IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re VENOCO, LLC, *et. al.*, Debtors.[1] EUGENE DAVIS, in his capacity as Liquidating Trustee of the Venoco Liquidating Trust, Plaintiff, v. STATE OF CALIFORNIA and CALIFORNIA STATE LANDS COMMISSION, Defendant.	Chapter 11 Case No. 17-10828 (KG) (Jointly Administered) JURY TRIAL DEMANDED Adv. Pro. No. 18-50908 (KG) **Relates to D.I. 1 & 8**

CALIFORNIA STATE LANDS COMMISSION'S
BRIEF IN SUPPORT OF MOTION TO DISMISS

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[1] The debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: Venoco, LLC (3555); TexCal Energy (LP) LLC (0806); Whittier Pipeline Corporation (1560); TexCal Energy (GP) LLC (0808); Ellwood Pipeline, Inc. (5631); and TexCal Energy South Texas, L.P. (0812) (collectively, the "Debtors"). The mailing address for the Venoco Liquidating Trust, for purposes of these Chapter 11 cases, is 5 Canoe Brook Drive, Livingston, NJ 07039.

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I. INTRODUCTION

As the Complaint makes clear, the only thing at issue in this adversary proceeding is whether the Trust will recover some amount of money from the Commission on account of *post-Effective Date* use of a portion of the EOF. It is likely that the Trust's environmental obligations associated with the EOF eventually will dwarf any amounts the Trust is seeking from the State. But that is not an issue this Court need address. The Trustee's state law inverse-condemnation claim could have been filed in state court, whether or not the bankruptcy case was filed. Instead, the Trust seeks to bring in new money to a post-confirmation trust by asserting in this Court state law claims that did not exist while there was a bankruptcy estate. This Court does not have subject matter jurisdiction over the Trust's claims.

II. NATURE AND STAGE OF THE PROCEEDINGS[2]

On May 23, 2018 this Court entered its *Order (I) Approving Combined Disclosure Statement and Chapter 11 Plan of Liquidation Proposed by the Debtors as Containing Adequate Information on a Final Basis and (II) Confirming Combined Disclosure Statement and Chapter 11 Plan of Liquidation Proposed by the Debtors* (D.I. 922, the "**Confirmation Order**"), confirming the Combined Disclosure Statement and Chapter 11 Plan of Liquidation Proposed by the Debtors (D.I. 905, the "**Plan**"). On October 1, 2018, almost six months after confirmation of the Plan, the Effective Date of the Plan occurred. *See* Complaint ¶ 23.

On October 16, 2018, the Trustee of the Venoco Trust, created under the confirmed Plan, filed a Complaint commencing this adversary proceeding, naming the State of California and the California State Lands Commission (the "**Commission**" and, collectively with the State of

[2] Capitalized terms used but not otherwise defined in this introductory section shall have the meanings ascribed to them in the body of this brief.

California, "**Defendants**") as defendants. The Complaint presents a dispute governed entirely by California law, relating to California property, premised upon acts taken after the Effective Date of the Plan to protect the health and safety of California residents and the marine environment.

The Complaint's lone count under § 105 of the Bankruptcy Code (the "**§ 105 Claim**"), and references to generic retention-of-jurisdiction provisions of the Plan, do not give rise to any cognizable bankruptcy issues. As such, the present dispute does not fall within this Court's limited post-confirmation jurisdiction. Even if the Court were to determine that the Complaint's § 105 Claim fell within its limited post-confirmation jurisdiction, the claim would fail as a matter of law because the Plaintiff has not exhausted its remedies in the appropriate forum, namely the California courts.

Moreover, Defendants enjoy sovereign immunity from suit in this Court under the Eleventh Amendment to the United States Constitution and principles of sovereign immunity regarding the claims asserted in the Complaint. On these bases, this Court should grant this motion to dismiss the Complaint.

Finally, in the alternative, the Court should exercise its discretion to abstain from hearing the dispute under 28 U.S.C. § 1334(c)(1), so that Plaintiff's claims may be heard in a more appropriate forum. Pursuant to Local Rules 7008-1 and 7012-1 of the Local Rules of Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "**Local Rules**"), the Commission does not consent to the entry of final orders or a judgment by this Court in this Adversary Proceeding.

III. SUMMARY OF THE ARGUMENT

Defendants respectfully submit that the Court should dismiss the Complaint for the following reasons:

a) The Court lacks subject matter jurisdiction.

i) The Court lacks "arising in" jurisdiction. Proceedings "arise in" a bankruptcy case if they have "no existence outside of the bankruptcy." *Stoe v. Flaherty*, 436 F.3d 209, 216, 218 (3d Cir. 2006); *see also Geruschat v. Ernst Young LLP (In re Seven Fields Dev. Corp.*), 505 F.3d 237, 260 (3d Cir. 2007). Here, the Trustee's state law claims exist outside of bankruptcy, and indeed are routinely adjudicated by California courts.

ii) The Court likewise lacks "related to" jurisdiction over this case. "Related to" jurisdiction does not exist post-confirmation unless the claims affect an integral aspect of the bankruptcy process and bear a close nexus to the Plan. *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l Inc.)*, 372 F.3d 154, 167 (3d Cir. 2004). The Court's reduced post-confirmation jurisdiction does not reach the Trustee's claims here because they are simply a matter of California environmental and condemnation law.

iii) Neither § 105 nor the Plan can create bankruptcy jurisdiction if it is otherwise unmoored to a substantive right under the Bankruptcy Code.

a) The Complaint's § 105 Claim has no relation to a substantive right under the Bankruptcy Code. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 225, 233-38 (3d Cir. 2004)

b) The § 105 Claim—whether framed as unjust enrichment or restitution—is contrary to public policy. *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (Cal. Ct. App. 2007)

b) Even if the Court were to determine that it otherwise could exercise subject matter jurisdiction, the Eleventh Amendment to the United States Constitution and principles of sovereign immunity preclude this Court from determining this inverse condemnation action.

c) Even if the Court were to determine that it has jurisdiction, it should nonetheless exercise its discretion to abstain from adjudicating these state law claims. The overwhelming majority of relevant considerations weigh in favor of abstention in favor of a non-bankruptcy forum in this case. *In re DHP Holdings II Corp.*, 435 B.R. 220, 233 (Bankr. D. Del. 2010).

d) The Commission joins in the State's separately filed motion to dismiss regarding the Trustee's failure to state a claim upon which relief can be granted for the reasons set forth in that motion.

IV. STATEMENT OF THE FACTS[3]

Until April 17, 2017, debtor Venoco LLC ("**Venoco**") was a party to certain leases with the Commission for drilling rights in the South Ellwood Field ("**SEF**"), Lease Nos. PRC 3242.1 and 3120.1 (collectively "**Leases**"), and in connection therewith owned Platform Holly, an offshore platform used to conduct drilling operations in the SEF. *See* Complaint, ¶ 2. Since the 1970s, an onshore facility known as the Ellwood Onshore Oil and Gas Processing Facility (the "**EOF**") has been used to process oil and gas emanating from Platform Holly. *See* Complaint, Ex. E, Attachment 1. Platform Holly and the EOF were built and continue to operate as integrated and necessary components of the overall oil production and treatment operations in the SEF. *See* Complaint, ¶¶ 24-25. Because it is integrated, the EOF is needed to plug and abandon the wells on Platform Holly. *See* Complaint, Ex. A, p.2.

