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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-1 Chapter 9 **CITY OF STOCKTON'S REPLY TO ASSURED GUARANTY CORP. AND ASSURED GUARANTY MUNICIPAL CORP.'S OPPOSITION TO CITY OF STOCKTON'S *DAUBERT* MOTION SEEKING TO EXCLUDE THE EXPERT TESTIMONY OF NANCY L. ZIELKE** Date: March 20, 2013 Time: 9:30 a.m. Dept: C, CTRM 35 Judge: Hon. Christopher Klein

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The City of Stockton, California (the "City") hereby submits this Reply to the Opposition Of Assured Guaranty Corp. And Assured Guaranty Municipal Corp. To City Of Stockton's *Daubert* Motion Seeking To Exclude The Expert Testimony Of Nancy L. Zielke (the "Opposition" to the City's "*Daubert* Motion").[1]

I. INTRODUCTION

While asking the Court to delay its determination of the admissibility of the Zielke Declaration and Report until after the Evidentiary Hearing, the Opposition fails to rebut the fact that Zielke expert testimony does not satisfy the requirements of Federal Rule of Evidence 702,[2] which states that expert opinion testimony must be both helpful to the finder of fact and sufficiently reliable. FRE 702; *Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579 (1993). The Zielke Declaration and Report are not helpful to the Court as finder of fact because they are irrelevant to the questions actually before the Court. Rather than testify as to the existing standards for insolvency or good faith under 11 U.S.C. §§ 109(c)(3) and 921, Zielke instead offers testimony supporting her conclusion that the City has "budgeted itself into insolvency." Opposition, at 5. This is not the standard for determining the insolvency question before the Court, and Zielke offers no evidence that the City's budgeting decisions were a deliberate attempt to become insolvent. Further, Zielke's testimony is inadmissible because it is based on unsupported assumptions and speculation and thus fails on the reliability prongs of FRE 702 as well.

Apparently aware that Zielke's testimony is flawed as to both its relevance and unreliability, the Opposition also attempts to postpone the Court's admissibility determination by arguing that the Court, as both finder of fact and evidentiary gatekeeper, can wait until after the Evidentiary Hearing to render a decision on the City's *Daubert* Motion. While the Court has the discretion to make its admissibility determination either before or after the Evidentiary Hearing, a pre-trial decision would be more beneficial for the parties and the Court. Specifically, a pre-trial

[1] Unless otherwise stated, capitalized terms in this Reply have the same meaning as in the City's *Daubert* Motion.
[2] As the proponent of Zielke's expert testimony, Assured has the burden of establishing its admissibility. *United States v. 87.98 Acres of Land More or Less in the County of Merced*, 530 F.3d 899, 904 (9th Cir. 2008) (citing *Lust v. Merrell Dow Pharm., Inc.,* 89 F.3d 594, 598 (9th Cir.1996)).

ruling on the City's *Daubert* motion will make the upcoming Evidentiary Hearing more efficient and focused, and will avoid the possibility that the parties will spend a portion of their limited trial time presenting and attacking evidence which the Court might later find inadmissible. Moreover, because Zielke's testimony has already been presented to the Court in its entirety (through the Zielke Report and Declaration), the Court is able to make a fully informed decision now and does not require additional testimony on admissibility issues.

For the reasons discussed below, as well as in the City's *Daubert* Motion, the Zielke Declaration and Report are inadmissible under FRE 702 and *Daubert* and should be excluded.

II. DISCUSSION

A. The Court Should Exercise Its Discretion To Rule On The City's *Daubert* Motions Prior To The Evidentiary Hearing.

The Opposition leads with the argument that because the Court is acting as the finder of fact, it need not rule on the admissibility of Zielke's expert testimony under FRE 702 and *Daubert* until after the Evidentiary Hearing. *See* Opposition, at 3-4. The Opposition then cites several cases for the proposition that the need for a pre-trial *Daubert* determination is lessened where the Court serves as both gatekeeper and finder of fact. *Id.* None of these cases, however, hold that the Court "should" or "must" delay its decision; they state only that one reason for a pre-trial determination (potential jury bias) has been removed. *Id.* (citing *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1015 (8th Cir. 2012) ["there is *less* need . . ."]; *Volk v. United States*, 57 F. Supp. 2d 888, 896 n. 5 (N.D. Cal. 1999) ["[T]he *Daubert* gatekeeping obligation is *less* pressing . . ."]; *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006) [stating the need for a pre-hearing decision "is *lessened*"]; *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) [most *Daubert* safeguards are "not *as* essential]) (all emphasis added).[3]

