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

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

Case No. 2012-32118
 D.C. No. OHS-15
 Chapter 9

**CITY OF STOCKTON'S OPPOSITION
 TO MOTION OF FRANKLIN HIGH
 YIELD TAX-FREE INCOME FUND
 AND FRANKLIN CALIFORNIA HIGH
 YIELD MUNICIPAL FUND TO
 EXCLUDE TESTIMONY OF TOM
 NELSON**

19 WELLS FARGO BANK, et al.
 20 Plaintiffs,
 21 v.
 22 CITY OF STOCKTON, CALIFORNIA,
 Defendant.

Adv. No. 2013-02315
 Date: May 12, 2014
 Time: 9:30 a.m.
 Dept: Courtroom 35
 Judge: Hon. Christopher M. Klein

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1 Pursuant to paragraph 45 of the Order Governing The Disclosure And Use Of Discovery
2 Information And Scheduling Dates Related To The Trial In The Adversary Proceeding And Any
3 Evidentiary Hearing Regarding Confirmation Of Proposed Plan Of Adjustment (“Scheduling
4 Order”), as modified by paragraph 17 of the Order Modifying Order Governing The Disclosure
5 And Use Of Discovery Information And Scheduling Dates Related To The Trial In The
6 Adversary Proceeding And Any Evidentiary Hearing Regarding Confirmation Of Proposed Plan
7 Of Adjustment (“Modifying Order”) (collectively, the “Orders”), the City of Stockton, California
8 (“City”) hereby submits the following Opposition to the Motion of Franklin High Yield Tax-Free
9 Income Fund And Franklin California High Yield Municipal Fund To Exclude Testimony Of
10 Tom Nelson (the “Exclusion Motion” filed by “Franklin”)¹:

11 **I. INTRODUCTION**

12 Franklin’s Exclusion Motion improperly seeks to strike the testimony contained in the
13 Direct Testimony Declaration Of Tom Nelson Rebutting Expert Report Of Frederick E. Chin (the
14 “Declaration” of “Nelson”). Nelson is the manager of the Swenson and Van Buskirk golf courses
15 and has detailed knowledge of the operation, physical condition, and competitive market of the
16 golf courses. The Declaration contains testimony that rebuts and impeaches the expert report of
17 Frederick Chin² (“Chin”) by presenting facts and evidence that the Chin Report fails to
18 adequately consider in its valuation of Swenson and Van Buskirk golf courses. As rebuttal and
19 impeachment testimony, the Declaration was expressly exempted from all disclosure deadlines in
20 the Orders, as agreed to by the parties. As such, this testimony did not have to be disclosed until
21 it was presented at trial. Yet Franklin now faults the City for offering this testimony three weeks
22 early.

23 The Exclusion Motion ignores the obvious nature and purpose of Nelson’s testimony and
24 seeks to have it excluded in order to avoid revealing the obvious deficiencies in Chin’s testimony
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26 ¹ Because the content of the Exclusion Motion mirrors the content of the Motion Of Franklin High Yield Tax-Free
27 Income Fund And Franklin California High Yield Municipal Fund To Exclude Testimony of Michael Cera (“Cera
28 Exclusion Motion”), the arguments made herein closely mirror the arguments made in the City’s Opposition to the
Cera Exclusion Motion, which is being filed concurrently.

² Submission By Franklin High Yield Tax-Free Income Fund And Franklin California High Yield Municipal Fund Of
Expert Report Of Frederick E. Chin, Ex. 1 (the “Chin Report”).

1 and in the Chin Report. But Franklin's arguments are baseless. Nelson's testimony is offered for
2 rebuttal and impeachment purposes, and was submitted entirely in accord with the Orders. The
3 Exclusion Motion should be denied.

4 **II. ARGUMENT**

5 **A. Nelson's Testimony Is Offered To Rebut And Impeach Chin's Testimony.**

6 Nelson's testimony is offered for the specific purpose of rebutting and impeaching Chin's
7 testimony, both as contained in the Chin Report and such testimony as he may offer at trial.
8 Specifically, Nelson's testimony provides probative facts, based on Nelson's personal knowledge,
9 that undermine the methodologies utilized in the Chin Report, as well as Chin's conclusions of
10 value for Swenson and Van Buskirk golf courses.

