

8

1 MARC A. LEVINSON (STATE BAR NO. 57613)  
 malevinson@orrick.com  
 2 NORMAN C. HILE (STATE BAR NO. 57299)  
 nhile@orrick.com  
 3 PATRICK B. BOCASH (STATE BAR NO. 262763)  
 pbocash@orrick.com  
 4 ORRICK, HERRINGTON & SUTCLIFFE LLP  
 400 Capitol Mall, Suite 3000  
 5 Sacramento, California 95814-4497  
 Telephone: +1-916-447-9200  
 6 Facsimile: +1-916-329-4900

7 Attorneys for Debtor  
 City of Stockton  
 8

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 ROBERT LELAND**

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

23  
 24  
 25  
 26  
 27  
 28

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”), the City of Stockton, California (“City”) hereby submits the  
8 following Opposition to the Motion of Franklin High Yield Tax-Free Income Fund And Franklin  
9 California High Yield Municipal Fund To Exclude Portion Of Testimony Of Robert Leland (the  
10 “Exclusion Motion” filed by “Franklin”):

11 **I. INTRODUCTION**

12 The City’s Long-Range Financial Plan (“LRFP”) was attached as Exhibit B to the  
13 Disclosure Statement filed with the Court on November 15, 2013. The LRFP projects the City’s  
14 financial performance under the Plan over thirty years, and is arguably the most important  
15 document to the City’s confirmation proceedings, aside from the Plan and Disclosure Statement  
16 themselves. The LRFP was authored by Robert Leland (“Leland”), who was deposed by Franklin  
17 on March 7, 2014. Unsurprisingly, Franklin spent the bulk of that deposition questioning Leland  
18 about the assumptions, methodologies, and conclusions contained in the LRFP. Then, on March  
19 26, Franklin submitted the report of its expert, Charles Moore (the “Moore Report”<sup>1</sup>), the primary  
20 purpose of which was to attack the LRFP as inaccurate. Yet now Franklin claims that it is  
21 surprised and prejudiced by the fact that Leland’s Direct Testimony Declaration,<sup>2</sup> submitted on  
22 April 21 (the date set for the submission of such declarations), contains a discussion of, and  
23 response to, Moore’s criticisms of the LRFP.

24 Franklin argues that the portions of Leland’s testimony responding to Moore should be  
25 stricken because Leland’s Declaration was filed after the April 4, 2014, deadline for filing  
26

---

27 <sup>1</sup> Submission By Franklin High Yield Tax-Free Income Fund And Franklin California High Yield Municipal Fund Of  
Expert Report Of Charles M. Moore (Dkt. No. 1293), Ex. A.

28 <sup>2</sup> Direct Testimony Declaration Of Robert Leland In Support Of Confirmation Of First Amended Plan For The  
Adjustment Of Debts Of City Of Stockton, California (November 15, 2013) (“Declaration”).

1 rebuttal expert reports set by the Scheduling Order and Modifying Order. This argument fails for  
2 several reasons. First, Leland is not testifying as an expert witness. Rather, he is testifying as a  
3 fact witness to the methods and calculations he used in creating the LRFP. Second, even if  
4 Leland's Declaration could be taken as expert testimony, Leland would at most be a "non-  
5 retained" expert pursuant to Federal Rule of Civil Procedure ("FRCP") 26(a)(2)(C). The April 4  
6 deadline cited by Franklin expressly applies only to retained experts who must produce official  
7 reports pursuant to FRCP 26(a)(2)(B). Finally, Franklin's claim that Leland's Declaration  
8 testimony "expand[s] the topics" to which Mr. Leland will testify is baseless. The challenged  
9 testimony responds directly to the attacks of Franklin's expert upon the LRFP, which is, and  
10 always has been, central to the case. It strains credulity for Franklin to claim that it did not expect  
11 Leland to respond to Moore's attempts to undercut Leland's work on the LRFP.