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[3] The Opposition's citation to *In re Trigem Am. Corp.*, 2010 Bankr. LEXIS 6274, at *2-3 for the proposition that waiting until after trial to make admissibility determinations for expert testimony is the "preferred approach" stretches the language of the two-paragraph *Trigem* holding, which states only that the court preferred that approach in that particular instance. Of course, even if this were the "preferred approach" in most cases where the Court plays the dual roles of gatekeeper and finder of fact, it is ultimately left to the Court's discretion to decide the most efficient, effective, and fair procedure in the specific circumstances of this case.

Of course, this is nothing more than a slanted restatement of the principle that the Court has substantial discretion to decide when to make its *Daubert* determination. As Judge Coyle of the District Court for the Eastern District of California recognized, while a court in a bench trial need not be worried about potential jury bias, "the trial judge acting as trier of fact *has 'broad discretion to admit or exclude' expert testimony that is not helpful to its decision*." *CFM Communications, LLC v. Mitts Telecasting Co.*, 424 F. Supp. 2d 1229, 1233-34 (E.D. Cal. 2005) (emphasis added); *see also Beech Aircraft Corp. v. United States,* 51 F.3d 834, 842 (9th Cir. 1995) (holding that the trial court properly excluded expert opinion from a bench trial) (cited by *CFM Communications*). The Opposition notes the Court's discretion in this regard, but offers no reason why the Court should exercise its discretion to decide the admissibility of Zielke's expert testimony later rather than sooner.

In fact, there are several reasons why the Court should render a decision on the City's *Daubert* Motion prior to the Evidentiary Hearing. First, the Court has set a pretrial hearing five days before the Evidentiary Hearing for the specific purpose of resolving as many evidentiary issues as possible prior to the trial. While the Court could reserve its decision on many, or most, of these evidentiary issues until after the Evidentiary Hearing, the Court has stated a clear preference for pre-trial resolution of these issues in order to ensure an efficient and focused trial. It would run counter to this goal to delay a decision on the City's *Daubert* Motion rather than decide it at the same time that other evidentiary issues are being resolved. Second, whereas some courts may choose to postpone an admissibility determination under FRE 702 until after the Court has had the chance to hear the expert testimony at issue, no such need arises here. Zielke's testimony has already been completely laid out in the Zielke Declaration and Zielke Report, and there is no reason to expect that Zielke will produce any new or additional information relevant to the City's *Daubert* Motion at trial.[4] The Court is thus in a position to make a fully informed

[4] This is particularly true given that the Parties have generally agreed to the use of the Alternate Direct Testimony Procedure provided for in Local Rule 9017-1. There is thus a substantial likelihood that Zielke may not provide any direct testimony at trial beyond the authentication of her Declaration and Report. Even if Zielke does provide additional direct testimony, however, any testimony reflecting the contents of the Zielke Declaration and Zielke Report would be inadmissible under FRE 702 and *Daubert* for the same reasons discussed in the City's *Daubert* Motion.

decision regarding the admissibility of this evidence now. Finally, as the Parties' trial time is limited by the Court, there is a clear, affirmative reason for the Court to rule on the City's *Daubert* Motion prior to the Evidentiary Hearing; to wit, because the Parties must ration their limited time for argument and testimony, this time should not be spent on issues that may ultimately be determined to be irrelevant or on evidence that is later held inadmissible. Such a result would waste valuable trial time, as well as preparation time for all Parties, and would preclude more detailed testimony and argument regarding evidence that is admissible and helpful to the Court's decision.