11 For instance, the Chin Report makes passing reference to "deferred maintenance and
12 upkeep" at both golf courses, but ultimately appears to give these items little to no weight in
13 Chin's final valuation of these properties. *See* Chin Report, at 19 (citing only parking lot
14 resurfacing, bathrooms, and clubhouse). Nelson's testimony provides a detailed list of necessary
15 capital improvements and deferred maintenance at the golf courses, which rebuts Chin's
16 implication that the amount of necessary repairs is minor and can be essentially ignored for
17 valuation purposes. Declaration, ¶¶ 14-18. Similarly, the Chin Report concludes that rates at the
18 golf courses could be easily raised, resulting in an immediate increase in revenue. Chin Report, at
19 37-38. Nelson's testimony provides a description of the marketplace in which the courses
20 compete that is based on Nelson's personal experience in that market that rebuts this assertion in
21 the Chin Report. Declaration ¶¶ 6-8. Also, the Chin Report repeatedly suggests that the courses
22 could be operated at a profit in the very near future. *See, e.g.*, Chin Report, at 36. Nelson's
23 testimony describes the recent poor financial performance at the courses, including updated actual
24 and projections that directly contradict the outdated projections used by Chin, as well as factors
25 (such as the marketplace and maintenance needs) that will impact profitability going forward.
26 Declaration ¶¶ 9-13.

27 All of this testimony is textbook rebuttal and impeachment evidence. Black's Law
28 Dictionary defines rebuttal evidence as "evidence offered to disprove or contradict the evidence

1 presented by an opposing party,” while impeachment evidence is “evidence used to undermine a
 2 witness’s credibility.”³ This is exactly the purpose of the Declaration. Nelson’s testimony
 3 directly impeaches Chin’s credibility and rebuts his conclusions by presenting facts⁴ that the Chin
 4 Report did not adequately consider.

5 **B. Nelson’s Testimony Is Not Only Timely, But Early.**

6 Because the Declaration is offered for the purpose of rebutting and impeaching Chin’s
 7 testimony and the Chin Report, it is timely under the Orders. In fact, the City did not have to
 8 identify Nelson or submit Nelson’s testimony *until trial*. Rebuttal and impeachment witnesses
 9 were expressly exempted from the disclosure requirements cited by Franklin. The Scheduling
 10 Order, agreed to by the parties and signed by the Court, states: “The requirement of advance
 11 identification of witnesses and production of exhibits *does not apply* to witnesses and exhibits
 12 presented for purposes of impeachment or rebuttal by any Party.” Scheduling Order ¶ 42
 13 (emphasis added). This exception is reflected throughout the Scheduling Order. Scheduling
 14 Order ¶ 36; Modifying Order ¶ 5 (“[E]ach Party intending to present evidence shall serve on each
 15 other Party a list of fact and expert witnesses (other than rebuttal and impeachment witnesses)
 16 whose testimony the Party may submit at the Trial or Hearing.”).⁵ Moreover, the Scheduling
 17 Order makes clear that rebuttal and impeachment evidence may also be presented by oral
 18 testimony at trial as well as by direct testimony declaration. Scheduling Order ¶ 35 (“[E]vidence
 19 at the Trial and Hearing may be submitted (a) in written form by declaration, consistent with the
 20 Alternate Direct Testimony procedure provided for in Local Rule 9017-1 . . . , [and/or] (b) in the
 21 form of oral testimony (for expert, *rebuttal* and *impeachment* witnesses)”) (emphasis added).

22 The Orders could not make it any clearer that rebuttal and impeachment witnesses and
 23 evidence were not required to be identified in advance of trial. Nevertheless, the City, as it has

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 25 ³ Black’s Law Dictionary 637, 639 (9th ed. 2009).

26 ⁴ The vast majority of Nelson’s testimony is purely factual. What little there is in the way of opinion qualifies as lay
 27 opinion testimony that is based on Nelson’s first-hand knowledge and experience in managing Swenson and Van
 28 Buskirk golf courses. *See* Fed. R. Evid. 701 (“a lay opinion is one that is (a) rationally based on the witness’s
 perceptions; (b) helpful to understanding the witness’s testimony or to determining a fact in issue; and (c) not based
 on scientific, technical, or other specialized knowledge”). Such lay opinion testimony is also offered for rebuttal and
 impeachment purposes.

⁵ The same exception is made for exhibits to be used for impeachment or rebuttal. *See* Scheduling Order ¶ 37;
 Modifying Order ¶ 6.

1 done throughout these proceedings, chose to be more open and forthcoming than it was required
2 to be. Rather than spring “surprise” rebuttal and impeachment witnesses at the trial and
3 Evidentiary Hearing – which it was entitled to do under the Orders – the City presented Nelson’s
4 testimony along with its other direct testimony declarations well ahead of time. Franklin’s
5 constant refrain that the City is “[lying] in wait” and “hid[ing] the ball” to prejudice Franklin is
6 thus completely meritless.⁶ Franklin continues to try to cast the City as insidious, when in fact the
7 City has made great efforts to be as candid and transparent as possible.

