

1 MICHAEL J. GEARIN (admitted pro hac vice)  
MICHAEL B. LUBIC (SBN 122591)  
2 MICHAEL K. RYAN (admitted pro hac vice)  
BRETT D. BISSETT (SBN 280366)  
3 K&L GATES LLP  
10100 Santa Monica Boulevard, Seventh Floor  
4 Los Angeles, California 90067  
Telephone: 310.552.5000  
5 Facsimile: 310.552.5001  
Email: michael.gearin@klgates.com  
6 michael.lubic@klgates.com  
michael.ryan@klgates.com  
7 brett.bissett@klgates.com

8 Attorneys for California Public Employees'  
Retirement System

9 UNITED STATES BANKRUPTCY COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 RIVERSIDE DIVISION

12 In re  
13 CITY OF SAN BERNARDINO, CALIFORNIA,  
14 Debtor.

Case No. 6:12-bk-28006 MJ

Chapter 9

CALPERS' MOTION FOR LEAVE TO  
15 APPEAL FILED PURSUANT TO FRBP  
16 8001(b)

17 [HEARING TO BE SET BY DISTRICT  
18 COURT]

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1 The California Public Employees' Retirement System ("CalPERS"), by and through its  
2 undersigned attorneys, hereby moves, out of an abundance of caution, pursuant to Federal Rules of  
3 Bankruptcy Procedure 8001(b) and 8003, for leave to appeal the bankruptcy court's Order for Relief  
4 under Chapter 9 of the Bankruptcy Code [Dkt. No. 798] ("Order for Relief") and its Order (1)  
5 Granting the City of San Bernardino's Motion for Summary Judgment on Eligibility and (2) Denying  
6 CalPERS' Rule 56 Motions [Dkt. No 797] ("Order on Summary Judgment," and collectively with the  
7 Order for Relief, the "Orders").<sup>1</sup> Because the Orders finally adjudicated the discrete legal issues of  
8 the City of San Bernardino's eligibility for relief under the Bankruptcy Code and CalPERS' ability to  
9 conduct discovery related to that question, the Orders are final and therefore may be appealed as a  
10 matter of right. CalPERS has filed its notice of appeal under 28 U.S.C. § 158(a)(1) and FRBP  
11 8001(a). Out of an abundance of caution, CalPERS' notice of appeal has been filed in the alternative  
12 under 28 U.S.C. § 158(a)(3) and FRBP 8001(b). In support thereof, CalPERS files this Motion  
13 requesting leave to appeal. For the reasons set forth below, CalPERS respectfully requests that the  
14 Court grant the Motion and exercise its discretion and allow this appeal to proceed expeditiously.

15 **I. CalPERS' Appeal Is of Right because the Orders from which CalPERS Appeals Are**  
16 **"Final."**

17 CalPERS' appeal is of right because the bankruptcy court's Orders finally resolve the discrete  
18 legal issues which they address. That is, the Order for Relief *finally* determines that the City may be  
19 a debtor under chapter 9 of the Bankruptcy Code, a matter CalPERS has contested from the outset of  
20 the City's filing for chapter 9 protection. The bankruptcy court's Orders, absent an appeal, are not  
21 interim in nature, will not be further litigated by the parties, and will not be considered again by the  
22 bankruptcy court. In short, they are final and therefore appealable as a matter of right. In addition,  
23 the Orders also seriously affect the substantive rights of the City, CalPERS, and many interested  
24 parties in the City's bankruptcy case.

25 Under 28 U.S.C. § 158(a)(1), district courts of the United States shall have jurisdiction to hear  
26 appeals from *final* judgments, orders, and decrees. The standard for determining whether a

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27 <sup>1</sup> The bankruptcy court's reasons for entering the Orders are articulated in its oral ruling on August  
28 28, 2013, the "Court's Statement of Uncontroverted Facts and Conclusions of Law," [Dkt. No. 796]  
and its San Bernardino Eligibility Opinion [Dkt. No. 830].

1 bankruptcy court's disposition is "final" is more flexible than in an ordinary civil case. In the  
2 bankruptcy context, the Ninth Circuit has developed a "pragmatic" approach to determining finality,  
3 "recognizing that certain proceedings in a bankruptcy case are so distinct and conclusive either to the  
4 rights of individual parties or the ultimate outcome of the case that final decisions as to them should  
5 be appealable as of right." *In re Mason*, 709 F.2d 1313, 1317 (9th Cir. 1983). Under this flexible  
6 standard, the court need not completely adjudicate the merits of the entire bankruptcy proceeding.  
7 Rather, a bankruptcy court order is appealable as of right when it "1) resolves and seriously affects  
8 substantive rights and 2) finally determines the discrete issue to which it is addressed." *Law Offices*  
9 *of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1043 (9th Cir. 1997). Thus, a variety  
10 of bankruptcy court orders have been determined "final." See e.g., *Preblich v. Battley*, 181 F.3d  
11 1048, 1056 (9th Cir. 1999) (allowing or disallowing exemption); *In re Lewis*, 113 F.3d 1040, 1211  
12 (9th Cir. 1997) (disgorgement of attorneys' fees); *In re Mickey Thompson Entm't. Grp., Inc.*, 292  
13 B.R. 415, 419-20 (9th Cir. BAP 2003) (approval of settlement agreement).

14 The bankruptcy court's Orders are "final" orders under the Ninth Circuit's pragmatic  
15 approach to determining whether an appeal exists as a matter of right. The Orders resolve and  
16 determine the discrete legal issues of the City's ability to be a debtor under chapter 9 and CalPERS'  
17 ability to obtain discovery related to that question. They also resolve and seriously affect the  
18 substantive rights of the parties. The City's eligibility was a contested matter under Fed. R. Bankr. P.  
19 9014 and subject to the Federal Rules of Civil Procedure, as incorporated into the Bankruptcy Rules.  
20 The bankruptcy court denied CalPERS' request for discovery and determined the City to be eligible  
21 as a matter of law. CalPERS has no ability to further object to the City's eligibility under Section  
22 109 and the City now can take advantage of the provisions of the Bankruptcy Code subject to only  
23 limited control by the bankruptcy court.

24 That the Orders are "final" is underscored by the fact that the eligibility determination is one  
25 of the keystone events of a chapter 9 case and far more important than many bankruptcy court orders,  
26 such as orders approving settlements or disgorging attorneys' fees, that other courts have considered  
27 "final." Chapter 9, as a consequence of the constitutional concerns imposed by the rights granted to  
28 the states, imposes unique requirements in municipal bankruptcies. Chapter 9 requires a putative

1 debtor to litigate its way into bankruptcy court once a party objects to the municipality's eligibility.  
2 Municipal debtors are not automatically entitled to an order of relief at the time the case is filed.  
3 Furthermore, once a municipality that seeks protection under the Code obtains an order for relief, the  
4 Tenth Amendment concerns reflected in 11 U.S.C. §§ 903 & 904 limit the control that the bankruptcy  
5 court has over the actions of a municipal debtor. Additionally, the eligibility determination is  
6 particularly important because many of the protections available to creditors in a chapter 7 or 11 case  
7 are absent in chapter 9. Indeed, Congress's early attempt at crafting municipal bankruptcy legislation  
8 was declared unconstitutional by the Supreme Court. *See Ashton v. Cameron Cnty. Water*  
9 *Improvement Dist. No. 1*, 298 U.S. 513 (1936). Keenly aware of the constitutional issues that lurk  
10 around every corner in a municipal bankruptcy case, Congress purposefully imposed strict eligibility  
11 requirements under 11 U.S.C. § 109(c) "to limit accessibility to the bankruptcy court by  
12 municipalities." *In re Cottonwood Water & Sanitary Dist., Douglas County, Colo.*, 138 B.R. 973,  
13 979 (Bankr. D. Colo. 1992) (quoting legislative history).<sup>2</sup>

14 Even if this Court does not consider the Orders final, the bankruptcy court's eligibility  
15 determination—which is essentially a ruling that says the City is properly a debtor under chapter 9—  
16 should be subject to the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan*  
17 *Corp.*, 337 U.S. 541 (1949). Under *Cohen*, the "order must [1] conclusively determine the disputed  
18 question, [2] resolve an important issue completely separate from the merits of the action, and [3] be  
19 effectively unreviewable on a appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437  
20 U.S. 463, 468 (1978) (footnote omitted). For example, "the Court has held that orders denying  
21 individual officials' claim of absolute and qualified immunity are among those" that are immediately  
22 appealable as a matter of right. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506  
23 U.S. 139, 143 (1993) (citations omitted). In including the question of sovereign immunity in the  
24 class of cases covered by *Cohen*, the court in that case focused on the fact that sovereign immunity  
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26 <sup>2</sup> In *In re Desert Hot Springs*, 339 F.3d 782, 789 (9th Cir. 2003), the Ninth Circuit held that the denial  
27 of a creditor's motion to dismiss the city's chapter 9 case was not a final decision. That case,  
28 however, is distinguishable. The denial of a creditor's motion to dismiss a chapter 9 case is different  
than a court's determination of the municipality's eligibility for relief. A dismissal motion may be  
revisited, while eligibility under Section 109(c) finally determines whether the municipality may be  
eligible for relief at all.

1 raised the question of whether the particular defendant should even be in federal court in the first  
2 place. *Puerto Rico Aqueduct* at 145-46. The bankruptcy court’s eligibility determination is the other  
3 side of this same coin—if the City is not eligible it cannot be a debtor in chapter 9. Thus, it presents  
4 an appropriate application of the collateral order doctrine. Each of *Cohen’s* factors are met: (1) the  
5 bankruptcy court conclusively determined that the City was eligible; (2) it resolved an issue  
6 completely separate from the merits of the underlying case, which in a chapter 9 case is the ultimate  
7 confirmation of a plan of adjustment; and (3) the bankruptcy court’s eligibility determination could  
8 be effectively unreviewable if CalPERS had to wait until a plan was confirmed because the  
9 “equitable mootness” doctrine could preclude substantive consideration of the appeal if the City’s  
10 plan of adjustment is substantially consummated. *See, e.g., In re Thorpe Insulation Co.*, 677 F.3d  
11 869, 879-83 (9th Cir. 2012) (explaining “equitable mootness” doctrine). Accordingly, even if this  
12 Court determines that the Orders are not final, it should apply the collateral order doctrine and allow  
13 the appeal to proceed.

14 For these reasons, CalPERS’ appeal of the bankruptcy court’s Orders is as of right, and it is  
15 therefore unnecessary for CalPERS to obtain leave to file its appeal. Nevertheless, in the event that  
16 the Orders are construed as interlocutory, as opposed to final, CalPERS alternatively requests that the  
17 Court grant leave to file an appeal. This request is consistent with Ninth Circuit precedent. *See, e.g.,*  
18 *In re City of Desert Hot Springs*, 339 F.3d 782, 787 (9th Cir. 2003) (“if a litigant is unsure about the  
19 nature of an order, the litigant should file both a notice of appeal and a motion for leave to appeal  
20 before the BAP or district court.”)

## 21 **II. Requirements Necessary for Motion for Leave to Appeal.**

22 The Federal Rules of Bankruptcy Procedure, pursuant to 28 U.S.C. § 158(a)(3), specifically  
23 authorize appeals from orders that are interlocutory in nature. The Bankruptcy Rules provide:

24 A motion for leave to appeal under 28 U.S.C. § 158(a) shall contain: (1) statement of  
25 facts necessary to an understanding of the questions to be presented by the appeal; (2)  
26 a statement of those questions and the relief sought; (3) statement of the reasons why  
an appeal should be granted; and (4) a copy of the judgment, order, or decree  
complained of an any opinion or memorandum relating thereto.

27 Fed. R. Bankr. P. 8003(a). As will be demonstrated below, to the extent necessary, CalPERS satisfies  
28 all of these bases and this Court should grant CalPERS’ Motion.



1 **III. Statement of Facts Necessary to an Understanding of the Questions Presented By the Appeal.**

2 **A. CalPERS.**

3 In 1945, the City of San Bernardino elected to participate in the California State Retirement  
4 System, subject to the provisions of the State Employees' Retirement Act. The City's obligations are  
5 defined by the Public Employees' Retirement Law (the "PERL"), Cal. Gov. Code § 20000 *et. seq.*  
6 Article XVI, section 17 of the California Constitution mandates that the CalPERS Board of  
7 Administration ensure the rights of CalPERS members and retirees to their full earned benefits. *City*  
8 *of Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 39 (2002). The PERL requires an agency  
9 participating in the CalPERS system to make timely contributions for employees in amounts  
10 recommended by CalPERS' actuary and approved by the CalPERS Board. Cal. Gov. Code §§ 20532,  
11 20831. The PERL explicitly provides that a participating agency may not refuse to pay the required  
12 contributions as determined by CalPERS within the prescribed deadlines. *Id.* at § 20831.

13 **B. The City of San Bernardino's Bankruptcy Filing.**

14 On August 1, 2012, the City of San Bernardino became the second-largest city in the nation  
15 (at that time) to file a chapter 9 petition for relief. The City authorized its filing before considering  
16 any alternatives to bankruptcy and without negotiating with any of its principal creditors even though  
17 the City was aware that it was in financial distress as early as March of 2007. Despite the fact that  
18 the City knew about its financial trouble for years, it took no action to address its problems. Instead,  
19 the City simply stopped paying its bills, filed its petition for relief under chapter 9 of the Bankruptcy  
20 Code (the "Petition"), and used the automatic stay of this Court as a means to avoid its ongoing  
21 financial obligations. In clear violation of California State law, the City immediately stopped making  
22 payments to CalPERS, and currently owes CalPERS approximately \$14 million in statutorily  
23 required postpetition payments that it has deferred. Such payments continue to accrue interest,  
24 penalties, and fees and costs.

25 In October, 2012, CalPERS filed its objection to the City's eligibility for relief under chapter  
26 9 of the Bankruptcy Code arguing, principally, that the City did not have a desire to effect a plan of  
27 adjustment and that it did not file its Petition in good faith. At a status conference on December 21,  
28 2012, the parties commenced a discussion of protocol for discovery and a briefing schedule for

1 resolving the eligibility dispute. Between January and June of 2013, the City and CalPERS discussed  
2 informal document production, directed principally towards understanding the City's finances. The  
3 City and CalPERS agreed to defer the bulk of discovery pertaining to eligibility and the eligibility  
4 contest during this period, and deferred formal discovery, including document production relating to  
5 eligibility and depositions of City representatives. At the bankruptcy court's June 5, 2013 status  
6 conference, the City abruptly changed its position regarding the deferral of the eligibility contest and  
7 insisted on proceeding to a decision on a summary basis, without discovery. At the status conference,  
8 the Court stated that it would not set a discovery schedule until after considering the City's motion  
9 for summary judgment on eligibility issues (for which it set the filing and hearing schedule that day  
10 and, accordingly, imposed an informal, de facto stay on formal discovery).

11 **C. The Bankruptcy Court's Determination of the City's Eligibility.**

12 On July 5, 2013, the City filed its Motion for Summary Judgment on Eligibility [Dkt. No.  
13 679] ("Summary Judgment Motion"). On August 2, 2013, CalPERS filed its Response to the City of  
14 San Bernardino's Motion for Summary Judgment and Request for Rule 56 Relief [Dkt. No. 722]. In  
15 CalPERS' response, it requested that the bankruptcy court enter judgment in favor of CalPERS,  
16 arguing that the City did not file its Petition in good faith and that, on the date the City filed its  
17 Petition, it did not have the desire to effect a plan of adjustment. In the alternative, CalPERS  
18 requested that the court deny the City's motion because the evidence cited by the City, which was  
19 subject to CalPERS' evidentiary objections, plus the facts shown by CalPERS, demonstrated the  
20 existence of genuine disputes as to material facts. CalPERS filed the Declaration of Michael B.  
21 Lubic in Support of CalPERS' Request for Rule 56 Relief [Dkt. No. 725] regarding additional  
22 facts that, because of the lack of discovery on eligibility to date, CalPERS was unable to present that  
23 may have been essential to its opposition to the City's summary judgment motion.

24 The bankruptcy court held a hearing on the City's Summary Judgment Motion on August 28,  
25 2013. The bankruptcy court issued an oral decision granting the City's motion, and subsequently  
26 issued a separate written opinion memorializing its conclusions of law. In its ruling, the bankruptcy  
27 court assumed as true many of the facts supporting CalPERS' assertions that the City did not have a  
28 desire to effect a plan and did not file its Petition in good faith. It was undisputed that the City failed

1 to negotiate with its principal creditors prior to filing for relief, failed to consider alternatives to filing  
2 for bankruptcy, and failed, even a year after filing its petition, to propose a plan of reorganization or  
3 even develop a term sheet or outline of a plan. When it filed its Petition, the City had not even  
4 assigned anyone with the task of working on a plan of adjustment. The same was true a year after the  
5 City filed its Petition. Additionally, during the year after the City filed for bankruptcy, the City had  
6 made no effort to engage in negotiations with most of its principal creditors. Despite the existence of  
7 these undisputed facts, and others, the bankruptcy court determined, as a matter of law, that the City  
8 had a desire to effect a plan of adjustment, and that it filed its petition in good faith. No bankruptcy  
9 court, let alone district court or circuit court of appeals, has ever set the hurdle of eligibility, a  
10 requirement made intentionally difficult by Congress, so low.

11 On September 17, 2003, the bankruptcy court entered the Order for Relief and Order on  
12 Summary Judgment. The Order on Summary Judgment provides that the City is eligible for chapter  
13 9 relief, and that such relief shall be entered, and that all objections to eligibility and requests for  
14 dismissal under § 921(c) are overruled. The Order on Summary Judgment also denies CalPERS’  
15 Rule 56(d) request and Rule 56(f)(1) motion for summary judgment. The Order for Relief provides  
16 that the City filed its chapter 9 petition in good faith and that the Petition meets all of the applicable  
17 requirements of the Bankruptcy Code. In conjunction with its entry of the Orders, the bankruptcy  
18 court also entered its Statement of Uncontroverted Facts and Conclusions of Law [Dkt. No. 796]. On  
19 September 27, 2013, the bankruptcy court entered an order approving the stipulation between the  
20 City and CalPERS to extend, pursuant to Fed. R. Bankr. P. 8002(c)(2), the time to file appeals from  
21 the Orders and from the Statement of Uncontroverted Facts and Conclusions of Law to October 22,  
22 2013. Dkt. No. 817 (the “Order Extending Appeal Deadline”). On October 16, the bankruptcy court  
23 issued its San Bernardino Eligibility Opinion [Dkt. No. 830].

24 **IV. Statement of Questions to be Presented by CalPERS’ Appeal and Relief Sought.**

25 CalPERS will raise the following issues in its appeal:

26 Whether the bankruptcy court’s entry of the order granting summary judgment  
27 in the City’s favor is proper where:

- 28 (i) the City filed its Petition without any concept of a plan of adjustment;

- (ii) the City filed its Petition without negotiating with any of its major creditors;
- (iii) the City failed to explore any alternatives to bankruptcy;
- (iv) a year after the City filed its Petition, had not even tasked someone with developing the basic terms of a plan of adjustment;
- (v) the City failed to make meaningful financial information available to pre- and postpetition creditors during the course of its bankruptcy;
- (vi) the City made significant prepetition preferential transfers prior to filing its Petition; and
- (vii) the bankruptcy court denied CalPERS' request to obtain any discovery regarding the City's eligibility and good faith.

**V. Statement of Reasons Why an Appeal Should Be Granted.**

The bankruptcy court's ruling turns on the meaning of key sections of the Bankruptcy Code, including 11 U.S.C. § 109(c)(4) (desire to effect a plan) and 11 U.S.C. § 921(c) (good faith). Accordingly, CalPERS' appeal presents an issue of law. *See, e.g., In re Flores*, -- F.3d --, 2013 WL 4566428, at \* 1 n.4 (9th Cir. August 29, 2013) ("We review the de novo the issue of statutory construction, including a bankruptcy court's interpretation of the Bankruptcy Code."). In addition, the meanings of these particular sections of the Bankruptcy Code have never been addressed by the Ninth Circuit Court of Appeals, any other circuit court of appeals, or the Supreme Court. The bankruptcy court determined that standards for eligibility are to be construed broadly. The bankruptcy court, in granting the City's Motion for Summary Judgment, effectively reduced Congress's requirement that a municipality have a desire to effect a plan of adjustment into a "check-the-box" standard that may be satisfied by any insolvent municipality that merely files a petition for relief and submits a declaration stating that the City has a desire to effect a plan. The bankruptcy court's ruling deprived the Bankruptcy Code's eligibility requirements of real meaning and is inconsistent with the principle that courts must scrutinize chapter 9 petitions with "a jaded eye" given the federalism concerns that are ever-present in chapter 9 cases. *See e.g., In re New York City Off-Track Betting Corp.*, 427 B.R. 256, 264 (Bankr. S.D.N.Y. 2010) ("Bankruptcy courts should review chapter 9 petitions with a jaded eye."); *In re Cottonwood Water & Sanitary Dist. Douglas Cnty, Colo.*, 138 B.R. 973, 979 (Bankr. D. Colo. 1992) (stating that Congress, recognizing the constitutional concerns present in chapter 9, "consciously sought 'to limit accessibility to the bankruptcy court' by municipalities") (quoting legislative history). Furthermore, the bankruptcy court's ruling creates a dangerous precedent that provides municipalities with the incentive to ignore

1 its deteriorating financial condition until there is a fiscal crisis, fail to negotiate with its creditors, and  
2 file a bankruptcy petition without any genuine intention of moving its case forward in a diligent  
3 manner and effectuating a plan. The issue is of vital importance to CalPERS, the State of California,  
4 other States and municipalities across the nation, and raises important federalism issues.

5 A court may grant leave to appeal from an interlocutory order where it “involves a controlling  
6 question of law as to which there is substantial ground for difference of opinion” and where “an  
7 immediate appeal from the order may materially advance the ultimate termination of the litigation.”  
8 28 U.S.C. § 1292(b). While 28 U.S.C. § 1292(b) applies to interlocutory appeals from the district  
9 court to the courts of appeal, the Ninth Circuit Bankruptcy Appellate Panel and district courts have  
10 applied the same standard when considering a motion for leave to appeal a bankruptcy court’s  
11 decision. *See e.g., Roderick Timber Co. v. Levy (In re Roderick Timber Co.)*, 185 B.R. 601, 604 (9th  
12 Cir. BAP 1995); *In re Coudert Bros. LLP Law Firm Adversary Proceedings*, 447 B.R. 706, 711  
13 (S.D.N.Y. 2011). For leave to be granted, the appellant does not need to establish that a prior court  
14 “reached a conclusion adverse to that from which appellants seek relief.” *Reese v. BP Exploration*  
15 *(Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). Rather, a substantial ground for difference of  
16 opinion exists “when novel legal issues are presented, on which fair-minded jurists might reach  
17 contradictory conclusions . . . .” *Id.* Courts also consider whether denying leave “will result in  
18 wasted litigation and expense.” *Id.* (citing *In re NSB Film Corp.*, 167 B.R. 176, 180 (9th Cir. BAP  
19 1994)).

20 If the Court determines the Orders to be interlocutory in nature, the issues presented on appeal  
21 present a particularly compelling case in which the Court should grant leave to appeal. No court,  
22 including the Ninth Circuit and the Supreme Court, may stay the bankruptcy court’s proceedings “on  
23 account of an appeal from an order for relief.” 11 U.S.C. § 921(e). Immediate review of this case is  
24 necessary to afford CalPERS an opportunity for meaningful relief and will obviate the need for  
25 further costly bankruptcy proceedings if the appeal is withheld. A successful appeal may end the  
26 case before more time and money is spent by the parties in the City’s bankruptcy case and before the  
27 City takes additional steps to alter its legal rights and relationships with its creditors. Even if the case  
28 is remanded for an evidentiary hearing on the City’s eligibility, immediate review will clarify, for the

1 benefit of the many interested parties to this case, the right of the City to avail itself of benefits of the  
2 Bankruptcy Code.