It is also important to note that the Court's increased discretion in cases where it serves as the finder of fact does *not* alter the standards for admissibility under FRE 702 and *Daubert*. Expert testimony must still be helpful to the Court's determination of the City's eligibility under chapter 9 and must still be based upon reliable facts and methodology. *CFM Communications, LLC*, 424 F. Supp. 2d at 1233-34; *In re Salem*, 465 F.3d at 777 ("It is not that evidence may be less reliable during a bench trial; it is that the court's gatekeeping role is different."). Thus, while the Court may decide when to make its *Daubert* determination, Zielke's expert testimony must still be both relevant and reliable in order to be admissible. The Court already has all of the information it needs to make that determination, and a decision as to the admissibility of Zielke's testimony prior to the Evidentiary Hearing will benefit the Parties and the Court by making the Evidentiary Hearing more efficient and (potentially) avoiding wasteful testimony, cross-examination, and argument on evidence that is not admissible.

The City therefore requests that the Court exercise its discretion to rule on the City's *Daubert* Motion at the May 20, 2013 hearing, at the same time that it rules on other evidentiary issues.

B. Zielke's Declaration And Report Are Irrelevant To The Issues Of The City's Insolvency And Good Faith, And Are Thus Unhelpful To The Court.

As noted in the City's *Daubert* Motion, expert testimony is only admissible where it is helpful to the trier of fact. *Daubert*, 509 U.S. at 591; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 156 (1999); *Stillwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007).

Moreover, expert testimony "which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591 (quoting 3 Weinstein & Berger ¶ 702[02], p. 702-18.). Zielke's Declaration and Report are not relevant and therefore not helpful to the Court as the finder of fact because they do not offer any testimony relevant to the issues before the Court – specifically, (1) whether the City is insolvent under 11 U.S.C. § 109(c)(3), (2) whether the City has satisfied the negotiation requirement of § 109(c)(5)(B), and (3) whether the City filed its Petition in good faith as required by § 921(c). Zielke's expert opinion is simply this: if the City had adopted the numerous, drastic measures contained in the Alternative Model, it would not have been insolvent as of the Petition Date. However, Zielke offers no testimony bearing on whether the City in fact was insolvent as of the Petition Date. Furthermore, the City's alleged failure to adopt all or any part of the proposals contained in the Alternative Model does not affect the Court's determination of the City's good faith or satisfaction of its negotiation requirement. *See In re Pierce Cnty. Hous. Auth.*, 414 B.R. 702, 711 (Bankr. W.D. Wash. 2009) (laying out the factors for determination of good faith under § 921(c)) (citing COLLIER ON BANKRUPTCY ¶ 921.04[2]). Even if the City could have feasibly implemented the Alternative Model outlined in the Zielke Report (which it could not), Zielke offers no evidence that the City did not have a good faith belief that it had to file for insolvency as of the Petition Date. Zielke's opinion that the City should have adopted the Alternative Model is thus completely irrelevant to the established standards for eligibility under chapter 9.

Given this infirmity in Zielke's opinions, the Opposition relies on a manufactured test to claim that Zielke's testimony is relevant. Specifically, the Opposition claims that the City must prove that it "has not budgeted itself into insolvency." Opposition, at 5; *see also* Zielke Declaration, ¶ 4. As discussed fully in the City's Reply To Objections To Its Statement Of Qualifications Under Section 109(c) Of The United States Bankruptcy Code (the City's "Reply"), this is not the applicable standard for determining the City's insolvency under section 109(c)(3). *See* City's Reply at 15-37.[5] The proper test under section 109(c) is based on a cash flow analysis,

[5] Because the City's response to the Capital Market Creditors' argument that the City is ineligible for chapter 9 because it has "budgeted itself into insolvency" has been fully briefed in the City's Reply and accompanying documents, the City does not reiterate it here, and instead incorporates its arguments on this issue by reference.

