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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

In re: ) Case No. 12-32118  
CITY OF STOCKTON, CALIFORNIA, ) DC No. OHS-1  
Debtor. ) Chapter 9  
)  
) **OPPOSITION OF ASSURED**  
) **GUARANTY CORP. AND ASSURED**  
) **GUARANTY MUNICIPAL CORP. TO**  
) **CITY OF STOCKTON'S DAUBERT**  
) **MOTION SEEKING TO EXCLUDE THE**  
) **EXPERT TESTIMONY OF NANCY L.**  
) **ZIELKE**  
)  
) Date: March 20, 2013  
) Time: 9:30 a.m.  
) Dept.: Courtroom 35  
) Judge: Hon. Christopher M. Klein

1 Assured Guaranty Corp. and Assured Guaranty Municipal Corp. (collectively, “Assured”),  
2 by their undersigned counsel, respectfully submit this Opposition in response to the City of  
3 Stockton’s (“Stockton” or the “City”) Objection to the Declaration and Expert Report of Nancy L.  
4 Zielke Pursuant To Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals,  
5 Inc. (the “Motion”) [Dkt. 702]. Assured requests that the Court deny the City’s Motion because  
6 Zielke is a properly qualified expert whose opinions, as offered in the Declaration and Expert  
7 Report of Nancy L. Zielke (the “Zielke Declaration” and “Zielke Report,” respectively) [Dkt. Nos.  
8 639 & 640], meet the requirements of Federal Rule of Evidence 702 and Daubert v. Merrell Dow  
9 Pharmaceuticals, Inc., 509 U.S. 579 (1993) (“Daubert”) and will assist the Court in understanding  
10 the issues in this case.

#### 11 I. INTRODUCTION

12 Assured filed the Zielke Declaration and Zielke Report with its December 14, 2012  
13 Supplemental Objection to Stockton’s Chapter 9 Petition and Statement of Qualifications  
14 (“Supplemental Objection”) [Dkt. No. 638]. At its most basic level, the Zielke Report provides an  
15 evaluation of the City’s financial condition. In particular, drawing on nearly 30 years of public  
16 sector experience, including over two decades in key financial administrative positions, Zielke  
17 examined matters of fact central to the City’s solvency, such as the accuracy of the City’s current  
18 and projected budgets, the state of its financial controls, and its General Fund revenues and costs.  
19 Zielke Report at 6-33. In its Motion, the City moves this Court to strike the entirety of the Zielke  
20 Declaration, or, in the alternative, as described below, to strike portions of the Zielke Report as  
21 unreliable; devoid of independent expert analysis; and presenting inadmissible legal conclusions.  
22 Mot. at 4-14.

23 As discussed at length below, the City’s Motion should be denied. Procedurally, there is no  
24 need for the Court to decide on the admissibility of the Zielke Declaration and Zielke Report prior  
25 to the evidentiary hearing regarding the City’s eligibility where the Court acts as the factfinder.  
26 Substantively, in both the Zielke Declaration and Zielke Report, Zielke has carefully reviewed the  
27 facts and opined on matters central to both the City’s claim of insolvency for purposes of 11 U.S.C.  
28 § 109(c)(2) and its claim that it filed its bankruptcy petition in good faith for purposes of 11 U.S.C.

1 § 921(c). The City’s attempt to exclude the entirety of Zielke’s work is not credible; its criticisms  
2 of the data and methods used by Zielke are unfounded; and its arguments that Zielke failed to  
3 conduct an independent expert analysis and offered legal conclusions are frivolous.

## 4 **II. LEGAL STANDARD**

5 Federal Rule of Evidence 702<sup>1</sup> permits “a witness who is qualified as an expert by  
6 knowledge, skill, experience, training, or education” to give opinion testimony, provided that the  
7 expert’s specialized knowledge “will help the trier of fact to understand the evidence or to  
8 determine a fact in issue,” and further provided that “the testimony is based on sufficient facts or  
9 data . . . [and] is the product of reliable principles and methods, and the expert has reliably applied  
10 the principles and methods to the facts of the case.” Fed. R. Evid. 702; Daubert, 509 U.S. at 597  
11 (establishing a “gatekeeping role” for courts regarding the admissibility of expert testimony); see  
12 also Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). If an expert’s testimony is grounded in  
13 the expert’s area of specialized knowledge, based on sound data and reliable methodology, and  
14 soundly applied to the facts of the case, the testimony should be admitted. Daubert, 509 U.S. at  
15 597; see also Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995) (“Daubert  
16 II”).

