14-1550

In the United States Bankruptcy Appellate Panel for the Ninth Circuit

IN RE CITY OF STOCKTON, CALIFORNIA,

Debtor.

FRANKLIN HIGH YIELD TAX-FREE INCOME FUND AND FRANKLIN CALIFORNIA HIGH YIELD MUNICIPAL FUND,

Appellants,

v.

CITY OF STOCKTON, CALIFORNIA,

Appellee.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,
CASE NO. 12-32118, HON. CHRISTOPHER M. KLEIN

DEBTOR AND APPELLEE CITY OF STOCKTON, CALIFORNIA'S MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT

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I. Introduction[1]

The City of Stockton, California ("the City") respectfully moves this Court to dismiss Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund's (together, "Franklin") appeal as equitably moot.[2] Equitable mootness applies "when a 'comprehensive change of circumstances' has occurred so 'as to render it inequitable for this court to consider the merits of the appeal.'" *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012) (quoting *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981)). For the City, its employees, its residents, and virtually all of its major creditors, bankruptcy has faded from the rearview mirror. The City's plan of adjustment ("the Plan") was confirmed eight months ago. Since then, every transaction necessary to effectuate the Plan has taken place. Wire transfers were sent, checks cut and cashed, employees laid off or hired, properties transferred or placed

[1] Throughout this motion, we use "BAP Dkt. No." to cite filings in this Court; "Bankr. Dkt. No." to cite filings in the bankruptcy court, *In re City of Stockton, Cal.*, No. 12-32118 (Bankr. E.D. Cal.); and "OB" to cite Franklin's Opening Brief, BAP Dkt. No. 15. The abbreviations for the exhibits submitted in support of this motion are listed in the Table of Contents, *supra* i-ii.

[2] The City has also filed an equitable mootness motion in the other appeal from the bankruptcy court's plan confirmation order, Debtor and Appellee City of Stockton, California's Motion to Dismiss the Appeal as Equitably Moot, *Cobb v. City of Stockton, Cal.*, No. 14-17269 (9th Cir.), Dkt. No. 19. Franklin filed an amicus brief in the Ninth Circuit opposing the City's motion. Brief of *Amici Curiae* Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund in Support of Appellant's Objection to Motion to Dismiss the Appeal as Equitably Moot, *Cobb*, No. 14-17269 (9th Cir.), Dkt. No. 26-2. The motion is currently pending.

in receivership, and management brought on to run them. Franklin now wants to reverse the confirmation order, even though it largely sat on its hands allowing the Plan to be fully effectuated.

The Ninth Circuit has made clear that to preserve the right to appeal plan confirmation, a creditor *must* diligently pursue a stay of the implementation of the plan; if the request for a stay is denied by the bankruptcy court, the creditor must then diligently pursue a stay in this Court and the court of appeals. *See In re Roberts Farms, Inc.*, 652 F.2d at 798; *In re Mortgages Ltd.*, 771 F.3d 1211, 1215 (9th Cir. 2014). That is not what happened here, however. Franklin filed a pro forma stay motion before the bankruptcy court, citing the wrong legal standard and making no serious claim that a stay of the implementation of the Plan was actually warranted. Unsurprisingly, that pro forma stay request was denied. Franklin was happy to rest on that, hoping it was enough to stave off equitable mootness, but not really wanting to "win" a stay, which undoubtedly would have required it to post a hefty appeal bond. So, it chose not to seek a stay from this Court or the Ninth Circuit, content to let the Plan go into full effect.

Now, the Plan has been substantially consummated and the many transactions it provides for cannot be undone. The question before this Court is whether Franklin can be allowed to seek to undo the Plan upon which these transactions are premised. It is no longer possible at this point to grant Franklin the relief it requests in this appeal—reversal of confirmation—without "completely knocking the props out from under the

plan," *In re Thorpe Insulation Co.*, 677 F.3d at 881-82. This Court cannot, as Franklin has at times suggested, simply order the bankruptcy court to pay Franklin more money, because a bankruptcy court has no power to direct a municipal debtor to pay money or to modify an existing plan of adjustment. Franklin is seeking reversal of the order confirming the Plan, plain and simple. Granting that relief would destabilize the economic foundations upon which the Plan is based and would frustrate the legitimate reliance interests of legions of creditors and other third parties who have conducted their affairs in reliance on the Plan's finality.

