip side of the same coin. (See *City of Oakland* v. *Oakland Raiders*, 32 Cal. 3d 60, 67 (1982) ["[C]ondemnation and inverse condemnation . . . are merely different manifestations of the same governmental power, with

correlative duties imposed upon public entities by the same constitutional provisions . . . .]; see also *Frustuck* v. *Fairfax*, 212 Cal.App.2d 345, 357-358 (1963).)

The policy principle underlying both direct condemnation and inverse condemnation law is to ensure that the cost of any loss caused by public improvements — whether or not the loss is intended or foreseeable — will be spread throughout the community rather than imposed disproportionately on one or a few property owners. (*Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 123 (1978); *Holtz* v. *San Francisco Bay Area Rapid Transit District*, 17 Cal. 3d 648, 656 fn.8 (1976); *Reardon* v. *City & County of San Francisco*, 66 Cal. 492, 505 (1885).) The policy consideration is that the cost of a public improvement should be spread among the community rather than allocated to a single person or entity within the community. (See *Belair* v. *Riverside County Flood Control Dist*., 47 Cal.3d 550, 558 (1988).)

Upon proof of a governmental taking for public use, the landowner is entitled to the value of the property taken, the diminution in the value of the part not taken as a "severance" damage (*United States* v. *Miller*, 317 U.S. 369, 376 (1943); Cal. Code Civ. Proc., §

1263.410), prejudgment interest (Cal. Code Civ. Proc., § 1268.340), costs (Cal. Code Civ. Proc., § 1268.710), and in some cases litigation expenses (Cal. Code Civ. Proc., §§ 1036, 1268.610, 1250.410).

In this matter, with the City itself having initiated an eminent domain action and installing a public roadway, there is no question that, in the absence of the City's bankruptcy, Cobb was entitled to just compensation in accordance with the foregoing principles. As will be discussed, the City's bankruptcy does not alter this entitlement.

ii. The acquisition of private property for a public use is conditional on the public entity's actual payment of just compensation.

As will be discussed in greater detail in section C. *post*, the bankruptcy court brushed aside any requirement that the City make payment of just compensation to Cobb, instead focusing on the court's perception of whether he was a "secured" creditor whose interest could not be impaired by the bankruptcy plan versus an "unsecured" creditor whose interests could be impaired. Cobb urges that the issue is not one of his placement within the classifications of the City's creditors under the bankruptcy laws, but rather whether the City, as a public entity unquestionably having taken Cobb's property, has an overriding obligation to pay the full measure of just compensation

despite becoming insolvent and seeking bankruptcy relief.

The obligation of a governmental entity taking a private landowner's property is a *condition* imposed on the exercise of the power. (*Long Island Water Supply Co.* v. *Brooklyn*, 166 U.S. 685, 689 (1897):

> "All private property is held subject to the demands of a public use. The constitutional guaranty of just compensation is not a limitation of the power to take, but only a condition of its exercise. Whenever public uses require, the government may appropriate any private property on the payment of just compensation."

The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power [and] is designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-315 (1987) [italics in original].)

The physical taking or invasion entitles the owner to just compensation. (*Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979).) Title to the property interest does pass without the payment or adequate provision for the payment. (*Albert Hanson Lumber Co. v.*

United States, 261 U.S. 581, 587 (1923); *People* v. *Peninsula Title Guaranty Co.*, 47 Cal.2d 29, 33 (1956).) In either a *de jure* or a *de facto* (inverse) condemnation, the property owner's title to the property being taken by the United States passes to the United States "only when the owner receives compensation." (*Seneca Nation* of *Indians v. New York,* 206 F. Supp.2d 448, 534 (2002); see *United States v. Dow,* 357 U.S. 17, 21 (1958).)

The City in this case, having failed to complete its taking by the payment of just compensation as determined at a trial, has no title to the property taken and has not satisfied the necessary condition for its retention by paying such determined amount.

C. The bankruptcy court's conclusion that Cobb's claim to additional money for the taking results in a mere unsecured claim for bankruptcy purposes overlooks that all inverse condemnation claimants are seeking money, and in no way does this relieve a municipality from affording just compensation to the affected landowner.

