

No.

IN THE
Supreme Court of the United States

PEGGY KIRTON; DIANA AGNELLO, PETITIONERS

v.

VALLEY HEALTH SYSTEM; VALLEY HEALTH
SYSTEM RETIREMENT PLAN; JOEL
BERGENFELD, TRUSTEE OF THE VALLEY
HEALTH SYSTEM RETIREMENT PLAN; VINAY M.
RAO, TRUSTEE OF THE VALLEY HEALTH
SYSTEM RETIREMENT PLAN; MICHELE BIRD,
TRUSTEE OF THE VALLEY HEALTH SYSTEM
RETIREMENT PLAN; METROPOLITAN LIFE
INSURANCE COMPANY

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

- Whether a Bankruptcy Court can declare a class unimpaired and, in a subsequent paragraph, impair the class of pensioners.
- Whether the Bankruptcy Court lacks jurisdiction over these unimpaired creditors in this matter and is equitably stopped from acting otherwise.
- If the pensioners were not unimpaired, as promised, they possessed voting rights which they were denied which voids the REORGANIZATION PLAN.
- If the pensioners were impaired they possessed voting rights which they were denied.
- Whether an Art. II Judge can exercise the duties of the Art. III judiciary or a California Superior Court absent specific Bankruptcy Court jurisdiction not present here.
- Whether in a Chapter 9 bankruptcy the taking imposed in this matter, by the fiction of the class being unimpaired, resulted in an unconstitutional taking of a constitutionally protected property interest in their fully vested pension benefits without just compensation.
- Whether the Bankruptcy Court allowed the payment of other debts without the payment of the substantially larger class deemed unimpaired when there are no funds provided for such purposes and/or by allowing the expenditure of the funds due to the unimpaired class which totally divested the class of any recovery whatsoever.
- Whether once the debtor was dismissed from the mandate action any claimed jurisdiction failed.

- If the class was truly unimpaired any matter thereafter would lack a case or controversy and thus moot.
- Whether absent a federal claim the Bankruptcy Court did not have jurisdiction over pensioners state court claims seeking to compel the public entity respondents comply with state law under a state special proceeding statute or to enjoin or delay such mandate.
- Whether absent some of the class members receiving notices about bankruptcy, the debtor did not provide notice of the various motions to any unimpaired party and were never made aware of the provisions of the bankruptcy plan because they were all deemed to be unimpaired, resulting in a fundamental problem of notice and opportunity to be heard not being provided.
- Whether the Rule 12 Motion must be reversed since the Petitioners could clearly plead a claim for relief under state law even though the Bankruptcy Court was without jurisdiction to Order anyone to perform any ministerial duties.
- Whether a mere assertion of indemnity rights, absent an evidentiary showing of entitlement, cannot support Bankruptcy Court jurisdiction.
- Whether a bankrupt, nor his counsel, cannot divest voting rights by promising to pay creditors as unimpaired when it does not possess adequate funds and cannot present, as unimpaired, a REORGANIZATION PLAN for class pensioners it knows will be deprived of their pensions and is, in fact, impaired.

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OPINION BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit, which was unpublished, was issued on September 12, 2017 (1a-4a). The opinion of the United States Court of Appeal for the Ninth Circuit, which was unpublished, denying the petition for rehearing *en banc*, was issued on October 18, 2017, (44a-45a). The transcript of the trial court hearing is attached at (52a-64a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) with the caveat that the federal jurisdictional issues remain to be determined in this proceeding as it is contested. The decision of the United States Court of Appeal for the Ninth Circuit, which petitioner seeks reviewed, was issued on September 12, 2017. The Request for Rehearing and Rehearing *en banc* were issued on October 18, 2017. This petition is filed within 90 days of the United States Court of Appeal for the Ninth Circuit of discretionary review, under Rules 13.1 and 29.2 of this Court.

RELEVANT PROVISIONS INVOLVED(see Appendix)**STATEMENT**

This case is before this Court because of the Bankruptcy Plan which denied all the pensioners employed under the Valley Health System Retirement Plan their right to vote on the REORGANIZATION PLANS. Any such ballot would have resulted in the Pensioners being the largest number of creditors. To

avoid that the pensioners rights to vote on the bankrupts REORGANIZATION PLANS Petitioners were declared “unimpaired” under 11 U.S.C. 1124. The Petition for Writ of Mandate (hereinafter “mandate”) under *California Code of Civil Procedure* § 1085 was filed in the Superior Court of the County of Riverside, California.

MetLife never joined in the removal to the Bankruptcy Court and did not file or appear in the Rule 12 motion. Petitioners sought to compel the performance of ministerial duties by respondents, with emphasis of compelling the performance of the Valley Health System Retirement Plan (hereinafter “VHSRP PLAN”)¹ regarding the requirements of the California Constitution and statutes, which sets forth the duties of the VHSRP PLAN, a *sui juris* entity of the State of California. As of the time when the Bankruptcy Court accepted jurisdiction several things occurred. First, it was discovered that the pensioners were impaired under 11 U.S.C. 1124, and second, that the Bankruptcy Court refused to allow the Petitioners to seek a mandate under state law on purely state law claims as an unimpaired creditor.

¹ “A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.” (C.C.P. 1085(a).) 8 Witkin, Cal. Proc. 5th Writs § 23 (2008)

The lower courts have had two BAP appeals and two ninth Circuit appeals to date. The first BAP appeal reversed for lack of jurisdiction which the Ninth Circuit reversed and remanded to the BAP which then sustained the Motion to Dismiss which then was appealed.

REASONS FOR GRANTING THE PETITION

The following issues provide compelling reasons to grant the Petition of Certiorari in this Court:

- (a) a United States Court of Appeals has entered a decision in conflict has decided an important federal question in a way that has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, as it affects all public pension plans in California and the use of 11 U.S.C. 1124 in an important federal question in a way that conflicts with relevant decisions of this Court.

I. BANKRUPTCY COURT JURISDICTION CANNOT AVOID VOTING RIGHTS FOR AN UNIMPAIRED CREDITOR AND ON THE OTHER HAND CAN ALSO BAR VOTING RIGHTS TO IMPAIRED CREDITORS.