Equitable mootness was made for circumstances like this, particularly in the chapter 9 context, where the reliance interests of debtors, creditors, and other third parties, along with the public interest in the finality of a plan of adjustment, outweigh a creditor's interest in challenging a plan's confirmation to the bitter end. Franklin willingly risked a change in the status quo by failing to diligently seek a stay, and it has now irreversibly come to pass. The City's motion should be granted.

II. Factual And Procedural Background

The facts in the record underlying this appeal are detailed at length in the City's Answering Brief ("AB") (at 6-32). We discuss them here only as relevant. The remainder of the facts are drawn from declarations in support of this motion.

A. The City submits a largely consensual chapter 9 plan.

The Plan is a product of compromise. Before it filed for chapter 9 relief, the City

engaged in extensive mediation through the statutorily mandated "AB 506" process. AB 11-12. This yielded huge concessions from almost all of the City's labor organizations, slashing compensation and benefits going forward. AB 12. In the bankruptcy case, the negotiations continued, led by Bankruptcy Judge Elizabeth Perris, the court-appointed mediator. Ultimately, the City reached consensual resolutions with all nine of its labor unions; the official committee representing 1,100 retirees who held rights to lifetime health benefits; the California Department of Boating and Waterways; the City's two minor league sports teams; and three capital markets creditors that held or insured bonds totaling over $270 million. AB 16-20; Carney Decl. ¶ 5.

Negotiations with the capital markets creditors were contentious affairs, but the parties ultimately were able to hammer out creative solutions.

- Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (together, "Assured") insured $125 million in Pension Obligation Bonds ("POBs") and $40.8 million in secured lease-revenue bond issuances. AB 13-14. In its settlement with Assured, the City was able to extinguish the bond issuances. In exchange, it effectively conveyed ownership of an office building at 400 E. Main Street to Assured, while negotiating a lease that will allow the City to move its City Hall functions into the building at below market rates for up to 12 years. The parties also negotiated a reduction on POBs, but with an upside provision

that allowed Assured to recover more to the extent the City outperformed certain revenue projections. AB 18.

- National Pubic Finance Guarantee Corporation ("NPFG") insured over $90 million in secured lease-revenue bonds from three issuances. AB 18. Under the settlement, the City transferred ownership in its downtown parking facilities to a new Parking Authority, shifting its payment obligations to that Authority and thus removing them from its over-obligated General Fund. The settlement also restructured certain bonds and capped the ceiling of repayment to virtually ensure that they could be paid from restricted tax revenues. A final bond issuance was left unimpaired to enable the City to continue to house several essential functions in the City's Stewart Eberhardt Building. AB 19-20.
- Ambac Assurance Corporation ("Ambac") insured $13.3 million in certificates of participation. AB 14. The City was able to negotiate reductions and deferrals of General Fund obligations related to these certificates that permitted it to retain other crucial City properties, including the City's main police station and two fire stations. AB 20.

The viability of these settlements—and thus the feasibility of the plan of adjustment that resulted from them—is based on the City's Long Range Financial Plan ("LRFP"), a meticulous set of revenue, budget, and reserve projections designed to restore the City's fiscal stability. AB 26-28. And the LRFP is itself also the product of

a different sort of compromise, one approved by the City's electorate, which, in November of 2013, approved a tax hike that would raise an additional $28 million per year. AB 25. The end result of all of this is a plan of adjustment made up of a constellation of bilateral settlements, all based on the LRFP's economic foundation, and all effectively approved by the City's residents.

Despite all the compromise and buy-in of the City's creditors, stakeholders, and citizens, there was one major holdout: Franklin. Franklin—holder of $35 million in bonds—was the one major creditor with whom the City could not, despite its good faith efforts, come to a workable compromise. Franklin took its chances litigating the confirmation process tooth-and-nail, hoping to defeat the City's negotiated Plan.

