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

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

16 Case No. 2012-32118-C-9
17 D.C. No. OHS-15
18 Chapter 9

19 **NOTICE OF MOTION AND MOTION TO**
20 **FILE AMICUS CURIAE BRIEF IN SUPPORT**
21 **OF CONFIRMATION OF THE CITY OF**
22 **STOCKTON'S FIRST AMENDED PLAN OF**
23 **ADJUSTMENT;**
24 **[PROPOSED] ORDER**

25 Date: October 1, 2014
26 Time: 10:00 a.m.
27 Courtroom: Robert T. Matsui U.S. Courthouse
28 501 I Street
Department C, Fl. 6, Courtroom 35
Judge: Honorable Christopher M. Klein

29 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

30 PLEASE TAKE NOTICE that on October 1, 2014, at 10:00 a.m. in Department C, Floor 6,
31 Courtroom 35 of the United States Bankruptcy Court, Eastern District, Sacramento Division, located
32 at 501 I Street, Sacramento, California 95814, amicus curiae applicant the Peace Officers Research
33 Association of California moves for permission to submit the attached brief as amicus curiae. The

basis of the application, PORAC's interest in this case, disclosures, and a summary of the points addressed in the brief are set forth in the initial pages of the attached brief.

Dated: August 19, 2014

BEESON, TAYER & BODINE, APC

By: /s/ Teague P. Paterson
TEAGUE P. PATERSON

Attorneys for Amicus Curiae Applicant
PEACE OFFICERS RESEARCH
ASSOCIATION OF CALIFORNIA

[PROPOSED] ORDER

The Court hereby grants the motion of the Peace Officers Research Association of California's to submit a brief as amicus curiae..

Dated: _____

SO ORDERED.

Honorable Christopher M. Klein

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17 **SUPPORT OF CONFIRMATION OF THE CITY**
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IDENTITY OF AMICUS AND AMICUS' INTEREST IN THIS CASE

1
2 The Peace Officers Research Association of California ("PORAC") was established in 1953
3 as a professional federation of local, state and federal law enforcement associations. It was formed
4 by peace officers for the purpose of advancing the mutual interests of California peace officers
5 through collective effort. PORAC consists of approximately 880 peace officer associations, and
6 represents the interests of over 64,000 public safety officers employed by the state, its counties, cities
7 and other subdivisions. PORAC is the largest law enforcement association in the state and the largest
8 statewide peace officer association in the nation. Much of PORAC's peace officer membership
9 participate in the CalPERS' public agency pension system.

10 From its inception, and continuing to the present, PORAC has been at the forefront of
11 advancing the welfare of law enforcement personnel, whether economic, professional or social.
12 PORAC advances these goals through a number of means, including research and collective
13 bargaining support, legislative affairs and political action, litigation in federal and state courts,
14 training and education. Through its legislative affairs efforts, PORAC has initiated or shaped
15 important legislation affecting peace officer safety, training standards, disability and survivorship,
16 and various other laws including laws related to retirement security.

17 PORAC has a strong institutional interest in the issues on which the Court has requested
18 supplemental briefing. PORAC has been involved in shaping peace officer retirement security for
19 decades, and its work to preserve and improve peace officer retirement security through Legislative
20 affairs has been a central component of its mission. The issues implicated by the Court's request for
21 supplemental briefs have the potential to impact the extent to which peace officer pensions provided
22 under the PERL will be guaranteed to them having dedicated their productive lives to public service,
23 or whether they may be discharged despite a statutory admonition to the contrary.

24 Through this amicus submission, PORAC describes the practical effects that a plan of
25 adjustment providing for diminished pension benefits will have on the City of Stockton and its efforts
26 to recruit and retain law enforcement personnel. As California's statewide association of law
27 enforcement officer associations, PORAC is uniquely able to provide the Court with that perspective.
28

1 **I. DISCLOSURES**

2 The undersigned certifies that no party's counsel authored or reviewed this amicus
3 submission, nor did a party or party's counsel contribute money to fund the preparation or submission
4 of this brief. No person other than the amicus party and its undersigned attorney participated in
5 preparing this brief.

6 PORAC is a membership association and thus has no parent corporation, and no corporations
7 have any ownership interest in PORAC.

8 **II. SUMMARY OF ARGUMENT**

9 *Amicus Curiae* Peace Officers Research Association of California ("PORAC") submits this
10 brief in the hope of assisting the Court, and also to urge confirmation of the City of Stockton's
11 proposed plan of adjustment ("Stockton" and "Plan," respectively). As noted in the preceding
12 statement of interest, PORAC has been involved and instrumental in statewide matters concerning
13 peace officer representation, recruitment, retention, training and, pertinently here, retirement security.
14 Through this brief it hopes to share its perspective with the Court.

15 PORAC has great interest in the outcome of the broad issues raised in the Courts request for
16 supplemental briefing, and PORAC concurs and supports the points and authorities set forth in
17 CalPERS' briefs relating to the juridical and fiduciary status of the CalPERS retirement board, the
18 mechanics of the Public Employee Relations Law ("PERL") as it relates to local agencies, and the
19 necessary interplay between state statutory and constitutional law and, particularly, the limitations
20 state law imposes on the Chapter 9 bankruptcy process with respect to pensions earned under the
21 PERL. As detailed below, in the final analysis the Court should respect the State of California's
22 political decision to except obligations arising from the PERL from adjustment under Chapter 9.

23 However the Court need not reach such broad political questions, founded exclusively on
24 state law and within the confines of state sovereignty protected under the Tenth Amendment.

25 Rather, PORAC urges the Court to consider the practicalities of this case which, as explained
26 below, necessitate approving the Plan. It is the practicalities with which this submission is primarily
27 concerned. PORAC is mindful of, and sympathetic to, the fact that voluminous supplemental
28 briefing has been submitted, and therefore PORAC addresses only the following discrete points that

1 deserve consideration in the Court’s final analysis:

- 2 • Police recruitment and retention in California, the experiences of other municipalities that
- 3 have modified peace officer pensions, and the impact of California policy mandating pension
- 4 reciprocity for law enforcement officers;
- 5 • The status of CalPERS as an “Alternative Retirement System” under the Social Security Act,
- 6 and the limits such federal law provides;
- 7 • The nature of the individual and irrevocable rights that public employees retain in their
- 8 accrued pension benefits under state statutory and constitutional law;
- 9 • The futility of considering alternative pension-providers to CalPERS;
- 10 • The mechanics of termination liability that necessitate confirmation of the proposed plan of
- 11 adjustment;
- 12 • The application of principles of federal abstention.

