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9 UNITED STATES BANKRUPTCY COURT  
 10 EASTERN DISTRICT OF CALIFORNIA  
 11 SACRAMENTO DIVISION  
 12

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

Case No. 2012-32118  
 D.C. No. OHS-1  
 Chapter 9

**OBJECTIONS TO DECLARATION  
 AND EXPERT REPORT OF NANCY L.  
 ZIELKE PURSUANT TO FEDERAL  
 RULE OF EVIDENCE 702 AND  
 DAUBERT V. MERRELL DOW  
 PHARMACEUTICALS, INC.<sup>1</sup>**

Date: February 26, 2013  
 Time: 1:30 p.m.  
 Dept: C  
 Judge: Christopher M. Klein

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27 \_\_\_\_\_  
 28 <sup>1</sup> The City is not asking the Court for a ruling on the City's objections to evidence at the February 26, 2013 Status Conference. Rather, the City will seek direction from the Court at such hearing as to how it would like to proceed as to the City's objections.

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1 The City of Stockton (the “City”) hereby submits the following objections to the  
2 Declaration of Nancy L. Zielke In Support of Supplemental Objection of Assured Guaranty Corp.  
3 and Assured Guaranty Municipal Corp. to Debtor’s Chapter 9 Petition and Statement of  
4 Qualifications filed June 28, 2012 (the “Zielke Declaration” in support of the “Assured Obj.” to  
5 the City’s “Petition”) and the accompanying Expert Report of Nancy L. Zielke (the “Zielke  
6 Report”), pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm, Inc.*,  
7 509 U.S. 579 (1993). These objections are made in addition to those objections raised in the  
8 City’s “Objections To Declaration And Expert Report Of Nancy L. Zielke In Support Of  
9 Supplemental Objection Of Assured Guaranty Corp. And Assured Guaranty Municipal Corp. To  
10 Debtor’s Chapter 9 Petition And Statement Of Qualifications” and focus on the helpfulness,  
11 qualifications, and reliability of the expert opinions rendered by Nancy L. Zielke (“Zielke”) in the  
12 Zielke Declaration and Zielke Report.

13 **I. INTRODUCTION**

14 In *Daubert*, the Supreme Court recognized and reaffirmed that the Federal Rules of  
15 Evidence require courts to perform a “gatekeeping role” with regards to the admissibility of  
16 expert opinion testimony. 509 U.S. at 597; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526  
17 U.S. 137, 149 (1999) (holding that the *Daubert* “gatekeeping” obligation applies to all expert  
18 testimony, not just “scientific” testimony); *General Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).  
19 This gatekeeping obligation requires courts considering the admissibility of expert opinions based  
20 on scientific, technical, or otherwise specialized knowledge to ensure that the expert is properly  
21 qualified to render the proffered opinion, that the proffered opinion will be helpful to the trier of  
22 fact, and that the proffered opinion is based upon sufficiently reliable information, principles, and  
23 methodologies. *See* FRE 702. Put more simply, courts at the trial level “must ensure that any and  
24 all [expert opinion] admitted is not only relevant, but reliable.” *Daubert*, 509 U.S. at 589. The  
25 Zielke Declaration and Zielke Report fail these fundamental criteria.

26 As a preliminary matter, the entirety of both Zielke’s Declaration and Report is  
27 inadmissible because neither offers any opinion testimony that would be relevant or helpful to the  
28 Court in deciding the questions that are actually before it. The City has presented evidence

1 showing that it meets the requirements for chapter 9 eligibility, including (1) that the City is a  
2 municipality; (2) that the City is authorized by California law to bring its Petition; (3) that the  
3 City is insolvent as defined under 11 U.S.C. § 109(c)(3); (4) that the City desires to effect a plan  
4 to adjust its debts; (5) that the City has met the negotiation requirement of § 109(c)(5)(B); and,  
5 finally (6) that the City has filed its Petition in good faith pursuant to § 921(c). *See generally* City  
6 Of Stockton’s Memorandum Of Facts And Law In Support Of Its Statement Of Qualifications  
7 Under Section 109(c) Of The United States Bankruptcy Code (“Mem.”). The Assured Obj.,  
8 meanwhile, contends that the City is not in fact insolvent under section 109(c)(3), has not met the  
9 negotiation requirement of section 109(c)(5)(B), and did not file its Petition in good faith as  
10 required by section 921(c). Zielke’s Declaration and Report, however, offer no opinion testimony  
11 relevant to the Court’s determination of the City’s solvency, negotiations, or good faith.