B. The Plan is confirmed and consummated.

Franklin failed. At a hearing on October 30, 2014, the bankruptcy court announced that it would confirm the Plan. ER409-44. After the oral ruling, Franklin filed a motion asking the bankruptcy court to stay the effectiveness of its confirmation order pending appeal. Stay Mot. 1. The motion was a transparently pro forma effort to stave off equitable mootness. Franklin included not a single declaration in support of its motion. Other than pointing to the possibility that the City might later argue equitable mootness, it made no attempt to show the requisite likelihood of irreparable harm. *Id.* at 10-11. Indeed, its reply in support of its motion stated that "if no stay is issued, Franklin will not be irreparably harmed." Stay Reply 2 (emphasis in original).

On January 20, 2015, not surprisingly, the bankruptcy court denied Franklin's motion. ER467-85. Franklin did not further seek a stay from the district court, this Court, or the court of appeals. Later, the bankruptcy court filed an order confirming the Plan on February 4, 2015. ER224-303. The Plan went effective on February 25, 2015 ("the Effective Date"). Carney Decl. ¶ 3. And the City filed a notice of the occurrence of the Effective Date on March 6, 2015. Bankr. Dkt. No. 1915.

On (or, in the case of some payments, before) the Effective Date, the City effectuated the Plan's provisions, completing a flurry of transactions. Among them: It transferred funds to satisfy settlements that "adjusted over $259 million in principal amount of claims against the City," Carney Decl. ¶ 5, including settlements with retirees and capital markets creditors; it "conveyed fee title to 17 separate parking lots and garages to the newly-created Stockton Parking Authority, assigned its leasehold interests in six additional parking lots to the Parking Authority, and transferred management control of all parking assets to the Parking Authority—including approximately 1,700 parking meters," Runner Decl. ¶ 3; it transferred day-to-day operation of the parking facilities over to a new entity, which in turn hired new leadership and staff, Runner Decl. ¶ 5; and it "conveyed an option to Assured Guaranty to enable it to purchase … 400 East Main Street" and "control of the building was transferred to a receiver … for the benefit of Assured Guaranty, which receives the net

rent from the building," Runner Decl. ¶ 7. The City has now completed every transaction called for in the Plan.

III. Franklin's Appeal Should Be Dismissed As Equitably Moot.

"Equitable mootness occurs when a 'comprehensive change of circumstances' has occurred so 'as to render it inequitable for th[e] court to consider the merits of the appeal.'" *In re Thorpe Insulation Co.*, 677 F.3d at 880 (quoting *In re Roberts Farms, Inc.*, 652 F.2d at 798). The doctrine rests on the rationale that "public policy values the finality of bankruptcy judgments because debtors, creditors, and third parties are entitled to rely on a final bankruptcy court order." *Id.* And to prevent a creditor from unfairly disrupting this finality, the Ninth Circuit mandates that a creditor diligently seek a stay and, even if the stay is denied at first, that it diligently pursue the stay in this Court and the court of appeals. *See In re Roberts Farms*, 652 F.2d at 798.

As we detail below, this is a paradigmatic equitable mootness case, made even more compelling by the need for finality in light of the goals of chapter 9. Franklin failed to diligently pursue a stay, content to let the Plan be fully consummated. It is now too late to seek reversal of the confirmation of the Plan. The equitable interests here all weigh in favor of the City and the many others who have invested in the City's future in reliance on the Plan. This appeal should be dismissed.

A. Each of the equitable mootness factors favors dismissal.

1. Franklin failed to diligently pursue a stay of the implementation of the Plan.

The Ninth Circuit has identified several factors relevant to the equitable mootness inquiry, *infra* 12, 14, but at the threshold, "it is *obligatory* upon appellant … to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order." *Id.* (emphasis added); *see In re Mortgages Ltd.*, 771 F.3d at 1216; s*ee id*. at 1215 ("When an appellant fails to seek a stay without giving adequate cause, … we dismiss the appeal as equitably moot."); *In re Thorpe Insulation Co.*, 677 F.3d at 881 (court of appeals "look[s] first at whether a stay was sought").[3]