13 Each of these points is addressed below.

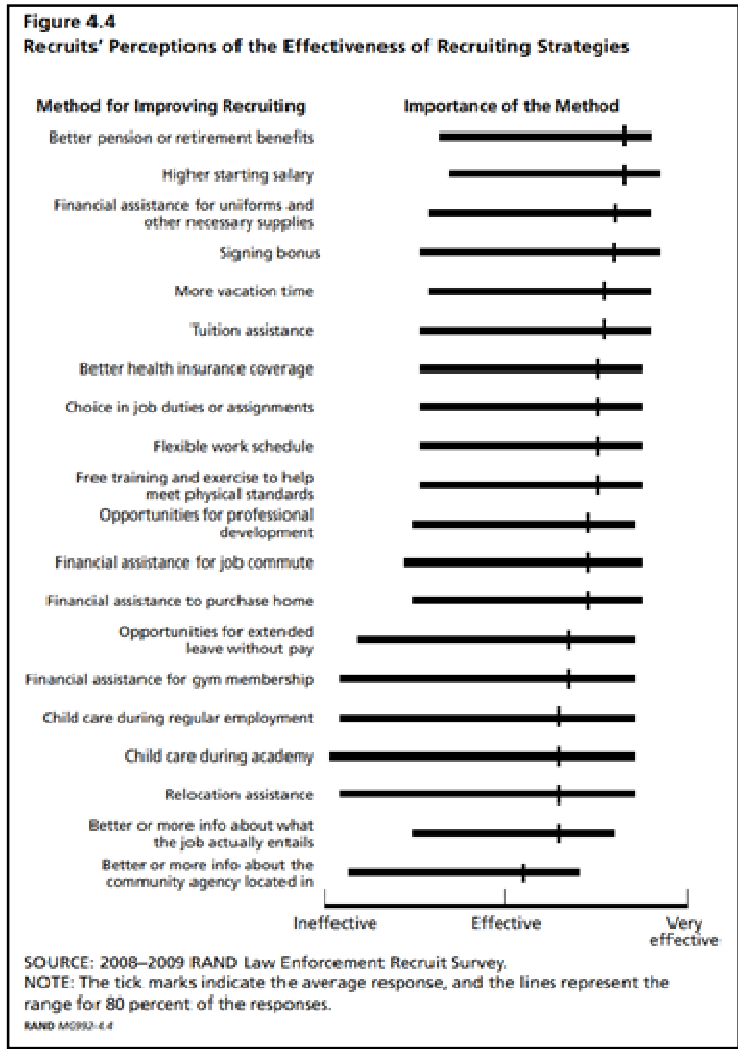
14 III. ARGUMENT

15 A. Police Recruitment and Retention In California

16 There are good reasons, supported by statistics and present-day examples, to confirm a plan of
17 adjustment that leaves in place current pension benefits. Any downward adjustments in police officer
18 retirement benefits will result in officer attrition, and hinder officer recruitment. As other
19 municipalities have experienced, with fewer cops on the street and fewer detectives resolving cases,
20 crime will spike. Citizens may abandon Stockton, its property values will continue to plummet and
21 its tax base further dwindle. Other California municipalities have made these mistakes, and their
22 citizens continue to suffer hardships as a result. The City has exercised sound judgment by proposing
23 a plan that does not reduce officer pensions.

24 Pension and retirement benefits are a key component of police recruitment and retention. A
25 nationwide statistical study of police recruits, performed by the RAND Institute, found that of
26 nineteen factors, pension and retirement benefits were the highest-ranked for recruiting and retention
27
28

1 efficacy.¹ RAND’s findings are summarized by the following chart:



19 RAND also noted that demand for officer recruits will increase. The hiring cycle of peace
20 officers generally tracks the twenty-year vesting schedule applicable to most safety pension systems
21 (*Id.*) As noted by RAND, over 100,000 police were hired in the mid 1990’s as a result of the
22 federally-funded COPS programs, which “suggests that police departments may expect this cohort to
23 retire between 2014 and 2019.” (*Id.*, at p. 4) Rand predicts that “[u]nless communities are willing to
24 tolerate shrinking departments, intense police recruiting will have to begin anew.” (*Id.*) RAND’s
25 prediction is proving correct, and as indicated below, today’s police recruits face a ‘buyer’s market,’
26 with great demand for their service.

27
28 ¹ RAND Center on Quality Policing, “*Today’s Police and Sheriffs Recruits*”, p. 58, figure 4.4 (2010) (available at: <http://www.rand.org/pubs/monographs/MG992.html> (last visited August 17, 2014)).

1 Officer recruiting is already highly competitive. A 2012 U.S. D.O.J. Bureau of Justice
 2 Statistics (“BJS”) report, “*Hiring and Retention of State and Local Law Enforcement Officers*,” found
 3 that most state and local law enforcement agencies utilized “specific strategies and policies designed
 4 to help them meet the challenges of recruiting, hiring, and retaining qualified sworn personnel.”²
 5 Noting that competition for law enforcement personnel is high, the BJS found that nine out of ten
 6 state and local law enforcement agencies actively recruit in order to meet their needs. (*Id.*) Of local
 7 police agencies of similar size to the Stockton police force, the report found that 69% of such
 8 agencies have a dedicated recruiting budget and 53% employ a full-time recruitment manager. (*Id.* at
 9 p. 12). In addition, state and local agencies have adopted select methods for increasing recruitment
 10 and retention and, importantly here, 35% of law enforcement agencies have enhanced their retirement
 11 benefits as a means of increasing officer recruiting and retention. (*Id.* at p. 17). The BJS specifically
 12 found that full-service pension benefits were a key component of competitiveness in recruiting
 13 among agencies, as indicated in the following chart:

14

15 **TABLE 22**
Percent of state and local law enforcement agencies offering
a full-service retirement pension to sworn personnel, by size
and type of agency, 2008

Size of agency	All agencies	Local police	Sheriff's office	Primary state
All sizes	91%	90%	92%	98%
500 or more officers	98%	100%	94%	97%
100-499	97	97	96	100
25-99	96	97	94	~
10-24	96	96	94	~
Fewer than 10	85	85	88	~

16 ~No primary state agency had fewer than 100 sworn officers.
 17 Source: Bureau of Justice Statistics, Census of State and Local Law Enforcement
 18 Agencies, 2008.

