

11

1 MICHAEL J. GEARIN *admitted pro hac vice*
 MICHAEL B. LUBIC (SBN 122591)
 2 MICHAEL K. RYAN *admitted pro hac vice*
 MANOJ D. RAMIA (SBN 295718)
 3 K&L GATES LLP
 10100 Santa Monica Boulevard, Seventh Floor
 Los Angeles, California 90067
 4 Telephone: 310.552.5000
 Facsimile: 310.552.5001
 5 Email: mike.gearin@klgates.com
 michael.lubic@klgates.com
 6 michael.ryan@klgates.com
 7 manoj.ramia@klgates.com

8 Attorneys for California Public Employees'
 Retirement System

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

13 In re
 14 CITY OF STOCKTON, CALIFORNIA,
 15 Debtor.

Case No. 2012-32118

D.C. No. OHS-15

Chapter 9

16 **CALPERS' SUMMARY OF**
 17 **SUPPLEMENTAL LIMITED**
 18 **OBJECTIONS REGARDING THE CITY**
 19 **OF STOCKTON'S FIRST AMENDED**
 20 **PLAN OF ADJUSTMENT**

Date: May 12, 2014

Time: 9:30 a.m.

Place: Robert T. Matsui U.S. Courthouse,
 501 I Street
 Department C, Fl. 6, Courtroom 35
 Sacramento, CA 95814

Judge: Hon. Christopher M. Klein

TABLE OF CONTENTS

Page

I. BACKGROUND 2

II. THE PLAN’S TREATMENT OF THE CITY’S OBLIGATIONS TO CALPERS..... 2

III. RESERVATION OF RIGHTS AND LIMITED OBJECTIONS 3

 A. Definition of “CalPERS Pension Plan”4

 B. Scope of Discharge and Release5

 C. Injunction5

 D. Distribution Mechanics6

 E. Retention of Jurisdiction7

IV. CONCLUSION..... 8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases

Associated Vintage Grp., Inc.,
283 B.R. 549 (9th Cir. BAP 2002)..... 4

Bank of Louisiana v. Craig’s Stores of Texas, Inc. (In re Craig’s Stores of Texas, Inc.),
266 F.3d 388 (5th Cir. 2001)..... 8

City of Oakland v. Pub. Emps. Ret. Sys.,
95 Cal. App. 4th 29 (2002) 4

CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73,
162 F.3d 405 (6th Cir. 1998)..... 6

In re Texscan Corp.,
976 F.2d 1269 (9th Cir. 1992)..... 3

Jasper v. Davis,
164 Cal. App. 2d 671, 675 (1958)..... 3

L&J Anaheim Assocs.,
995 F.2d 940 (9th Cir. 1993)..... 2

Montana v. Goldin (In re Pegasus Gold Corp.),
394 F.3d 1189 (9th Cir. 2005)..... 8

Statutes

11 U.S.C. § 1123(b)(6)..... 4

11 U.S.C. § 1124..... 2

11 U.S.C. § 365(a) 3

11 U.S.C. § 901(a) 4

28 U.S.C. § 1334..... 8

Cal Gov. Code § 20506..... 4

1 The California Public Employees' Retirement System ("CalPERS" or the "System") files this
2 Summary of Supplemental Limited Objections Regarding the City's First Amended Plan of
3 Adjustment (the "Plan") [Dkt. 1204] of the City of Stockton (the "City" or "Stockton"). CalPERS
4 earlier filed its Summary of Limited Objections and Reservation of Rights [Dkt. 1255] and has
5 worked with the City to arrive at agreed amendments to the Plan to address the issues raised in the
6 Summary of Limited Objections. The City has committed to amend and circulate a revised version of
7 the Plan, but is working on other, more complicated amendments to the Plan such as those relating to
8 the stipulation that the City recently reached with Franklin in the Franklin adversary proceeding.
9 CalPERS expects that the City will make changes to the Plan which fully address the limited issues
10 raised in this objection, but to protect its right to be heard if necessary, CalPERS hereby supplements
11 and restates its objections to the Plan.

