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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. SA-1

Chapter 9

CITY OF STOCKTON'S OPPOSITION TO MOTION OF ASSURED GUARANTY CORP. AND ASSURED GUARANTY MUNICIPAL CORP. PURSUANT TO RULE 52(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE TO ALTER OR AMEND THE COURT'S FINDINGS OF FACT

Date: May 28, 2013
Time: 9:30 A.M.
Dept: C, Courtroom 35
Judge: Hon. Christopher M. Klein

Debtor City of Stockton, California (the "City"), respectfully submits this opposition to the Motion of Assured Guaranty Corp. and Assured Guaranty Municipal Corp.[1] Pursuant to Rule

[1] Collectively, "Assured".

52(b) Of The Federal Rules Of Civil Procedure, As Incorporated By Rule 7052 Of The Federal Rules Of Bankruptcy Procedure, To Alter Or Amend The Court's Findings Of Fact Made Orally On The Record On April 1, 2013 (the "Motion"), [Dkt. No. 871].

I. INTRODUCTION

Following a three-day eligibility trial, during which both the City and the Capital Markets Creditors[2] presented live and declaration witness testimony and by stipulation moved thousands of pages of documentary evidence into the record, the Court determined that the City had satisfied its burden of proving that it was eligible for chapter 9 relief. The Court presented its findings of fact and conclusions of law orally at a hearing on April 1, 2013. The comprehensive findings established the factual bases upon which the Court held that the City had satisfied the elements of sections 109(c) and 921(c) of the Bankruptcy Code. Among the findings was the Court's determination that the City had participated in good faith in a neutral evaluation process pursuant to California Government Code § 53760.3 in order to satisfy the requirement of Bankruptcy Code § 109(c)(2) that the City be specifically authorized in its capacity as a municipality to be a chapter 9 debtor. The Court further found that the Capital Markets Creditors also had a duty to participate in the neutral evaluation in good faith, and that Assured, along with other of the Capital Markets Creditors, failed to do so. *See* Reporter's Transcript ("RT") 4/1/13, p. 572:14-573:1; 579:9-22.

In the Motion, Assured asks the Court to amend two findings of fact underlying the Court's conclusion that Assured did not participate in the neutral evaluation process in good faith. Specifically, Assured takes issue with the findings that (1) Assured "vot[ed] with their feet" and "act[ed] as a stone wall" by absenting themselves from the neutral evaluation process after the City stated that it did not intend to impair CalPERS as part of its negotiations, and (2) Assured also did not act in good faith because of its failure to pay its share of the costs for the neutral evaluation process as required by California Government Code section 53760.3(s). Mot. 1; RT

[2] "Capital Markets Creditors" collectively refers to Assured, National Public Finance Guarantee Corp. ("NPFG"), Franklin High Yield Tax-Free Income Fund, Franklin California High Yield Municipal Fund (together, "Franklin"), and Wells Fargo Bank, National Association in its capacity as indenture trustee.

4/1/13, p. 568:9-25, 579:23-580:7, 589:14-21.

These findings of fact are not in error, as they are based upon evidence in the record and reasonable inferences drawn therefrom. Moreover, Assured cites no evidence directly contradicting either the fact that it withdrew from the neutral evaluation process or that it did not pay its share of the costs for that process. Instead, Assured points to a handful of pieces of circumstantial evidence which it contends show that it was, in fact, acting in good faith. The Court was already aware of this evidence and, as the finder of fact, the Court has the inherent power to weigh competing evidence, draw reasonable inferences, and make ultimate credibility determinations. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996) (it is the "exclusive province of the fact finder to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts.").

The City submits that the Court, in light of all of the evidence, correctly concluded that Assured's actions did not constitute good faith. Having failed to establish any error in the Court's findings of fact, the Motion should be denied.

II. DISCUSSION

A. Standard Of Review

Federal Rule of Civil Procedure 52 is incorporated into bankruptcy cases by Federal Rules of Bankruptcy Procedure 7052 and 9014(c). In order to succeed on a motion under F.R. Civ. P. 52(b) to alter or amend findings of fact, the moving party must demonstrate that the court's findings contain a "manifest error of law or fact." *In re Tyrone F. Conner Corp., Inc.*, 140 B.R. 771, 784 (Bankr. E.D. Cal. 1992).[3] Rule 52(b) may not be asserted "to relitigate old issues, advance new theories, or to secure a rehearing on the merits." *In re Fotouhi*, 05-44839 N, 2008 WL 821723 (Bankr. N.D. Cal. Mar. 24, 2008) *aff'd*, BAP.NC-08-1092-DJUT, 2008 WL 8444811 (B.A.P. 9th Cir. Oct. 16, 2008) (citing *In re Tyrone F. Conner Corp.*). Nor may a party use a motion to amend findings of fact as an attempt to present a stronger case on its second attempt.