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22 The state of California presents a particularly demanding market for effective police officer
 23 retention and recruitment, exemplified by police officer salary and compensation statistics. As found
 24 by the U.S. D.O.L. Bureau of Labor Statistics, California ranks as the number two state in police
 25 officer compensation levels.³ The particularly high demand for qualified police recruits in California

26 ² Department of Justice, Bureau of Justice Statistics, “*Hiring and Retention of State and Local Law Enforcement*
 27 *Officers*,” p. 10 (available at: <http://www.bjs.gov/content/pub/pdf/hrsleo08st.pdf> (last visited August 17, 2014).)

28 ³ See U.S. Bureau of Labor Statistics, Occupational Employment Statistics, Occupational Employment and Wages, May
 2013, Police and Sheriff's Patrol Officers (available at: <http://www.bls.gov/oes/current/oes333051.htm> (last visited
 August 17, 2014).)

1 is also exemplified by local compensation statistics. As noted by the BLS report, among all cities
 2 across the nation, the three highest metropolitan area police officer compensation levels are in areas
 3 with which the City of Stockton competes for recruits. (*Id.*) The study found (1) San Francisco-San
 4 Mateo-Redwood City, (2) the Oakland-Fremont-Hayward metropolitan areas, and (3) the San Jose-
 5 Sunnyvale-Santa Clara region were the top three compensation areas, respectively, and the North SF
 6 Bay counties, and Redding area were the sixth and seventh highest-compensated metropolitan
 7 divisions across the nation. (*Id.*) Officer demand, reflected in compensation levels, is not limited to
 8 metropolitan areas. Of non-metropolitan areas, across the nation the highest median compensation
 9 level for peace officers is the Mother Lode Region of California, and the Northern Mountains
 10 Regions of California is the second highest, while the North Coast and the Eastern Sierra Regions of
 11 California are the fourth and fifth highest, respectively. (*Id.*)

12 Consistent demand for qualified law enforcement officers across California and the resulting
 13 high compensation expectations is a practical reality with which the City of Stockton must contend.
 14 Should Stockton's citizens wish to continue to recruit and retain qualified law enforcement personnel,
 15 the City will have to provide commensurately attractive compensation packages, and ensure pension
 16 levels remain competitive. This is not mere speculation, as the recent experiences of two California
 17 municipalities provide cautionary tales.

18 *1. The City of San Diego*

19 When San Diego increased officer pension contributions in 2005, the city experienced an
 20 exodus of police officers. As noted at that time: "Big-city officers willing to make a lateral move are
 21 coveted by other police agencies. They are experienced, seasoned and ready to don a new uniform
 22 and go to work within weeks. Their training, which can cost as much as \$100,000 for each officer,
 23 already has been provided."⁴ Indeed, within two months of these adjustments, seventy officers had
 24 left, and more were heading out the door. (*Id.*) Then, in 2012, San Diego adopted Proposition B,
 25 which capped officer pensions and imposed a second, lesser tier on new hires. Another round of
 26
 27

28 ⁴ U-T San Diego, July 10, 2005, "*S.D. Police Officers are Jumping Ship*" (available at
http://www.utsandiego.com/uniontrib/20050710/news_1m10exodus.html (last visited August 17, 2014)).

1 police departures ensued.⁵ Police retention rates after the passage of Proposition B were described as
 2 “grim” and the City’s crime rate escalated.⁶ The effectiveness of the force was compromised and by
 3 2014, half of San Diego’s working patrol officers had six or fewer years of experience and on some
 4 commands, 70 percent of officers had six or fewer years.⁷ San Diego’s crime rate increased by
 5 12.6% in the year following adoption of Proposition B. (*Id.*) At the time, the City’s political leaders
 6 announced that the issue would resolve itself, as they believed other agencies would adopt pension
 7 modifications or eliminate pensions altogether, as did San Diego for non-sworn personnel. However,
 8 the passage of PEPRA prevented this, as PEPRA mandates agencies provide defined benefit pension
 9 levels while capping the amount employees must contribute toward their pensions. Because San
 10 Diego officers enjoy reciprocity with CalPERS and other city and county plans, there was little that
 11 the city could do to staunch police attrition, and its force remains understaffed today as even newly
 12 recruited officers continue to leave for higher paying agencies.⁸

13 2. The City of San Jose

14 The City of San Jose provides another illustration. In 2012 the City proposed and the
 15 electorate passed Measure B, which provided for either a reduced pension or an increased employee
 16 contribution, reduced officer entitlement to disability pensions, and provided a lesser pension tier for
 17 new officers. After its passage, San Jose faced an immediate and disastrous inability to attract police
 18

19 ⁵ April 29, 2014, Voice of San Diego, “*What the Latest City Budget Means for Cops*” (“Fifteen officers told the Police
 20 Department they were leaving San Diego for other (likely more lucrative) law-enforcement jobs elsewhere and another 34
 21 bailed for miscellaneous reasons they didn’t share. Zimmerman told Voice of San Diego she suspects many took other
 22 police jobs.”) (Available at: <http://voiceofsandiego.org/2014/04/29/what-the-latest-city-budget-means-for-cops> (last
 visited August 17, 2014)); see also Fox San Diego, “*City is beginning to lose firefighters, chief says*” (available at:
<http://fox5sandiego.com/2013/06/26/chief-sdfd-retention-problems-beginning/#ixzz3AfgEXnnC> (last visited on August
 17, 2014).)

23 ⁶ U-T San Diego, “*SD Police Say more cops needed as crime rises*” July 28, 2012 (“City crime rates jumped in the first
 five months of this year and public safety personnel retention rates are grim, according to San Diego police officials”) available at: <http://www.utsandiego.com/news/2012/Jul/18/sd-police-say-more-cops-needed-crime-rise/> (last visited on
 August 17, 2014).)

24 ⁷ Voice of San Diego, April 29, 2014, “*What the Latest City Budget Means for Cops*” (available at:
 25 <http://voiceofsandiego.org/2014/04/29/what-the-latest-city-budget-means-for-cops/> (last visited on August 17, 2014).)

26 ⁸ ABC News San Diego, “*Shorthanded and Shortchanged in Pay, Will SDPD Officers Stay the Course?*” April 21, 2014 “
 27 (“But half the force – which has been maintained well below its “budgeted” number of positions -- could join a surge of
 retirees over the next four years. And hiring isn't keeping pace with departures, as many younger officers leave for better-
 28 paying agencies. “The other agencies can now cherry-pick from our department and not have to pay the investment of
 having to send someone to the Police Academy -- getting them trained up,”” said Brian Marvel, president of the 1,800-
 member San Diego Police Officers Association.”)(available at: [http://www.nbcsandiego.com/news/local/Shorthanded-
 and-Shortchanged-in-Pay-Will-SDPD-Officers-Stay-the-Course-256102951.html](http://www.nbcsandiego.com/news/local/Shorthanded-and-Shortchanged-in-Pay-Will-SDPD-Officers-Stay-the-Course-256102951.html) (last visited August 17, 2014).)