After filing a chapter 9 petition, a debtor municipality is required to file a plan for the adjustment of its debt. (11 U.S.C. § 941.) The City's plan affords Cobb with no treatment other than as an unsecured creditor to be paid some percentage of an unsecured creditor pool. The plan does not mention Cobb or segregate inverse

condemnation claimants from other classes of creditors. As allowed by the bankruptcy court, Cobb's claim for additional compensation for his loss by inverse condemnation is to fall under "Class 12," or "General Unsecured Claims" (E.R.,Vol. 3, pp. 86-87.) Under the Plan, the Class 12 claimants, other than certain retiree claims, are to receive "cash on the Effective Date in the amount equal to a percentage of the Allowed Amount of such Claims, which percentage equals the Unsecured Claim Payout Percentage, or such other amount as is determined by the Bankruptcy Court before confirmation of this Plan to constitute a pro-rata payment on such other General Unsecured Claims," up to a cap of $500,000.00 before certain installment payments rights are to be allowed. (*Ibid*.) The plan openly admits that the unsecured claims will be "impaired" (*Ibid*), and there is no dispute that this treatment will afford Cobb only a fraction of his claim, i.e., cents-on-the-dollar. The plan provides for discharge of the debts of the City other than those claims excepted from discharge or those owing to creditors who had no notice or knowledge of the City's bankruptcy (E.R., Vol. 3, p. 96). It further enjoins any continuation of an action to recover against the City (E.R., Vol. 3, p. 97). The effect of this treatment, since the entry of the bankruptcy

court's order overruling Cobb's objection to this treatment, has now become concrete, as the bankruptcy court on February 4, 2015 ordered the Plan confirmed. (E.R., Vol. 2, pp. 1-5.[1])

Cobb objected to his proposed treatment, relying on his status as an inverse condemnation claimant. At the City's urging, the bankruptcy court relied on Cobb's use of the California Eminent Domain Law statutory provisions for a property owners withdrawal of the City's deposit of "probable compensation" as a basis to treat his claim for full just compensation as an unsecured claim for the purposes of appropriate treatment under the City's bankruptcy plan. The ruling of the court and the position of the City both fail to recognize that the claim for additional compensation is precisely what an inverse condemnation claimant under the Fifth Amendment is pursuing. The issue, assuming *arguendo* that Cobb's rights were limited solely to money (see § D, *post*, for the proposition that a condemning authority's failure to pay just compensation entitles the landowner to his property back), is whether Cobb's claim for money

[1] The order confirming the City's bankruptcy plan is not part of Cobb's initial designation of the record on appeal, as the order did not issue until recently. It is included under F.R.A.P. 32.1.

arising out of a takings claim must be treated differently from other claims solely for money from the City arising from non-takings claims.

As the previous discussion verifies, a landowner whose property interests are taken by governmental conduct is entitled to just compensation for the interests taken. Cobb contends that this entitlement remains despite the City's bankruptcy, regardless of whether Cobb had only a claim for money or not. The City contends that the reduction of Cobb's claim to one for money relieves the City from the obligation to pay just compensation and permits adjusting the claim under bankruptcy law to cents-on-the-dollar along with other unsecured creditors of the City.

In siding with the City, the bankruptcy court relied on Cobb's withdrawal in the former eminent domain action of the deposit of probable compensation and the effects of this under California Code of Civil Procedure section 1255.260:

> "If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation."

This provision of the California Eminent Domain Law operates as a condemnee's waiver of the right to challenge the condemning authority's right to take as well as any claim that the taking is not for a public purpose, but in no way causes a waiver of a landowner's constitutional right to seek just compensation for the property interests taken. (*Mt. San Jacinto Community College Dist.* v. *Superior Court*, 40 Cal.4th 648, 656 (2007).)

The fundamental error with the court ruling is that since a landowner is constitutionally entitled to just compensation for the governmental taking of his property, whatever waivers he suffers by withdrawing the government's deposit of probable compensation never includes any impairment to his right to obtain the full measure of just compensation, i.e., the "claim for greater compensation." As the inverse condemnation action is pending before the state court seeking this recovery, the landowner's right to obtain the just compensation endures despite the government's bankruptcy.