On April 17, 2017, immediately before commencing its Chapter 11 case, Venoco quitclaimed the SEF Leases back to the State Lands Commission. It did so without first performing the necessary plug-and-abandonment work on the Platform Holly wells to render the wells and infrastructure inert and safe. Venoco has acknowledged that the Commission "asserts that the [Commission]'s Oil and Gas Leases provide that Venoco has ongoing responsibilities for securing, decommissioning and lawfully abandoning the facilities located on the Quitclaims Assets (the "**Quitclaimed Facilities**"), subject to the California Public Resources Code Section 6804.1, which responsibilities survive and remain even if Venoco quitclaims its interests in the [Commission]'s Oil and Gas Leases" to the Commission. *See* Complaint, Ex. A, p.1. Nonetheless, "Venoco explicitly stated that it could not fulfill its obligations to the State of

[3] A more fulsome recitation of the factual background regarding Platform Holly, the EOF, and the dealings between the Commission and Venoco is set forth in the Commission's contemporaneously-filed response to the Trustee's motion to expedite the litigation schedule for this adversary proceeding.

California and was planning to eliminate the staff necessary to safely operate and manage both Platform Holly and the Ellwood facilities soon." *See* Complaint, Exhibit E, Attachment 1.

The Trustee correctly notes that the Commission believes that any interruption in its daily maintenance and operation of the EOF threatens the public health, safety and the environment. Complaint ¶ 5. During the pendency of the Chapter 11 cases and through to the Effective Date, the Commission received non-exclusive access and use rights to the EOF from Venoco, first pursuant to a Reimbursement for Temporary Services Agreement, then pursuant to a Gap Agreement. *See* Complaint, ¶¶ 3-4. The Gap Agreement terminated on October 15, 2018, slightly more than two weeks after the Effective Date of the Chapter 11 Plan confirmed in these cases. *See* Complaint, ¶¶ 4. The Trustee maintains that the Commission is now occupying the EOF without paying the Trust just compensation for such use. Complaint, ¶ 5. The Trustee has brought this adversary proceeding for inverse condemnation and "just compensation" for the Commission's use of the EOF beginning October 16, 2018. *Id.*

V. ARGUMENT

Plaintiff bears the burden of demonstrating that this Court has jurisdiction over this action. *In re The Fairchild Corp.,* 452 B.R. 525, 530 (Bankr. D. Del. 2011) *(citing Kehr Packages, Inc. v. Fidelcor, Inc.,* 926 F.2d 1406, 1409 (3d. Cir. 1991)); *see also DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 n.3 (2006). The Trustee has not and cannot meet that burden here, and, accordingly, the Court should dismiss the action. *See Fairchild Corp.,* 452 B.R. at 529.

A. The Court Lacks Subject Matter Jurisdiction.

Before confirmation of a plan, bankruptcy court jurisdiction potentially extends to (1) cases under title 11, (2) proceedings arising under title 11, (3) proceedings arising in a case under title 11, and (4) proceedings related to a case under title 11. 28 U.S.C. §§ 1334 and 157; *see also*

Resorts Int'l, 372 F.3d at 162; *In re Exide Techs.,* 544 F.3d 196, 205 (3d Cir. 2008). "The first three categories are 'core' proceedings in which the bankruptcy court has power to hear, decide, and enter orders and judgments." *Exide Techs.,* 544 F.3d at 205.

"The fourth category, 'related to' proceedings, are 'non-core' proceedings, which the bankruptcy court can hear, but in which it can only submit proposed findings of fact and conclusions of law to the district court, not issue orders." *Id.* Generally, "a proceeding is 'related to' a bankruptcy case if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Stoe,* 436 F.3d at 216 (quotation omitted); *see also Resorts Int'l,* 372 F.3d at 164.

1. The Trustee's action is not a core proceeding pursuant to 28 U.S.C. § 157(b) because the dispute did not "arise in" the bankruptcy case, rather the inverse condemnation claim is a matter of California state law and exists outside of the bankruptcy.

In the Complaint the Trustee asserts without explanation or facts that this is a "core proceeding pursuant to 28 U.S.C. § 157(b)." *See* Complaint ¶ 16. The Plaintiff's claims asserted in the Complaint are not a "case under title 11." Nor does the Complaint allege that this is a case "arising under" title 11, and for good reason, because the Complaint's claims arise under California law, not from the Bankruptcy Code. None of the Trustee's claims invokes "a substantive right provided by title 11." *Stoe,* 436 F.3d at 216. Rather, Count I is a claim for inverse condemnation under California state law, and Count II is a plea for relief under § 105 of the Bankruptcy Code and is not tied to any right provided under the Bankruptcy Code.

The only basis remaining to assert that the Complaint is a core proceeding is "arising in" jurisdiction. A claim "arises in" bankruptcy only if that claim could not be brought outside of a bankruptcy case. *Seagate Tech. (US) Holdings, Inc. v. Global Kato HG, LLC (In re Solyndra, LLC)*, Case No. 11-12799 (MFW), 2015 Bankr. LEXIS 3515, at *10 (Bankr. D. Del. Oct. 16,

2015) ("Proceedings arising in a case under title 11 refer to proceedings that are not based on any right expressly created by title 11, but nevertheless would have no existence outside the bankruptcy case."). But the Complaint is silent on how the current dispute "could only arise in the context of a bankruptcy case." *Stoe,* 436 F.3d at 218. To the contrary, the inverse condemnation action here is entirely a creature of state law *(see, e.g., Mercury Casualty Co. v. City of Pasadena*, 14 Cal. App. 5th 917 (Cal. Ct. App. 2017) (adjudicating an inverse condemnation claim); *Pacific Shores Property Owners Assn. v. Department of Fish & Wildlife*, 244 Cal. App. 4th 12 (Cal. Ct. App. 2016) (same); *Gutierrez v. County of San Bernardino*, 198 Cal. App. 4th 831 (Cal. Ct. App. 2011) (same)) and is predicated on acts occurring after the Effective Date of the Plan (the Commission's alleged occupancy and use of the EOF without just compensation after October 15, 2018). California courts routinely adjudicate, in non-bankruptcy proceedings, state law claims of the kind asserted by the Trustee.

2. The claim is not "related to" the bankruptcy because the Commission's occupation of the EOF does not affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan.