12 Leland's Declaration was timely filed with the City's other direct testimony declarations  
13 on April 21, 2014. *See* Modifying Order ¶ 13. Franklin's attempt to cast Leland's testimony in  
14 response to Moore as a late expert rebuttal is nothing more than a thinly-veiled bid to improperly  
15 prevent Leland from defending his work against Franklin's criticisms. The Exclusion Motion  
16 should be denied.

## 17 **II. ARGUMENT**

### 18 **A. The April 4, 2014, Deadline Did Not Apply To Leland Because Leland Is Not** 19 **A Retained Expert.**

20 In support of its claim that Leland's testimony should be excluded, Franklin quotes ¶ 8 of  
21 the Modifying Order, which required rebuttal expert reports to be served and filed by April 4,  
22 2014. Modifying Order, ¶ 8. Notably absent from Franklin's citation is the final clause of ¶ 8,  
23 which states that parties shall serve and file rebuttal expert reports "as described in ¶ 32 of the  
24 Scheduling Order." *Id.* Franklin omits this reference because paragraph 32 of the Scheduling  
25 Order provides that "each Party intending to present rebuttal expert testimony shall serve and file  
26 their rebuttal expert reports *and otherwise comply with the requirements of Rule 26(a)(2)(B) of*  
27 *the Federal Rules of Civil Procedure.*" Scheduling Order, ¶ 32 (emphasis added). This provision  
28 makes it abundantly clear that the deadline for rebuttal expert reports applied only to retained

1 experts who were required to submit a written report, which are the subject of Rule 26(a)(2)(B).  
2 That deadline did not apply to fact witnesses or to non-retained experts. As such, it did not apply  
3 to Leland's testimony.

4 Leland's testimony is that of a fact witness. The testimony targeted by Franklin in  
5 Leland's Declaration is nothing more than an explanation of the LRFP's methodologies that  
6 counters Moore's assertions of error. For instance, in the purportedly objectionable sections,  
7 Leland describes the bases for the LRFP's revenue estimates in response to Moore's contention  
8 that those estimates are excessively conservative. Declaration ¶ 22. Leland also explains the  
9 nature and purpose of the fund balance reserve and annual contingency included in the LRFP's  
10 projections in response to Moore's statements that such safeguards are unnecessary. Declaration  
11 ¶¶ 23-26. Similarly, Leland provides facts related to the City's PFF revenues and projections that  
12 show Moore's conclusion that the City could pay Franklin hundreds of thousands of dollars from  
13 such revenues to be erroneous. Declaration ¶¶ 27-28. This is not expert testimony, and the mere  
14 fact that Leland is responding to Franklin's retained expert does not render Leland himself an  
15 expert witness.<sup>3</sup>

16 Furthermore, even if such testimony was properly considered to be "expert" in nature,  
17 Leland would still only be a non-retained expert<sup>4</sup> under FRCP 26(a)(2)(C). Retained experts,  
18 under FRCP 26(a)(2)(B), are those "retained or specially employed to provide expert testimony in  
19 the case or . . . whose duties as the party's employee regularly involve giving expert testimony."  
20 Fed. R. Civ. P. 26(a)(2)(B). Leland fits neither of these categories, because he was brought on as  
21 a consultant to the City (with the firm of Management Partners) in order to aid the City in

---

22 <sup>3</sup> Fact witness testimony may be used to rebut expert testimony. *United States v. Shackelford*, 494 F.2d 67, 68, 75  
23 (9th Cir. 1974) (holding that the government could rely entirely on lay witnesses with percipient knowledge to rebut  
24 the defendant's expert); *United States v. Bennett*, 908 F.2d 189, 195 (7th Cir. 1990) (government was not required to  
25 rebut expert testimony with its own expert because "it may accomplish the same result by presenting lay witnesses  
26 and other evidence and by undermining the defense expert's credibility through cross-examination."); *United States*  
27 *v. Mota*, 598 F.2d 995, 999 (5th Cir. 1979) (jury may find expert testimony "adequately rebutted by the observations  
28 of mere laymen").

