

11

1 MICHAEL J. GEARIN *admitted pro hac vice*
 MICHAEL B. LUBIC (SBN 122591)
 2 MICHAEL K. RYAN *admitted pro hac vice*
 BRETT D. BISSETT (SBN 280366)
 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 brett.bissett@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 LIMITED**
 17 **OBJECTIONS AND RESERVATION OF**
 18 **RIGHTS REGARDING THE CITY OF**
STOCKTON'S FIRST AMENDED PLAN
OF ADJUSTMENT

Date: March 5, 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 1

 A. What Is CalPERS? 1

 B. The Nature of the City of Stockton’s Relationship with CalPERS..... 2

II. THE PLAN’S TREATMENT OF THE CITY’S OBLIGATIONS TO CALPERS..... 4

III. RESERVATION OF RIGHTS AND LIMITED OBJECTION..... 4

 A. Definition of “CalPERS Pension Plan” 5

 B. Scope of Discharge and Release 6

 1. Discharge 6

 2. Release 6

 C. Injunction 7

 D. Distribution Mechanics 7

 E. Retention of Jurisdiction. 8

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

Barroga v. Bd. of Admin. of CalPERS,
No. 2:12-cv-01179, 2012 WL 5337326 (E.D. Cal. Oct. 26, 2012)..... 1

Bd. of Administration of PERS v. Wilson,
52 Cal. App. 4th 1109 (1997) 3

Cal. Ass’n of Prof’l Scientists v. Schwarzenegger,/
137 Cal. App. 4th 371 (2006) 2

CalPERS v. Moody’s Corp.,
No. C09-03628, 2009 WL 3809816 (N.D. Cal. Nov. 10, 2009)..... 1

City of Oakland v. Pub. Emps. Ret. Sys.,
95 Cal. App. 4th 29 (2002) 2, 5

CPT Holdings, Inc. v. Industrial & Allied Employees Union Pension Plan, Local 73,
162 F.3d 405 (6th Cir. 1998)..... 7

In re Texscan Corp.,
976 F.2d 1269 (9th Cir. 1992)..... 5

Jasper v. Davis,
164 Cal. App. 2d 671 (1958)..... 2, 5

Valdes v. Cory,
139 Cal. App. 3d 773 (1983)..... 3

Wheeler v. Bd. of Admin. of PERS,
25 Cal.3d 600 (1979) 2

Statutes

11 U.S.C. § 365(a) 4, 5

28 U.S.C. § 1334 8

Cal. Gov. Code § 20001 2

Cal. Gov. Code § 20002 1

Cal. Gov. Code § 20460 2

Cal. Gov. Code § 20487 3

Cal. Gov. Code § 20506 2, 5

Cal. Gov. Code § 20532 3

Cal. Gov. Code § 20535 3

Cal. Gov. Code § 20536 3

Cal. Gov. Code § 20831 3

1 The California Public Employees' Retirement System ("CalPERS" or "System") files this
2 Summary of Limited Objections and Reservation of Rights Regarding the City's First Amended Plan
3 of Adjustment (the "Plan") [Dkt. 1204] of the City of Stockton (the "City" or "Stockton").

4 The Plan provides that "The City will continue to honor its obligations to its employees and
5 retirees to fund employment retirement benefits under the CalPERS Pension Plan, and CalPERS as
6 trustee and the CalPERS Pension Plan Participants retain all of their rights under applicable
7 nonbankruptcy law. Thus, CalPERS and the CalPERS Pension Plan Participants will be entitled to
8 the same rights and benefits to which they are currently entitled under the CalPERS Pension Plan."
9 Plan, § IV.P.2, at 41. CalPERS supports the City in its commitment to continue to comply with its
10 obligations to retirees, employees, and CalPERS with respect to the City's participation in the
11 System.

12 Despite the clarity of Section IV, the Plan in other places characterizes the City's relationship
13 with CalPERS in a manner that could be interpreted to contradict or limit the proposed unqualified
14 unimpairment of CalPERS' rights and the City's obligations under the Plan. CalPERS understands
15 that the City does not intend to qualify or limit CalPERS' rights and that the City will make
16 appropriate clarifying changes to the Plan or will include appropriate clarifying language in its
17 proposed Confirmation Order to address any perceived limitations. Nonetheless, to reserve its right
18 to be heard if necessary, CalPERS hereby sets forth its reservation of rights and limited objections to
19 the Plan.