A California Writ of Mandate standing alone is not a claim for relief under federal law. In the mandate proceeding there is a simple request to the Respondents in the matter that they perform their ministerial duties. The removal of the instant case below by VHS was improper and becomes the first problem regard to the so-called “unimpaired” status of these Petitioners.

A Bankruptcy Courts’ jurisdiction Over “Core” vs. “Noncore” assumes the federal district court has issued a referral order that a bankruptcy judges may:

- a. hear and determine “core” proceedings; and
- b. hear, but not determine, absent consent, “non-core” proceedings otherwise related to a case under Title 11. 28 USC § 157(b)(1), (c)(1)(2). A “Core” proceeding involves claim for relief created or determined by the Bankruptcy Code or administrative matters arising *only* in bankruptcy cases. “Arising under” or “arising in” bankruptcy proceedings require Core proceedings “arise under” or “arise in a case under” Title 11. *Stern v. Marshall* (2011) 564 US 462, 476, 131 S.Ct. 2594, 2604.

That is not the case at bar.² Under *Stern*, the Congress violated Article III when it enacted 28 USC § 157(b)(2)(C) because it purported to grant authority to Article II bankruptcy courts to decide a matter only Article III courts have authority to decide. *Stern v. Marshall*, *supra*, 564 US at 503, 131 S.Ct. at 2620. Under Article III, state *common law claims* can only be decided by lifetime-tenured judges with salary protection. *Stern v. Marshall*, *supra*, 564 US at 469, 131 S.Ct. at 2600-2601. This case was removed to the Bankruptcy Court from the Superior Court of Riverside, California, which sought to compel the performance of solely under California law. There was compliance with the recent relevant decisions of the Bankruptcy Court because this case predates *Wellness Int'l Network, Ltd. v. Sharif* 135 S.Ct. 1932 (2015); *Executive Benefits Ins. Agency v. Arkison* (2014) – US –, 134 S.Ct. 2165, 2174 and on the cusp of *Stern v. Marshall* (2011), 135 S.Ct. 1932, 1945-1946; 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475.

A bankruptcy court can, when faced with a *Stern* claim, issue proposed findings of fact and conclusions of law to be reviewed de novo by the district court *if a Stern claim is noncore*. See *Executive Benefits Ins. Agency v. Arkison* (2014) US 134 S.Ct. 2165, 2174. If not a core/non-core matter it is not a matter for bankruptcy court.

Here, the bankruptcy court had found that it has “related to” jurisdiction to consider claims against an

² Specific core proceedings are set forth in Title 28 U.S.C. and contains a nonexclusive list of 16 specific core proceedings 28 USC § 157(b)(2). However, the inclusion of a particular item listed in the statute as “core” does not necessarily mean the bankruptcy court has constitutional power to enter a final order in that proceeding.

officer of the debtor because the officer claimed contractual indemnification rights against the debtor that could potentially result in a “substantial claim” against the debtor which could affect the debtor's bankruptcy case. *In re KSRP, Ltd.* (5th Cir. 2015) 809 F3d 263, 267-269; see also *Stichting Pensioenfonds ABP v. Countrywide Fin'l Corp.* (CD CA 2010) 447 BR 302, 310-311.

That is a factual question which cannot be decided on a Rule 12 motion since, in California, there is no contractual right to indemnification for public employees. Unless the statutory requirements of the California Tort Claims Act have been met – none of which has been shown to exist and is waived absent a valid claim being presented long ago. In fact, under the California Tort Claims Act, the bankruptcy court asserted that there was a lack of compliance with that Act by the plaintiffs – in failing to file a claim against VHS. That conclusion is unavailing since the Act only relates to the issue of financial damages, not a special proceeding to compel performance or equitable relief does not apply as to unpaid wages, which the retirement funds are a part of. *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 121, 113 Cal.Rptr. 102, 108–109, 520 P.2d 726, 732–733.

There are no “contractual or other promises of indemnity in the current case that can be asserted by the Respondents that could provide for such a factual conclusion on a Rule 12 motion. This is not a claim with contractual indemnification rights against the debtor and thus cannot factually result in a “substantial claim” against the debtor and no statutory right since they waived them all by not filing timely for them.

Thus, the final order or judgment in a noncore related proceeding is of no effect if the bankruptcy

court lacks jurisdiction over the matter. *In re Crystal Mfg. & Packaging, Inc.* (ND IL 1986) 60 BR 816, 820; *see also In re City Wide Press, Inc.* (BC ED PA 1989) 107 BR 68, 70. Express consent is required in adversary proceedings. In an adversary proceeding before a bankruptcy court, the complaint, counterclaim, cross-claim or third-party complaint shall contain a statement that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy court. FRBP 7008 (amended eff. 12/1/16). No such compliance has ever been had in the trial court. There is no such statement in the Respondents pleadings, in fact, MetLife stipulated to an answer and then failed to file it with regard to the proposed First Amended Complaint and thereafter did not appeal or seek judicial relief until after the second 9th Cir. proceeding was underway and then sought to intervene. Also, a response to any complaint, counterclaim, cross-claim or third-party complaint must also state whether the responding party consents to the bankruptcy court rendering a final order or judgment. FRBP 7012(b) (amended eff. 12/1/16). That did not occur – nor did all the Respondents agree to removal as required in the trial court and thereafter never appeared in the subsequent appeals until this last appeal to the 9th Cir. was underway.

**II. APPELLANTS BELIEVE THAT
METLIFE'S BRIEF DEMONSTRATES
THAT THE INTERVENITION IN THIS
CASE SHOULD BE REVERSED.**

In the case at bar, the Court was asked to allow MetLife to intervene in the second appeal. MetLife sought to intervene into this case after they failed to

appear in the Bankruptcy Court (dismissed *sua sponte*); did not appear in the first BAP appeal; failed to appear in the appeal to this Court to reverse the BAP decision; did not make an appearance on remand; and in this Court failed to file a notice of appeal. After this Court remanded the matter to the BAP, MetLife continued to fail to make an appearance and then, long into the appeal process now at bar, MetLife files a motion to intervene.