<sup>4</sup> Even if Leland's testimony was considered "expert," such testimony is admissible. See *Int'l Ass'n of Firefighters,*  
*Local 1186 v. City of Vallejo*, 48 B.R. 208, 292-93 (B.A.P. 9th Cir. 2009) (upholding the bankruptcy court's  
admission of the testimony of the City of Vallejo's Assistant Finance Director regarding Vallejo's financial  
conditions and constraints even though the testimony "arguably contained legal conclusions" because the testimony  
pertained to the "complex[]" area of municipal accounting and promoted "judicial efficiency") (citing FRE 701). In  
any case, Leland would clearly qualify as an expert if the need arose, based on the extensive experience outline in ¶¶  
1-2 of the Declaration.

1 assessing its finances and developing projections for its future performance. Leland was thus not  
2 retained for the specific purpose of providing expert testimony, as contrasted with Franklin's  
3 experts, who are classic examples of FRCP 26(a)(2)(B) retained experts. Thus, if Leland were  
4 found to be an expert, he would be a non-retained expert under FRCP 26(a)(2)(C). And as  
5 previously stated, the April 4th deadline upon which the Exclusion Motion relies applies only to  
6 retained experts.

7 In an attempt to bolster its Exclusion Motion, Franklin implies that the City definitively  
8 identified Leland as an expert witness. This is not the case. Leland was disclosed as a witness in  
9 the City's preliminary and final witness lists.<sup>5</sup> In the City's final witness list, Leland was listed as  
10 a fact witness and was specifically identified as testifying to "issues relating to the City's Long-  
11 Range Financial Plan" as such. Morse Decl., Ex. N. While he was also listed as a *possible* expert  
12 witness, along with other of the City's employees and consultants, both of the City's witness lists  
13 expressly provided that:

14 Witnesses that are employees or consultants of the City are being  
15 designated as experts *merely out of an abundance of caution*.  
16 These individuals will testify primarily as percipient witnesses, but  
17 may be called upon to give expert testimony pursuant to Federal  
18 Rule of Civil Procedure 26(a)(2)(C) and Federal Rules of Evidence  
19 602, 703, or 705. The City is being over-inclusive in its  
20 designations to ensure that all Parties are so informed.

21 Morse Decl., Exs. B, N (emphasis added). The City thus made clear that it did not believe that  
22 the topics listed for Leland constituted expert testimony, and that it was merely raising the  
23 possibility that circumstances might arise that required expert opinions from these witnesses.  
24 Additionally, though the City believed it was not necessary, the City also provided a further  
25 summary of Leland's background and expected testimony in a Disclosure Of Non-Retained  
26 Expert Testimony Pursuant To Federal Rule Of Civil Procedure 26(a)(2)(C) ("Non-Retained  
27 Expert Disclosure"), the first version of which was provided to Franklin on February 20, 2014.  
28 *See* Morse Decl., Ex. A (March 18, 2014 version). Like the City's witness lists, and despite its  
title, the Non-Retained Expert Disclosure explicitly stated that the City did not believe or concede

---

<sup>5</sup> Declaration of Joshua D. Morse In Support Of Motions of Franklin High Yield Tax-Free Income Fund And Franklin California High Yield Municipal Fund To Exclude Portions Of Testimony of K. Dieker, V. Toppenberg, R. Smith, and R. Leland, And Motions To Exclude Testimony Of M. Cera And T. Nelson ("Morse Decl."), Exs. B, N.

1 that the listed witnesses were in fact experts, and that the disclosure was being made “in an  
2 abundance of caution.” Morse Decl., Ex. A, at 2. Franklin conveniently omits both of these  
3 reservations from its discussion. Moreover, Franklin’s citation to the City’s FRCP 26(a)(2)(C)  
4 disclosures should have made clear that Leland was not required to submit a rebuttal expert report  
5 as a non-retained expert in any event (just as he was not required to submit an initial expert  
6 report). Franklin’s invocation of the April 4th deadline is therefore misplaced.