20 **I. BACKGROUND**

21 **A. What Is CalPERS?**

22 CalPERS is an arm of the State of California, *i.e.* an agency that is an integral part of the
23 State, through which the State acts. *See* Cal. Gov. Code § 20002 (stating CalPERS "is a unit of the
24 Government Operations Agency."); *see also Barroga v. Bd. of Admin. of CalPERS*, No. 2:12-cv-
25 01179, 2012 WL 5337326 at *5 (E.D. Cal. Oct. 26, 2012) (finding that CalPERS is an "arm of the
26 state" for sovereign immunity purposes) (citing cases holding the same); *cf. CalPERS v. Moody's*
27 *Corp.*, No. C09-03628, 2009 WL 3809816 at *6 (N.D. Cal. Nov. 10, 2009) (concluding CalPERS is
28 "an arm of the state" for diversity jurisdiction purposes).

1 The Public Employees' Retirement Law (Cal. Gov. Code, § 20000 *et seq.*) ("PERL") creates a
2 statutorily governed retirement system for certain State and local government employees. *City of*
3 *Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 33 (2002). The retirement system serves an
4 important public purpose. The PERL "effect[s] economy and efficiency in the public service" by
5 providing a pension plan to pay retirement compensation and death benefits. Cal. Gov. Code
6 § 20001; *see also Wheeler v. Bd. of Admin. of PERS*, 25 Cal.3d 600, 605 (1979) ("Pension programs
7 for public employees serve two objectives: to induce persons to enter into and continue in public
8 service, and to provide subsistence for disabled or retired employees and their dependants.")
9 (quotation and citation omitted).

10 The California Legislature established CalPERS in 1932 to provide retirement benefits to
11 California State employees and, beginning in 1939, public agencies like Stockton were allowed to
12 participate in CalPERS. *See* (California Public Employees' Retirement System, Office of Public
13 Affairs, Facts at a Glance: General (June 2012)). CalPERS provides pension and healthcare services
14 for approximately 1.6 million California public employees, retirees, and their families. *Id.* A "state
15 employee generally becomes a member of the Public Employees' Retirement System ... 'upon his or
16 her entry into employment.'" *Cal. Ass'n of Prof'l Scientists v. Schwarzenegger*, 137 Cal. App. 4th
17 371, 376 (2006). Local government employers may participate in the System to provide pension and
18 retirement benefits to their employees.

19 **B. The Nature of the City of Stockton's Relationship with CalPERS**

20 Under the PERL, a municipality participates in the System by entering into a contract with
21 CalPERS that describes the benefits to its employees and contributions required by the municipality
22 and its employees. Cal. Gov. Code § 20460. While labeled a "contract," this relationship is
23 categorically different than a commercial contract; rather, the municipality has elected to participate
24 in a statutorily created and mandated system of deferred compensation. *See Jasper v. Davis*, 164 Cal.
25 App. 2d 671, 675 (1958). Once a city makes this statutory election, it is necessarily bound by the
26 statutory provisions governing the System and the decisions of the CalPERS Board. Cal. Gov. Code
27 § 20506; *City of Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 55 (2002). The governing
28 statutes require the municipality to timely pay required employer contributions and expressly prohibit

1 rejecting a contract or agreement under chapter 9. Cal. Gov. Code §§ 20831 & 20487. The statutory
2 pension provisions are fundamental to the employment relationship, and should be read to require
3 adequate funds to meet reasonable expectations of the employees. *Valdes v. Cory*, 139 Cal. App. 3d
4 773, 786 (1983). Participating cities cannot alter their funding obligations to CalPERS. *Bd. of*
5 *Administration of PERS v. Wilson*, 52 Cal. App. 4th 1109, 1122 (1997). For these reasons, the City’s
6 obligations to CalPERS are not limited to the language of the document that is labeled a “contract”;
7 rather, the City’s obligations are defined by applicable State law, which includes but is not limited to
8 the contractual language.

9 The PERL requires an agency, such as a city, participating in the System to make timely
10 contributions in amounts recommended by CalPERS’ actuary and approved by the CalPERS Board.
11 Cal. Gov. Code §§ 20532 & 20831. The PERL explicitly provides that a participating agency may
12 not refuse to pay the required contributions as determined by CalPERS within the prescribed
13 deadlines. *Id.* at § 20831. A participating agency is also responsible to CalPERS for the expenses of
14 determining the approximate and actual contributions, as well as of administering the System. *Id.* at
15 §§ 20535 & 20536.