8 **C. The Testimony Of Other Witnesses Does Not Bar Nelson’s Testimony.**

9 Franklin makes the strained argument that Nelson cannot offer rebuttal testimony about
10 the golf courses because another witness, Susan Wren, an employee of the City, is also offering
11 testimony about the golf courses. Exclusion Motion, at 7. This argument appears to be based on
12 the completely unsupported notion that only one witness can speak to any particular topic.
13 Unsurprisingly, Franklin fails to cite any legal source for this dubious principle. It borders on
14 belaboring the obvious to point out that the testimony of multiple witnesses may overlap, and that
15 there is no rule that prevents more than one witness from testifying on the same topic. Put
16 simply, the fact that Susan Wren has submitted testimony relating to the golf courses in the City’s
17 case in chief has no impact whatsoever on Nelson’s ability to offer testimony that rebuts and
18 impeaches Chin.

19 **D. Nelson Has Not Offered Expert Testimony.**

20 Franklin also repeatedly attempts to cast the Declaration as a rebuttal expert report, or as
21 inextricably tied to the rebuttal expert report of Ray Smith, in an attempt to apply deadlines for
22 expert witnesses to Nelson. *See, e.g.*, Exclusion Motion, at 4 (claiming that because Ray Smith, a
23 City rebuttal expert, references Nelson’s testimony, such testimony is “a part of Mr. Smith’s
24 report.”). Neither portrayal is accurate. The fact that an expert incorporates the testimony of a
25 fact witness does not make the underlying factual testimony an expert opinion. Nor does the fact

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27 ⁶ In fact, Franklin made clear that it was aware that expert, rebuttal, and impeachment witnesses could offer live
28 testimony at trial when it stated in its Supplemental Objection that the opinion of its expert, Moore, “will be
developed fully at the confirmation hearing.” Supplemental Objection Of Franklin High Yield Tax-Free Income
Fund And Franklin California High Yield Municipal Fund To Confirmation Of First Amended Plan Of Adjustment
Of Debts Of City Of Stockton, California (November 15, 2013), at 13 n. 30.

1 that Chin himself is an expert render factual testimony that contradicts his conclusions “expert” in
2 nature.⁷ Nelson’s testimony stands on its own, is based on his personal knowledge from
3 managing the golf courses, and does not require any specialized or technical knowledge.

4 **E. There Is No Improper Prejudice To Franklin.**

5 Franklin asserts that allowing Nelson to testify to the financial performance of the golf
6 courses, as well as to the capital improvements and deferred maintenance needed at the
7 properties, will somehow “prejudice” Franklin. This is plainly not the case. First, as the City has
8 not only complied with, but exceeded its obligations under the Orders, Franklin is actually better
9 off than it would otherwise be. Second, and even more telling, Franklin’s claim of prejudice
10 completely ignores that all of the information contained in Nelson’s declaration was readily
11 available to Franklin. For one, Nelson’s role at the courses was no secret. Franklin subpoenaed
12 documents relating to the golf courses from KemperSports, Inc., the management company that
13 employs Nelson, but opted not to speak with Nelson himself. If Franklin had wished to depose
14 Nelson, who manages the golf courses, about any aspect of the courses, it had every opportunity
15 to do so. Meanwhile, Chin, who purports to be an expert in golf course valuation, chose not to
16 speak with anyone at the golf courses he was appraising. Thus, despite the fact that the Chin
17 Report references the financial performance of the courses and the deferred maintenance required
18 at those properties, neither Chin nor Franklin made any attempt to interview the person most
19 familiar with the present state of the golf courses about these issues. Franklin’s claim of
20 prejudice is thus not a result of any violation of the Orders by the City, but rather of Franklin’s
21 own litigation decisions.

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26 ⁷ Fact witness testimony may be used to rebut expert testimony. *United States v. Shackelford*, 494 F.2d 67, 68, 75
27 (9th Cir. 1974) (holding that the government could rely entirely on lay witnesses with percipient knowledge to rebut
28 the defendant’s expert); *United States v. Bennett*, 908 F.2d 189, 195 (7th Cir. 1990) (government was not required to
rebut expert testimony with its own expert because “it may accomplish the same result by presenting lay witnesses
and other evidence and by undermining the defense expert’s credibility through cross-examination.”); *United States*
v. Mota, 598 F.2d 995, 999 (5th Cir. 1979) (jury may find expert testimony “adequately rebutted by the observations
of mere laymen”).

