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

Attorneys for Debtor
City of Stockton

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re: CITY OF STOCKTON, CALIFORNIA, 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 VAL TOPPENBERG**
WELLS FARGO BANK, et al. Plaintiffs, v. 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

Pursuant to paragraph 45 of the Order Governing The Disclosure And Use Of Discovery Information And Scheduling Dates Related To The Trial In The Adversary Proceeding And Any Evidentiary Hearing Regarding Confirmation Of Proposed Plan Of Adjustment ("Scheduling Order"), as modified by paragraph 17 of the Order Modifying Order Governing The Disclosure And Use Of Discovery Information And Scheduling Dates Related To The Trial In The Adversary Proceeding And Any Evidentiary Hearing Regarding Confirmation Of Proposed Plan Of Adjustment ("Modifying Order"), the City of Stockton, California ("City") hereby submits the following Opposition to the Motion of Franklin High Yield Tax-Free Income Fund And Franklin California High Yield Municipal Fund To Exclude Portions Of Testimony Of Val Toppenberg (the "Exclusion Motion" filed by "Franklin"):

I. INTRODUCTION

Franklin's Exclusion Motion seeks to exclude portions of testimony contained in the Direct Testimony Declaration of Val Toppenberg[1] on the basis that Toppenberg does not meet the standards to testify as a retained expert. As such, the Exclusion Motion completely misses the mark, because the City is not offering Toppenberg as a classic Rule 702 expert. Rather, Toppenberg's testimony is offered under the longstanding rule that landowners[2] may testify as to the value of their real property. As explained below, the owner of a piece of property is *automatically* qualified to offer an opinion as to the value of its land. Moreover, such opinions may be based on the hearsay opinions of others, in addition to the personal knowledge of the landowner. The bulk of the Exclusion Motion is thus off point. Toppenberg's testimony as to the City's view of the value of its properties is entirely proper, and the Exclusion Motion should be denied.[3]

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[1] Direct Testimony Declaration Of Val Toppenberg In Support Of Confirmation Of First Amended Plan For The Adjustment Of Debts Of City Of Stockton, California (the "Declaration" or "DTD").

[2] The landowner in this case is, of course, the City, and Toppenberg's testimony as to the value of the properties is made on behalf of the City.

[3] As it has in other exclusion motions, Franklin misleadingly claims that the City definitively identified Toppenberg (and others) as an expert witness pursuant to 26(a)(2)(C). Exclusion Motion, at 2. This is not the case. The City made clear in its witness lists and in its precautionary Disclosure Of Non-Retained Expert Testimony Pursuant To Federal Rule Of Civil Procedure 26(a)(2)(C) that it did not believe or concede that Toppenberg was an expert and that such disclosures were made "in an abundance of caution." *See* 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, Ex. A (March 18, 2014 version), at 2; Ex. B, at 4; Ex. N, at 4-5.

II. ARGUMENT

A. Toppenberg's Testimony Is Admissible Under FRE 702 Because Property Owners Are Presumed Qualified to Testify to the Value of their Property

Franklin's motion overlooks the time-honored rule that "the opinion testimony of a landowner as to the value of his land is admissible *without further qualification*. Such testimony is admitted because of the presumption of special knowledge that arises out of ownership of the land." *United States v. 329.73 Acres of Land, Situated in Grenada & Yalobusha Counties., Miss.*, 666 F.2d 281, 284 (5th Cir. 1982) (emphasis added) (citation omitted); *see also United States v. 10,031.98 Acres of Land, More or Less, Situate in Las Animas Cnty., Colo.*, 850 F.2d 634, 636-37, 639-40 (10th Cir. 1988) (collecting cases) ("[A]n owner, because of his ownership, is presumed to have special knowledge of the property and may testify as to its value."). As the Advisory Committee's Notes to Rule 702 explain, "within the scope of the rule are not only experts in the strictest sense of the word … but also the large group sometimes called 'skilled' witnesses, such as bankers or *landowners testifying to land values*." Fed. R. Evid. 702 advisory committee's note (1972) (emphasis added). A landowner is thus "automatically qualified to give [valuation] testimony." *LaCombe v. A-T-O, Inc.*, 679 F.2d 431, 434 (5th Cir. 1982)

This automatic qualification does not require the testifying landowner to meet the standards of a retained expert. For instance, in *Tamen v. Alhambra World Inv. (In re Tamen)*, 22 F.3d 199 (9th Cir. 1994), the Ninth Circuit affirmed a bankruptcy court's ruling permitting the plaintiff to provide expert testimony regarding damages from the premature sale of his property. *Id.* at 206 (citing Fed. R. Evid. 702 advisory committee's note (1972)). In challenging the admissibility of this testimony, the defendants stressed that "Tamen had little previous experience in property development and that his only previous venture was unsuccessful." *Id.* at 206 n.4. The Court rejected this argument and explained that while the trier of fact "was free to consider these allegations in assessing Tamen's credibility," they did not render his testimony inadmissible. *Id.* Here, similar to the argument rejected in *Tamen*, Franklin attacks Toppenberg's qualifications and the basis for his valuation testimony. Exclusion Motion, at 5-11. But Franklin's arguments go to weight, not admissibility. *See id.*; *see also 10,031.98 Acres of Land*,