Following confirmation of a plan the bankruptcy court's jurisdiction shrinks. *See Resorts Int'l,* 372 F.3d at 165 (ruling that "the scope of bankruptcy court jurisdiction diminishes with plan confirmation"). After confirmation, a bankruptcy court retains jurisdiction only over actions with a "close nexus" or "related to" the bankruptcy plan or proceeding, which requires a showing that the claims "affect the interpretation, implementation, consummation, execution, or administration of the confirmed plan." *Id.* at 166-67; *see also Stoe,* 436 F.3d at 216 n.3 (noting that for jurisdiction to exist post-confirmation "the claim must affect an integral aspect of the bankruptcy process"). The claims asserted in the Complaint do not "arise in" or "arise under" the Bankruptcy Code. Therefore, contrary to the Trustee's unsupported and unsupportable

assertion, this is not a core proceeding, so the Court must examine whether it has "related to" jurisdiction over this dispute. It does not.

The test for "related to" jurisdiction articulated by the Third Circuit is "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins (In re Pacor),* 743 F.2d 984, 994 (3d Cir. 1984) (emphasis omitted), *rev'd on other grounds by Things Remembered, Inc. v. Petrarca,* 516 U.S. 124 (1995). As the Third Circuit observed in *Resorts International*, "it is impossible for the bankrupt debtor's estate to be affected by a post-confirmation dispute because the debtor's estate ceases to exist once confirmation has occurred." 372 F.3d at 165. Accordingly, the Third Circuit instructs that the "essential inquiry" in any post-confirmation jurisdictional analysis is whether there is a sufficiently "close nexus" between the bankruptcy plan or proceeding and the post-confirmation matter. *Id.* at 166.

The current dispute does not fall within the bankruptcy court's limited post-confirmation "related to" jurisdiction. The fact that the EOF was at one time property of the estate is insufficient to transform this dispute regarding the Commission's post-Effective Date possession of the EOF into a matter affecting the "interpretation, implementation, consummation, execution, or administration of the confirmed plan." *Resorts Int'l*, 372 F.3d at 167. At its core, the Complaint concerns acts taken by the Commission to protect the health and safety of California's citizens and its marine environment. The Commission's acts are consistent with state law. And to the extent that there is any dispute on that point, such dispute is governed by state law. A non-bankruptcy court is the only appropriate forum to resolve that dispute and give effect to the parties' rights under applicable state law.

The fact that the outcome of litigation has the potential to increase distributions to creditors does not create the close nexus necessary for a bankruptcy court to have "related to" jurisdiction. *See Resorts Int'l*, 372 F.3d at 170 (noting that "the mere possibility of a gain or loss of trust assets" does not suffice to confer jurisdiction); *In re PRS Ins. Grp., Inc.*, 445 B.R. 402, 405 (Bankr. D. Del. 2011) ("The mere potential to increase the assets of a post-confirmation trust is insufficient to establish the required 'close nexus.'"); *see also VeraSun Energy Corp. v. West Plains Co. (In re VeraSun Energy Corp.)*, Case No. 08-12606 (BLS), 2013 Bankr. LEXIS 2634, at *20 (Bankr. D. Del. June 28, 2013) (potential benefit to creditors cannot create "related to" jurisdiction); *In re BWI Liquidating Corp.*, 437 B.R. 160, 166 (Bankr. D. Del. 2010) (same).

In *Resorts International*, the Third Circuit held that, for a bankruptcy court to have jurisdiction over a post-confirmation dispute, the dispute must have a "close nexus" to the bankruptcy plan to uphold bankruptcy court jurisdiction. In analyzing the "close nexus" test, the court discussed *In re Haws*, 158 B.R. 965 (S.D. Tex. 1993). In *Haws*, the Court focused its inquiry on the fact that "[n]owhere in the lawsuit is the bankruptcy court being asked to construe or interpret the confirmed plan or to see that federal bankruptcy laws are complied with in the face of violations." *Id.* at 971. The court concluded that jurisdiction was lacking because "[t]he only nexus to this bankruptcy case is that the plaintiff in this matter is a liquidating trustee representing a group of creditors appointed pursuant to the confirmed plan of reorganization." *Id*.

As with the court in *Haws*, the Third Circuit in *Resorts* found jurisdiction lacking, holding that "the state law causes of action set forth in the Complaint could have been brought in state court whether or not the bankruptcy case was ever filed. . . . The only nexus to this bankruptcy case is that the plaintiff in this matter is a liquidating trustee representing a group of

creditors appointed pursuant to the confirmed plan of reorganization." 372 F.3d at 168. The *Resorts* court explained that:

> The potential to increase assets of the Litigation Trust and its beneficiaries does not necessarily create a close nexus sufficient to confer "related to" bankruptcy court jurisdiction post-confirmation. The Trust beneficiaries here no longer have the same connection to the bankruptcy proceeding as when they were creditors of the estate. For reasons they believed financially prudent, they traded their creditor status as claimants to gain rights to the Litigation Trust's assets. Thus, their connection to the bankruptcy plan or proceeding is more attenuated. Furthermore, if the mere possibility of a gain or loss of trust assets sufficed to confer bankruptcy court jurisdiction, any lawsuit involving a continuing trust would fall under the "related to" grant. Such a result would widen the scope of bankruptcy court jurisdiction beyond what Congress intended for non-Article III bankruptcy courts.

Id. at 170.

Just as in *Resorts International*, the only nexus between the Complaint and this bankruptcy case is that a liquidating trustee was appointed pursuant to a plan confirmed by the Court in this case. Consequently, the bankruptcy court lacks jurisdiction to adjudicate the complaint. As in *Resorts*, the requisite "close nexus" is lacking here. The dispute here is whether the Trust must be compensated for the Commission's post-Effective Date occupancy of a portion of the EOF. The Complaint does not identify a single specific provision of the Plan that the Court is being asked to construe or that would be disrupted depending on the outcome of this case. Nor is the Trustee seeking to adjust the terms of a sale or any provision of the Plan. As the Complaint makes clear, the only thing at issue is whether the Trust will recover some amount of money from the Commission on account of *post-Effective Date* use of a portion of the EOF. It is likely that the Trust's environmental obligations associated with the EOF eventually will dwarf any amounts the Trust is seeking from the State. But that is not an issue this Court need address. The Trustee's state law inverse-condemnation claim could have been filed in state

court, whether or not the bankruptcy case was filed. Accordingly, this Court does not have "related to" jurisdiction over the Trust's claims.

3. Neither § 105 nor the Plan can create bankruptcy jurisdiction if it is otherwise unmoored to a substantive right under the Bankruptcy Code.

a. The Complaint's § 105 claim has no relation to a substantive right under the Bankruptcy Code.

The Trustee half-heartedly attempts to create subject matter jurisdiction where none exists by including as Count II of the Complaint a bare claim for equitable relief under § 105 of the Bankruptcy Code, untethered to any substantive claim or right under the Bankruptcy Code. Section 105(a) provides that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate *to carry out the provisions of this title*." 11 U.S.C. § 105(a) (emphasis added). Without further statutory justification for bankruptcy jurisdiction, § 105 of the Bankruptcy Code "does not provide an independent source of federal subject matter jurisdiction." *See Combustion Eng'g, Inc.*, 391 F.3d at 225, 233-38 (refusing to extend a channeling injunction to non-debtors in an asbestos case under the auspices of § 105(a) when the statutory requirements of § 524(g) were not met, because such action would be an impermissible extension of bankruptcy jurisdiction; finding that § 105(a) alone did not provide a basis for "related to" jurisdiction).

