5

1   MARC A. LEVINSON (STATE BAR NO. 57613)
    malevinson@orrick.com
2   NORMAN C. HILE (STATE BAR NO. 57299)
    nhile@orrick.com
3   PATRICK B. BOCASH (STATE BAR NO. 262763)
    pbocash@orrick.com
4   ORRICK, HERRINGTON & SUTCLIFFE LLP
    400 Capitol Mall, Suite 3000
5   Sacramento, California 95814-4497
    Telephone: +1-916-447-9200
6   Facsimile: +1-916-329-4900

7   Attorneys for Debtor
    City of Stockton

8

9   UNITED STATES BANKRUPTCY COURT

10   EASTERN DISTRICT OF CALIFORNIA

11   SACRAMENTO DIVISION

12

13 In re: Case No. 2012-32118

14 CITY OF STOCKTON, CALIFORNIA,   D.C. No. SEJ-1

15   Debtor.   Chapter 9

16   **CITY'S RESPONSE TO MOTION FOR
                                              ORDER (1) CONFIRMING**
17   **INAPPLICABILITY OF AUTOMATIC
                                              STAY AND (2) GRANTING RELIEF**
18   **FROM THE AUTOMATIC STAY TO
                                              THE EXTENT THE AUTOMATIC**
19   **STAY IS APPLICABLE**

20   Date: July 1, 2014
                                              Time: 9:30 a.m.
21   Dept: C, Courtroom 35
                                              Judge: Hon. Christopher M. Klein
22

23   The City of Stockton, California (the "City"), hereby responds to the Motion For Order

24 (1) Confirming Inapplicability Of Automatic Stay And (2) Granting Relief From The Automatic

25 Stay To The Extent The Automatic Stay Is Applicable (the "Motion") submitted by Darshan

26 Singh, Kulwinder Kaur, Komar Bros, Inc., and Wilshire Bank (collectively, the "Movants").

27   Movants should not be granted relief from the automatic stay at this stage of the City's

28 chapter 9 case. First, the Motion is wrong in its assertion that the automatic stay does not apply to

1   the State's eminent domain action. The exception to the automatic stay cited by Movants for the

2   exercise of a government's police or regulatory power is inapposite because eminent domain

3   actions are separate and distinct from the government's exercise of police and regulatory powers.

4   Second, lifting the stay at this time would prejudice the City by forcing the City Attorney's Office

5   to divert its time and attention away from the goal of exiting bankruptcy and consummating the

6   City's plan of adjustment.

7   As the Court is well aware, the City's bankruptcy case is at a critical stage. The City

8   hopes and believes that it will be able to confirm its plan and go effective within the next few

9   months. Once that has happened, the stay will be lifted by virtue of sections 362(c)(2)(C) and

10   922(b) of the Bankruptcy Code[1]. If the City's plan is *not* confirmed and the City returns to the

11   bargaining table with its various creditor constituencies, having to spend its limited resources on

12   litigating with creditors over real property taken by the State in 2012 does not make sense.

13   Indeed, that would fly in the face of the purpose for the inclusion of the automatic stay in the

14   Bankruptcy Code. The City therefore requests that the Court deny the Motion, without prejudice

15   to the Movants renewing their request for relief from the automatic stay if the Court declines to

16   confirm the plan of adjustment.

17   **I.   ARGUMENT**

18   **A.   The Automatic Stay Applies To The State's Eminent Domain Action.**

19   Section 362(a)(1) bars the "commencement or continuation . . . of a judicial,

20   administrative, or other action or proceeding against the debtor that was or could have been

21   commenced before the commencement of the [bankruptcy] case . . . ." The superior court

22   recognized that this section precludes the continuation of the State of California's eminent

23   domain action – to which the City is a defendant – while the City's bankruptcy case is ongoing

24   and the automatic stay remains in effect.

25   Section 362(b) lists a number of exceptions to the automatic stay. Movants argue that the

26   State's eminent domain action is an exercise of the State's "police and regulatory power" within

27

28   _____
     [1] All references to code sections are to the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, unless otherwise
     specified.

CITY'S RESPONSE TO MOTION FOR ORDER
CONFIRMING INAPPLICABILITY OF STAY AND
GRANTING RELIEF TO EXTENT STAY APPLIES

the meaning of section 362(b)(4), and is thus exempt from the automatic stay. This is not the

case; multiple courts have held that eminent domain actions do not fall within the section

362(b)(4) exception. *In re Altamirco*, 56 B.R. 199, 201 (Bankr. C.D. Cal. 1986); *see also In re*

PMI-DVW Real Estate Holdings, L.L.P., 240 B.R. 24, 30-31 (Bankr. D. Ariz. 1999). The rulings

note that a state's eminent domain power is not the same as its police and regulatory powers.

Rather, while the two government powers share some similarities, the ultimate standards for

taking private property under the eminent domain power differ from those for taking property

pursuant to a government's police and regulatory powers. *See In re PMI-DVW Real Estate*

Holdings, 240 B.R at 31. In fact, federal courts "have consistently distinguished between

regulations falling within the police power and regulations constituting takings of property under

the Fifth and Fourteenth Amendments." *Altamirco*, 56 B.R. at 200.