12           Instead, Zielke’s expert opinion boils down to the contention that the City could have  
13 avoided insolvency if it had instituted a host of draconian, and potentially impossible, fiscal  
14 measures, as outlined in the “Alternative Model” presented in the Zielke Report. Regardless of  
15 whether this contention is true (which the City maintains it is not), it has no bearing whatsoever  
16 on the question of whether or not the City was insolvent on June 28, 2012. Nor does the City’s  
17 “failure” to adopt the measures laid out in the Alternative Model affect the Court’s determination  
18 of the City’s good faith in filing its Petition. *See In re Pierce Cnty. Hous. Auth.*, 414 B.R. 702,  
19 711 (Bankr. W.D. Wash. 2009) (laying out the factors for determination of good faith under §  
20 921(c)) (citing COLLIER ON BANKRUPTCY ¶ 921.04[2]). Thus, the expert opinions stated in  
21 Zielke’s Declaration and Expert Report do nothing to aid the Court’s determination of the City’s  
22 eligibility for chapter 9, and as such are inadmissible.

23           Moreover, much of the Zielke Report, as described in detail below, is also inadmissible  
24 because it is based on incomplete information, unwarranted assumptions and speculation, and  
25 flawed methodologies. As such, these opinions fail the basic requirement of reliability laid out in  
26 FRE 702 and *Daubert*, and are inadmissible on that ground as well.

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1 **II. OBJECTIONS**

2 **A. Legal Standard**

3 Federal Rule of Evidence 702<sup>2</sup> provides:

4 A witness who is qualified as an expert by knowledge, skill,  
5 experience, training, or education may testify in the form of an  
6 opinion or otherwise if:

7 (a) the expert's scientific, technical, or other specialized knowledge  
8 will help the trier of fact to understand the evidence or to determine  
9 a fact in issue;

10 (b) the testimony is based on sufficient facts or data;

11 (c) the testimony is the product of reliable principles and methods;  
12 and

13 (d) the expert has reliably applied the principles and methods to the  
14 facts of the case.

15 Fed. R. Evid. 702. Thus, in order for an expert's opinion to be admissible as evidence, the expert  
16 must be qualified to render such an opinion, the opinion must be helpful to the trier of fact, and  
17 the opinion must be reliable (based on sufficient facts, reliable principles, and reliable application  
18 of those principles).

19 Trial courts have broad discretion in deciding whether to admit or exclude expert  
20 testimony under FRE 702. *General Elec. Co.*, 522 U.S. at 141-42; *see also In re Cloobek*, BAP  
21 NV-06-1165-BSN, 2007 WL 7535051 (B.A.P. 9th Cir. May 2, 2007). However, a trial court  
22 must exercise its gatekeeping function for expert opinion evidence, and any determination of  
23 reliability should be made on the record. *See White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th  
24 Cir. 2002) *opinion amended on denial of reh'g*, 335 F.3d 833 (9th Cir. 2003) (holding that  
25 *Daubert* and *Kumho Tire* “require that the judge apply his gatekeeping role under *Daubert* to all  
26 forms of expert testimony”); *Elsayed Mukhtar v. California State Univ., Hayward*, 299 F.3d  
27 1053, 1066 (9th Cir. 2002) *amended sub nom. Mukhtar v. California State Univ., Hayward*, 319  
28 F.3d 1073 (9th Cir. 2003) (“*Kumho* and *Daubert* make it clear that the court must, on the record,  
make some kind of reliability determination.”).

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<sup>2</sup> The Federal Rules of Evidence are made applicable to cases under the Bankruptcy Code by Rule of Bankruptcy Procedure 9017.

1           **B.     The Expert Opinion Testimony In The Zielke Declaration And Zielke Report**  
2           **Is Irrelevant To The Question Of The City's Eligibility For Chapter 9 And Is**  
3           **Inadmissible As Unhelpful To The Court.**

4           In order to be admissible, expert testimony must be helpful to the trier of fact. *Daubert*,  
5           509 U.S. at 591; *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007); *Kumho*  
6           *Tire*, 526 U.S. at 156. Specifically, expert evidence or testimony must “assist the trier of fact to  
7           understand the evidence or to determine a fact in issue.” *Daubert*, 509 U.S. at 591. Where expert  
8           testimony does not touch on the questions actually at issue in a case, such testimony is necessarily  
9           unhelpful to the Court. *Id.* (“Expert testimony which does not relate to any issue in the case is not  
10          relevant and, ergo, non-helpful.”) (quoting 3 Weinstein & Berger ¶ 702[02], pp. 702–18). Expert  
11          opinion testimony which fails this basic test of relevance is inadmissible. *Id.*; *Stilwell*, 482 F.3d  
12          at 1192; *United States v. Redlightning*, 624 F.3d 1090, 1123 (9th Cir. 2010).

