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

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

Case No. 2012-32118
 D.C. No. OHS-1
 Chapter 9

**OBJECTIONS TO DECLARATION
 AND EXPERT REPORT OF
 ROBERT C. BOBB PURSUANT TO
 FEDERAL RULE OF EVIDENCE 702
 AND DAUBERT V. MERRELL DOW
 PHARMACEUTICALS, INC.¹**

Date: February 26, 2013
 Time: 1:30 p.m.
 Dept: C
 Judge: Christopher M. Klein

27 _____
 28 ¹ The City is not asking the Court for a ruling on the City's objections to evidence at the February 26, 2013 Status Conference. Rather, the City will seek direction from the Court at such hearing as to how it would like to proceed as to the City's objections.

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1 The City of Stockton (the “City”) hereby submits the following objections to the
2 Declaration of Robert C. Bobb In Support of Supplemental Objection of Assured Guaranty Corp.
3 and Assured Guaranty Municipal Corp. to Debtor’s Chapter 9 Petition and Statement of
4 Qualifications filed June 28, 2012 (the “Bobb Declaration” in support of the “Assured Obj.” to
5 the City’s “Petition”) and the accompanying Expert Report of Robert C. Bobb (the “Bobb
6 Report”), pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm, Inc.*,
7 509 U.S. 579 (1993). These objections are made in addition to those objections raised in the
8 City’s “Objections To Declaration And Expert Report Of Robert C. Bobb In Support Of
9 Supplemental Objection Of Assured Guaranty Corp. And Assured Guaranty Municipal Corp. To
10 Debtor’s Chapter 9 Petition And Statement Of Qualifications” and focus on the helpfulness,
11 qualifications, and reliability of the expert opinions rendered by Robert C. Bobb (“Bobb”) in the
12 Bobb Declaration and Bobb Report.

13 **I. INTRODUCTION**

14 In *Daubert*, the Supreme Court recognized and reaffirmed that the Federal Rules of
15 Evidence require courts to perform a “gatekeeping role” with regards to the admissibility of
16 expert opinion testimony. 509 U.S. at 597; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526
17 U.S. 137, 149 (1999) (holding that the *Daubert* “gatekeeping” obligation applies to all expert
18 testimony, not just “scientific” testimony); *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).
19 This gatekeeping obligation requires courts considering the admissibility of expert opinions based
20 on scientific, technical, or otherwise specialized knowledge to ensure that the expert is properly
21 qualified to render the proffered opinion, that the proffered opinion will be helpful to the trier of
22 fact, and that the proffered opinion is based upon sufficiently reliable information, principles, and
23 methodologies. *See* FRE 702. Put more simply, courts at the trial level “must ensure that any and
24 all [expert opinion] admitted is not only relevant, but reliable.” *Daubert*, 509 U.S. at 589. The
25 Bobb Declaration and Bobb Report fail these fundamental criteria.

26 As a preliminary matter, the entirety of both Bobb’s Declaration and Bobb’s Report is
27 inadmissible because neither offers any opinion testimony that would be relevant or helpful to the
28 Court in deciding the questions that are actually before it. The City has presented evidence

1 showing that it meets the requirements for chapter 9 eligibility, including (1) that the City is a
2 municipality; (2) that the City is authorized by California law to bring its Petition; (3) that the
3 City is insolvent as defined under 11 U.S.C. § 109(c)(3); (4) that the City desires to effect a plan
4 to adjust its debts; (5) that the City has met the negotiation requirement of § 109(c)(5)(B); and,
5 finally (6) that the City has filed its Petition in good faith pursuant to § 921(c). *See generally* City
6 Of Stockton’s Memorandum Of Facts And Law In Support Of Its Statement Of Qualifications
7 Under Section 109(c) Of The United States Bankruptcy Code (“Mem.”). The Assured Obj.,
8 meanwhile, contends that the City is not in fact insolvent under section 109(c)(3), has not met the
9 negotiation requirement of section 109(c)(5)(B), and did not file its Petition in good faith as
10 required by section 921(c). Bobb’s Declaration and Report, however, offer no opinion testimony
11 relevant to the Court’s determination of the City’s solvency, negotiations, or good faith.