3 **A. The Appeal Involves a Controlling Question of Law on Which There is a**  
4 **Substantial Basis for Difference of Opinion.**

5 The appeal will raise the issue of law that the bankruptcy court erred in its determination,  
6 necessary to its entry of the Order for Relief, that the City satisfied Section 109(c)(4)'s requirement  
7 that the City have a desire to effect a plan of adjustment and its determination that the City filed its  
8 petition in good faith under Section 921(c). The bankruptcy court's determination of the City's  
9 eligibility for relief under chapter 9 is a controlling question of law. Section 921(c) *requires*  
10 dismissal of the City's bankruptcy case if the debtor is not eligible for relief for failure to meet the  
11 eligibility requirements of Section 109. *See, In re Capen Wholesale, Inc.*, 184 B.R. 547, 549 (N.D.  
12 Ill. 1995) (noting that "controlling" issue of law is ordinarily "outcome determination" but may also  
13 encompass issues that could "significantly" impact "the bankruptcy proceedings below"). It is  
14 difficult to imagine a more impactful issue than the City's eligibility for relief and ability to be in  
15 bankruptcy.

16 Furthermore there is a substantial basis for a difference of opinion. As highlighted above,  
17 there is *no circuit court authority* that squarely faces the 109(c)(4) eligibility requirement. Nor is  
18 there authority from *any* circuit court of appeals discussing dismissal of a chapter 9 petition for lack  
19 of good faith under Section 921(c). In CalPERS' view, never before has a bankruptcy court set such  
20 a low bar for a municipal debtor to enter the doors of the bankruptcy court. Certainly, "fair-minded  
21 jurists" may reach a conclusion contrary to that of the bankruptcy court in this case given that chapter  
22 9 petitions must be scrutinized with a "jaded eye" in order to honor Congress's intent that the gates to  
23 chapter 9 be intentionally difficult to open. *See In re Sullivan Cnty Reg'l Refuse Disposal Dist.*, 165  
24 B.R. 60, 82 (Bankr. D.N.H. 1994) ("Considering the bankruptcy court's severely limited control over  
25 the debtor, once the petition is approved, access to Chapter 9 relief has been designed to be an  
26 intentionally difficult task.")

**B. An Immediate Appeal Will Materially Advance the Resolution of this  
Bankruptcy Case.**

1  
2 If the bankruptcy court's decision to deny CalPERS' cross-motion for summary judgment is  
3 reversed, this entire bankruptcy case will end. Even if the bankruptcy court's decision to grant the  
4 City's Motion for Summary Judgment is reversed and remanded for a trial, the appeal will materially  
5 advance the ultimate resolution of this case because it will provide clarity to all parties with respect to  
6 the City's ability to be in bankruptcy and use the bankruptcy process to alter its relationships with  
7 creditors.

8 If leave is not granted, the City will proceed in bankruptcy—a lengthy, time consuming and  
9 expensive process—with the specter of a possible reversal on appeal (assuming “equitable mootness”  
10 does not prevent the appeal altogether). Immediate relief is the only way to avoid wasted litigation  
11 and expense because, pursuant to Section 921(e), the proceedings below cannot be stayed.  
12 Bankruptcy is unique in that the parties' rights and legal relationship with a debtor are altered and  
13 modified throughout the bankruptcy process—whether it be through a debtor's assumption or  
14 rejection of executory contracts, claims allowance, or plan confirmation. The more time that passes  
15 in the City's case, the more difficult it becomes for this Court to grant CalPERS' meaningful relief  
16 given that the City will presumably have taken additional steps to move towards plan confirmation  
17 and may argue that CalPERS' appeal has become moot. *See e.g., In re Gotcha Int'l. L.P.*, 311 B.R.  
18 250 (9th Cir. BAP 2004) (appeal from confirmation order dismissed as moot where plan of  
19 reorganization was substantially consummated and effective relief was no longer available).

20 Immediate leave should be granted because the eligibility determination is *the* threshold  
21 decision in chapter 9 that allows the City to take advantage of the panoply of provisions in the  
22 Bankruptcy Code to the detriment of CalPERS and many other creditors. Should the Court grant  
23 CalPERS leave to appeal, the consideration of these largely untested legal issues in an expeditious  
24 appeal will have the added benefit of providing meaningful guidance to municipalities, in California  
25 as well as in other states, that are financially distressed and contemplating bankruptcy. The parties  
26 should not have to engage in additional costly and time intensive proceedings that impair the rights of  
27 the City's many creditors if the City is, in fact, ineligible for relief under chapter 9.

1 **VI. Copy of the Judgment and Order.**

2 CalPERS attaches, as Appendix A to this Motion, a copy of the bankruptcy court's Orders and  
3 its Statement of Uncontroverted Facts and Conclusions of Law, which were entered on September 17,  
4 2013. Also included in Appendix A is a copy of the transcript of the bankruptcy court's oral ruling  
5 given on August 28, 2013, a copy of the Order Extending Appeal Deadline, and a copy of the  
6 bankruptcy court's San Bernardino Eligibility Opinion.

7 **VII. Conclusion.**

8 For the foregoing reasons, the Court should grant CalPERS' request for leave to appeal the  
9 bankruptcy court's Orders determining that the City is eligible for relief under chapter 9 as a matter  
10 of law and denying CalPERS' request for Rule 56 relief.

11 Respectfully submitted,

12 Michael J. Gearin (pro hac vice)  
13 Michael B. Lubic  
14 Michael K. Ryan (pro hac vice)  
15 Brett D. Bissett  
16 K&L GATES LLP

17 Dated: October 22, 2013

18 By: /s/ Michael B. Lubic

19 Michael B. Lubic  
20 Attorneys for California Public Employees'  
21 Retirement System  
22  
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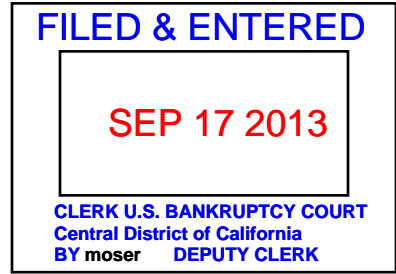


# EXHIBIT A

**APPENDIX A**

1. Order for Relief under Chapter 9 of the Bankruptcy Code  
[Dkt. No. 798] (“Order for Relief”).....14
2. Order (1) Granting the City of San Bernardino’s Motion for  
Summary Judgment on Eligibility and (2) Denying CalPERS’  
Rule 56 Motions [Dkt. No 797] (“Order on Summary Judgment”).....19
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Conclusions of Law [Dkt. No. 796].....25
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of Bankruptcy Procedure 8002(c) [Dkt. No. 817].....37
5. San Bernardino Eligibility Opinion [Dkt. No. 830].....42
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1 PAUL R. GLASSMAN (State Bar No. 76536)  
FRED NEUFELD (State Bar No. 150759)  
2 LAURA L. BUCHANAN (State Bar No. 156261)  
STRADLING YOCCA CARLSON & RAUTH, P.C.  
100 Wilshire Blvd., 4th Floor  
3 Santa Monica, CA 90401  
Telephone: (424) 214-7000  
4 Facsimile: (424) 214-7010  
E-mail: pglassman@sycr.com  
5 fneufeld@sycr.com  
lbuchanan@sycr.com  
6



7 JAMES F. PENMAN (State Bar No. 91761)  
CITY ATTORNEY  
300 North "D" STREET, Sixth Floor  
8 San Bernardino, CA 92418  
Telephone: (909) 384-5355  
9 Facsimile: (909) 384-5238  
E-mail: Penman\_Ja@sbcity.org  
10

11 Attorneys for Debtor  
City of San Bernardino

12 **UNITED STATES BANKRUPTCY COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA**  
14 **RIVERSIDE DIVISION**

15 In re  
16 CITY OF SAN BERNARDINO,  
CALIFORNIA,  
17 Debtor.

Case No. 6:12-bk-28006 MJ  
Chapter 9

18 **ORDER FOR RELIEF UNDER CHAPTER 9**  
19 **OF THE BANKRUPTCY CODE**

20 Hearing held August 28, 2013

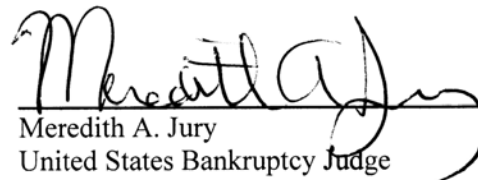
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Order for Relief Under Chapter 9

The Court having determined that the City of San Bernardino, California (“City”) is eligible to be a debtor under chapter 9, that the City filed its chapter 9 petition in good faith and that the petition meets all of the applicable requirements of the Bankruptcy Code, relief is hereby ordered under chapter 9 for the City.

###

Date: September 17, 2013

  
Meredith A. Jury  
United States Bankruptcy Judge

## NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (specify): ORDER APPOINTING THE HONORABLE GREGG W. ZIVE AS MEDIATOR was entered on the date indicated as Entered on the first page of this judgment or order and will be served in the manner stated below:

**1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of August 12, 2013, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

### UNITED STATES TRUSTEE

United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov

### ATTORNEYS FOR DEBTOR

Paul Glassman pglassman@sycr.com

Fred Neufeld fneufeld@sycr.com

### ATTORNEYS FOR CALPERS

Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com

Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com

### ATTORNEYS FOR SAN BERNARDINO CITY PROFESSIONAL FIREFIGHTERS LOCAL 891

David M Goodrich dgoodrich@marshackhays.com, ecfmarshackhays@gmail.com

Chad V Haes chaes@marshackhays.com, ecfmarshackhays@gmail.com

D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com

Richard A Marshack rmarshack@marshackhays.com, lbergini@marshackhays.com;

ecfmarshackhays@gmail.com

### ATTORNEYS FOR SAN BERNARDINO PUBLIC EMPLOYEES ASSOCIATION

Christopher H Conti chc@sdlaborlaw.com, sak@sdlaborlaw.com

### ATTORNEYS FOR SAN BERNARDINO POLICE OFFICERS ASSOCIATION

Aron M Oliner roliner@duanemorris.com

### ATTORNEYS FOR AMBAC ASSURANCE COMPANY, ERSTE EUROPAISCHE PFANDBRIEF-UND KOMMUNALKREDITBANK AG AND WELLS FARGO BANK, N.A., AS TRUSTEE

Mette H Kurth kurth.mette@arentfox.com

Jerrold Abeles abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com

### ATTORNEYS FOR RETIRED EMPLOYEES OF THE CITY OF SAN BERNARDINO JENIFER ARAGON, MICHAEL BILLDT, DAVE DILLON, MICHAEL ECKLEY, WALT GOGGIN, WAYNE HARP, STEVE KLETTENBERG, FRANK MANKIN, DENIS MOON, SCOTT PATERSON, AND ROBERT SIMMONS

Anthony Bisconti tbisconti@bmkattorneys.com, admin@bmkattorneys.com

Steven J Katzman SKatzman@bmkattorneys.com, admin@bmkattorneys.com

Anne A Uyeda auyeda@bmkattorneys.com

Jerrold Abeles abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com

Franklin C Adams franklin.adams@bbklaw.com,

arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknotices@bbklaw.com

Joseph M Adams jadams@lawjma.com

Andrew K Alper aalper@frandzel.com, efiling@frandzel.com;ekidder@frandzel.com

---

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Thomas V Askounis taskounis@askounisdarcy.com  
Julie A Belezzuoli julie.belezzuoli@kayescholer.com  
Anthony Bisconti tbisconti@bmkattorneys.com, admin@bmkattorneys.com  
Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com  
Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com  
Jeffrey E Bjork jbjork@sidley.com  
Michael D Boutell mdbell@comerica.com  
J Scott Bovitz bovitz@bovitz-spitzer.com  
John A Boyd fednotice@tclaw.net  
Jeffrey W Broker jbroker@brokerlaw.biz  
Deana M Brown dbrown@milbank.com  
Michael J Bujold Michael.J.Bujold@usdoj.gov  
Suzanne Burke Spencer sburke@sall-lawoffice.com, aduran@sall-lawoffice.com;rsall@sall-lawoffice.com;jberaldo@sall-lawoffice.com;msall@sall-lawoffice.com  
Shirley Cho scho@pszjlaw.com  
Alicia Clough alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com  
Marc S Cohen mcohen@kayescholer.com, dhernandez@kayescholer.com  
Ronald R Cohn rcohn@horganrosen.com  
Christopher H Conti chc@sdlaborlaw.com, sak@sdlaborlaw.com  
Christopher J Cox chris.cox@weil.com, janine.chong@weil.com  
Christina M Craige ccraige@sidley.com  
Alex Darcy adarcy@askounisdarcy.com, akapai@askounisdarcy.com  
Susan S Davis sdavis@coxcastle.com  
Robert H Dewberry robert.dewberry@dewlaw.net  
Todd J Dressel dressel@chapman.com, lubecki@chapman.com  
Chrysta L Elliott elliottc@ballardspahr.com, manthiek@ballardspahr.com  
Scott Ewing contact@omnimgt.com, sewing@omnimgt.com;katie@omnimgt.com  
John A Farmer jfarmer@orrick.com  
Brian W Freeman brian@pedigolaw.com, brian@brianwfreeman.com  
Victoria C Geary victoria.geary@boe.ca.gov  
Paul R. Glassman pglassman@sycr.com  
Robert P Goe kmurphy@goeforlaw.com, rgoe@goeforlaw.com;mforsythe@goeforlaw.com  
David M Goodrich dgoodrich@marshackhays.com, ecfmarshackhays@gmail.com  
Christian Graham cgraham23@dlblaw.net  
Everett L Green everett.l.green@usdoj.gov  
Chad V Haes chaes@marshackhays.com, ecfmarshackhays@gmail.com  
James A Hayes jhayes@jamesahayesaplc.com  
M Jonathan Hayes jhayes@srhlawfirm.com, roksana@srhlawfirm.com;carolyn@srhlawfirm.com;shawnj@srhlawfirm.com;rosarioz@srhlawfirm.com  
D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com  
Eric M Heller eric.m.heller@irscounsel.treas.gov  
Jeffery D Hermann jhermann@orrick.com  
Jeffery D Hermann jhermann@orrick.com  
Bonnie M Holcomb bonnie.holcomb@doj.ca.gov, rosita.eduardo@doj.ca.gov  
Whitman L Holt wholt@ktbslaw.com  
Michelle C Hribar mch@sdlaborlaw.com  
Steven J Katzman SKatzman@bmkattorneys.com, admin@bmkattorneys.com  
Jane Kespradit jane.kespradit@limruger.com, amy.lee@limruger.com  
Mette H Kurth kurth.mette@arentfox.com  
Mette H Kurth kurth.mette@arentfox.com  
Sandra W Lavigna lavignas@sec.gov  
Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com

---

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com  
Richard A Marshack rmarshack@marshackhays.com,  
lbergini@marshackhays.com;ecfmarshackhays@gmail.com  
David J McCarty dmccarty@sheppardmullin.com  
Reed M Mercado rmercado@sheppardmullin.com  
Fred Neufeld fneufeld@sycr.com  
Aron M Oliner roliner@duanemorris.com  
Scott H Olson solson@seyfarth.com  
Dean G Rallis drallis@sulmeyerlaw.com  
Christopher O Rivas crivas@reedsmith.com  
Kenneth N Russak krussak@frandzel.com, efiling@frandzel.com;dmoore@frandzel.com  
Gregory M Salvato gsalvato@salvatolawoffices.com, calendar@salvatolawoffices.com  
Mark C Schnitzer mschnitzer@rhlaw.com, mcschnitzer@gmail.com  
William R Shafton wshafton@winston.com  
Diane S Shaw diane.shaw@doj.ca.gov  
Ariella T Simonds asimonds@sidley.com  
Leonard Steiner ls@steinerlibo.com, jasoncarter@steinerlibo.com;aam@steinerlibo.com  
Jason D Strabo jstrabo@mwe.com, LosAngelesTrialDocket@mwe.com  
Cathy Ta cathy.ta@bbklaw.com, Arthur.Johnston@bbklaw.com;lisa.spencer@bbklaw.com  
Sheila Totorp stotorp@clausen.com, jbrzezinski@clausen.com  
Benjamin R Trachtman btrachtman@trachtmanlaw.com, sstraka@trachtmanlaw.com  
Matthew J Troy matthew.troy@usdoj.gov  
United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov  
Anne A Uyeda auyeda@bmkattorneys.com  
Annie Verdries verdries@lbbsslw.com, Autodocket@lbbsslw.com  
Brian D Wesley brian.wesley@doj.ca.gov  
Kirsten A Roe Worley kworley@wthf.com, bcordova@wthf.com  
Clarisse Young youngshumaker@psmlawyers.com, sally@psmlawyers.com  
Pamela Jan Zylstra zylstralaw@gmail.com

Service information continued on attached page

**2. SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Service information continued on attached page

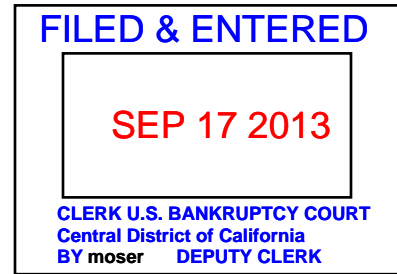
**3. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

Service information continued on attached page

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1 PAUL R. GLASSMAN (State Bar No. 76536)  
FRED NEUFELD (State Bar No. 150759)  
2 LAURA L. BUCHANAN (State Bar. No. 156261)  
KATHLEEN D. DeVANEY (State Bar No. 156444)  
3 STRADLING YOCCA CARLSON & RAUTH, P.C.  
100 Wilshire Blvd., 4<sup>th</sup> Floor  
4 Santa Monica, CA 90401  
Telephone: (424) 214-7000  
5 Facsimile: (424) 214-7010  
E-mail: pglassman@sycr.com  
6 fneufeld@sycr.com  
lbuchanan@sycr.com  
7 kdevaney@sycr.com



8 JAMES F. PENMAN (State Bar No. 91761)  
CITY ATTORNEY  
9 300 North "D" STREET, Sixth Floor  
San Bernardino, CA 92418  
10 Telephone: (909) 384-5355  
Facsimile: (909) 384-5238  
11 E-mail: Penman\_Ja@sbcity.org

12 Attorneys for Debtor  
13 City of San Bernardino

14  
15 **UNITED STATES BANKRUPTCY COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**  
17 **RIVERSIDE DIVISION**

18 In re  
19 CITY OF SAN BERNARDINO,  
CALIFORNIA,

20 Debtor.

Case No. 6:12-bk-28006 MJ

Chapter 9

**ORDER (1) GRANTING CITY OF SAN  
BERNARDINO'S MOTION FOR  
SUMMARY JUDGMENT ON ELIGIBILITY,  
AND (2) DENYING CALPERS' RULE 56  
MOTIONS**

**Hearing:**

**Date: August 28, 2013**

**Time: 1:30 p.m.**

**Place: United States Bankruptcy Court  
3420 Twelfth Street  
Courtroom 301  
Riverside, CA 92501**



1 Order Granting City's Motion for Summary Judgment on Eligibility

2 On July 5, 2013, chapter 9 debtor City of San Bernardino, California (the "City") filed its  
3 motion for summary judgment and supporting papers on eligibility for relief under chapter 9 of the  
4 Bankruptcy Code pursuant to 11 U.S.C. §§109(c), 921(c) and 921(d) (the "City Eligibility Motion").  
5 On August 5, 2013, the California Public Employees' Retirement System ("CalPERS") filed its  
6 opposition brief and supporting papers with respect to the City Eligibility Motion, including a  
7 request under Federal Rule of Civil Procedure 56(d) (made applicable by Federal Rule of  
8 Bankruptcy Procedure 7056) for additional discovery, and a motion for summary judgment under  
9 Federal Rule of Civil Procedure 56(f)(1). On August 16, 2013, the City filed its reply brief and  
10 supporting papers. A hearing was held on August 28, 2013 (the "Hearing") on the City's Eligibility  
11 Motion, CalPERS' request for additional discovery under Federal Rule of Civil Procedure 56(d) and  
12 CalPERS' motion for summary judgment under Federal Rule of Civil Procedure 56(f)(1).

13 The Court, having read and considered the moving, opposition and reply papers, including all  
14 supporting documents submitted therewith, and having considered only admissible and competent  
15 supporting evidence and declarations; having heard the arguments of counsel on this matter at the  
16 Hearing; having determined that there are no triable issues of material fact and that the City is  
17 eligible to be a debtor under chapter 9 of the United States Bankruptcy Code as a matter of law, and  
18 that CalPERS' Rule 56(d) request and Rule 56(f)(1) motion are without merit; and having  
19 determined that the City is entitled to summary judgment in its favor as a matter of law based on the  
20 uncontroverted facts and law, and good cause appearing therefor, IT IS HEREBY ADJUDGED,  
21 ORDERED AND DECREED that:

22 1. The City is granted judgment in its favor that it is eligible for chapter 9 relief and that  
23 an order for chapter 9 relief shall be entered.

24 2. All objections to eligibility and requests for dismissal on Bankruptcy Code Section  
25 921(c) grounds are overruled.

26 3. CalPERS' Rule 56(d) request is denied.

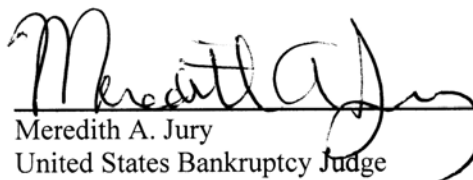
27 4. CalPERS' Rule 56(f)(1) motion is denied.

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5. The Court's findings of fact and conclusions of law and/or memorandum decision on eligibility shall follow in a separate document.