As the Third Circuit explained in *Combustion Engineering*, § 105(a) "has been construed to give a bankruptcy court 'broad authority' to provide equitable relief appropriate to assure the orderly conduct of reorganization proceedings," but "the equitable powers authorized by § 105(a) are not without limitation, and courts have cautioned that this section 'does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.'" *Id* at 236 (quoting *Schwartz v.*

Aquatic Dev. Group, Inc. (In re Aquatic Dev. Group, Inc.), 352 F.3d 671, 680-81 (2d Cir. 2003) (quoting *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986)). *See also Jamo v. Katahdin Fed. Credit Union (in Re Jamo)*, 283 F.3d 392, 403 (1st Cir. 2002) (noting that § 105(a) "does not provide bankruptcy courts with a roving writ, much less a free hand. The authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code."); *In re Argose, Inc.*, 372 B.R. 705, 708 (Bankr. D. Del. 2007) ("Equitable remedies under section 105(a) are limited, however, and should be used only to further the substantive provisions of the Code.") (citing *In re Joubert*, 411 F.3d 452, 455 (3d Cir. 2005) and *In re Morristown & Erie R.R. Co.*, 885 F.2d 98, 100 (3d Cir. 1990)). Indeed, "the exercise of bankruptcy power must be grounded in statutory bankruptcy jurisdiction." *In re Combustion Eng'g*, 391 F.3d at 225.

Here, the Trustee argues that it is necessary and appropriate to award damages on the basis of the § 105 Claim, because such damages "would increase the distributable value in the Liquidating Trust and directly inure to the benefit of its beneficiaries." But the Trustee cites no provision of the Bankruptcy Code under which the Bankruptcy Court has authority to award damages for a purely state law inverse condemnation or unjust enrichment claim. The Trustee cannot generate bankruptcy-court jurisdiction where there is no independent basis for it to be found in the Bankruptcy Code. Because there is "no identifiable right conferred elsewhere in the Bankruptcy Code," the Trustee's attempted invocation of § 105(a) as a jurisdictional talisman is unavailing, and the Court cannot rely on it as a basis for asserting jurisdiction over the state law claims asserted in the Complaint.

At best, the Trustee's second count might be characterized as a claim for unjust enrichment or restitution, though even that fails to state a claim.[4] Under California law the elements of unjust enrichment are "the receipt of a benefit and the unjust retention of the benefit at the expense of another." *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1593 (Cal. Ct. App. 2008) (internal quotation marks and modifications omitted) Under such a claim, the benefit to the defendant must be "conferred by mistake, fraud, coercion or request." *See Nibbi Bros. v. Home Fed. Sav. & Loan Ass'n,* 205 Cal. App. 3d 1415, 1422 (Cal. Ct. App. 1988) (internal quotation marks omitted). The elements for restitution are essentially the same, when alleged outside the confines of an express contract; under such a claim, a plaintiff must allege that "the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct." *Durell*, 183 Cal. App. 4th at 1370. The Trustee has not alleged anything beyond a so-called "taking" and has failed to connect, in any way, the Commission's conduct to the elements necessary to allege unjust enrichment or restitution. Thus the § 105 Claim does not arise in, arise under, or relate to any provision of the Bankruptcy Code, but rather is most generously characterized as a common law claim over which this Court has no jurisdiction.

[4] Under California case law, there is a split in authority as to whether a cause of action for unjust enrichment even exists. *Compare Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (Cal. Ct. App. 2010) ("There is no cause of action in California for unjust enrichment.) (internal citations, quotation marks, and modifications omitted) *with Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1132 (Cal. Ct. App. 2014) (adjudicating an unjust enrichment claim and discussing the elements). Those courts that do not recognize a claim for unjust enrichment hold that "[u]njust enrichment is synonymous with restitution." *Durell*, 183 Cal. App. 4th at 1370 (citing *Dinosaur Development, Inc. v. White*, 216 Cal.App.3d 1310, 1314 (Cal. Ct. App. 1989); *see also Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (Cal. Ct. App. 2014) (electing to treat a claim of unjust enrichment as a claim for restitution). Regardless of how the § 105 Claim is packaged, it fails to state a claim for either cause of action.

b. The § 105 Claim—whether framed as unjust enrichment or restitution—is contrary to public policy.

First, the Commission, with the Trustee's consent, is occupying the EOF not out of any desire for the Commission to enrich itself; rather, the Commission is undertaking Venoco's shirked duty under California law to properly and fully staff oil and gas production facilities to ensure public health and safety and to prevent the release of hazardous substances from Platform Holly and the EOF to the detriment of the citizens and environment of California. Permitting a claim of unjust enrichment or restitution to go forward in such a context is contrary to California's environmental policy of requiring facilities to be staffed and maintained to prevent accidental releases of oil and gas.

Additionally, Count II of the Complaint also is improperly premised upon § 105 of the Bankruptcy Code. As courts have ruled, a claim under § 105 cannot create bankruptcy jurisdiction if it is otherwise unmoored to a substantive right under the Bankruptcy Code: as the § 105 Claim is in the present case. As such, taking a California common law claim and packaging it as relief under the Bankruptcy Code is contrary to the statute and to its underlying public policy.

Further, even if the Trustee were able to assert a claim for unjust enrichment or restitution, such claims—similar to those for inverse condemnation— arise independent of the bankruptcy context and are regularly adjudicated by California state courts. *See, e.g., Prakashpalan* 223 Cal. App. 4th 1105 (adjudication a claim for unjust enrichment); *Peterson*, 164 Cal. App. 4th 1583 (same); *Walsh*, 158 Cal. App. 4th 533 (same) *see also, e.g., Durell*, 183 Cal. App. 4th (adjudicating a claim for restitution).

Courts consistently hold that state law claims such as those asserted by the Trustee here do not fall within a bankruptcy court's "arising in" jurisdiction and are not core proceedings.

See, e.g., N*ew Jersey Dep't of Envtl. Prot. v. Occidental Chem. Corp. (In re Maxus Energy Corp.)*, 560 B.R. 111, 122 (Bankr. D. Del. 2016) (ruling that claims under a state environmental statute did not invoke substantive rights under the Bankruptcy Code and, thus, lacked "arising in" jurisdiction); *Solyndra*, 2015 Bankr. LEXIS 3515, at *11-12 (determining that claims arising from state contract law did not "arise in" the bankruptcy case, notwithstanding the fact that such claims' *factual* circumstances occurred within the bankruptcy context). Here, the claim for inverse condemnation invokes Article I, Section 19 of the California Constitution and the Fifth Amendment to the United States Constitution. It is absurd to argue that the claims with their genesis in the Fifth Amendment and, even more so, from a *state's* constitution would have "no existences outside of [a] bankruptcy case" predicated upon the *federal* Bankruptcy Code. *See Seven Fields*, 505 F.3d at 260.