Nor is there any merit to Movants' attempt to paint the State's eminent domain action as

an exercise of the State's police and regulatory power on the sole basis that it was brought, in

part, to generally "improve public safety and welfare." Rather, in order to constitute an exercise

of the police and regulatory power, government action must seek to address a "*specific* public

health, safety or welfare issue which would traditionally involve the government's police and

regulatory power." *In re PMI-DVW Real Estate Holdings*, 240 B.R at 31 (emphasis added) (citing

In re Blunt, 210 B.R. 626 (Bankr. M.D. Fla. 1997), in which the City of Jacksonville demolished

an apartment complex owned by the debtor because the property was condemned as a fire hazard,

as an example of a specific public health and safety issue). No such specific public health, safety

or welfare issue is at play here. As acknowledged in the Motion, the purpose of the project that

resulted in the State's taking was "to improve mobility and accommodate growth in traffic due to

planned growth in south Stockton." Motion, at 5 (citing testimony of Alex Menor).

**B.   There Is Insufficient "Cause" To Lift The Automatic Stay, And Doing So
Would Prejudice The City**

There is insufficient cause to lift the automatic stay at this stage of the City's bankruptcy

case. In fact, vacating the stay would prejudice the City by creating an unnecessary distraction

just as the City is seeking to confirm its plan of adjustment and thereafter to consummate the

1 various transactions and make the payments that are conditions precedent to the plan going

2 effective. While the City has engaged outside counsel to handle the Singh eminent domain

3 litigation, the City Attorney will need to devote a substantial amount of attention to this case

4 should it be re-started before the effective date of the plan. Given current staffing levels, this will

5 cause a hardship on the City Attorney's Office. *See* Declaration Of Guy D. Petzold In Support Of

6 City's Response To Motion For Order (1) Confirming Inapplicability Of Automatic Stay And (2)

7 Granting Relief From The Automatic Stay To The Extent The Automatic Stay Is Applicable

8 ("Petzold Decl."), ¶ 7. Moreover, the City will be forced to spend additional money on outside

9 counsel.

10   The time burden on City personnel engaged in the bankruptcy case and the extra cost of

11 re-starting the litigation belie Movants' claim that the City will "suffer little or no prejudice" were

12 the state court action allowed to proceed. This Court has previously cited both of these

13 considerations as important to the analysis of a request for relief from the automatic stay. *See In*

14 *re City of Stockton (Hittle)*, 484 B.R. 372 (Bankr. E.D. Cal. 2012) (denying motion for relief from

15 automatic stay where action "necessarily would consume the time and attention of [the City

16 Manager and Deputy City Manager]" during a critical portion of the bankruptcy case, and where

17 "active prosecution of the civil action will constitute a financial burden to the City."). The same

18 factors apply here. *See* Petzold Decl., ¶ 7.

19   On July 8, the Court will announce a ruling on the valuation of the collateral securing

20 Franklin's claim. Such ruling likely will chart the course and the timeline for the remainder of

21 this case. The City is hopeful that it will be able to confirm a plan of adjustment and establish an

22 effective date within the third quarter of this year, at which point the automatic stay will be lifted

23 by operation of law. If the City's plan is not confirmed, the City will need to re-evaluate many of

24 the decisions it has made to date, and likely will return to mediation with one or more of the key

25 creditors. The prejudice to Movants of awaiting the Court's confirmation decision is minimal.

26 The City therefore requests that the Court deny the Motion without prejudice to Movants

27 / / /

28 / / /

CITY'S RESPONSE TO MOTION FOR ORDER
CONFIRMING INAPPLICABILITY OF STAY AND
GRANTING RELIEF TO EXTENT STAY APPLIES

1 renewing their request for relief from the automatic stay once a confirmation decision has been

2 issued.[2]

3 <div align="center">**CONCLUSION**</div>

4   For the foregoing reasons, the City requests that the Court deny the Motion.

5

6 Dated: June 17, 2014   MARC A. LEVINSON
                                          NORMAN C. HILE

7   PATRICK B. BOCASH
                                          Orrick, Herrington & Sutcliffe LLP

8

9   By: _____ */s/ Marc A. Levinson*_____

10   MARC A. LEVINSON
                                               Attorneys for Debtor
11   City of Stockton

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

_____

[2] The memorandum of points and authorities in support of the Motion devotes a paragraph and cites to one case in a half-hearted argument that the takings clause of the Fifth Amendment to the United States Constitution somehow translates to Movants receiving less that just compensation. The Fifth Amendment issue was fully briefed in connection with the Cobb objection to the plan, and the City will not re-argue those issues – to the extent that they even apply to Movants – here. See Docket Nos. 1261, 1298, 1396, and 1408.

27

28

CITY'S RESPONSE TO MOTION FOR ORDER
CONFIRMING INAPPLICABILITY OF STAY AND
GRANTING RELIEF TO EXTENT STAY APPLIES