In its ruling, the bankruptcy court spoke of the effect of "waiving all defenses" under section 1255.260 not for what it was, namely a limitation of Cobb's right to obtain anything more than additional monetary compensation in the eminent domain action, but

as proof that the claim was "unsecured." The conclusion that an inverse condemnation claimant seeks only money does not erode that claimant's position as a property owner who seeks compensation under the Fifth Amendment for a taking of his property. That property owner's claim to entitlement to constitutionally-mandated just compensation is not variably satisfied by how this claim would be treated for federal bankruptcy purposes. The bankruptcy court simply addressed where in the bankruptcy law scheme did Cobb's claims fit, rather than considering where in the constitutional law scheme did Cobb's claims fit.

While often sidetracked in its ruling by addressing its view as to the merits of Cobb's claim, from its assertion that Cobb sat on his hands despite having the burden of going forward (E.R., Vol. 1, pp. 25-26 (transcript p. 24, lines 23-24)[2], to finding significance in the

[2] The burden of "going forward" in the initial eminent domain case was not raised by the parties, and the court's comments about California eminent domain law appear incorrect. While *at trial* the defendant condemnee presents his or her evidence of the value of compensation first and last (Cal. Code Civ. Proc., § 1260.210(a)), neither the plaintiff nor the defendant has the burden of proof on the issue of compensation (Cal. Code Civ. Proc., § 1260.210(b)).

timing of the dismissal of the eminent domain action in relation to the effort by Cobb to re-deposit the probable compensation after the eminent domain case had remained pending for more than five years (E.R., Vol. 1, p. 27 (transcript p. 25, lines 2-6), to stating that Cobb "thinks that he's holding a winning ticket in the lottery" (E.R., Vol. 1, p. 27 (transcript p. 25, lines 12-13), to suggesting that Cobb bore part of the blame for the dismissal of the eminent domain action because the five-year dismissal was not "automatic" (E.R., Vol. 1, p. 28 (transcript p. 26, lines12-16)[3], and to supplying defenses that "fly off the page," including estoppel (E.R., Vol. 1, p. 28 (transcript p. 26, lines 22-25), the court summed up its view as follows:

> "The bankruptcy clause does permit the adjustment of a debt for greater compensation. As soon as Mr. Cobb

[3] Under California procedural law, the dismissal *is* automatic and mandatory unless five years have not elapsed from the action's filing after excluding periods when the court's jurisdiction is suspended or stayed or when bringing the action to trial is "impossible, impracticable, or futile."(Cal. Code. Civ. Proc., §§ 583.310, 583.360, 583.340.) The burden is on the plaintiff (here the City) to establish grounds for extensions beyond the five years (e.g., *Wale* v. *Rodriguez*, 206 Cal.App.3d 129, 133 (1988)), and it is further on the plaintiff to demonstrate reasonable diligence in prosecuting the case (*Moran* v. *Superior Court*, 35 Cal.3d 229, 238 (1983)).

> 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 . . . .” (E.R., Vol. 1, pp. 30-31 (transcript pp. 28, line 18 – 29, line 5.)

In its written order, the bankruptcy court added that “such other defenses as laches” were not foreclosed against Cobb’s claim due to his “having done nothing to pursue his claim for greater compensation and ” that the withdrawal of probable compensation under section 1255.260 restricted Cobb’s remedies even after dismissal of the eminent domain action “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.” (E.R., Vol. 1, pp. 1-2.) The written order then formally overruled Cobb’s objection. (E.R., Vol. 1, p. 2.)

As for the question of which of the competing interests between the Fifth Amendment and the Bankruptcy clause and legislation prevails, the bankruptcy court had this to say:

> "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." (ER, Vol. 1, p. 24 (transcript 22, lines 11-24)

It has been repeatedly recognized that the Bankruptcy Clause is not absolute in its reign over matters of debts between persons.[4] The

[4] The suggestion has been made that the Bankrupty Clause does indeed trump the Fifth Amendment. (See James S. Rogers, "The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause," *Harvard Law Review* 96, (1983): 973-1031 ["Some commentators and courts have argued that the takings clause of the fifth amendment limits congressional power to interfere with property rights in bankruptcy proceedings. In this Article, Professor Rogers argues to the contrary that, at least with respect to prospective bankruptcy legislation, the bankruptcy clause itself and not the fifth amendment limits congressional bankruptcy power."].) Cobb's