###

Date: September 17, 2013

  
Meredith A. Jury  
United States Bankruptcy Judge

## NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): ORDER (1) GRANTING CITY OF SAN BERNARDINO'S MOTION FOR SUMMARY JUDGMENT ON ELIGIBILITY, AND (2) DENYING CALPERS' RULE 56 MOTIONS was entered on the date indicated as Entered on the first page of this judgment or order and will be served in the manner stated below:

**1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of August 29, 2013, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

### UNITED STATES TRUSTEE

United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov

### ATTORNEYS FOR DEBTOR

pglassman@sycr.com

fneufeld@sycr.com

### ATTORNEYS FOR CALPERS

Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com

Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com

Jerrold Abeles abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com

Franklin C Adams franklin.adams@bbklaw.com,

arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknoces@bbklaw.com

Joseph M Adams jadams@adamspham.com

Andrew K Alper aalper@frandzel.com, efilng@frandzel.com;ekidder@frandzel.com

Thomas V Askounis taskounis@askounisdarcy.com

Julie A Belezzuoli julie.belezzuoli@kayescholer.com

Anthony Bisconti tbisconti@bmkattorneys.com, admin@bmkattorneys.com

Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com

Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com

Jeffrey E Bjork jbjork@sidley.com

Michael D Boutell mdbell@comerica.com

J Scott Bovitz bovitz@bovitz-spitzer.com

John A Boyd fednotice@tclaw.net

Jeffrey W Broker jbroker@brokerlaw.biz

Deana M Brown dbrown@milbank.com

Michael J Bujold Michael.J.Bujold@usdoj.gov

Suzanne Burke Spencer sburke@sall-lawoffice.com, aduran@sall-lawoffice.com;rsall@sall-

lawoffice.com;jberaldo@sall-lawoffice.com;msall@sall-lawoffice.com

Shirley Cho scho@pszjlaw.com

Alicia Clough alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com

Marc S Cohen mcohen@kayescholer.com, dhernandez@kayescholer.com

Ronald R Cohn rcohn@horganrosen.com

Christopher H Conti chc@sdlaborlaw.com, sak@sdlaborlaw.com

Christopher J Cox chris.cox@weil.com, janine.chong@weil.com

Christina M Craige ccraige@sidley.com

Alex Darcy adarcy@askounisdarcy.com, akapai@askounisdarcy.com

Susan S Davis sdavis@coxcastle.com

Robert H Dewberry robert.dewberry@dewlaw.net

Todd J Dressel dressel@chapman.com, lubecki@chapman.com

Chrysta L Elliott elliottc@ballardspahr.com, manthiek@ballardspahr.com

Scott Ewing contact@omnimgt.com, sewing@omnimgt.com;katie@omnimgt.com

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June 2012

**F 9021-1.1.NOTICE.ENTERED.ORDER**

DOCSSM/3004396v1/200430-0003

EXHIBIT A PAGE 22

John A Farmer jfarmer@orrick.com  
Brian W Freeman brian@pedigolaw.com, brian@brianwfreeman.com  
Victoria C Geary victoria.geary@boe.ca.gov  
Paul R. Glassman pglassman@sycr.com  
Robert P Goe kmurphy@goeforlaw.com, rgoe@goeforlaw.com;mforsythe@goeforlaw.com  
David M Goodrich dgoodrich@marshackhays.com, ecfmarshackhays@gmail.com  
Christian Graham cgraham23@dlblaw.net  
Everett L Green everett.l.green@usdoj.gov  
Chad V Haes chaes@marshackhays.com, ecfmarshackhays@gmail.com  
James A Hayes jhayes@jamesahayesaplc.com  
M Jonathan Hayes jhayes@srhlawfirm.com,  
roksana@srhlawfirm.com;carolyn@srhlawfirm.com;shawnj@srhlawfirm.com;rosarioz@srhlawfirm.com  
D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com  
Eric M Heller eric.m.heller@irscounsel.treas.gov  
Jeffery D Hermann jhermann@orrick.com  
Jeffery D Hermann jhermann@orrick.com  
Bonnie M Holcomb bonnie.holcomb@doj.ca.gov, rosita.eduardo@doj.ca.gov  
Whitman L Holt whoht@ktbslaw.com  
Michelle C Hribar mch@sdlaborlaw.com  
Steven J Katzman SKatzman@bmkattorneys.com, admin@bmkattorneys.com  
Jane Kespradit jane.kespradit@limruger.com, amy.lee@limruger.com  
Mette H Kurth kurth.mette@arentfox.com  
Mette H Kurth kurth.mette@arentfox.com  
Sandra W Lavigna lavignas@sec.gov  
Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com  
Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com  
Richard A Marshack rmarshack@marshackhays.com, lbergini@marshackhays.com;ecfmarshackhays@gmail.com  
David J McCarty dmccarty@sheppardmullin.com  
Reed M Mercado rmercado@sheppardmullin.com  
Fred Neufeld fneufeld@sycr.com  
Aron M Oliner roliner@duanemorris.com  
Scott H Olson solson@seyfarth.com  
Dean G Rallis drallis@sulmeyerlaw.com  
Christopher O Rivas crivas@reedsmith.com  
Kenneth N Russak krussak@frandzel.com, efiling@frandzel.com;dmoore@frandzel.com  
Gregory M Salvato gsalvato@salvatolawoffices.com, calendar@salvatolawoffices.com  
Mark C Schnitzer mschnitzer@rhlaw.com, mcschnitzer@gmail.com  
William R Shafton wshafton@winston.com  
Diane S Shaw diane.shaw@doj.ca.gov  
Ariella T Simonds asimonds@sidley.com  
Leonard Steiner ls@steinerlibo.com, jasoncarter@steinerlibo.com;aam@steinerlibo.com  
Jason D Strabo jstrabo@mwe.com, cnorris@mwe.com  
Cathy Ta cathy.ta@bbklaw.com, Arthur.Johnston@bbklaw.com;lisa.spencer@bbklaw.com  
Sheila Totorp stotorp@clausen.com, jbrzezinski@clausen.com  
Benjamin R Trachtman btrachtman@trachtmanlaw.com, sstraka@trachtmanlaw.com  
Matthew J Troy matthew.troy@usdoj.gov  
United States Trustee (RS) ustpregion16.rs.ecf@usdoj.gov  
Anne A Uyeda auyeda@bmkattorneys.com  
Annie Verdries verdries@lbbsslw.com, Autodocket@lbbsslw.com  
Brian D Wesley brian.wesley@doj.ca.gov  
Kirsten A Roe Worley kworley@wthf.com, bcordova@wthf.com  
Clarisse Young youngshumaker@psmlawyers.com, sally@psmlawyers.com  
Pamela Jan Zylstra zylstralaw@gmail.com

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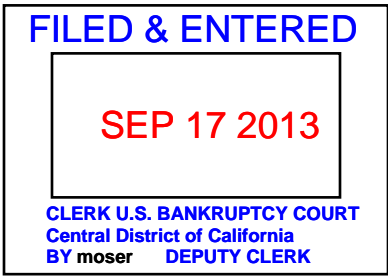
2. **SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Service information continued on attached page

3. **TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
RIVERSIDE DIVISION

In re:  
CITY OF SAN BERNARDINO, CALIFORNIA  
Debtor.

Case No. 6:12-bk-28006 MJ  
Chapter 9  
COURT'S STATEMENT OF  
UNCONTROVERTED FACTS AND  
CONCLUSIONS OF LAW  
Hearing Held: August 28, 2013  
Time: 1:30 p.m.

On July 5, 2013, debtor City of San Bernardino, California (the "City") filed its motion for summary judgment seeking an order determining that it is eligible for relief under chapter 9 pursuant to 11 U.S.C. §§109(c), 921(c) and 921(d) (the "Eligibility Motion") and supporting papers. On August 5, 2013, the California Public Employees' Retirement System ("CalPERS") filed its opposition to the Eligibility Motion and supporting papers. On August 16, 2013, the City filed its reply and supporting papers. A hearing was held on the Eligibility Motion on August 28, 2013.

By separate orders, the Court has determined that the City is entitled to summary judgment on the Eligibility Motion, and that that an order for relief under chapter 9 should be entered. Pursuant to Fed. R. Civ. P. 56, made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7056 and 9014, the Court hereby adopts the following Statement of Uncontroverted Facts and Conclusions of Law

1 concerning the City’s petition and eligibility for chapter 9 relief in support of the grant of the City’s  
 2 Summary Judgment Motion.

3  
 4 **UNCONTROVERTED FACTS**

Uncontroverted Facts	Evidence
1. The City is a California municipal corporation operating under a city charter ratified by its voters.	Ex. A to Declaration of Georgeann Hanna In Support of City of San Bernardino’s Memorandum of Facts and Law in Support of the Statement of Qualifications Under Section 109(c) of the Bankruptcy Code (“Hanna Decl.”) [Docket No. 129]
2. The City is a municipality.	The evidence in paragraph 1 above and that no party objected to eligibility on Section 109(c)(1) grounds.
3. The City placed items on the agenda for the July 10, 2012 noticed public meeting of the Mayor and Common Council that there would be discussion on the City’s budget for the fiscal year 2012/2013 and possible action on authorizing the filing of a petition under Chapter 9.	Hanna Decl., Exhibit D; Declaration of Andrea Travis-Miller in Support of City of San Bernardino’s Memorandum of Facts and Law in Support of the Statement of Qualifications Under Section 109(c) of the Bankruptcy Code [Docket No. 126] (“Travis-Miller Decl.”), ¶ 7.
4. A report was prepared entitled the “San Bernardino Budgetary Analysis and Recommendations for Budget Stabilization” dated July 9, 2012 (the “Budget Report”).	Exhibits B and C to Hanna Decl.; Travis-Miller Decl. at ¶ 6.
5. At the July 10, 2012 noticed public meeting of the Mayor and Common Council, the Budget Report concerning the fiscal condition of the City was presented and the meeting was open for public comments.	Hanna Decl. Exhibits B and C; Travis-Miller Decl., ¶ 8; Busch Decl., ¶ 13.
6. The City placed items on the agenda of the July 16, 2012 noticed public meeting of the Mayor and Common Council for discussion concerning a declaration of fiscal emergency in the City and taking possible action on authorizing the filing of a petition under Chapter 9.	Exhibit E to Hanna Decl.; Travis-Miller Decl., ¶ 9.
7. The July 16, 2012 meeting of the Mayor and Common Council was open for public comments and was adjourned and continued to July 18, 2012. A presentation was made on the city’s financial crisis at that meeting.	Exhibit F to Hanna Decl.; Travis-Miller Decl., ¶ 9.

<b>Uncontroverted Facts</b>	<b>Evidence</b>
8. The City placed items on the agenda of the July 18, 2012 noticed public meeting of the Mayor and Common Council for discussion concerning a declaration of fiscal emergency in the City and taking possible action on authorizing the filing of a petition under Chapter 9.	Exhibit F to Hanna Decl.; Travis-Miller Decl., ¶ 9.
9. A report entitled “City of San Bernardino, California Staff Report” dated July 18, 2012 (“Staff Report”) was prepared for the Mayor and Common Council regarding the subject of a declaration of fiscal emergency.	Exhibit I to Hanna Decl.; Travis-Miller Decl. ¶ 10; Bush Decl. ¶ 15.
10. At the July 18, 2012 noticed public meeting of the Mayor and Common Council concerning the fiscal condition of the City, the Common Council was presented with an considered the Staff Report and public comments were taken.	Exhibit I to Hanna Decl.; Travis-Miller Decl. ¶ 9.
11. After the presentations and public comments that took place at the three noticed public meetings of the Mayor and Common Council held on July 10, July 16 and July 18, 2012 concerning the fiscal condition of the City, a majority of the members of the Common Council voted to declare a fiscal emergency and approved a resolution finding that: (1) the City is or will be unable to pay its obligations within the next 60 days, and that the financial state of the City jeopardizes the health, safety or well-being of the residents of the City absent the protections of Chapter 9; and (2) given the City’s dire financial condition, it was in the best interest of the City to declare a fiscal emergency. The Common Council also passed by a majority vote a resolution authorizing the filing of a petition under chapter 9 of the Bankruptcy Code.	Exhibits G and H to Hanna Decl.; Travis-Miller Decl. ¶ 10.
12. The City was specifically authorized under California law to be a chapter 9 debtor.	The evidence in paragraphs 3-11 above and that no party maintained an objection to eligibility on Section 109(c)(2) grounds.
13. A plan entitled “Fiscal Emergency Operating Plan--July 2012 to September 2012” (the “Fiscal Emergency Plan”) and a report entitled “City of San Bernardino selected Monthly Cash Flow Analysis	Exhibits L and M to Hanna Decl.; Simpson Decl., ¶ 21; Busch Decl., ¶ 16.



Uncontroverted Facts	Evidence
Measures to Manage Cash” were prepared and presented for approval to the Mayor and Common Council on July 24, 2012.	
14. The Fiscal Emergency Plan was approved by the Common Council on July 24, 2012.	Exhibit N to Hanna Dec.
15. The City was insolvent within the meaning of Section 101(32)(c) of the Bankruptcy Code as of August 1, 2012.	No party maintained an objection to eligibility on Section 109(c)(3) grounds. Amended Statement of Qualifications under Section 109(c) [Docket No. 124].
16. The City filed its Amended Statement of Qualifications signed by the City Manager that states under penalty of perjury that the City desires to effect a plan to adjust its debts.	Amended Statement of Qualifications Under Section 109(c) [Docket No. 124].
17. A document entitled Pre-Pendency Plan was prepared and first presented to the Common Council for consideration and approval at the meeting of the Mayor and Common Council conducted on August 30, 2012.	Busch III Decl. at ¶ 7 and Exhibit 2 thereto.
18. In September 2012 and on October 1, 2012, the Common Council approved the Pre-Pendency Plan as adjusted by a 9-Point Adjustment Plan.	Busch III Decl. at ¶ 7 and Exhibit 1, 2 and 3.
19. A document entitled Pendency Plan was prepared and first presented to the Common Council at the meeting of the Mayor and Common Council conducted on November 19, 2012.	Busch II Decl. at ¶ 5 and Exhibit 1 thereto.
20. The Common Council approved the Pendency Plan at the meeting of the Mayor and Common Council conducted on November 26, 2012.	Busch III Decl. at ¶ 5 and Exhibit 1 thereto.
21. On or about September 12, 2012, the City engaged Linda Daube to perform services for the City as the City’s principal representative and chief negotiator at all meet and confer sessions held with representatives of the City’s bargaining units. Linda Daube attended and participated in meetings with representatives of the City’s seven bargaining units subsequent to September	Declaration of Linda Daube In Support Of Debtor City of San Bernardino’s Motion Pursuant To 11 U.S.C. §§ 365, 901 And 904 For Order Approving: (A) Rejection Of Collective Bargaining Agreements With San Bernardino Public Employees Assoc., San Bernardino Police Officers Assoc. And San Bernardino City Professional Firefighters; And (B) February 1, 2013 Interim Modifications To Such Collective

Uncontroverted Facts	Evidence
12, 2012.	Bargaining Agreements [Docket No. 444] (“Daube Decl.”) at ¶ 3.
22. The City reached agreements with four of its seven unions (the General Bargaining Unit, the Fire Management Bargaining Unit, the Police Management Bargaining Unit, and the Management/Confidential Bargaining Unit) on modifications of the terms and conditions of employment to their respective collective bargaining agreements, and those modifications took effect on February 1, 2013 as set forth in Resolution No. 2013-22, Resolution No. 2013-23, Resolution No. 2013-24, and Resolution No. 2013-25.	Declaration Of Diana Leibrich In Support Of Debtor City Of San Bernardino’s Motion Pursuant To 11 U.S.C. §§ 365, 901 And 904 For Order Approving: (A) Rejection Of Collective Bargaining Agreements With San Bernardino Public Employees Assoc., San Bernardino Police Officers Assoc. And San Bernardino City Professional Firefighters; And (B) February 1, 2013 Interim Modifications To Such Collective Bargaining Agreements [Docket No. 446] (“Leibrich Decl.”) at ¶¶ 11-15 and Exhibits 17-20 thereto.
23. The City did not reach an agreement with three of its bargaining units on the modifications of the terms and conditions of employment- the Middle Management Unit, the Police Safety Unit and the Fire Safety Unit. On January 28, 2013, the City Council voted to impose modifications to the terms and conditions of employment on these three bargaining units as set forth in Resolution No. 2013-18, Resolution No. 2013-19, and Resolution No. 2013-20.	Leibrich Decl. at ¶¶ 16-19 and Exhibits 21-23 thereto; Daube Decl. at ¶ 13.
24. At the meeting of the Mayor and Common Council conducted on April 22, 2013, the City adopted its budget for the General Fund for fiscal years 2012-13 and 2013-14.	City Of San Bernardino’s Report Respecting: (1) Approval Of Budgets for Fiscal Years 2012-13 And 2013-14 Further Implementing Pendency Plan; And (2) Supplemental Update On City’s Financial Condition; Declaration Of Michael Busch In Support Thereof [Docket No. 572] (“Busch II Decl.”) at ¶ 5 and Exhibit 1 thereto.
25. The City was unable to negotiate with creditors because such negotiation was impracticable.	No party objected to eligibility on Section 109(c)(5) grounds. Amended Statement of Qualifications under Section 109(c)
26. In March 2007, the City was provided with a study from Management Partners, Inc., noting the City’s “fiscal distress,” “significant and threatening unfunded liabilities,” and “tenuous” general fund finances.”	Bissett Decl. ¶ 5, Ex. A (page 3). This uncontroverted fact was found by the court to be irrelevant to Section 109(c)(4) and Section 921 issues.

Uncontroverted Facts	Evidence
27. In March 2008, the City Manager reported a projected \$7.2 million budget deficit.	Bissett Decl. ¶ 7, Ex. C (page 1). This uncontroverted fact was found by the court to be irrelevant to Section 109(c)(4) and Section 921 issues.
28. In February 2009, the Interim City Manager reported a projected deficit of \$9.0 million for fiscal year 2008-2009, and a \$19.8 million deficit for fiscal year 2009-10.	Bissett Decl. ¶ 8, Ex. D (page 1). This uncontroverted fact was found by the court to be irrelevant to Section 109(c)(4) and Section 921 issues.
29. In early 2009, the City fire chief and police chief submitted reports with cost-cutting recommendations, including layoffs, but those recommendations were not adopted.	Bissett Decl. ¶¶ 9-10, Exs. E & F. This uncontroverted fact was found by the court to be irrelevant to Section 109(c)(4) and Section 921 issues.
30. During the meeting of the Mayor and Common Council on August 23, 2010, the Treasurer noted the possibility of bankruptcy if the City continued its “accounting tricks” and did not close its deficit.	Bissett Decl. ¶ 11. This uncontroverted fact was found by the court to be irrelevant to Section 109(c)(4) and Section 921 issues.
31. During the meeting of the Mayor and Common Council on August 23, 2010, the City’s Finance Director presented a PowerPoint Slide entitled “Symptoms of Bankruptcy.”	Bissett Decl. ¶ 11, Ex. G. This uncontroverted fact was found by the court to be irrelevant to Section 109(c)(4) and Section 921 issues.
32. The City’s Finance Department issued a report entitled “San Bernardino Budgetary Analysis and Recommendations for Budget Stabilization” on July 9, 2012 (the “Budget Report”). The Budget Report projected that the City’s General Fund balance would be a negative \$10.6 million by June 30, 2012.	Decl. Simpson [Dkt. No. 127] ¶ 6.
33. At the July 18, 2012 meeting of the Common Council, the Common Council adopted resolutions declaring a fiscal emergency and directing that a chapter 9 petition “shall be filed.” The Common Council resolutions authorizing the Petition say nothing about a plan of adjustment or let a “desire to effect” a plan of adjustment.	Bissett Decl. ¶¶ 14-15, Exs. J-K.

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Uncontroverted Facts	Evidence
<p>34. Nearly a year after the City filed its Petition, it has failed to file a plan of adjustment, set forth the terms of a plan of adjustment, or formulate so much as an outline of an eventual plan of adjustment. As of May 2013, no one at the City had been assigned the task of creating a plan of adjustment.</p>	<p>Busch Dep. at 268:18-272:4.</p>
<p>35. At the time the City filed its Petition, it had no concept or outline of a plan of adjustment.</p>	<p>See Busch Dep. at 268:18-272:4.</p>
<p>36. The City did not negotiate with its principal creditors prior to filing its Petition on Aug. 1, 2012 and has not engaged in meaningful postpetition negotiations with its creditors regarding the terms of a plan of adjustment.</p>	<p>See July 31, 2013 Declaration of Corey W. Glave filed concurrently herewith, ¶¶ 2-4; February 8, 2013 Declaration of Bonnie E. Clarke [Dkt. No. 401-3], ¶¶ 10, 13; March 21, 2013 Declaration of Dennis J. Hayes [Dkt. 498-1], ¶¶ 12-13, 28-30; February 26, 2013 Declaration of Michael A. McGill [Dkt. No. 424-2], ¶¶ 17-21, 24.</p>
<p>37. The City did not formulate a pendency plan until November 26, 2012.</p>	<p>See Declaration of Michael Busch Re City of San Bernardino's Pendency Plan [Dkt. No. 234], Ex. 1; CalPERS' Preliminary Objection [Dkt. No. 207] at 9.</p>
<p>38. The City has not submitted any evidence that it ever explored alternatives to bankruptcy, other than those included in the Budget Report of July 9, 2012.</p>	<p>Minutes of the July 10, 2012 council meeting (where bankruptcy was authorized) reflect that the City did not evaluate alternatives such as access to the capital markets or asset sales. See Bissett Decl. ¶ 13, Ex. I. The Budget Report of July 9, 2012 Minutes of City Council July 10, 2012 meeting. Hanna Decl. Exhibits B and C.</p>
<p>39. The City's Pendency plan is 10 pages long, contains no detailed supporting financial information, and is premised on a postpetition budget which deferred postpetition expenses.</p>	<p>See Pendency Plan [Dkt. No. 234-2].</p>
<p>40. The City had inadequate resources in its finance department at the time it filed its bankruptcy case and the City's finance department remains understaffed.</p>	<p>Bissett Decl., ¶ 5, Ex. A (page 2); <i>id.</i> ¶ 6, Ex. B (Busch Dep. At 257:17-261:5). Williams Decl. [Dkt. No. 282] ¶¶ 7-8.</p>

Uncontroverted Facts	Evidence
41. The City did not produce to CalPERS its reconciled bank account statements until late January and early February 2013, and did not prepare cash forecasts until April 2013.	Crisafulli Decl. ¶¶ 16-17.
42. The City, since filing its Petition, has not provided all requested financial information to its creditors and parties in interest.	<i>See</i> March 21, 2013 Declaration of Dennis J. Hayes [Dkt. No. 498-1], ¶¶ 15-24; <i>see also</i> July 10, 2013 Declaration of Corey W. Glave [Dkt. 686, p. 11 of 298], ¶¶ 8. Decl. Crisafulli ¶¶ 15-18.
43. The City has failed to provide CalPERS with some financial data it has requested during the pendency of the City’s case.	Decl. Crisafulli ¶¶ 13-18.
44. During the 90 days before filing its bankruptcy petition, the City paid some \$2 million as “cashouts” to employees and newly retiring employees, including nearly \$1.2 million in July (\$600,000 of which was paid on the day before it filed its Petition).	Bissett Decl. ¶ 16, Ex. L (Reuters article); Crisafulli Decl. ¶ 23.
45. The City has made payments on prepetition debt post-filing while it continues to not pay some postpetition creditors.	Busch Dep. at 265:9-268:17
46. The City has failed to timely pay millions of dollars in postpetition obligations.	Crisafulli Decl. ¶¶ 20-21; Busch Decl. of April 29 [Dkt. No. 572-6].
47. The City knew of the underlying settlements in the three civil rights cases months before filing its Petition.	<i>See generally</i> Galipo Decl.
48. The audited annual financial report for the City’s Water Department reflects that at the time the City filed its Petition, the City’s Water Department held over \$37,000,000 in immediately available cash and cash equivalents which were not designated as restricted. The City has set forth no evidence indicating that it considered borrowing money from the Water Department to address its liquidity concerns.	Decl. Crisafulli ¶ 12. The Court determined as a matter of law that the City could not use any of the Water Department funds as general fund monies nor could it borrow from the Water Department.

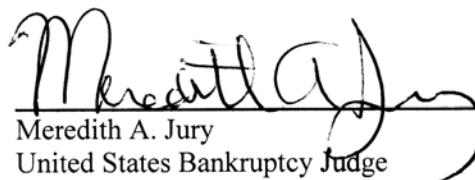
Uncontroverted Facts	Evidence
49. The City's Water Department had total net assets in the amount of \$263 million as of the Petition date.	Decl. Crisafulli ¶ 12. The Court determined as a matter of law that the City could not use any of the Water Department funds as general fund monies nor could it borrow from the Water Department.

**CONCLUSIONS OF LAW**

1. The Court's conclusions of law on the City's Motion for Summary Judgment on Eligibility for Chapter 9 Relief (the "Motion") were made by the Court on the record at the hearing on August 28, 2013, and will be reflected in the Court's forthcoming written opinion on its ruling on the City's Motion.

###

Date: September 17, 2013

  
Meredith A. Jury  
United States Bankruptcy Judge

1 **NOTICE OF ENTERED ORDER AND SERVICE LIST**

2  
3 Notice is given by the court that a judgment or order entitled (*specify*): CALPERS' STATEMENT OF  
4 UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW was entered on the date indicated as  
"Entered" on the first page of this judgment or order and will be served in the manner stated below:

5 **1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** <sup>B</sup> Pursuant to controlling  
6 General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF  
and hyperlink to the judgment or order. As of (*date*) 09/11/13, the following persons are currently on the  
7 Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the  
8 email addresses stated below.