13          The expert opinions offered by Zielke in her Declaration and Report are not helpful to the  
14          Court, because they are irrelevant to the issues before the Court. The Assured Obj. raises three  
15          challenges to the City's Eligibility Petition: first, that the City is not insolvent under section  
16          109(c)(3) of the Bankruptcy Code; second, that the City did not satisfy the negotiation  
17          requirement of section 109(c)(5)(B), and; third, that the City did not file its Petition in good faith,  
18          as required by section 921(c). However, Zielke's expert testimony does not touch on *any* of these  
19          issues.

20          The fundamental opinion asserted by Zielke is that the City could have avoided  
21          insolvency and the need to file for chapter 9 relief if it had implemented a host of measures as  
22          part of the Alternative Model outlined in the Zielke Report.<sup>3</sup> Zielke Declaration, ¶¶ 4, 9; Zielke  
23          Report, at 15. In support of this assertion, the Zielke Report proffers numerous revenue increases  
24          and budget cuts which Zielke opines would have balanced the City's budget. However, these  
25          opinions miss the point. The question before the Court is not whether the City *could* have  
26          avoided insolvency, but whether it was, in fact, insolvent as of the date of its Petition. The fact  
27          that the City did not adopt the Alternative Model proposed by Zielke, even assuming it could

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<sup>3</sup> Moreover, to the extent that Zielke's Declaration and Report do no more than second guess the City's decisions,  
this is not a proper subject for the Court's determination. See City of Stockton's Reply to Objections to its Statement  
of Qualifications Under Section 109(c) of the United States Bankruptcy Code, at 3, 12-13, 37.

1 have been successfully carried out and would have realized the benefits Zielke assumes, has no  
2 bearing whatsoever on the question of the City's insolvency.

3 In fact, Zielke states outright that "[i]n [her] expert opinion on municipal finance and  
4 budgeting . . . Stockton has budgeted itself into insolvency." Zielke Declaration, ¶ 4; *see also*  
5 Zielke Report, at 15; Assured Obj., at 8. Zielke thus acknowledges that the City *was* insolvent as  
6 of the filing of its Petition and, implicitly, that her expert opinion testimony does not challenge  
7 this fact.<sup>4</sup> *See also*, Zielke Report, at 24 (citing a letter from former Chief Financial Officer  
8 Susan Mayer stating that "[f]inancial planning and reporting failures have . . . left the City on the  
9 brink of insolvency.") Moreover, Zielke concedes that she did not perform any cash flow  
10 projection for the City's General Fund for 2012-13. Transcript of Deposition of Nancy L. Zielke,  
11 January 31, 2013 ("Zielke Depo."), at 110:17-111:6. Zielke's Declaration and Report thus  
12 contain no opinion as to the City's actual cash flow situation. Zielke's testimony, which focuses  
13 solely on what she believes the City should have done leading up to the filing of its Petition, is  
14 therefore completely irrelevant to the determination of whether the City meets the insolvency  
15 requirement of section 109(c)(3). It is therefore unhelpful to the Court in making that  
16 determination.

17 Zielke's testimony is also irrelevant to the question of the City's good faith in filing its  
18 Petition. Even if it is assumed that the expense and revenue measures laid out in the Alternative  
19 Model touted by the Zielke Report were plausible and could have saved the City from insolvency  
20 had they been implemented months before the City filed its Petition, neither the Zielke  
21 Declaration or Report make any showing that the City did not believe in good faith that it had to  
22 file for chapter 9 relief as of June 28, 2012. Further, the Zielke Declaration and Report all but  
23 ignore the substantial actions the City did take in an effort to prevent its insolvency, and further  
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25 <sup>4</sup> Zielke attempted to backtrack from this position in her deposition, stating that she had not analyzed the City's claim  
26 that its General Fund was "service insolvent." Zielke Depo., at 66:6-9. She also stated that she believed the  
27 Management Partners review of the City General Fund's "cash solvency" was inconclusive and opined that the City  
28 was cash solvent, despite offering no independent analysis and despite the fact that the Zielke Report does not appear  
to make that claim. Zielke Depo., at 68:8-16. Finally, Zielke stated that she disagreed that the City's General Fund  
was insolvent from a budget perspective, again without any analysis of the City's actual fiscal condition as of the date  
of its filing. Zielke Depo., at 67:6-24. All of these responses are in sharp contrast to the plain statement in Zielke's  
Declaration and Report that the City has "budgeted itself into insolvency."