1 recruits, while attrition increased.⁹ Indeed, following passage of Measure B, of 60 members of San
 2 Jose’s police academy, only 29 accepted positions with the City, and the City has been unable to meet
 3 its needed staffing levels. (*Id.*) This inability has been directly linked to the diminished pension
 4 benefits.¹⁰ As a result, crime has spiked in San Jose, and for the first the city time has exceeded
 5 California’s median metropolitan crime rate.¹¹ As noted by the City Auditor, by the end of 2013, the
 6 crime rate had spiked by 27 percent and the “dwindling police force has likely contributed to the
 7 recent sharp drop in arrests.”¹²

8 3. Pension Reciprocity and Police Mobility

9 Because of the State’s mandated policy of pension reciprocity for law enforcement personnel,
 10 Stockton police officers have substantial mobility and, if pensions were adjusted, could preserve their
 11 pension levels by transferring to other cities or agencies. Reciprocity arrangements are encouraged as
 12 a matter of policy, and the State of California requires reciprocity among state and local retirement
 13 systems for safety employees. (See Government Code section 513268 (while section 513222 makes
 14 reciprocity generally permissive, section 513268 provides a right of redeposit for fire and law
 15 enforcement personnel).) Thus, state, county and local retirement systems are obligated to permit
 16 reciprocity through redeposit because, as stated in subpart (h) of section 513268:

17 _____
 18 ⁹ *Shrinking San Jose Police Department has few Recruits*, April 2, 2014, CBS News (available at
 19 <http://sanfrancisco.cbslocal.com/2014/04/02/mayor-reed-calls-san-jose-police-academys-low-enrollment-unacceptable>
 20 (last visited on August 17, 2014).)

21 ¹⁰ *Id.* (“Police Union President Jim Unland said San Jose is having a hard time attracting new officers because the city is
 22 less competitive with other police departments as a result of the passage of pension reform.”); San Jose Mercury News,
 23 April 2, 2014, “*San Jose: Light incoming academy class underlines recruiting concerns for shrinking SJPD*” (“Adding to
 24 the drumbeat of dwindling officer numbers at the San Jose Police Department was the news Wednesday that the next
 25 police academy will be among the smallest in decades, underlining concerns about the agency’s ability to attract new cops
 26 amid a heated political battle over pay and pension reform.”) (available at: http://www.mercurynews.com/crime-courts/ci_25479281/san-jose-light-incoming-academy-class-underlines-recruiting (last visited on August 17, 2014);
 27 March 20, 2014, San Jose Mercury News San Jose “*Police will lose another 100 officers by 2016, according to
 28 projections*” (“The city’s plans to add officers could be moot if pay, pension and disability benefits continue to be
 29 outpaced by surrounding Bay Area agencies, which have made SJPD less competitive for high-quality recruits.”)
 30 (available at: http://www.mercurynews.com/crime-courts/ci_25387775/san-jose-police-will-lose-another-100-officers
 31 (last visited on August 17, 2014).)

32 ¹¹ San Jose Mercury News, “*San Jose crime rate surpasses U.S. average, arrests plummet*,” Dec. 16, 2013 (available at
 33 http://www.mercurynews.com/pensions/ci_24737175/san-jose-crime-rate-surpasses-u-s-average-arrests-plummet (last
 34 visited August 17, 2014).)

35 ¹² City of San Jose 12012-2013 Service Efforts and Accomplishments Report, Office of the City Auditor, December 12,
 36 2013 p. 85 (available at <http://www.sanjoseca.gov/DocumentCenter/View/24941> (last visited on August 17, 2014).); San
 37 Jose Mercury News, Dec. 16, 2013, “*San Jose crime rate surpasses U.S. average, arrests plummet*” (available at:
 38 http://www.mercurynews.com/pensions/ci_24737175/san-jose-crime-rate-surpasses-u-s-average-arrests-plummet (last
 39 visited on August 17, 2014).)

1 It is the intent of the Legislature in enacting this section to recognize *a statewide*
 2 *public obligation* to all those whose duties as local public safety officers expose them
 3 to more than ordinary risks through their contribution to ensuring public safety *and to*
 4 *ensure* that those who do serve or have served as local public safety officers *shall*
 5 *have the ability to receive pension benefits for past public service in other*
 6 *jurisdictions within the state.*

7 Both the PERL, CERL and local agency retirement systems are therefore mandated to provide for
 8 reciprocity, as noted below, these rights are beyond attachment, execution or “any process
 9 whatsoever.” (See Government Code Section 21255.)

10 Further, Government Code section 45310.5 establishes a web of reciprocity among almost all
 11 California agencies, cities, districts and counties. (Gov. Code section 45310.5 (“When a city has
 12 established a reciprocal retirement system under this section and has received approval thereof from
 13 the Public Employees' Retirement System, then such system shall be automatically reciprocal with all
 14 other state, local and public agencies who are members, or contracting members of the Public
 15 Employees' Retirement System or any retirement system established under the County Employees
 16 Retirement Law of 1937.”)¹³

17 This means that Stockton police have incredible portability in their pension benefits, and can
 18 transfer their service credit to any 1937 Act employer, any other agency participating in CalPERS,
 19 and any independent city retirement system,¹⁴ a right protected from “any process whatsoever.”
 20 (Government Code section 21255).

21 Finally, as a result of the passage of PEPRA, if the Court were to require some impairment of

22 ¹³ In *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 109-112, the court noted that “a
 23 pool of reciprocal agencies is established among ... those public agencies having a reciprocal agreement with PERS” and
 24 that “PERS, ‘[r]eciprocity is an agreement among public retirement systems to allow members to move from one public
 25 employer to another public employer within a specific time limit without losing some valuable retirement and related
 26 benefit rights.’” (*Id.* at p. 108; see also *City of Los Angeles v. Superior Court* (Cal. Ct. App., Nov. 19, 2013, B246933)
 27 2013 WL 6072700).