- 9 • Jerrold Abeles abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com
- 10 • Franklin C Adams franklin.adams@bbklaw.com,  
11 arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknotices@bbklaw.com
- 12 • Joseph M Adams jadams@adamspham.com
- 13 • Andrew K Alper aalper@frandzel.com, efilings@frandzel.com;ekidder@frandzel.com
- 14 • Thomas V Askounis taskounis@askounisdarcy.com
- 15 • Julie A Belezzuoli julie.belezzuoli@kayescholer.com
- 16 • Anthony Bisconti tbisconti@bmkattorneys.com, admin@bmkattorneys.com
- 17 • Brett Bissett brett.bissett@klgates.com,  
18 carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com
- 19 • Brett Bissett brett.bissett@klgates.com,  
20 carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com
- 21 • Jeffrey E Bjork jbjork@sidley.com
- 22 • Michael D Boutell mdbell@comerica.com
- 23 • J Scott Bovitz boviz@bovitz-spitzer.com
- 24 • John A Boyd fednotice@tclaw.net
- 25 • Jeffrey W Broker jbroker@brokerlaw.biz
- 26 • Deana M Brown dbrown@milbank.com
- 27 • Michael J Bujold Michael.J.Bujold@usdoj.gov
- 28 • Shirley Cho scho@pszjlaw.com
- Alicia Clough alicia.clough@kayescholer.com,  
managingattorneyofficeassignments@kayescholer.com
- Marc S Cohen mcohen@kayescholer.com, dhernandez@kayescholer.com
- Ronald R Cohn rcohn@horganrosen.com
- Christopher H Conti chc@sdlaborlaw.com, sak@sdlaborlaw.com
- Christopher J Cox chris.cox@weil.com, janine.chong@weil.com
- Christina M Craige ccraige@sidley.com
- Alex Darcy adarcy@askounisdarcy.com, akapai@askounisdarcy.com
- Susan S Davis sdavis@coxcastle.com
- Robert H Dewberry robert.dewberry@dewlaw.net
- Todd J Dressel dressel@chapman.com, lubecki@chapman.com
- Chrysta L Elliott elliottc@ballardspahr.com, manthiek@ballardspahr.com
- Scott Ewing contact@omnimgt.com, sewing@omnimgt.com;katie@omnimgt.com
- John A Farmer jfarmer@orrick.com
- Brian W Freeman brian@pedigolaw.com, brian@brianwfreeman.com
- Victoria C Geary victoria.geary@boe.ca.gov
- Paul R. Glassman pglassman@sycr.com
- Robert P Goe kmurphy@goeforlaw.com, rgoe@goeforlaw.com;mforsythe@goeforlaw.com
- David M Goodrich dgoodrich@marshackhays.com, ecfmarshackhays@gmail.com
- Christian Graham cgraham23@dlblaw.net
- Everett L Green everett.l.green@usdoj.gov
- Chad V Haes chaes@marshackhays.com, ecfmarshackhays@gmail.com
- James A Hayes jhayes@jamesahayesaplc.com

- 1 • M Jonathan Hayes jhayes@srhlawfirm.com, roksana@srhlawfirm.com; carolyn@srhlawfirm.com; shawnj@srhlawfirm.com; rosarioz@srhlawfirm.com; jhayesecf@gmail.com; j@alkazian.com
- 2 • D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com
- 3 • Eric M Heller eric.m.heller@irscounsel.treas.gov
- 4 • Jeffery D Hermann jhermann@orrick.com
- 5 • Jeffery D Hermann jhermann@orrick.com
- 6 • Bonnie M Holcomb bonnie.holcomb@doj.ca.gov, rosita.eduardo@doj.ca.gov
- 7 • Whitman L Holt wholt@ktbslaw.com
- 8 • Michelle C Hribar mch@sdlaborlaw.com
- 9 • Steven J Katzman SKatzman@bmkattorneys.com, admin@bmkattorneys.com
- 10 • Jane Kespradit jane.kespradit@limruger.com, amy.lee@limruger.com
- 11 • Mette H Kurth kurth.mette@arentfox.com
- 12 • Mette H Kurth kurth.mette@arentfox.com
- 13 • Sandra W Lavigna lavignas@sec.gov
- 14 • Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com
- 15 • Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com
- 16 • Richard A Marshack rmarshack@marshackhays.com, lbergini@marshackhays.com; ecfmarshackhays@gmail.com
- 17 • David J McCarty dmccarty@sheppardmullin.com
- 18 • Reed M Mercado rmercado@sheppardmullin.com
- 19 • Fred Neufeld fneufeld@sycr.com
- 20 • Aron M Oliner roliner@duanemorris.com
- 21 • Scott H Olson solson@seyfarth.com
- 22 • Dean G Rallis drallis@sulmeyerlaw.com
- 23 • Christopher O Rivas crivas@reedsmith.com
- 24 • Kenneth N Russak krussak@franzel.com, efiling@franzel.com; dmoore@franzel.com
- 25 • Gregory M Salvato gsalvato@salvatolawoffices.com, calendar@salvatolawoffices.com
- 26 • Mark C Schnitzer mschnitzer@rhlaw.com, meschnitzer@gmail.com
- 27 • William R Shafton wshafton@winston.com
- 28 • Diane S Shaw diane.shaw@doj.ca.gov
- Ariella T Simonds asimonds@sidley.com
- Leonard Steiner ls@steinerlibo.com, jasoncarter@steinerlibo.com; aam@steinerlibo.com
- Jason D Strabo jstrabo@mwe.com, LosAngelesTrialDocket@mwe.com
- Cathy Ta cathy.ta@bbklaw.com, Arthur.Johnston@bbklaw.com; lisa.spencer@bbklaw.com
- Sheila Totorp stotorp@clausen.com, jbrzezinski@clausen.com
- Benjamin R Trachtman btrachtman@trachtmanlaw.com, sstraka@trachtmanlaw.com
- Matthew J Troy matthew.troy@usdoj.gov
- United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov
- Anne A Uyeda auyeda@bmkattorneys.com
- Annie Verdries verdries@lbbslaw.com, Autodocket@lbbslaw.com
- Brian D Wesley brian.wesley@doj.ca.gov
- Kirsten A. Worley kw@wlawcorp.com, admin@wlawcorp.com
- Clarisse Young youngshumaker@psmlawyers.com, sally@psmlawyers.com
- Pamela Jan Zylstra zylstralaw@gmail.com

25  Service information continued on  
26 attached page

27 **2. SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this  
28 judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or  
entities at the addresses indicated below:

Debtor



1 City of San Bernardino, California, City Hall, 300 North "D" Street,  
2 San Bernardino, CA 92418-0001

3 attached page

Service information continued on

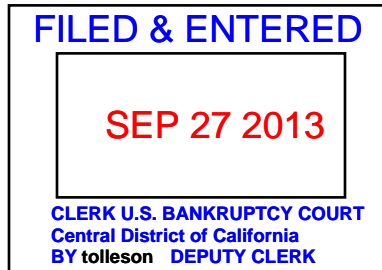
4  
5 **3. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or  
6 order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy  
7 bearing an "Entered" stamp by United States mail, overnight mail, facsimile transmission or email and file a  
8 proof of service of the entered order on the following persons and/or entities at the addresses, facsimile  
9 transmission numbers, and/or email addresses stated below:

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1 PAUL R. GLASSMAN (State Bar No. 76536)  
2 FRED NEUFELD (STATE BAR NO. 150759)  
3 STRADLING YOCCA CARLSON & RAUTH, P.C.  
4 100 Wilshire Blvd., 4<sup>th</sup> Floor  
5 Santa Monica, CA 90401  
6 Telephone: (424) 214-7000  
7 Facsimile: (424) 214-7010  
8 pglassman@sycr.com  
9 fneufeld@sycr.com

6 JAMES F. PENMAN (State Bar No. 91761)  
7 CITY ATTORNEY  
8 300 North "D" STREET, Sixth Floor  
9 San Bernardino, CA 92418  
10 Telephone: (909) 384-5355  
11 Facsimile: (909) 384-5238  
12 E-mail: Penman\_Ja@sbcity.org  
13 Attorneys for Debtor  
14 City of San Bernardino



12 **UNITED STATES BANKRUPTCY COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA**  
14 **RIVERSIDE DIVISION**

15 In re  
16 CITY OF SAN BERNARDINO,  
17 CALIFORNIA,  
18 Debtor.

Case No. 6:12-bk-28006 MJ  
Chapter 9

**ORDER APPROVING STIPULATION  
BETWEEN CITY OF SAN BERNARDINO  
AND CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM REGARDING  
EXTENSION OF TIME TO FILE APPEAL IN  
ACCORDANCE WITH FEDERAL RULE OF  
BANKRUPTCY PROCEDURE 8002(C)**

Hearing Date:

Date: September 30, 2013  
Time: 9:30 a.m.  
Place: United States Bankruptcy Court  
3420 Twelfth Street  
Courtroom 301  
Riverside, CA 92501

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Order

The Court, having read and considered the motion and related papers filed by the California Public Employees' Retirement System ("CalPERS") for a 21-day extension of time to file appeals from the following orders entered on September 17, 2013:

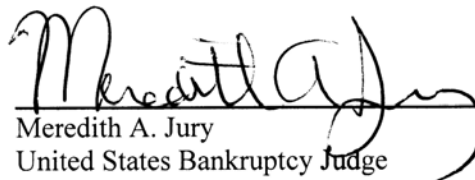
- (i) *Order (1) Granting City of San Bernardino's Motion for Summary Judgment on Eligibility and (2) Denying CalPERS' Rule 56 Motions* [Dkt. No. 797],
- (ii) *Court's Statement of Uncontroverted Facts and Conclusions of Law* [Dkt. No. 796], and
- (iii) *Order for Relief Under Chapter 9 of the Bankruptcy Code* [Dkt. No. 798],

(collectively, the "Eligibility Orders"); and having read and considered the *Stipulation between City of San Bernardino and California Public Employees' Retirement System regarding Extension of Time to File Appeal in Accordance with Federal Rule of Bankruptcy Procedure 8002(C)* ("Stipulation") entered into by and between debtor City of San Bernardino, California and CalPERS, which contains the agreement of the parties that a 21-day extension of time should be granted; and having determined that (a) CalPERS is not seeking an extension of time for appeal for an improper purpose; (b) an extension does not inconvenience the Court or the City and would not unduly delay the administration of this case; and (c) an extension would benefit the appeal process as whole, accordingly, IT IS HEREBY ORDERED that:

1. The Stipulation is approved in its entirety and the time to file appeals from the Eligibility Order is extended to October 22, 2013, as allowed pursuant to Federal Rule of Bankruptcy Procedure 8002(c)(2).

2. This Court shall retain jurisdiction to hear and determine all matters arising from or related to this Order.

Date: September 27, 2013

  
Meredith A. Jury  
United States Bankruptcy Judge

## NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): ORDER APPROVING STIPULATION BETWEEN CITY OF SAN BERNARDINO AND CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM REGARDING EXTENSION OF TIME TO FILE APPEAL IN ACCORDANCE WITH FEDERAL RULE OF BANKRUPTCY PROCEDURE 8002(C) was entered on the date indicated as Entered on the first page of this judgment or order and will be served in the manner stated below:

**1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of September 26, 2013, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

The United States trustee will be served electronically by the court to:  
United States Trustee (RS) ustpregion16.rs.ecf@usdoj.gov

### ATTORNEYS FOR DEBTOR

Paul R. Glassman pglassman@sycr.com  
Fred Neufeld fneufeld@sycr.com

### ATTORNEYS FOR CALPERS

Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com  
Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com

Jerrold Abeles abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com  
Franklin C Adams franklin.adams@bbklaw.com,  
arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknotices@bbklaw.com  
Joseph M Adams jadams@adamspham.com  
Andrew K Alper aalper@frandzel.com, efiling@frandzel.com;ekidder@frandzel.com  
Thomas V Askounis taskounis@askounisdarcy.com  
Julie A Belezzuoli julie.belezzuoli@kayescholer.com  
Anthony Bisconti tbisconti@bmkattorneys.com, admin@bmkattorneys.com  
Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com  
Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com  
Jeffrey E Bjork jbjork@sidley.com  
Michael D Boutell mdbell@comerica.com  
J Scott Bovitz bovitz@bovitz-spitzer.com  
John A Boyd fednotice@tclaw.net  
Jeffrey W Broker jbroker@brokerlaw.biz  
Deana M Brown dbrown@milbank.com  
Michael J Bujold Michael.J.Bujold@usdoj.gov  
Shirley Cho scho@pszjlaw.com  
Alicia Clough alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com  
Marc S Cohen mcohen@kayescholer.com, dhernandez@kayescholer.com  
Ronald R Cohn rcohn@horganrosen.com  
Christopher H Conti chc@sdlaborlaw.com, sak@sdlaborlaw.com  
Christopher J Cox chris.cox@weil.com, janine.chong@weil.com  
Christina M Craige ccraige@sidley.com  
Alex Darcy adarcy@askounisdarcy.com, akapai@askounisdarcy.com  
Susan S Davis sdavis@coxcastle.com  
Robert H Dewberry robert.dewberry@dewlaw.net  
Todd J Dressel dressel@chapman.com, lubecki@chapman.com

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Chrysta L Elliott elliottc@ballardspahr.com, manthiek@ballardspahr.com  
Scott Ewing contact@omnimgt.com, sewing@omnimgt.com;katie@omnimgt.com  
John A Farmer jfarmer@orrick.com  
Brian W Freeman brian@pedigolaw.com, brian@brianwfreeman.com  
Victoria C Geary victoria.geary@boe.ca.gov  
Paul R. Glassman pglassman@sycr.com  
Robert P Goe kmurphy@goeforlaw.com, rgoe@goeforlaw.com;mforsythe@goeforlaw.com  
David M Goodrich dgoodrich@marshackhays.com, ecfmarshackhays@gmail.com  
Christian Graham cgraham23@dlblaw.net  
Everett L Green everett.l.green@usdoj.gov  
Chad V Haes chaes@marshackhays.com, ecfmarshackhays@gmail.com  
James A Hayes jhayes@jamesahayesaplc.com  
M Jonathan Hayes jhayes@srhlawfirm.com,  
roksana@srhlawfirm.com;carolyn@srhlawfirm.com;shawnj@srhlawfirm.com;rosarioz@srhlawfirm.com;jhayesecf@gmail.com;j@alkazian.com  
D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com  
Eric M Heller eric.m.heller@irscounsel.treas.gov  
Jeffery D Hermann jhermann@orrick.com  
Jeffery D Hermann jhermann@orrick.com  
Bonnie M Holcomb bonnie.holcomb@doj.ca.gov, rosita.eduardo@doj.ca.gov  
Whitman L Holt wholt@ktbslaw.com  
Michelle C Hribar mch@sdlaborlaw.com  
Steven J Katzman SKatzman@bmkattorneys.com, admin@bmkattorneys.com  
Jane Kespradit jane.kespradit@limruger.com, amy.lee@limruger.com  
Mette H Kurth kurth.mette@arentfox.com  
Mette H Kurth kurth.mette@arentfox.com  
Sandra W Lavigna lavignas@sec.gov  
Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com  
Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com  
Richard A Marshack rmarshack@marshackhays.com,  
lbergini@marshackhays.com;ecfmarshackhays@gmail.com  
David J McCarty dmccarty@sheppardmullin.com  
Reed M Mercado rmercado@sheppardmullin.com  
Fred Neufeld fneufeld@sycr.com  
Aron M Oliner roliner@duanemorris.com  
Scott H Olson solson@seyfarth.com  
Dean G Rallis drallis@sulmeyerlaw.com  
Christopher O Rivas crivas@reedsmith.com  
Kenneth N Russak krussak@frandzel.com, efiling@frandzel.com;dmoore@frandzel.com  
Gregory M Salvato gsalvato@salvatolawoffices.com, calendar@salvatolawoffices.com  
Mark C Schnitzer mschnitzer@rhlaw.com, mcschnitzer@gmail.com  
Diane S Shaw diane.shaw@doj.ca.gov  
Ariella T Simonds asimonds@sidley.com  
Leonard Steiner ls@steinerlibo.com, jasoncarter@steinerlibo.com;aam@steinerlibo.com  
Jason D Strabo jstrabo@mwe.com, cnorris@mwe.com  
Cathy Ta cathy.ta@bbklaw.com, Arthur.Johnston@bbklaw.com;lisa.spencer@bbklaw.com  
Sheila Totorp stotorp@clausen.com, jbrzezinski@clausen.com  
Benjamin R Trachtman btrachtman@trachtmanlaw.com, sstraka@trachtmanlaw.com  
Matthew J Troy matthew.troy@usdoj.gov  
United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov  
Anne A Uyeda auyeda@bmkattorneys.com  
Annie Verdries verdries@lbbslaw.com, Autodocket@lbbslaw.com

---

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Brian D Wesley brian.wesley@doj.ca.gov  
Kirsten A. Worley kw@wlawcorp.com, admin@wlawcorp.com  
Clarisse Young youngshumaker@psmlawyers.com, sally@psmlawyers.com  
Pamela Jan Zylstra zylstralaw@gmail.com

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**2. SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

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# FOR PUBLICATION

<b>FILED &amp; ENTERED</b>
<b>OCT 16 2013</b>
CLERK U.S. BANKRUPTCY COURT Central District of California BY moser DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
RIVERSIDE DIVISION

CITY OF SAN BERNARDINO CALIFORNIA ,  
  
Defendant

Case No.: RS 6: 12-bk-28006 MJ  
  
OPINION

## CITY OF SAN BERNARDINO ELIGIBILITY OPINION

A major creditor of the City of San Bernardino, the California Public Employee Retirement System, objected to the eligibility of the City to file a petition under chapter 9<sup>1</sup> of the Bankruptcy Code on the grounds that it did not desire to effect a plan of adjustment and did not file the petition in good faith. The Court recognizes that the City was not a poster child in organization and prepetition planning before it entered into the complex world of chapter 9 reorganization. The Court also acknowledges that the

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<sup>1</sup> Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1521. "Rule" references are to the Federal Rules of Bankruptcy Procedure and "Civil Rules" references are to the Federal Rules of Civil Procedure.

1 City got off to a slow start in getting its financial records in order and adopting an  
2 interim balanced budget to bridge the gap from the petition date to eventual plan of  
3 adjustment. However, despite the untidy disarray of the City's finances and the early  
4 lack of direction toward long-term resolution of its admitted financial distress, in this  
5 summary judgment proceeding, the Court overrules the CalPERS objections on their  
6 limited stated grounds and finds the City eligible to remain in its chapter 9 proceeding.  
7 The factual and legal basis for the Court's decision follows.<sup>2</sup>

### 8 **Factual Background**

9 The Great Recession and the burst of the housing bubble in 2007 negatively  
10 affected the City of San Bernardino like many other cities in California and the entire  
11 country. The drop in housing prices and increase in foreclosures of single family  
12 residences resulted in significantly lower property tax revenues, a prime source of  
13 revenue for California cities. The City was particularly hard hit by these phenomena  
14 because, due to the cheaper housing and available financing, an influx of people moved  
15 to the Inland Empire during the boom, and the consequent bust led to unprecedented  
16 foreclosures, one of the highest rates in the country. Along with the foreclosures came  
17 substantial unemployment, as much of the population had been employed in the  
18 housing industry, from construction workers to real estate realtors to mortgage brokers,

19 \_\_\_\_\_  
20 <sup>2</sup> This opinion is intended to supplement the oral ruling made by this Court on the summary judgment motion on  
21 August 28, 2013, and the docketed Statement of Uncontroverted Facts which supports the order granting the  
summary judgment. All three sources are meant to articulate the reasons the Court granted eligibility.



1 resulting in a significant drop in household income.<sup>3</sup> This decline led to less consumer  
2 sales and consequently smaller sales tax revenues, another major component of the  
3 City's revenues.

4 The City was impacted not only on the revenue side but also by escalating  
5 expenses. The influx of population created a greater demand for public services, from  
6 public safety (police and fire) to more mundane matters such as street repair and  
7 infrastructure maintenance.<sup>4</sup> City employee salaries and benefits, as in most  
8 municipalities, make up 75% of the City's budget and, as the need for services grew in  
9 the boom, so did the number of City employees and consequent expenses. Adding to  
10 the costs were particularly lucrative retirement benefits which the Common Council had  
11 negotiated in the collective bargaining agreements with the City's seven unions.

12 The City participates in the California Public Employee Retirement System  
13 (CalPERS), a state-run retirement system, which is funded by a combination of an  
14 employer share and an employee share.<sup>5</sup> Until 2011, the City, unlike most California  
15 cities, paid not only the employer share but also the employee share to CalPERS, making  
16 the City's contributions to retirement rate as a percentage of payroll 39% for safety and  
17 25% for other employees. Along with the current CalPERS obligations were substantial  
18 unfunded liabilities to the pension funds based on actuarial tables, past performance of

19 <sup>3</sup> The City's unemployment rate was 16.9% as of June 2012, more than double the national rate of 8.2%.

<sup>4</sup> The City's population of approximately 213,000 is spread over 59.3 square miles, compounding the difficulty in providing adequate services.

20 <sup>5</sup> CalPERS has set the City's employer share at 30% for safety employees and 17% for all others, and the employee share at 9% for safety and 8% for all others.

1 the funds, retirement age and other contractual factors. Each year the City must also  
2 pay a portion of the unfunded liabilities to CalPERS.<sup>6</sup>

3 Along with the CalPERS obligations, the City has promised its retirees an annual  
4 2% cost of living adjustment regardless of the Consumer Price Index or the state of the  
5 retirement funds. In addition, the City's retirement plans also provide for another post-  
6 employment benefit consisting of retiree medical care. Because the City's employees  
7 are eligible to retire at either age 50 (safety) or 55 (other employees), many employees  
8 retire before they are eligible for Medicare, creating a significant cost for the City. The  
9 cost of this perk has not been funded through the working life of the employees and the  
10 City has little money set aside to fund these benefits, resulting in another substantial  
11 unfunded liability.

12 As the economy worsened and revenues decreased, the City took some stop gap  
13 measures to try to stop the bleeding. It implemented a hiring freeze and down-sized  
14 departments, reducing the workforce by 20%. It negotiated and imposed concessions  
15 on its unions, saving about \$10 million per year.<sup>7</sup> It exhausted its general fund reserves  
16 and sold excess assets to provide cash to fund ongoing operations. While the financial  
17 crisis deepened, the City's finance department, either because it was understaffed or  
18 because it was incompetent (or both), fell behind in providing basic accounting records

19 \_\_\_\_\_  
20 <sup>6</sup> It is the Court's understanding that most cities in California have unfunded liabilities to CalPERS.

<sup>7</sup> One negotiated or imposed term was that beginning with new employees in 2011, employees would pay the  
21 employee share to CalPERS.

1 for the City, including bank reconciliations. The financial picture for the City was blurred  
2 at best and the City was sliding toward severe cash flow problems.

3 A major change in City personnel from late December 2011 through May 2012  
4 awakened the Common Council to the full import of the impending financial crisis. The  
5 City's former Director of Finance retired at the end of December 2011 and the City  
6 Manager resigned effective May 1, 2012. The new Director of Finance, James P.  
7 Simpson, began analyzing the City's financial condition in May 2012, while attempting to  
8 formulate a budget for 2012-13. In doing so, he discovered the bookkeeping woes  
9 described above and even worse. He determined that the budget projection for 2012-  
10 13 resulted in a \$45.9 million cash deficit with no general fund reserves; the cash  
11 balances for the prior two fiscal years had been overstated; the beginning cash deficit  
12 for the next fiscal year was over \$18.2 million; and the City did not have enough  
13 unrestricted cash or reserves to pay its current financial obligations due and those  
14 obligations to become due beginning in July 2012, and continuing indefinitely.

15 On July 9, 2012, the City's Department of Finance issued a report "San Bernardino  
16 Budgetary Analysis and Recommendations for Budget Stabilization" (the Budget Report)  
17 which was presented to the Common Council at a publicly noticed meeting on July 10,  
18 2012. The presentation of the Budget Report on July 10, 2012, was the first  
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20  
21

1 comprehensive report to the Common Council regarding the fiscal crisis facing the City.<sup>8</sup>  
2 The Common Council addressed the Budget Report at three meetings in July 2012. At  
3 meetings on July 16 and 18, 2012, the Common Council adopted Resolutions 2012-205  
4 and 2012-206 which (1) declared a fiscal emergency and (2) authorized the City Attorney  
5 to file a chapter 9 petition in the bankruptcy court and the City Attorney and other  
6 management staff to take all steps necessary to prosecute the chapter 9 proceeding.  
7 Compliant with these resolutions, on August 1, 2012, the City filed its petition for  
8 chapter 9 in the Central District of California, Riverside Division.<sup>9</sup>

#### 9 **Procedural Background in Chapter 9**

10 The City filed its Statement of Qualifications on August 13, 2013, and its  
11 Amended Statement of Qualifications on August 31, 2013.<sup>10</sup> Based on a deadline set by  
12 the Court, only two parties filed objections to eligibility: CalPERS and the San  
13 Bernardino Public Employees Association (SBPEA).<sup>11</sup> CalPERS objected on the grounds

---

14 <sup>8</sup> CalPERS has argued and for the purposes of this opinion the Court does acknowledge that earlier reports of  
15 impending financial doom were presented to the City by its consultants as early as 2007 and that some of these  
16 reports contained suggested actions which the City could take to stave off financial crisis. The City did not take  
many of the recommended steps. As a consequence, the Common Council was not totally unaware of the unstable  
fiscal condition of the City.

