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 City of Stockton

8  
 9 UNITED STATES BANKRUPTCY COURT  
 10 EASTERN DISTRICT OF CALIFORNIA  
 11 SACRAMENTO DIVISION

13 In re:  
 14 CITY OF STOCKTON, CALIFORNIA,  
 15 Debtor.

Case No. 2012-32118  
 DC No. OHS-4  
 Chapter 9

16 **DECLARATION OF MARC A.  
 LEVINSON IN SUPPORT OF  
 17 EMERGENCY MOTION FOR LEAVE  
 TO INTRODUCE EVIDENCE  
 18 RELATING TO NEUTRAL  
 EVALUATION PROCESS UNDER  
 19 GOVERNMENT CODE 53760.3(q)**

20 Date: Friday, July 6, 2012  
 21 Time: 10:00 a.m.  
 22 Place: United States Courthouse  
 Dept. A, Courtroom 28  
 501 I Street  
 Sacramento, CA 95814

23  
 24 I, Marc A. Levinson, hereby declare:

25 1. I am an attorney licensed to practice law in all California state and federal courts,  
 26 and am a partner with the firm of Orrick, Herrington & Sutcliffe LLP, counsel of record for the  
 27 City of Stockton, California (the "City"). I make this declaration in support of the City's  
 28 Emergency Motion for Leave to Introduce Evidence Relating to Neutral Evaluation Process

1 Under Government Code Section 53760.3(q). Except as to those matters set forth on information  
2 and belief, I have personal knowledge of the facts set forth herein and if called as a witness I  
3 could testify competently to such facts.

4 2. Following a public hearing that I attended on February 28, 2012, the Stockton City  
5 Council determined that the City “is or likely will become unable to meet its financial obligations  
6 as and when those obligations are due or become due and owing,” and voted to commence a  
7 neutral evaluation process pursuant to California Government Code section 53760.3 (the “AB 506  
8 Process”).

9 3. On February 29, 2012, under my direction, the City transmitted its “Notice of  
10 Initiation” of the AB 506 Process to approximately 30 interested parties by certified mail.

11 4. By March 15, 2012, nearly all of the potential interested parties had elected to  
12 participate in the mediation, including all nine of the City’s employee groups, the indenture  
13 trustees of its public debt issuances, bond insurers, judgment creditors and a group representing  
14 retirees.

15 5. On March 26, 2012, the participants in the AB 506 Process selected Ralph Mabey  
16 as a “neutral evaluator,” or mediator, from the list of five candidates submitted by the City.  
17 Mabey, a former bankruptcy judge and accomplished bankruptcy lawyer and mediator, accepted  
18 the role the following day. Attached hereto as Exhibit A is a true and correct copy of his resume.

19 6. The AB 506 process lasted for 60 days, as required by statute, beginning on  
20 March 27, 2012. On or around May 21, 2012, a majority of the interested parties notified the City  
21 in an email sent to me that the process would be extended an additional 30 days.

22 7. The AB 506 process concluded on June 25, 2012. Despite the good faith efforts of  
23 the City and the interested parties, as of the conclusion of the AB 506 process, the City had not  
24 resolved all of its pending disputes with its creditors.

25 8. Attached hereto as Exhibit B is a true and correct copy of the cover page and of  
26 pages 44-50 of the corrected transcript of the hearing conducted in the City of Vallejo chapter 9  
27 case (Eastern District of California Case No. 2008-26813-A-9) on July 24, 2008 [Dkt. No. 192 in  
28 the Vallejo case].



# Exhibit A

**Ralph R. Mabey** is Senior of Counsel to Stutman Treister & Glatt P.C. (Los Angeles) and Professor of Law at the S. J. Quinney College of Law, University of Utah. He received his law degree from Columbia University where he served on the Board of Editors of the Columbia Law Review. Judge Mabey served with distinction as a United States Bankruptcy Judge before returning to private practice and teaching. His judicial opinions have been cited frequently by courts and scholars.

He currently serves as a court-appointed mediator in the Lehman Brothers cases in New York, assigned to mediate complex derivatives disputes. Lehman mandatory mediations enjoy approximately a 90% success rate, resolving disputes approaching \$1 billion in value.

Judge Mabey recently served as examiner in Extended Stay Hotels and as Trustee of Cajun Electric Power Cooperative, cases also involving several billion dollars. As a court-appointed examiner and trustee, Judge Mabey investigated and evaluated the firms' financial distress and proposed appropriate remedies and solutions.

Courts, parties and the Department of Justice (U.S. Trustee Program) have appointed Judge Mabey to serve as mediator, arbitrator, examiner or trustee in Alaska, Arizona, California, Delaware, Louisiana, Michigan, New York, Texas, Utah, Virginia and Washington, D.C.