Even if the Court were to find that the Trustee properly pled a claim for unjust enrichment or restitution, California courts have consistently ruled that unjust enrichment and restitution are only proper when "such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly." *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (Cal. Ct. App. 2007); *see also Peterson*, 164 Cal. App. 4th at 1595 (ruling the same). In *Peterson*, the California Court of Appeals upheld a lower court ruling dismissing plaintiffs' claim for unjust enrichment in part because such claim would permit the plaintiffs to circumvent the law and public policy reflected in the applicable California statutes; the Unfair Competition Law, which only provided a claim to injured parties (plaintiffs failed to plead injury) and the California Insurance Code, which did not provide a private right of action whatsoever. *Id*. The claim was contrary to public policy and the plain language of the relevant statutes, so the *Peterson* Court upheld the dismissal. *Id*. at 1595-96.

If the § 105 Claim is construed as a state law claim, it is barred as a matter of law for failure to allege compliance with the claim filing process of the California Tort Claims Act. Pleading and proof of facts establishing timely presentation of a government claim with the proper California public entity is an element of the Plaintiff's cause of action based upon California law. *California v. Superior Court*, 32 Cal. 4th 1234, 1239-1240 (2004). Failure to timely comply with government claim presentation subjects a complaint to a general demurrer for failure to state a cause of action. *Id* at 1240-1241. This requirement applies to California state law claims for relief asserted in a federal court lawsuit. *Moshin v. Cal. Dept. of Water Resources*, 52 F.Supp.2d 1006, 1017 (C.D. Cal. 2014). An inverse condemnation claim is statutorily exempt from this requirement. CA Govt Code § 905.1.

c. Subject matter jurisdiction cannot be created by retention of jurisdiction provisions in the Plan and Confirmation Order.

The Trustee also attempts to manufacture jurisdiction by referencing the retention-of-jurisdiction provisions of the Plan and Confirmation Order. As an initial matter, neither the Plan nor the Confirmation Order specifically references the present claims, which is unsurprising given that the claims, which are premised on the Commission's continued occupancy of a portion of the EOF after the October 15, 2018 expiration of the Gap Agreement, did not arise until after the Effective Date. This is not a dispute over which the Court "expressly reserved jurisdiction" as the Trustee wrongly asserts in the Complaint. *See* Complaint, ¶ 17 ("The Combined Disclosure Statement and Plan and the Court's Confirmation Order each expressly provide for this Court to retain jurisdiction over the claims arising herein"). Rather, the provisions of the Plan and Confirmation Order to which the Trustee cites in support of the alleged "express" retention of jurisdiction are simply generic retention-of-jurisdiction provisions making no mention of the present dispute specifically or even inverse-condemnation actions in

general. *See* Plan, Art. XIII; Confirmation Order ¶¶ 33-34. In all events, as the Third Circuit instructs, subject matter jurisdiction cannot be manufactured through such retention-of-jurisdiction provisions. *See Resorts Int'l*, 372 F.3d at 161 ("Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization. . . . Similarly, if a court lacks jurisdiction over a dispute, it cannot create that jurisdiction by simply stating it has jurisdiction in a confirmation or other order") (internal citations omitted).

At a minimum, to be effective, retention-of-jurisdiction provisions must *specifically* mention the cause of action over which jurisdiction is meant to be retained; even then, without sufficiently close nexus, such provisions do not create jurisdiction where there is none. *See Solyndra*, 2015 Bankr. LEXIS 3515, at *15-17 (finding that "provisions that purport to preserve the bankruptcy court's jurisdiction over claim resolution are not alone sufficient to establish post-confirmation jurisdiction" and ruling that post-confirmation "related to" jurisdiction did not exist where the specific cause of action at bar was not enumerated in the plan); *Wash. Mut., Inc. v. XL Specialty Ins. Co. (In re Wash. Mut. Inc.*), Case No. 08-12229 (MFW), 2012 Bankr. LEXIS 4673, at *15 (Bankr. D. Del. Oct. 4, 2012) ("[E]ven when a plan clearly and unambiguously reserves jurisdiction for a specific cause of action, the Court will not have post-confirmation jurisdiction unless a substantial nexus is established."). Here, the Plan and Confirmation Order each contain only vague retention-of-jurisdiction language that fails to specifically identify any causes of action against the State or the Commission; what is more, the Trustee has not (and cannot) allege any close nexus between the bankruptcy proceedings and the Complaint's two counts.

Indeed, if the Trustee's view were adopted—that merely a general retention-of-jurisdiction provision in a plan and a confirmation order were sufficient to create post-confirmation subject matter jurisdiction—a bankruptcy court's jurisdiction could potentially extend to any dispute regarding property that formerly was an estate asset. Conferring such perpetual jurisdiction in the bankruptcy court over disputes related to assets that were once property of the estate, but are no longer, would undermine bankruptcy's policy of providing a "fresh start," *Tenn. Student Assistance Corp. v. Hood,* 541 U.S. 440, 447 (2004), and make a mockery of a bankruptcy court's diminished post-confirmation jurisdiction, *Resorts Int'l*, 372 F.3d at 165. *See Interlake Mecalux, Inc. v. Summit Steel & Mfg.*, Civil No. 1:CV-09-1610, 2009 U.S. Dist. LEXIS 91963, at *11 (M.D. Pa. Oct. 2, 2009) ("If we were to adopt Summit Steel's interpretation, the bankruptcy court could conceivably have jurisdiction in perpetuity over any dispute that may arise between Interlake and another non-debtor.").

B. The Court's exercise of jurisdiction is barred by the Eleventh Amendment to the United States Constitution and principles of sovereign immunity.

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

For Congress to validly abrogate state sovereign immunity, and absent a waiver, first there must be an "unequivocal expression" of congressional intent to overturn constitutionally guaranteed immunity and, second, even if the congressional intent is clear, Congress must have acted pursuant to a valid grant of power to it by the states in the Constitution itself. *Seminole*

Tribe of Florida v. Florida, 517 U.S. 44 (1996). As discussed below, neither of those tests is satisfied here, nor have the Defendants waived their sovereign immunity.

The presupposition underlying the Eleventh Amendment is that the states retain certain attributes of sovereignty and that it would violate the sovereignty retained by the states for the federal courts to exercise jurisdiction over them without their consent. *Hans v. Louisiana,* 134 U.S. 1, 15 (1890). Sovereign immunity under the Eleventh Amendment is not limited to suits based on diversity of citizenship, but also bars suits against a state by its own citizens invoking federal question jurisdiction under Article 3 of the Constitution. *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261 (1997).