This requirement is "grounded in important principles of equity," *In re Mortgages Ltd.*, 771 F.3d at 1216—it is no mere formality. The Ninth Circuit has made clear that an appellant's obligation to seek a stay is not discharged merely by filing a stay motion in bankruptcy court. The appellant must "pursue with diligence *all* available remedies to obtain a stay … *even to the extent of applying to the Circuit Justice for relief*." *In re Roberts Farms*, 652 F.2d at 798 (emphasis added). And it may

[3] Other Circuits agree on the central importance of seeking a stay. *E.g.*, *In re Pub. Serv. Co. of N.H.*, 963 F.2d 469, 472-73 (1st Cir. 1992); *In re Chateaugay Corp.*, 10 F.3d 944, 953 (2d Cir. 1993); *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 186-87 (3d Cir. 2001); *id.* at 191-92 (Alito, J., concurring); *In re GWI PCS 1 Inc.*, 230 F.3d 788, 800 (5th Cir. 2000); *In re United Producers, Inc.*, 526 F.3d 942, 948 (6th Cir. 2008); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir. 1993); *In re Paige*, 584 F.3d 1327, 1340-41 (10th Cir. 2009).

not shirk this obligation merely because it thinks "the chances of success seem dim." *In re Mortgages*, 771 F.3d at 1216 (internal quotation marks and citation omitted); *see In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005).

Franklin did not come close to satisfying its obligation. Although it filed a motion before the bankruptcy court, it did not *diligently* pursue a stay. The motion was pro forma, with the express intent of avoiding a later finding of equitable mootness. Beyond noting the possibility that the City may in the future raise an equitable mootness argument, Franklin did not even *attempt* to carry its burden of showing a likelihood of irreparable harm. In its initial motion, Franklin relied on cases saying it could obtain a stay by showing a mere possibility of irreparable harm. Stay Mot. 3. When the City's response explained that those cases were no longer good law, Stay Resp. 2-3, Franklin conceded that it had "misstated the law" and that it could not satisfy the correct standard. Stay Reply 2-3. Franklin's reply stated that "if no stay is issued, Franklin will not be irreparably harmed." *Id.* at 2 (emphasis in original).

Franklin's papers thus never made a bona fide argument on an essential element. In any event, even where a motion before the bankruptcy court is denied, a party must still act diligently to further pursue a stay. The creditor must ask this Court (or the district court) and, if necessary, the Ninth Circuit for relief. *In re Roberts Farms*, 652 F.2d at 798; *accord In re Pub. Serv. Co. of N.H.*, 963 F.2d at 472 (noting that "no attempt was made to appeal the denial of the stay"). That is why this Court in *In re*

Transwest Resort Props., Inc., No. 12-17176, 2015 WL 5332447, *4 (9th Cir. Sept. 15, 2015), a recent equitable mootness case, went out of its way to point out that the appellant was "diligent" about seeking a stay from both the bankruptcy court and the district court before the district court initially dismissed the appeal as equitably moot. Unlike the appellant in that case, Franklin has not been diligent.

Based on arguments Franklin has made elsewhere, it will likely respond that it is exempt from attempting to obtain a stay because, even in the absence of a stay, the bankruptcy court will be able to fashion effective relief were Franklin to win its appeal. The notion appears to be that as long as the bankruptcy court—despite consummation of the Plan—can give Franklin more money later, Franklin has nothing to worry about now. The first problem with this is that Franklin's premise is wrong: As we explain in detail below, the bankruptcy court cannot at this point fashion meaningful relief for Franklin, and certainly cannot just give Franklin more money, which is an independent reason Franklin's appeal is moot. *Infra* 15-18. So its excuse is meritless.

But Franklin's argument also misses a key point: This is not all about Franklin. The requirement that Franklin diligently pursue a stay of consummation of the Plan is also meant to protect the City, as well as thousands of creditors and other interested third parties—such as creditors who reached settlement—who, in the absence of a stay, have made decisions in reliance on the Plan. *See In re Mortgages Ltd.*, 771 F.3d at 1216. In this regard, it bears further note that had Franklin made a diligent effort to

obtain a stay and prevailed, it almost certainly would have been required to post a substantial bond to secure against losses resulting from the stay. And its failure *to do that* would similarly have triggered equitable mootness. *E.g.*, *In re Cont'l Airlines*, 91 F.3d 553, 562 (3d Cir. 1996); *In re Tribune Media Co.*, No. 15-3332, 3333, 2015 WL 4925923, *8 (3d Cir. Aug. 19, 2015). Franklin's tactic, it appears, is designed to give it the best of both worlds. It filed a pro forma stay motion to try to avoid equitable mootness, but knew it would never be granted and thus never necessitate a bond—under this strategy, Franklin foists all of the risk of its appeal onto others.