17 Where there is no jury and the Court is the trier of fact, the Court “does not have the sort of  
18 ‘gatekeeping’ function envisioned and discussed in Daubert and the Note to Rule 702.” Frye v.  
19 Ayers, 2009 U.S. Dist. LEXIS 124339, at \*12, 14 (E.D. Cal. May 11, 2009). That is, the Court  
20 may hear the evidence and make reliability determinations in the context of trial and exclude or  
21 disregard the evidence that does not meet the reliability standard of FRE 702. Id. at \*12-13  
22 (quoting In re Salem, 465 F.3d 767, 776-77 (7th Cir. 2006)) (further citations omitted); see also  
23 CFM Commc’ns, LLC v. Mitts Telecasting Co., 424 F. Supp. 2d 1229, 1233 (E.D. Cal. 2005)  
24 (“The concerns about admitting expert legal opinion may be lessened where, as here, a court sits as  
25 trier of fact.”).

26 \_\_\_\_\_  
27 <sup>1</sup> The Federal Rules of Evidence are made applicable to cases under the Bankruptcy Code by Rule  
28 of Bankruptcy Procedure 9017.

1 **III. ARGUMENT**

2 As demonstrated below, the City’s arguments to set aside the Zielke Declaration and Zielke  
3 Report are meritless and should be rejected.

4 **A. Excluding All Or Part Of The Zielke Declaration And Zielke Report Is  
5 Unnecessary And Premature.**

6 The City’s request that the Court exclude the Zielke Declaration and Zielke Report in  
7 advance of an evidentiary hearing is wholly unnecessary because this Court will sit as the trier of  
8 fact. Although Daubert is important in jury trials, “there is less need for the gatekeeper to keep the  
9 gate when the gatekeeper is keeping the gate only for himself. Thus, we relax Daubert’s  
10 application for bench trials.” David E. Watson v. United States, 668 F.3d 1008, 1015 (8th Cir.  
11 2012) (citations and internal quotation marks omitted); see also Volk v. United States, 57 F. Supp.  
12 2d 888, 896 (N.D. Cal. 1999).

13 Rather than acting to exclude evidence at the outset of a trial, the Court is in a better  
14 position “to hear the evidence and make its reliability determination during, rather than in advance  
15 of, trial.” In re Salem, 465 F.3d 767, 777 (7th Cir. 2006); see also Gibbs v. Gibbs, 210 F.3d 491,  
16 500 (5th Cir. 2000) (“Most of the safeguards provided for in Daubert are not as essential in a case  
17 such as this where a district judge sits as the trier of fact in place of a jury.”). The Court not only  
18 has “substantial discretion” to proceed in this way, see In re Trigem Am. Corp., 2010 Bankr.  
19 LEXIS 6274, at \*2-3 (Bank. C.D. Cal. Apr. 27, 2010) (denying a Daubert motion), but this “careful  
20 review of burdens of proof and vigorous cross-examination [and] not the exclusion of witnesses” is  
21 the “preferred approach, id. at \*3 (citing Kumho, 526 U.S. at 141-42 (emphasis added). To the  
22 extent that “certain methodologies are suspect or ... mistakes were made go[es] more to the weight  
23 of the testimony, not to its admissibility.” Trigem, 2010 Bankr. LEXIS 6274, at \*2-3 (citations  
24 omitted); see also Salem, 465 F.3d at 777 (noting the court’s ability to “separate[e] out what the  
25 witness is an expert in and what he is not”). All parties to this matter will have an opportunity at  
26 trial to test their opposition’s expert testimony.

27 Further, bankruptcy courts when evaluating eligibility routinely admit and consider  
28 evidence submitted by objecting parties as to whether a municipal debtor pursued alternatives to