[3] Alternatively, the moving party can demonstrate "the existence of newly discovered evidence which was not available at the time of the original hearing." *Tyrone F. Conner Corp.*, 140 B.R. at 884. However, Assured has not cited to any allegedly new evidence in the Motion.

1 *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1220 (5th Cir. 1986); *see also Sheldon L.*
2 *Pollack Corp. v. Universal Health Servs. Inc.*, 919 F.2d 741 (9th Cir. 1990) ("[a] party who fails
3 to present his strongest case is not entitled to a second opportunity by moving to amend a finding
4 of fact.") (unpublished opinion).

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6 **B. The Finding That Assured And Other Capital Markets Creditors Refused To Negotiate In Good Faith Is Supported By Evidence In The Record And Is Not Manifestly Erroneous.**

7 Based on a thorough review of the evidence, the Court determined that the Capital Market
8 Creditors, including Assured, failed to negotiate in good faith as required by California
9 Government Code section 53760.3. *See* RT 4/1/13, p. 579:17-22. Specifically, the Court found
10 that after being informed that the City did not intend to impair CalPERS, the Capital Markets
11 Creditors chose to absent themselves from the remainder of the neutral evaluation process and
12 instead played the part of a "stone wall." *See* RT 4/1/13, p. 586:4-7, 589:14-21, 592:5-11. These
13 findings of fact are supported by evidence in the record.

14 The record demonstrates that after being informed by the City's counsel that the City
15 Council had reaffirmed its decision not to impair CalPERS the night before, counsel for NPFG
16 stated at the next day's mediation session that "as far as [NPFG] was concerned, the City's
17 reaffirmed stance on pensions meant that there was nothing left to negotiate in the AB 506
18 process." Supplemental Declaration of Marc A. Levinson [Dkt. 824] ("Levinson Supp. Decl."),
19 ¶ 5. Given that the mediation session ended almost immediately thereafter, and given that Judge
20 Mabey did not schedule any further mediation sessions between the Capital Markets Creditors
21 and the City, this Court could reasonably infer that Assured and the other Capital Markets
22 Creditors did not disagree with NPFG's statement. *Id.*, at ¶ 5, 6. Moreover, it is also clear from
23 the record that Assured never presented a counteroffer to the Ask. Declaration of Marc A.
24 Levinson [Dkt. No. 452] ¶ 5 and ex. C, p. 2; Levinson Supp. Decl., ¶ 4. Thus, the Court's
25 findings that Assured refused to participate in the neutral evaluation process based on the City's
26 decision not to impair CalPERS is properly supported by evidence before the Court.

27 Assured, however, contends that it is mere conjecture to conclude that it "did not
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disagree" that the mediation was concluded for the Capital Markets Creditors upon the City's decision not to impair CalPERS. *See* Mot. 7. Assured then cites statements in the Bjork Declaration that it claims show that Assured was actually negotiating in good faith. *See* Mot. 7. This argument is not compelling. For one, the Bjork Declaration in no way contradicts the fact that Assured ceased its participation in the neutral evaluation process. Moreover, the Court, in its role as finder of fact, can weigh competing testimony and may draw such inferences and conclusions as it deems correct. *See Hubbard*, 96 F.3d at 1226 (Court may "determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts."). Here, the Court considered the declarations submitted by the City's counsel and Mr. Bjork in light of all of the other evidence before it, and determined that the Capital Markets Creditors, including Assured, had not negotiated in good faith by absenting themselves from the neutral evaluation process. Assured fails to offer any persuasive reason why this was a "manifest error" on the Court's part. Rather, Assured merely hopes that the Court will re-weigh the evidence it already has assessed. *See In re Tyrone F. Conner Corp., Inc.*, 140 B.R. at 784 (motion to amend findings of fact may not be used to relitigate old issues or secure a rehearing on the merits); *see also Sheldon L. Pollack Corp.*, 919 F.2d 741.