In their application to intervene, which Appellants opposed, MetLife stated:

MetLife bases its motion on assertions that (a) it will be "directly impacted" by the appeal's outcome; (b) its claims and those of the Respondents are "inseparably intertwined," in that they both arise from the same transaction, and therefore share common issues of fact and law; (c) if not permitted to join/intervene in the appeal, its interest will be impaired; (d) both MetLife and the Respondents are seeking the same remedy (an order affirming dismissal); and (e) its failure to join or intervene earlier has not affected the course of the appeal. MetLife further asserts that no other party will be prejudiced by this Court's granting of permission allowing its joinder and/or intervention, nor has any other party objected to its "announced plan to participate in this appeal."

They forget to mention they abandoned the appeal in the first place after the initial trial court ruling. The MetLife argument fails inasmuch as their claim is not the same as Respondents who distinguish their valid appeal (as opposed to the total disregard to

the numerous proceedings to date that they ignored) from the MetLife intervention on a critical point, *i.e.*, MetLife concedes, as it must, that the VHSRP is a separate Respondent in the Superior Court Writ of Mandate directed to it and not, as the Respondents assert, a misnaming of VHSRP when it should have been VHS – a “fact” not subject to reclassification.

So, on a critical issue of this intervention, MetLife should not be allowed to come in and challenge both the underlying argument of the Respondents while trying to assert their own, unrepentantly dispute with the Respondents and Appellants. As discussed elsewhere MetLife is not entitled to indemnity – moreover, any claims it may have had were extinguished by the same VHS bankruptcy as to VHS – which is no longer a party. Simply put the Intervenor ignored everything up to now and seeks to throw the wrench into the gears of this appeal for its own determinations – not supporting either Respondents or appellants factual position. Moreover, its own statements make clear that, under its factual argument, the dismissal was improper.

It is incomprehensible what the three-way factual dispute has done to make this appeal more difficult and confusing than it ought to be, a problem squarely laid at the Intervenor's feet.

Intervention on appeal is seldom sought or granted. An appellate court will allow intervention on appeal where none was sought in the district court *only in an exceptional case for imperative reasons*. *Bates v. Jones*, 127 F3d 870, 873 (9th Cir. 1997); *Landreth Timber Co. v. Landreth*, 731 F2d 1348, 1353 (9th Cir. 1984), *rev'd on other grounds*, 471 US 681, 105 S.Ct. 2297 (1985).

Intervention here was represented to be based on the same legal issues and facts that were raised and the *sua sponte* granting of the Motion to Dismiss as to the Intervenor would, as required by the trial court, need to be the same as the Respondents, which is not the state of the case in light of this newly crafted – long ago ignored MetLife conduct that distinguished MetLife from VHS of the threshold issue of the parties to this case, *i.e.*, MetLife specifically concedes the VHSRP standing and VHS says they are VHSRP (contrary to the Petition and the MetLife position now) leaving appellants trying to reconcile the fact that MetLife has its own claims against VHS and is apparently trying to preserve them for the defense of other cases pending against VHS and MetLife. Although the Federal Rules of Civil Procedure apply only in federal district courts, the policies underlying intervention pursuant to FRCP 24 are applicable to intervention in appellate courts.

Here, in the long process of appeals and additional appeals thereafter, the position of MetLife is untenable. *A party should not be allowed to intervene to interject new claims into an appeal* “merely for the sake of judicial efficiency.” *See Warren v. CIR*, 302 F3d 1012, 1015-1016 (9th Cir. 2002) permissive intervention denied “without prejudice” to would-be-intervenor’s right to file separate district court action raising his claims.

Moreover, the issues of “due process” and improper *sua sponte relief* are not factual issues in this appeal except for the last minute, long delayed, attack by intervention in this case. There is no reason that the abandonment of their appellate rights should be excused and rewarded by this intervention. As discussed above [a]n appellate court will allow

intervention on appeal where none was sought in the district court *only in an exceptional case for imperative reasons. Bates, supra.*

The defendants briefing prevents new issues and confuses the appeal inappropriately because they failed to preserve their rights. The attempt to expand their *sua sponte* decision to other cases under theory of *res judicata* is the goal – even if it is contrary to the interests of VHS or the VHSRP, the latter of which has never been heard and the claims in them are unrelated legally given the Bankruptcy Court cannot make factual determinations on the Rule 12 motion for the Intervenor.

III. STANDARD FOR DISMISSAL OF CALIFORNIA STATUTORY

When a trial court dismisses a claim pursuant to a Rule 12(b)(6) motion, the Court will evaluate the California statutory Petition of Writ of Mandate de novo to decide whether it states a claim upon which relief could be granted. *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir.1999). All factual allegations set forth in the California statutory Petition of Writ of Mandate “are taken as true and construed in the light most favorable to [p]laintiffs.” *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.1999). That did not occur here and MetLife cannot claim otherwise when it, itself, it painted the VHSRP Respondent as just that, a Respondent in the Writ of Mandate. The factual determination to the contrary was not properly decided at all, much less properly decided as to MetLife which started their “Answering Brief” with the statement “VHS, *the Retirement Plan [ValleyHealth System Retirement*

Plan or “VHSRP”), certain individual Trustees of VHSRP, and MetLife” are the parties. *Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 683.

The argument of MetLife is self-serving and flatly wholly improper. That they try, by sleight of hand, to forget their duty to say that they are not entitled to a dismissal in these circumstances, by being tongue in cheek about their own agreement that Respondents would not need to respond to the California statutory Petition of Writ of Mandate and would wait until the 1st Amended Complaint was filed. They knew this, they never denied it below (in fact they never appeared below in the trial court, the BAP or the 9th Circuit) and only reemerged to assert their position when this appeal came up.