1 bankruptcy and whether particular options were available and feasible for a municipality to pursue.  
2 See, e.g., In re City of Vallejo, 2008 Bankr. LEXIS 4433, at \*5-59 (Bankr. E.D. Cal. Sep. 5, 2008)  
3 (considering in detail numerous options proposed by the objector’s expert for revenues the city  
4 should have pursued or cuts it should have made, evaluating the relative credibility of the parties’  
5 witnesses after live testimony, comparing the city’s actual post-petition results to its projected  
6 results, and evaluating insolvency, not only under the city’s current budget, but a more austere  
7 budget); In re City of Bridgeport, 132 B.R. 85, 92 (Bankr. D. Conn. 1991) (“If Bridgeport is able to  
8 and does raise taxes and/or reduce spending enough to balance its budget, it will be able to pay its  
9 bills as they become due. . . . [That] scenario is a self-evident statement of solvency.”); In re Town  
10 of Westlake, 211 B.R. 860, 863 (Bankr. N.D. Tex. 1997) (failing to accept debtor’s representation  
11 that “it has insufficient revenue to continue to operate as a viable municipality and to continue to  
12 provide basic municipal services to its citizens” and noting “insufficient credible proof of such  
13 insolvency” after hearing testimony from objectors’ experts about city’s adoption of a budget with a  
14 projected monthly deficit yielding a final cash deficit for the year, which included expenditures not  
15 contained in previous budgets); In re N.Y. Off-Track Betting Corp., 427 B.R. 256, 282 (Bankr.  
16 S.D.N.Y. 2010) (finding that the debtor had filed in good faith under § 921 only after it considered the  
17 debtor’s discussions regarding “the work that needed to be done to save” the debtor, including certain  
18 options suggested by the objector, which the debtor incorporated into its business plan). These  
19 decisions recognize that a municipality’s decisions prior to bankruptcy and in contemplation of  
20 bankruptcy are relevant to insolvency and/or good faith in filing a bankruptcy petition and ought to  
21 be considered in the context of a broader evidentiary trial.

22 The City’s Motion would act only to preemptively deprive the Court of its opportunity to  
23 hear relevant evidence. As the Court is “fully prepared and able to critically evaluate [the]  
24 qualifications and opinions” of the experts for both sides after hearing them presented at the  
25 hearing on the merits, Frye, 2009 U.S. Dist. LEXIS 124339, at \*13, the City’s pre-hearing Daubert  
26 challenge should be summarily denied.

1           **B.     Zielke’s Testimony Is Relevant And Will Assist The Court In Resolving**  
2           **Whether The City Is Eligible For Relief Under Chapter 9.**

3           Under Federal Rule of Evidence 702(a), expert opinion testimony must “help the trier of  
4 fact to understand the evidence or determine a fact in issue.” The goal of this requirement is to  
5 avoid the admission of expert evidence that has the potential to “mislead the jury.” Daubert II, 43  
6 F.3d at 1321 n.17; see also United States v. Hankey, 203 F.3d 1160, 1167 (9th Cir. 2000). That  
7 concern is not implicated here, and, in any case, Zielke’s expert testimony more than satisfies the  
8 requirement that it be “relevant to the task at hand” in that it “logically advances a material aspect  
9 of the proposing party’s case.” Daubert II, 43 F.3d at 1315.

10           The City has attempted to attack Zielke’s expert testimony under Federal Rule of Evidence  
11 702 by retreating to its limited conception of what it must show to satisfy the “insolvency”  
12 requirement under 11 U.S.C. § 109(c)(2). Mot. at 4-5. However, in order to carry its burden to  
13 establish insolvency as required by chapter 9, the City must establish insolvency on a cash flow  
14 basis and that it has not “budgeted itself into insolvency,” matters that have been briefed  
15 extensively in this case. See Preliminary Objection of Assured Guaranty To Debtor’s Chapter 9  
16 Petition and Statement of Qualifications (“Preliminary Objection”) [Dkt. No. 482] at 8-15;  
17 Supplemental Objection at 6-26. The City cannot object to the Zielke Declaration and Zielke  
18 Report on the basis of relevance simply because the City chooses not to recognize what it must  
19 show to carry its legal burden, particularly because these materials directly address the sufficiency  
20 of the City’s evidence on insolvency. See, e.g., Zielke Declaration ¶ 4 (setting forth Zielke’s  
21 opinion that the City “budgeted itself into insolvency”); Zielke Report at 3, 17-23 (same).

22           The City makes four principal challenges to the Zielke Declaration and Zielke Report on  
23 relevance grounds: (i) that Zielke has conceded that the City is insolvent; (ii) that Zielke did not  
24 perform a cash flow projection; (iii) that “neither the Zielke Declaration or Report make any  
25 showing that the City did not believe in good faith that it had to file for chapter 9 relief as of June  
26 28, 2012;” and (iv) that Zielke materials “all but ignore” the City’s efforts to close its budget  
27 shortfalls. Mot. at 5-6. Each challenge is easily dismissed.