12 Instead, Bobb’s expert opinion boils down to the contention that the City could have
13 avoided insolvency if it had instituted a host of draconian, and potentially impossible, fiscal
14 measures. Regardless of whether this contention is true (which the City maintains it is not), it has
15 no bearing whatsoever on the question of whether or not the City was insolvent on June 28, 2012.
16 Nor does the City’s “failure” to adopt the measures laid out in Bobb’s Report affect the Court’s
17 determination of the City’s good faith in filing its Petition. *See In re Pierce Cnty. Hous. Auth.*,
18 414 B.R. 702, 711 (Bankr. W.D. Wash. 2009) (laying out the factors for determination of good
19 faith under § 921(c)) (citing COLLIER ON BANKRUPTCY ¶ 921.04[2]). Lastly, Bobb’s implication
20 that the City’s decision not to seek concessions from CalPERS fails the negotiation requirement
21 of § 109(c)(5)(B), in addition to being erroneous, is inadmissible both because it is entirely
22 outside the scope of Bobb’s expertise and because it amounts to a legal conclusion. *See*
23 *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (expert
24 witnesses may not give an opinion as to a legal conclusion). Thus, the expert opinions stated in
25 Bobb’s Declaration and Expert Report do nothing to aid the Court’s determination of the City’s
26 eligibility for chapter 9, and as such are inadmissible.

27 Moreover, much of the Bobb Report, as described in detail below, is also inadmissible
28 because it is based on incomplete information, unwarranted assumptions and speculation, and

1 flawed methodologies. As such, these opinions fail the basic requirement of reliability laid out in
 2 FRE 702 and *Daubert*, and are inadmissible on that ground as well.

3 **II. OBJECTIONS**

4 **A. Legal Standard**

5 Federal Rule of Evidence 702² provides:

6 A witness who is qualified as an expert by knowledge, skill,
 7 experience, training, or education may testify in the form of an
 opinion or otherwise if:

8 (a) the expert's scientific, technical, or other specialized
 9 knowledge will help the trier of fact to understand the evidence
 or to determine a fact in issue;

10 (b) the testimony is based on sufficient facts or data;

11 (c) the testimony is the product of reliable principles and
 12 methods; and

13 (d) the expert has reliably applied the principles and methods to
 the facts of the case.

14 Fed. R. Evid. 702. Thus, in order for an expert's opinion to be admissible as evidence, the expert
 15 must be qualified to render such an opinion, the opinion must be helpful to the trier of fact, and
 16 the opinion must be reliable (based on sufficient facts, reliable principles, and reliable application
 17 of those principles).

18 Trial courts have broad discretion in deciding whether to admit or exclude expert
 19 testimony under FRE 702. *General Elec. Co.*, 522 U.S. at 141-42; *see also In re Cloobek*, BAP
 20 NV-06-1165-BSN, 2007 WL 7535051 (B.A.P. 9th Cir. May 2, 2007). However, a trial court
 21 must exercise its gatekeeping function for expert opinion evidence, and any determination of
 22 reliability should be made on the record. *See White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th
 23 Cir. 2002) *opinion amended on denial of reh'g*, 335 F.3d 833 (9th Cir. 2003) (holding that
 24 *Daubert* and *Kumho Tire* “require that the judge apply his gatekeeping role under *Daubert* to all
 25 forms of expert testimony”); *Elsayed Mukhtar v. California State Univ., Hayward*, 299 F.3d
 26 1053, 1066 (9th Cir. 2002) *amended sub nom. Mukhtar v. California State Univ., Hayward*,

27
 28 ² The Federal Rules of Evidence are made applicable to cases under the Bankruptcy Code by Rule of Bankruptcy
 Procedure 9017.

1 319 F.3d 1073 (9th Cir. 2003) (“*Kumho* and *Daubert* make it clear that the court must, on the
2 record, make *some* kind of reliability determination.”).

3 **B. The Expert Testimony In The Bobb Declaration And Bobb Report Is**
4 **Irrelevant To The Question Of The City’s Eligibility For Chapter 9 And Is**
5 **Inadmissible As Unhelpful To The Court.**

6 In order to be admissible, expert testimony must be helpful to the trier of fact. *Daubert*,
7 509 U.S. at 591; *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007); *Kumho*
8 *Tire*, 526 U.S. at 156. Specifically, expert evidence or testimony must “assist the trier of fact to
9 understand the evidence or to determine a fact in issue.” *Daubert*, 509 U.S. at 591. Where expert
10 testimony does not touch on the questions actually at issue in a case, such testimony is necessarily
11 unhelpful to the Court. *Id.* (“Expert testimony which does not relate to any issue in the case is not
12 relevant and, ergo, non-helpful.”) (quoting 3 Weinstein & Berger ¶ 702[02], p. 702–18). Expert
13 opinion testimony which fails this basic test of relevance is inadmissible. *Id.*; *Stilwell*, 482 F.3d
14 at 1192; *United States v. Redlightning*, 624 F.3d 1090, 1123 (9th Cir. 2010).