He has authored *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and Other Forms of ADR* (with Professor Charles J. Tabb and Ira S. Dizengoff), 46 South Carolina Law Review 1259 (1995). He was an invited guest and speaker on Alternative Dispute Resolution at INSOL India's 2011 Conference in Gwalior, India.

Judge Mabey has had many prominent bankruptcy engagements, also including counsel for the TWA Airline Pilots Association (ALPA), for official committees in Columbia Gas System and Federated Department Stores, as examiner in the A.H. Robins (Dalkon Shield) case, for creditors in many cases, as special counsel for the debtor in Enron, and as expert witness in the Boston Chicken and ASARCO matters.

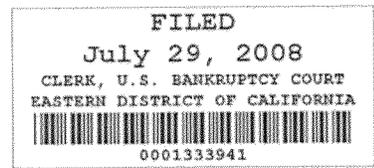
Judge Mabey is the past President and Chair of the American College of Bankruptcy. He served as an appointee of the Chief Justice of the United States to the U.S. Judicial Conference's Advisory Committee on the Bankruptcy Rules. He also served as the managing editor of the Norton Bankruptcy Law Adviser and on the Editorial Advisory Board of the American Bankruptcy Law Journal. He is a Contributing Author to *Collier on Bankruptcy*.

He is a member of the National Bankruptcy Conference, the American Law Institute, and a founding member of the International Insolvency Institute.

Stutman Treister & Glatt is a California firm and a pioneer in the bankruptcy field. The firm has practiced exclusively in the insolvency arena for more than 60 years. Extensive Chapter 9 experience includes representation of the County of Orange and more recently Valley Health Systems.

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# Exhibit B



1 UNITED STATES BANKRUPTCY COURT  
2 EASTERN DISTRICT OF CALIFORNIA  
3 SACRAMENTO DIVISION

4 --oOo--

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6 In re )  
7 CITY OF VALLEJO, ) Case No. 08-26813-A-9  
8 CALIFORNIA, )  
9 Debtor. )  
\_\_\_\_\_ )

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13 REPORTER'S CORRECTED TRANSCRIPT OF PROCEEDINGS  
14 BEFORE THE HONORABLE MICHAEL S. McMANUS

15

16 --oOo--

17 Thursday, July 24, 2008, 1:00 P.M.

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REPORTED BY:

LAURIE A. HOWARD  
CSR No. 9802

25

1 not believe that they are.

2 Q. Okay. And you did not need the protection  
3 of the bankruptcy case to implement these reduced  
4 salaries and reduced minimum staffing arrangement,  
5 did you?

6 A. Well, they would have violated the  
7 contract, so I think the answer is we would have  
8 needed the protection.

9 Q. But they offered it, so a mutual change to  
10 the contract would not have required bankruptcy  
11 protection, correct?

12 A. There was no such mutual agreement to the  
13 contracts.

14 Q. I understand. But, you could have made  
15 these changes without seeking bankruptcy protection  
16 because the firefighters offered it, didn't they?

17 MR. HILE: Objection, Your Honor. Calls  
18 for speculation. It also gets into what the City  
19 agreed or didn't agree to in the mediation which is  
20 privileged under both the agreement and the mediation  
21 and also with respect to the evidence code.

22 THE COURT: Well, let's talk about that for  
23 a minute. I really don't understand your objection  
24 on that. I mean, you don't want to talk about what  
25 happened in the mediation, but you have an obligation

1 to show you bargained in good faith.

2 MR. HILE: Yes, Your Honor.

3 THE COURT: How do you do that without  
4 talking about the mediation?

5 MR. HILE: It's our position that having  
6 mediated with the unions for 11 sessions with a  
7 mediator who wanted to be part of the mediation and  
8 who agreed that it was worth going on with the  
9 mediation and the fact that the City had entered into  
10 an agreement with respect to what the mediation would  
11 be, that it would violate the expectation of at least  
12 the City with respect to whether or not things were  
13 going to be brought back against them as part of what  
14 they were bargaining in good faith.

15 Now, our position is that given the number  
16 of occasions on which we mediated and, in fact, there  
17 were actual offers and counteroffers made outside the  
18 mediation after the mediation was concluded, that all  
19 of that establishes good faith for purposes of what  
20 the bankruptcy code requires. And, otherwise, the  
21 fact of the matter is that a party could always agree  
22 to confidentiality and then blatantly breach it after  
23 the fact which would prevent people from being able  
24 to go into these mediations.

25 The fact of the matter is you have before

1 you, and you will have before you, testimony about  
2 what the final offers were outside the mediation, and  
3 those will show the court whether they were in good  
4 faith in addition to the fact that we had 11 sessions  
5 of mediation.

6 THE COURT: Well, but my understanding of  
7 the issue whether there was negotiations or  
8 bargaining in good faith requires that the court  
9 engage in sort of a factor analysis to look at all  
10 the facts and circumstances. I don't know how I can  
11 do that without talking about what happened at  
12 mediation.

