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

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

Case No. 2012-32118  
 D.C. No. OHS-15  
 Chapter 9

**CITY OF STOCKTON'S OPPOSITION  
 TO MOTION OF FRANKLIN HIGH  
 YIELD TAX-FREE INCOME FUND  
 AND FRANKLIN CALIFORNIA HIGH  
 YIELD MUNICIPAL FUND TO  
 EXCLUDE TESTIMONY OF  
 MICHAEL CERA**

19 WELLS FARGO BANK, et al.  
 20 Plaintiffs,  
 21 v.  
 22 CITY OF STOCKTON, CALIFORNIA,  
 Defendant.

Adv. No. 2013-02315  
 Date: May 12, 2014  
 Time: 9:30 a.m.  
 Dept: Courtroom 35  
 Judge: Hon. Christopher M. Klein

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1 Pursuant to paragraph 45 of the Order Governing The Disclosure And Use Of Discovery  
2 Information And Scheduling Dates Related To The Trial In The Adversary Proceeding And Any  
3 Evidentiary Hearing Regarding Confirmation Of Proposed Plan Of Adjustment (“Scheduling  
4 Order”), as modified by paragraph 17 of the Order Modifying Order Governing The Disclosure  
5 And Use Of Discovery Information And Scheduling Dates Related To The Trial In The  
6 Adversary Proceeding And Any Evidentiary Hearing Regarding Confirmation Of Proposed Plan  
7 Of Adjustment (“Modifying Order”) (collectively, the “Orders”), the City of Stockton, California  
8 (“City”) hereby submits the following Opposition to the Motion of Franklin High Yield Tax-Free  
9 Income Fund And Franklin California High Yield Municipal Fund To Exclude Testimony Of  
10 Michael Cera (the “Exclusion Motion” filed by “Franklin”)<sup>1</sup>:

11 **I. INTRODUCTION**

12 Franklin’s Exclusion Motion improperly seeks to strike the testimony contained in the  
13 Direct Testimony Declaration Of Michael Cera Rebutting Expert Report Of Frederick E. Chin  
14 (the “Declaration” of “Cera”). Cera is an employee of SMG, Inc., the company that manages the  
15 Oak Park Ice Arena, and is familiar with the physical condition of the Ice Arena. The Cera  
16 Declaration contains testimony that rebuts and impeaches the expert report of Frederick Chin<sup>2</sup>  
17 (“Chin”) by presenting facts and evidence that the Chin Report fails to adequately consider in its  
18 valuation of the Oak Park Ice Arena. As rebuttal and impeachment testimony, the Declaration  
19 was expressly exempted from all disclosure deadlines in the Orders, as agreed to by the parties.  
20 As such, this testimony did not have to be disclosed until it was presented at trial. Yet Franklin  
21 now faults the City for offering this testimony three weeks early.

22 The Exclusion Motion ignores the obvious nature and purpose of Cera’s testimony and  
23 seeks to have it excluded in order to avoid revealing the obvious deficiencies in Chin’s testimony  
24 and in the Chin Report. But Franklin’s arguments are baseless. Cera’s testimony is offered for  
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26 <sup>1</sup> Because the content of the Exclusion Motion mirrors the content of the Motion Of Franklin High Yield Tax-Free  
27 Income Fund And Franklin California High Yield Municipal Fund To Exclude Testimony of Tom Nelson (“Nelson  
28 Exclusion Motion”), the arguments made herein closely mirror the arguments made in the City’s Opposition to the  
Nelson Exclusion Motion, which is being filed concurrently.

<sup>2</sup> Submission By Franklin High Yield Tax-Free Income Fund And Franklin California High Yield Municipal Fund Of  
Expert Report Of Frederick E. Chin, Ex. 1 (the “Chin Report”).

1 rebuttal and impeachment purposes, and was submitted entirely in accord with the Orders. The  
2 Exclusion Motion should be denied.

3 **II. ARGUMENT**

4 **A. Cera's Testimony Is Offered To Rebut And Impeach Chin's Testimony.**

5 Cera's testimony is offered for the specific purpose of rebutting and impeaching Chin's  
6 testimony, both as contained in the Chin Report and such testimony as he may offer at trial.

7 Specifically, Cera's testimony provides probative facts, based on Cera's personal knowledge, that  
8 undermine the methodologies utilized in the Chin Report, as well as Chin's conclusions of value  
9 for the Oak Park Ice Arena.