12 The Plan provides that "The City will continue to honor its obligations to its employees and
13 retirees to fund employment retirement benefits under the CalPERS Pension Plan, and CalPERS as
14 trustee and the CalPERS Pension Plan Participants retain all of their rights under applicable
15 nonbankruptcy law. Thus, CalPERS and the CalPERS Pension Plan Participants will be entitled to
16 the same rights and benefits to which they are currently entitled under the CalPERS Pension Plan."
17 Plan, § IV.P.2, at 41. CalPERS supports the City in its commitment to continue to comply with its
18 obligations to retirees, employees, and CalPERS with respect to the City's participation in the
19 System.

20 Despite the clarity of Section IV, the Plan in other places characterizes the City's relationship
21 with CalPERS in a manner that could be interpreted to contradict or limit the proposed unqualified
22 continuation of CalPERS' rights and the City's obligations under the Plan, all without impairment.
23 CalPERS understands that the City does not intend to qualify or limit CalPERS' rights, and the City
24 has advised CalPERS that the City intends to make appropriate clarifying changes to the Plan or to
25 include appropriate clarifying language in its proposed Confirmation Order to address any unintended
26 perceived limitations.

1 **I. BACKGROUND**

2 As background, CalPERS incorporates by reference section I (“Background”) of its Summary
3 Limited Objections and Reservation of Rights [Dkt. 1255] and section I (“Background”) of its
4 Response to Franklin’s Objection to Confirmation of the City of Stockton’s First Amended Plan of
5 Adjustment [Dkt. 1308].

6 **II. THE PLAN’S TREATMENT OF THE CITY’S OBLIGATIONS TO CALPERS**

7 Section III of the Plan defines “Class 15” to be “Claims Regarding the City’s Obligations to
8 Fund Employee Pension Plan Contributions to CalPERS, as Trustee under the CalPERS Pension Plan
9 for the Benefit of CalPERS Pension Plan Participants.” Plan Section IV.P sets forth the Plan’s
10 treatment of the Class 15 claims (i.e, the City’s obligations to CalPERS).

11 Plan Section IV.P.1 states that Class 15 is not “Impaired” because the Plan “will not affect the
12 legal, equitable, or contractual rights of the holder of such Claims....”

13 The Plan defines “Impaired” by reference to 11 U.S.C. § 1124. For a claim or interest not to
14 be impaired within the meaning of section 1124(1), a plan must “leave[] unaltered the legal,
15 equitable, and contractual rights to which such claim or interest entitles the holder of such claim or
16 interest.” 11 U.S.C. § 1124. Impairment is defined in “the broadest possible terms,” *In re L&J*
17 *Anaheim Assocs.*, 995 F.2d 940, 942 (9th Cir. 1993), such that “any alteration” is impairment. *Id.*
18 Therefore, anything in the Plan that could modify the City’s obligations or CalPERS’ rights under the
19 CalPERS Pension Plan would be an impairment contrary to the stated intention of the Plan.

20 Plan Section IV.P.2 states that “CalPERS will continue as the trustee for the City’s pension
21 plan for its employees, and the CalPERS Pension Plan will be assumed by the City. The City will
22 continue to honor its obligations to its employees and retirees to fund employee retirement benefits
23 under the CalPERS Pension Plan, and CalPERS as trustee and the CalPERS Pension Plan
24 Participants will retain all of their rights and remedies under applicable nonbankruptcy law. Thus,
25 CalPERS and the CalPERS Pension Plan Participants will be entitled to the same rights and benefits
26 to which they are currently entitled under the CalPERS Pension Plan. CalPERS, pursuant to the
27 CalPERS Pension Plan, will continue to provide pension benefits for participants in the manner
28 indicated under the provisions of the CalPERS Pension Plan and applicable nonbankruptcy law.”

1 The City's commitment under the Plan to leave CalPERS unimpaired, to assume, and to have
2 CalPERS, the City, and employees fully retain their rights and remedies under nonbankruptcy law
3 necessarily means that the provisions of the Plan providing for discharge of claims, releases, filing of
4 claims, distributions on account of claims, and jurisdiction over future issues are not applicable to the
5 CalPERS relationship. CalPERS seeks to have the Plan amended to make the inapplicability of those
6 provisions completely clear.