13 MR. HILE: Your Honor, let me phrase it  
14 this way. I think that the code doesn't say that you  
15 have to bargain in good faith, specifically. It says  
16 that you have to have been in good faith when you  
17 filed the petition.

18 Now, there are a number of factors that  
19 could go into that determination. It's not just a  
20 question of whether or not the mediation was a good  
21 faith bargaining session. The fact that the parties  
22 agreed to that mediation and that they went through  
23 11 --

24 THE COURT: It says you have to negotiate  
25 in good faith with creditors.

1 MR. HILE: Yes. And the fact that we met  
2 with them for 11 sessions and had final offers that  
3 were outside the mediation and that we talked to the  
4 other creditors, such as Union Bank, and all of that  
5 shows good faith.

6 THE COURT: Well, how do I know that you  
7 just didn't say the same thing over and over again 11  
8 times and you're only there, for example, because,  
9 the bank was making you go. I mean, I don't know how  
10 I can come to any reasoned conclusion that you  
11 bargained in good faith without knowing what  
12 happened.

13 MR. HILE: Well, Your Honor, we know that  
14 no agreement was reached, but we also know that the  
15 mediator agreed over those 11 sessions to keep  
16 meeting. And, in fact, Your Honor, what happened was  
17 the facts break down this way.

18 The City Council voted on May 3rd to file  
19 for bankruptcy, but no petition was yet filed, and  
20 the evidence will show that after that vote, even  
21 though the City manager had the authority to file,  
22 the City continued to participate in mediation  
23 sessions on September 5th -- I'm sorry May 5th and  
24 May 9th. And this is the part that the court can get  
25 into. When the mediator finally said we're just not

1 going to be able to reach an agreement after all of  
2 that time, the City and the Unions still negotiated  
3 and those negotiations will be before the court for  
4 it to look at.

5 But, what the Unions want to do now -- and  
6 that will show the good faith of the City with  
7 respect to all those negotiations.

8 What the Unions want to do now, however, is  
9 to say that things that were said by the City during  
10 that mediation process show that the City was doing  
11 something that was not in good faith, and our  
12 position is that's not necessary for purposes of this  
13 section of the statute, as long as 11 sessions of  
14 mediation and you have additional negotiations which  
15 we didn't get into.

16 THE COURT: I guess I'm just going to have  
17 to disagree with you, because I don't think the fact  
18 that people sat down 11 times, necessarily in itself,  
19 shows good faith in negotiation. And furthermore,  
20 from my reading of this federal common law privilege,  
21 you know, it's usually asserted in situations where  
22 what's said at the mediation is being used to  
23 establish liability for a debt or a claim or the  
24 amount of it, and that's not really what's going on  
25 here. I mean, this isn't being offered for that

1 purpose. I mean, you've got to show that you  
2 bargained in good -- I think it does say negotiate in  
3 good faith. Not only the petition has to be filed in  
4 good faith, but there were negotiations in good  
5 faith. I may be phrasing that slightly at variance  
6 with what the statute says, but it does have good  
7 faith and negotiations in the same sentence. That  
8 I'm sure of.

9 MR. HILE: I understand the court's  
10 position on this, and I'll just add one word to this.

11 THE COURT: All right.

12 MR. HILE: If the court's ruling is what it  
13 is and that becomes the law, then any municipality  
14 who is trying to avoid bankruptcy will have to know  
15 that when it goes into a mediation that anything  
16 that's said there is going to be used against it and  
17 it will not be able to be candidly open, will not be  
18 able to try to educate the other side in ways that  
19 might help, and therefore we would be faced with a  
20 situation where, at least for purposes of this  
21 section of the Bankruptcy Code, whenever a City or  
22 municipality is trying to negotiate, it will know  
23 that everything it says is going to be used against  
24 us even if there's an agreement to the contrary.

25 THE COURT: Well, unfortunately, if you

1 hadn't gone to mediation and you had negotiated in  
2 some other way, I'd be hearing about that, wouldn't  
3 I?

4 MR. HILE: Absolutely.

5 THE COURT: All right. So, I'm not sure  
6 what's the different because we add a mediator to the  
7 mix.

8 MR. HILE: The difference, Your Honor, is  
9 simply this, and then I will sit down. The  
10 difference is the City went into the mediation with  
11 the understanding that it could be candid and open  
12 because what was said in that mediation would not be  
13 used against it in litigation and now it is.

14 THE COURT: Well, I know that's your  
15 position, but you've got to prove to me, you not --  
16 they don't have to disprove it. You have to prove  
17 you negotiated in good faith, and I'm telling you,  
18 telling me that you sat down 11 times with somebody  
19 is not going to cut it.

20 MR. HILE: In that case, then I lose my  
21 objection. I certainly want to convince you, so  
22 we'll hear about all of that.

23 THE COURT: All right. Well, I'm going to  
24 overrule the objection and deny that motion in  
25 limine.