28 ¹⁴ In addition to the 332 California agencies participating in CalPERS, Stockton employees enjoy reciprocity rights with
 all other 1937 Act plans and most independent City and district plans, including: Counties of Alameda, Sacramento,
 Contra Costa, San Bernardino, Fresno, San Diego, Imperial, San Joaquin, Kern, San Mateo, Los Angeles, Santa Barbara,
 Marin, Sonoma, Mendocino, Stanislaus, Merced, Tulare, Orange and Ventura; the University of California Retirement
 Plan; STRS; as well as the following agencies and districts: City of Concord, City of Costa Mesa, City of Fresno, City of
 Pasadena, City of Sacramento, City of San Diego, City & County of San Francisco, City of San Jose, Contra Costa Water
 District, County of San Luis Obispo, East Bay Municipal Utility District, East Bay Regional Park District, Los Angeles
 County Metropolitan Transportation Authority, City of Los Angeles. (see “When You Change Retirement Systems; a
 CalPERS Guide”, pp. 3-4 (available at: [http://www.calpers.ca.gov/eip-docs/about/pubs/member/change-retirement-
 system.pdf](http://www.calpers.ca.gov/eip-docs/about/pubs/member/change-retirement-system.pdf) (last visited August 17, 2014)); see also Facts at a Glance June 2012 (available at:
<http://www.calpers.ca.gov/eip-docs/about/facts/general.pdf> (last visited August 17, 2014).)

1 officer pensions that resulted in a termination of CalPERS membership, Stockton police officers
2 would have a mere six months to seek employment at another California public agency in order to be
3 entitled to reciprocity in their “classic” level of CalPERS membership. This is because, as noted in
4 Stockton POA’s supplemental brief, the State of California’s mandated second tier applicable to
5 public employees hired after December 31, 2012, is not applicable to employees who have a break in
6 pension reciprocity. Officers who may lose reciprocity as a result of a termination by CalPERS may
7 no longer qualify as “classic” employees under PEPRAs grandfathering provisions. (See Gov. Code
8 section 7522.04(f)). Of course, such a “break” in reciprocity is of questionable legality under
9 California law with respect to peace officers, but even a whiff of uncertainty could trigger an
10 immediate exodus of experienced officers from Stockton’s force if they wished to preserve their
11 pension benefits.

12 Law enforcement and police work is an essential function of a City. In light of the
13 competitive environment among California agencies to attract and retain law enforcement officers,
14 and the right of Stockton officers to seek employment at other agencies while maintaining their
15 existing pension rights, the City’s plan of adjustment soundly leaves in place current pension levels
16 and ensures to current officers a level of benefits comparable to what they have worked toward and
17 what they can obtain elsewhere.

18 **B. CalPERS as an “Alternative Retirement System” to Social Security**

19 As the Court is aware, Stockton police officers are not enrolled in social security. The federal
20 Omnibus Budget Reconciliation Act of 1990 (“OBRA 1990”) provides that employees of states must
21 be enrolled in the Social Security Administration’s Old Age, Survivor and Disability Insurance
22 program (“Social Security”) unless they are enrolled in an “alternative retirement system” (or
23 “ARS.”)¹⁵ An ARS must provide a level of benefits equivalent or greater to the benefits offered
24 under Social Security. With respect to Stockton employees, CalPERS is an ARS. Because social
25

26 ¹⁵ The regulation, 20 C.F.R. § 404.1020, excludes state employees from Social Security coverage unless they are covered
27 under a § 218 agreement or, After July 1, 1991 the state employees are “not a member of a retirement system of such
28 State, political subdivision, or instrumentality. Retirement system has the meaning given that term in section 218(b)(4) of
the Act, except as provided in regulations prescribed by the Secretary of the Treasury” Section 218(b)(4) of the Social
Security Act, at 42 U.S.C. § 418, defines retirement system as “a pension, annuity, retirement, or similar fund or system
established by a State or by a political subdivision thereof.”

1 security contributions are collected as FICA taxes from employees and employers, pursuant to
 2 Congressional authority, the Department of the Treasury has issued regulations defining the requisites
 3 of an ARS, which allows public employers to avoid FICA taxes. When a public employee has not
 4 been enrolled in Social Security and the public-employer has failed to provide a qualifying ARS, the
 5 employer and employee are liable for FICA taxes (which, of course, are not dischargeable or
 6 adjustable in bankruptcy).

7 Under OBRA 1990 and subsequent Treasury Regulations,¹⁶ an “alternative retirement
 8 system” is a plan that satisfies certain minimum requirements, depending on whether the alternative
 9 plan is a defined contribution or defined benefit plan. Whether a public employee’s retirement plan
 10 qualifies as an ARS is determined with respect to the individual employee, and not on a group-wide
 11 basis. (See 26 C.F.R. § 31.3121(b)(7)-2(e)(2).) Under the regulation, a public employee must be
 12 entitled to an accrued benefit, as he works, that is equivalent to the “fully-insured” Social Security
 13 benefit. The term “fully insured” refers to the maximum benefit under Social Security.

14 The submissions of the parties to the Court indicate that, absent approval of the plan, Stockton
 15 employee and retiree pension benefits could face a sixty percent reduction in benefits by CalPERS if
 16 a termination liability assessment is not paid by the City. Such a reduction would eliminate the ARS
 17 qualification under the Treasury regulations with respect to officer’s prior service with the City, and
 18 trigger the City’s commensurate FICA obligations for such prior service.¹⁷ Because ARS-coverage is
 19 applied on an individual-by-individual basis, any reduction in pension benefits must necessarily
 20 proceed on an individual basis, a process which will be time-consuming, and subject to
 21 individualized due process requirements under the Social Security Act.

22 **C. The Nature of Public Pensions Under California Law**

23 Under California law pension benefits are a form of compensation, earned during
 24 employment, the payment of which is deferred until death or retirement. (See *Sweesy v. Los Angeles*
 25 *County Peace Officers’ Retirement Bd.* (1941) 17 Cal.2d 356; *Terry v. City of Berkeley* (1953) 41
 26 Cal.2d 698 (“The pension payments are in effect deferred compensation...”); *Butterworth v. Boyd*

27 ¹⁶ 26 C.F.R. § 31.3121

28 ¹⁷ PORAC notes that, to its knowledge, this issue was not addressed in the Detroit plan because city employees participate in social security.