Assured also asserts that the City conceded that the Capital Markets Creditors negotiated in good faith based upon general references made by the City to the good work of other participants in the neutral evaluation process. *See* Mot. 6 (citing the City's reference to "good faith efforts by the City and the interested parties" and the City's representation that "the City and the Participants engaged in serious discussions—through many meetings and communications—aimed at reaching a consensual restructuring."). Assured's attempt to slip under the cover of these general statements is weak at best. Many of the City's creditors did negotiate in good faith during the neutral evaluation process, and these negotiations resulted directly in successful agreements between the City and eight of its labor unions (and also set the stage for a negotiated deal with the City's police union several months after the chapter 9 filing). However, the record is clear that Assured, along with the other Capital Markets Creditors, chose to withdraw itself

from the neutral evaluation process at which the City successfully worked out these agreements.

The Court's findings of fact regarding Assured's decision not to engage in further negotiations without concessions from the City regarding CalPERS are thus not in error (much less "manifestly" erroneous), and the Motion should therefore be denied.

C. The Finding That Assured And Other Capital Markets Creditors Refused To Pay Their Statutory Share Of Fees For The Neutral Evaluation Process Is Supported By Evidence In The Record And Is Not Manifestly Erroneous.

The Court also determined that the Capital Markets Creditors refused to pay their share of the costs of the neutral evaluation process as required by California Government Code section 53760.3(s). *See* RT 4/1/13, p. 568:9-25, 579:23-580:7. That statute is clear that while the agency (i.e., the City) is responsible for 50 percent of the costs of the neutral evaluation process, "the creditors shall pay the balance, unless otherwise agreed to by the parties," Cal. Gov't Code § 53760.3(s), and it is clear from the record that none of the Capital Markets Creditors paid their share. During the evidentiary hearing, in response to questions from the Court, each of counsel for NPFG and counsel for Franklin conceded that his client had not paid any of the costs for the neutral evaluation process. RT 3/27/13, p. 472:16-473:1, 534:14-15; s*ee also* City's Trial Exhibit 1385, Ex. P, p. 2 ("National disclaims any obligation or liability for the payment of any costs or expenses under Section 53760.3(s) of the Act."). Given that the other Capital Markets Creditors admitted to not making the statutory payments, the Court made the plainly reasonable inference that *none* of the Capital Markets Creditors had done so, including Assured.

Assured attempts to evade this obvious fact by arguing that the City did not "provide any evidence of the mediator's fee, how much the City paid, or when it made the payment." Mot. 10. Such argument is irrelevant to the findings at issue, and likely is intended to deflect attention from the fact that Assured cannot honestly state that it has abided by its statutory obligations. Similarly, Assured contends that it is absolved of its duty to pay because the City did not send invoices for these costs to any of its other creditors. Mot. 10. In addition to also being irrelevant, this claim reverses cause and effect. It is *because* the Capital Markets Creditors declined to pay their share that the City chose to bear the entire burden of funding the neutral evaluation itself.

The City elected to cover the entire cost rather than demand that some of its creditors pay while the Capital Markets Creditors refused.

Finally, Assured implies that the various bond documents obligated the City to pay Assured's share of the neutral evaluation process costs. *See* Mot. 9-10. This contention is based on the boilerplate language in Assured's agreement stating that in the event the City defaults, it must pay the bond insurer's costs for protecting its rights. It has been the City's position, however, that the costs inherent to the neutral evaluation process were not the result of a default to Assured or any other single default. Rather, the City entered the neutral evaluation process because it could not pay its bills and it wanted to expedite any bankruptcy case if it could not avoid bankruptcy altogether.

While Assured coyly claims that it "assumed that the City agreed with its position regarding the neutral evaluation costs," Mot. 10, the basic fact remains that the Capital Markets Creditors did not pay *any* of the costs of the neutral evaluation process. Moreover, the dispute regarding the Capital Market Creditors' obligations in this regard was squarely raised both in the evidence before the Court and in closing argument. Everyone in the courtroom knew that Assured had not paid its share of the cost of the neutral evaluation process. Had it paid (or even offered to pays its share), surely its counsel would have said so, particularly after counsel for Franklin and counsel for NPFG admitted that their own clients did not pay any of the costs. In short, the Court was entitled to draw the obvious inference, and Assured has offered no reason why the finding about the nonpayment of the mediation process was a "manifest error."

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III. CONCLUSION

For the reasons set forth above, the City respectfully requests that the Court deny the Motion.

Dated: May 14, 2013

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By: */s/ Marc A. Levinson*

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