1 fail to consider potential reasons why the City might not have been able to take the extreme steps  
2 recommended in the Alternative Model. Instead, Zielke merely testifies to a laundry list of  
3 measures she believes the City should have implemented, without any independent analysis of  
4 their likely efficacy in the City's specific situation or of the City's actual ability to carry them out.  
5 Thus, the Zielke Declaration and Report are also irrelevant to the issue of the City's good faith,  
6 and are unhelpful on that question as well.

7 Because the expert opinion testimony offered in the Zielke Declaration and Report will  
8 not help the Court in its determination of whether the City meets the eligibility criteria for  
9 chapter 9, it fails the "helpfulness" requirement of *Daubert* and FRE 702, and is therefore  
10 inadmissible in its entirety.

11 **C. Zielke's Expert Opinion As To Specific Proposals For Increasing Revenues  
12 And Cutting Costs Are Inadmissible Because They Are Not Sufficiently  
13 Reliable.**

14 1. The Zielke Report Offers No Support For The Assumption That The City  
15 Could Have Passed Multiple New Tax Increases And Fees.

16 The "Alternative Model" propounded by the Zielke Report assumes that the City would be  
17 able to raise over \$9.5 million in additional revenues by passing multiple new tax measures and  
18 fees. Zielke Report, at 18 (Table 1). These include a local retail sales tax increase of 0.5 percent,  
19 a 2 percent increase in the utility user tax, a 2 percent increase in a transient occupancy tax, a \$48  
20 parcel tax, new emergency service cost recovery fees, a 911 fee, and a countywide library sales  
21 tax. Zielke Report, at 47-48. However, Zielke provides no support whatsoever for the  
22 assumption that the City would be able to successfully pass all of these new taxes and fees. Nor  
23 did Zielke undertake any polling or perform any feasibility analysis of the likelihood that the tax  
24 increases would be passed upon a required vote by the City's citizens. Zielke Depo., at 166:18-  
25 167:2; 188:24-189:3. As such, Zielke's conclusion that the City could implement the revenue  
26 enhancement measures of the Alternative Model and, in turn, avoid insolvency, is purely  
27 speculative.

28 In order to be deemed reliable, expert testimony must be "supported by appropriate  
validation – i.e., good grounds." *Daubert*, 509 U.S. at 590. An expert opinion must be more than

1 a bald assertion without support, and expert opinions that lack a factual basis and are based on  
2 speculation or conjecture are inadmissible. *Guidroz-Brault v. Missouri Pac. R. Co.*, 254 F.3d  
3 825, 829 (9th Cir. 2001) (expert testimony may not include “unsupported speculation and  
4 subjective beliefs.”); *California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1181 (9th Cir.  
5 2010) *on reh'g en banc sub nom. California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th  
6 Cir. 2011) (expert testimony inadmissible where expert testified a result was “plausible” and  
7 “likely” but “admitted that he had done no analysis”).<sup>5</sup> This is precisely the case with Zielke’s  
8 testimony that the City could have avoided bankruptcy in part by passing several new taxes and  
9 fees.<sup>6</sup> What little evidence Zielke provides on this point is either misstated or not reliably  
10 applicable to the City’s situation. Ultimately, Zielke simply assumes that such fees and taxes  
11 could be passed and then claims that the resulting revenue increases would balance the City’s  
12 budget.