IV. DISMISSAL WITHOUT LEAVE TO AMEND

Respondents are, as MetLife knows and admits, “the Retirement Plan [Valley Health System Retirement Plan or “VHSRP”], certain individual Trustees of VHS, and MetLife” are the parties to the action. Unlike the other Respondent MetLife does not assert that VHS and VHSRP are the same. Answering Brief p. 1 (ER 1-52) (emphasis added). The Valley Health System Retirement Plan (VHSRP) is, as a matter of California Constitutional law, a separate entity from Valley Health System (VHS), as the Intervenor below, MetLife, admits in the statements above. The California Constitution requires the separation of Pension Plan Boards and Government Boards. For the determination here, the sufficiency of the facts the Appellants’ allegations must be taken as true in face of the language of the California statutory Petition of Writ of Mandate and are confirmed by this

language. The trial court cannot convert VHSRP into VHS without offending Rule 12 and it did just that. Moreover, a Bankruptcy Court cannot take away the legal obligations of funding a pension plan without, as done here, violating the takings clause and the statute governing unimpairing provisions.

The Petition for Writ of Mandate asserted that the VHSRP started “January 1, 1971, as amended and restated effective May 3, 1994 with retroactive provisions under TRA effective January 1, 1989”. The VHSRP states its EIN as 5581 and identifies the “Agent for Service of Legal Process” as Senior Vice President, Human Resources, Valley Health System – it also states that “Service of legal process may also be served on the plan trustees” who are different than the Directors of the Valley Health System. It also listed the Plan Trustees for that period of time [MetLife’s failure to participate in status conference].)

A critical provision in the plan is that they define what happens in the VHSRP and states that the beneficiaries “will have a vested or nonforfeitable right to your plan benefit . . .” and they actually issued letters to the employees showing that amount which were also provided as part of the Writ. The “California statutory Petition for a Writ of Mandate” is a “special proceeding” under California law.³ The Repondents have failed to address the distinctions between a special proceeding and a civil case. They also ignore the real

³ Despite the factual arguments replete in the appellees, they cannot replace the allegations in the writ of mandate or change the sufficiency of that pleading. A bankruptcy court cannot prohibit a claim that requires a public entity to perform its lawful obligations and cannot continuance on-going unlawful actions.

issues in the case which is the massive underfunding of the “vested property interests” that the VHSRP beneficiaries clearly established as set forth in the California Petition of Writ of Mandate. MetLife argues a great deal of law and attempts to describe the VHSRP inconsistent with the California Petition of Writ of Mandate. The reality is that the law changed and the position that VHSRP has taken fails to account for those changes and attempts to rely on the old, out of date language in the initial VHSRP plan. After the pension funding raids of Pete Wilson, as Governor, the citizens of California amended the Constitution to require an independent board of trustees and required the retirement plan be actuarially sound, as alleged in the California statutory Petition of Writ of Mandate. There were other mandates imposed on VHS which failed to comply with the law.⁴

We review de novo the bankruptcy court’s grant of a motion to dismiss under Civil Rule 12(b)(6). *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 905 (9th Cir.2010). We may affirm the bankruptcy court’s dismissal of a complaint “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations” *Cooke, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 244 (9th Cir.1990). *In re Bello* (B.A.P. 9th Cir., May 30, 2013, No. ADV 10-90528) 2013

⁴ VHS, if it is a public entity, cannot take advantage of the California Tort Claims Act since it never registered as a public entity as required. The public registry of the years in question do not reflect it as a public entity.

WL 2367796, at *2, aff'd (9th Cir. 2015) 622 Fed.Appx. 663.

MetLife cannot simply argue the California Petition of Writ of Mandate fails since that is not the issue they are addressing. The issue is why, in totality, the California Petition of Writ of Mandate is defective, as to them.. It does not do that below.

In particular the pleading standards of the state and federal court are not the same and there is no standard for a Writ of Mandate other than the pleading requirements of the California Supreme Court in regards to extraordinary writs since the federal judicial system has no such Claim for Relief. In this removal case, the trial Court is required to follow Federal Civil Procedure; but it cannot ignore the truth of the factual allegations pled to make a contrary decision. *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 679–80.

**V. APPELLANTS BELIEVE THAT
METLIFE'S BRIEF DEMONSTRATES
THAT THE REQUEST TO INTERVENE IN
THIS CASE SHOULD BE REVERSED**

In the case at bar, the Court of Appeal was asked to allow MetLife to intervene in the appeal. MetLife sought to intervene after they failed to appear in the Bankruptcy Court (dismissed *sua sponte*); did not appear in the first BAP appeal; failed to appear in the appeal to this Court to reverse the BAP decision; did not make an appearance on remand; and in this Court filed failed to file a notice of appeal. After this Court remanded the matter to the BAP, MetLife continued to fail to make an appearance and then, long into the appeal process now at bar, MetLife files a

motion to intervene, where they have made no record and where, after the bankrupt was dismissed, there was no further jurisdiction. Intervention is not a substitute from participation and the required briefing to make a record for review thereafter.

In their application to intervene, which Petitioners opposed, MetLife stated:

MetLife bases its motion on assertions that (a) it will be "directly impacted" by the appeal's outcome; (b) its claims and those of the Respondents are "inseparably intertwined," in that they both arise from the same transaction, and therefore share common issues of fact and law; (c) if not permitted to join/intervene in the appeal, its interest will be impaired; (d) both MetLife and the Respondents are seeking the same remedy (an order affirming dismissal); and (e) its failure to join or intervene earlier has not affected the course of the appeal. MetLife further asserts that no other party will be prejudiced by this Court's granting of permission allowing its joinder and/or intervention, nor has any other party objected to its "announced plan to participate in this appeal."

MetLife concedes, as it must, that the VHSRP is a separate Respondent in the Superior Court Writ of Mandate directed to it and not, as the other Respondents assert, a misnaming of VHSRP when it should have been VHS – a "fact" not subject to reclassification. So, on a critical issue this intervention should not be allowed to come in and challenge both the underlying argument of the Respondents while trying to assert their own, unrepentantly dispute with the

Respondents and Appellants. Simply put the Intervenor ignored everything up to now and sought to throw the wrench into the gears of the appeal for its own determinations – not supporting either Respondents or appellants factual position or the record. Moreover, its own statements make clear that, under its factual argument, the dismissal was improper.

