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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 PORTIONS OF
 TESTIMONY OF KENNETH DIEKER**

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”), 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 Portions Of Testimony Of Kenneth Dieker
10 (the “Exclusion Motion” filed by “Franklin”):

11 **I. INTRODUCTION**

12 Franklin’s Exclusion Motion seeks to strike a portion of the Direct Testimony Declaration
13 of Kenneth Dieker¹ on the grounds that Dieker does not qualify as an expert, and that the
14 offending testimony is irrelevant. However, Dieker is not testifying as an expert. Rather,
15 Dieker’s testimony describes his personal experience and work leading up to Franklin’s purchase
16 of the 2009 Golf Course/Park Bonds.² Furthermore, this testimony is clearly relevant, as it
17 provides important background information regarding the reasons Franklin accepted relatively
18 low-value collateral, and thus supports the City’s consideration of this collateral in the Plan.
19 Dieker’s testimony is helpful to the Court and is not an improper expert opinion. The Exclusion
20 Motion should be denied.

21 **II. ARGUMENT**

22 **A. Dieker’s Testimony Relates To His Personal Knowledge Of Events Leading**
23 **Up To Franklin’s Purchase Of The 2009 Golf Course/Park Bonds, And Is Not**
24 **Expert Testimony.**

25 The majority of the Exclusion Motion focuses on attempting to disqualify Dieker as a
26 purported expert witness. This argument misses the mark, however, because Dieker is not being

27 ¹ Direct Testimony Declaration Of Kenneth Dieker In Support Of Confirmation Of First Amended Plan For the
28 Adjustment Of Debts Of City Of Stockton, California (November 15, 2013) (the “Declaration”).

² Unless otherwise specified, capitalized defined terms in this Opposition shall have the same meaning as in the
City’s Plan of Adjustment.

1 offered as an expert witness and his testimony does not constitute an expert opinion. Rather,
2 Dieker is testifying to facts and opinions based on his personal knowledge of the events
3 surrounding Franklin's purchase of the 2009 Golf Course/Park Bonds. Part of that testimony –
4 and the portion which Franklin finds objectionable – includes Dieker's explanation of the process
5 he normally engages in to review market conditions and comparable sales prior to a bond deal.
6 Having engaged in that market review, Dieker may testify as to his (and the City's) understanding
7 of the deal.

8 As with other witnesses, Franklin misleadingly implies that the City definitively identified
9 Dieker as an expert witness, both in its witness lists and in its precautionary Rule 26(a)(2)(C)
10 disclosures.³ Exclusion Motion at 1-2. Franklin omits that in every case, the City made
11 abundantly clear that it did not believe or concede that Dieker was an expert witness. For
12 instance, while Dieker was listed as a *possible* expert witness along with other of the City's
13 employees and consultants, both of the City's witness lists expressly provided that “[w]itnesses
14 that are employees or consultants of the City are being designated as experts *merely out of an*
15 *abundance of caution*. These individuals will testify primarily as percipient witnesses, but may
16 be called upon to give expert testimony pursuant to Federal Rule of Civil Procedure 26(a)(2)(C)
17 and Federal Rules of Evidence 602, 703, or 705. The City is being over-inclusive in its
18 designations to ensure that all Parties are so informed.” Morse Decl., Ex. B, N (emphasis added).
19 Similarly, while the City did not believe it was necessary, it also provided a further summary of
20 Dieker's background and expected testimony in its Non-Retained Expert Disclosure. Morse
21 Decl., Ex. A. Like the City's witness lists, the Non-Retained Expert Disclosure explicitly states
22 that the City did not concede that the listed witnesses were in fact experts, and that the disclosure
23 was being made “in an abundance of caution.” *Id.*, at 2.

24 Franklin ignores these reservations, as well as the non-expert nature of the testimony at
25 issue. Dieker does not have to qualify as an expert in order to describe the factual background to

26 ³ City Of Stockton's Disclosure Of Non-Retained Expert Testimony Pursuant To Federal Rule Of Civil Procedure
27 26(a)(2)(C) (“Non-Retained Expert Disclosure”). See Declaration of Joshua D. Morse In Support Of Motions of
28 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.”), Ex. A.

1 the 2009 Golf Course/Park Bonds deal, particularly given his personal involvement. Moreover,
2 while most of Dieker's testimony is factual, the single opinion challenged by the Exclusion
3 Motion – that relative to market conditions at the time, the bond purchase was riskier than
4 average and that Franklin was compensated at a higher rate as a result⁴ – is not an expert opinion.
5 As described below, this testimony is an admissible lay opinion because it is based on Dieker's
6 personal knowledge and is helpful to understanding the context in which the bond deal was
7 struck. *See* Fed. R. Evid. 701. Franklin's attempts to exclude it as improper expert testimony are
8 misplaced.