7 **III. RESERVATION OF RIGHTS AND LIMITED OBJECTIONS**

8 CalPERS supports the City in its commitment to fully ratify its obligations to retirees,
9 employees, and CalPERS with respect to the City's participation in the System. The City has
10 previously suggested that it may seek to implement its decision to continue its relationship with
11 CalPERS pursuant to an "Assumption Motion" pursuant to 11 U.S.C. § 365(a) to assume "executory
12 contracts." See Disclosure Statement [Dkt. 1215] at 87 and the City's Memorandum of Law in
13 Support of Confirmation of First Amended Plan for the Adjustment of Debts [Dkt. 1243] at 11. The
14 City through its counsel has now committed it will not seek to accept and ratify the City's
15 relationship with CalPERS via a motion under section 365, but instead will rely on the existing
16 language of the Plan.

17 The CalPERS Pension Plan is not an executory contract within the meaning of section 365.
18 See *In re Texscan Corp.*, 976 F.2d 1269, 1273 (9th Cir. 1992) (holding that statutory obligations
19 arising from a contract must be considered in determining whether a material breach by one party
20 would excuse performance by the other). While there are contract features of the City's relationship
21 with CalPERS, the relationship has other attributes which distinguish it from an executory contract as
22 that term is used in section 365 of the Code. By contracting with CalPERS, the City has elected to
23 participate in a statutory system of deferred compensation. See *Jasper v. Davis*, 164 Cal. App. 2d
24 671, 675 (1958). The City's relationship with CalPERS is governed by its statutory obligations as set
25 forth in the PERL. Once a city makes its statutory election to participate in the System, it is bound by
26 the statutory provisions governing the System and the decisions of the CalPERS Board. Cal Gov.
27 Code § 20506; *City of Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 55 (2002). CalPERS
28 does not believe it is necessary for the City to assume its contract with CalPERS by motion under

1 § 365 of the Code, as the City's commitments to fully comply with its obligations under the
2 "contract" and applicable state law clearly express CalPERS' treatment under the Plan.

3 As CalPERS has noted in its Response to Franklin's Objections [Dkt. 1308], the City has the
4 authority under 11 U.S.C. § 1123(b)(6) to ratify its continued relationship with CalPERS. Section
5 1123(b)(6) (which applies in chapter 9, *see* 11 U.S.C. § 901(a)) provides that a plan may "include any
6 other appropriate provision not inconsistent with the applicable provisions of this title." Section
7 1123(b)(6) defines the "outer boundary" of the broad "flexibility" afforded to a plan proponent. *In re*
8 *Associated Vintage Grp., Inc.*, 283 B.R. 549, 560 (9th Cir. BAP 2002). To make clear that the Plan's
9 treatment of the CalPERS Pension Plan is pursuant to this authority, Plan Section IV.P.2 should be
10 revised to add the following new first sentence: "Pursuant to 11 U.S.C. § 1123(b)(6), this Plan
11 provides the following treatment of the CalPERS Pension Plan."

12 Although the City's and the Plan's stated intention of continuing the City's relationship with
13 CalPERS and the CalPERS Pension Plan is clear and unobjectionable, certain other provisions of the
14 Plan could be interpreted as undermining that basic promise. CalPERS believes that the City intends
15 to eliminate the risk of misinterpretation of the Plan by amending the Plan or including clarifying
16 language in a proposed Confirmation Order. Nonetheless, to protect CalPERS' right to be heard on
17 these matters, CalPERS makes the following limited objections to the following Plan provisions:

18 **A. Definition of "CalPERS Pension Plan"**

19 Plan Section I.A.55 defines "CalPERS Pension Plan" as "the pension plan contract between
20 CalPERS and the City, dated as of September 1, 1944, as amended (CalPERS ID 6373973665)." As
21 explained in the materials incorporated in the Background, however, the City's obligations to
22 CalPERS are defined by California statutes (principally the PERL) and other applicable State law
23 governing the obligations of municipal employers that enter into a relationship with CalPERS. Plan
24 Section IV.P.2 confirms that applicable law is an essential component of the CalPERS Pension Plan:
25 "Thus, CalPERS and the CalPERS Pension Plan Participants will be entitled to the same rights and
26 benefits to which they are currently entitled under the CalPERS Pension Plan. CalPERS, pursuant to
27 the CalPERS Pension Plan, will continue to provide pension benefits for participants in the manner
28 indicated under the provisions of the CalPERS Pension Plan and applicable nonbankruptcy law." To

1 make clear that those obligations are included among the obligations that the City will assume and
2 continue to honor, the definition of “CalPERS Pension Plan” should be revised to add the phrase:
3 “, including the statutory and other applicable State law obligations resulting from or otherwise
4 governing the City’s relationship with CalPERS.”

5 **B. Scope of Discharge and Release**

6 Plan Section XI.A provides that upon the Effective Date, “the City will be discharged from all
7 debts of the City and Claims against the City other than (i) any Debt specifically and expressly
8 exempted from discharge by the Plan or the Confirmation Order”

9 The Plan states that CalPERS is unimpaired and that the CalPERS Pension Plan will be
10 “assumed,” but nothing in the Plan “expressly” identifies the CalPERS Pension Plan as being
11 excepted from discharge. To avoid any potential misunderstanding or dispute on whether any or all
12 of the City’s present or future obligations to CalPERS would purportedly be discharged by the Plan,
13 the Plan should be clarified to add, at the end of the first paragraph of Plan Section XI.A, language
14 confirming that the discharge does not apply to any Claims or other obligation of the City under the
15 CalPERS Pension Plan.

16 For similar reasons, the second paragraph of Plan Section XI.A could be interpreted to
17 conflict with the unqualified ratification of the CalPERS Pension Plan set forth in Plan Section IV.P.
18 Section XI.A states that the treatment under the Plan of “all holders of Claims” including Unimpaired
19 Claims, will “be in exchange for and in complete satisfaction, discharge, and release of all Claims of
20 any nature whatsoever ...” and that “all Pre-Confirmation Date Claims will be and shall be deemed to
21 be satisfied, discharged, and released in full” Again, to avoid potential misunderstanding or
22 dispute, the Plan should be clarified to include at the end of the second paragraph of Plan Section
23 XI.A language confirming that the satisfaction, discharge, and release provisions do not apply to any
24 Claims or other obligation of the City under the CalPERS Pension Plan.

25 **C. Injunction**

26 Plan Section XI.B provides an injunction against all holders of Pre-Confirmation Date
27 Claims, prohibiting a variety of actions concerning those claims, “[e]xcept as otherwise provided in
28 this Plan.” There is nothing in the Plan expressly excepting CalPERS from the injunction, to the

1 extent that it might have a Pre-Confirmation Date Claim.¹ To avoid misunderstandings or disputes
2 about the scope of the injunction, the Plan should be amended to add at the end of Plan Section XI.B
3 language confirming that the injunction provisions of the Plan do not apply to any Claims or other
4 obligations of the City under the CalPERS Pension Plan.

5 Also, Plan Section II.D imposes a bar date for Administrative Claims and Other Postpetition
6 Claims and provides that, if a proof of claim for any such claim is not timely filed, “holders of such
7 Claims shall be barred from asserting such Claims in any manner against the City.” The City remains
8 current on its payment obligations to CalPERS as of the time of the filing of this pleading and has
9 timely paid its contributions throughout the case. However, at the anticipated time of the
10 confirmation hearing, there may technically be a pro-rated monthly amount of contributions owed to
11 CalPERS which could be construed as an administrative claim. To avoid a potential interpretation of
12 section II.D that would cause its requirements to supersede the terms of the CalPERS Pension Plan,
13 with which the City will continue to comply, the Plan should be amended to add at the end of Plan
14 Section II.D language confirming that the administrative claims process and bar date do not apply to
15 any Claims or other obligation of the City under the CalPERS Pension Plan.