17 <sup>9</sup> The August 1, 2012 filing date was earlier than the City staff and its bankruptcy counsel had anticipated filing. The  
initial projected filing date was late August. The earlier filing date was precipitated by the City's belief that a party  
which held a stipulated civil rights judgment against the City was seeking a writ from the federal district court  
which would allow it to execute on the City's bank account. The City asserted this belief as an alternative ground  
18 to meet eligibility under § 109(c)(5)(D). However since no party objected to eligibility under § 109(c)(5) and the  
City also qualified under § 109(c)(5)(C), the Court need not determine whether this criteria was met. Suffice it to  
19 say, the belief did lead to an earlier filing date.

<sup>10</sup> The only difference between the two statements was the addition in the Amended Statement of the alternative  
ground for § 109(c)(5) eligibility under subpart (D).

20 <sup>11</sup> Several individual interested parties filed "objections" with the court but none of these individual objections  
stated an opposition to the grounds for eligibility set forth in § 109(c).

1 that the City did not “desire to effect a plan to adjust debts” as required under § 109(c)  
2 (4) and that the City did not file the petition in good faith, which is a ground for  
3 dismissal under § 921(c). SBPEA objected on the basis that the City was not authorized  
4 by state law to file a chapter 9 because it had not complied with Assembly Bill 506 (AB  
5 506) as mandated by § 109(c)(2)<sup>12</sup> and because the City was not insolvent as required  
6 by § 109(c)(3). SBPEA also asserted the petition was not filed in good faith. Subsequent  
7 to the objection deadline, the Court held a status conference to schedule the case, but a  
8 discovery deadline was not set because the parties wished to engage in informal  
9 discovery. As will be further described below, the Court held a series of these status  
10 conferences on case progress but at the mutual request of the City and CalPERS never  
11 set a discovery deadline. The Court, however, also did not issue an order staying  
12 discovery.

13 While the initial procedural matters were taking place, in September and October  
14 2012, the City adopted a Pre-Pendency Plan as adjusted by a 9-Point Adjustment Plan.  
15 The Pre-Pendency Plan did not present a balanced budget from a cash flow perspective,  
16 but anticipated that expense adjustments were necessary to balance available cash with  
17 expected expenses during the first year in chapter 9. Subsequently, the City on  
18 November 26, 2012, approved a Pendency Plan, which was a balanced budget for that

19 \_\_\_\_\_  
20 <sup>12</sup> AB 506 enacted by the State of California in 2011 and effective on January 1, 2012, is the common California  
21 nomenclature for Cal. Gov’t Code § 53760, et seq. It requires a city to participate in a neutral evaluation process  
pursuant to § 53760.3 or, in the alternative, to declare a fiscal emergency before it may file a bankruptcy petition.  
Because SBPEA subsequently withdrew its objection, this opinion does not address the AB 506 issues.

1 first year but was dependent on the City either negotiating or imposing certain  
2 conditions on the employees. Both the Pre-Pendency Plan and the Pendency Plan were  
3 short-term budgets and neither purported to address the longer term planning required  
4 by a chapter 9 plan of adjustment. As asserted frequently by CalPERS, the City's  
5 financial department was understaffed and no person was assigned the task of drafting  
6 a plan of adjustment.

7 In order to implement the Pendency Plan, the City authorized two employees to  
8 meet with the seven unions to negotiate the concessions required by that budget.<sup>13</sup>

9 Four of the unions reached agreement with the City and accepted the changes, which  
10 became effective on February 1, 2013. Three unions, police, fire, and SBPEA, did not.

11 On January 28, 2013, the City unilaterally imposed the modifications, also effective on  
12 February 1, 2013, so that it could balance the Pendency Plan budget. On April 22, 2013,  
13 the City adopted budgets for the General Fund for fiscal years 2012-13 and 2013-2014.

14 Meanwhile, informal discovery continued between the City, CalPERS, and the  
15 other interested parties but little progress was made in moving the case toward an  
16 eligibility hearing to resolve the CalPERS and SBPEA objections. However, at a status  
17 conference in April or May 2013, SBPEA formally withdrew its objection under §  
18 109(c)(3), conceding that the City was insolvent. At that time, with respect to the

19 <sup>13</sup> The concessions required from the unions pertained to the employee share of the contributions to CalPERS, not  
20 salary. CalPERS has asserted that these changes in contributions are not authorized by state law and the three  
21 nonconsenting unions – Police, Fire, and the SBPEA – echo those arguments. For the purpose of this opinion, the  
court only notes the practical effect on the employees' net take home pay and the budget; the take home pay is  
substantially negatively impacted but the concessions allowed the Pendency Plan budget to balance.

1 remaining contested eligibility issues under §§ 109(c)(2) and (c)(4) and the good faith  
2 requirement under § 921(c), the Court openly questioned whether there were any  
3 disputed material facts that would require formal discovery. Subsequently, at a status  
4 conference in early June 2013 the Court suggested that a summary judgment motion  
5 could resolve the remaining issues. While an unusual approach in a contested matter as  
6 opposed to an adversary proceeding, resolution by a summary judgment motion is not  
7 unprecedented. When CalPERS protested that it wished to conduct essential formal  
8 discovery on the eligibility issues, the Court directed CalPERS to brief those arguments in  
9 a Civil Rule 56(d) motion, made applicable in bankruptcy proceedings by Rule 7056, and  
10 set the Civil Rule 56 (d) motion to be heard at the same time the City's summary  
11 judgment motion would be argued.

### 12 **The Propriety of Summary Judgment to Resolve Eligibility**

13 A summary judgment motion under Civil Rule 56(d), as incorporated by Rule  
14 7056, is properly granted when the movant shows that there is no genuine dispute as to  
15 any material fact and the movant is entitled to judgment as a matter of law. *Celotex*  
16 *Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In making this determination, conflicts are  
17 resolved by viewing all facts and reasonable inferences in the light most favorable to the  
18 non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

19 In deciding a contested motion for summary judgment, a court is required to  
20 make decisions of law based on a statement of uncontroverted facts and is prohibited  
21

1 from granting summary judgment where material disputed facts are at issue.  
2 Accordingly, this Court in granting the City's motion for eligibility must address the  
3 critical issue of whether material disputed facts are at issue. Civil Rule 56(d) allows a  
4 party, such as CalPERS here, to assert as a defense to summary judgment a need to  
5 conduct further discovery. In particular, "where, as here, [non-moving party's] case  
6 turns so largely on [its] ability to secure evidence within the possession of [moving  
7 party], courts should not render summary judgment because of gaps in a [non-moving  
8 party's] proof without first determining that [non-moving party] has had a fair chance to  
9 obtain necessary and available evidence from the other party." *Carmona v. Toledo*, 215  
10 F.3d 124, 133 (1<sup>st</sup> Cir. 2000).

11 Operating within the universe of the remaining contested eligibility  
12 requirements—desire to effect a plan, good faith in filing the petition and compliance  
13 with AB 506 in meeting state authorization to file—the Court observed that the  
14 subjective state of mind of any employee or representative of a city was not at issue  
15 because a city, as an entity, takes objective actions such as adopting resolutions,  
16 presenting budgets, and negotiating with unions. Based on these considerations, the  
17 Court invited the objecting parties to present in a Civil Rule 56(d) motion those factual  
18 issues which they believed to be material and disputed and upon which they needed  
19 further discovery before eligibility could be determined. The Court observed that if the  
20 Civil Rule 56(d) motion revealed that formal discovery was necessary for disputed  
21



1 material factual issues, then the factual disputes would need to be resolved in an  
2 evidentiary hearing after perhaps months of such discovery.

3 The remaining contested issues narrowed by the time the Civil Rule 56(d) motion  
4 was filed; SBPEA reached an agreement with the City whereby it accepted on a short-  
5 term basis the conditions imposed on it on January 28, 2013, and withdrew its objection  
6 to eligibility. That eliminated the challenge under § 109(c)(2), leaving only CalPERS as an  
7 objecting party and only §§ 109(c)(4) and 921(c) in play.<sup>14</sup> Addressing CalPERS Civil Rule  
8 56(d) motion, the Court found that none of the facts that it asserted were material and  
9 disputed would impact the decision on “desire” and good faith.

10 The Court will address why the purported facts are either irrelevant or, even  
11 taken as true in the most negative light to the City, do not show a lack of desire or good  
12 faith. The Court categorizes the Civil Rule 56(d) discovery requests into groups as  
13 follows: (1) discovery on historical facts pertaining to activities at the City between 2006  
14 and early 2012; (2) discovery on facts immediately prepetition; (3) discovery on post  
15 petition facts pertaining to City actions during the chapter 9; and (4) discovery directed  
16 toward depositions of City officials or consultants and on document requests not yet  
17 satisfied.

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18 <sup>14</sup> CalPERS argued in its opposition that its objections to eligibility filed at the court deadline were “preliminary”  
19 and that it had reserved the right to supplement those objections (without specifying which ground it wished to  
20 assert that had not been previously challenged). The Court rejected the notion that new objections could be  
21 raised after the deadline date because no court order allowed the right to supplement. The whole purpose of the  
objection deadline was to fix the eligibility issues so that a chapter 9 could proceed in an orderly manner, and  
CalPERS had not attempted to supplement its objections prior to the summary judgment motion and therefore had  
waived any right it might have claimed to do so.

1 CalPERS argues that it should have discovered about consultant and staff reports  
2 presented to the City as early as 2006 which alerted the Common Council about  
3 unstable financial issues and budgetary concerns and made recommendations of steps  
4 the City could take to alleviate the impending crisis. CalPERS asserts that these issues  
5 are material to good faith or desire because the discovery will reveal that the City knew  
6 or should have known about the budgetary shortfalls and cash crisis for several years,  
7 yet took no material steps to alleviate the problem until it declared a financial  
8 emergency on July 18, 2012.

9 The Court finds these remote facts irrelevant to determining desire or good faith  
10 on the petition date. The inactivity of the City to forestall cash flow insolvency in prior  
11 years does not mean, as a matter of law, the City is forever forbidden to file chapter 9  
12 when the full impact of the cash situation was presented to the Common Council on July  
13 10, 2012. Just because it did not act earlier does not mean it cannot act now if the City  
14 finds, as it did, that the City was cash flow insolvent and could not pay its bills as they  
15 came due on July 1, 2012, and onward without the protection of a bankruptcy  
16 proceeding where it could defer or impair liabilities. No matter that some earlier  
17 actions by the City might have lessened the shortfalls in July 2012. The undisputed  
18 material facts are the cash flow crunch existed and no immediate remedies could  
19  
20  
21

1 address it other than the relief that chapter 9 afforded.<sup>15</sup> Historical facts have no import  
2 on the Court's decision.

3 The Court will accept as true many of the "negative" facts that occurred  
4 immediately prepetition which CalPERS argues are material and disputed. The Court's  
5 legal analysis which follows will encompass those facts and demonstrate why, taken as  
6 true, they do not defeat eligibility on the contested grounds. Because the Court adopts  
7 them, no dispute exists and no discovery is needed.<sup>16</sup> A summary of the facts follows:

- 8 (a) the City had not formulated a proposed plan of adjustment or even a  
9 term sheet before it filed;  
10 (b) the City did not enter into meaningful negotiations with its major  
11 creditors prepetition;  
12 (c) the City entered into several stipulated judgments to settle civil rights  
13 litigation prepetition upon which it immediately defaulted;  
14 (d) the City's financial records were in disarray, including delinquent  
15 audited financials, lack of bank reconciliations, imprecise cash  
16 projections, and incomplete interfund accounting;  
17 (e) the City's finance department was understaffed;  
18 (f) the City paid more than a million dollars in cash outs to terminating  
19 employees within 60 days of filing, including a substantial sum  
20 immediately before the petition date;  
21 (g) the City had no pre-filing plan to pay post petition expenses and  
obligations to CalPERS;

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<sup>15</sup> The prior knowledge of the City of the upcoming fiscal crisis might have relevance on the declaration of emergency to meet the AB 506 requirements which allowed the City to bypass neutral evaluation. Since SBPEA withdrew its objection, that uncontested criteria is not before the Court to decide.

<sup>16</sup> The legal analysis below demonstrates why any individual mindset or subjective intent is not material in assessing the objective actions of the City which affect eligibility. Discovery consisting of depositions of City officials or consultants would not elicit any objective information not already in the City records. Most communications are not only irrelevant but also protected by the closed session or legislative privileges accorded such communications in California. Cal. Gov't Code § 54963(a); see *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 772 (1975).

- 1 (h) other than as set forth in the Budget Report and reflected by  
2 downsizing of personnel and employment freezes, the City had not  
3 considered financial alternatives to face the cash flow crisis other than  
4 filing chapter 9; and  
5 (i) the City's Water Fund had more than \$37,000,000 in immediately  
6 available cash.

7 The post petition facts which CalPERS argues are material and subject to  
8 discovery because they are disputed do not lend themselves to objective discovery. As  
9 with a number of the asserted prepetition facts, the Court will adopt those facts as  
10 uncontroverted and provide in the legal analysis below an explanation for why even if  
11 true they do not defeat the City's petition for eligibility:

- 12 (a) during the 13 months of post petition activity in the chapter 9 case,  
13 the City did not undertake meaningful negotiations with its major  
14 creditors which focused on a proposed plan;  
15 (b) the City did not adopt a Pendency Plan until November 26, 2012, and  
16 only then because the Court made clear that the existence of a  
17 Pendency Plan was a factor to be considered under § 109(c)(4);  
18 (c) the Pendency Plan was only 10 pages long and contained no detailed  
19 financials;  
20 (d) no City employee or agent was assigned to draft the plan of  
21 adjustment;  
22 (e) CalPERS did not receive reconciled bank statements and other  
23 requested financial documents until April 2013, or later;  
24 (f) the City did not have cash projections until April 2013;  
25 (g) the City did not adopt a 2012-2013 budget until April 2013;  
26 (h) the City paid certain vendors on their prepetition invoices post  
27 petition;  
28 (i) the City did not pay post petition obligations to CalPERS;  
29 (j) the City did not have enough manpower in its finance department;

- 1 (k) the City accrued cash post petition while not paying all monies due to  
CalPERS;
- 2 (l) the City did not provide all requested financial information to  
creditors; and
- 3 (m) the City imposed wage and benefit conditions on the three unions  
4 which did not agree to them, effective February 1, 2013.

5 In addition to these areas of requested discovery by CalPERS is a demand to  
6 depose certain City employees. First, the factual expertise of Mr. Simpson, prior  
7 Director of Finance for the City, and Mr. Bush, financial consultant to the City are  
8 irrelevant because insolvency is not at issue. Second, Mr. Kennedy, Mr. Pachon, Mr.  
9 McNeely, Mr. Wilson, Mr. Weinberg, and Mr. Majaj's knowledge is limited to facts too  
10 remote in time to be relevant. Lastly, any testimony would be subject to closed session  
11 or legislative privilege to the extent there were inquiries about the witness' state of  
12 mind. Objective facts are all known in the City records.

13 In summary, the Court denies the Civil Rule 56(d) motion as grounds to delay  
14 ruling on eligibility because CalPERS is entitled to formal discovery only on material  
15 disputed facts. The inquiries which are relevant to the determination of whether the  
16 City desired to effect a plan of adjustment on the petition date and whether the City  
17 filed in good faith are centered on objective facts, which are measured by the acts of the  
18 City, and not by a subjective inquiry into the state of mind of any employee, consultant  
19 or agent. The relevant objective facts are either admittedly undisputed or the Court will  
20 adopt them as true for the purpose of its analysis on these two legal principles.

21

1 The consequence of the Court's approach in determining there are no disputed  
2 material facts is that it may grant summary judgment for the non-moving party, here  
3 CalPERS (Civil Rule 56(f)(1)).<sup>17</sup> As shown below, the uncontroverted facts lead the Court  
4 to conclude the City is eligible for chapter 9.

### 5 Analysis

#### 6 (a) General Requirements; Uncontested Provisions

7 Eligibility for an order for relief under chapter 9 is governed by five mandatory  
8 requirements. Four of these requirements are set forth in the provisions of §§  
9 109(c)(1)-(4). Alternatives for the fifth requirement are set forth in § 109(c)(5).

10 In addition, the Court may dismiss a chapter 9 petition under § 921(c), even  
11 where all of the § 109(c) requirements are met, if the debtor did not file the petition in  
12 good faith. "Unlike the eligibility requirements of § 109(c), the court's power to dismiss  
13 a petition under § 921(c) is permissive, not mandatory." *In re Pierce Cnty. Hous. Auth.*,  
14 414 B.R. 702, 714 (Bankr. W.D. Wash. 2009) ("*Pierce County*") (citing 6 *Collier on*  
15 *Bankruptcy* 921-7 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2009) [hereinafter  
16 *Collier*]).

17 The chapter 9 petitioner has the burden to show that it is eligible to file under §  
18 109(c). *In re City of Stockton, Cal.*, 475 B.R. 720, 725-26 (Bankr. E.D. Cal. 2012)

19 \_\_\_\_\_  
20 <sup>17</sup> If the Court granted for nonmovant CalPERS on § 109(c)(4) the result would be dismissal for ineligibility. If it  
21 granted for nonmovant CalPERS on § 921(c), the Court could exercise its discretion to not dismiss the case. *In re*  
*Pierce Cnty. Hous. Auth.*, 414 B.R. 702, 710 (Bankr. W.D. Wash. 2009).

1 (“*Stockton*”); *Int’l Assn. of Firefighters, Local 1186 v. City of Vallejo (In re City of Vallejo)*,  
2 408 B.R. 280, 289 (9th Cir. BAP 2009) (“*Vallejo*”); *In re Valley Health Sys.*, 383 B.R. 156,  
3 161 (Bankr. C.D. Cal. 2008) (“*Valley Health*”). “The quantum of proof, there being no  
4 contrary indication in statute or in controlling decisional law, is the familiar  
5 preponderance-of-evidence standard of basic civil litigation. Nothing suggests there  
6 should be a higher burden. This conclusion comports with the argument by the authors  
7 of the *Collier* treatise that the burden should be liberally applied in favor of granting  
8 relief.” *Stockton*, 475 B.R. at 726 (citing 2 *Collier* § 109.04[3]). The § 109(c) eligibility  
9 requirements are to be construed broadly “to provide access to relief in furtherance of  
10 the Code’s underlying policies.” *Valley Health*, 383 B.R. at 161 (quoting *Hamilton Creek*  
11 *Metro. Dist. v. Bondholders Colo. Bondshares (In re Hamilton Creek Metro. Dist.)*, 143  
12 F.3d 1381, 1384 (10th Cir. 1998)).

13 The issues before the Court are controlled by any objections that were filed with  
14 the Court by October 24, 2012. The SBPEA union and CalPERS were the two original  
15 objecting parties. After SBPEA withdrew its objections to the City’s eligibility, the  
16 CalPERS objections under § 109(c)(4)—whether the City has presented undisputed  
17 material facts to show the City’s desire to effect a plan as a matter of law—and § 921—  
18 whether the undisputed evidence establishes that the City’s chapter 9 petition was filed  
19 in good faith—are the only contested matters before the Court.

20 ///

1 I) *Municipality: § 109(c)(1)*

2 The City of San Bernardino is a municipal corporation and a political subdivision  
3 of the State of California. This issue is uncontested.

4 II) *Specifically Authorized To Be a Debtor by California Law: § 109(c)(2)*

5 It is undisputed that the Common Council passed by a majority vote a resolution  
6 authorizing the filing of a petition under chapter 9 of the Bankruptcy Code. The  
7 Common Council also adopted a resolution declaring a financial emergency as required  
8 by Cal. Gov't Code § 53760(b). The City met the State requirements and is authorized to  
9 file a chapter 9 under California law. This issue is uncontested.

10 III) *Insolvency: § 109 (c)(3)*

11 The uncontroverted facts establish that the City is insolvent. The City was unable  
12 to pay its forthcoming obligations when the resolutions were passed and faced a cash  
13 deficit of \$45.9 million for fiscal year 2012-2013. This issue is uncontested.

14 IV) *Negotiations With All of the City's Creditors Was Impracticable: § 109(c)(5)(C)*

15 The following uncontroverted facts support the finding that negotiations were  
16 impracticable: there are a large number of creditors in one or more classes; there is a  
17 lack of a viable business plan that addresses the City's ongoing financial problems; and  
18 there is a need to act quickly to protect the public from harm. This issue is uncontested.

19 *Vallejo*, 408 B.R. at 298.

20 ///



1 (b) General Requirements; Contested Provisions

2 1) *Desire to Effect a Plan: § 109(c)(4)*

3 “An entity may be a debtor under chapter 9 of this title if and only if such  
4 entity . . . desires to effect a plan to adjust such debts.” § 109(c)(4). Although  
5 uncommon, “[t]hose cases that have considered the issue demonstrate that no bright-  
6 line test exists for determining whether a debtor desires to effect a plan because of the  
7 highly subjective nature of the inquiry under § 109(c)(4).” *Vallejo*, 408 B.R. at 295. This  
8 requirement may be satisfied with direct and circumstantial evidence. *Id.*; *In re City of*  
9 *Stockton, Cal.*, 493 B.R. 772, 791 (Bankr. E.D. Cal. 2013) (“*Stockton II*”) (noting that  
10 “[e]vidence probative of intent includes attempt to resolve claims, submitting a draft  
11 plan, and other circumstantial evidence.”). So long as the evidence shows that the  
12 “purpose of the filing of the chapter 9 petition not simply be to buy time or evade  
13 creditors,” a bankruptcy court may properly find that the § 109(c)(4) requirement has  
14 been met. *Vallejo*, 408 B.R. at 295 (quoting 2 *Collier* § 109.04[3][d]); *In re Boise Cnty.*,  
15 465 B.R. 156, 168 (Bankr. D. Idaho 2011) (“*Boise County*”).

16 “The cases equate ‘desire’ with ‘intent’ and make clear that this element is highly  
17 subjective.” *Stockton II*, 493 B.R. at 791 (citing *Vallejo*, 408 B.R. at 295). Subjective  
18 inquiry should not be misunderstood as an inquiry into a subjective state of mind.  
19 Courts in the Ninth Circuit and other circuits conduct a subjective inquiry when  
20 determining whether the municipality’s objective acts demonstrate the requisite  
21

1 “desire” or “intent.” *Vallejo*, 408 B.R. at 295; *Stockton II*, 493 B.R. at 791 (finding that  
2 circumstantial evidence indicating the debtor’s desire to effect a plan existed where the  
3 debtor could either excuse certain impaired contracts by confirming a chapter 9 plan or  
4 reach an agreement with the affected parties); *In re Cnty. of Orange*, 183 B.R. 594, 607  
5 (Bankr. C.D. Cal. 1995) (“*Orange County*”) (finding a comprehensive settlement  
6 agreement along with other steps taken sufficiently demonstrated efforts to resolve  
7 claims which satisfied § 109(c)(4)); *In re Sullivan County Reg'l Refuse Disposal Dist.*, 165  
8 B.R. 60, 76 (Bankr. D.N.H. 1994) (“*Sullivan County*”) (finding a draft plan of adjustment  
9 post petition met the requirement of § 109(c)(4)).