9 **B. Dieker's Opinion Regarding The Riskiness Of The Bond Deal Addresses**
10 **Arguments Raised By Both Parties And Is Helpful To The Court.**

11 The gravamen of the Exclusion Motion is Franklin's assertion that Dieker's testimony is
12 "wholly irrelevant to any issue to be decided and therefore is unhelpful to the Court." Exclusion
13 Motion, at 2. This is simply not the case. In addition to providing useful context for the deal
14 underlying Franklin's claim, Dieker's testimony speaks to at least two issues raised by the parties.

15 First, the City has consistently stated its position that "collateral counts." *See* City's
16 Supplemental Memorandum Of Law In Support Of Confirmation Of First Amended Plan For The
17 Adjustment Of Debts Of City Of Stockton, California (November 15, 2013) [Dkt. No. 1309], at 2,
18 26; *see also* Declaration ¶ 21. That is, Franklin's treatment in the Plan relative to other creditors
19 is in part a function of its comparatively weak collateral. As such, the issue of Franklin's
20 collateral relates to numerous issues central to the case, including the best interests test,
21 classification, good faith, and Franklin's claims of unfair discrimination. Dieker's testimony
22 speaks to the issue of Franklin's collateral by describing the circumstances under which the deal
23 was forged, including the fact that Franklin entered into a deal that was riskier than average (in
24 part because of the weaker collateral) and was compensated accordingly. This testimony not only
25 establishes the factual background of the bond deal by which Franklin received this collateral, but
26 also provides circumstantial evidence that Franklin understood that it was taking on greater risk in
27 exchange for other consideration. Given that one of the fundamental bases of Franklin's

28 ⁴ While essentially accurate, the quoted "opinion" cited by Franklin at pages 1-2 of the Exclusion Motion is taken from the Non-Retained Expert Disclosure, and thus is not technically a part of Dieker's testimony.

1 Objection to the City's Plan is its contention that it is being inappropriately treated differently
2 than other creditors, and that part of the City's response to this argument is the difference in
3 collateral held by said creditors, testimony regarding the background and basis for the difference
4 in collateral is clearly relevant.

5 Second, Dieker's testimony also helps to counter Franklin's implied allegations of fraud.
6 See Pretrial Brief Of Franklin High Yield Tax-Free Income Fund And Franklin California High
7 Yield Municipal Fund, at 5-6. Through selective citation to certain deal documents, Franklin
8 insinuates that Franklin was somehow hoodwinked into purchasing the 2009 Golf Courses/Park
9 Bonds. *Id.*; see also Submission By Franklin High Yield Tax-Free Income Fund And Franklin
10 California High Yield Municipal Fund Of Expert Report Of Frederick E. Chin [Dkt. No. 23], Ex.
11 A, at 4, 57. Dieker's testimony counters this suggestion by describing the context of the bond
12 deal and offering evidence that Franklin was aware of the risks inherent in the deal, including the
13 weak collateral.

14 Dieker's testimony is thus plainly relevant to the issues to be decided at the Evidentiary
15 Hearing and trial in the Adversary Proceeding. Fed. R. Evid. 401 (evidence is relevant if it "(a)
16 has any tendency to make a fact more or less probably than it would be without evidence; and (b)
17 the fact is of consequence to determining the action."). By the same token, it is also helpful to the
18 Court. Because Dieker's opinion regarding the relative risk of the bond deal is based on his own
19 personal knowledge and perception of the marketplace at the time of the bond sale, does not
20 require any knowledge within the scope of Rule 702, and supports the rationale of the
21 City's Plan of Adjustment, it is proper lay opinion testimony. Fed. R. Evid. 701(lay opinion
22 testimony must be "(a) rationally based on the witness's perception; (b) helpful to clearly
23 understanding the witness's testimony or to determining a fact in issue; and (c) not based on
24 scientific, technical, or other specialized knowledge within the scope of Rule 702.").⁵ The rest of
25 Dieker's factual testimony is similarly helpful to the Court, and should be admitted.

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28 ⁵ In the event the Court finds that Dieker's testimony is expert in nature, the City will make an offer of proof at the
evidentiary hearing as to Dieker's qualifications to render such opinion.

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III. CONCLUSION

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

Dated: May 6, 2014

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