and not whether the City has a balanced budget or made "proper" budgeting decisions. *See Int'l Ass'n of Firefighters, Local 1186 v. City of Vallejo (In re City of Vallejo)*, 408 B.R. 280, 289 (B.A.P. 9th Cir. 2009); *In re City of Bridgeport*, 132 B.R. 85 (Bankr. D. Conn. 1991). The cases cited by the Opposition do not create a separate "bad budgeting" standard for insolvency, and Zielke's testimony is thus unhelpful to the Court's insolvency determination. *See* Opposition, at 6 (quoting *In re Town of Westlake*, 211 B.R. 860, 864, and also citing *Bridgeport*, 132 B.R. at 92; *In re N.Y. Off-Track Betting Corp.*, 427 B.R. 256, 282 (Bankr. S.D.N.Y. 2010)).

The Opposition blithely asserts that the City cannot object to Zielke's testimony on relevance grounds "because the City chooses not to recognize what it must show to carry its legal burden." Opposition, at 5. Suffice it to say, it is conversely true that the Capital Markets Creditors cannot render Zielke's testimony relevant by inventing a standard more to their liking. If the thrust of the Opposition is that the relevance of the Zielke Report and Declaration[6] rest on the Court's adoption of a previously unrecognized test for insolvency, then the City is confident that this evidence should be deemed unhelpful to the Court.

Similarly, the Opposition's citation to *Westlake* does not render Zielke's testimony relevant to the issue of good faith. Whereas *Westlake* involved a city intentionally attempting to subvert the bankruptcy system, Zielke offers no evidence whatsoever that the City ever *deliberately* attempted to render itself insolvent. To the contrary, the City made herculean efforts to cut costs, increase revenues, and avoid insolvency. Instead, Zielke asserts only that the City made poor budget choices,[7] when it should have been implementing the measures presented in Zielke's Alternative Model. Again, this is not the question before the Court. Even assuming the Alternative Model was realistic and could have prevented the City's insolvency, a municipality is not rendered ineligible for chapter 9 by virtue of the fact that it has made poor budgeting decisions. If that were the case, no insolvent debtor would be able to obtain relief through the bankruptcy process. The City's situation is clearly different from that of *Westlake*, and Zielke

[6] As well as the Bobb Report and Declaration.

[7] As stated in the City's *Daubert Motion*, Zielke's testimony improperly second guesses the City's governmental decisions, which is not a proper subject for the Court's determination under the Tenth Amendment, a point which the Opposition fails to address. S*ee Daubert* Motion, at 4 n. 3.

offers no testimony to the contrary aside from her bald assertion that the City could and should have adopted the Alternative Model to avoid insolvency. This is not evidence that the City is not insolvent, nor is it evidence that the City deliberately tried to become insolvent.

The Opposition also asserts that Zielke's testimony is relevant because she "determines that the City cannot verify its claims of cash flow insolvency because it cannot prepare basic cash flow statements or projections." Opposition, at 6. Essentially, Zielke points to the City's past difficulties managing its fiscal information and then renders her own credibility determination as to the City's later testimony and evidence regarding insolvency. This statement is not helpful to the Court's insolvency determination, because (1) Zielke does not have the accounting credentials to opine on such matters, and (2) Zielke does not offer any analysis or evidence disputing the accuracy of any specific information upon which the City relies to prove its insolvency. Instead, she merely contends that because the City's financial information was unreliable in the past, the information provided by the City in support of its Petition must also be unreliable. In addition to being incorrect, *see* City's Reply, at 35-37, this is an entirely unfounded, speculative and unhelpful conclusion. Moreover, the Court is aware of the errors in the City's *past* financial management and accounting practices, and is more than capable of considering those errors in weighing the credibility of the City's testimony and evidence without the aid of an expert opinion, particularly from a witness with no accounting credentials.[8]

Moreover, Zielke's testimony is also unhelpful to the Court because of its lack of support and reliability (discussed below, and in the City's *Daubert* Motion, at 6-12). *See In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F. 3d 804 (2d Cir. 1994) ("Expert opinions are excluded as unhelpful if based on speculative assumptions or unsupported by the record."). The Opposition argues that Zielke's Declaration and Report are relevant and helpful because bankruptcy courts "routinely admit and consider evidence submitted by objecting parties as to whether a municipal debtor pursued alternatives to bankruptcy and whether particular options were available and feasible for a municipality to pursue." Opposition, at 4 (citing *In re City of*

[8] Furthermore, to the degree that Zielke's testimony on this subject is meant to attack the credibility of the City's witnesses, such an attack constitutes impermissible expert opinion testimony, as questions of credibility are left to the finder of fact. *See, e.g.*, *United States v. Sine*, 493 F. 3d 1021, 1040 (9th Cir. 2007).