10 The City filed a Qualification Statement signed by the City Manager that stated  
11 under penalty of perjury that the City desires to effect a plan to adjust its debts. The  
12 Court places little weight on the Qualification Statement, recognizing that any  
13 municipality could prepare that conclusionary document. The Court notes, however,  
14 the following additional steps which demonstrate desire: preparing and presenting the  
15 Budget Report at the public meeting of the Mayor and Common Council on July 10,  
16 2012; preparing and presenting the staff report to the Common Council on July 18,  
17 2012; conducting open public meeting discussions of what these reports projected as  
18 the City’s financial future; voting to declare a fiscal emergency and approve the  
19 resolutions; preparing a cash flow analysis report; preparing the Fiscal Emergency Plan,  
20 which was presented to the Common Council and approved before the petition date;

1 preparing and discussing the Pre-Pendency Plan at the Common Council meetings in late  
2 August 2012 and then approving the Pre-Pendency Plan as adjusted by a 9-Point  
3 Adjustment Plan in September 2012 and on October 1, 2012; and approving its  
4 Pendency Plan on November 26, 2012. These actions are of public record and they  
5 objectively demonstrate that the City desired to effect a plan.

6         These uncontroverted facts sufficiently show that after taking steps to cut costs  
7 and raise revenue, the City—faced with a 45.9 million dollar cash deficit—had little  
8 choice but to restructure its debt. Prior to filing, the City had depleted any reserves it  
9 had in its general fund and had cut salaries and jobs of its employees. These cuts had  
10 already negatively impacted City services and safety. The Budget Report also indicated  
11 that the City liquidated what assets it could and had made limited attempts to raise its  
12 revenue. Upon filing its chapter 9 petition, the City defaulted on numerous obligations,  
13 including payments owed to CalPERS, health benefit payments owed to retirees and  
14 payments owed to pension obligation bondholders and other bondholders.

15         The Pre-Pendency Plan and Budget Report reinforced the reality that the City did  
16 not have enough money to pay all of its contracts and would need to impair contracts,  
17 voluntarily or otherwise, in order to achieve a balanced budget. The City did this with its  
18 employees; the City reached agreements with four of its seven unions on modifications  
19 to their respective collective bargaining agreements and voted to impose modifications  
20 on the remaining three unions. The undisputed circumstances which precipitated the

1 City's filing and the steps taken after the petition date show that the City began  
2 implementation of the steps necessary to restructure its debt.

3 The sparse reported case law where a municipality was found ineligible under §  
4 109(c)(4) turned on filing to evade a creditor. In *Sullivan County*, a bankruptcy court  
5 found that the decision to file chapter 9 was a litigation tactic to hold off the major  
6 creditor's "threatened shut-out." *Sullivan County*, 165 B.R. at 82. In that case, the  
7 option to file chapter 9 was not memorialized on the written agenda of the board  
8 meeting and there was no evidence that the district engaged in a discussion regarding  
9 what type of plan might be appropriate under chapter 9. Rather, the district filed  
10 preemptively to ward off a threatened action of its only creditor, which caused the court  
11 to declare it ineligible under § 109(c)(4). *Id.*

12 The triggering event that often forces a bankruptcy filing under other chapters is  
13 aggressive creditor activity, but this is not the case here. Unlike the single major  
14 creditor scenario in *Sullivan County*, the City's decision to file chapter 9 was a logical and  
15 arguably inevitable result of a debt structure that it could no longer keep current. Faced  
16 with inevitable default on its obligations because of insufficient cash, the City took the  
17 affirmative step to file chapter 9 so that it could restructure the debt and impair the  
18 creditors as necessary to achieve a balanced budget.<sup>18</sup>

19 \_\_\_\_\_  
20 <sup>18</sup> As noted previously, the precise date the City filed its petition was driven by the steps a civil rights judgment  
21 creditor was taking to execute on the City's bank accounts. However, the resolutions to declare a fiscal emergency  
and file the petition had been passed two weeks prior and before the creditor action was threatened.

1 CalPERS contends that to determine the City's intent, it is entitled to depose the  
2 relevant decision-makers for the City. When conducting the § 109(c)(4) inquiry, courts  
3 have only looked at the municipality's objective actions as an entity. *Vallejo*, 408 B.R. at  
4 295; *In re City of Stockton, Cal.*, 475 B.R. 720, 726 (Bankr. E.D. Cal. 2012); *In re Pierce*  
5 *Cnty. Hous. Auth.*, 414 B.R. 702, 710 (Bankr. W.D. Wash. 2009). The subjective intent of  
6 an individual councilmember is immaterial in determining whether a municipal body  
7 had the requisite intent or good faith.

8 CalPERS argues that the adoption of the Pendency Plan is not evidence of a  
9 "desire to effect" because the Court put pressure on the City to adopt it. The objective  
10 fact is the City did adopt the Pendency Plan in November 2012 and the Court may  
11 consider this as evidence of desire.

12 CalPERS asserts that § 109(c)(4) requires some form of plan of adjustment be  
13 presented to creditors prior to filing and that the City have staff tasked to prepare and  
14 formulate the plan immediately post petition. CalPERS also argues that the admittedly  
15 woeful state of the City's financial records upon and after filing make desire impossible  
16 to achieve. The Court disagrees that those factors defeat a showing under § 109(c)(4).  
17 The lack of an early plan might have an impact on some of the alternative prongs of §  
18 109(c)(5), but not on desire. And the disarray of the City's financial books more  
19 persuasively enforces why it needed a breathing space to get them in order before it  
20 could effect the plan of adjustment.

1 It is widely endorsed that “no bright-line test exists for determining whether a  
2 debtor desires to effect a plan because of the highly subjective nature of the inquiry  
3 under § 109(c)(4).” *Vallejo*, 408 B.R. at 295; *Stockton*, 475 B.R. at 726; *Pierce County*,  
4 414 B.R. at 710; *Boise County*, 465 B.R. at 169. Moreover, the cases CalPERS cites to for  
5 this proposition are not specific to a determination of intent for purposes of § 109(c)(4)  
6 and thus offer no persuasive weight. As such, the fact the City did not have some form  
7 of plan in place at the Petition Date is immaterial.

8 Other factors that CalPERS argues defeat “desire” such as the cash outs to  
9 terminating employees just before the filing date, the negotiation of civil rights  
10 settlements upon which the City immediately defaulted, and the payments post petition  
11 of some prepetition bills are all issues which need to be addressed in any plan before it  
12 can be approved by the Court. But they are not material to “desire;” nor is the fact that  
13 the City did not have a method in mind to address the immediate post petition defaults  
14 to CalPERS. Again, those are plan issues and must be addressed in the course of  
15 negotiating or litigating treatment in the plan.

16 Finally, CalPERS submits that the uncontroverted fact that the City’s Water Fund  
17 had a large cash balance before and after the petition date which the City did not tap to  
18 attempt to balance its books is evidence of lack of desire to effect a plan. This argument  
19 has no legal legs. It is a matter of California constitutional law that the City may not use  
20 funds belonging to the Water Department for general fund purposes. Amendments to  
21

1 the Constitution enacted by Proposition 218 in 1996, which added Articles XIIC and  
2 XIID, expanded restrictions on local government revenue-raising and imposed  
3 limitations on local government use of special fees, including water and sewer fees. C.A.  
4 Const. art. XIIC and XIID. Article XIID covers water fees and prohibits the use of such  
5 fees for general governmental services, including police, fire and other services. *Bighorn*  
6 *Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 216-17 (2006); *Richmond v. Shasta*  
7 *Cnty. Servs. Dist.*, 32 Cal. 4th 409 (2004). Thus, the City was legally prohibited by the  
8 California Constitution from using Water Department funds for general fund purposes.

9 Similarly, the City could not have borrowed funds from the Water Department  
10 without incurring debt that it could not repay within one year. Article XVI, Section 18 of  
11 the Constitution prohibits the City from incurring a debt in any year that exceeds the  
12 available revenues of the City for that year without the approval of a two-thirds vote of  
13 qualified voters. C.A. Const. art. XVI, § 18. Looking at its dire financial status in July  
14 2012, the City could not reasonably conclude that it would be able to repay to the  
15 Water Fund any loans it made within that fiscal year. The Water Fund cash was thereby  
16 out of reach to address the City's insolvency and this issue is an outlier to the Court's  
17 analysis.

18 Accordingly, the uncontroverted facts provide a broad basis on which the Court  
19 may find that the City has shown a desire to effect a plan by giving an official statement  
20 of its intent to adjust its debt, taking actions to approve a Pendency Plan, and by  
21

1 circumstantial evidence that indicated the City needed relief in a chapter 9 proceeding  
2 to give it space to restructure its debt.

3 II) *Good Faith: § 921(c)*

4 Section 921(c) provides that a court may dismiss a chapter 9 petition if the debtor  
5 did not file the petition in good faith. *Pierce County*, 414 B.R. at 714. “Unlike the  
6 eligibility requirements of § 109(c), the court's power to dismiss a petition under §  
7 921(c) is permissive, not mandatory.” *Id.* Although Judge Klein in *Stockton II*, 493 B.R. at  
8 794-795, concluded that a rebuttable presumption arises when the City meets its  
9 burden under § 109(c), this Court need not shift the burden because it finds that the  
10 City has met its burden by a preponderance of the evidence and shown that its chapter  
11 9 petition was filed in good faith.

12 In *Pierce County*, the court found that relevant facts to the good faith analysis  
13 include “(i) the debtor's subjective beliefs; (ii) whether the debtor's financial problems  
14 fall within the situations contemplated by chapter 9; (iii) whether the debtor filed its  
15 chapter 9 petition for reasons consistent with the purposes of chapter 9; (iv) the extent  
16 of the debtor's prepetition negotiations, if practicable; (v) the extent that alternatives to  
17 chapter 9 were considered; and (vi) the scope and nature of the debtor's financial  
18 problems.” *Pierce County*, 414 B.R. at 714. Courts look to objective acts of a city to  
19 determine good faith. *In re Town of Westlake, Tex.*, 211 B.R. 860, 868 (Bankr. N.D. Tex.  
20 1997) (finding that the chapter 9 debtor filed in good faith because it faced “frozen  
21



1 funds, multiple litigation, and disannexation of a substantial portion of its tax base.”);  
2 *Stockton II*, 493 B.R. at 794-95 (looking to the city’s effort to cut spending, its cash and  
3 service insolvency, its efforts to negotiate with creditors, and its inability to achieve  
4 significant reductions without being able to impair contracts, to find that the § 921(c)  
5 good faith presumption was strong). As in many other considerations of good faith in  
6 the context of bankruptcy, the test is a totality of the circumstances where the Court is  
7 given the power to weigh the numerous factors in light of the circumstances as a whole  
8 in determining whether good faith is lacking.<sup>19</sup>

9 The Court finds that the City filed in good faith by relying on uncontroverted  
10 facts. At the July 18, 2012 meeting, the Common Council adopted Resolution 2012-205,  
11 declaring a fiscal emergency. In Resolution 2012-205, the Common Council made the  
12 official findings that (1) the City was or would be unable to pay its obligations within the  
13 next 60 days, and that the financial state of the City jeopardized the health, safety, or  
14 well-being of the residents of the City absent the protections of chapter 9 of the United  
15 States Bankruptcy Code; and (2) given the City’s dire financial condition, it was in the  
16 best interest of the City to declare a fiscal emergency. The Common Council, as an  
17 authoritative body, did so because they knew that the City was insolvent and believed

18  
19 \_\_\_\_\_  
20 <sup>19</sup> The Court notes parenthetically that the counter to good faith is bad faith, which often arises in the context of  
21 other bankruptcy matters. Evidence of bad faith is concealing assets, lying to the court, multiple and abusive  
filings – all of them affirmative acts of bad behavior. None of the typical bad faith factors are argued to the Court  
in this proceeding.

1 that the City could no longer pay its employees on July 1st without impairing contracts.

2 The Court finds that this factor weighs in favor of a finding of good faith.

3 The City's financial problems fall within the situations contemplated by chapter 9.

4 Here, the City cannot achieve a balanced budget unless it is allowed to reorganize its

5 debt. The City cannot keep current with its mounting obligations because it is insolvent.

6 The City's filing is consistent with the purposes of chapter 9, which is to give a debtor a

7 "breathing spell" so that it may establish a plan of adjustment. *In re Cnty. of Orange*,

8 183 B.R. 594, 607 (Bankr. C.D. Cal. 1995). The findings in Resolution 2012-205

9 demonstrate that the City filed the Petition for this exact purpose.

10 Although the Court finds that the City did not engage in meaningful prepetition

11 negotiations with its creditors, did not seriously consider alternatives to filing chapter 9

12 (other than those considered in the Budget Report) when faced with the severe cash

13 flow shortage in July 2012, honored its contractual obligations to its terminating

14 employees by paying large cash outs just before the petition date, and was generally

15 unprepared to formulate a plan of adjustment either before or soon after it filed, none

16 of these uncontroverted facts add up to lack of good faith in filing. Were the purposes

17 of chapter 9—to give a municipality a breathing space from a cash crunch and an

18 opportunity to address its long term solvency through an organized process of

19 proposing a long term plan of adjustment—met here? The Court answers this question

20 "yes." Was there an alternative available to the City when it was faced with a \$45.9

21

1 million cash deficit in the upcoming fiscal year and inevitably was going to default on its  
2 obligations as they came due? The Court answers this question “no.” To deny the  
3 opportunity to reorganize in chapter 9 based on lack of good faith would be to ignore  
4 fiscal reality and the general purposes of the Bankruptcy Code. The Court will not deny  
5 that opportunity.

6 Even if the Court were to find that the City did not file in good faith, which it  
7 declines to do, case law instructs that the dismissal is not mandatory. *Pierce County*,  
8 414 B.R. at 714. Having had a firsthand view of this City and its struggles, the attitudes  
9 and actions of its major creditors, the concerns of its unions, particularly the safety  
10 employees, and the paucity of options for a City with such substantial, undisputed fiscal  
11 woes, this Court would exercise its discretion to not dismiss this case.

12 Almost no cases have addressed this permissive nature of § 921(c), but the Court  
13 can take some instruction from the Ninth circuit in *In re City of Desert Hot Springs*, 339  
14 F.3d 782 (9<sup>th</sup> Cir. 2003), where the circuit ruled that an order denying a motion to  
15 dismiss under § 921(c) and objections to eligibility is an interlocutory order which  
16 cannot be appealed without leave of the BAP, which in that case had been denied. In  
17 reaching its decision that the ruling was not final, the Ninth circuit found that there was  
18 no irreparable injury to the movant that could not be addressed after finality:

19  
20 The denial of an objection to and a motion to dismiss a chapter 9 bankruptcy  
21 does not irreparably injure a party so that later addressing the issue would be

1 futile. We therefore hold that such a denial is not a final decision and cannot  
be immediately appealed to this court.

2 *Id.* at 792.

3 In reaching this conclusion, which is contrary to a similar denial of a motion to  
4 dismiss for bad faith in a chapter 11 case, the Ninth circuit observed that the purpose  
5 and statutory scheme of a chapter 9 proceeding were different than those in chapter  
6 11, but also found that a creditor was not without further remedy if its motion to  
7 dismiss was denied by the bankruptcy court.

8 When determining whether an order is final, in the context of objections to  
and motions to dismiss a bankruptcy, our cases are concerned with whether  
9 an order finally determines an issue in such a way that addressing the issue  
later would not serve to prevent a party from suffering irreparable injury.  
10 [citations omitted] A court's denial of such a motion merely allows the  
municipality to proceed with the bankruptcy. We are not convinced that  
Congress's whole municipal bankruptcy statutory scheme is so skewed in  
11 favor of the municipality that the commencement of proceedings itself causes  
irreparable injury. To so hold would essentially say that a creditor's rights are  
determined before the bankruptcy process really begins.

12 *Id.* at 790.

13 This holding instructs this Court that by granting eligibility for the City and  
14 overruling CalPERS objections, the Court is not condemning CalPERS to an unfair or  
15 injurious outcome in the proceeding. The plan process is complex and will be lengthy,  
16 involving potentially extensive negotiations before the Court-appointed mediator. This  
17 Court is well aware, as observed by Judge Klein in his *City of Stockton* opinions, that  
18 most chapter 9 plans are consensual, having been achieved after good faith and willing  
19 participation in a mediation process. However, if that process fails to reach consensus,  
20 ultimate approval of any plan of adjustment lies with this Court, which would have to  
21

1 bless any creditor impairment. CalPERS will have further opportunities to argue its  
2 potential injury to the Court and to protect its interests, just as the other creditors have  
3 those remedies.

4 As the Court observed when making its oral ruling on this motion, at least six  
5 other major creditors or classes of creditors exist here: the guarantors of the Pension  
6 Obligation Bonds<sup>20</sup>; the guarantors of other general obligation bonds; the police and fire  
7 unions; the remaining five unions of City employees; the potential class of unsecured  
8 creditors (which might have subclasses); and the potential class of City retirees. Each of  
9 these creditor groups stands to be substantially impacted by the City's chapter 9  
10 proceeding<sup>21</sup>; each of these creditor groups was given the opportunity to object to the  
11 City's eligibility or good faith in filing. None of them objected because they conceded  
12 the City was insolvent and needed a long term, orderly process to sort out its finances  
13 and propose a path out of its abyss. The Court rightly notes that the best interest of all  
14 these creditor groups is served by proceeding forward in chapter 9.

15 Only the interest of CalPERS would be served if the Court dismissed this case.  
16 Exactly how that interest would be served is far from crystal clear. The cash deficit of  
17 the City is real and unchallenged. The City cannot pay its obligations with money it does  
18 not presently have. Impairment of contracts seems inevitable in order for the City to

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19 <sup>20</sup> The Pension Obligation Bonds were issued in the mid-2000's to generate a substantial cash paydown by the City  
20 of its unfunded liabilities to CalPERS. As a result CalPERS benefited from the cash generated by these bonds.

<sup>21</sup> Almost all have already been impacted at least short term because the City has deferred payments to these  
21 classes of debt since the petition date.

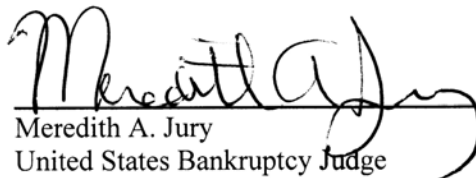
1 reach cash stability and only the chapter 9 process accords the City the legal opportunity  
2 to do so. How far that impairment might reach is a question to be negotiated or  
3 answered by this Court on a later day. Dismissal would leave this quagmire without  
4 orderly court oversight. This Court believes that oversight is critical to the financial  
5 future of the City and its creditors.

6 **Conclusion**

7 The purposes of chapter 9 are met by this proceeding. The integrity of the  
8 bankruptcy system is not offended by this proceeding. The City, its citizens, and its  
9 creditors deserve a chance to achieve an orderly financial future. The Court finds the  
10 City of San Bernardino eligible to proceed in its chapter 9 case.

11 ###

12  
13  
14  
15  
16  
17  
18 Date: October 16, 2013

19   
Meredith A. Jury  
United States Bankruptcy Judge

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**NOTE TO USERS OF THIS FORM:**

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II.** below: List **ONLY** addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. **DO NOT** list an address if person/entity is listed in category I.

**NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that the attached order was entered on the date indicated as AEntered@ on the first page of this judgment or order and will be served in the manner indicated below:

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (ANEF@)** Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), I, deputy clerk who is making this entry; certify that service on all parties under Section II was completed, the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. The following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Jerrold Abeles on behalf of Interested Party Ambac Assurance Company  
abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com

Jerrold Abeles on behalf of Interested Party Erste Europäische Pfandbrief-und Kommunalkreditbank AG  
abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com

Jerrold Abeles on behalf of Interested Party Wells Fargo Bank, N.A.  
abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com

Franklin C Adams on behalf of Creditor San Bernardino Associated Governments  
franklin.adams@bbklaw.com, arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknnotices@bbklaw.com

Franklin C Adams on behalf of Creditor San Bernardino Local Agency Formation Commission  
franklin.adams@bbklaw.com, arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknnotices@bbklaw.com

Franklin C Adams on behalf of Interested Party Courtesy NEF  
franklin.adams@bbklaw.com, arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknnotices@bbklaw.com

Joseph M Adams on behalf of Interested Party Courtesy NEF  
jadams@adamspham.com

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Andrew K Alper on behalf of Interested Party Courtesy NEF  
aalper@frandzel.com, efiling@frandzel.com; ekidder@frandzel.com

Thomas V Askounis on behalf of Interested Party Courtesy NEF  
taskounis@askounisdarcy.com

Julie A Belezuoli on behalf of Defendant California Department of Finance  
julie.belezuoli@kayescholer.com

Julie A Belezuoli on behalf of Defendant Office of State Controller, State of California  
julie.belezuoli@kayescholer.com

Julie A Belezuoli on behalf of Defendant Ana J Matosantos  
julie.belezuoli@kayescholer.com

Julie A Belezuoli on behalf of Defendant John Chiang  
julie.belezuoli@kayescholer.com

Anthony Bisconti on behalf of Creditor Certain Retired Employees of the City of San Bernardino  
tbisconti@bmkattorneys.com, admin@bmkattorneys.com

Anthony Bisconti on behalf of Interested Party Courtesy NEF  
tbisconti@bmkattorneys.com, admin@bmkattorneys.com

Brett Bissett on behalf of Creditor California Public Employees' Retirement System  
brett.bissett@klgates.com, carolyn.orphey@klgates.com; klgatesbankruptcy@klgates.com

Brett Bissett on behalf of Interested Party Courtesy NEF  
brett.bissett@klgates.com, carolyn.orphey@klgates.com; klgatesbankruptcy@klgates.com

Jeffrey E Bjork on behalf of Interested Party Courtesy NEF  
jbjork@sidley.com

Michael D Boutell on behalf of Creditor Comerica Bank  
mdbell@comerica.com

J Scott Bovitz on behalf of Creditor U.S. TelePacific Corp.  
bovitz@bovitz-spitzer.com

John A Boyd on behalf of Interested Party Courtesy NEF  
fednotice@tclaw.net

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John A Boyd on behalf of Interested Party Thompson & Colegate LLP  
fednotice@tclaw.net

Jeffrey W Broker on behalf of Creditor The Glen Aire Mobilehome Park Corporation  
jbroker@brokerlaw.biz

Jeffrey W Broker on behalf of Interested Party Courtesy NEF  
jbroker@brokerlaw.biz

Deana M Brown on behalf of Interested Party Courtesy NEF  
dbrown@milbank.com

Michael J Bujold on behalf of U.S. Trustee United States Trustee (RS)  
Michael.J.Bujold@usdoj.gov

Shirley Cho on behalf of Interested Party National Public Finance Guarantee Corp.  
scho@pszjlaw.com

Alicia Clough on behalf of Defendant California Department of Finance  
alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com

Alicia Clough on behalf of Defendant Office of State Controller, State of California  
alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com

Alicia Clough on behalf of Defendant State of California  
alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com

Alicia Clough on behalf of Defendant Ana J Matosantos  
alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com

Alicia Clough on behalf of Defendant John Chiang  
alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com

Marc S Cohen on behalf of Defendant California Department of Finance  
mcohen@kayescholer.com, dhernandez@kayescholer.com

Marc S Cohen on behalf of Defendant Office of State Controller, State of California  
mcohen@kayescholer.com, dhernandez@kayescholer.com

Marc S Cohen on behalf of Defendant State of California

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mcohen@kayescholer.com, dhernandez@kayescholer.com

Marc S Cohen on behalf of Defendant Ana J Matosantos  
mcohen@kayescholer.com, dhernandez@kayescholer.com

Marc S Cohen on behalf of Defendant John Chiang  
mcohen@kayescholer.com, dhernandez@kayescholer.com

Ronald R Cohn on behalf of Interested Party Courtesy NEF  
rcohn@horganrosen.com

Christopher H Conti on behalf of Interested Party San Bernardino Public Employees Association  
chc@sdlaborlaw.com, sak@sdlaborlaw.com

Christopher J Cox on behalf of Interested Party National Public Finance Guarantee Corp.  
chris.cox@weil.com, janine.chong@weil.com