13           Instead of providing any polling data or analysis of the plausibility that the City’s citizens  
14 would pass the specific new measures called for in the Alternative Model, the Zielke Report  
15 instead offers general evidence that “[California] voters have become increasingly willing to  
16 support local tax and bond measures.” Zielke Report, at 38, 48 (Table 10). Zielke then  
17 misleadingly uses this data to imply that the City could readily have convinced its own citizens to  
18 pass multiple new tax increases. However, Zielke’s interpretation of this evidence is highly  
19 unreliable, if not outright disingenuous. For instance, Zielke asserts that according to the City’s  
20 September 16-18, 2012 survey, 64% of voters agreed that they would vote in favor of a half-cent  
21 sales tax measure. Zielke Report, at 49. However, this statement omits the fact that the survey  
22 question at issue specifically stated that the sales tax increase would be used to expand the police  
23 force, improve 911 services, increase anti-gang and crime prevention programs, and supplement  
24 other general services. *See Declaration of Robert Deis In Support Of City Of Stockton’s Reply  
25 To Objections To Its Statement Of Qualifications Under Section 109(c) Of The United States*

26 \_\_\_\_\_  
27 <sup>5</sup> Expert testimony which is the product of speculation or unsupported assumptions is also inadmissible as unhelpful  
28 to the trier of fact. *See In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994)  
29 (“Expert opinions are excluded as unhelpful if based on speculative assumptions or unsupported by the record.”).

<sup>6</sup> Zielke’s opinion that the City could have taken advantage of “Unrealized State Grant Opportunities” is also  
completely speculative. *See Zielke Report*, at 47.

1 Bankruptcy Code, Ex. B. Zielke's Alternative Model, meanwhile, would reduce all of these  
2 services while simultaneously raising taxes. Thus, whereas 64% of the voters polled said they  
3 would support a sales tax increase in order to maintain or improve the services listed, Zielke  
4 offers no support for her conclusion that the same number of voters would support a sales tax  
5 increase under a plan where those services received further cuts. Meanwhile, the percentage of  
6 voters who stated they would be willing to approve a new tax to pay debt holders, employee  
7 compensation and benefits, and city-paid retiree medical benefits, was only 21%. Thus, the  
8 Zielke Report erroneously states that the City could have passed the tax measures in the  
9 Alternative Model, even though the Alternative Model (which cuts services preferred by voters,  
10 while maintaining payments the voters oppose) takes precisely the opposite approach supported  
11 by the City's polling data. In fact, Zielke concedes that the Alternative Model does not include  
12 *any* provisions for improving or restoring city services, which is what the voters polled said they  
13 would be willing to pay for with a tax increase. Zielke Depo., at 180:7-13.

14 Similarly, the Zielke Report states that 171 of 240 tax referenda were successfully passed  
15 in the November 2012 election. However, the Zielke Report fails to discuss how many of those  
16 referenda simply renewed existing taxes as opposed to enacting new tax increases. Moreover, the  
17 Zielke Report contains no analysis as to how these referenda compared to those recommended in  
18 the Alternative Model, or whether the voters in the jurisdictions passing these referenda were  
19 similar to those in the City. Zielke also did not attempt to determine how many California  
20 jurisdictions considered placing a tax measure on the November 2012 ballot, but ultimately chose  
21 not to (such that Zielke's data naturally self-selects towards those cities that believed such a  
22 measure would pass). Zielke Depo., at 168:14-18. Nor does the Zielke Report discuss how  
23 many, if any, cities passed *multiple* new taxes during the last election. All of these questions are  
24 vital to the City's ability to pass the Alternative Model's tax increases, yet the Zielke Report  
25 offers no consideration of these questions or context for its limited evidence. Without that  
26 context, Zielke's conclusion that the Alternative Model represented a feasible option for the City  
27 is speculative and unreliable.

28 ///

1 Zielke also eschews any consideration of the potential secondary effects of her proposed  
2 fee and tax increases. For instance, there is no analysis of whether a new transient occupancy tax  
3 might actually deter people from staying in hotels in the City, thus reducing the City's tax  
4 revenues from that source. Zielke Depo., at 186:12-23. Nor is there any analysis of whether the  
5 proposed sales tax increases might cause a loss of sales to neighboring municipalities. Zielke's  
6 Declaration and Report thus not only fail to consider whether the proposed new taxes and fees  
7 were plausible, but also whether they would have been as effective as claimed.

8 Moreover, even if the City was able to pass the Alternative Model's laundry list of tax  
9 measures, the Zielke Report provides no analysis as to whether such measures would have taken  
10 effect in time to prevent the City's insolvency. The additional revenues from these measures  
11 would not have been received by the City immediately, but instead would have come in over the  
12 course of the year as new taxes were implemented. Thus, even if the City had passed all of these  
13 new taxes during the prior fiscal year, it is not clear that this would have been enough to prevent  
14 insolvency at beginning of fiscal year 2012/2013.