Vallejo, 2008 Bankr. LEXIS 4433, at *5-59). In doing so, however, the Opposition inadvertently highlights the fundamental flaw underlying Zielke's expert testimony regarding the Alternative Model, which is that Zielke provides no evidence whatsoever as to the *availability* or *feasibility* of the "alternatives" she proposes. Instead, Zielke merely points to numerous severe and impracticable budget cuts and tax increases in the Alternative Model and states that if the City had imposed all of them it would have avoided insolvency.

This is plainly unhelpful to the Court as the finder of fact. Any witness could make the unsupported assertion, for instance, that if a city cuts its cost by 75% and doubled its tax revenues it would still be solvent. The job of an *expert*, on the other hand, is to testify as to whether the actions proposed represented realistic options for the municipality at issue. Zielke offers no such support or analysis and fails to provide any consideration of whether the City could feasibly carry out Zielke's Alternative Model, whether those proposals would have been as effective as she claims, or whether the City might have suffered any detrimental side effects (to its services, public safety, etc.) as a result of implementing the Alternative Model. Instead, Zielke simply assumes that the entirety of the Alternative Model could have been imposed without any cost, delays, difficulty, or downside. This is pure speculation, and is not helpful to the Court's real-world determination.

Thus, the Zielke Declaration and Report are unhelpful to the Court's determination of the City's eligibility for chapter 9 for three reasons: First, because Zielke's testimony speaks only to a non-existent test for insolvency; second, because Zielke offers no evidence of a lack of good faith by the City; and third, because Zielke's opinions lack any accounting expertise, support or analysis. As a result, they are unreliable, and thus useless to the Court. Because Zielke's testimony fails the helpfulness requirement of *Daubert* and FRE 702, it should be excluded in its entirety.

C. Zielke's Testimony Is Based On Incomplete Information, Unsupported Assumptions, Speculation, And Flawed Methodologies, And Is Therefore Unreliable.

In order to be admissible under FRE 702, expert opinion testimony must be sufficiently reliable, and must be based on sufficient facts or data and the correct application of reliable

methodologies and principles. *See* FRE 702(b)-(d); *Daubert*, 509 U.S. at 590 (expert testimony must be "supported by appropriate validation – *i.e.*, good grounds."). Expert opinions that lack support or that are purely speculative do not satisfy this reliability requirement. *Guidroz-Brault v. Missouri Pac. R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001) (expert testimony may not include "unsupported speculation and subjective beliefs."); *California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1181 (9th Cir. 2010) *on reh'g en banc sub nom. California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011) (expert testimony inadmissibile where expert testified a result was "plausible" and "likely" but "admitted that he had done no analysis").

The Zielke Declaration and Report fail this essential test of reliability because Zielke offers no supporting facts or analysis for her conclusion that the City could have implemented the host of provisions laid out in the Alternative Model and (by doing so) avoided insolvency. On the revenue side, the Alternative Model touted by Zielke calls for more than a half dozen tax and fee increases, yet Zielke offers no independent analysis or evidence showing that the City's citizens would have passed any of these proposed tax increases at the ballot box (let alone all of them). Nor does Zielke offer any support for her conclusion that these taxes could have been collected quickly enough during FY 2012-13 to have prevented the City's insolvency or provide any analysis of the potential consequences of imposing multiple tax increases or what would have happened if the City had budgeted for these new revenue sources and those measures had failed in the following election. In fact, as the Opposition essentially concedes, the only evidence Zielke even attempts to offer on this point are the opinion poll surveys the City itself conducted with City voters.