16 In September 1944, the City of Stockton, through its City Council, elected to participate in the
17 California State Retirement System, subject to the provisions of the State Employees’ Retirement
18 Act. *See, e.g.*, Stockton/CalPERS Original Contract & Amendments. The City’s retirement plan has
19 two subplans with different benefit formulas—safety workers and miscellaneous employees. *See*
20 Annual Valuation Report as of June 30, 2012, for the Miscellaneous and Safety Stockton Plans. All
21 City employees who are not safety workers are part of the miscellaneous subplan and all
22 contributions made to this subplan are allocated to this subplan as a whole. *See id.*

23 The City’s contribution obligations are determined on an actuarial basis taking into account
24 expected investment returns, employee life expectancy, projected retirement date, and projected
25 compensation and are communicated in Annual Valuation Reports provided to the City. Actuarial
26 calculations are based on assumptions about the future: (a) demographic assumptions include the
27 percentage of employees that will terminate, die, become disabled, and retire in each future year and
28

1 (b) economic assumptions include future salary increases for each active employee and future
2 investment returns.

3 Based on information currently available, including payroll information provided by the City
4 to CalPERS, CalPERS believes that the City is current in its obligations to CalPERS under the
5 CalPERS Pension Plan as of this date.

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 Plan section IV.P.2 states that "CalPERS will continue as the trustee for the City's pension
14 plan for its employees, and the CalPERS Pension Plan will be assumed by the City. The City will
15 continue to honor its obligations to its employees and retirees to fund employee retirement benefits
16 under the CalPERS Pension Plan, and CalPERS as trustee and the CalPERS Pension Plan
17 Participants will retain all of their rights and remedies under applicable nonbankruptcy law. Thus,
18 CalPERS and the CalPERS Pension Plan Participants will be entitled to the same rights and benefits
19 to which they are currently entitled under the CalPERS Pension Plan. CalPERS, pursuant to the
20 CalPERS Pension Plan, will continue to provide pension benefits for participants in the manner
21 indicated under the provisions of the CalPERS Pension Plan and applicable nonbankruptcy law."

22 **III. RESERVATION OF RIGHTS AND LIMITED OBJECTION**

23 CalPERS supports the City in its commitment to fully ratify its obligations to retirees,
24 employees and to CalPERS with respect to the City's participation in the System. The City has
25 asserted that it intends to implement its decision to continue its relationship with CalPERS pursuant
26 to the "Assumption Motion" defined in Plan section I.A.44. That definition states that the
27 Assumption Motion will be a motion pursuant to 11 U.S.C. § 365(a) to assume "executory contracts."
28 Page 87 of the Disclosure Statement [Dkt. 1215] and the City's Memorandum of Law in Support of

1 Confirmation of First Amended Plan for the Adjustment of Debts [Dkt. 1243] make clear that this is
2 the City's intention.

3 CalPERS does not concur with the City's position that the CalPERS Pension Plan is an
4 executory contract within the meaning of section 365. *See In re Texscan Corp.*, 976 F.2d 1269, 1273
5 (9th Cir. 1992) (holding that statutory obligations arising from a contract must be considered in
6 determining whether a material breach by one party would excuse performance by the other). While
7 there are contract features of the City's relationship with CalPERS, the relationship has other
8 attributes which distinguish it from an executory contract as that term is used in section 365 of the
9 Code. By contracting with CalPERS, the City has elected to participate in a statutory system of
10 deferred compensation. *See Jasper v. Davis*, 164 Cal. App. 2d 671, 675 (1958). The City's
11 relationship with CalPERS is governed by its statutory obligations as set forth by the PERL. Once a
12 city makes its statutory election to participate in the System, it is bound by the statutory provisions
13 governing the System and the decisions of the CalPERS Board. Cal Gov. Code § 20506; *City of*
14 *Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 55 (2002). CalPERS does not believe it is
15 necessary for the City to assume its contract with CalPERS by motion under § 365 of the Code, as the
16 City's commitments to fully comply with its obligations under the "contract" and applicable state law
17 clearly express CalPERS' treatment under the Plan.

18 Although the City's and the Plan's stated intention of continuing the City's relationship with
19 CalPERS and the CalPERS Pension Plan is clear and unobjectionable, certain other provisions of the
20 Plan could be interpreted as undermining that basic promise. CalPERS believes that the City intends
21 to eliminate the risk of misinterpretation of the Plan by amending the Plan or including clarifying
22 language in a proposed Confirmation Order. Nonetheless, in order to assure that CalPERS retains its
23 right to be heard on these matters, CalPERS makes the following contingent, limited objections to the
24 following Plan provisions.