10 For instance, the Chin Report makes passing reference to "deferred maintenance and  
11 upkeep" at the Oak Park Ice Arena, but makes no attempt to quantify these expenses in his final  
12 valuation of the property. *See* Chin Report, at 19 (citing only parking lot resurfacing, bathrooms,  
13 and "mechanical system upgrades"). Cera's testimony provides a detailed list of necessary  
14 capital improvements and deferred maintenance at the Oak Park Ice Arena. Declaration ¶¶ 4-8.  
15 This information provides necessary background information that rebuts Chin's assertion that  
16 "some capital improvements to enhance appeal and lower costs" might create "revenue  
17 enhancement possibilities" at the property. Chin Report, at 43 (emphasis added).

18 This testimony is textbook rebuttal and impeachment evidence. Black's Law Dictionary  
19 defines rebuttal evidence as "evidence offered to disprove or contradict the evidence presented by  
20 an opposing party," while impeachment evidence is "[e]vidence used to undermine a witness's  
21 credibility."<sup>3</sup> This is exactly the purpose of the Declaration. Cera's testimony directly impeaches  
22 Chin's credibility and rebuts his conclusions by presenting facts<sup>4</sup> that the Chin Report did not  
23 adequately consider.

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26 <sup>3</sup> Black's Law Dictionary 637, 639 (9th ed. 2009).

27 <sup>4</sup> The vast majority of Cera's testimony is purely factual. What little there is in the way of opinion qualifies as lay  
28 opinion testimony that is based on Cera's first-hand knowledge and experience in managing the Oak Park Ice Arena.  
*See* Fed. R. Evid. 701 ("a lay opinion is one that is (a) rationally based on the witness's perceptions; (b) helpful to  
understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or  
other specialized knowledge"). Such lay opinion testimony is also offered for rebuttal and impeachment purposes.

1           **B. Cera’s Testimony Is Not Only Timely, But Early.**

2           Because the Declaration is offered for the purpose of rebutting and impeaching Chin’s  
 3 testimony and the Chin Report, it is timely under the Orders. In fact, the City did not have to  
 4 identify Cera or submit Cera’s testimony *until trial*. Rebuttal and impeachment witnesses were  
 5 expressly exempted from the disclosure requirements cited by Franklin. The Scheduling Order,  
 6 agreed to by the parties and signed by the Court, states: “The requirement of advance  
 7 identification of witnesses and production of exhibits *does not apply* to witnesses and exhibits  
 8 presented for purposes of impeachment or rebuttal by any Party.” Scheduling Order ¶ 42  
 9 (emphasis added). This exception is reflected throughout the Scheduling Order. Scheduling  
 10 Order ¶ 36; Modifying Order ¶ 5 (“[E]ach Party intending to present evidence shall serve on each  
 11 other Party a list of fact and expert witnesses (other than rebuttal and impeachment witnesses)  
 12 whose testimony the Party may submit at the Trial or Hearing.”).<sup>5</sup> Moreover, the Scheduling  
 13 Order makes clear that rebuttal and impeachment evidence may also be presented by oral  
 14 testimony at trial. Scheduling Order ¶ 35 (“[E]vidence at the Trial and Hearing may be submitted  
 15 (a) in written form by declaration, consistent with the Alternate Direct Testimony procedure  
 16 provided for in Local Rule 9017-1 . . . , [and/or] (b) in the form of oral testimony (for expert,  
 17 *rebuttal and impeachment* witnesses) . . . .”) (emphasis added).

18           The Orders could not make it any clearer that rebuttal and impeachment witnesses and  
 19 evidence were not required to be identified in advance of trial. Nevertheless, the City, as it has  
 20 done throughout these proceedings, chose to be more open and forthcoming than it was required  
 21 to be. Rather than spring “surprise” rebuttal and impeachment witnesses at the trial and  
 22 Evidentiary Hearing – which it was entitled to do under the Orders – the City presented Cera’s  
 23 testimony along with its other direct testimony declarations well ahead of time. Franklin’s  
 24 constant refrain that the City is “[lying] in wait” and “hid[ing] the ball” to prejudice Franklin is

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 28 <sup>5</sup> The same exception is made for exhibits to be used for impeachment or rebuttal. *See* Scheduling Order ¶ 37;  
 Modifying Order ¶ 6.

1 thus completely meritless.<sup>6</sup> Franklin continues to try to cast the City as insidious, when in fact the  
2 City has made great efforts to be as candid and transparent as possible.