It is incomprehensible what the three-way factual dispute has done to make this appeal more difficult and confusing than it ought to be, a problem squarely laid at the Intervenor's feet. Intervention on appeal is seldom sought or granted. An appellate court will allow intervention on appeal where none was sought in the district court *only in an exceptional case for imperative reasons*. *Bates v. Jones*, 127 F3d 870, 873 (9th Cir. 1997); *Landreth Timber Co. v. Landreth*, 731 F2d 1348, 1353 (9th Cir. 1984), rev'd on other grounds, 471 US 681, 105 S.Ct. 2297 (1985).

Intervention here was represented to be based on the same legal issues and facts that were raised and the *sua sponte* granting of the Motion to Dismiss as to the Intervenor would, as required by the trial court, need to be the same as the Respondents, which is not the state of the case in light of this newly crafted – long ago ignored by MetLife – that distinguished MetLife from VHS of the threshold issue of the parties to this case, i.e., MetLife specifically concedes the VHSRP standing and VHS says they are VHSRP (contrary to the Petition and the MetLife position now) leaving appellants trying to reconcile the fact that MetLife has its own claims against VHS and is apparently trying to preserve them for the defense of other cases pending against VHS and MetLife. Although the Federal Rules of Civil Procedure apply only in federal district courts,

the policies underlying intervention pursuant to FRCP 24 are applicable to intervention in appellate courts.

Here, in the long process of appeals and additional appeals thereafter, the position of MetLife is untenable. A party should not be allowed to intervene to interject new claims into an appeal “merely for the sake of judicial efficiency.” See *Warren v. CIR*, 302 F3d 1012, 1015-1016 (9th Cir. 2002) permissive intervention denied “without prejudice” to would-be-intervenor’s right to file separate district court action raising his claims.

Moreover, the new issues of “due process” and improper *sua sponte* relief are not factual issues in this appeal except for the last minute long delayed attack by intervention in this case. There is no reason that this intervention should excuse the abandonment of their appellate rights. As discussed above [a]n appellate court will allow intervention on appeal where none was sought in the district court *only in an exceptional case for imperative reasons. Bates, supra.*

The defendants briefing presents new issues and confuses the appeal inappropriately because they failed to preserve their rights. The attempt to expand their *sua sponte* decision to other cases under theory of *res judicata* is the goal – even if it is contrary to the interests of VHS or the VHSRP, the latter of which has never been heard and the claims in them are unrelated legally given the Bankruptcy Court cannot make factual determinations on the Rule 12 motion for the Intervenor.

VI. PETITION OF WRIT OF MANDATE AND DENIAL OF LEAVE TO AMEND

When a trial court dismisses a claim pursuant to a Rule 12(b)(6) motion, the Court will evaluate the California Petition of Writ of Mandate de novo to decide whether it states a claim upon which relief could be granted. *Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir.1999). All factual allegations set forth in the California Petition of Writ of Mandate “are taken as true and construed in the light most favorable to [p]laintiffs.” *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.1999). That did not occur here and MetLife cannot claim otherwise when it, itself, it painted the VHSRP Respondent as just that, a Respondent in the Writ of Mandate. The factual determination to the contrary was not properly decided at all, much less properly decided as to MetLife which started their “Answering Brief” with the statement “VHS, the Retirement Plan [ValleyHealth System Retirement Plan or “VHSRP”), certain individual Trustees of VHSRP, and MetLife” are the parties.

MetLife argues that the trial Court properly dismissed the California Petition of Writ of Mandate on its behalf *sua sponte*. That is patently inconsistent with 9th Circuit law and due process. *Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 683. (Emphasis added).

The argument of MetLife is self-serving and flatly wholly improper. That they try, by sleight of hand, to forget their duty to say that they are not entitled to a dismissal in these circumstances, by being tongue in cheek about their own agreement that Petitioners/Appellants would not need to respond to

the California statutory Petition of Writ of Mandate and would wait until the 1st Amended Complaint was filed. They knew this, they never denied it below (in fact they never appeared below in the trial court, the BAP or the 9th Circuit) and only reemerged to assert their position when this appeal came up.

The initial case was dismissed on a Rule 12 motion and the denial of the Motion for reconsideration. On appeal the Bankruptcy Appeal Panel (hereinafter “BAP”) ruled that the Bankruptcy Court had no jurisdiction in the matter *sua sponte*. (5a-19a). That left the factual allegations unaddressed on appeal. Thereafter the decision of the BAP was reversed in the United States Court of Appeal for the Ninth Circuit (hereinafter “9th Cir.”). On remand, the BAP affirmed the Bankruptcy Court decision to dismiss the case, albeit they did not address the legal issues in their analysis. (1a-4a). The decision was then appealed to the 9th Cir. which affirmed the BAP. A motion for reconsideration and en banc review was filed and denied on October 18, 2017. This Petitioner for Certiorari is now filed because of the significant impact this decision will continue to have on the separate California public entities responsible for the administration of a public pension plan under California law, as well as related litigation concerning MetLife, *Phylis Abbondanza, et al. v. Metlife, et al.*, Case No. 6:17-ap-01155-PC, *Jan Reichardt, et al. v. The Valley Health System Retirement Plan, et al.*, Case No. 6:14-ap-01236-PC, all of which have been stayed by the Bankruptcy Court pending the 9th Circuit decision.

The retirement board is separate from the bankrupt:

(h) As used in this section, the term “retirement board” shall mean the board of administration, board of trustees, board of directors, or other governing body or board of a public employees’ pension or retirement system;

To date the bankruptcy court, nor any other Court, has ruled on the impairment issue the bankruptcy court imposed on these unimpaired Petitioners. However, the Bankruptcy Court has made factual determinations that destroyed these unimpaired Petitioners and the hundreds (believed to be in excess of 1,000 pensioners affected) the rights of Petitioners to compel the VHSRP, a separate public entity in California, to comply with its legal obligations to manage the pension of these Petitioners.

**VII. THE BANKRUPTCY COURT ILLEGALLY
IMPAIRED THE PROPERTY RIGHTS OF
PETITIONERS OWED TO THEM BY THE
VALLEY HEALTH SYSTEM RETIREMENT
PLAN.**

The VHSRP, as a California public entity, never agreed to the jurisdiction of the Bankruptcy Court and the Bankruptcy Court never addressed the lack of jurisdiction factually or legally under California law – a law which requires that the VHSRP manage and control all activities of the pension funds and management. Contrary to all the Courts assertions below the California Constitution §§ Art. XVI, SEC. 17 controls the public pension plan in all aspects – not the employer.