1 (1938) 12 Cal.2d 140, 150) (same); *Miller v. State of California* (1977) 18 Cal.3d 808, 814 (pension
2 benefits are deferred compensation); *Legislature v. Eu* (1991) 54 Cal.3d 492, 533 (accord);
3 *International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300 (accord); *Betts v.*
4 *Board of Administration* (1978) 21 Cal.3d 859, 863 (accord). (*O’Dea v. Cook* (1917) 176 Cal. 659,
5 661-662 (when “services are rendered under [] a pension statute, the pension provisions become a
6 part of the contemplated compensation for those services.”); *Retired Employees Association v.*
7 *County of Orange* (2011) 52 Cal.4th 1171, 1185 (same).) This deferred compensation is protected as
8 employee property under both California’s legislative scheme applicable to public pensions, and as a
9 matter of state constitutional law

10 As noted in the brief submitted by the Stockton City Employees Association, *et al.*,
11 California’s constitution preserves an employee’s prospective right to continue to earn such deferred
12 compensation under the terms offered at the time the employee commences employment. This right
13 is prospective, is vested, and is founded in the public-employment relationship. This long-established
14 doctrine recognizes that when an employee accepts employment she foregoes other opportunities, and
15 ensures that by devoting her productive years to the public service, she will be entitled to continue to
16 earn the benefits promised when she initially embarked on her life of public service. (*Allen v. City of*
17 *Long Beach* (1955) 45 Cal.2d 128, 131; *Pasadena Police Officers Assn. v. Pasadena* (1983) 147
18 Cal.App.3d 695, 703.) This “Rule of Allen,” as set forth in the Stockton City Employees’
19 Association brief, is a vested right to be enjoyed prospectively. But under California law, earned and
20 accrued pension benefits are the property of the employee because they represent the employee’s
21 deferred compensation. Alterations to pension systems that impair either earned benefits or a vested
22 right to continue to earn such benefits, are protected in equal degrees by California law.

23 In fact, the nature of these rights have been specifically defined, recently, by the California
24 Supreme Court on a certified question of state law submitted to it by the Ninth Circuit. In that case,
25 *Retired Employees Association of Orange County v. County of Orange* (2011) 52 Cal.4th 1171
26 (“*REAOC*”), the Court confirmed that the term “vested” indicates irrevocability, and more than a
27 mere contractual right:

28 A benefit is deemed “vested” when the employee acquires an *irrevocable interest* in the

1 benefit. The “vesting” of retirement benefits must be distinguished from the
2 “maturing” of those benefits, which occurs after the conditions precedent to the
3 payment of the benefits have taken place or the benefits are otherwise within the
4 control of the employee.

5 (*Id.*, at 1189 n. 3 (emphasis added).) This description by California’s Supreme Court cannot be
6 understated: under state law pension benefits are compensation, and are “*irrevocable.*” Necessarily,
7 such an irrevocable interest in one’s compensation sounds in property, not contract. This is
8 especially the case where an employee contributes towards a pension plan either directly via payroll
9 deductions, or as a result of the negotiated package of compensation.

10 California’s statutory scheme regarding public pensions removes both categories from this
11 proceeding. State statutory law, including Government Code section 20487 as described in
12 CalPERS’ submissions, underscores this conclusion. While section 20487 specifically prohibits
13 adjustments in Chapter 9 that are contrary to the PERL, a separate provision of the PERL also
14 provides that the pension rights arising from the PERL are not subject to execution or “*any process*
15 *whatsoever.*” Section 21255 of the PERL provides:

16 Exemption from Process; unassignability: The right of a person to *any benefit or*
17 *other right under this part* and the money in the retirement fund are not subject to
18 execution or any process whatsoever except to the extent permitted by Section
19 704.110 of the Code of Civil Procedure, and are unassignable, except as specifically
20 provided in this part.¹⁸

21 (emphasis added). The reference to “this part” refers to the entire PERL and, by its terms, covers
22 “any right” conferred by the PERL.¹⁹ As stated in section 20004(a) of the PERL, the Legislature’s
23 intent in enacting the PERL was “to ensure that [CalPERS] members are provided with the retirement
24 and related benefits to which they are entitled pursuant to law.” California’s statutory scheme is
25 more protective still. California Code of Civil Procedure section 704.110(b), related to exemptions
26 from money judgment attachments, prohibits attachment of “All amounts held, controlled, or in
27 process of distribution by a public entity derived from contributions by the public entity or by an

28 ¹⁸ The CERL contains a similar provision, at Government Code § 31452 (“Retirement allowances exempt from taxation
and other process: The right of a person to a pension, annuity, retirement allowance, return of contributions, the pension,
annuity, or retirement allowance, any optional benefit, *any other right accrued or accruing to any person under this*
chapter... are not subject to execution or any other process of court whatsoever except to the extent permitted by Section
31603 of this code and Section 704.110 of the Code of Civil Procedure...” (emphasis added).

¹⁹ Clearly, under *Patterson v. Shumate* (1992) 504 U.S. 753, CalPERS pensions are not be part of a bankruptcy estate as a
result of “applicable non-bankruptcy law.” 11 U.S.C. § 541(c)(2). Although section 541 is not incorporated into Chapter
9, this is pertinent when considering the nature of public pension rights.

1 officer or employee of the public entity for public retirement benefit purposes, *and all rights and*
 2 *benefits accrued or accruing to any person under a public retirement system*, are exempt without
 3 making a claim.” (emphasis added).

4 The enactments reviewed above, of which section 20487 is only one example, indicate that
 5 California unambiguously views public pension rights as irrevocable and unreachable by any process
 6 not specifically enumerated. Because such pensions comprise an essential governmental function²⁰
 7 as described in CalPERS’ submission, they are beyond the discretion or authority of the Court, and
 8 sound in state statutory law. Here the State has made a political decision to protect pension rights to
 9 a degree that, under state law, they are rendered a property right of the employee.

10 The Court may not condone the fact that California has enacted an impenetrable wall around
 11 CalPERS-administered pensions, protecting them from execution or impairment in all contexts. But
 12 Section 903 and the Tenth Amendment places that question well beyond the authority of the Court,
 13 the People’s decision in this regard presents a non-justiciable political question best avoided in these
 14 proceedings.

15 Because California law establishes a property right in public pensions as a form of deferred
 16 compensation, protected from attachment, execution, or “*any process whatsoever*” not specifically
 17 enumerated, they fall outside of a Chapter 9 proceeding and are protected under the Fifth and
 18 Fourteenth amendments of the federal constitution. The legislative history of the Bankruptcy Code
 19 indicates that its drafters considered the Fifth Amendment to be a limitation upon the taking of
 20 property rights in bankruptcy, and current bankruptcy law gives great deference to property rights.
 21 (*U.S. v. Security Indus. Bank* (1982) 459 U.S. 70, 75 (“The bankruptcy power is subject to the Fifth
 22 Amendment’s prohibition against taking private property without compensation.”; citing *Louisville*
 23 *Joint Stock Land Bank v. Radford* (1935) 295 U.S. 555.)