15 The expert opinions offered in the Bobb Declaration and Bobb Report are not helpful to
16 the Court, because they are irrelevant to the issues before the Court. The Assured Obj. raises
17 three challenges to the City’s Eligibility Petition: first, that the City is not insolvent under
18 section 109(c)(3) of the Bankruptcy Code; second, that the City did not satisfy the negotiation
19 requirement of section 109(c)(5)(B); and third, that the City did not file its Petition in good faith,
20 as required by section 921(c). However, Bobb’s expert testimony does not touch on *any* of these
21 issues.

22 The foundational opinion asserted by Bobb is that the City “failed to take the steps
23 expected of a financially distressed city and did not consider various reductions and revenue
24 enhancement measures that would have enabled it to avoid the chapter 9 filing.” Bobb
25 Declaration, ¶ 4. Bobb attempts to support this position with an Expert Report that lists various
26 fiscal measures he contends the City could have taken in order to prevent insolvency. However,
27 none of the opinions proffered by Bobb in his Declaration or Report support his ultimate
28 conclusion that the City “cannot make the showing that it was insolvent when it filed for
chapter 9 relief at the end of June 2012.” Bobb Declaration, ¶ 9, Bobb Report, at 2-3. The fact

1 that the City did not undertake to implement the alternative budget proposed by Bobb,³ even
2 assuming it could have been carried out, has no bearing whatsoever on the question of whether
3 the City was insolvent as of the filing of its Petition.

4 In fact, Bobb's Report implicitly acknowledges that the City *was* insolvent on June 28,
5 2012 under section 109(c)(3). The Bobb Report relies upon a September 12, 2011 memorandum
6 from then-City Chief Financial Officer Susan Mayer stating that "[f]inancial planning and
7 reporting failures have misrepresented the City's condition and left the City at the brink of
8 insolvency." Bobb Report, at pp. 16-17.⁴ Bobb also admits in his deposition that he has "no
9 reason to dispute" the City's claims that it was "service-delivery insolvent," "general fund
10 insolvent," and "cash insolvent." Deposition Transcript of Robert C. Bobb, January 25, 2013
11 ("Bobb Depo."), at 96:12-97:6. Bobb also contends that if the City had "moved aggressively with
12 the menu of options" he has presented, "the City would not be insolvent." Bobb Depo., at 129:6-
13 9. This of course concedes that the City was insolvent as of the filing of its Petition.

14 Thus, Bobb's expert testimony, which focuses solely on what he believes the City should
15 have done leading up to the filing of its Petition, is completely irrelevant to the determination of
16 whether the City is actually insolvent.⁵ Rather, it serves only to support Assured's misguided
17 assertion that the City "has budgeted itself into insolvency." *See* Assured Obj., at 8. This
18 argument misses the point, as the question posed by section 109(c)(3) is whether the City was
19 insolvent on June 28, 2012, not how it got there. As such, Bobb's expert testimony is unhelpful
20 on the issue of solvency.

21 Bobb's testimony is also irrelevant to the question of the City's good faith in filing its
22 Petition. Even if it is assumed that the expense and revenue measures laid out in the Bobb Report
23 were plausible and could have saved the City from insolvency had they been implemented
24

25 ³ This alternative budget model is included in the Expert Report of Nancy Zielke, which is Exhibit B to the
26 Declaration Of Nancy L. Zielke In Support Of Assured Guaranty Corp. And Assured Guaranty Municipal Corp. To
Debtor's Chapter 9 Petition And Statement Of Qualifications.

27 ⁴ The Bobb Report contains two sets of page numbers. Citations in this objection are to the top number.

28 ⁵ Moreover, to the extent that Bobb's Declaration and Report do no more than second guess the City's decisions, this
is not a proper subject for the Court's determination. *See* City of Stockton's Reply to Objections to its Statement of
Qualifications Under Section 109(c) of the United States Bankruptcy Code, at 3, 12-13, 37.

1 months before the filing of the City's Petition, Bobb's Declaration and Report make no showing
2 that the City did not believe in good faith that it had to file for chapter 9 relief as of June 28,
3 2012. Not only does Bobb ignore the numerous and substantial actions which the City did take in
4 an attempt to stave off insolvency, but he also fails to consider whether the City had good reason
5 not to take the extreme steps suggested in the Bobb Report. The Bobb Declaration and Bobb
6 Report are thus irrelevant to the issues currently before the Court and, it follows, will not aid the
7 Court in its determination of these issues. Because the Bobb Report and Declaration fail the
8 "helpfulness" requirement of *Daubert* and FRE 702, they are inadmissible in their entirety.