This is a case where retired public employee of the Valley Health System (hereinafter “VHS”) were

stripped of their pensions by a bankruptcy court under the pretext that the Petitioners were “unimpaired” under Title 11 U.S.C. § 1124. The bankruptcy court stripped the Petitioners of their right to vote on the original bankruptcy plan (hereinafter “OBP”) asserting that the Petitioners were unimpaired when the Bankruptcy Court, itself, impaired by refusing these Petitioners rights to compel all defendants follow the law seeking the performance of ministerial duties by the Respondents in their Writ of Mandate.

VIII. THE UNIMPAIRMENT CLASS CLAIMS STATUS IN THE BANKRUPTCY PLAN WAS FALSE

The mandate was filed after the original bankruptcy plan (herein “OBP”), where the individual petitioners, in that Court, were told by their employer and MetLife representatives that the pension fund was fully funded. Subsequently an amendment to the OBP was had, which did not affect the non-impairment provisions in the OBP, which also supposedly left the pensioners unimpaired, again referring to them as unimpaired as Class 2C remained unmodified. However, despite the Court’s OPD and the Amended OPB (hereinafter referred to as the “AOPB”), stating Petitioners were unimpaired, the bankruptcy court ruled that this mandate filing was subject to the jurisdiction of the bankruptcy court and impaired the and:

“1. Impairment and Voting.

Class 2C [Pensioners] is Unimpaired by this Plan and, accordingly, the Defined Benefit Plan

Participants are not entitled to vote such Allowed Claims, if any, as they may have to accept or reject this Plan.”

This provision was quoted to the pensioners by the Bankrupt at employee meetings, called by the Bankrupt employer, along with other false promises learned of during the time.

Under the law unimpaired is defined by Title 11 U.S.C. § 1124 which states:

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest. 11 U.S.C.A. § 1124.

The Bankruptcy Court, in subparagraph 2, violates the mandates of 11 U.S.C. § 1124, by impairing the rights of Petitioners in this case below stating, separately: “such participants shall have no recourse to the District or to any assets of the District, and shall not be entitled to receive any distributions under this Plan.”

The effect of the provisions of subparagraph 2 of 2C is, from language of the Bankruptcy Court, within its jurisdiction and in effect, denies these class of pensioners the right to compel the VHSRP to act upon and protect its members/pensioners rights as required under California law. In effect the Bankruptcy Judge exercised jurisdiction to prevent the Superior Court to

review purely state law matters. Even the Bankruptcy Court OPB/AOPB's did not prevent the recovery from MetLife saying that the Petitioners/pensioners are "entitled to the same rights and benefits to which such participants are currently entitled under the VHS Retirement Plan [VHSRP] and the MetLife Group Annuity Contract entitled to the same rights and benefits to which such participants are currently entitled under the VHS Retirement Plan and the MetLife Group Annuity Contract." However, the Bankruptcy Court did not provide the benefits of 11 U.S.C. § 1124 that were to protect these pension rights, which were and are the biggest debt of the bankrupt.

C.C.P. § 1084, like C.C.P. § 1067, allows the use of the English equivalent: "The writ of mandamus may be denominated the writ of mandate."

Contrary to the requirements of California law the bankrupt had, for years, secreted the trust monies, failed to contribute to the trust for the pension, failed to allow the VHSRP to act by stacking the so-called "VHSRP Board of Trustees" with cronies (who despite their obligations never appeared in the bankruptcy or conducted an actual VHSRP Board of Trustees meeting in the history of the pension plan) and VHS Board members who failed to disclose their breaches of their fiduciary duties as imposed by the California Constitution and made fraudulent representations to the pensioners. At no time were the pensioners ever informed that the fund had been underfunded and mismanaged by the employer, the administrator MetLife or the Trustees, who ignored their duties to Petitioners and VHSRP, since VHS had failed to fund it as required by the provisions of the California Constitution.

**IX. THE TAKINGS CLAUSE AS APPLIED TO
VESTED PENSION BENEFITS**

Moreover, this cannot be determined factually on a Rule 12 motion, as all allegations are deemed to be true. Leave to amend should be granted as matter of course, at least until defendant files responsive pleadings; after that point, leave to amend should be granted unless amendment would cause prejudice to opposing party, is sought in bad faith, is futile, or creates undue delay. Fed.Rules Civ.Proc. Rules 15, 15(a), 28 U.S.C. *Johnson v. Mammoth Recreations, Inc.* (9th Cir. 1992) 975 F.2d 604. See also *Foman v. Davis* (1962) 371 U.S. 178 83 S.Ct. 227.

Respondents are, as MetLife knows and admits, “the Retirement Plan [Valley Health System Retirement Plan or “VHSRP”], certain individual Trustees of VHS, and MetLife” are the parties to the action. Unlike the other Respondent MetLife does not assert that VHS and VHSRP are the same. Answering Brief p. 1 (AB1) (emphasis added)⁵. The Valley Health System Retirement Plan (VHSRP) is, as a matter of California Constitutional law, a separate entity from Valley Health System (VHS), as the Intervenor below, MetLife, admits in the statements above. The California Constitution requires the separation of Pension Plan Boards and Government Boards. For the determination here, the sufficiency of the facts the Appellants’ allegations must be taken as true in face of the language of the California statutory Petition of Writ of Mandate and are confirmed by this language. The trial court cannot convert VHSRP into VHS

without offending Rule 12 and it did just that. Moreover, a Bankruptcy Court cannot take away the legal obligations of funding a pension plan without, as done here, violating the takings clause and the statute governing unimpairing pensions when the Court says it can and did just the opposite.

