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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 PORTION OF TESTIMONY  
 OF RAYMOND SMITH**

19 WELLS FARGO BANK, et al.  
 20 Plaintiffs,  
 21 v.  
 22 CITY OF STOCKTON, CALIFORNIA,  
 23 Defendant.  
 24

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”, together 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 Portion Of  
10 Testimony Of Raymond Smith (the “Exclusion Motion” filed by “Franklin”):

11 **I. INTRODUCTION**

12 Franklin argues that the City’s submission of the Direct Testimony Declaration of Ray  
13 Smith<sup>1</sup> is an improper late supplement to Smith’s expert rebuttal report.<sup>2</sup> To the contrary, the  
14 Declaration is an *early* offer of testimony that is specifically provided for in the Scheduling and  
15 Modifying Orders agreed to by the parties and signed by the Court. Pursuant to those Orders,  
16 expert testimony may be offered both by direct testimony declaration and by live testimony at the  
17 trial and evidentiary hearing. Franklin plainly understands this to be the case, as it has overtly  
18 stated that its own experts will provide additional detailed testimony at trial. Moreover, contrary  
19 to Franklin’s assertions, the Declaration does not raise any new issues. Each of the items  
20 discussed in the Declaration was already raised in the Smith Report, the Chin Report<sup>3</sup>, and/or the  
21 deposition of Frederick Chin. The Declaration is entirely proper, and in fact benefits the Court  
22 and Franklin by providing a preliminary synopsis of Smith’s testimony weeks before trial.  
23 Franklin’s attempt to cast Smith’s testimony as inadmissible is belied by the plain language of the  
24 Scheduling and Modifying Orders, and Franklin’s own plans to submit expert testimony at trial.

25  
26 <sup>1</sup> Direct Testimony Declaration of Ray Smith In Support Of City’s Confirmation Of First Amended Plan For The  
Adjustment Of Debts Of City Of Stockton, California (November 15, 2013) (the “Declaration”).

27 <sup>2</sup> Submission By The City Of Stockton Of Rebuttal Expert Report Of Raymond F. Smith (Dkt. No. 43), Ex. A (the  
“Smith Report”)

28 <sup>3</sup> Submission By Franklin High Yield Tax-Free Income Fund And Franklin California High Yield Municipal Fund Of  
Expert Report Of Frederick E. Chin (Dkt. No. 26), Ex. 1 (the “Chin Report”).

1 **II. ARGUMENT**

2 **A. The Declaration Is Timely And Proper Under The Scheduling Order.**

3 The Scheduling Order expressly allows for expert witnesses to offer testimony at trial both  
 4 by direct testimony declaration and orally at trial. Scheduling Order ¶ 35 (“[E]vidence at the  
 5 Trial and Hearing may be submitted (a) in written form by declaration, consistent with the  
 6 Alternate Direct Testimony procedure provided for in Local Rule 9017-1 . . . [and/or] (b) in the  
 7 form of oral testimony (for expert, rebuttal and impeachment witnesses).”). Franklin is clearly  
 8 aware of this provision in the Scheduling Order, as evidenced by its own stated intention to have  
 9 its expert witnesses provide additional testimony at trial. *See, e.g.*, Supp. Obj.,<sup>4</sup> at 13 n. 30  
 10 (stating that the expert opinions of Charles Moore “will be developed fully at the confirmation  
 11 hearing”). However, unlike the City, which has provided Franklin and the Court with a preview  
 12 of its expert’s testimony by submitting a direct testimony declaration, Franklin submitted no  
 13 direct testimony declarations, and has made clear that it intends to wait until trial to present its  
 14 expert testimony. So while Franklin accuses the City of preventing Franklin from preparing a  
 15 rebuttal to said testimony, Franklin is actually the party lying in wait. This is Franklin’s  
 16 prerogative under the Scheduling and Modifying Order, but it cannot be heard to complain on the  
 17 basis that the City provided its testimony *early*.

18 Franklin also complains that Smith was not listed on the City’s preliminary or “finalized”  
 19 witness lists, and that Smith was “unknown to Franklin until the City issued the Smith Report on  
 20 the evening of April 4, 2014.” Exclusion Motion, at 3. Of course, Franklin notably omits the fact  
 21 that rebuttal witnesses were expressly exempted from inclusion on said witness lists, and that the  
 22 first deadline in the Scheduling and Modifying Orders related to rebuttal experts *was* the  
 23 submission of rebuttal expert reports. Scheduling Order ¶ 36 and Modifying Order ¶ 5 (“[E]ach  
 24 party intending to present evidence shall serve on each other Party a list of fact and expert  
 25 witnesses (*other than rebuttal* and impeachment witnesses) whose testimony the Party may  
 26 submit at the Trial or Hearing.”) (emphasis added); Scheduling Order ¶ 42 (“The requirement of

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 28 <sup>4</sup> 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) (“Supp. Obj.”)

