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Jeffrey E. Bjork (Cal. Bar No. 197930)
Christina M. Craige (Cal. Bar No. 251103)
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600
Email: jbjork@sidley.com
ccraige@sidley.com

Guy S. Neal (Admitted *Pro Hac Vice*)
Alan C. Geolot (Admitted *Pro Hac Vice*)
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
Email: gneal@sidley.com
ageolot@sidley.com

Attorneys for Assured Guaranty Corp. and
Assured Guaranty Municipal Corp.

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 ROBERT C.**
) **BOBB**
)
) 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 Robert C.
4 Bobb Pursuant To Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc.
5 (the “Motion”) [Dkt. 705]. Assured requests that the Court deny the City’s Motion because Bobb is
6 a properly qualified expert whose opinions, as offered in his Declaration and Expert Report (the
7 “Bobb Declaration” and “Bobb Report,” respectively) [Dkt. Nos. 641 & 642], meet the requirements
8 of Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579
9 (1993) (“Daubert”) and will assist the Court in understanding the issues in this case.

10 I. INTRODUCTION

11 Assured filed the Declaration and Expert Report of Robert Bobb with its December 14, 2012
12 Supplemental Objection to Stockton’s Chapter 9 Petition and Statement of Qualifications
13 (“Supplemental Objection”) [Dkt. No. 638]. The Bobb Report evaluates the City’s financial
14 condition and analyzes the steps that the City took, and should have taken, to respond to its financial
15 difficulties. In particular, drawing on more than 40 years of executive management experience in
16 both the private and public sectors, Bobb examined the City’s operational decisions in response to
17 the City’s financial distress and its failure to take steps to cut costs and generate new revenue prior to
18 seeking relief in Chapter 9. These matters of fact are at the center of the City’s financial solvency
19 and its purported good faith decision to file for bankruptcy for purposes of 11 U.S.C. § 921(c).

20 In its Motion, the City moves this Court to strike the entirety of the Bobb Declaration and
21 Bobb Report, or, in the alternative, as described below, to strike portions of the Bobb Declaration
22 and Bobb Report as unreliable. Mot. at 10:10-18. The City’s Motion should be denied. There is no
23 need for the Court to reach these issues prior to a hearing on the merits, given that the Court will act
24 as the factfinder in this case. That alone justifies denial of the City’s Motion. Clearly, the substance
25 of the Bobb Declaration and Bobb Report is relevant to the Court’s evaluation of the City’s claim of
26 insolvency under 11 U.S.C. § 109(c)(2). Similarly, the City’s argument that Bobb offered a legal
27 conclusion is nonsensical, and its criticisms of the reliability of Bobb’s conclusions are unfounded.

1 **II. LEGAL STANDARD**

2 Federal Rule of Evidence 702¹ permits “a witness who is qualified as an expert by
3 knowledge, skill, experience, training, or education” to give opinion testimony, provided that the
4 expert’s specialized knowledge “will help the trier of fact to understand the evidence or to determine
5 a fact in issue,” and further provided that “the testimony is based on sufficient facts or data . . . [and]
6 is the product of reliable principles and methods[,] and the expert has reliably applied the principles
7 and methods to the facts of the case.” Fed. R. Evid. 702; Daubert, 509 U.S. at 597 (establishing a
8 “gatekeeping role” for courts regarding the admissibility of expert testimony); see also Kumho Tire
9 Co. v. Carmichael, 526 U.S. 137 (1999). If an expert’s testimony is grounded in the expert’s area of
10 specialized knowledge, based on sound data and reliable methodology, and soundly applied to the
11 facts of the case, the testimony should be admitted. Daubert, 509 U.S. at 597; see also Daubert v.
12 Merrell Dow Pharms., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995) (“Daubert II”).

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

21 **III. ARGUMENT**

22 As demonstrated below, the City’s arguments to set aside the Bobb Declaration and Bobb
23 Report act only to shield the Court from reliable and relevant expert testimony. They should be
24 rejected.

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¹ The Federal Rules of Evidence are made applicable to cases under the Bankruptcy Code by Rule of
28 Bankruptcy Procedure 9017.