Fifth Amendment's mandate for the payment of just compensation has been noted to supersede the bankruptcy laws, for the same policy reason underlying eminent domain law in general, that the cost of the public use of private property must be borne by the public as a whole rather than by a particular private owner. See *Louisville Joint Stock Land Bank* v. Radford, 295 U.S. 555, 589 (1935) ["The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."]:

> "[T]he Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just

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response to this suggestion is that unlike usual debtor-creditor relations where the creditor, with presumed awareness of existing law, can conduct itself so as to minimize or accept risk of nonpayment, a property owner cannot prevent the government from taking his property and no "prospective-only" legislation can eliminate his property interests without compensation without running afoul of the Fifth Amendment. Additionally, where the professor would find limitations in a clause that provides that Congress may "establish . . . uniform laws on the subject of Bankruptcies throughout the United States" (U.S. Const., Art. I, Sect. 8, Clause 4) is unclear. Moreover, the professor's criticism of Supreme Court precedent does not undermine the fact that Supreme Court precedent is the final statement of what the law is.

> compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public." (*Id.* at p. 602.)

"The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" (*Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994).) Congress' bankruptcy power "is subject to the Fifth Amendment's prohibition against taking private property without compensation." (*United States* v. *Security Indus. Bank*, 459 U.S. 70, 75 (1982) [section 522 lien avoidance not applied retroactively to effect a taking in violation of Fifth Amendment.]; see also *Armstrong* v. *United States*, 364 U.S. 40, 46-49 (1961) ["The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking,' and is not a mere 'consequential incidence' of a valid regulatory measure."]; *In re Lahman Manufacturing Company, Inc.*, 33 B.R. 681, 686 (Bankr. D.S.D 1983) [a physical taking of property is not an impairment of a "mere contractual right" that may

be adjusted under the bankruptcy laws].)

Cobb's rights arise out the undoubted public taking of his property. The federal and state constitutions grant him the right to obtain just compensation for the taking. There is no logical sense to the bankruptcy court's elimination of this right, and its reduction to an unsecured claim, simply because Cobb chose to waive the right to contest the taking or its public nature and to pursue only additional compensation. The taking was for a road, perhaps the quintessential public taking. (*Rindge Co.* v. *Los Angeles*, 262 U.S. 700, 706 (1923) ["That a taking of property for a highway is a taking for public use has been universally recognized from time immemorial."].) A landowner faced with a legislative determination that a public purpose is achieved by the taking of private property has almost no chance anyway of contesting that purpose as public.

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia." (*Berman* v. *Parker*, 348 U.S. 26, 32 (1954); see also *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 241 (1984) [the Public Use Clause has never proscribed a taking "rationally

> related to a *conceivable* public purpose"] (italics added).)

Simply stated, Cobb's withdrawal of the probable compensation did not alter the fact that his claim for additional compensation arose from the condemnation of his property and his right to additional compensation, if proven to be due him in order to afford him "just compensation," was not a defense that was waived by the withdrawal. A claim for money is what all inverse condemnation claimants are pursuing. The bankruptcy court's sanctioning the City's treatment of Cobb's claim as a general unsecured claim to be paid a fraction of his allowed amount was a direct authorization that Cobb could be paid less than just compensation for the taking of property, in direct violation of the Fifth Amendment.[5]

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[5] Cobb has located at least one case that appears to hold to the contrary, that of *Pointsett Lumber Mfg.* v. *Drainage Dist. No. 7*, 119 F.2d 270 (8th Cir. 1941), where a landowner harmed by flood waters claimed entitlement to "dollar for dollar" compensation. The Court of Appeals dismissed this claim, citing to its prior decision in *Luehrmann* v. *Drainage District No. 7 of Poinsett County, Arkansas*, 104 F.2d 696, 702-703 (8th Cir. 1939), and Supreme Court cases that upheld public entity bankruptcies in general (*id*. at pp. 272-273). However, in *Luehrmann*, the issues involved the treatment of a

Cobb also wishes to bring to the attention of this Court that since the time of the proceedings involving Cobb's objection to the City's plan, similar contentions have been raised and decided in the bankruptcy of the City of Detroit. (*In re City of Detroit, Michigan, Debtor, United States Bankruptcy Court, Eastern District of Michigan, No. 13-53846*.) There, inverse condemnation claimants, including an inverse condemnation judgment creditor[6], objected to Detroit's bankruptcy plan on Fifth Amendment grounds. The bankruptcy court held their claims to be not subject to impairment in the City's bankruptcy and excepted the claims from discharge entirely under 11 U.S.C. § 944(c)(1), with the following oral opinion on the record:

> "Finally, the Court concludes that the Fifth Amendment does establish a right to just compensation

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judgment creditor and bondholders none of whom does the opinion reveal had land physically appropriated. The *Pointsett* decision thus appears to have extended *Luehrmann* to a scenario not presented there.