VHSRP allegations are replete in the MetLife brief and the brief itself attempts to dispute the facts as alleged in the Writ of Mandate that was removed to the bankruptcy Court. Accordingly, the Respondents and Intervenor have fashioned their own substitutions of the actual parties for the Writ to create their own dialectic. However, MetLife and VHS do not agree on who is what in this matter. VHS improperly argues to this Court to the contrary of the Writ being reviewed claiming VHSRP is VHS whereas MetLife separates them as the California Constitution requires. The Writ asserted that the VHSRP started “January 1, 1971, as amended and restated effective May 3, 1994 with retroactive provisions under TRA effective January 1, 1989” – nothing else was provided to the appellants about the VHSRP. The VHSRP states its EIN as 5581 and identifies the “Agent for Service of Legal Process” as Senior Vice President, Human Resources, Valley Health System – it also states that “Service of legal process may also be served on the plan trustees” who are different than the Directors of the Valley Health System. It also listed the Plan Trustees for that period of time. (ER Vol. 2, p. 191, ln. 20-25 [MetLife’s failure to participate in status conference].)

A critical provision in the plan is that they define what happens in the VHSRP and states that the beneficiaries “will have a vested or nonforfeitable right to your plan benefit . . .” and they actually issued letters to the employees showing that amount which were also

provided as part of the Writ. (ER 158-170). The “California statutory Petition for a Writ of Mandate” is a “special proceeding” under California law.⁶ The Repondents have failed to address the distinctions between a special proceeding and a civil case. They also ignore the real issues in the case which is the massive underfunding of the “vested property interests” that the VHSRP beneficiaries clearly established as set forth in the California statutory Petition of Writ of Mandate. MetLife argues a great deal of law and attempts to describe the VHSRP inconsistent with the California statutory Petition of Writ of Mandate. The reality is that the law changed and the position that VHSRP has taken fails to account for those changes and attempts to rely on the old, out of date language in the initial VHSRP plan. After the pension funding raids of Pete Wilson, as Governor, the citizens of California amended the Constitution to require an independent board of trustees and required the retirement plan be actuarially sound, as alleged in the California statutory Petition of Writ of Mandate. There were other mandates imposed on VHS which failed to comply with the law.⁷

⁶ Despite the factual arguments replete in the appellees, they cannot replace the allegations in the writ of mandate or change the sufficiency of that pleading. A bankruptcy court cannot prohibit a claim that requires a public entity to perform its lawful obligations and cannot continuance on-going unlawful actions.

⁷ VHS, if it is a public entity, cannot take advantage of the California Tort Claims Act since it never registered as a public entity as required. The public registry of the years in question do not reflect it as a public entity.

We review de novo the bankruptcy court's grant of a motion to dismiss under Civil Rule 12(b)(6). *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 905 (9th Cir.2010). We may affirm the bankruptcy court's dismissal of a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" *Cooke, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 244 (9th Cir.1990). *In re Bello* (B.A.P. 9th Cir., May 30, 2013, No. ADV 10-90528) 2013 WL 2367796, at *2, aff'd (9th Cir. 2015) 622 Fed.Appx. 663.

X. THE BANKRUPTCY, BY LEAVING THE APPELLANTS UNIMPAIRED, DID NOT AFFECT, IMPACT OR CONCERN ITSELF WITH THE RETIREMENT PLAN AND NO EVIDENCE, ARGUMENT OR PROCEEDING OCCURRED IN THE BANKRUPTCY WHICH WOULD IMPACT OR CONCERN THE RIGHTS OF THE APPELLANTS AND THEREFOR THE BANKRUPTCY IS NOT A BAR TO THE RELIEF SOUGHT FOR PRE-OR POST MISCONDUCT OF METLIFE AS ADMINISTRATORS OF THE VHSRP.

VHSRP has never appealed this action and to the extent that the Pension Plan is represented by legal counsel advocating against the interests mandated by the California Constitution, they are acting *ultra vires* and without legal authority thereunder. The attorneys for the Appellants, Jackson Lewis, are not retained or authorized to speak for the VHSRP under the

California Constitution and can solely represent the employer in this action – not the Retirement Plan, which as shown above, has been compromised by the Respondents and MetLife conduct and unlawful control.

At no time has any attorney advocated for the proper fulfillment of the Pension Plans constitutional obligations. The last-minute attempt to bootstrap and avoid all these legal issues, by this intervention of MetLife, does not change that basic fact and moreover, MetLife knows full well that its authority ceased when 200 pensioners appeared at the VHS Board meeting and objected to the continued retention and payment to MetLife – resulting in the Motion being taken off calendar and never approving the MetLife involvement thereafter. Misuse of the pension funds has made this appellate situation difficult, at a minimum, since these issues have not been properly addressed by the proper lawyers for VHSRP.

The bankruptcy order was entered and became final on April 26, 2010 and unknown to the Respondents, was thereafter amended effective October 13, 2010. At no time did MetLife join or become protected by that bankruptcy. Pursuant to the provisions of paragraph 2(C) the appellants were unimpaired by the bankruptcy and denied their voting rights (which were sufficient to overrule the proposed plan⁸). The actions of the defendant MetLife pre-and post-date the later date; however, that is irrelevant under the plan which left the appellants unimpaired. *In re 7th Street & Beardsley Partnership* (Bankr. D. Ariz. 1994) 181 B.R. 426, 431–32. (Appendix B)

The discharge injunction argued by MetLife did not apply to the appellants since that would be the anthesis of unimpaired. Nor can the Bankruptcy Court assert authority over post-confirmation misconduct of MetLife. This circuit has addressed these bait and switch type tactics of VHS and MetLife. *In re Reeves* (B.A.P. 9th Cir., July 31, 2006, No. ADV.05-03172) 2006 WL 6811012, at 6.

XI. METLIFE HAD NO RIGHTS BEFORE THE BANKRUPTCY COURT TO RELIEF FROM THAT COURT ON CLAIMS COVERED BY THE BANKRUPTCY PLAN THAT MADE ALL PENSION CLAIMS UNIMPAIRED

The Appellee MetLife intervened in this action claiming that the decision about Valley Health System would impact it and not that they were seeking to present a cross-appeal and enlarge the issues on appeal. However, that is exactly what the intervenor has done here, including setting forth its own issues for the appeal, none of which are proper and should be ignored. Any change of creditor's rights, whether for better or for worse, constitutes "impairment" and creates possibility of consenting impaired class. Bankr. Code, 11 U.S.C.A. § 1129(a) (10). *In re 7th Street & Beardsley Partnership* (Bankr. D. Ariz. 1994) 181 B.R. 426.