1 **A. Excluding All Or Part Of The Bobb Declaration And Bobb Report Is**
2 **Unnecessary And Premature.**

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

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

23 Further, bankruptcy courts when evaluating eligibility routinely admit and consider evidence
24 submitted by objecting parties as to whether a municipal debtor pursued alternatives to bankruptcy
25 and whether particular options were available and feasible for a municipality to pursue. See, e.g., In
26 re City of Vallejo, 2008 Bankr. LEXIS 4433, at *5-59 (Bankr. E.D. Cal. Sep. 5, 2008) (considering
27 in detail numerous options proposed by the objector’s expert for revenues the city should have
28 pursued or cuts it should have made, evaluating the relative credibility of the parties’ witnesses after

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

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

23 **B. Bobb’s Expert Testimony Is Relevant And Will Assist The Court In Resolving**
24 **Whether The City Is Eligible For Relief Under Chapter 9.**

25 The City has attempted to portray the Bobb Declaration and Bobb Report as wholly
26 irrelevant to the core issues presented in this case. Rule 702 requires that the expert’s specialized
27 knowledge “help the trier of fact to understand the evidence or to determine a fact in issue.” In other
28 words, the expert’s testimony must be relevant. Daubert, 509 U.S. at 591 (“This condition goes

1 primarily to relevance.”). Of course, “[e]xpert testimony which does not relate to any issue in the
2 case is not relevant and, ergo, non-helpful.” *Id.* (quoting 3 Weinstein & Berger ¶ 702[02], p. 702-
3 18). In this case, Bobb has offered expert opinion on matters that “logically advance[] a material
4 aspect of” Assured’s eligibility objections. *Daubert II*, 43 F.3d at 1315. In particular, the Bobb
5 Report addresses matters relevant to determining whether the City has met the statutory
6 requirements of insolvency under 11 U.S.C. § 109(c)(2), and whether the City filed its petition in
7 good faith under 11 U.S.C. § 921(c).

8 The City claims that the Bobb Declaration and Bobb Report cannot support his ultimate
9 conclusion that the City “cannot make the required showing that it was insolvent when it filed for
10 chapter 9 relief at the end of June 2012.” Mot. at 4:26-29 (quoting Bobb Dec. ¶ 9; Bobb Report at 2-
11 3). However, in determining whether the City meets the Bankruptcy Code’s definition of
12 insolvency, this Court must decide whether the City “deliberately budget[ed and] spen[t] itself into
13 insolvency ... when other realistic avenues and scenarios [were] possible.” *In re Town of Westlake*,
14 211 B.R. 860, 864 (Bankr. N.D. Tex. 1997). Essentially, before a city can demonstrate that it is
15 insolvent, it must first prove that it attempted to solve its financial problems by taking the difficult
16 steps of cutting services and raising revenue. *See id.* at 867 (dismissing Chapter 9 petition because
17 the debtor had not first explored service cuts). This is particularly the case when the City itself is
18 picking and choosing which debts it makes itself liable for and renders itself unable to meet for the
19 purposes of demonstrating prospective insolvency. The Bobb Declaration and Bobb Report are
20 helpful and relevant to this determination. The Bobb Report explicitly examines the very issue
21 central to the insolvency analysis: whether the City “engaged in the hard work of deciding on the
22 City’s priorities in the provision of services—what were ‘Must Have’ and what were ‘Nice to Have’
23 services.” Bobb Report at 29.

24 Furthermore, Bobb’s testimony is relevant to whether the City acted in good faith in filing its
25 petition. Before a municipal debtor can file in good faith for purposes of 11 U.S.C. § 921(c), it must
26 pursue alternative avenues to bankruptcy. *See N.Y. Off-Track Betting*, 427 B.R. at 282; 6 COLLIER
27 ON BANKRUPTCY ¶ 921.04[2]. Bobb’s testimony shows the ways that the City “has not followed the
28 steps cities in crisis should and typically do take....” Bobb Report at 22-25, 30. To be sure, the City

1 argues that Bobb failed to “consider whether the City had good reason not to take the extreme steps
2 suggested in the Bobb Report.” Mot. 6: 3-4. Clearly, however, this argument is unrelated to the
3 admissibility of Bobb’s testimony and instead addresses the weight the Court should assign to this
4 evidence—a matter properly relegated to the trial stage.