9 **C. Bobb's Opinion That The City Should Have Sought Further Concessions**
10 **From CalPERS Is Inadmissible As To The City's Satisfaction Of The**
11 **Negotiation Requirement of § 109(c)(5)(B) Because It Is A Legal Conclusion.**

12 Bobb includes among his criticisms of the City that it has "fail[ed] to engage its largest
13 creditor, CalPERS, in discussions about reducing the City's outstanding pension obligations."
14 Bobb Declaration, ¶ 6; *see also* Bobb Report, at 23-24. While Bobb does not expressly say so,
15 this statement appears to implicitly support Assured's contention that the City has not satisfied
16 the negotiation requirement of section 109(c)(5)(B) because it did not negotiate with CalPERS for
17 additional concessions. *See* Assured Obj., at pp. 26-28. To the extent that this portion of Bobb's
18 expert testimony is meant to apply to the City's satisfaction of its negotiation requirement, it is
19 inadmissible for two reasons: First, because it is an improper legal conclusion, and second,
20 because such an opinion goes beyond Bobb's expertise.

21 Expert opinion testimony is not admissible where it amounts to a legal conclusion.
22 *Nationwide Transp. Fin.*, 523 F.3d at 1058. Whether or not the City has satisfied section
23 109(c)(5)(B) is a legal question, and is thus solely within the province of the Court. Moreover,
24 expert opinion testimony is only admissible when the expert is sufficiently qualified to render
25 such an opinion. *See United States v. Lukashov*, 694 F.3d 1107, 1115 (9th Cir. 2012); *Primiano*
26 *v. Cook*, 598 F.3d 558, 563 (9th Cir. 2010). Despite his other qualifications, Bobb is not qualified
27 to render a legal opinion on the necessity of seeking concessions from CalPERS in order for the
28 City to satisfy its negotiation requirement. Bobb's testimony as to the City's negotiations with
CalPERS is thus inadmissible on the question of the negotiation requirement.

1 **D. Bobb’s Expert Opinions As To Specific Proposals For Increasing Revenues**
 2 **And Cutting Costs Are Inadmissible Because They Are Not Sufficiently**
 3 **Reliable.**

4 1. The Bobb Report Offers No Support For The Assumption That The City
 5 Could Have Successfully Passed Multiple New Tax Increases and Fees.

6 The “Alternative Model” adopted by the Bobb Report assumes that the City would be able
 7 to raise millions of dollars in additional revenues by passing multiple new tax measures and fees.
 8 These include a local retail sales tax increase of 0.5 percent, a 2 percent increase in the utility user
 9 tax, a 2 percent increase in a transient occupancy tax, a \$48 parcel tax, new emergency service
 10 cost recovery fees, a 911 fee, and a countywide library sales tax. Bobb Report, at 32-40.
 11 However, Bobb provides no support whatsoever for the assumption that the City would be able to
 12 successfully pass all of these new taxes and fees. Nor did Bobb undertake any polling or perform
 13 any feasibility analysis of the likelihood that the tax increases would be passed upon a required
 14 vote by the City’s citizens. Bobb Depo., at 199:20-200:12. Instead, Bobb relies only upon the
 15 surveys performed by the City itself (which the Court does not need an expert’s assistance to
 16 read).

17 In order to be deemed reliable, expert testimony must be “supported by appropriate
 18 validation – *i.e.*, good grounds.” *Daubert*, 509 U.S. at 590. An expert opinion must be more than
 19 a bald assertion without support, and expert opinions that lack a factual basis and are based on
 20 speculation or conjecture are inadmissible. *Guidroz-Brault v. Missouri Pac. R. Co.*, 254 F.3d
 21 825, 829 (9th Cir. 2001) (expert testimony may not include “unsupported speculation and
 22 subjective beliefs.”); *California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1181 (9th Cir.
 23 2010) *on reh’g en banc sub nom. California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th
 24 Cir. 2011) (expert testimony inadmissible where expert testified a result was “plausible” and
 25 “likely” but “admitted that he had done no analysis”).⁶ This is precisely the case with Bobb’s
 26 testimony that the City could avoid bankruptcy in part by passing several new taxes and fees. It is
 27 easy for Bobb to simply assume the passage of several tax increases and then claim that such

28 ⁶ Expert testimony which is the product of speculation or unsupported assumptions is also inadmissible as unhelpful to the trier of fact. *See In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994) (“Expert opinions are excluded as unhelpful if based on speculative assumptions or unsupported by the record.”).