However, Zielke completely misconstrues and misapplies this evidence. The Opposition claims that "a fair interpretation" of the City's polling data "indicate[s] voter support for tax increases, even if measures are put forward while the City is in bankruptcy." Opposition, at 8. This carefully crafted statement is ultimately based on a single line in the Report of Fairbank, Maslin, Maullin, Metz & Association to Robert Deis (the "FMMM Memo"), which stated that "[a] ¾ cent sales tax measure remains viable, even if it is put forward while the City is in bankruptcy." *See* Opposition, at 7-8; FMMM Memo at 2. What the Opposition (and Zielke) omit

is the fact that this reflects voter support for a single, specific tax increase where the voters were asked to assume that the tax increase would be used to *maintain or increase* City services related to public safety (including "expanding the police force, improving 9-1-1 emergency response services, increasing anti-gang and crime prevention programs, and other general services such as street repair, libraries, and parks."). *See* Declaration of Robert Deis in Support of City of Stockton's Reply to Objections to its Statement of Qualifications Under Section 109(c) of the United States Bankruptcy Code ("Deis Reply Decl.") [Dkt. No. 708], Ex. B**,** at 2, 14 (questions 3 and 18).

The Opposition's reliance on this statement thus suffers from multiple flaws: First, the Opposition misreads voter support for a tax increase supporting a specific program as support for tax increases in general. Second, Zielke did not offer any evidence of voter support for passage of any of the other tax increases included in the Alternative Model, much less all of them together. Third, Zielke and the Opposition misconstrue the results of the City's poll as support for the Alternative model – yet while the survey shows that the City voters would approve a single tax increase in order to preserve and increase safety-related services, the Alternative Model would have imposed multiple tax increases while also making additional cuts to services. In fact, Zielke and the Opposition blatantly ignore the leading conclusion of the FMMM memo, which clearly states that "[t]he survey results demonstrate that while an overwhelming majority of voters (74%) *oppose* increasing local taxes primarily to pay existing debt holders, employee compensation and benefits and city paid retiree medical benefits, voters *would* be willing to support an increase in local taxes to fund improvements to City services." FMMM Memo, at 1 (emphasis in original). This is not a "genuine disagreement over the likelihood of success of proposed tax increases." *See* Opposition, at 8. Zielke, and the Opposition, have simply misstated the evidence at hand.

Zielke's conclusion that the City could have implemented the revenue increasing measures contained in the Alternative Model is thus entirely unsupported and purely speculative. Zielke has no expertise in polling or predicting how tax measures might fare. Moreover, Zielke offers no independent analysis of the feasibility of passing multiple tax increases and misuses the

polling data that is available.[9] As a result, her testimony on this issue is mere guesswork and entirely unreliable.

The same is true of Zielke's conclusion that the City could have implemented the cost-cutting measures proposed by the Alternative Model. The Zielke report offers no support for her opinion that the City could have reduced its department budgets by 15% across the board (on top of the cuts already made), or made any of the other proposed cuts, without harming critical City services. Nor can Zielke reliably testify that these cuts would have resulted in the savings she claims, as she offers no evidence regarding the administrative cost, likely success, or secondary effects of these proposals. Instead Zielke simply assumes that such measures were feasible and would not result in any downside. This, too, is no more than speculation.[10]

Ultimately, Zielke's opinion that the City could have adopted the measures in the Alternative Model is wholly unsupported by her background or analysis and is based only on her own speculative assumptions. This is insufficient to meet the reliability requirements of FRE 702 and *Daubert*. The Zielke Declaration and Report should therefore be excluded as unreliable.

D. Zielke's Testimony Does Not Meet The Threshold Requirement Of Reliability, And The Flaws In Zielke's Methodology Should Not Be Taken As Going To The Weight Of Her Opinions, Rather Than Their Admissibility.