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

26 Plan Section I.A.55 defines "CalPERS Pension Plan" as "the pension plan contract between
27 CalPERS and the City, dated as of September 1, 1944, as amended (CalPERS ID 6373973665)." As
28 explained above, however, the City's obligations to CalPERS are defined by the California statutes

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

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

7 *1. Discharge*

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

11 The Plan states that the CalPERS Pension Plan will be “assumed,” and the Modified
12 Disclosure Statement [Dkt. 1215] states that the CalPERS Pension Plan will be included among the
13 contracts covered by the Assumption Motion (*id.* at 87), but nothing in the Plan “expressly” identifies
14 the CalPERS Pension Plan as being excepted from discharge. To avoid any potential
15 misunderstanding or dispute on whether any or all of the City’s present or future obligations to
16 CalPERS would purportedly be discharged by the Plan, the Plan should be clarified to expressly
17 except obligations to CalPERS under the CalPERS Pension Plan from the discharge provisions of the
18 Plan.

19 *2. Release*

20 For similar reasons, the second paragraph of Plan section XI.A could be interpreted to conflict
21 with the unqualified ratification of the CalPERS Pension Plan set forth in Plan section IV.P. Section
22 XI.A states that the treatment under the Plan of “all holders of Claims” including Unimpaired Claims,
23 will “be in exchange for and in complete satisfaction, discharge, and release of all Claims of any
24 nature whatsoever ...” and that “all Pre-Confirmation Date Claims will be and shall be deemed to be
25 satisfied, discharged, and released in full” Again, to avoid potential misunderstanding or dispute,
26 the Plan should be clarified to except obligations to CalPERS under the CalPERS Pension Plan from
27 the release provisions of the Plan.

1 **C. Injunction**

2 Plan Section XI.B provides an injunction against all holders of Pre-Confirmation Date
3 Claims, prohibiting a variety of actions concerning those claims, “[e]xcept as otherwise provided in
4 this Plan.” There is nothing in the Plan expressly excepting CalPERS from the injunction.¹ To avoid
5 misunderstandings or disputes about the scope of the injunction, the Plan should be amended to
6 except obligations under the CalPERS Pension Plan from the injunctive provisions of the Plan.

7 Also, Plan section II.D imposes a bar date for Administrative Claims and Other Postpetition
8 Claims and provides that, if a proof of claim for any such claim is not timely filed, “holders of such
9 Claims shall be barred from asserting such Claims in any manner against the City.” To avoid a
10 potential interpretation of section II.D that would cause its requirements to supersede the terms of the
11 CalPERS Pension Plan, with which the City will continue to comply, the Plan should be amended to
12 except the CalPERS Pension Plan from the Administrative Bar Date provisions of the Plan.

13 **D. Distribution Mechanics**

14 Plan section IX sets forth detailed provisions governing payments or distributions “pursuant
15 to this Plan” or on “Allowed Claims.” CalPERS understands that, because the City will be
16 continuing its relationship with the CalPERS under the CalPERS Pension Plan, the City will continue
17 to make payments when and in the manner required by the CalPERS Pension Plan. To avoid
18 potential confusion about whether Plan section IX would override the terms of the CalPERS Pension
19 Plan (something that would be inconsistent with the City’s stated position that it will unequivocally
20 assume the CalPERS Pension Plan), the Plan should be amended to except obligations under the
21 CalPERS Pension Plan from the distribution mechanics of the Plan.

22
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 below, however, will eliminate any need to consider whether CalPERS has any “Pre-
Confirmation Date Claim.”

E. Retention of Jurisdiction

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

Having this Court exercise jurisdiction (let alone “exclusive” jurisdiction) over potential future disputes or enforcement of the CalPERS Pension Plan would exceed the Court’s limited jurisdiction provided under 28 U.S.C. § 1334. The Plan should be amended to except any Claims, disputes, controversies, or other matters arising under or in connection with the CalPERS Pension Plan from the retention of jurisdiction provisions of the Plan.

IV. CONCLUSION

CalPERS supports the confirmation of the Plan, subject to resolution of the limited issues identified in this Statement of Position.

Respectfully submitted,

Michael J. Gearin
Michael B. Lubic
Michael K. Ryan
Brett D. Bissett
K&L GATES LLP

Dated: February 10, 2014

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

Attorneys for California Public Employees’
Retirement System

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

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

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.”

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