15 Thus, the minimal, unrelated evidence offered by Zielke is completely insufficient to  
16 support Zielke's conclusion that the City could have passed *all* of the new taxes and fees  
17 demanded by the Alternative Model. Moreover, Zielke's limited or non-existent analysis of this  
18 evidence falls well-short of the requirement that expert testimony be based on the reliable  
19 application of reliable principles and methods. Since the City would have had to implement all of  
20 these new fees and taxes in order to balance its budget under the Alternative Model, *see* Zielke  
21 Depo., at 163:6-11, and Zielke offers insufficient and unreliable support for her opinion that such  
22 measures could be passed, Zielke's conclusion that the City could have avoided insolvency is a  
23 matter of pure speculation, and is therefore inadmissible as unreliable.

24 2. The Zielke Report Offers No Independent Analysis Or Support For The  
25 Conclusion That Its Recommended Cost Cutting Measures Would Have  
26 Been Plausible Or Effective.

27 The Alternative Model proposed in the Zielke Report would also require numerous,  
28 substantial reductions to City departments, services, compensation, and benefits. Most notably,  
the Zielke Report opines that the City should have implemented an across-the-board reduction of

1 15% for department budgets, “restructured” (read: reduced) its employee personnel and benefits  
2 (including requiring current employees to begin contributing 25% for their health care and  
3 reducing retiree medical benefits), and sought to consolidate or privatize City services.<sup>7</sup> Zielke  
4 Report, at 57, 61 (Table 18), 62-68. However, just as with its suggestions for revenue increases,  
5 the Zielke Report provides no independent analysis of the feasibility of any of these proposed  
6 budget cuts and cost-reduction measures.

7         Zielke provides no analysis of the plausibility or impact of requiring the City to further  
8 reduce its department budgets by 15 percent, above and beyond the drastic reductions the City has  
9 already made. Zielke even concedes that no one at Alvarez & Marsal performed a detailed  
10 efficiency review or cost study as it related to independent departments. Zielke Depo., at 193:2-  
11 10; 195:7-8. In fact, Zielke could not perform a proper analysis of whether her proposed cuts  
12 would materially impact necessary City services because the recommendation for an  
13 across-the-board cut of 15% to department budgets includes no discussion of what, exactly, each  
14 department would be forced to cut. Without such an analysis, Zielke’s expert opinion on the  
15 City’s ability to make these cuts is useless, because it lacks any context to demonstrate whether  
16 such cuts would ultimately have been beneficial to the City. At the same time, Zielke contradicts  
17 herself by calling for a 15 percent cut to the City’s administrative services while simultaneously  
18 complaining that the City is already unable to produce financial information in a timely manner.  
19 This illustrates the fundamental disconnect between the Zielke Report’s speculative assumptions  
20 regarding the City’s ability to implement drastic cuts while maintaining important City services.  
21 More colloquially, Zielke’s Alternative Model seeks to have its cake and eat it too.

22         The Zielke Report also eschews any discussion as to the plausibility of lowering  
23 compensation and benefits employee and retirees. *See, e.g.*, Zielke Depo., at 205:19-24. Zielke’s  
24 “professional opinion” appears to be that compensation and benefits do not “deliver[] a benefit to  
25 the City.” Zielke Depo., at 209:25-210:2. This stance ignores the obvious political costs of  
26 attempting to make further unilateral reductions to the City’s labor agreements, and provides no  
27

28 <sup>7</sup> It is telling that the Alternative Model in the Zielke Report at no point considers a restructuring of the City’s bond debt, which would include the City’s debt to Zielke’s client, Assured. Zielke Depo., at 178:10-17; 180:22-181:2.

1 analysis at all of what impacts such reductions might have on the City's ability to recruit qualified  
2 employees in the future. Moreover, the Zielke Report does not consider whether the City would  
3 legally be able to make changes to its labor agreements outside of bankruptcy. Zielke Depo., at  
4 206:10-15. Similarly, the Zielke Report simply assumes that the City would legally be able to  
5 force its retirees to contribute 25% of benefits outside of bankruptcy. Zielke Depo., at 208:18,  
6 208:22-24.