In the face of the unreliability of Zielke's testimony, the Opposition attempts to fall back on the argument that where "certain methodologies are suspect or . . . mistakes were made go[es] more to the weight of the testimony, not to its admissibility." Opposition, at 3 (citing *Trigem*, 2010 Bankr. LEXIS 6274, at *2-3). This misstates the requirements of FRE 702. While some disputes over methodology may be left to a question of weight, rather than admissibility, this is true only in those cases "where experts might reasonably differ." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153 (1999) (cited by *Trigem*). Where this is not the case, expert testimony based on flawed methodologies should be excluded. For instance, the Supreme Court in *Kumho* upheld the District Court's decision to exclude expert evidence based on its unreliable

[9] In fact, the Court arguably does not need an expert's assistance to read the results of the City's survey at all, but it is certainly not aided by an expert's misreading of that evidence.

[10] The Opposition's reliance on Zielke's reference to GFOA's Best Practices Guidelines is also unavailing. *See* Opposition, at 8-9. Zielke's testimony is unreliable because she offers no support for the feasibility of her proposals in Stockton's specific situation, not because of the source of those proposals.

methodology and expressly held that the excluded testimony "fell outside the range where experts might reasonably differ." *Id.*; *see also S.M. v. J.K.*, 262 F.3d 914, 921 (9th Cir. 2001) *amended*, 315 F.3d 1058 (9th Cir. 2003) ("A court may admit somewhat questionable testimony if it falls within 'the range where experts might reasonably differ, and where the jury must decide among the conflicting views . . . .'"). Thus, before expert testimony can be admitted, and its weight considered, it must still meet the "minimum reliability threshold," of FRE 702. *In re Barnes*, 266 B.R. 397, 405 (B.A.P. 8th Cir. 2001). This only makes sense, as the admissibility requirements of FRE 702 would be vitiated if courts acting as gatekeepers could disregard serious reliability concerns as going to the "weight" of expert testimony, rather than its admissibility.

Certainly this should not be the case here. This is not a situation where two reliable methodologies have presented conflicting results, or where experts could reasonably disagree on the interpretation of facts. Rather, Zielke has offered *no support* at all for most, if not all, of her conclusions as to the feasibility and efficacy of the Alternative Model. The entirety of the Zielke Report and Declaration rely on Zielke's unfounded, speculative assumption that the City could have adopted the Alternative Model in its entirety, and that the measures in the Alternative Model would have allowed the City to avoid insolvency while still maintaining a functioning municipality. This is not a close question of methodology, it is a complete lack thereof. The Court should therefore not admit Zielke's Declaration and Report on the notion that the flaws in Zielke's methodology can simply be dealt with as a matter of weight rather than admissibility. Zielke's expert opinion testimony does not meet the "minimum reliability threshold" required by FRE 702, and is therefore inadmissible.

E. To The Extent Zielke's Testimony Constitutes a Legal Conclusion, It Is Inadmissible.

1. Zielke's Statements Regarding Her Opinion As To The Sufficiency Of The City's Evidence

The Opposition argues that two statements made by Zielke that (1) the City "has failed to produce reliable evidence," and that (2) Zielke is "unable to validate the City's . . . actual cash balances or budgeted General Fund fund balances," do not constitute impermissible legal

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conclusions. Opposition at 10-11. Rather, the Opposition contends, these are merely "factual statements about . . . the City's shoddyrecordkeeping." *Id.*

As a preliminary matter, these two specific statements are cited in a footnote of the City's *Daubert* Motion as examples of Zielke's decision to attack the City's evidence, rather than proffer any affirmative evidence of her own. *See* City's *Daubert* Motion, at 12, n. 8. As such, they were not meant to be an exhaustive list of legal conclusions in the Zielke Report. With regard to Zielke's general contention that the City has not provided sufficient, reliable evidence of its insolvency, it is well accepted that determinations as to the weight and reliability of evidence, and the credibility of witnesses, belong to the Court. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 845 (1982) ("Determining the weight and credibility of the evidence is the special province of the trier of fact."); *see also Hearn v. McKay*, 603 F.3d 897, 904 (11th Cir. 2010) ("It is the exclusive province of the judge in non-jury trials to assess the credibility of witnesses and to assign weight to their testimony."); *Farrell v. United States*, 321 F.2d 409, 414 (9th Cir. 1963) ("[T]he credibility of witnesses and the weight to be accorded their testimony is peculiarly within the province of the trier of facts."). Thus, Zielke may not, under the guise of an expert opinion, render a determination as to whether the City has proffered sufficient evidence to prove that it is insolvent, as this intrudes upon the province of the Court to make that ultimate legal decision.