28           The claim that the Zielke Declaration and Zielke Report are not relevant because Zielke

1 “implicitly” does not challenge that Stockton is insolvent is nonsensical. Zielke clearly states just  
2 the opposite: she opines that Stockton has “budgeted itself into insolvency” by failing to take  
3 feasible action to avoid budget insolvency. See, e.g., Zielke Report at 3-5. Given that the  
4 Bankruptcy Code requires that, before a city can demonstrate it is insolvent, city leaders must  
5 behave with the necessary financial discipline and attempt to solve financial problems by making  
6 the difficult decision to cut services or raise fees, see, e.g., In re Town of Westlake, 211 B.R. 860,  
7 867 (Bankr. N.D. Tex. 1997), the claim that Zielke “implicitly” agreed that Stockton is insolvent is  
8 wrong. Indeed, this requirement is particularly important where, as here, a city seeks to  
9 demonstrate it is prospectively insolvent. Here, the City decided what “debts” it would incur over  
10 the next fiscal year and could essentially ensure that it would incur enough debts to be able to meet  
11 the prospective insolvency test. The City’s assumptions and decisions therefore must be  
12 scrutinized in determining insolvency to avoid the potential for abuse of the bankruptcy process.  
13 Moreover, Zielke determines that the City cannot verify its claims of cash flow insolvency because  
14 it cannot prepare basic cash flow statements or projections. Zielke Report at 8-10. Of course, the  
15 fact that the City’s records are unreliable and were inadequate to prepare a cash flow projection,  
16 Zielke Dep. at 115:15-117:5, Jan. 31, 2013, is an issue relevant to determining whether the City  
17 meets the insolvency requirement of section 109(c)(3) of the Bankruptcy Code. A key point  
18 highlighted by Zielke’s work is that the City cannot demonstrate its cash flow insolvency; her  
19 inability to prepare such a projection for inclusion in the Zielke Report due to the problems with  
20 the City’s own financial information is nothing more than a red herring. If anything, it underscores  
21 the unreliable state of the City’s financial records.

22 The City is also incorrect in asserting that Zielke’s testimony is irrelevant to this Court’s  
23 determination of the City’s good faith filing requirements. “A municipal debtor must also  
24 seriously explore alternative avenues to bankruptcy before it can file in good faith. See  
25 Preliminary Objection at 19-20; see also New York Off-Track Betting, 427 B.R. at 282. Zielke’s  
26 entire Alternative Model (as defined in the Zielke Report), for one, assists the Court with its  
27 assessment of this issue because it provides plausible and detailed alternatives to the decisions the  
28 City made before filing for bankruptcy. See, e.g., Zielke Report at 33-55. Accordingly, the City’s

1 final challenge that the Zielke Report is irrelevant because Zielke (i) “ignored” the substantial  
2 actions that the City did take and (ii) failed to consider the difficulties of implementing the  
3 recommendations of the Alternative Model, Mot. at 5-6, is misplaced. To be sure, Zielke’s expert  
4 opinion is that the City should have done more to address its fiscal problems. See Zielke Report at  
5 3-5. However, Zielke neither ignores the actions the City has taken nor fails to consider whether  
6 her recommendations in the Alternative Model are feasible. For example, every recommendation  
7 identifying “Opportunities to Increase Stockton’s General Fund Revenues,” Zielke Report at 35-44,  
8 is paired with an analysis of its feasibility for Stockton. These recommendations are helpful to the  
9 Court’s evaluation of Stockton’s good faith. That is, that the City’s criticism on these grounds has  
10 little to do with the relevance of the Zielke Report and speaks more to the reluctance of the City to  
11 make the choices necessary to avert insolvency.

12 **C. Zielke’s Specific Proposals For Increasing Revenues And Cutting Costs Satisfy**  
13 **the Daubert Reliability Requirements And Should Be Admitted.**

14 The City would have this Court decide in advance of trial broad-sweeping Daubert  
15 objections cataloging every possible criticism of nearly every line of expert testimony. This is not  
16 the litigation model envisioned by Daubert, which emphasizes a “flexible” inquiry regarding the  
17 admissibility of expert testimony to keep with the “liberal thrust” of the rules of evidence and their  
18 “general approach of relaxing traditional barriers to opinion testimony.” Daubert, 509 U.S. at 588,  
19 594 (citations and quotations omitted). What is required is a case-by-case analysis of the facts and  
20 data relied on by the expert to form his or her opinions, which “must be reasonably relied on by  
21 experts in the particular field.” United States v. Redlightning, 624 F.3d 1090, 1111-12 (9th Cir.  
22 2010) (citations and quotations omitted) (affirming exclusion of expert testimony because it was  
23 not reasonable for expert to rest his opinion on “advice of counsel rather than facts provided by a  
24 party or a witness”). In the Zielke Report, Zielke provides an assessment of the City’s financial  
25 controls and recordkeeping, an analysis of economic condition of the City (including the City’s  
26 revenues and spending projections), and a proposed Alternative Model budget based upon  
27 Government Finance Officers Association (“GFOA”) Best Practice Guidelines. Zielke is a former  
28 President of the GFOA, and her testimony is comprehensive, credible, and more than satisfies the

1 reliability requirement of Federal Rule of Evidence 702 on these subjects.