24 _____
 25 ²⁰ In addition to authorities cited by CalPERS in Note 15 of its “Constitutional” supplemental brief, the Internal Revenue
 26 Service, construing section 115 of the Internal Revenue Code, 26 U.S.C. section 115, which excepts “income derived
 27 from [] the exercise of any essential governmental function,” includes the funding of post employment benefits is an
 28 “essential government function.” I.R.S. P.L.R. 201219012 (May 11, 2012) (“Providing such benefits to former public
 employees constitutes the performance of an essential government function. Based upon Rev. Rul. 90-74 and Rev. Rul.
 77-261, the Trust performs an essential governmental function within the meaning of § 115(1).”; I.R.S. P.L.R. 200727002
 (July 6, 2007) (“Providing health benefits to current and former employees constitutes the performance of an essential
 government function.”) Moreover, because CalPERS functions as an alternative to Social Security for Stockton police
 officers, its purpose is certainly a core and essential public function.

1 **D. The Futility of Considering Alternative Pension Providers**

2 There are no viable alternatives to participation in CalPERS. None of the potential
3 alternatives, including a county plan, a City-administered pension plan, or social security enrollment,
4 will enable police retention and recruitment, or save the taxpayers any money.

5 1. SJCERA

6 As a technical matter, the City could move to the CERL-covered county plan in which the
7 City is geographically situated, if it reached agreement with the San Joaquin County Employees
8 Retirement Association (“SJCERA”). The funded ratio of SJCERA for 2013 was 63.4%, as
9 compared with CalPERS’ public agency funded ratio of 68.9%.²¹ It does not appear SJCERA
10 presents any less risk to the City taxpayers.

11 Further, participating in SJCERA would not alleviate the City’s pension obligations in any
12 meaningful manner. The only method for enrolling legacy employees in SJCERA would be to
13 purchase service credit, which is an expensive, up-front proposition. Moreover, because PEPRA now
14 mandates certain benefits for all new hires regardless of the particular retirement system, a transfer to
15 SJCERA would not provide more flexibility with respect to pension benefits. In addition, the City’s
16 ability to leave SJCERA once enrolled, is significantly curtailed. Under the CERL, a city -- which is
17 encompassed within the definition of “District” per Government Code section 31468(e) -- may only
18 exit a CERL-governed system if the City Council is presented with a petition signed by more than
19 fifty percent of its employees and officers participating in the system. (Government Code sections
20 31564 and 31564.2). Thus, entering SJCERA presents a highly speculative option that, once
21 invoked, becomes burdensome to undo.

22 2. City-Administered Pension Plan

23 Although the City *could* adopt its own pension system - a significant undertaking in its own
24 right -- the decision to do so does not necessarily rest with the City. Under California’s City
25 Retirement Law, a City may establish a pension system by ordinance, but only after the employees
26

27 ²¹ Compare SJCERA 2013 CAFR (available at: [http://www.sjcera.org/Pages/content/financial/SJCERA_2013_CAFR-](http://www.sjcera.org/Pages/content/financial/SJCERA_2013_CAFR-Financial.pdf)
28 [Financial.pdf](http://www.sjcera.org/Pages/content/financial/SJCERA_2013_CAFR-Financial.pdf) (last visited on August 17, 2014); with <http://www.calpers.ca.gov/eip-docs/about/facts/facts-at-a-glance.pdf>
(last visited on August 17, 2014).) PORAC notes these funded ratios are not necessarily comparable, based on differing
actuarial assumptions each plan may adopt.

1 vote by secret ballot to adopt it. (Gov. Code section 45303 (“The ordinance shall not be adopted
2 unless an election is first held to permit the employees proposed to be included in the system to
3 express by secret ballot their approval or disapproval of the retirement proposal”).) Thus, the
4 adoption of a City-governed pension system is beyond the political control of the City Council and
5 rests with the employees themselves, making any such option highly speculative.

6 In addition, although Ms. Nicoll gave able testimony regarding the lack of any California
7 cities that contract with private firms to provide pension benefits, there is a good reason no such
8 private entities exist: it is prohibited by law. The City Retirement Law states, at government Code §
9 45308, that “The legislative body may maintain its own pension and retirement fund or may contract
10 with the legislative body of any city or county in the State, or any state department, for: (a) The
11 performance of any service in connection with the establishment or administration of the retirement
12 system. (b) The investment, care, or administration of retirement funds. (c) Any other service relating
13 to the system or its funds.” Notably absent from this menu of options is the contracting with private
14 entities to oversee or provide pension benefits.

15 Moreover, Article 16, Section 17 of the California Constitution requires a public governing
16 board to administer public pension systems, and provides that such governing boards have “sole and
17 exclusive responsibility to administer the system in a manner that will assure prompt delivery of
18 benefits and related services to the participants and their beneficiaries.” (Cal. Const., Art. 16, section
19 17). As a matter of California constitutional law, the City cannot “outsource” its pension
20 administration to a private entity, rather a public governing board has the “sole and exclusive” duty to
21 administer a public pension system.

22 3. Social Security Coverage

23 Lastly, incorporating social security into a retirement benefit scheme is neither viable nor
24 practicable, for two reasons. Social security eligibility accrues only after forty quarters, or ten years,
25 of social security covered employment. (See 42 U.S.C. § 414(a).) Because many California local
26 agencies, including Stockton, are not covered by social security, few Stockton police officers will
27 have any covered earnings, and so they will be required to work for an additional ten years before
28 becoming entitled to any social security benefits.

1 In addition, Stockton police officers' eventual social security benefits will be subject to
2 reduction under the Social Security Act's windfall elimination provision ("WEP"), which makes the
3 social security system less than ideal. The WEP provision reduces social security benefits when an
4 employee is entitled to a public pension associated with service not covered by social security, as is
5 the case for Stockton's police. (See 42 U.S.C. section 415). The WEP would eliminate a significant
6 portion of the earnable social security benefits. (*Id.* (social security benefits are generally determined
7 by taking 90% of an enrollee's first \$816 in average monthly earnings, 32% of the next \$4,101, and
8 15% of any further monthly salary; for public employees subject to the WEP, employees receive only
9 40% of their first \$816 dollars in average monthly salary is credited; see also Social Security
10 Administration Program Operations Manual System, RS-00605.362).)