850 F.2d 639-40 (the basis for a property owner's valuation opinion goes to the weight of the testimony, not its admissibility) (collecting cases). Toppenberg's testimony is therefore admissible as the opinion of the City as to the value of its land without any further showing being necessary.[4]

B. Landowners May Base Their Opinion Of The Value Of Their Property On The Hearsay Opinions Of Others.

Franklin is also incorrect to argue that Toppenberg may not rely on the opinions of two appraisers retained by the City, Kenneth Hopper of Real Property Analysts and Kevin Ziegenmeyer of Seevers Jordan Ziegenmeyer. Exclusion Motion, at 7-11. Courts have repeatedly held that property owners may rely on the hearsay opinions of others in forming and expressing their opinions regarding the value of their property. *See Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729, 739 (1st Cir. 1982) (owner permitted to give estimate of property value based in part on hearsay); *Hornick v. Boyce*, 280 F. App'x 770, 774 (10th Cir. 2008) (unpublished) (property owner properly based his value opinion on "second-hand information that he obtained from two real estate brokers"); *In re Young*, 390 B.R. 480, 492 (Bankr. D. Me. 2008) (property owner's opinion based in part on two third-party appraisals). If the law were otherwise, few property owners could provide admissible valuation testimony: "In nearly every instance, a landowner … takes into account facts that he knows only by hearsay …. If the witness' candid admission that he has considered such matters destroys his testimony, only a dishonest or an ill-informed witness can give an admissible opinion about the value of property." *LaCombe*, 679 F.2d at 435 (quoting *D.C. Redevelopment Land Agency v. Thirteen Parcels of Land*, 534 F.2d 337, 343 n.15 (D.C. Cir. 1976)).

Franklin's citation to *Imperial* is off point. Exclusion Motion, at 7-8 (citing *In re Imperial Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d 1005 (C.D. Cal. 2003)). In that case, the plaintiff's

[4] As an independent alternative, landowner valuation testimony also is admissible as lay opinion testimony. Lay opinion testimony is admissible if it is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. As observed by the Advisory Committee Note to FRE 701: "[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert." Fed. R. Evid. 701 Advisory Committee's Note (2000).

accounting expert relied on excerpts from another expert's report, which was prepared for a separate litigation. The facts in this case could hardly be more different. Toppenberg is not testifying as an expert, but on behalf of the City as landowner; the opinions he received from Hopper and Ziegenmeyer were not a part of an expert report prepared for litigation; and the appraisal opinions relied upon were not related to an entirely separate case. *Dura* and *James Wilson Associates* are similarly inapplicable, again because those cases deal with the testimony of retained experts, and not landowners. Exclusion Motion, at 7 (citing *Dura Auto Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609 (7th Cir. 2002); *In re James Wilson Associates*, 965 F.2d 160 (7th Cir. 2992)). Cases that have directly considered the issue of whether a landowner may base its valuation opinion on hearsay statements have ruled in the affirmative.

Thus, while Hopper and Ziegenmeyer opinions were not the sole basis for Toppenberg's testimony, they are properly incorporated into said testimony.

C. Toppenberg's Testimony Is Reliable And Helpful.

In addition to being admissible, Toppenberg's testimony is also reliable and helpful to the Court. For one, Franklin's suggestion that Toppenberg's conversations with professional appraisers renders his testimony less valuable is misplaced. To the contrary, as recognized in *LaCombe* and *D.C. Redevelopment Land Agency*, a landowner would be foolish *not* to seek the opinion of professionals. Even more important, Franklin's singular focus on the opinions Toppenberg received from two appraisers obscures the fact that those opinions were just one piece of information relied upon in Toppenberg's DTD. As described in the Declaration, Toppenberg in fact relied on a number of factors in concluding that a leasehold interest in the properties would have essentially no value.

First, Toppenberg considered the historical performance of the properties: Swenson Golf Course, Van Buskirk Golf Course, and Oak Park. As described in Toppenberg's Declaration, each of these properties has operated at a loss, before factoring in debt service, for each of the last five years. Toppenberg DTD ¶ 2. Moreover, in the aggregate, these properties have lost money since at least as far back as FY 2005-06, as relatively minor positive cash flow at Swenson was swallowed up by losses at the other properties. *Id.* As a result, for the last several years the City

has had to subsidize these properties to the tune of several hundred thousand dollars a year in order to maintain operations. Second, the City's financial projections for the golf courses indicate that they are unlikely to turn a profit for the foreseeable future, due to the continuing effects of the recent recession, limited disposable income available to Stockton and San Joaquin County residents, and long-term trends in the golf industry at large. *Id.* ¶ 3. Third, Toppenberg relied on his review of documents placing restrictions on the use of the properties. *Id.* ¶ 5. Fourth, Toppenberg relied on information regarding needed capital improvements and deferred maintenance at the golf courses and Oak Park. *Id.* Fifth, and finally, Toppenberg relied upon his extensive experience in planning, redevelopment, and economic development, as well as his recent experience with the City. *Id.* ¶ 1. Toppenberg has worked for public agencies in these fields for 36 years, and has been the director of redevelopment and economic development for other cities for the past 25 years. *Id.* Moreover, based on his recent work on properties within the City, Toppenberg is familiar with the local market and the City's property holdings.

Franklin argues that Toppenberg is unqualified to render his valuation opinions because he has never previously been offered as an expert witness and is not a professional appraiser, but ignores the many relevant bases upon which Toppenberg's testimony is founded. Motion 5-6.

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