5 **C. Bobb’s Fact Statements Concerning The City’s Failure To Seek Concessions**
6 **from CalPERS Are Proper And Admissible.**

7 The City argues that the portion of the Bobb Report discussing the City’s “failure to engage
8 its largest creditor, CalPERS, in discussions about reducing the City’s outstanding pension
9 obligations” is inadmissible as a legal conclusion, to the extent that the testimony “is meant to apply
10 to the City’s satisfaction of its negotiation requirement.” Mot. at 6:14-19. The City objects
11 specifically to the statement’s appearance of “implicit[] support [for] Assured’s contention that the
12 City has not satisfied the negotiation requirement of section 109(c)(5)(B).” The City’s argument is
13 meritless.

14 Assured and the other Objecting Parties² argue that the City’s failure to seek concessions
15 from CalPERS is relevant to determining whether the City satisfied the negotiation requirement of
16 § 109(c). However, Bobb made no such legal conclusion. The Bobb Report simply highlights the
17 City’s choice not to negotiate with CalPERS and to wait to seek a hardship extension until
18 November 2012 as demonstrative of the City’s failure to exhaust all options in addressing its
19 financial crisis. Bobb Report at 24-25. Bobb’s statements on this subject were made in the context
20 of his discussion of the need for a city in distress to “put all options on the table”—which would
21 include holding discussions with the City’s largest creditor. This was not an improper “opinion on
22 an ultimate issue of law,” Hangarter, 373 F.3d at 1016, but rather a description of steps that a city in
23 financial straits should take. As such, Bobb’s proposed steps described only fact—that the City did
24 not negotiate with CalPERS, which was a significant step to address its financial problems that the
25 City failed to take.

26 _____
27 ² The “Objecting Parties” refers collectively to Assured, National Public Finance Guarantee
28 Corporation, Franklin High Yield Tax-Free Income Fund and Franklin California High Yield
Municipal Fund, and Wells Fargo Bank, National Association, in its role as indenture trustee.

1 **D. Bobb’s Expert Opinions As To Specific Proposals For Increasing Revenues And**
 2 **Cutting Costs Satisfy the Daubert Reliability Requirements.**

3 The City claims that Bobb’s recommendations for generating additional revenue and cutting
 4 expenses are inadmissible because these opinions do not meet the reliability standard of FRE 702.³
 5 See Mot. at 7-8. In particular, the City accuses Bobb of providing merely a “laundry list of tax
 6 measures” and “insist[ing]” on cuts without considering their feasibility. As described below, this
 7 statement ignores the substance of the Bobb Report, in particular the Alternative Model, which
 8 serves as the backbone of Bobb’s opinions and is based on Bobb’s extensive experience with cities
 9 in financial distress.

10 Under Daubert, “[t]he test for reliability ... ‘is not the correctness of the expert’s conclusions
 11 but the soundness of his methodology.’” Stilwell v. Smith & Nephew, Inc., 482 F.3d 1187, 1192
 12 (9th Cir. 2007) (quoting Daubert II, 43 F.3d at 1318). Although expert testimony should not include
 13 “unsupported speculation and subjective beliefs,” Guidroz-Brault v. Mo. Pacific R. Co., 254 F.3d
 14 825, 829 (9th Cir. 2001), objections to the inadequacies of a study usually “are more appropriately
 15 considered an objection going to the weight of the evidence rather than its admissibility.”
 16 Hemmings v. Tidyman’s Inc., 285 F.3d 1174, 1188 (9th Cir. 2002).

17 The Bobb Report contains ample support to meet the reliability standard of Rule 702.
 18 Guidroz-Brault, 254 F.3d at 830-31 (requiring that expert testimony be “sufficiently founded on
 19 facts” under Rule 702). The Bobb Report is based upon the same opinion poll surveys relied upon
 20 by the City, Mot. at 7:13-15, a fair reading of which indicates voter support for tax increases, even if
 21 measures were put forward while the City is in bankruptcy. Bobb Report at 32; see also Ex. 106 at 2
 22 (Report, Fairbank, Maslin, Maullin, Metz & Assoc. to R. Deis, Summary of Key Survey Findings
 23 from 2012 Voter Survey, Sept. 26, 2012) (concluding that “[a] 3/4 cent sales tax measure remains

