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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

**CITY OF STOCKTON'S OPPOSITION
 TO NATIONAL PUBLIC FINANCE
 GUARANTEE'S MOTION *IN LIMINE*
 #1**

Date: March 20, 2013
 Time: 9:30 a.m.
 Dept: C
 Judge: Hon. Christopher M. Klein

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1 On March 13, National Public Finance Guarantee, on behalf of the Objectors,¹ filed a
2 motion in limine (“Mot.”) seeking to exclude “any evidence or argument concerning the rationale
3 for the City of Stockton, California’s [“the City”] decision not to negotiate with or to seek to
4 impair the California Public Employees’ Retirement System [“CalPERS”] prior to the filing of
5 this chapter 9 petition.” Mot. 1; Dkt. No. 757. According to the Objectors, the City’s decision
6 during depositions to assert the attorney-client privilege with respect to certain communications
7 between City staff and its attorneys should prevent the City from introducing *any* evidence in
8 support of its decision not to impair employee pensions outside of chapter 9.

9 The fatal flaw in the Objectors’ logic is that the privileged communications which the City
10 refused to disclose during its depositions were not relied upon by the City in countering the
11 Objectors’ CalPERS arguments. The refusal to disclose Communication A during a deposition
12 does not preclude a party from subsequently introducing Exhibits B, C, and D at trial. It only
13 precludes the party from introducing Communication A. The Objectors’ motion in limine is thus
14 overbroad; while a motion to exclude evidence of “A” would have been proper, they cannot move
15 to exclude B, C, and D.

16 The Objectors have abundant, non-privileged information with which to test the City’s
17 “rationale” for not impairing pensions outside of chapter 9. Just on reply the City submitted 16
18 pages of briefing and hundreds of pages of evidence addressing that precise issue, all of which the
19 Objectors had the opportunity to test and none of which the City asserted was protected by
20 privilege. The Objectors also deposed the City’s Vice Mayor, the City Manager, the Police Chief
21 (twice), the City’s chief labor negotiator (twice), the Human Resources Director, the City’s
22 compensation consultant, and the City’s reply expert. While the City’s attorneys instructed City
23 witnesses not to disclose attorney-client communications within one specific context (“A”), it
24 offered full discovery of the material on which the City actually relied in its papers and on which
25 it will rely at trial (“B, C, and D”). Despite their posturing, the Objectors have not demonstrated
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28 ¹ (1) Assured Guaranty Corp. and its affiliate Assured Guaranty Municipal Corp. (together, “Assured”); (2) National Public Finance Guaranty Corporation (“National”); (3) Franklin Advisers, Inc. (“Franklin”); and (4) Wells Fargo Bank, National Association, as indenture trustee (“Wells Fargo”).

1 in any way that the City is using the attorney-client privilege as both a “shield” and a “sword.”
2 *See* Mot. 3. The Court should deny the motion.

3 **I. COMMUNICATIONS BETWEEN CITY STAFF AND ITS ATTORNEYS ARE**
4 **PRIVILEGED, AS ARE CLOSED SESSION COMMUNICATIONS.**

5 As explained in detail in the City’s June 29 Memorandum of Fact and Law [Dkt. No. 19]
6 and its Reply [Dkt. No. 707], on February 28, 2012, the City Council authorized the City
7 Manager to initiate the AB 506 process, a never-before-used precursor to the rarely used
8 municipal bankruptcy process. The City retained a team of legal and financial experts to guide it
9 through mediation and to assist in preparing for the largest city chapter 9 filing in United States
10 history. To steer this effort, the City Manager assembled a “Strategic Direction Team” (“SDT”),
11 which met once a week. The Strategic Direction Team consisted of the City Manager, the City
12 Attorney, a Deputy City Manager, the Chief Financial Officer, the Human Resources Director,
13 financial consultants, labor consultants, and numerous outside attorneys representing the City for
14 chapter 9 strategy and labor negotiations. *See, e.g.*, Transcript of Deposition of David N. Millican
15 taken October 31, 2012, p. 132:4-13.

16 In fact, the SDT involved three separate layers of attorneys. First, either the City Attorney
17 or a Deputy City Attorney attended every SDT meeting. Second, at least one attorney from
18 Orrick, the City’s restructuring counsel, attended every meeting. Third, attorneys from Renne
19 Sloan Holtzman Sakai LLP, the City’s labor counsel, attended many meetings. *Every* meeting
20 from spring 2012 included requests for and the provision of extensive legal advice on every
21 aspect of the City’s operations and chapter 9 strategy during the AB 506 process and then during
22 bankruptcy.