The leading modern case addressing sovereign immunity is *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996). In *Seminole Tribe,* the Supreme Court determined that the provision of the Indian Gaming Regulatory Act permitting tribes to sue states in federal court was unconstitutional because "even when the Constitution vests complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states." *Id.* 72-73 (overruling *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989)). For Congress to abrogate state sovereign immunity, first there must be an "unequivocal expression" of congressional intent to overturn constitutionally guaranteed immunity. Second, even if the congressional intent is clear, Congress must have acted pursuant to a valid grant of power to it by the states in the Constitution itself. *Seminole Tribe,* 517 U.S. 44, 72-73; see also *Board of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 362 (2001).

The two-part test in *Seminole Tribe* is not met in this case. Even if Congress intended to abrogate the states' immunity through Bankruptcy Code—specifically via § 106—Congress did not act pursuant to a valid grant of power in attempting to do so. In *Sacred Heart Hospital v.*

Department of Public Welfare (In re Sacred Heart Hospital), 133 F.3d 237, 243 (3d Cir. 1998), the Third Circuit Court of Appeals "concluded that Congress may not abrogate state sovereign immunity pursuant to any of its Article I powers" and held "that [Bankruptcy Code] § 106(a) is unconstitutional to the extent that it purports to abrogate state sovereign immunity in federal court." *Id.* at 245. *Accord Maryland* v. *Schlossberg (In re Creative Goldsmiths of Washington D.C.),* 119 F.3d 1140, 1147 (4th Cir. 1997); *Mitchell v. Franchise Tax Bd. (In re Mitchell),* 209 F.3d 1111, 1121 (9th Cir. 2000). *Sacred Heart* remains binding authority in this Circuit to this day. "Until the Third Circuit revisits the issue, this Court is obligated, consistent with the Third Circuit's opinion in *Sacred Heart,* to find that § 106(a) of the Bankruptcy Code may not be relied upon by the Trustee to defeat the Commonwealth Parties' assertion of sovereign immunity." *Philadelphia Entm't & Dev. Partners, L.P. v. Pa. Dep't of Revenue (In re Philadelphia Entm't & Dev. Partners, L.P.),* 549 B.R. 103, 121 (Bankr. E.D. Pa. 2016), *rev'd on other grounds,* 879 F.3d 492 (3d Cir. 2018).

The Trustee might argue that, under *Central Virginia Community College v. Katz,* 546 U.S. 356 (2006), this Court has jurisdiction over this contested matter because it includes a claim asserted under § 105 the Bankruptcy Code. Even if the Court did not have an independent basis for dismissing the § 105 Claim as discussed above, this would be a gross misreading of *Katz*. In *Katz,* a liquidating trustee filed complaints against four state colleges, alleging that they received preferential transfers; the colleges filed motions to dismiss on the grounds of sovereign immunity. *Id.* at 360. Relying on the history surrounding the use of *habeas* petitions to free debtors from debtor's state prisons if the federal courts granted a discharge, the Supreme Court concluded that the preference lawsuits were not barred by the doctrine of sovereign immunity because they were necessary to bankruptcy courts' *in rem* jurisdiction. It held that "in ratifying

the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings *necessary to effectuate the* in rem *jurisdiction of the bankruptcy courts." Id.* at 378 (emphasis added).

At the same time as the Supreme Court held that states waived their sovereign immunity to the extent "necessary to effect the *in rem* jurisdiction of the bankruptcy courts," it also cautioned that the scope of the waiver is in "a *limited* sphere." *Id.* at 377. Not "every law labeled a 'bankruptcy' law could, consistent with the Bankruptcy Clause, properly impinge upon state sovereign immunity." *Id.* at 378, n.15. Rather, "Congress has the power to enact bankruptcy laws the purpose and effect of which are to ensure uniformity in treatment of state and private creditors." *Id.* at 376, n.13. *Only* in such cases have the states have waived their immunity and consented to be treated equally with other creditors.

This case falls outside the sovereign-immunity waiver described in *Katz.* Unlike the preference lawsuits in *Katz,* this is a contested matter to determine state law rights with respect to property that is no longer property of the estate—in connection with two causes of action that were never property of the estate and are non-core claims. Preference lawsuits seek to attach property that was available to creditors of the debtor, so they implicate the *res* of the bankruptcy estate. *Begier v. IRS,* 496 U.S. 53, 58 (1990) ("'property of the debtor' subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings"). Preference lawsuits are properly considered ancillary to the Court's *in rem* jurisdiction.

In contrast, this lawsuit does not determine the *res* of the estate or ensure equal distribution of it. Instead, it seeks to bring in new money to a post-confirmation trust by asserting state law claims that did not exist while there was a bankruptcy estate. Courts have held that the

waiver in *Katz* does not reach state law claims that merely enlarge the funds available for administration. *See, e.g., In re Philadelphia Entm't,* 549 B.R. at 135 ("This Court has no difficulty concluding that sovereign immunity deprives this Court of subject matter jurisdiction to hear the Trustee's non-traditional bankruptcy causes of action."); *Shieldalloy Metallurgical Corp. v. New Jersey Dept. of Environmental Protection,* 743 F. Supp. 2d 429, 439 (D.N.J. 2010) (limiting *Katz* to "claims created by the Bankruptcy Code").

The distinction between preference lawsuits and lawsuits to bring in new money to the estate is also relevant because allowing states immunity from preference litigation would undermine "uniformity in treatment of state and private creditors." *Katz,* 546 U.S. at 376, n.13. On the other hand, making trustees use the state courts to assert actions for state claims does not undermine uniformity of treatment. Unlike adversary proceedings in *Katz,* this action has nothing to do with equal treatment of creditors, the scope of the discharge, or the *res* of the bankruptcy estate. It concerns a liquidating trust that is attempting to avoid litigating what are entirely California state law claims in California courts. Thus, this Court should find that *Katz* does *not* apply to the inverse condemnation action asserted here. *See, e.g., In re City of San Bernardino,* No. 6:12-BK-28006-MJ, 2014 U.S. Dist. LEXIS 77653, at *41 (C.D. Cal. June 4, 2014) ("The link between the Court's exercise of its *in rem* jurisdiction over the City's property and the payment of disputed tax revenues to the Successor Agency is far weaker than the corresponding links between the court's *in rem* jurisdiction and the sought-after remedies in *Hood* and *Katz.").*

Because the Court has no jurisdiction over the Defendants with regard to the claims asserted in the Complaint, it should dismiss this lawsuit.

C. Alternatively, even if the Court were to find that it has jurisdiction, it should decline to exercise such jurisdiction here and abstain from hearing this case.

Almost all of the factors that courts in this district typically consider in analyzing permissive abstention weigh in favor of abstention. Simply put, state law issues predominate over any bankruptcy issues in this proceeding, which involves three non-debtors, and which is remote from the original bankruptcy proceeding. *DHP Holdings II Corp.,* 435 B.R. at 223-24.