24 ³ The City specifically claims that the Bobb Report is deficient because it fails (i) to establish that
 25 Stockton’s residents would have passed measures enacting new tax measure and fees; (ii) to
 26 undertake any analysis of the ramifications of the proposed tax increases; (iii) to determine whether
 27 the proposed tax increases would have prevented the City’s insolvency; (iv) to provide an analysis of
 28 the impact of reducing department budgets by 15%; (v) to discuss the plausibility of lowering
 employee and retiree benefits; (vi) to investigate the feasibility of consolidating or privatizing some
 City services; and (vii) to consider the administrative costs and delays inherent in enacting the Bobb
 Report’s various proposals. Id.

1 viable, even if it is put forward while the City remains in bankruptcy”). And, although the City
2 criticizes Bobb’s failure to conduct his own surveys, see Mot. at 7, the City ignores Bobb’s outside
3 research highlighting the success of tax proposals elsewhere in California, which together with the
4 polling data suggests a strong likelihood that Stockton voters would have approved new taxes, even
5 while the City sought relief in bankruptcy. Bobb Report at 34 (noting the high passage rates of tax
6 increases and local revenue measures throughout California); see also Tod Newcombe, Tired of
7 Service Cuts, California Cities Raise Taxes, GOVERNING, Nov 21, 2012.

8 Finally, the City ignores altogether the justifications for both tax and fee increases and
9 budget cuts outlined in the Alternative Model, which answers the remaining evidentiary complaints
10 lodged by the City. See Expert Report of Nancy L. Zielke (“Zielke Report”) at 33-56; Bobb Report
11 at 31 (incorporating the Alternative Model). A cursory review of both the Alternative Model and the
12 Bobb Report—which are based on the Best Practice Guidelines⁴ of the Government Finance Officers
13 Association (“GFOA”), id. at 23—demonstrates that the Bobb Report is “sufficiently founded on
14 facts.” Guidroz-Brault, 254 F.3d at 830-31. Moreover, the Bobb Report is reliable, as it explains the
15 bases for both cost reductions and increased revenue sources. E.g., Bobb Report at 36 (identifying
16 Emergency Service Cost Recovery fees, common in several California cities and generating
17 approximately \$1.6 million annually that does not require voter approval); see also Zielke Report at
18 40-44 (identifying multiple revenue opportunities, including privatization of underutilized assets);
19 Bobb Report at 44 (proposing to end marina debt service payments and subsidies, \$732,000 in
20 savings). Accordingly, the City’s challenge to the Bobb Report’s reliability is unfounded. The
21 City’s arguments go instead to the weight this Court should afford Bobb’s conclusions at trial, not
22 the admissibility of Bobb’s opinions, as set forth in the Bobb Declaration and Bobb Report. As the
23 Supreme Court itself has cautioned, a Daubert analysis must focus “solely on principles and
24 methodology, not on the conclusions they generate.” Daubert, 509 U.S. at 595. Although the City’s
25 attacks on Bobb’s conclusions may be appropriate for cross-examination, they do not provide any

26 ⁴ Bobb’s reliance on the GFOA standards is noteworthy because an important factor in assessing the
27 reliability of an expert’s proposed testimony is whether the principles on which the expert bases his
28 opinions have been a “subject of peer review or publication.” Daubert, 509 U.S. at 592-94; see also
Kumho, 526 U.S. at 143 (extending Daubert to cover technical knowledge under Rule 702).

1 valid basis to exclude his testimony.

2 **IV. CONCLUSION**

3 For the foregoing reasons, the City's Daubert Motion to exclude the expert testimony of
4 Robert C. Bobb should be denied.

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Respectfully submitted,

Dated: March 12, 2013

SIDLEY AUSTIN LLP

By: /s/ Christina M. Craige

Jeffrey E. Bjork (Cal. Bar No. 197930)
Christina M. Craige (Cal. Bar No. 251103)
Guy S. Neal (Admitted *Pro Hac Vice*)
Alan C. Geolot (Admitted *Pro Hac Vice*)
Attorneys for Assured Guaranty Corp.
and Assured Guaranty Municipal Corp.