7 The Zielke Report also attempts to find phantom savings through dubious accounting  
8 practices. For instance, the Zielke Report states that a savings of \$3.54 million can be had by  
9 "consider[ing] more realistic calculations for vacancy savings associated with the existing safety  
10 related vacant positions and expected staff turnover resulting from retirement, terminations, and  
11 voluntary turnover." Zielke Report, at 62 (Table 19). This refers to the fact that while there are  
12 currently approximately 88 vacancies out of the City's total positions, the City's budget includes  
13 a 0.8% vacancy savings for the payment of a portion of those positions that are expected to be  
14 filled over the course of the fiscal year. Zielke Report, at 64. This is a common and appropriate  
15 budgeting tool, as even Zielke admits. Zielke Depo., at 203:3-9 (conceding that City budgeting  
16 techniques "typically do include" an offset for vacant positions that may be filled). Yet the  
17 Alternative Model calls for "more realistic calculations," which it defines as raising the vacancy  
18 savings provision to 9%, which it claims will generate an additional savings of \$3.5 million.  
19 Zielke Report, at 64. This amounts to an assumption that an even larger number of the City's  
20 current vacancies will remain vacant, and does nothing to actually create savings (after all, the  
21 vacancy savings provision is only an assumption, and is set aside in case these positions are  
22 filled). Zielke offers not support or analysis for the conclusion that the vacancy rate for City  
23 positions is likely to remain higher than the City budgeted for. As such, this is just another of  
24 Zielke's speculative assumptions.

25 The Zielke Report also fails to consider the administrative costs and delays inherent in  
26 enacting its various proposals. In many cases, passing cost cutting measures or revenue increases  
27 would take time, money, and political capital that the City simply did not have. Without  
28 considering potential limitations on the City's ability to implement her proposals, Zielke cannot

1 reliably testify as to whether the City could have managed the cuts she insists were necessary.  
2 Nor can she reliably testify as to whether these measures would result in the savings she claims  
3 without a proper analysis of their administrative cost, likely success, and secondary effects. Once  
4 again, the Zielke Report simply assumes that certain cost-cutting measures can be successfully  
5 implemented without any downside. This is pure speculation, and is not the proper basis for an  
6 expert opinion. *See Guidroz-Brault v. Missouri Pac. R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001).  
7 Zielke’s expert testimony as to cost-cutting measures the City should have undertaken is therefore  
8 unreliable, and inadmissible under FRE 702.

9 **D. Zielke’s Opinion That The City’s Financial Information Does Not**  
10 **Demonstrate Insolvency Is Inadmissible Because It Is Not Based On Any**  
11 **Independent Expert Analysis.**

12 A large portion of the Zielke Report is dedicated to Zielke’s testimony that the City’s  
13 financial data and reporting practices are such that the City cannot show that it was in fact  
14 insolvent. *See generally*, Zielke Report at 20-29. However, in addition to the fact that Zielke  
15 herself admits that the City has “budgeted itself into insolvency,” Zielke offers no independent  
16 analysis or supporting facts suggesting that the City is not, in fact, insolvent. Instead, Zielke  
17 attempts to disguise this lack of independent analysis and conclusions by asserting only that the  
18 City’s own data and evidence are insufficient.<sup>8</sup> This is not admissible as expert testimony for two  
19 reasons. First, without undertaking any of her own analysis, Zielke can only speculate that the  
20 City’s evidence-based conclusion that it is insolvent is erroneous. *See Guidroz-Brault* 254 F.3d  
21 825 at 829; *California ex rel. Brown*, 615 F.3d at 1181 (9th Cir. 2010). Second, Zielke’s  
22 testimony renders an improper opinion on an ultimate legal conclusion – namely, that the City’s  
23 evidence does not satisfy its burden to prove its eligibility. *See Nationwide Transp. Fin. v. Cass*  
24 *Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (expert witnesses may not give an opinion as  
25 to a legal conclusion).

26 ///

27 <sup>8</sup> Throughout the Zielke Report, Zielke couches her opinions in carefully selected language, stating, for instance, that  
28 the City “has failed to produce reliable evidence” or that she is “unable to validate” the City’s conclusions. *See*  
Zielke Report, at 20, 22. This does not amount to an affirmative expert opinion that the City’s conclusions are  
incorrect.