2. Zielke's Statement That The City Made No Effort To Seek Concessions From CalPERS

In the Zielke Report, Zielke claimed that "prior to Chapter 9, the City made no effort to seek from CalPERS a reduction or modification of its PERS liability." Zielke Report, at 35. In its *Daubert* Motion, the City argued that to the extent this opinion implied that the City had not satisfied the negotiation requirement of section 109(c)(5)(B), it constituted an impermissible legal conclusion and was therefore inadmissible. Moreover, to whatever degree Zielke's statement implies that the City was legally able to obtain such concessions, it is also an improper legal conclusion.

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The Opposition's response to the City's contention is that Zielke was merely making a "factual statement[]" Opposition, at 10. Essentially, the Opposition claims that Zielke's assertion "relate[s] to issues of fact, not law," and that no implication as to a legal conclusion was made. *Id.* This is far from the case. Zielke opines that the City should have sought concessions from CalPERS, *see* Zielke Report, at 35, and it is hardly a difficult stretch for the City to point out that this statement inherently implies that the City *could* have achieved such concessions, and/or that negotiations with CalPERS were a necessary prerequisite to the City's eligibility for chapter 9 (which is, after all, supposed to be the focus of Zielke's testimony). As briefed fully in the City's Reply, the City could not legally have reduced its obligations to CalPERS outside of chapter 9 and has fully satisfied section 109(c)(5)(B)'s negotiation requirement. *See* Reply, at 41-53. Both of these issues are fundamentally questions of law, and as such are beyond the scope of Zielke's expert opinion. *See Nationwide Transp. Fin. v. Cass. Info Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (expert witnesses may not give an opinion as to a legal conclusion).

Nevertheless, the Opposition attempts to hide behind the cliché refrain that Zielke was just reciting facts. This is a little too cute. The Capital Markets Creditors have repeatedly argued that the City's alleged "failure" to seek concessions from CalPERS constitutes a lack of good faith and a failure to satisfy the City's negotiation requirement. Simultaneously, their expert (Zielke) has testified that the City "made no effort" to seek concessions from CalPERS. *See* Zielke Report, at 35. It strains credulity for the Opposition to claim that the Zielke Report does not imply that City should have sought concessions from CalPERS and is merely a statement of fact entirely unrelated to the Capital Markets' Creditors good faith and negotiation arguments. To the contrary, the clear rationale behind this testimony was to draw precisely the implication cited by the City.

If the Capital Markets Creditors are willing to concede that this testimony in fact has no bearing on the issues of good faith or the negotiation requirement and in no way implies the (legal) conclusion that the City was (legally) required and able to seek concessions from CalPERS, then Zielke's testimony on this point is at best irrelevant. To whatever extent the Capital Markets Creditors hope to use Zielke's opinion that the City should have sought

concessions from CalPERS to support its claim that this was a legally viable option (and that by not doing so the City acted in bad faith and failed to satisfy its negotiation requirement), Zielke's testimony is an improper legal conclusion, in addition to being wrong.

III. CONCLUSION

Based on the foregoing and the City's *Daubert* Motion, the City requests that the Court exclude the Zielke Declaration and Report in their entirety as unhelpful and inadmissible. In the alternative, the City requests that the Court exclude as unreliable those portions of the Zielke Declaration and Report which proffer speculative opinion testimony as to revenue-increasing and cost-reducing measures. Finally, the City requests that the Court strike all portions of the Supplemental Objection of Assured Guaranty Corp. and Assured Guaranty Municipal Corp. to Debtor's Chapter 9 Petition and Statement of Qualifications filed June 28, 2012 that depend upon any portion of the Zielke Declaration or Zielke Report that are found to be inadmissible.

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