Moreover, MetLife has no independent case or controversy in the bankruptcy Court that has not already been determined by the Bankruptcy Court, which states that these plaintiffs may seek relief

against anyone but VHS.⁹ The VHS bankruptcy cannot interfere with the rights of the plaintiffs that are independent of the bankrupt. MetLife is estopped from claiming otherwise. *In re Blendheim* (9th Cir. 2015) 803 F.3d 477, 493–94.

Thus, the rights of the plaintiffs to proceed in the ordinary course are spelled out in 2(C) of the bankruptcy plan and leaves them unimpaired by the Court. Moreover, the VHSRP is “*in rem*” as a pension trust. As the Court stated:

1. Impairment and Voting.

Class 2C is Unimpaired by this Plan and, accordingly, the Defined Benefit Plan Participants are not entitled to vote such Allowed Claims, if any, as they may have to accept or reject this Plan.

2. Treatment.

Defined Benefit Plan Participants will be entitled to the same rights and benefits to which such participants are currently entitled under the VHS Retirement Plan and the MetLife Group Annuity Contract, and such participants shall have no recourse to the District or to any assets of the District, and shall not be entitled to receive any distributions under this Plan. Instead, all unallocated amounts held

⁹ Even that language constitutes an impairment and certainly saying that the unimpaired class cannot seek relief is a betrayal of the rights that unimpairment grants.

by MetLife Group, pursuant to the VHS Retirement Plan and the MetLife Group Annuity Contract, will continue to be made available to provide retirement benefits for participants in the manner indicated under the provisions of the VHS Retirement Plan and the MetLife Group Annuity Contract. Accordingly, the treatment of Allowed Class 2C Claim holders set forth herein shall not affect any legal, equitable or contractual rights to which the VHS Retirement Plan participants are entitled.” *In re Valley Health System* (Bankr. C.D. Cal., Nov. 8, 2011, No. 6:07-BK-18293-PC) 2011 WL 7637256, at *3, aff’d (B.A.P. 9th Cir., Aug. 3, 2012, No. BAP CC-11-1657-MKDKI) 2012 WL 3205173.

There is no doubt as to the prohibition of MetLife from seeking bankruptcy relief as a non-bankrupt. Moreover, the language above does not qualify as unimpairment.

We are instructed by Congress’ intent that a creditor be treated as unimpaired so long as the reorganization plan returned the creditor to its original position:

The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain. S.Rep. No. 989, 95th Cong., 2d Sess. 120, *reprinted in* 1978

U.S. Code Cong. & Admin. News 5787, 5906. FPC has here been restored to its original position. Accordingly, the BAP did not err in denying FPC's claim for interest at the post-default rate. *In re Southeast Co.* (9th Cir. 1989) 868 F.2d 335, 338.

MetLife seeks to ignore the legal issues in the case and plow a path of a cross-appellant in its brief. That cannot be allowed as it is a collateral attack on the appellants claim that they are unimpaired.

XII. METLIFE SEEKS TO IGNORE THE LEGAL ISSUES IN THE CASE AND PLOW A PATH OF A CROSS-APPELLANT IN ITS BRIEF BUT THAT CANNOT BE ALLOWED AS IT IS A COLLATERAL ATTACK ON THE APPELLANTS CLAIM THAT THEY ARE UNIMPAIRED.

The term “unimpaired” has legal significance in bankruptcy, and I think that the debtor’s counsel and the debtor knew exactly what they were doing when they said the class of claims was unimpaired. They used the language of the statute: the legal, equitable and contractual rights of the holder of the Class 4 claim are unaltered by the plan. There’s only one claim, and then there was a bundle of security to go with that claim. And to take away part of the bundle of security would be to impair the claim, to alter the legal, equitable and contractual rights. And this plan didn’t do that. *In re Reeves* (B.A.P. 9th Cir., July 31, 2006, No. ADV.05-03172) 2006 WL 6811012, at *4.

VHS and its attorneys put the unimpaired provisions before the Court. No one else can complain of the actions to sign off on and represented, falsely, that it took at this time since the Order is final and res judicata that the pensions were unimpaired (subject to this appeal on this issue).

A debtor's plan is required to specify which classes are unimpaired. 11 U.S.C. § 1123(a)(2). The plan also is required to specify the treatment of impaired classes. 11 U.S.C. § 1123(a)(3). Whether a claimant is "impaired" is determined pursuant to Section 1124.

A class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan: (1) leaves unaltered the legal, equitable and contractual rights to which the claim or interest holder is entitled (11 U.S.C. § 1124(1)); (2) reinstates a claim or interest and thus leaves it unimpaired (11 U.S.C. § 1124(2)); or (3) provides for the claim holder to receive on the effective date of the plan cash equal to the allowed amount of the claim (11 U.S.C. § 1124(3)). *In re M. Long Arabians* (B.A.P. 9th Cir. 1989) 103 B.R. 211, 214.

In the case at bar, like the Stockton case, the pension claims were to be left unimpaired – even though that turned out to be a lie and repudiation of the unimpaired status by the debtor. *In re City of*

Stockton, California (B.A.P. 9th Cir. 2015) 542 B.R. 261, 267.

The clear import of the Order in the CURRENT bankruptcy is clear (albeit erroneous as to VH SRP beneficiaries being unimpaired – a status that was supposedly being conferred in this case is an example where the so-called exception argued swallows the rule – everyone was impaired about the pension since there was insufficient money because of the conduct of VHS and MetLife and the Order violated §1124). MetLife has is not entitled to a defense in the bankruptcy court and predated and concealed its joint misconduct with VHS (which apparently seems impaired plaintiffs despite § 1124) claims impairment in its defense against these beneficiaries.

CONCLUSION

For the reasons set forth above the Petitioners pray this Court vacate and remand the matter with instructions that the Trial Court set aside the Removal of this action as in excess of the jurisdiction of the Bankruptcy Court. In the alternative, the Court remand with leave to amend and set aside the dismissal without leave to amend.

Respectfully submitted,

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