7 **B. Leland’s Testimony Was Timely Filed.**

8 The Modifying Order requires that direct testimony declarations be filed and served on or  
9 before April 21, 2014. Modifying Order, ¶ 13. The Declaration was filed and served with the  
10 City’s other direct testimony declarations on April 21, and is therefore timely.

11 **C. Leland’s Testimony Does Not Raise Any “New” Opinions.**

12 Franklin attempts to characterize portions of Leland’s declaration as an improper  
13 “rebuttal” or “supplement” that raises “entirely new opinions and conclusions.” Exclusion  
14 Motion, at 4-5. To the contrary, Leland’s testimony does nothing more than explain the LRFP  
15 and related materials. While the Moore Report attacks numerous calculations, assumptions,  
16 methodologies, and conclusions in the LRFP, Leland, as Franklin itself states, “respond[s]  
17 directly” to Moore’s attacks. Exclusion Motion, at 4. It is unclear how Leland can be raising  
18 entirely new issues if he is responding directly to the Moore Report, which itself is based on the  
19 LRFP.

20 Further, even if the Court were to conclude that Leland’s testimony constituted “rebuttal”  
21 evidence, such testimony would still not be untimely. In fact, pursuant to the Scheduling Order  
22 and Modifying Order, the City did not have to disclose rebuttal or impeachment testimony *until*  
23 *trial*. See Scheduling Order ¶ 36 and Modifying Order ¶ 5 (“On or before [March 21, 2014], each  
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). Only witnesses so listed (*other than*  
26 rebuttal and impeachment witnesses) will be permitted to testify at trial.”) (emphasis added); *see*  
27 *also* Scheduling Order ¶ 35 (“[E]vidence at the Trial and Hearing may be submitted . . . (b) in the  
28 form of oral testimony (for expert, rebuttal, and impeachment witnesses).”). Thus, if Leland’s

1 testimony is considered rebuttal testimony, the City has actually provided Franklin with greater  
2 notice than was required.<sup>6</sup>

3 **D. Franklin Cannot Claim Prejudice.**

4 While it is abundantly clear that the Declaration was submitted in accordance with the  
5 Scheduling and Modifying Orders, Franklin cannot claim prejudice in any case.

6 Franklin’s own actions indicate that it did not view Leland as an expert witness. For  
7 instance, Franklin deposed Leland during the time set for fact witness depositions, and did not  
8 depose him during the time set for expert depositions. Franklin had a full opportunity to depose  
9 Leland on any and all topics that it wished on March 6, 2014. A representative of Moore’s firm  
10 was present at that deposition to advise counsel for Franklin, and there was no doubt that  
11 Franklin’s purpose in deposing Leland was to seek material that both it and Moore might use to  
12 dispute the LRFP. If there was any portion of the LRFP on which Franklin wanted additional  
13 information, it had every chance to ask. Moreover, Franklin made no attempt to seek an  
14 additional deposition of Leland during the time set for expert depositions.

15 Furthermore, since all of the supposedly objectionable testimony is directly responsive to  
16 Moore, every issue addressed was necessarily raised in the Moore Report. Franklin cannot  
17 justifiably claim it is prejudiced, or surprised, by a witness responding to issues raised by  
18 Franklin’s own expert.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 \_\_\_\_\_  
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  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**III. CONCLUSION**

For the foregoing reasons, the Exclusion Motion should be denied.

Dated: May 6, 2014

MARC A. LEVINSON  
NORMAN C. HILE  
PATRICK B. BOCASH  
Orrick, Herrington & Sutcliffe LLP

By:           /s/ Patrick B. Bocash            
PATRICK B. BOCASH  
Attorneys for Debtor  
City of Stockton