Whatever Franklin's motivations, the bottom line is this: Franklin has never, before any court, made a serious argument in favor of obtaining a stay. It has therefore not satisfied its obligation to diligently seek a stay, and the "appeal[] must be dismissed." *In re Mortgages Ltd.*, 771 F.3d at 1217.

2. The Plan has been substantially consummated.

If this Court does not deem it appropriate to dismiss Franklin's appeal because of its failure to diligently seek a stay, that failure nevertheless "weighs strongly" in the balance with other relevant factors. *Id.* The next such factor this Court considers is whether the plan has been "substantially consummated." *In re Thorpe Insulation Co.*,

677 F.3d at 881-82. There can be no dispute that it has. Each transaction necessary to effectuate the Plan has now occurred[4]:

- The Plan required the City to make a wire transfer in the amount of $5.1 million to a distributing agent to satisfy the retirees' claims for health benefits. Carney Decl. ¶ 4. The City made this transfer to Rust Consulting/Omni Bankruptcy, its distributing agent, on February 18. Carney Decl. ¶ 8. Rust Omni has distributed these funds via check to the retirees, and all but one of the checks has now been cashed. Schwarz Decl. ¶¶ 4-10.

- To effect the Assured settlement, the City and Assured executed a reimbursement agreement, a real property option agreement and joint escrow instructions, a new lease for 400 East Main, a site and facility lease termination agreement, and a lease and assignment termination agreement. Bankr. Dkt. No. 1842.

- To effect the NPFG settlements, the City and NPFG executed two forbearance agreements, an amended and restated pledge agreement, an installment sale agreement, a management agreement for the parking properties subject to the

[4] The major documents underlying these transactions are contained in the 550-page collection of settlement-related documents entitled Second Supplemental Plan Supplement, which is part of the designated appellate record and available on the bankruptcy docket, *In re City of Stockton, Cal.*, 12-32118 (Bankr. E.D. Cal.), Dkt. Nos. 1842 & 1843.

settlement, a bill of sale, assignments and assumptions of four leases, and a title insurance policy. Bankr. Dkt. Nos. 1842 and 1843.

- To effect the Ambac settlement, the City and Ambac executed an amended and restated stipulation and settlement agreement. Bankr. Dkt. No. 1843.
- The City executed a new agreement with the California Department of Boating and Waterways. Bankr. Dkt. No. 1843.
- The City executed new agreements with its two minor league sports teams. Bankr. Dkt. No. 1843.

There is nothing more to do to effectuate the Plan, because all the mandated payments and transactions have been completed. It has been fully consummated, and this factor weighs in favor of equitable mootness.

3. The bankruptcy court cannot fashion effective relief without disrupting the Plan's economic foundations and upsetting the reliance interests of third parties not before the court.

The final two factors relevant to equitable mootness concern the availability and impact of a remedy if Franklin prevails on the merits. They are (i) whether the court can fashion effective relief "without completely knocking the props out from under the plan," *In re Thorpe Insulation Co.*, 677 F.3d at 881-82; and (ii) the effect of an appellate remedy on third parties not before the court, *id.* Franklin's requested remedy—reversal of confirmation—would "fatally scramble the plan and …

significantly harm third parties who have justifiably relied on plan confirmation." *In re Semcrude, L.P.*, 728 F.3d 314, 321 (3d Cir. 2013). These factors thus favor dismissal.