[6] Compare the treatment of the inverse condemnation judgment creditor by the Detroit bankruptcy court to the treatment proposed by the bankruptcy court, which would have shoehorned Cobb, had his inverse condemnation action proceeded to judgment, again as an inverse condemnation judgment creditor subject to fractional adjustment. (E.R., Vol. 1, pp. 30-31 (transcript p. 28, line 24 – p. 29, line 1.)

> when a municipality takes private property for public use. Chapter 9 would violate the Fifth Amendment if its application in this case would result in less than just compensation to these objecting claimants. There is, however, a ready solution.
>
> "Section 944(c)(1) gives the Court the discretion to exempt debts from discharge in the confirmation order. At the suggestion of the Attorney General, to avoid any issue as to the constitutionality of chapter 9 in this respect, the Court will use its authority under section 944(c)(1) to order that the objecting parties' Takings Clause claims are exempt from discharge. This ruling eliminates any constitutional grounds to deny confirmation of the City's plan of adjustment." (E.R., Oral Opinion on the Record, pp. Vol. 2, pp. 10-13.)

In its written order, the Detroit bankruptcy court confirmed that city's bankruptcy plan, ordering discharge of "all [unsecured] debts of the City shall be, and hereby are, discharged, and such discharge will void any judgment obtained against the City at any time to the extent that such judgment relates to a discharged debt; *provided that,* in accordance with section 944(c)(I) of the Bankruptcy Code, such discharge shall not apply to [certain identified creditors] related to condemnation or inverse condemnation actions against the City alleging that the City has taken private property without just compensation in violation of the Takings Clause of the Fifth

Amendment to the United States Constitution." (E.R., pp. 6-9 [italics in original].[7])

In this case, by contrast, the bankruptcy court impressed bankruptcy classifications on the question of whether Cobb's claim was "secured" or "unsecured," and, concluding that his claim was "unsecured," otherwise disregarded the constitutional nature of the claim and the just compensation requirements of the Fifth Amendment, and allowed his treatment to be no different than any other unsecured claims presented in the City's bankruptcy. By doing so, the bankruptcy court erred, and its determination must be reversed.

D. To the extent that this case hinges on whether Cobb has rights to any "specific property" and thus a "secured" creditor, Cobb has rights to obtain the property back if just compensation goes unpaid.

Before the bankruptcy court, the City argued that the Cobb's withdrawal of the probable compensation deposit, and the resulting effects of California Code of Civil Procedure section 1255.260 that

[7] The Detroit oral and written orders and comments were unable to be presented to the bankruptcy court in this case as they were issued in November 2014, several months after the proceedings had with respect to Cobb's objection. They are also included under F.R.A.P. 32.1.

waived defenses other than to seek additional compensation, mean that none of the protections given to secured creditors apply to Cobb. The bankruptcy court accepted this argument. Neither, however, recognize that even if a landowner's rights are reduced to a claim for money for complete just compensation, and the payment is not made, then, despite any supposed "waiver," the landowner can seek restoration of his property interests under state law.

In *Frustruck* v. *City of Fairfax*, 212 Cal.App.2d 345 (1963), a city made a series of drainage improvements, and an affected landowner sought to enjoin these activities. The Court of Appeal denied the injunctive relief, on the bases cited above that a public entity is free to take private property for public purposes so long as just compensation is paid. There, as here, an intervening public use had arisen due to the construction of the drainage works, but the Court of Appeal nonetheless held that while the City "was entitled to drain thereon pursuant to the public easement it enjoyed, provided it made just compensation to the plaintiff . . . [t]he only limitation on said right is the requirement for the payment of or provision for just compensation subject to the further limitation that any such attempted

taking or damaging may be enjoined until such compensation is made or provided for." (*Id*. at p. 372.)