2 The City takes issue with multiple aspects of the Zielke Report, but in particular questions  
3 Zielke's reliance on voter surveys commissioned by the City in 2012, which the City interprets as  
4 showing very little voter support for any new revenue measures. Id. at 6-7. The City uses its  
5 interpretation of this data to attempt to undercut Zielke's entire Alternative Model budget, claiming  
6 that "Zielke's conclusion that the City could implement the revenue enhancement measures of the  
7 Alternative Model ... is purely speculative." Mot. at 6, 9. This view of the voter surveys is not a  
8 fair interpretation of their actual findings. The surveys indicate voter support for tax increases,  
9 even if measures are put forward while the City is in bankruptcy. See Ex. 106 at 2 (Report,  
10 Fairbank, Maslin, Maullin, Metz & Assoc. to R. Deis, Summary of Key Survey Findings from  
11 2012 Voter Survey, Sept. 26, 2012) (concluding that "[a] 3/4 cent sales tax measure remains viable,  
12 even if it is put forward while the City remains in bankruptcy"); see also Tod Newcombe, Tired of  
13 Service Cuts, California Cities Raise Taxes, *Governing*, Nov 21, 2012 (reporting success rates of  
14 referendums raising municipal taxes in jurisdictions throughout California). In any case, it is not  
15 credible to characterize the Zielke Declaration and Zielke Report as unreliable under Daubert  
16 because of a genuine disagreement over the likelihood of success of proposed tax increases.

17 It is likewise not credible to claim that the Zielke Declaration and Zielke Report are  
18 inherently unreliable because the City finds other ways in which to criticize them.<sup>2</sup> Far from being  
19 unreliable, Zielke's opinions and methods are based on GFOA's Best Practices Guidelines,  
20 research studies, and common industry practices. See, e.g., Zielke Report at 26; Zielke Dep. 218:3-  
21 10, Jan. 31, 2013. The Supreme Court recognized in Daubert that a factor that may be considered  
22 in assessing the reliability of an expert's proposed testimony is whether the principles on which the  
23 expert bases his opinions have been a "subject of peer review or publication." Daubert, 509 U.S. at

24 \_\_\_\_\_  
25 <sup>2</sup> The City claims that the Zielke Declaration and Zielke Report "eschew[] any consideration of the  
26 potential secondary effects of [the] proposed fee and tax increases"; failed to consider whether the  
27 new taxes and fees, as well as budget cuts and cost-reduction measures, were feasible; "provide no  
28 analysis as to whether [the proposed] measures would have taken effect in time to prevent the  
City's insolvency"; given department-by-department guidance as to budget cuts; and "fail[] to  
consider the administrative costs and delays inherent in enacting its various proposals." Mot. at 9-  
11.

1 592-94; see also Kumho, 526 U.S. at 143 (extending Daubert to cover technical knowledge under  
2 Rule 702). To be sure, the City does not seek to claim that the standards and studies relied upon by  
3 Zielke are inappropriate.

4 The City's criticisms of Zielke's Alternative Model, which is comprehensive in its review  
5 of the City's financial circumstances and in its recommendations to address the City's financial  
6 distress, are an appropriate subject for cross-examination, but are not a basis to exclude Zielke's  
7 testimony. Whether "mistakes" were allegedly made in interpreting data goes "more to the weight  
8 of the testimony, not to its admissibility." In re Trigem, 2010 Bankr. LEXIS 6274, at \*2-3  
9 (citations omitted). A Daubert analysis must focus "solely on principles and methodology, not on  
10 the conclusions they generate," Daubert, 509 U.S. at 595, and it does not act as a substitute for  
11 cross-examination at trial.

12 **D. Zielke's Expert Opinion Is Admissible As Independent Expert Analysis.**

13 The City next claims that Zielke offers no "evidence of her own" and engages in "no  
14 independent analysis" of the City's insolvency; that Zielke "can only speculate" as to the City's  
15 determination that it is insolvent; and that Zielke's "various references to the insufficiency of the  
16 City's evidence as to insolvency are an attempt to usurp the Court's fact-finding role and replace it  
17 with Zielke's own speculative opinion." Mot. at 12-13. These claims are demonstrably false.