23 During discovery, the Objectors persistently sought to pierce the attorney-client privilege
24 and learn what the City and its attorneys discussed in SDT meetings. Mot. 7. Indeed, nearly
25 every example the Objectors cite as an example of the City’s unwillingness to provide
26 information reflected their own attorneys asking City witnesses about “conversations at the SDT
27 level as well as the closed council level.” Mot. 7 (attorney for National).

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1 City staff’s weekly conferences with counsel about legal strategy unquestionably
2 constitute attorney-client privileged communications. *See Maricopa Audubon Soc. v. United*
3 *States Forest Service*, 108 F.3d 1089, 1092 (9th Cir. 1997) (a public entity may assert attorney-
4 client privilege); *see also Ross v. City of Memphis*, 423 F.3d 596, 602 (6th Cir. 2005) (collecting
5 cases holding that municipal corporations may assert the attorney-client privilege). Closed City
6 Council sessions are likewise privileged. *See Cal. Gov’t Code* § 54963.

7 **II. REFUSAL TO DISCLOSE ITS PRIVILEGED CONVERSATIONS DOES NOT**
8 **PRECLUDE THE CITY FROM INTRODUCING, DIFFERENT, NON-**
9 **PRIVILEGED EVIDENCE AT TRIAL**

10 The crux of the Objectors’ complaint is that the City “on the one hand argu[ed] that it had
11 good reasons not to negotiate with or seek to impair CalPERS, while, on the other hand, asserting
12 privilege to prohibit the Objecting Parties from conducting fulsome discovery on the issue.” Mot.
13 8. Nor, they say, “can the City disclose some carefully chosen portion of its rationale – as it
14 attempts to do in its papers – while keeping the remainder under wraps.” *Id.* They then cite a
15 number of cases standing for the proposition, which the City does not dispute, that a party cannot
16 withhold evidence based on the attorney-client privilege and then introduce the *exact same*
17 evidence at trial. *Id.*

18 The problem for the Objectors is that they cannot and do not explain what attorney-client
19 privileged material the City intends to rely on at trial. They cryptically accuse the city of keeping
20 the “remainder” of its rationale “under wraps,” but they do not point to a declaration, witness list,
21 exhibit list, communication with counsel, or anything else, that might suggest that the City
22 suddenly intends to sandbag the Objectors at trial with testimony from or documents prepared in
23 conjunction with the SDT or closed City Council sessions. If such evidence existed, it might be
24 subject to exclusion. But it does not.

25 And such evidence would have *nothing* to do with the dozens of pages of briefing and
26 hundreds of pages of evidence—all non-privileged—that actually explain the City’s rationale for
27 not impairing pensions outside of chapter 9. The City was crystal clear in its Reply. It did not
28 impair chapter 9 pensions outside of chapter 9 because (1) doing so was effectively impossible
under governing state law; (2) even if it were possible, the City had a good faith belief that

1 reducing employee compensation and benefits to far below market levels would prompt employee
2 departures, particularly of police. It supported this belief through evidence presented by its City
3 Manager, its Police Chief, its chief labor consultant, and an expert witness. It also supported this
4 evidence with quotes from City Council members in open session. *See* City’s Reply [Dkt. No.
5 707], at 10-12. It did not rely on any evidence that would necessitate the violation of that
6 attorney-client privilege. Nor did it rely on any information which it did not produce or otherwise
7 make available for testing.

8 The goal of the Objectors’ motion in limine is to have the Court exclude this mountain of
9 (non-privileged) evidence based on the City’s unquestionably valid assertion of the attorney-
10 client privilege not over that evidence, but over a completely different class of communications
11 which the City has not attempted to offer into evidence. If the Court were to adopt the Objectors’
12 logic, the attorney-client privilege would be vitiated because using it would then prevent parties
13 from subsequently introducing any non-privileged evidence at trial. The Court should reject the
14 Objectors’ theory out of hand.

15 **III. THE OBJECTORS OBTAINED ALL THE DISCOVERY THEY NEEDED TO**
16 **TEST THE CITY’S GOOD FAITH**

17 The Objectors’ pleading is more like a tardy motion to compel than a motion in limine. If
18 the Objectors truly believed that the City’s assertion of the attorney-client privilege kept them
19 from discovering “crucial information at the heart of this eligibility dispute,” Mot. 3, the
20 appropriate remedy would have been for the Objectors—five months ago—to move to compel the
21 information they supposedly needed to prepare their substantive objections in December. That
22 would have allowed this issue to be decided long before trial, and given the parties the
23 opportunity to complete discovery with a ruling that resolved the issue. That the Objectors did
24 not reveals the hollowness of their protests now, 12 days before trial. The Objectors lacked no
25 “crucial information” in December with which to challenge the City’s assertion of the attorney-
26 client privilege and they lack no crucial information now. After sitting on their hands for months,
27 they now launch a sneak attack seeking without serious basis to knock out virtually all of the
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