3 **C. The Testimony Of Other Witnesses Does Not Bar Cera’s Testimony.**

4 Franklin makes the strained argument that Cera cannot offer rebuttal testimony about the  
5 Oak Park Ice Arena because another witness, Susan Wren, is also offering testimony about the  
6 Oak Park Ice Arena. Exclusion Motion, at 6-7. This argument appears to be based on the  
7 completely unsupported notion that only one witness can speak to any particular topic.  
8 Unsurprisingly, Franklin fails to cite any legal source for this dubious principle. It borders on  
9 belaboring the obvious to point out that the testimony of multiple witnesses may overlap, and that  
10 there is no rule that prevents more than one witness from speaking to the same topic. Put simply,  
11 the fact that Susan Wren has submitted testimony relating to the Oak Park Ice Arena in the City’s  
12 case in chief has no impact whatsoever on Cera’s ability to offer testimony that rebuts and  
13 impeaches Chin.

14 **D. Cera Has Not Offered Expert Testimony.**

15 Franklin also repeatedly attempts to cast the Declaration as a rebuttal expert report, or as  
16 inextricably tied to the rebuttal expert report of Ray Smith, in an attempt to apply deadlines for  
17 expert witnesses to Cera. *See, e.g.*, Exclusion Motion, at 8 (claiming that because Ray Smith, a  
18 City rebuttal expert, references Cera’s testimony, such testimony is “a part of Mr. Smith’s  
19 report.”). Neither portrayal is accurate. The fact that an expert incorporates the testimony of a  
20 fact witness does not make the underlying factual testimony an expert opinion. Nor does the fact  
21 that Chin himself is an expert render factual testimony that contradicts his conclusions “expert” in

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27 <sup>6</sup> In fact, Franklin made clear that it was aware that expert, rebuttal, and impeachment witnesses could offer live  
28 testimony at trial when it stated in its Supplemental Objection that the opinion of its expert, Moore, “will be developed fully at the confirmation hearing.” Supplemental Objection Of Franklin High Yield Tax-Free Income Fund And Franklin California High Yield Municipal Fund To Confirmation Of First Amended Plan Of Adjustment Of Debts Of City Of Stockton, California (November 15, 2013), at 13 n. 30.

1 nature.<sup>7</sup> Cera’s testimony stands on its own, is based on his personal knowledge from managing  
2 the Oak Park Ice Arena, and does not require any specialized or technical knowledge.

3 **E. There Is No Improper Prejudice To Franklin.**

4 Franklin asserts that allowing Cera to testify to the capital improvements and deferred  
5 maintenance needed at the Oak Park Ice Arena will somehow “prejudice” Franklin. This is  
6 plainly not the case. First, as the City has not only complied with, but exceeded its obligations  
7 under the Orders, Franklin is actually better off than it would otherwise be. Second, and even  
8 more telling, Franklin’s claim of prejudice completely ignores that all of the information  
9 contained in Cera’s declaration was readily available to Franklin. For one, Cera’s role at the Oak  
10 Park Ice Arena was no secret. If Franklin had wished to depose Cera, who manages the Ice Arena  
11 property, about any aspect of the Oak Park Ice Arena, it had every opportunity to do so.  
12 Meanwhile, Chin, who purports to be an expert in ice arena valuation, chose not to speak with  
13 anyone at the arena he was appraising. Thus, despite the fact that the Chin Report references the  
14 deferred maintenance required at the Oak Park Ice Arena, neither Chin nor Franklin made any  
15 attempt to interview the person most familiar with the present state of the Oak Park Ice Arena  
16 about these issues. Franklin’s claim of prejudice is thus not a result of any violation of the  
17 Orders, but rather of Franklin’s own litigation decisions.

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26 <sup>7</sup> Fact witness testimony may be used to rebut expert testimony. *United States v. Shackelford*, 494 F.2d 67, 68, 75  
27 (9th Cir. 1974) (holding that the government could rely entirely on lay witnesses with percipient knowledge to rebut  
28 the defendant’s expert); *United States v. Bennett*, 908 F.2d 189, 195 (7th Cir. 1990) (government was not required to  
rebut expert testimony with its own expert because “it may accomplish the same result by presenting lay witnesses  
and other evidence and by undermining the defense expert’s credibility through cross-examination.”); *United States  
v. Mota*, 598 F.2d 995, 999 (5th Cir. 1979) (jury may find expert testimony “adequately rebutted by the observations  
of mere laymen”).