18 Federal Rule of Evidence 702 requires that the testimony of experts be reliable and free of  
19 unsupported speculation and subjective beliefs. Daubert, 509 U.S. at 590. The Zielke Declaration  
20 and Zielke Report more than satisfy both requirements.

21 Zielke was engaged to analyze Stockton's financial condition, which in part entailed  
22 evaluating the City's claim of insolvency and its "historical, current and projected General Fund  
23 revenues and expenditures." See Zielke Report at 3. As discussed at length in the Zielke Report,  
24 the City's financial reporting is "seriously flawed and inherently unreliable," as evidenced by the  
25 City's inability to provide basic documents, such as its cash flow projections, and its multiple  
26 financial reporting failures. Id. at 8-12. It is on these records that the City bases its claim of  
27 insolvency. And, it is these same records from which Zielke draws her conclusions.

28 Drawing on her decades of experience in municipal finance, Zielke prepared a 60-page

1 report detailing her analysis of the City’s finances, in accordance with the GFOA Best Practices  
 2 Guidelines. On the basis of this analysis, Zielke determined that “the City’s own financial  
 3 information cannot be trusted,” Zielke Report at 3, and she identified millions of dollars in savings  
 4 and new revenues for the City—i.e., steps the City can take to balance its current and future year  
 5 budgets. See Zielke Decl. ¶ 6; see also Zielke Report at 33-55 (“Financial Budget Alternatives”).  
 6 In short, Zielke examined matters of fact central to determining whether the City’s claimed  
 7 insolvency is accurate. What the City claims is “speculation” on these points appears to be no  
 8 more than a difference of opinion. While the City may disagree with Zielke’s conclusions, there  
 9 are no grounds to exclude as “speculative” any of her testimony under Daubert.

10 **E. Zielke Makes No Legal Conclusions In The Zielke Declaration Or The Zielke**  
 11 **Report.**

12 The City has asked the Court to exclude portions of the Zielke Report on the grounds that  
 13 three statements within it constitute legal opinions. In particular, the City challenges the following:

- 14 • The City “has failed to produce reliable evidence” as to its financial position;
- 15 • Zielke was “unable to validate the City’s ... actual cash balances or budgeted  
 General Fund fund balances”; and
- 16 • “[T]he City made no effort to seek from CalPERS a reduction or modification of its  
 PERS liability.”

17 See Mot. at 12 n.8, 13; see also Zielke Report at 8, 10, 35. The City’s rationale for its first  
 18 two challenges is that Zielke has “render[ed] a conclusory legal opinion that the City has failed to  
 19 carry its evidentiary burden” to demonstrate insolvency. Mot. at 13. Its rationale for challenging  
 20 the third statement is even stranger: “While Zielke does not draw such a connection, *the statement*  
 21 *could be taken as implicitly supporting* Assured’s contention that the City has not satisfied the  
 22 negotiation requirement of section 109(c)(5) (B) ....” Mot. at 13 (emphasis added).

23 These challenges fail at their premise because the statements in question relate to issues of  
 24 fact, not law. That is, Zielke provided factual statements about (i) the City’s shoddy recordkeeping  
 25 and (ii) the City’s relationship with CalPERS (in order to explain the savings that could be realized  
 26 if CalPERS were to grant the City a hardship funding extension). The City’s point is well taken  
 27 that the facts referenced by Zielke (i.e., that the City’s records are a shambles and that the City  
 28

1 made no effort to seek a reduction or modification of its PERS liability) may bear on whether the  
2 City is legally insolvent or has satisfied the negotiation requirement of § 109(c)(5). However,  
3 Zielke herself provided no legal opinion on any of those subjects. Cf. United States v. Blount, 502  
4 F.3d 674, 680 (7th Cir. 2007) (distinguishing an expert’s statement of a legal conclusion and an  
5 expert’s provision of “concrete information against which to measure abstract legal concepts”). In  
6 addition, the Court is well positioned to make the legal judgments based on the opinions expressed  
7 by Zielke. In sum, the City’s request to exclude expert testimony on this basis is groundless.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the City’s Daubert Motion to exclude the expert testimony of  
10 Nancy L. Zielke should be denied.

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Respectfully submitted,

Dated: March 12, 2013

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