Similarly, in *Community Redevelopment Agency of the City of Hawthorne* v. *Force Electronics*, 55 Cal.App.4th 622 (1997), a redevelopment agency condemned the defendant's property by eminent domain, prosecuted its case to judgment, but found itself unable to pay the judgment and sought an order allowing it to pay the judgment over ten years, which order the trial court issued. The Court of Appeal reversed this decision, holding that a condemnee is constitutionally entitled to the "full and perfect" equivalent of the property taken and without prompt payment after judgment the condemnee had the option of accepting payments over time or "it can have the property back." (*Id.* at p. 635 ["To the extent the Legislature has allowed a financially destitute condemner to defer payment of an eminent domain judgment . . . [it] is unconstitutional."].)

Thus, while the City may have had, at one point, the right to compel Cobb to accept nothing other than such additional compensation as might be awarded for the road taking, it would lose this limitation on Cobb's rights if it failed to pay what was determined to be the constitutional measure of loss. Accordingly, Cobb did (and

does) maintain rights to a specific piece of property, namely the one taken by the City, and has the right to its restoration if the City does not provide just compensation.

Furthermore, to provide protection to secured creditors who voluntarily enter into debtor-creditor relationships with a municipality, yet deny that protection to landowners who through no choice of their own have their property taken, defies any attempt too explain the difference for the treatment.

E. Where the City proposed a plan that could not be confirmed, a dismissal was proper unless the City would alter the plan to provide for unimpaired treatment of Cobb's claim or unless the claim was excepted from discharge.

In the bankruptcy court, Cobb argued that because the City's plan proposed to pay him, as an inverse condemnation claimant, something less than complete just compensation, it could not be confirmed due to its containing this constitutional violation. Under bankruptcy authority, where a Chapter 9 Plan may not be confirmed, the remedy appears to be to dismiss the bankruptcy case. (*In re Richmond Sch. Dist.,* 133 B.R. 221, 225 (Bankr. N.D.Cal.1991).) The only other alternative would be to utilize 11 U.S.C. § 944(c)(1), as did the Detroit bankruptcy court, to except Cobb's claim entirely from the

effects of the plan's discharge and injunction provisions. Either of which should have been ordered by the bankruptcy court in this case.

VIII. CONCLUSION

Because Cobb's claim arises from the City's taking of his property, the order of the bankruptcy court permitting cents-on-the-dollar treatment of his claim as unsecured, and the court's subsequent confirmation of the City's plan providing for the discharge of unsecured claims after the fractional distribution, must be reversed and the matter remanded to the bankruptcy court to require either (a) the City to provide for Cobb's claim to be paid to the full measure of just compensation or have the case dismissed, or (b) the bankruptcy court to except Cobb's claim from the effects of the discharge and injunctive relief enjoining recovery of Cobb's claim.

Dated: March 12, 2015

Respectfully submitted,

ATHERTON & DOZIER

Bradford J. Dozier
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Attorney for Objector and Appellant Michael A. Cobb

Date March 12, 2015

CONSTITUTIONAL AND STATUTORY ADDENDUM

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article I, Section 8, Clause 4

The Congress shall have power . . .

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

U.S. Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution, Article I, section 19

(a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

(b) The State and local governments are prohibited from acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person.

(c) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; or remedying environmental contamination that poses a threat to public health and safety.

(d) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of acquiring private property for a public work or improvement.

(e) For the purpose of this section:

1. "Conveyance" means a transfer of real property whether by sale, lease, gift, franchise, or otherwise.

2. "Local government" means any city, including a charter city, county, city and county, school district, special district, authority, regional entity, redevelopment agency, or any other political subdivision within the State.

3. "Owner-occupied residence" means real property that is improved with a single-family residence such as a detached home, condominium, or townhouse and that is the owner or owners' principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property. Owner-occupied residence also includes a residential dwelling unit attached to or detached from such a single-family residence which provides complete independent living facilities for one or more persons.

4. "Person" means any individual or association, or any business entity, including, but not limited to, a partnership, corporation, or limited liability company.