Christina M Craige on behalf of Interested Party Courtesy NEF  
ccraige@sidley.com

Alex Darcy on behalf of Creditor Marquette Bank  
adarcy@askounisdarcy.com, akapai@askounisdarcy.com

Susan S Davis on behalf of Interested Party Courtesy NEF  
sdavis@coxcastle.com

Robert H Dewberry on behalf of Creditor Allison Mechanical, Inc.  
robert.dewberry@dewlaw.net

Todd J Dressel on behalf of Creditor Pinnacle Public Finance, Inc.  
dressel@chapman.com, lubecki@chapman.com

Chrysta L Elliott on behalf of Interested Party Courtesy NEF  
elliottc@ballardspahr.com, manthiek@ballardspahr.com

Scott Ewing on behalf of Interested Party Rust Consulting/Omni Bankruptcy  
contact@omnimgt.com, sewing@omnimgt.com;katie@omnimgt.com

John A Farmer on behalf of Creditor County of San Bernardino, California  
jfarmer@orrick.com

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Brian W Freeman on behalf of Creditor Kim Thompson  
brian@pedigolaw.com, brian@brianwfreeman.com

Victoria C Geary on behalf of Defendant California State Board Of Equalization  
victoria.geary@boe.ca.gov

Victoria C Geary on behalf of Defendant Cynthia Bridges  
victoria.geary@boe.ca.gov

Paul R. Glassman on behalf of Attorney Paul R. Glassman  
pglassman@sycr.com

Paul R. Glassman on behalf of Debtor City of San Bernardino, California  
pglassman@sycr.com

Paul R. Glassman on behalf of Plaintiff City of San Bernardino, California  
pglassman@sycr.com

Robert P Goe on behalf of Creditor Miramontes Const. Co., Inc.  
kmurphy@goeforlaw.com, rgoe@goeforlaw.com;mforsythe@goeforlaw.com

David M Goodrich on behalf of Creditor San Bernardino City Professional Firefighters Local 891  
dgoodrich@marshackhays.com, ecfmarshackhays@gmail.com

Christian Graham on behalf of Creditor Miramontes Const. Co., Inc.  
cgraham23@dlblaw.net

Everett L Green on behalf of U.S. Trustee United States Trustee (RS)  
everett.l.green@usdoj.gov

Chad V Haes on behalf of Creditor San Bernardino City Professional Firefighters Local 891  
chaes@marshackhays.com, ecfmarshackhays@gmail.com

Chad V Haes on behalf of Interested Party Courtesy NEF  
chaes@marshackhays.com, ecfmarshackhays@gmail.com

James A Hayes on behalf of Interested Party Courtesy NEF  
jhayes@jamesahayesapl.com

M Jonathan Hayes on behalf of Interested Party Courtesy NEF  
jhayes@srhlawfirm.com,

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roksana@srhlawfirm.com;carolyn@srhlawfirm.com;shawnj@srhlawfirm.com;rosarioz@srhlawfirm.com;jhayesecf@gmail.com;j@alk  
azian.com

D Edward Hays on behalf of Creditor San Bernardino City Professional Firefighters Local 891  
ehays@marshackhays.com, ecfmarshackhays@gmail.com

Eric M Heller on behalf of Interested Party Courtesy NEF  
eric.m.heller@irscounsel.treas.gov

Jeffery D Hermann on behalf of Creditor County of San Bernardino, California  
jhermann@orrick.com

Jeffery D Hermann on behalf of Defendant County of San Bernardino  
jhermann@orrick.com

Bonnie M Holcomb on behalf of Interested Party Courtesy NEF  
bonnie.holcomb@doj.ca.gov, rosita.eduardo@doj.ca.gov

Whitman L Holt on behalf of Interested Party Courtesy NEF  
wholt@ktbslaw.com

Michelle C Hribar on behalf of Interested Party San Bernardino Public Employees Association  
mch@sdlaborlaw.com

Steven J Katzman on behalf of Creditor Certain Retired Employees of the City of San Bernardino  
SKatzman@bmkattorneys.com, admin@bmkattorneys.com

Steven J Katzman on behalf of Interested Party Courtesy NEF  
SKatzman@bmkattorneys.com, admin@bmkattorneys.com

Jane Kespradit on behalf of Interested Party Courtesy NEF  
jane.kespradit@limruger.com, amy.lee@limruger.com

Mette H Kurth on behalf of Interested Party Ambac Assurance Company  
kurth.mette@arentfox.com

Mette H Kurth on behalf of Interested Party Erste Europische Pfandbrief-und Kommunalkreditbank AG  
kurth.mette@arentfox.com

Mette H Kurth on behalf of Interested Party Wells Fargo Bank, N.A.  
kurth.mette@arentfox.com

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Mette H Kurth on behalf of Trustee Ambac Assurance Company, Erste Europaische Pfandbrief-Und Kommunalkreditbank Ag And Wells Fargo Bank, N.A.  
kurth.mette@arentfox.com

Sandra W Lavigna on behalf of Interested Party U. S. Securities and Exchange Commission  
lavignas@sec.gov

Michael B Lubic on behalf of Creditor California Public Employees' Retirement System  
michael.lubic@klgates.com, jonathan.randolph@klgates.com

Michael B Lubic on behalf of Interested Party California Public Employees' Retirement System  
michael.lubic@klgates.com, jonathan.randolph@klgates.com

Richard A Marshack on behalf of Interested Party Courtesy NEF  
rmarshack@marshackhays.com, lbergini@marshackhays.com;ecfmarshackhays@gmail.com

David J McCarty on behalf of Interested Party David J. McCarty  
dmccarty@sheppardmullin.com

Reed M Mercado on behalf of Interested Party M. Reed Mercado  
rmercado@sheppardmullin.com

Fred Neufeld on behalf of Debtor City of San Bernardino, California  
fneufeld@sycr.com

Fred Neufeld on behalf of Plaintiff City of San Bernardino, California  
fneufeld@sycr.com

Aron M Oliner on behalf of Interested Party San Bernardino Police Officers Association  
roliner@duanemorris.com

Scott H Olson on behalf of Creditor Kohl's Department Stores, Inc.  
solson@seyfarth.com

Dean G Rallis, Jr on behalf of Interested Party Courtesy NEF  
drallis@sulmeyerlaw.com

Christopher O Rivas on behalf of Interested Party Courtesy NEF  
crivas@reedsmith.com

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Kenneth N Russak on behalf of Interested Party Courtesy NEF  
krussak@frandzel.com, efiling@frandzel.com;dmoore@frandzel.com

Gregory M Salvato on behalf of Interested Party Courtesy NEF  
gsalvato@salvatolawoffices.com, calendar@salvatolawoffices.com

Mark C Schnitzer on behalf of Attorney Mark C. Schnitzer  
mschnitzer@rhlaw.com, mcschnitzer@gmail.com

Diane S Shaw on behalf of Interested Party Courtesy NEF  
diane.shaw@doj.ca.gov

Ariella T Simonds on behalf of Interested Party Courtesy NEF  
asimonds@sidley.com

Leonard Steiner on behalf of Defendant Jose Munoz  
ls@steinerlibo.com, jasoncarter@steinerlibo.com;aam@steinerlibo.com

Jason D Strabo on behalf of Creditor U.S. Bank National Association, not individually, but as Indenture Trustee  
jstrabo@mwe.com, cnorris@mwe.com

Cathy Ta on behalf of Interested Party Courtesy NEF  
cathy.ta@bbklaw.com, Arthur.Johnston@bbklaw.com;lisa.spencer@bbklaw.com

Sheila Totorp on behalf of Creditor Landmark American Insurance Company  
stotorp@clausen.com, jbrzezinski@clausen.com

Benjamin R Trachtman on behalf of Interested Party Courtesy NEF  
btrachtman@trachtmanlaw.com, sstraka@trachtmanlaw.com

Matthew J Troy on behalf of Creditor United States of America  
matthew.troy@usdoj.gov

United States Trustee (RS)  
ustpregion16.rs.ecf@usdoj.gov

Anne A Uyeda on behalf of Interested Party Courtesy NEF  
auyeda@bmkattorneys.com

Annie Verdries on behalf of Interested Party Courtesy NEF  
verdries@lbbslaw.com, Autodocket@lbbslaw.com

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Brian D Wesley on behalf of Interested Party Courtesy NEF  
brian.wesley@doj.ca.gov

Kirsten A. Worley on behalf of Creditor Safeco Insurance Company Of America  
kw@wlawcorp.com, admin@wlawcorp.com

Clarisse Young on behalf of Interested Party Courtesy NEF  
youngshumaker@psmlawyers.com, sally@psmlawyers.com

Pamela Jan Zylstra on behalf of Interested Party Courtesy NEF  
zylstralaw@gmail.com

g Service information continued on attached page

**II. SERVED BY THE COURT VIA U.S. MAIL:** I deputy clerk who is making this entry; certify that service on all parties under Section II was completed, A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

<b>City of San Bernardino, California</b> City Hall 300 North "D" Street San Bernardino, CA 92418	
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g Service information continued on attached page

**III. TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an AEntered@ stamp, the party lodging the judgment or order will serve a complete copy bearing an AEntered@ stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

g Service information continued on attached page

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

In re: City of San Bernardino California	CHAPTER: 9 CASE NUMBER: RS 6:12-bk-28006-MJ
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**ADDITIONAL SERVICE INFORMATION** (if needed):

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

January 2009

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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA

--oOo--

In Re: ) Case No. 6:12-28006MJ  
)  
CITY OF SAN BERNARDINO, ) Riverside, California  
) Wednesday, August 28, 2013  
Debtor. ) 1:30 PM  
)

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MOTION of debtor City of San Bernardino pursuant to 11 U.S.C. Sections 365, 901 and 904 for Order approving: (A) Rejection of Collective Bargaining Agreements with San Bernardino Public Employees Assoc., San Bernardino Police Officers Assoc., and San Bernardino City Professional Firefighters; and (B) February 1, 2013 Interim Modifications to Such Collective Bargaining Agreements

MOTION for Summary Judgment on Eligibility

MOTION for relief from automatic stay with supporting declarations ACTION IN NON-BANKRUPTCY FORUM RE: see memorandum of points and authorities Filed by SAN BERNARDINO CITY OF PROFESSIONAL FIREFIGHTERS LOCAL 891

MOTION for relief from automatic stay with supporting declarations ACTION IN NON-BANKRUPTCY FORUM RE: grievance and related procedures et seq

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Filed by SAN BERNARDINO  
POLICE OFFICERS ASSOCIATION

MOTION for relief from  
automatic stay with  
supporting declarations  
ACTION IN NON-BANKRUPTCY  
FORUM RE: to file unfair  
practice charge. Filed by  
SAN BERNARDINO PUBLIC  
EMPLOYEES ASSOC

STATUS CONFERENCE on Chapter  
9 Voluntary Petition

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MEREDITH A. JURY  
UNITED STATES BANKRUPTCY COURT

APPEARANCES:

For the Debtor:

PAUL R. GLASSMAN, ESQ.  
FRED NEUFELD, ESQ.  
Stradling Yocca Carlson &  
Rauth, P.C.  
100 Wilshire Boulevard  
4th Floor  
Santa Monica, CA 90401

For the City of San  
Bernardino:

JAMES F. PENMAN, ESQ.  
City Attorney's Office  
300 North D Street  
Sixth Floor  
San Bernardino, CA 92418

For CalPERS:

MICHAEL J. GEARIN, ESQ.  
MICHAEL K. RYAN, ESQ.  
K&L Gates  
925 Fourth Avenue  
Suite 2900  
Seattle, WA 98104

1	For CalPERS:	MICHAEL B. LUBIC, ESQ. K&L Gates
2		10100 Santa Monica Boulevard
3		7th Floor
4		Los Angeles, CA 90067
5	For Ambac Inc. Co. and Wells Fargo:	METTE H. KURTH, ESQ. Arent Fox LLP
6		555 West Fifth Street
7		Los Angeles, CA 90013
8	For Ambac Inc. Co. and Wells Fargo: (Telephonic)	DAVID L. DUBROW, ESQ. Arent Fox LLP
9		1675 Broadway
10		New York, NY 10019
11	For San Bernardino Police Officers Association:	RON OLINER, ESQ. Duane Morris LLP
12		One Market Plaza
13		Suite 2200
14		San Francisco, CA 94105
15	For San Bernardino City Professional Firefighters:	COREY W. GLAVE, ESQ Corey W. Glave, Attorney at Law
16		1042 2nd Street
17		Hermosa Beach, CA 90254
18	For San Bernardino City Professional Firefighters:	DAVID M. GOODRICH, ESQ. Marshack Hays LLP
19		870 Roosevelt Avenue
20		Irvine, CA 92620
21	For Certain Retired Employees:	ANNE A. UYEDA, ESQ. Bienert, Miller & Katzman, PLC
22		903 Calle Amanecer
23		Suite 350
24		San Clemente, CA 92673
25	For National Public Finance Guarantee:	DEBRA A. DANDENEAU, ESQ. Weil, Gotshal & Manges LLP
		767 Fifth Avenue
		New York, NY 10153

1 Court Recorder: RENEE JEWELL  
2 United States Bankruptcy  
3 Court  
4 3420 Twelfth Street  
5 Riverside, CA 92501  
6 (855)460-9641

7 Transcriber: PENINA WOLICKI  
8 eScribers, LLC  
9 700 West 152nd Street,  
10 Suite #607  
11 New York, NY 10040  
12 (973)406-2250

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29 Proceedings recorded by electronic sound recording;  
30 transcript provided by transcription service.

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CITY OF SAN BERNARDINO

1 RIVERSIDE, CALIFORNIA AUGUST 28, 2013 1:30 PM

2 --oOo--

3 (Call to order of the Court.)

4 THE COURT: Now is the time and place in the matters  
5 set on the Court's 1:30 calendar in the Chapter 9 proceeding of  
6 the City of San Bernardino. I suppose it would help if I got  
7 the page up. I think the first matter, if I've turned to the  
8 right page, is the -- well, it is not the first matter.

9 We're skipping number 22, which are the continued  
10 motions on the 365 motions. Going to number 23, because I  
11 certainly intend to do that first, the motion for summary  
12 judgment on the eligibility filed by the City, opposed by  
13 CalPERS.

14 Because the issues in this motion are distinct to the  
15 parties that have briefed and will be arguing the case after I  
16 give my tentative ruling, I'm going to take only the  
17 appearances of people that will be speaking on the motion.  
18 After I complete the ruling on the motion, then I will take a  
19 brief recess, come back and take the appearances of all other  
20 parties that would be participating on the other matters on the  
21 calendar.

22 So calling for the appearances on the summary judgment  
23 motion.

24 MR. GEARIN: Good afternoon, Your Honor. Michael  
25 Gearin of K&L Gates for CalPERS. Also in the courtroom with me

CITY OF SAN BERNARDINO

1 is my colleague, Michael Ryan. To the extent the Court has any  
2 questions about specific evidentiary objection issues, he will  
3 address those --

4 THE COURT: Okay.

5 MR. GEARIN: -- but I'll address all the rest of the  
6 oral argument.

7 THE COURT: All right. Thank you.

8 MS. KURTH: Mette Kurth with Arent Fox LLP on behalf  
9 of Ambac Insurance Company and Wells Fargo Bank, N.A. NEPK.  
10 And David Dubrow from our New York office, I believe, is on the  
11 line --

12 THE COURT: I believe he is.

13 MS. KURTH: -- with the --

14 THE COURT: Do you want to make an appearance, Mr.  
15 Dubrow?

16 MR. DUBROW: Sure. David Dubrow from Arent Fox.  
17 Thank you very much.

18 THE COURT: Thank you.

19 MR. GLASSMAN: Good afternoon, Your Honor. Paul  
20 Glassman and Fred Neufeld of Stradling Yocca Carlson & Rauth,  
21 for the City of San Bernardino. Also appearing for the City is  
22 James Penman, the City Attorney. Also in attendance from the  
23 City are the Mayor, Patrick Morris; council members Wendy  
24 McCammack, Virginia Marquez, Robert Jenkins, and Fred Shorett;  
25 the City Manager, Allen Parker; Michael Busch of Urban Futures,

CITY OF SAN BERNARDINO

1 the financial consultant for the City; Jolena Grider, Senior  
2 Assistant City Attorney; and Steven Graham, Deputy City  
3 Attorney with the City Attorney's Office.

4 THE COURT: All right. I am going to give a tentative  
5 ruling on this matter. It will be lengthy, I believe, if my  
6 notes give me any indication how long it will take. And I will  
7 then entertain argument from the parties at the conclusion of  
8 that. If it is lengthy enough and people want to take a break  
9 after I announce the tentative, please let me know, and I will  
10 let you do that.

11 To not keep everybody here in suspense, I am going to  
12 grant the motion in favor of the City and rule that as a matter  
13 of law, based on the uncontroverted facts that have been placed  
14 before the Court on this summary judgment motion, that the City  
15 is eligible to remain in Chapter 9 and to proceed with the  
16 document plan of adjustment.

17 In making this ruling I'd initially like to make some  
18 preliminary comments that overrule or sort of direct the ruling  
19 that I'm going to make this afternoon. The challenges to the  
20 eligibility of the City for Chapter 9 are controlled by the  
21 objections that were filed with the Court on October 24th,  
22 2012. There was nothing preliminary about the Court's deadline  
23 for the filing of objections on that date. It was a hard date  
24 to file objections.

25 The Court is aware that CalPERS filed their objection

CITY OF SAN BERNARDINO

1 with some purported reservation of rights to object on more or  
2 different grounds. That was their statement. It was not  
3 something that was ever adopted by the Court. There was never  
4 an order extending the time to object. And the issues that  
5 were set forth in their objection are those that control my  
6 ruling of contested issues in the summary judgment motion.

7           There have been many open court discussions about what  
8 the challenges to eligibility encompassed. I began -- believe  
9 beginning in November and continuing thereon, there were many  
10 colloquies about what the issues were at the status  
11 conferences. And those issues were well defined by the  
12 objections that were filed with the Court.

13           The SBPEA union and CalPERS were the only original  
14 objecting parties. The union's objection was under 109(c)(2),  
15 the state authorization to file, which brought into play the  
16 emergency declaration under 109(c)(3), the issue of insolvency  
17 under 109(c)(4), and 921. The CalPERS objections were under  
18 109(c)(4) and 921.

19           SBPEA withdrew in open court, its objection on  
20 insolvency several months ago. I've forgotten exactly which  
21 hearing it was. The City made a statement that they believed  
22 that SBPEA had withdrawn its objection on insolvency, and their  
23 counsel confirmed that withdrawal in open court. And I have  
24 considered that issue not objected to since.

25           It was at that time that I began thinking, as I have



CITY OF SAN BERNARDINO

1 thought throughout this case, that other than the solvency  
2 issue, there were no genuine issues of disputed fact that  
3 really needed to be determined by the parties through discovery  
4 or otherwise. I think I said that very early on at the  
5 hearings in November or December. I know I repeated it in  
6 January, because I was all ready to almost go to this type of  
7 procedure then. CalPERS got up and argued that intent was some  
8 factual issue that they needed discovery on. And I did not  
9 move forward in pulling the plug at that time on discovery and  
10 left the issue pending.

11 In early August, after the oppositions -- the initial  
12 responses to the summary judgment motions were due, the  
13 settlement between SBPEA union and the City was finalized, and  
14 the balance of the SBPEA objection was withdrawn, meaning that  
15 the challenge to the 109(c)(2), the 109(c)(3) already gone,  
16 were both gone, leaving only the objection under 109(c)(4) and  
17 921.

18 There's a fair amount in the opposition filed by  
19 CalPERS about the issues that I think are 109(c)(5) and  
20 109(c)(3) issues. Although I have read them and I will have  
21 comments to make about the evidence that they think is out  
22 there on them, I have disregarded those arguments. They are  
23 not contested matters before the Court. And I believe that  
24 they are already resolved.

25 In affirming that there is no reservation of rights by

CITY OF SAN BERNARDINO

1 CalPERS or no right to raise issues that they did not raise,  
2 I'm really just following the general policy of bankruptcy  
3 courts in all proceedings, which is finality and moving cases  
4 forward is very important. This case has clearly not moved  
5 forward quickly. We are almost eleven months into the case --  
6 twelve months -- thirteen months, excuse me -- into the case,  
7 and at the time I structured the summary judgment motion, we  
8 were nine months in. And I might also remark, despite its  
9 reservation of rights, CalPERS never filed an amended objection  
10 or anything that would have put before the Court the issues  
11 that I will not consider this afternoon.

12           The City acts as a body, and although I entertained  
13 the arguments that were made by CalPERS in January about we  
14 need to discover about the subjective intent for our objections  
15 on good faith and desire to effect a plan of adjustment at the  
16 time of the filing of the petition, I really questioned whether  
17 there was discovery to be done on that issue.

18           Although the word "subjective" is out there in a  
19 number of the Chapter 9 cases, "it is a subjective inquiry as  
20 to whether a city desires", if you read each and every one of  
21 those cases, the only evidence that has ever been considered by  
22 any bankruptcy court in looking at desire or good faith, are  
23 the objective acts that have been taken by the city. There's  
24 no case that turns on state of mind. I'll have more to say  
25 about the Ninth Circuit law on that later. There is no case

CITY OF SAN BERNARDINO

1 that does the what-does-this-word-mean-type of objective --  
2 subjective inquiry. They all reached their subjective -- I  
3 really think it's more a discretionary decision than  
4 subjective, but the words are "subjective" in the case law --  
5 by looking at acts which are not in dispute in making their  
6 decision.

7           The private thoughts or statements of any member of  
8 the City Council or the City staff are not relevant. The state  
9 of mind of the people making the City's decisions are  
10 immaterial and not relevant. Even to a great extent, the  
11 comments anybody might have made in a City Council meeting when  
12 discussing in the public forum the decision to decide to pass a  
13 resolution or otherwise, are not relevant to the Court,  
14 although they certainly are open and in the minutes to some  
15 extent.

16           A third thing that I have taken into account in making  
17 this ruling is the petition date, as in all bankruptcy matters,  
18 is important. And the assertion by CalPERS to things that  
19 might have happened in 2007 and 2008 and 2010 are somehow  
20 relevant to the desire to effect a plan and the good faith of  
21 the debtor in filing the petition on August 1st, 2012, is just  
22 far too remote for this Court to consider important.

23           Again, reading all the cases, there's not a one of  
24 them that is looking at anything other than immediate  
25 determining facts when they consider the behaviors of the City

CITY OF SAN BERNARDINO

1 in choosing to file Chapter 9. Most of them, other than  
2 perhaps having a historical context in the way that Judge Klein  
3 wrote in his eligibility decision in describing how the City  
4 got into the financial mess it got into, most of them don't  
5 look very far back at all. They look at the immediate things  
6 that were going on. And I think that the case law and the  
7 inquiry that the Court is supposed to make, I am compelled to  
8 look at the immediate things going on, not something that  
9 happened in 2007, 2008, or in 2009.

10 So to the extent that CalPERS has asserted those  
11 events are important or have requested discovery under the  
12 56(d) motion, I think it is irrelevant and I am not considering  
13 that. Now, part of me kind of says maybe the City should have  
14 filed in 2007/2008. Certainly there were reports before the  
15 City that indicated they were in some financial difficulty.  
16 But because they didn't then, doesn't mean they can't now. And  
17 therefore, it's too remote to be important.

18 Finally, before I go into the merits of the  
19 eligibility issues, both in the prima facie case and the  
20 contested part of the motion, there is no script for what  
21 brings a city into Chapter 9. Reading all of the city cases  
22 that are out there as opposed to a district case or otherwise,  
23 they all of them came in under different circumstances.  
24 Different events led up to their filing. Sometimes, like  
25 Desert Hot Springs, Town of Mammoth, they had one major

CITY OF SAN BERNARDINO

1 judgment creditor that was aggressively going to assert their  
2 right to collect on their judgment. It's certainly a different  
3 situation than this City faced.