Even if the Court were to conclude that it has subject matter jurisdiction over this action, pursuant to Bankruptcy Rule 5011 and 28 U.S.C. § 1334(c)(1) the Court should exercise its discretion to abstain from hearing the dispute. A striking majority of relevant factors counsel in favor of abstention here, where Plaintiff raises only non-core, state law claims that cannot affect the nonexistent bankruptcy estate. If the Court determines that it should abstain under 28 U.S.C. § 1334(c)(1), it should then dismiss the case.

Section 1334(c)(1) provides as follows:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Courts in this district typically turn to a twelve-factor test to analyze permissive abstention:

(1) the effect or lack thereof on the efficient administration of the estate;

(2) the extent to which state law issues predominate over bankruptcy issues;

(3) the difficulty or unsettled nature of applicable state law;

(4) the presence of a related proceeding commenced in state court or other non-bankruptcy court;

(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

(7) the substance rather than the form of an asserted "core" proceeding;

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden on the court's docket;

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence in the proceeding of non-debtor parties.

DHP Holdings II Corp., 435 B.R. at 223-24.

While courts have held that these factors should be applied "flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative," *In re Earned Capital Corp.,* 331 B.R. 208, 221 (Bankr. W.D. Pa. 2005) (quoting *Matter of Chi., Milwaukee, St. Paul & Pac. R.R. Co.,* 6 F.3d 1184, 1189 (7th Cir. 1993)), they have also recognized that several factors are "more substantial" than others. *See In re Fruit of the Loom, Inc.,* 407 B.R. 593, 600, 602 (Bankr. D. Del. 2009); *DHP Holdings II Corp.,* 435 B.R. at 233; *In re Loewen Grp. Int'l, Inc.,* 344 B.R. 727, 731 (Bankr. D. Del. 2006).

The "more substantial" factors are "the effect on the administration of the estate, whether the claim involves only state law issues, and whether the proceeding is core or non-core." *See Fruit of the Loom,* 407 B.R. at 600. Here, those more substantial factors, and an overwhelming majority of all of the factors, weigh in favor of abstention. *See DHP Holdings II Corp.,* 435 B.R.

at 224-233 (abstaining where eight of the twelve factors created an "overwhelming majority" of factors weighing in favor of abstention).

1. Factor (1): The Possible Effect of Abstention on the Administration of the Estate in Bankruptcy.

The Trustee's arguments to the contrary, this Court's abstention from this case would have no effect on the administration of the estate. The Plan has been confirmed and gone effective, and thus the original Debtors' estates no longer exist. Rather, this matter deals only with non-debtors' rights under California law. While the Trustee maintains that knowing whether or how much it can recover from the Commission and the State will affect the amount and timing of distributions to creditors, the Trust's rights (or lack thereof) equally can be determined in the State Courts. Moreover, the Trust ignores that it is the owner of an environmentally challenged industrial property (the EOF), which it will need to dispose of before final distributions can be made to creditors. The Trust has presented no evidence regarding whether the Property can be sold or how long a sale process might take. Thus, the first factor weighs in favor of abstention.

2. Factors (2) & (3): The Extent to Which State Law Issues Predominate Over Bankruptcy Issues and the Difficulty or Unsettled Nature of Applicable State Law.

The fundamental issue in this litigation boils down to one question: Under California law, is the State obligated to compensate the Trust when it occupies a portion of property owned by the Trust to perform environmental obligations of the Trust that are necessary to protect the public health and safety? State law alone can answer this question. No bankruptcy law is implicated at all in adjudicating the Trustee's asserted inverse-condemnation claim. *See, e.g., Fruit of the Loom,* 407 B.R. at 600 (holding that this factor favored abstention where the proceeding centered on an ordinary contract dispute under state law and no Bankruptcy Code provision was implicated); *In re Sun Healthcare Grp., Inc.,* 267 B.R. 673, 679 (Bank. D. Del.

2000) (finding that state law issues dominated the litigation, thereby favoring abstention). Indeed, as discussed above, the nexus to bankruptcy is so negligible that it falls short of even "related to" jurisdiction. *See, e.g., Resorts Int'l,* 372 F.3d at 170; *Solyndra* 2015 Bankr. LEXIS 3515, at *15-17; *VeraSun*, 2013 Bankr. LEXIS 2634, at *20; *Wash. Mut.,* 2012 Bankr. LEXIS 4673, at *15; *In re PRS*, 445 B.R. at 405; *In re BWI*, 437 B.R. at 166; *Interlake,* 2009 U.S. Dist. LEXIS 91963, at *11.

In addition, the inverse condemnation cause of action asserted here presents complex issues of California law that California courts are familiar with determining. *See, e.g., Mercury Casualty Co.*, 14 Cal. App. 5th 917 (adjudicating an inverse condemnation claim); *Pacific Shores*, 244 Cal. App. 4th 12 (same); *Gutierrez*, 198 Cal. App. 4th 831 (same). Although California law in this regard is not wholly unsettled, courts have noted that "even if a matter does not involve unsettled issues of state law, where the state law issues so predominate the proceeding . . . this factor weighs in favor of having the state court decide it." *In re Integrated Health Servs., Inc.,* 291 B.R. 615, 620 (Bankr. D. Del. 2003); *Sun Healthcare Grp.,* 267 B.R. at 679; *In re Omna Med. Partners, Inc.,* 257 B.R. 666, 669 (Bankr. D. Del. 2000); *see also DHP Holdings II Corp.,* 435 B.R. at 227 ("Although the parties have not identified any unsettled state law issues, a state court would be better positioned to identify and resolve any such issues, should they arise. Therefore, the Court finds that this factor favors abstention.").

Similarly, with respect to the § 105 Claim, the key legal issues involve determinations of California common law as to unjust enrichment and restitution. *See, e.g., Prakashpalan* 223 Cal. App. 4th 1105 (adjudication of a claim for unjust enrichment); *Peterson*, 164 Cal. App. 4th 1583 (same); *Walsh*, 158 Cal. App. 4th 533 (same) *see also, e.g., Durell*, 183 Cal. App. 4th 1350 (adjudicating a claim for restitution). What is more, it is unclear whether a claim for unjust

enrichment even exists under California law; an issue vital to the determination of the § 105 Claim and dependent on Californian jurisprudence should be left to a state court to decide. *See Durell*, 183 Cal. App. 4th at 1370.

3. Factor (6): The Degree of Relatedness or Remoteness of the Proceeding to the Main Bankruptcy Case.

The Complaint here is distinctly removed from the bankruptcy case, and thus this factor also weighs heavily in favor of abstention. The Plan has been confirmed and become effective. Nothing at issue in this Complaint would disturb that. *See Fruit of the Loom,* 407 B.R. at 601 (abstaining from case that was "remote both in substance and time from the main bankruptcy case" and involved "an agreement merely executed as part of the main bankruptcy case"); *Loewen Grp. Int'l,* 344 B.R. at 730-31 (abstaining from case where the relationship between the adversary proceeding and the bankruptcy case was "extremely remote" even though it involved "an agreement executed as part of the bankruptcy case"); *Integrated Health Servs.,* 291 B.R. at 621 (abstaining from case that involved non-core issues only). The dispute here, which revolves around acts occurring after the Effective Date of the Plan that do not implicate any provision of the Plan, is not in any manner integral to the Chapter 11 case. This factor thus favors abstention.