5. "Public work or improvement" means facilities or infrastructure for the delivery of public services such as education, police, fire protection, parks, recreation, emergency medical, public health, libraries, flood protection, streets or highways, public transit, railroad, airports and seaports; utility, common carrier or other similar projects such as energy-related, communication-related, water-related and wastewater-related facilities or infrastructure;

projects identified by a State or local government for recovery from natural disasters; and private uses incidental to, or necessary for, the public work or improvement.

6. "State" means the State of California and any of its agencies or departments.

STATUTES

11 U.S.C. § 941 — Filing of Plan

The debtor shall file a plan for the adjustment of the debtor's debts. If such a plan is not filed with the petition, the debtor shall file such a plan at such later time as the court fixes

11 U.S.C. § 944(c)(1) — Effect of confirmation

(c) The debtor is not discharged under subsection (b) of this section from any debt—

(1) excepted from discharge by the plan or order confirming the plan; or

(2) owed to an entity that, before confirmation of the plan, had neither notice nor actual knowledge of the case.

28 U.S.C. § 157 — Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)

(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is

not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157 (b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334 (c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)

(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

28 U.S.C § 158 — Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121 (d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)

(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)

(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial

council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)

(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)

(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)

(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves 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, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph 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 bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

28 U.S.C. § 1334 — Bankruptcy cases and procedures

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)

(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is

commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158 (d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

40 U.S.C. § 3114 — Declaration of taking

(a) **Filing and Content.—** In any proceeding in any court of the United States outside of the District of Columbia brought by and in the name of the United States and under the authority of the Federal Government to acquire land, or an easement or right of way in land, for the public use, the petitioner may file, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the land described in the petition, declaring that the land is taken for the use of the Government. The declaration of taking shall contain or have annexed to it—

(1) a statement of the authority under which, and the public use for which, the land is taken;

(2) a description of the land taken that is sufficient to identify the land;

(3) a statement of the estate or interest in the land taken for public use;

(4) a plan showing the land taken; and

(5) a statement of the amount of money estimated by the acquiring authority to be just compensation for the land taken.

(b) **Vesting of Title.—** On filing the declaration of taking and depositing in the court, to the use of the persons entitled to the compensation, the amount of the estimated compensation stated in the declaration—

(1) title to the estate or interest specified in the declaration vests in the Government;

(2) the land is condemned and taken for the use of the Government; and

(3) the right to just compensation for the land vests in the persons entitled to the compensation.

(c) **Compensation —**

(1) **Determination and award.—** Compensation shall be determined and awarded in the proceeding and established by judgment. The judgment shall include interest, in accordance with section 3116 of this title, on the amount finally awarded as the value of the property as of the date of taking and shall be awarded from that date to the date of payment. Interest shall not be allowed on as much of the compensation as has been paid into the court. Amounts paid into the court shall not be charged with commissions or poundage.

(2) **Order to pay.—** On application of the parties in interest, the court may order that any part of the money deposited in the court be paid immediately for or on account of the compensation to be awarded in the proceeding.

(3) **Deficiency judgment.—** If the compensation finally awarded is more than the amount of money received by any person entitled to compensation, the court shall enter judgment against the Government for the amount of the deficiency.

(d) **Authority of Court.—** On the filing of a declaration of taking, the court—

(1) may fix the time within which, and the terms on which, the parties in possession shall be required to surrender possession to the petitioner; and

(2) may make just and equitable orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges.

(e) **Vesting Not Prevented or Delayed.—** An appeal or a bond or undertaking given in a proceeding does not prevent or delay the vesting of title to land in the Government.

California Code of Civil Procedure § 583.310

An action shall be brought to trial within five years after the action is commenced against the defendant.

California Code of Civil Procedure § 583.340

In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

(a) The jurisdiction of the court to try the action was suspended.

(b) Prosecution or trial of the action was stayed or enjoined.

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

California Code of Civil Procedure § 583.360

(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article.

(b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute

California Code of Civil Procedure § 1036

In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of that proceeding, shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a

sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding

California Code of Civil Procedure § 1250.410

(a) At least 20 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. The offer and the demand shall include all compensation required pursuant to this title, including compensation for loss of goodwill, if any, and shall state whether interest and costs are included. These offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.