1           Zielke asserts that the “City’s own financial information cannot be trusted to demonstrate  
2 insolvency.” Zielke Report, at 15. She cites “40 material weaknesses and significant  
3 deficiencies” in the City’s financial reporting, but fails to offer any support or analysis for her  
4 implication that these errors alter the basic conclusion that the City was insolvent on June 28,  
5 2012. Rather than providing independent analysis and rendering a factual opinion directly on this  
6 issue, Zielke instead renders a conclusory legal opinion that the City has failed to carry its  
7 evidentiary burden. Zielke Report, at 20 (asserting that the City “has failed to produce reliable  
8 evidence that it was insolvent as of June 28, 2012, or that it will be unable to pay its debts as they  
9 become due in its current fiscal year.”) This is *not* testimony that the City is not in fact insolvent.  
10 Nor could it be, as Zielke has offered no analysis on that question. Instead Zielke simply assumes  
11 (1) that the Alternative Model she propounds would have been workable and effective and (2)  
12 that the City’s evidence of insolvency must therefore be inaccurate. As discussed above, the  
13 former assumption is flawed. Zielke’s claims that the City’s evidence does not prove its  
14 insolvency, meanwhile, is the product of unsupported speculation and assumption, since Zielke  
15 offers no evidence of her own to show that the City is actually solvent.

16           Ultimately, Zielke’s various references to the insufficiency of the City’s evidence as to  
17 insolvency are an attempt to usurp the Court’s fact-finding role and replace it with Zielke’s own  
18 speculative opinion. This is not proper expert opinion testimony and should be excluded as  
19 inadmissible.

20           **E.     Zielke’s Testimony That The City Should Seek A Reduction Of Its CalPERS**  
21           **Liability Is An Inadmissible Legal Conclusion That Zielke Is Not Qualified**  
22           **To Offer.**

23           As part of its recommendation that the City reduce its pension costs, the Zielke Report  
24 states that “prior to Chapter 9, the City made no effort to seek from CalPERS a reduction or  
25 modification of its PERS liability.” Zielke Report, at 35. While Zielke does not draw such a  
26 connection, this statement could be taken as implicitly supporting Assured’s contention that the  
27 City has not satisfied the negotiation requirement of section 109(c)(5)(B) because it did not  
28 negotiate with CalPERS for additional concessions. *See* Assured Obj., at pp. 26-28. To the  
extent that this portion of Zielke’s expert testimony is meant to apply to the City’s satisfaction of

1 its negotiation requirement, it is inadmissible for two reasons: First, because it is an improper  
2 legal conclusion, and second, because such an opinion goes beyond Zielke's expertise.

3 Expert opinion testimony is not admissible where it amounts to a legal conclusion.  
4 *Nationwide Transp. Fin.*, 523 F.3d at 1058. Whether or not the City has satisfied section  
5 109(c)(5)(B) is a legal question, and is thus solely within the province of the Court. Moreover,  
6 expert opinion testimony is only admissible when the expert is sufficiently qualified to render  
7 such an opinion. See *United States v. Lukashov*, 694 F.3d 1107, 1115 (9th Cir. 2012); *Primiano*  
8 *v. Cook*, 598 F.3d 558, 563 (9th Cir. 2010). Despite her other qualifications, Zielke is not  
9 qualified to render a legal opinion on the necessity of seeking concessions from CalPERS in order  
10 for the City to satisfy its negotiation requirement. Moreover, Zielke has admitted that she does  
11 not know of any city that has been relieved of its requirement to make payments to CalPERS,  
12 Zielke Depo., at 125:21-25, and that she did not know of any cities other than San Bernadino or  
13 Stockton that had even asked CalPERS to be relieved of its PERS obligations, Zielke Depo., at  
14 124:20-125:8. Zielke's testimony as to the City's negotiations with CalPERS is thus inadmissible  
15 on the question of the negotiation requirement.

### 16 **III. CONCLUSION**

17 Based on the foregoing, the City requests that the Court exclude the Zielke Declaration  
18 and Report in their entirety as unhelpful and inadmissible. In the alternative, the City requests  
19 that the Court exclude as unreliable those portions of the Zielke Declaration and Report which  
20 proffer speculative opinion testimony as to revenue-increasing and cost-reducing measures Zielke  
21 asserts the City should have pursued without offering supporting facts or data showing that such  
22 measures would be plausible and effective. Finally, the City requests that the Court strike all  
23 portions of the Assured Obj. that depend upon any portion of the Zielke Declaration or Zielke  
24 Report that are found to be inadmissible.

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