1 advance identification of witnesses and production of exhibits does not apply to witnesses and  
2 exhibits presented for purposes of impeachment or rebuttal by any party.”); Modifying Order ¶ 8  
3 (“On or before April 4, 2014, each Party intending to present rebuttal expert testimony shall serve  
4 and file its rebuttal expert reports.”). The City’s submission of the Smith Report was thus  
5 perfectly timely, despite Franklin’s attempts to insinuate otherwise.

6 Similarly, the Declaration was also timely. The Declaration was submitted, along with the  
7 City’s other direct testimony declarations, on April 21, 2014, which was the date set in the  
8 Modifying Order. Modifying Order ¶ 13. Franklin’s claim that Smith’s direct testimony was  
9 “delinquent” introduced after the deadline for the submission of rebuttal reports and expert  
10 depositions is baseless. *See* Exclusion Motion, at 1. The schedule set by the Modifying Order, to  
11 which Franklin agreed, required expert rebuttal reports to be submitted on April 4, expert  
12 depositions to end April 18, and direct testimony declarations to be filed April 21. Modifying  
13 Order ¶¶ 8, 9, 13. Franklin’s feigned shock and outrage that the City would follow the  
14 established schedule notwithstanding, the Declaration was filed on time, and in accordance with  
15 the deadlines set by the Court.

16 **B. The Declaration Does Not Introduce New Issues.**

17 Franklin contends throughout the Exclusion Motion that it is prejudiced because the Smith  
18 Report raises a host of “entirely new opinions and conclusions.” Exclusion Motion, at 4. This is  
19 simply not the case. Every issue and opinion discussed in the Declaration was previously raised  
20 either in the Smith Report, or by Franklin’s own expert in the Chin Report or at Chin’s  
21 deposition. Rather than specifically identify the portions of the Declaration that it claims raise  
22 brand new issues, the Exclusion Motion, in two successive footnotes, instead simply cites to  
23 essentially the entirety of the Declaration without any discussion. Exclusion Motion, at 4 n. 9, 10.  
24 A close review of the Declaration, however, reveals that it discusses only previously raised issues.

25 For instance, the issue of capital improvements and deferred maintenance was referenced  
26 in the Chin Report, and Chin’s failure to adequately “analyze what capital improvements would  
27 be necessary to achieve” the revenue increase Chin projected for the golf courses was raised in  
28 the Smith Report. Declaration, ¶¶ 4-8, 12-14; Chin Report, at 19, Smith Report, at 4. The Smith

1 Report also raises the Chin Report's inadequate consideration of negative cash flows at the  
2 properties and projected continued losses (Declaration ¶¶ 9-10, 13; Smith Report, at 3; Chin  
3 Report, at 11, 38-39), the need to consider a discounted cash flow analysis and not rely solely on  
4 gross income modifiers (Declaration ¶¶ 16-18; Smith Report, at 5-6; Chin Report, at 38), Chin's  
5 use of an inflated gross income modifier (Declaration ¶¶ 10, 19-20; Smith Report, at 3; Chin  
6 Report, at 38-39), the Chin Report's unsupported and unexplained use of discounts from a fee  
7 simple market value (Declaration ¶ 21-22; Smith Report, at 4; Chin Report, at 42), and the Chin  
8 Report's failure to adequately account for functional obsolescence (Declaration ¶ 23; Smith  
9 Report, at 5; Chin Report, at 8-10). Smith thus has not raised any new issues or "modified" his  
10 testimony.

11 Franklin also complains that the Declaration contains testimony rebutting statements made  
12 by Chin at his deposition, as if this is not precisely what a rebuttal expert is expected to do at trial.  
13 Exclusion Motion at 4; *see* Declaration ¶¶ 11-23. Naturally, Smith could not be expected to  
14 address Chin's deposition testimony in the Smith Report, because Chin's deposition did not occur  
15 until two weeks after that report was filed. Like any rebuttal expert, Smith may counter the  
16 deposition testimony of the expert to which he is responding. The time to do that is at trial, and in  
17 this case may be done both through live oral testimony and through a direct testimony declaration  
18 (which is treated as the equivalent of live oral testimony). Scheduling Order ¶ 35. Here again,  
19 Franklin is not prejudiced by the City's choice to offer this evidence *earlier* than required.

20 **C. Franklin Is Not Prejudiced By The Early Provision Of Smith's Testimony.**

21 Finally, Franklin is not improperly prejudiced by the testimony in the Declaration. For  
22 one, as previously stated, Franklin will have three weeks to decide how it wishes to respond to  
23 Smith's testimony, which is an opportunity the City will not be afforded with the trial testimony  
24 of Franklin's experts. Second, because the issues covered in the Declaration were previously  
25 raised in the Smith and Chin reports, Franklin was on notice of these issues and had a full  
26 opportunity to depose Smith on any and all of those topics.<sup>5</sup> Lastly, Franklin is not prejudiced by  
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28 <sup>5</sup> Furthermore, as Franklin concedes, the City produced all of Smith's notes on his conversations with golf courses and ice arena personnel, and with Ken Hopper, prior to his deposition. Franklin thus had every opportunity to ask