(c) In determining the amount of litigation expenses allowed under this section, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code, any deposit made by the plaintiff pursuant to Chapter 6 (commencing with Section 1255.010), and any other written offers and demands filed and served before or during the trial.

(d) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

(e) As used in this section, "litigation expenses" means the party' s reasonable attorney's fees and costs, including reasonable expert witness and appraiser fees.

California Code of Civil Procedure § 1255.010

(a) At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal. The statement or summary shall contain detail sufficient to indicate clearly the basis for the appraisal, including, but not limited to, all of the following information:

(A) The date of valuation, highest and best use, and applicable zoning of the property.

(B)The principal transactions, reproduction or replacement cost analysis, or capitalization analysis, supporting the appraisal.

(C) If the appraisal includes compensation for damages to the remainder, the compensation for the property and for damages to the remainder separately stated, and the calculations and a narrative explanation supporting the compensation, including any offsetting benefits.

(c) On noticed motion, or upon ex parte application in an emergency, the court may permit the plaintiff to make a deposit without prior compliance with subdivision (b) if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the probable amount of compensation that the plaintiff, in good faith, estimates will be awarded in the proceeding. In its order, the court shall require that the plaintiff comply with subdivision (b) within a reasonable time, to be specified in the order,

and also that any additional amount of compensation shown by the appraisal required by subdivision (b) be deposited within that time.

California Code of Civil Procedure § 1255.210

Prior to entry of judgment, any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited. The application shall be verified, set forth the applicant' s interest in the property, and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff.

California Code of Civil Procedure § 1255.260

If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation

California Code of Civil Procedure § 1260.210

(a) The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.

(b) Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation

California Code of Civil Procedure § 1263.310

Compensation shall be awarded for the property taken. The measure of this compensation is the fair market value of the property taken

California Code of Civil Procedure § 1263.320

(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

(b) The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable

California Code of Civil Procedure § 1263.410

(a) Where the property acquired is part of a larger parcel, in addition to the compensation awarded pursuant to Article 4 (commencing with Section 1263.310) for the part taken, compensation shall be awarded for the injury, if any, to the remainder.

(b) Compensation for injury to the remainder is the amount of the damage to the remainder reduced by the amount of the benefit to the remainder. If the amount of the benefit to the remainder equals or exceeds the amount of the damage to the remainder, no compensation shall be awarded under this article. If the amount of the benefit to the remainder exceeds the amount of damage to the remainder, such excess shall be deducted from the compensation provided in Section 1263.510, if any, but shall not be deducted from the compensation required to be awarded for the property taken or from the other compensation required by this chapter.

California Code of Civil Procedure § 1268.340

Interest, including interest accrued due to possession of property by the plaintiff prior to judgment, and any offset against interest as provided in Section 1268.330, shall be assessed by the court rather than by jury.

California Code of Civil Procedure § 1268.610

(a) Subject to subdivisions (b) and (c), the court shall award the defendant his or her litigation expenses whenever:

(1) The proceeding is wholly or partly dismissed for any reason.

(2) Final judgment in the proceeding is that the plaintiff cannot acquire property it sought to acquire in the proceeding.

(b) Where there is a partial dismissal or a final judgment that the plaintiff cannot acquire a portion of the property originally sought to be acquired, or a dismissal of one or more plaintiffs pursuant to Section 1260.020, the court shall award the defendant only those litigation expenses, or portion thereof, that would not have been incurred had the property sought to be acquired following the dismissal or judgment been the property originally sought to be acquired.

(c) If the plaintiff files a notice of abandonment as to a particular defendant, or a request for dismissal of a particular defendant, and the court determines that the defendant did not own or have any interest in the property that the plaintiff sought to acquire in the proceeding, the court shall award that defendant only those litigation expenses incurred up to the time of filing the notice of abandonment or request for dismissal.

(d) Litigation expenses under this section shall be claimed in and by a cost bill to be prepared, served, filed, and taxed as in a civil action. If the proceeding is dismissed upon motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of judgment.

California Code of Civil Procedure § 1268.710

The defendants shall be allowed their costs, including the costs of determining the apportionment of the award made pursuant to subdivision

(b) of Section 1260.220, except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

9th Circuit Case Number(s) 14-17269

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CERTIFICATE OF SERVICE
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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) March 13, 2015 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Bradford J. Dozier

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