16 **D. Distribution Mechanics**

17 Plan Section IX sets forth detailed provisions governing payments or distributions “pursuant
18 to this Plan” or on “Allowed Claims.” CalPERS understands that, because the City will be
19 continuing its relationship with CalPERS under the CalPERS Pension Plan unimpaired, the City will
20 continue to make payments when and in the manner required by the CalPERS Pension Plan. To
21 avoid potential confusion about whether Plan Section IX would override the terms of the CalPERS
22 Pension Plan (something that would be inconsistent with the City’s stated position that it will

23
24 ¹ Because the City has timely fulfilled its contribution obligations under the CalPERS Pension Plan,
25 CalPERS does not concede that it would have any “Pre-Confirmation Date Claims” purportedly
26 subjecting it to the injunction. The Bankruptcy Code definition of “claim” may not apply to any part
27 of a theoretical future Termination Payment associated with pre-Confirmation Date services. *See*
28 *CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73*, 162 F.3d 405,
409 (6th Cir. 1998) (holding that liability under ERISA arising from withdrawal from a
multiemployer pension plan is not a “claim” prior to withdrawal). The amendment to the Plan
suggested in the text, however, will eliminate any need to consider whether CalPERS has any “Pre-
Confirmation Date Claim.”

1 unequivocally assume the CalPERS Pension Plan), the Plan should be amended to add at the end of
2 Plan Section IX a new subsection “K” providing as follows:

3 **“K. CalPERS Pension Plan**

4 Except as set forth in Section IX.F, this Section IX shall not apply to the
5 CalPERS Pension Plan.”

6 **E. Retention of Jurisdiction**

7 Plan Section XII provides that the Court will “retain and have exclusive jurisdiction” over a
8 number of matters, some of which could, in isolation, be interpreted to include disputes under the
9 CalPERS Pension Plan.²

10 Having this Court exercise jurisdiction (let alone “exclusive” jurisdiction) over potential
11 future disputes or enforcement of the CalPERS Pension Plan would exceed the Court’s limited
12 jurisdiction provided under 28 U.S.C. § 1334. *See, e.g., Montana v. Goldin (In re Pegasus Gold*
13 *Corp)*, 394 F.3d 1189, 1194 (9th Cir. 2005) (adopting a “close nexus” test for post-confirmation
14 “related to” jurisdiction, covering matters such as “interpretation, implementation, consummation,
15 execution, or administration of the confirmed plan”); *Cf. Bank of Louisiana v. Craig’s Stores of*
16 *Texas, Inc. (In re Craig’s Stores of Texas, Inc.)*, 266 F.3d 388, 391 (5th Cir. 2001) (holding that court
17 lacked post-confirmation jurisdiction over assumed contract). Plan Section XII should be amended to
18 add a final paragraph providing as follows: “This Section XII shall not apply to any Claims, disputes,
19 controversies, or other matters arising under or in connection with the CalPERS Pension Plan.”

20
21
22 ² Paragraph 1 provides for jurisdiction to “resolve any matters related to the assumption ... of any
23 executory contract ... and to hear, determine and, if necessary, liquidate any Claims arising
therefrom”

24 Paragraph 2 provides for jurisdiction to “implement or consummate ... all other contracts ... and
25 other agreements related to this Plan.”

26 Paragraph 12 provides for jurisdiction “to determine any other matters that may arise in connection
with or are related to ... any ... other agreement ... related to this Plan.”

27 Paragraph 14 provides jurisdiction to “hear and determine all disputes ... arising in connection with
28 or related to the terms or enforcement of any relevant agreements.”

IV. CONCLUSION

CalPERS supports the confirmation of the Plan, subject to resolution of the limited issues identified in this Summary of Supplemental Limited Objections.

Respectfully submitted,

Michael J. Gearin
Michael B. Lubic
Michael K. Ryan
Manoj D. Ramia
K&L GATES LLP

Dated: April 21, 2014

By: /s/ Michael J. Gearin
Michael J. Gearin

Attorneys for California Public Employees'
Retirement System

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28