4. Factor (7): The Substance Rather than Form of an Asserted "Core" Proceeding.

As set forth above, this is not a "core" proceeding. There is no dispute regarding whether the EOF is property of the Trust or any party's treatment under the Plan. This dispute does not arise under title 11 nor does it arise in this Chapter 11 case. Rather, this dispute involves state law claims that not only could, but in fact do, arise outside of the bankruptcy case and bankruptcy law. This substantial factor thus also favors abstention. *See Integrated Health Servs.,* 291 B.R. at 621.

5. Factor (8): The Feasibility of Severing State Law Claims from Core Bankruptcy Matters to Allow Judgments to be Entered in State Court with Enforcement Left to the Bankruptcy Court.

This factor also favors the Defendants' request for this Court to abstain. There are no core matters related to this Complaint that need to be severed, and the parties would not need to return to this Court to enforce any non-bankruptcy court judgment. *See DHP Holdings II Corp.,* 435 B.R. at 232. As discussed above, the Trustee's inclusion of a bare claim under § 105 of the Bankruptcy Code, untethered to any substantive right, cannot survive this Motion to Dismiss and should not weigh in the consideration of this factor.

6. Factor (9): The Burden on the Court's Docket.

The burden of litigating this action, which is at best tangentially related to a post-confirmation bankruptcy case, should not be underestimated. The Court would be taking on the burden of conducting an entirely new proceeding, including potentially supervising discovery, deciding dispositive motions, and presiding over a trial involving a dispute arising post-Effective Date—all for the purpose of determining the parties' rights and obligations under the California law of inverse condemnation and under California environmental laws and regulations. In these circumstances, the burden on this Court's docket of taking on a post-confirmation dispute cannot be justified.

7. Factor (10): The Likelihood That the Commencement of the Proceeding in a Bankruptcy Court Involved Forum Shopping by One of the Parties.

As set forth above, a California court is perfectly capable of applying California law to determine the Trust's environmental obligations under California law and whether the Commission may exercise non-exclusive use of a California property without compensating the Trust. The only plausible reason for the Trustee to bring this action in bankruptcy court is in the hope that this Court will provide a sympathetic ear for its complaints. The two Defendants are

the State of California and an agency of the State of California. The property in question is located in California. As discussed above, the *only* substantive law at issue is California law, as interpreted and developed by California courts. All of this strongly suggests forum shopping and counsels in favor of abstention.

8. Factor (11): The Existence of a Right to a Jury Trial.

The right to a jury trial is significant, and "its loss by [the Court's] retention of this case weighs heavily in favor of abstention." *In re Asousa P'ship,* 264 B.R. 376, 396 (Bankr. E.D. Pa. 2001). The Complaint asserts claims that are triable by a jury, including inverse condemnation and unjust enrichment. *See, e.g., Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 (Cal. 1994) (noting that the right to jury trial under the California state constitution extends to inverse condemnation actions, specifically to the determination of damages); *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 951 (Cal. 1996) (same)*;Int'l Paper Co. v. Affiliated FM Ins. Co.*, Case No. 974350, 2002 Cal. Super. LEXIS 651, at* 11-12 (Cal. Super. Ct. Aug. 16, 2002) (discussing the jury trial of an inverse condemnation claim in California state court); *see also, e.g., American Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451 (Cal. Ct. App. 2014) (adjudicating an appeal of an unjust enrichment claim that was determined on a jury verdict below); *Ajaxo Inc. v. E*Trade Financial Corp.*, 187 Cal. App. 4th 1295 (Cal. Ct. App. 2010) (same); *Lectrodryer v. Seoulbank*, 77 Cal. App. 4th 723 (Cal. Ct. App. 2000) (same). This Court is not authorized to conduct jury trials. *See DHP Holdings II Corp.,* 435 B.R. at 233; *Integrated Health Servs.,* 291 B.R. at 622. This Court's retention of this proceeding accordingly would force Defendants to forfeit this significant constitutional right. *Asousa P'ship,* 264 B.R. at 396. Therefore, this factor weighs heavily in favor of abstention.

9. Factor (12): The Presence in a Proceeding of Non-Debtor Parties.

None of the parties to the Complaint were debtors in the bankruptcy proceeding, though the Trust is a successor to the debtors with regard to ownership of the EOF and the Debtors' environmental obligations. This factor thus weighs in favor of abstention as well. *See Integrated Health Servs.,* 291 B.R. at 623.

In sum, the overwhelming majority of factors traditionally evaluated in connection with discretionary abstention favor abstention here, including the factors courts have found most significant in the abstention analysis. Although Defendants do not believe this Court has subject matter jurisdiction over this action, if the Court concludes otherwise, the Court should nevertheless abstain and dismiss the case under 28 U.S.C. § 1334(c)(1).

D. The Complaint Fails to State a Claim for Inverse Condemnation

As explained in detail in the State's separately filed motion to dismiss, even if this Court were to determine that it has subject matter jurisdiction, and abstention is not appropriate, the Complaint should be dismissed under Rule 12(b)(6), made applicable to this proceeding under Bankruptcy Rule 7012(b), because the Trustee has failed to state a claim for which relief can be granted. The Commission adopts and incorporates by reference the argument and authorities in the State's motion to dismiss filed contemporaneously herewith.

VI. CONCLUSION

The Trustee's gambit to bring this dispute in bankruptcy court, if accepted, would unreasonably expand bankruptcy jurisdiction and invite new litigation in the bankruptcy courts involving post-confirmation disputes between non-debtors. The Debtor exited the broad protective umbrella of Chapter 11 when the Plan went effective, and the Trust now operates under the more limited post-Effective Date jurisdiction of this Court. Under the Plan and Confirmation Order, the Trust was vested with ownership of the EOF and expressly assumed all

environmental obligations of Venoco. The Commission's continuing operation of the EOF is necessary to safely perform the Trust's environmental obligations associated with oil and gases emanating from Platform Holly. The Trust has shirked that responsibility. Governmental authorities charged with enforcing the Trust's obligations should not be shackled indefinitely to the Chapter 11 process simply because the property at issue was once owned by a Chapter 11 debtor. In order to further the goal of finality and closure that pervades Chapter 11, the Court should find that it lacks subject matter jurisdiction here or, in the alternative, decline to exercise it.

For the foregoing reasons, the Commission respectfully requests that the Court dismiss the Complaint for lack of subject matter jurisdiction. Should the Court find that it has jurisdiction, the Commission alternatively requests that the Court abstain from hearing this matter pursuant to 28 U.S.C. § 1334(c)(1). Should the Court assert jurisdiction and not abstain, the Commission reserves its right to have the claims in the Complaint tried to a jury.

[Signature Page Follows]

Dated: November 15, 2018
Wilmington, Delaware

Respectfully submitted,

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