1 increases would balance the City's budget, but these assumptions are useless without some
2 analysis of the likelihood they could actually be put into action. It is not sufficient for an expert
3 to simply "pick a number" and add it to the total.

4 Bobb did not perform any investigation or analysis into the plausibility of enacting the tax
5 increases his Report demands. In fact, he acknowledged that he is not aware of any city ever
6 putting more than one revenue measure on a ballot at one time. Bobb Depo., at 42. Nor did he
7 undertake any analysis into the potential ramifications of such tax increases (for instance, whether
8 an increased transient occupancy tax might lead to lower hotel usage, or whether an increased
9 sales tax would lead to loss of sales to neighboring municipalities). Bobb's Declaration and
10 Report are thus devoid of any support whatsoever for his opinions regarding ways the City could
11 have passed new taxes and fees, or otherwise increased its revenues.

12 Moreover, even if the City was able to pass Bobb's laundry list of tax measures, there is
13 no analysis as to whether such measures would have taken effect in time to prevent the City's
14 insolvency. The additional revenues from these measures would not have been received by the
15 City immediately, but instead would have come in over the course of the year as new taxes were
16 implemented. Thus, even if the City had passed all of these new taxes during the prior fiscal year,
17 it is not clear that this would have been enough to prevent insolvency at beginning of fiscal year
18 2012/2013.

19 Thus, the opinions in the Bobb Report pertaining to proposed methods by which the City
20 should have sought to increase its revenues are speculative, unsupported assumptions. They lack
21 sufficient underlying facts and data, and are not the product of applying reliable principles and
22 methods, as required by FRE 702. As such, they are not reliable and are therefore inadmissible.

23 2. The Bobb Report Provides No Independent Analysis Of The Feasibility Of
24 Its Proposed Budget Cuts.

25 Similar to its suggestions for revenue increases, the Bobb Report provides no independent
26 analysis of the feasibility of its many proposed budget cuts and cost-reduction measures. Most
27 notably, the Bobb Report opines that the City should have implemented an across-the-board
28 reduction of 15% for department budgets, "restructured" (read: reduced) its employee personnel

1 and benefits (including requiring current employees to begin contributing 25% for their health
2 care and reducing retiree medical benefits), and sought to consolidate or privatize City services.⁷
3 Bobb Report, at 41-45. The Bobb Report offers no analysis or substantiating information to
4 support the feasibility of such cuts.⁸

5 Bobb provides no analysis of the plausibility or impact of requiring the City to further
6 reduce its department budgets by 15 percent, above and beyond the drastic reductions the City has
7 already made. This proposal is thus meaningless, as it lacks any context to demonstrate whether
8 such a strategy would have ultimately been beneficial to the City, or even possible in the first
9 place. The Bobb Report also eschews any discussion as to the plausibility of lowering employee
10 and retiree benefits. In fact, with regards to pensions and retiree medical benefits, Bobb has
11 conceded that he is not a pension expert, and that he performed essentially no analysis of the
12 City's ability to reduce retiree medical benefits. Bobb Depo., at 195-199. Similarly, Bobb offers
13 no support for his opinion that the City could have consolidated and/or privatized some of its
14 services. In fact, the entirety of Bobb's opinion on this issue is that the City should consolidate or
15 outsource its police and fire services because it has been done elsewhere. *See* Bobb Report at 25-
16 26, 45 (mentioning Camden and Kalamazoo). He provides no analysis as to whether such a
17 proposal would be workable in Stockton's specific situation. In fact, the Bobb Report notes that
18 some jurisdictions considering these options have cited a "multitude" of potential problems. *See*
19 Bobb Report, at 26. Rather than consider these problems or analyze their possible impact on
20 Stockton, Bobb merely dismisses these concerns as "standard bureaucratic reasons for not taking
21 action." *Id.*

22 Bobb's Report also fails to consider the administrative costs and delays inherent in
23 enacting its various proposals. In many cases, passing cost cutting measures or revenue increases
24 would take time, money, and political capital that the City simply did not have. Without
25 considering potential limitations on the City's ability to implement his proposals, Bobb cannot
26

27 ⁷ It is telling that the alternative budget supported by the Bobb Report at no point considers a restructuring of the
City's bond debt, which would include the City's debt to Bobb's client, Assured. Bobb Depo., at 48:24-49:4.

28 ⁸ Ironically, the Bobb Report frequently calls out the City for failing to investigate or conduct feasibility analyses of
numerous options, yet itself provides no such analysis. *See, e.g.* Bobb Report, at 24-25.