As the Ninth Circuit explained in *In re Thorpe Insulation Co.*, "public policy values the finality of bankruptcy judgments because debtors, creditors, and third parties are entitled to rely on a final bankruptcy court order." 677 F.3d at 880. A recent Third Circuit decision, *In re Tribune*, illustrates this principle. Like here, *In re Tribune* concerned an appeal by a holdout creditor concerning a plan based largely on negotiated settlements. 2015 WL 4925923 at *2. After the appellant declined to post a bond, the plan—and the challenged settlement—went into effect. *Id.* at *2. The Court found the appeal equitably moot. Central to its reasoning was the many stakeholders' "common interest in the finality of a plan: the estate because it can wind up; the reorganized entity because it can begin to do business without court supervision and … without the cloud of bankruptcy; … lenders because they can collect interest and principal; customers …; and other constituents for different context-specific reasons that may boil down to it is easier to do business with an entity outside of bankruptcy." *Id.* at *6. In light of this, the court refused to undo the settlement, noting that it was "a central issue in the formulation of a plan of reorganization" and that "effectively undermin[ing] [it]" would "recall the entire Plan for a redo."[5] *Id.* at *7.

[5] The court also noted the appellant's refusal to post a bond, which indicated that "it effectively chose to risk a finding of equitable mootness and implicitly decided that an

The same analysis applies here. Franklin's appeal seeks one remedy: "that this Court reverse and remand with directions that the City provide fair, reasonable, and nondiscriminatory treatment to Franklin's unsecured claim." OB 84. In other words, Franklin wants this Court to undo the Plan and tell the bankruptcy court to pay Franklin more money. But "reversal of the order confirming the plan … would knock the props out from under the authorization for every transaction that has taken place." *In re Roberts Farms, Inc.*, 652 F.2d at 797. It would call into question the economic assumptions upon which each of the bilateral settlements is based and the payments made, and indeed would undermine the LRFP, the economic underpinning of the Plan and the City's recovery. This would drastically disrupt the City's ability to resume normal, post-bankruptcy functioning. *Cf. In re Tribune*, 2015 WL 4925923, at *7. A reversal order would also frustrate the expectations of creditors not before this court, whose settlements were premised on the Plan and cannot now be undone.

Franklin may argue that its desired relief will not scuttle the Plan or disrupt third-party reliance because all it wants is more money. Indeed, the bankruptcy court suggested that it could potentially fashion such relief. ER479-80. The reality, however, is that Franklin is seeking the reversal of confirmation of the Plan. If it wins, there would be no confirmed plan. As the *In re Tribune* court explained, the argument that

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appeal with a stay conditioned on any reasonable bond amount was not worth it." *Id.* So too here, where Franklin failed to diligently pursue a stay. *Supra* 9-12.

the debtor is a going concern and therefore could, in theory, provide "further recovery" to a creditor "misses the point of the equitable mootness inquiry." 2015 WL 4925923, at *7. The court "must also ask whether the *immediate* relief" sought by the debtor "would fatally scramble the plan." *Id.* (internal quotation marks and citation omitted).

Here it would. The bankruptcy court cannot unwind any of the settlements or other transactions. When Congress enacted chapter 9, it recognized that the Tenth Amendment requires respect for state and municipal sovereignty. To that end, chapter 9 includes § 904, which specifies that no order regarding the "property or revenues of the debtor" can be entered without debtor consent. 11 U.S.C. § 904(2). The bankruptcy court acknowledged that § 904 means that the court "cannot prevent or disapprove a settlement or compromise."[6] SER166. So the many consummated settlements founded on the Plan cannot be reversed—and even if they could be, the result would be disastrous.

Nor can a bankruptcy court simply order a municipal debtor to pay more money. No provision in chapter 9 suggests that sort of power, and it would raise similar Tenth

[6] The context for this statement was the bankruptcy court's opinion regarding the applicability in chapter 9 of Federal Rule of Bankruptcy Procedure 9019, which calls for judicial scrutiny of settlements or compromises. *See In re City of Stockton, Cal.*, 486 B.R. 194 (Bankr. E.D. Cal. 2013). In holding that Rule 9019 does not apply, the bankruptcy court specifically relied on the fact that § 904 "limits the jurisdiction and powers of the court" short of interference with a debtor's property. *Id.* at 198. The City can therefore "pay any debt … without permission from th[e] court." *Id.* at 199.