11 Finally, it is not within the Court's or the City's authority to enroll Stockton police in social
12 security. Under section 218 of the Social Security Act, 42 U.S.C. section 418, the method of
13 enrolling state and local public employees is by executing an agreement between the State and the
14 Social Security Commissioners. With respect to police and fire personnel, the Social Security Act
15 permits their inclusion only if the affected police or fire personnel have agreed by majority vote in a
16 secret ballot election. (See 42 U.S.C. section 418(l) ("Any agreement with a State entered into
17 pursuant to this section may, notwithstanding the provisions of subsection (d)(5)(A)... be modified
18 pursuant to subsection (c)(4) of this section to apply to service performed by employees of such State
19 or any political subdivision thereof in any policeman's or fireman's position covered by a retirement
20 system in effect on or after August 1, 1956, but only upon compliance with the requirements of
21 subsection (d)(3) of this section."); Section 418(d)(3) permits inclusion in social security only when
22 referendum is held among the employees and a majority vote for inclusion (although section 218
23 initially excluded police and fire personnel from coverage completely, 42 U.S.C. section
24 418(d)(5)(A), these amendments permit inclusion only upon approval by secret ballot among the
25 safety employees).)

26 Thus, it is beyond the City's or Court's authority to extend social security to police without a
27 secret ballot vote, and given the application of the WEP and the ten-year eligibility period required
28 for social security benefits, there is little reason why police personnel would vote to endorse it.

1 Lastly, social security can not be used as an interim measure, once arrangements are made to provide
2 social security coverage, the employees can not be removed or disenrolled. (See 42 U.S.C. section
3 418(f).)

4 Ensuring continued CalPERS participation for Stockton police is not only practically
5 advisable, there are no better authorized alternatives.

6 **E. Inviting an Assessment of Termination Liability Would Be Imprudent**

7 If the plan were rejected, and replaced with a plan that entailed an assessment by CalPERS of
8 termination liability, it would result in greater financial misery for Stockton's taxpayers. Under the
9 PERL, and CalPERS protocol, a reduced discount rate is applied to pension obligations associated
10 with terminated agencies. In other words, the taxpayers will pay more to extract the City from
11 CalPERS, not less. The discount rate, which represents the anticipated return on investment on
12 contributions for the purposes of funding future benefits, when reduced results in a dramatically
13 increased contribution obligation on the part of the City as compared to its obligations while actively
14 participating under the higher discount rate .

15 In August 2011, the CalPERS Retirement Board adopted a more conservative investment
16 strategy for the assets of the terminated agency pool. As a result, the applicable discount rate for the
17 terminated pool is now below four percent, due to an investment strategy that is shorter term, more
18 conservative, and designed to protect the principal by investing the majority of pooled assets in U.S.
19 Treasury based securities. The U.S Treasury market is now yielding below 4 percent long-term, and
20 near zero percent for short-term. In contrast, the discount rate applied to the active pool is 7.5 percent
21 (because the active fund has a source of income beyond interest, and is invested for the longer term in
22 a more aggressive and diversified portfolio, with a longer investment horizon). An employer that
23 terminates its plan but continues with CalPERS as the plan administrator is required to deposit more
24 assets into the pool to fund the terminated liabilities, which will fluctuate with interest rates. Interest
25 rates in the US are currently at an all-time low.

26 In addition to paying more, should the Court require a plan of adjustment that involves
27 triggering a termination liability assessment, the Court will essentially be making a bet that interest
28 rates will remain stable or decrease, and Stockton will be required to pay the assessment against

1 this bet. In the current environment, were the Federal Reserve is considering normalizing monetary
 2 policy,²² this is not a wise bet. Whether termination liability can be discharged or avoided as a result
 3 of the Chapter 9 proceeding is doubtful, as CalPERS' notes in its "PERL" brief, at pages 25-29, it can
 4 be said with certainty that there are no reasons to commend inviting an assessment of termination
 5 liability.

6 **F. Federal Abstention Principles Require Declining to Determine Unresolved Issues of**
 7 **State Law**

8 As noted by the submissions of the interested parties supporting the plan, the issues
 9 surrounding a CalPERS termination liability lien, or permissible benefit reduction, are not properly
 10 before the Court. If they were, principles of federal abstention would require this Court to decline to
 11 consider it. CalPERS' assertion of a lien would be triggered only if an alternative, hypothetical plan
 12 were adopted that provided for avoiding obligations to CalPERS (and the employees' and retirees'
 13 interests that CalPERS has a constitutionally-prescribed fiduciary duty to represent). That is a matter
 14 of state law.

15 As summarized in *In re City of Central Falls*, 468 B.R. 36, 53 (D. R.I. 2012), the federal
 16 mandatory abstention statute, 28 U.S.C. § 1334(c)(2), applies in Chapter 9 proceedings. (*Id.*)
 17 Abstention is mandated when (1) the proceeding is based on a state law claim or cause of action; (2)
 18 the claim or cause of action is related to a case under title 11 but does not arise under title 11; (3)
 19 federal courts would not have jurisdiction over the claim but for its relation to a bankruptcy case; (4)
 20 an action "is commenced" in a state forum of appropriate jurisdiction; and (5) the action can be
 21 timely adjudicated in that state forum. (*Id.*, at 53) Here, because the claim is not ripe, there is no
 22 pending claim. If the claim were ripe, the court would be obligated to abstain. *Ipsa facto*, the Court
 23 should not issue an advisory opinion over a matter that, if it were ripe, would require the court to
 24 abstain. Further, "the seminal case which addressed abstention within the context of a bankruptcy
 25 case held abstention appropriate solely on the basis that the case presented difficult questions of state
 26 law. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940)." *In re Republic Reader's Service*,

27
 28 ²² See Minutes of the Federal reserve Board, June 17-18 2014 (available at:
<http://www.federalreserve.gov/monetarypolicy/fomcminutes20140618.htm> (last visited on August 17, 214.))

1 *Inc.* 81 B.R. 422, 430 (Bankr. S.D. Tex. 1987). In *Thompson*, the Supreme Court held that the
2 bankruptcy court should not have determined unsettled questions of state property law in a
3 bankruptcy proceeding, but should have required that the bankruptcy trustee bring the action in state
4 court. The important and unresolved issues of state law should, in the first instance, be decided by
5 state courts.

6 **IV. CONCLUSION**

7 For the foregoing reasons, in addition to the reasons set forth in the submissions of the
8 interested parties seeking approval of the proposed plan of adjustment, *amicus curiae* PORAC
9 respectfully urges the Court to approve the plan, and leave for another day the status of pensions
10 earned pursuant to the PERL in the context of a Chapter 9 proceeding.

11 Dated: August 19, 2014

BEESON, TAYER & BODINE, APC

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13
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