Amendment and § 904 problems. And a bankruptcy court in a chapter 9 case cannot rewrite or modify a plan either. In chapter 9, only the debtor can propose a plan or propose a modification to its plan. 11 U.S.C. §§ 941, 942. The bankruptcy court "shall confirm the plan" if it meets all statutory requirements. *Id.* § 943(b). If not, it may deny the plan or dismiss the case. *Id.* § 930(a)(4)-(5), (b). But it cannot preserve the universe of existing treatment as to all but one dissenting creditor and order that such creditor be paid more than as provided in the plan of adjustment.

The "immediate result" of granting Franklin's request for reversal of the confirmation order would be to eliminate the one fixed point to which the Plan's now effectuated provisions were tethered. The flurry of transactions and other activities that occurred when the Plan went effective cannot be undone. More than 1,120 City retirees have cashed checks issued post-confirmation. A receiver and property manager for 400 E. Main Street have been hired, and the property was placed in receivership by a state court order. The building is undergoing sweeping renovations to convert space into the new City Hall. The downtown parking garages were transferred to a new Parking Authority, and are now being run by new management and staff who were hired after the Effective Date. Those parking garages yield revenues every day that go to paying off NPFG's parking bonds. These things have happened, at great expense and in reliance on the finality of the Plan. The toothpaste cannot be put back in the tube.

B. The equitable mootness doctrine's interest in finality is particularly important in the chapter 9 context.

The fact that this case arises under chapter 9 makes application of the equitable mootness doctrine even more appropriate than in chapter 11 cases like *In re Roberts Farms*, *In re Thorpe Insulation Co.*, or *In re Tribune*. The purpose of chapter 9 is to permit a distressed municipality to adjust its debts so that it can continue to provide essential services to citizens. 6 *Collier on Bankruptcy* ¶ 900.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). In this context—where relevant interests include not only those of debtors and creditors, but the public at large—the consequences of undoing a plan of adjustment are amplified and the need for finality is heightened. Particularly in a case in which the appellant did not diligently pursue a stay, the equities tilt strongly in favor of permitting the City and its residents to resume normal operation without the cloud of bankruptcy hanging over them.

Contrary to the above, a district court in the District of Alabama has suggested that the equitable mootness doctrine should not apply in a chapter 9 case. That decision, *Bennett v. Jefferson County., Ala.*, 518 B.R. 613 (N.D. Ala. 2014), is currently pending on appeal, and of course is not binding here. The Ninth Circuit's decisions are. And that Court has recognized and applied equitable mootness in a chapter 9 case. *In re City of Vallejo, Cal.*, 551 F. App'x 339 (9th Cir. 2013) (mem.).

Moreover, *Jefferson County* is simply wrong, as recognized by a recent opinion in *In re City of Detroit*, No. 15-cv-10036 (E.D. Mich.), Dkt. No. 47 (attached as Exhibit

I). In granting the City of Detroit's motion to dismiss an appeal as equitably and constitutionally moot, the district court expressly rejected the holding and rationale of *Jefferson County*. Noting that equitable mootness had been applied in a number of contexts outside of chapter 11 reorganizations, the district court determined that equitable mootness "is not concerned with the specific chapter under which the debtor's case was brought," but rather "whether hearing the bankruptcy appeal could unravel the debtor's plan and disturb the reliance interests created by it." *Id.* at 9-10.

The court found *Jefferson County*'s discussion of the differences between the policy objectives of chapter 9 and 11 "particularly problematic" and held that "[b]ecause the underlying equitable considerations of promoting finality and good faith reliance on a judgment applies with equal force to a Chapter 9 bankruptcy appeal, the Court sees no reason why the doctrine should not be applied" in chapter 9. *Id.* at 10. If anything, "the interests of finality and reliance ... surely apply with greater force" to a chapter 9 plan. *Id.* at 11. As in *Detroit*, those interests warrant dismissal of this appeal.

IV. Conclusion

For these reasons, Franklin's appeal should be dismissed as equitably moot.

Dated: October 1, 2015 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the appellate CM/ECF system on October 1, 2015, which will automatically serve all parties of record who are registered CM/ECF users. I further certify that parties of record to this appeal who are not CM/ECF users have consented in writing to electronic service, and that I have served these parties via email.

October 1, 2015

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