4 The facts of Vallejo and Stockton are certainly  
5 distinct from what San Bernardino did here. San Bernardino  
6 tested the emergency filing section of the new state court  
7 provisions and chose not to go the initial evaluation way, or  
8 decided they didn't have time, I guess would be a better way of  
9 saying it, because of the impending cash crunch that was facing  
10 them in July of 2012. So the way they got here was obviously  
11 very different than the way Stockton arrived at its Chapter 9.

12 The other city cases had other distinct differences.  
13 Just because they're different, doesn't mean it's wrong. And  
14 just because the City is short-staffed and is not as organized  
15 as, for example, Stockton was, when it filed its case and  
16 projecting where it's going or where it was, doesn't in and of  
17 itself prevent it from seeking the relief they have sought in  
18 the bankruptcy court, to have an opportunity to reorganize  
19 their fiscal situation and have an opportunity to continue as a  
20 viable city that is safe for its citizens.

21 The City has set forth its prima facie case in the  
22 motion. And on the issue of 109(c)(1), (c)(2), (c)(3), and  
23 (c)(5), they have satisfied the Court that they are eligible to  
24 file this petition. (c)(1), they are a municipality. That  
25 really is not in dispute. The (c)(2) situation authorized by

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1 the State, again, there was a challenge to that, that would  
2 have tested what is an emergency. That challenge was  
3 withdrawn. I have nothing to say on that since it's  
4 unchallenged. It looks like an emergency to me, and that's  
5 enough for my uncontested ruling.

6 The issue of insolvency, which is the one that hung up  
7 Vallejo and the BAP for that matter, was only challenged, and  
8 has been withdrawn. Even before it was withdrawn I made the  
9 comment on the record a couple times that it appears the City  
10 is broke. I thought in the solitude of my chambers that is  
11 sounded like I had pre-ruled on that issue, and I got off the  
12 hook, because that objection was withdrawn. But I don't think  
13 anybody in this courtroom seriously ever thought that the City  
14 was not insolvent.

15 First of all, they had defaulted on paying the bonds  
16 and other of their immediate obligations in July, before they  
17 even filed, so they were not paying their debts since they came  
18 due, which is a fairly easy definition. And luckily we avoided  
19 the massive motions and the eight-day evidentiary hearing that  
20 Vallejo had to set the precedent on, by having that issue not  
21 seriously challenged.

22 And then the 109(c)(5) issue, again, there was never  
23 an objection to that. So all of the things that are in the  
24 CalPERS papers that might have been pertinent to the (c)(5) are  
25 not before the Court in a contested matter.

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1 I believe that the Vallejo standard -- I'm now talking  
2 about the BAP case -- in speaking about what it is to have so  
3 many creditors that it was impracticable, pretty much is  
4 written in such a way that almost any city with a large number  
5 of retirees and trade creditors and then various bonds, secured  
6 creditors of various capacities, CalPERS obligations, but more  
7 importantly, the general unsecured trade creditors and the  
8 retirees, who have no organized way of participating in some  
9 work-out without the ability to form committees or otherwise  
10 participate in a bankruptcy proceeding, I don't -- my mind is,  
11 any city the size of San Bernardino is going to have a creditor  
12 body that's going to be impracticable to negotiate with without  
13 the assistance of the bankruptcy process.

14 And their original statement of qualifications filed  
15 by the City only relied on the 109(c)(5)(C) ground. They then  
16 added later the 109(c)(5)(D) ground of the threat of immediate  
17 execution by the civil rights judgment holders. And although,  
18 again, (c)(5) isn't before me, that addition of that -- and I  
19 actually made a comment on the record about it -- gave lots of  
20 furor to the fire coming from CalPERS -- that is all  
21 irrelevant -- and perhaps made their brief longer than it would  
22 have been if I hadn't -- if that hadn't been amended by the  
23 City. But 109(c)(5) is an "or", and we only need one, and  
24 clearly it is impracticable under the standard of the Vallejo  
25 case. So I've found the City has made a prima facie case. And

CITY OF SAN BERNARDINO

1 then we have a contest of (c) (4), which I will describe later.

2           The statement of uncontroverted facts set forth by the  
3 City is supported by mostly things that are certainly publicly  
4 undisputed things. I will speak -- again, after I go through  
5 some other things in the 56(d) -- about how I handled the  
6 objections to the declarations and the declaration of Ms.  
7 Travis-Miller and the statement of qualifications, but there  
8 really is nothing in their statement of uncontroverted facts  
9 that is truly controverted before the Court, because they are  
10 describing reports that were presented to the City. There's no  
11 question they were prepared and presented at City Council  
12 meetings, which they were done in public where the City Council  
13 met and adopted a resolution; met and adopted a fiscal  
14 emergency plan; met in an open court, adopted a pre-pendency  
15 plan; met in -- I don't mean open court -- open common council  
16 meeting -- met in an open meeting, adopted the pendency plan;  
17 later adopted a budget and did other things.

18           Those -- and the reports that were presented to them  
19 by their staff or their consultants are all public records in  
20 the City's files. None of those things are controverted. They  
21 are what they are. They are acts that took place. They are  
22 documents that exist. And they are really what the City has  
23 based its prima facie case on.

24           So I don't think there's any serious challenge to the  
25 uncontroverted facts that are set forth by the City. But



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1 CalPERS wants discovery. And the Court is well aware of Rule  
2 56(d) and all of the case law that support why my choosing this  
3 procedure was perhaps unusual; it should not have been a  
4 surprise, but perhaps unusual. And I am certainly aware that  
5 the case law supports that if there are material facts which  
6 will assist a nonmoving party in preparing their defense,  
7 they're entitled to discover those facts before they have to  
8 file their final opposition to a motion for summary judgment.

9 The CalPERS argues that I abruptly cut off discovery,  
10 which I had never ruled on at all, and set the summary judgment  
11 when we were here in May or June -- I've forgotten when it was.  
12 Again, I sent the message I didn't think there were any  
13 undisputed (sic) facts on most of the eligibility issues as  
14 early as November, December, and January. And so that I didn't  
15 think there were any facts in dispute should not have been a  
16 surprise to CalPERS.

17 But then when the matter came up in court, I still  
18 don't question the approach I took, and quite obviously I don't  
19 question it because of where I'm going. But they hadn't even  
20 commenced this formal discovery they were screaming about  
21 doing, purely by their own choice, quite frankly. I mean, they  
22 had an agreement with the City, but they could have terminated  
23 that agreement at any time. There was no stay on discovery  
24 ever issued by the Court.

25 And they kept filing these status conference reports

CITY OF SAN BERNARDINO

1 that had to do with a lot of things that had nothing to do with  
2 eligibility. And finally, I got the two status conference  
3 reports that were filed, I think, sometime the day before the  
4 hearing in which I set this procedure. And the City is saying  
5 there really are no factual disputes, now that insolvency has  
6 gone away. And CalPERS had this laundry list of things that  
7 they wanted from the City or they wanted the Court to order,  
8 most of which I had no authority to do. And that laundry list  
9 had nothing to do with eligibility. So I thought, what are we  
10 doing here? We're not getting anywhere. We're a year into the  
11 case and we're not moving.

12 So I thought, okay, if I -- they start their formal  
13 discovery, the City's going to -- and I said this in the  
14 hearing -- the City's going to object and they're going to say  
15 this isn't relevant to the issues of law that the Court has to  
16 decide on eligibility. So the City would object. Then they'd  
17 tee up a discovery motion, and then I'd have to rule on the  
18 same things that I'm actually prepared to rule on today, which  
19 is what is the scope of what the Court is supposed to look at  
20 in making these determinations and whether there is anything  
21 material that might be discovered by doing all the things that  
22 CalPERS wanted to do.

23 So rather than go through the -- what would have been  
24 a long, drawn-out process of starting formal discovery and  
25 having those objections and having the motions to compel and

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1 ruling on what I thought was important on the rulings that I  
2 have to make, I said let's do it by summary judgment, and let  
3 them try to raise as the issues of genuine issues of fact,  
4 there, and then I will then -- at least I've moved the case  
5 forward. And I have.

6           Yeah, I couldn't have done this if insolvency was an  
7 issue, but when it came down to only (c)(4) and 921, I thought  
8 I could.

9           I gave CalPERS ample opportunity to demonstrate to me  
10 that there were discovery they needed on the material disputed  
11 facts, genuine issues which would entitle them to discovery and  
12 a live trial, evidentiary hearing. They hadn't convinced me of  
13 anything at that hearing.

14           We had the status conference in July after the City  
15 filed its motion, for the very reason that I wished that  
16 CalPERS would tee up why they needed discovery on those issues,  
17 and they didn't do it then, for some reason; maybe because they  
18 misunderstood. But they had that opportunity and they didn't  
19 take it. And then I instructed them at that hearing, when they  
20 were upset because I was depriving them of discovery, that they  
21 could do it in their 56(d) motion, which in fact, they have  
22 done.

23           All right. Now, I'm going into the details of what  
24 they wished to discover on. Like the City in its reply, I have  
25 grouped them into three groups of things that they wish

CITY OF SAN BERNARDINO

1 discovery on. The A group is the remote facts, 2007 through  
2 2010. As I mentioned, I can't imagine that there is anything  
3 that supports the relevancy of the City not doing something  
4 before to their doing something in 2012. They -- I can take  
5 the facts as true that are there. There are long-standing  
6 budgetary issues at the City of San Bernardino. They had  
7 reports given to them by their professionals and staff that  
8 they should be addressing what to do to balance their budget,  
9 and they didn't.

10 So obviously they saw the reports at the Council  
11 meeting in 2010, maybe 2008. The deep and mean insolvency  
12 issues between 2007 and 2010 were before them. The fact that  
13 the Fire and Police recommended some cuts that might have  
14 helped them balance their budget in 2009, they didn't do it. I  
15 can assume all of those things are true. I don't know why we  
16 need discovery on them. I think they're irrelevant. I think  
17 they're too remote to make any difference on (c)(4) and 921.

18 They might have been relevant -- I'm not sure, because  
19 I didn't have to figure this out -- on the 109(c)(2) issue, the  
20 emergency part of it. Emergency is defined, at least in  
21 California Environmental Quality Act, as a sudden unexpected  
22 event. I once did a trial about the water basin under the City  
23 of San Bernardino, as to whether the rising ground water in  
24 that basin was a sudden unexpected event. Perhaps that was  
25 the -- what the City might have known five years before might

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1 have been important to their declaration of emergency, but it  
2 is not important to the issue before the Court, and it is not  
3 something that I would think was important.

4           The next grouping of facts were the facts immediately  
5 preceding the petition. The City kind of put them in the two  
6 months before they filed. I think they go back a little  
7 further than that, because I think some of the cash-outs to the  
8 employees and other preferential -- potentially preferential  
9 transfers might have been a little earlier than the two months  
10 before the petition. But they are certainly within the time  
11 frame that I think what was going on at the City and what steps  
12 the City took or didn't take are relevant.

13           The first of those issues is the water fund had cash  
14 on the petition date. There's no dispute they did. The City  
15 has pointed out under California Constitutional law that it  
16 didn't help the City's general fund. Article XIII C and D and  
17 the Constitution prevent the City from using the water funds  
18 without a two-thirds vote of their populace. And they can't  
19 borrow the funds from the water fund under Article XVI Section  
20 18 of the Constitution unless they could repay it within the  
21 fiscal year that they borrowed it.

22           Facing a forty-five-million dollar cash deficit in the  
23 2012/2013 budget -- an issue that really isn't disputed. I  
24 mean, that number has been given to me since the day this case  
25 was filed, and it's certainly within a million of that,

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1 probably, if you redid the accounting. They couldn't repay.  
2 So the water fund issue is irrelevant. They could not have  
3 used the money. They could not borrow the money. And the fact  
4 that there was cash in the water fund doesn't matter, nor does  
5 there need to be discovery on that.

6 All of the things about the civil-rights judgments and  
7 what happened, what the City was doing when it settled those  
8 judgments, I actually want to make some comments about that  
9 when I talk about how the undisputed facts relate to the legal  
10 decisions I have to make.

11 It is fairly clear that it is undisputed that when the  
12 City entered into those judgments it did not have the means to  
13 pay them. That isn't very prudent of the City, and certainly  
14 probably put their outside counsel that were negotiating those  
15 settlements in uncomfortable positions later, and definitely  
16 uncomfortable positions before the district courts that  
17 wondered what was going on when their payments weren't made.  
18 But those things happen. And there's no discovery needed to be  
19 done on that.

20 And all of the things that happened in July that might  
21 have enticed the lawyer for one of the -- I think it was the  
22 miners, the miner's settlement the judge got the most upset  
23 about, and essentially, it appeared to me, was about to issue  
24 an execution order on the City's accounts. A state court judge  
25 could not have done that but a federal court can; under state

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1 law you can't, but under federal law you can, and the judge  
2 appeared to be about to do that.

3 Number one, it's a (c)(5)(D) issue. Nobody challenged  
4 it. And the rest of it, quite frankly, just doesn't matter to  
5 the legal decision the Court has to make. So they don't need  
6 discovery on that.

7 I'm going to take as undisputed that there was no term  
8 sheet for a plan. There was no proposed plan of adjustment at  
9 the time when they filed. Then I'll discuss why I think --  
10 actually, more importantly when the resolution -- the file was  
11 passed on July the 18th, 2012, I will discuss later why I think  
12 the fact that they didn't have a plan or term sheet isn't  
13 important, but I'll take that as true. And therefore, we don't  
14 need discovery on that.

15 There aren't enough employees in the financial  
16 department. How many times have we heard that in a courtroom?  
17 I'll take that as true. I don't think anybody says the City  
18 has enough people in their financial department. Insolvency is  
19 not at issue, so there's nothing there about the numbers. It  
20 actually enhances why the City needed the protection of  
21 bankruptcy, more than it says they didn't file in good faith.  
22 They needed that breathing spell to get their house in order  
23 when they came to finally recognize we don't have enough cash  
24 to make payroll if we pay everybody else on time.

25 And part of the reason they didn't have enough staff

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1 is because they didn't have enough money to have enough staff.  
2 You know, the tail is chasing the dog on that issue. So  
3 wherever that came up in open court or in the arguments made by  
4 CalPERS, first of all, it doesn't paint the City as a black-hat  
5 person because they don't have enough people, and it actually  
6 helps the City's case far more than it helps CalPERS' case.  
7 Because it really demonstrated, in a very concrete way, how the  
8 City is trying to survive without enough employees because it  
9 doesn't have enough money. And because it doesn't have enough  
10 employees, not only can it not get its books and records in  
11 order quickly without the help of their consultants, but it's  
12 also is having problems with the health, welfare, and safety of  
13 its citizens, with regard to the safety unions, and just other  
14 city-maintenance issues that undoubtedly are sloughing because  
15 there isn't enough of staff in any department.

16 The City clearly paid things that might be  
17 preferential transfers; they did make some large payments. The  
18 City's never questioned what CalPERS has asserted to be a true  
19 fact in that area: the large, potentially preferential  
20 transfers that occurred within the ninety days of filing  
21 bankruptcy. And so therefore, I'm willing to assume that is  
22 true. I don't see any reason to discover on that, what  
23 happened, or did it happen, because it happened. I'm going to  
24 find that it does not affect the desire to effect a plan or  
25 good faith. It is a recoverable preferential transfer, if in



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1 fact, it was preferential. And if the City won't do it, I  
2 believe that Section 926 says somebody else can do it. And  
3 those monies, if they were preferential, will be recovered.

4 The argument, and I'll take it as an offer of proof  
5 from the City, is that they were cash-outs to employees, that  
6 the Labor Code requires you to do certain things. The TAs  
7 undoubtedly require you to do certain things when people  
8 terminate from the City with regard to making lump-sum  
9 payments. And apparently the City did that.

10 And you know, the employees of the City weren't  
11 stupid. The City had already laid off some, was trying to find  
12 ways to cut their pay if they could, and anybody that wanted  
13 job security that had any other options was going to terminate  
14 and leave. And apparently that exasperated the amount of cash  
15 that had to go out to them. But again, if they did it wrong,  
16 those are recoverable and I don't think we need any more  
17 discovery on that, or that it is even going to be relevant to  
18 the Court's ultimate determination.

19 CalPERS, the other issue in the immediately post-  
20 petition facts is the City didn't consider any alternative when  
21 it adopted the resolution to file Chapter 9 on July 18th. I  
22 will admit the record is kind of slim in that area. The budget  
23 report, I looked at them, and said forty-five million dollars  
24 is a lot. We don't have any quick way to raise revenues  
25 because no City does. And this deficit is such that there's no

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1 way we can pay everybody that is due on July 1st and during the  
2 fiscal year 2012-2013. And you know, it kind of said we need  
3 the protection of Chapter 9.

4 Certainly, there are many of the reported cases where  
5 the cities much more seriously tried to not file Chapter 9 once  
6 they engaged in thoughts about it than this City did. And I  
7 take that in the hopper when I analyze what, if any, effect  
8 that has on the desire to effect a plan of adjustment or to  
9 file in good faith.

10 So that is a somewhat troublesome issue, but again,  
11 I'm going to assume that they did only what the budget report  
12 said, and what City Council -- Common Council meeting minutes  
13 reflect they did in July, about thinking about anything else.  
14 And it was fairly limiting. There's no discovery then needs to  
15 be done there because I'm assuming they did very little else.

16 The post-petition facts that are raised in the 56(d)  
17 motion: there were no meaningful negotiations with creditors  
18 regarding the plan. I guess that's post-petition. Well, there  
19 wasn't a lot. That's true -- that I know of, but then again  
20 maybe I don't know of. I know there's a mediation with Judge  
21 Clarkson about some of the union issues. I know there was some  
22 authorization from the City of Ms. Dawby (ph.) and Mr. Lubic  
23 (ph.) to meet at least with the unions about what the City  
24 would impose on them if they didn't agree.

25 The unions don't think that was a negotiation,

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1 certainly under labor law, and I haven't ruled yet on what is a  
2 negotiation to meet the Lisco (ph.) standard of 365 and the 365  
3 motion. And I think -- I take those facts as really  
4 uncontroverted. What happened happened. What are we going to  
5 discover about that? You know, I ruled on a motion to compel  
6 from the unions and denied it because there's no more to be  
7 discovered about what happened or didn't happen post-petition.

8 CalPERS argues there was no pendency plan until  
9 November 26th. Well, there wasn't. What are we going to  
10 discover about that? And that they only filed one because I  
11 impliedly ordered them to, which of course I can't order them  
12 to do anything under 904, so I didn't do that.

13 But I would say that, you know, the record reflects  
14 they -- it wasn't -- they didn't adopt the pendency plan in a  
15 vacuum with doing nothing before. They did adopt that fiscal  
16 emergency budget in July and their pre-pendency plan on August  
17 30th. Now, they weren't a very good road map for what needed  
18 to happen because they implied that payments would be made that  
19 weren't made immediately, and the City never had the ability to  
20 make. But I think they kind of -- the way I read the pendency  
21 plan, they kind of settled the pre-pendency plan to show why  
22 they couldn't, you know, do it without impairing their  
23 contracts. And then in the pendency plan they say this is what  
24 we're going to do to balance our budget. And then they  
25 afterward complained it was too short.

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1 Well, without the financial budget detail breakdown,  
2 which was eventually done by the City after the first of the  
3 year, everything was in that pendency plan that was in anybody  
4 else's. And there's no blueprint for what a pendency plan is  
5 supposed to be. It's supposed to describe how they hope to  
6 balance their budget while the plan of adjustment is being  
7 negotiated. And it did. I mean -- and there's a two-page  
8 budget there with that detail that shows how they're going to  
9 balance it.

10 Now, obviously they made some assumptions: number  
11 one, that their imposed conditions -- they actually only  
12 imposed on three of the unions because four of them agreed --  
13 were in place. Their employee budgets couldn't have been what  
14 they were unless they were implementing what they said they  
15 were going to try to negotiate but they ended up imposing on  
16 the three unions that didn't agree. So again, there's nothing  
17 to be discovered about the pendency plan.

18 The next issue is no one has been assigned in the City  
19 to prepare the plan. I'm going to take that as true. It might  
20 not be, but I also know and was a sign because the financial  
21 staff is short. Certainly everything that the City has been  
22 doing is a move toward what they need to prepare a plan. And  
23 without all the things they've been doing -- slowly, agreed,  
24 slowly, and with short staff and consultants doing the work for  
25 them -- are necessary for them to ever get a plan in place

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1 because they've got to get a handle on their debts and their  
2 creditors -- I mean, their assets and their creditors, or their  
3 income and their creditors. So I will take it as true that no  
4 one has been assigned in the City staff to prepare a plan.  
5 Quite frankly, attorneys usually do it and I don't know that  
6 that has started or not. And whether it has started might be  
7 confidential, but I'm going to assume for the purpose of my  
8 legal ruling, that no one has been assigned, and therefore,  
9 there's nothing to discover there.

10 CalPERS' next argument is they didn't get reconciled  
11 bank statements until February, and other financial data they  
12 asked. If that's an issue at all, it's a plan issue. And I  
13 don't see that that matters that CalPERS didn't get what it  
14 wanted.

15 Their expert, Mr. Christopher Lee, tells me that the  
16 City was unable to do cash projections until April, and that  
17 somehow that affected their desire to effect a plan of  
18 adjustment. It might affect their ability to do a plan of  
19 adjustment until they can do cash projections, but I'm not  
20 prepared to find it affects their desire. So I'll take that as  
21 true. There's no discovery that's needed on that.

22 They paid some pre-petition claims post-petition and  
23 they admit they did a couple of trade creditors: fuel and I  
24 forgot what the other one was. If they did that, that's going  
25 to come up when you have to treat everybody the same in a plan.

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1 But I don't think it's a good-faith issue, which I think is  
2 what is argued by CalPERS. So I'm going to assume they did  
3 that and put that one in the hopper when I rule.

4 They haven't paid the administrative expenses -- them,  
5 CalPERS -- that have accrued post-petition. First of all, it  
6 is an open legal question whether there are administrative  
7 expenses in a Chapter 9. I asked the parties back in January  
8 if they wanted me to decide that and they said not yet. So I'm  
9 not going to assume there are or aren't, but they haven't paid  
10 them. They haven't paid CalPERS. I agree with that. There's  
11 no discovery to be done there.

12 They accrued some cash post-petition. Well, we would  
13 hope that ever debtor was accruing some cash before they  
14 proposed their plan because there are some things that usually  
15 you need cash for -- maybe or maybe not, depending on whether  
16 there are administrative expenses on petition date. I don't  
17 know what -- how that's no desire to effect a plan or good  
18 faith. So I'm going to assume that's true. They accrued cash  
19 post-petition.

20 And then there's this broad statement the City  
21 withheld financial information. I will say that when that was  
22 argued in court by Mr. Lubic at one of the status conferences  
23 the City attorney adamantly deny there had been any withholding  
24 of any financial information. But CalPERS argues that without  
25 telling me what type of information or why it's important to

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1 the issues I had to decide, so I didn't know what to do with  
2 that.

3 And then they argued Ms. Travis-Miller didn't have the  
4 authority to sign the statement of qualifications. I am  
5 satisfied by the legal argument of the City, which I think is  
6 very clear, that the Resolution 2012-206 authorized her to take  
7 the action necessary to prosecute filing of the Chapter 9, and  
8 that the Common Council had the authority to delegate that  
9 authority to Ms. Travis-Miller under the City's Charter 100 and  
10 some other subsections. And therefore, that's a nonissue  
11 before the Court.

12 There are some other issues that were not in those  
13 three categories that are brought up in the declaration from  
14 Mr. Lubic in support of a 56(d) motion that I think I need to  
15 address to make it clear I didn't ignore what CalPERS thought  
16 they wanted to get.

17 They want to take the depositions of Mr. Busch and Mr.  
18 Simpson. I'm willing, and primarily because they provided  
19 declarations that the City has relied on for its uncontroverted  
20 facts; insolvency isn't at issue so I don't know what else is  
21 even close to relevant that Mr. Busch and Mr. Simpson might  
22 say. Fiscal emergency's not at issue. So I looked at the  
23 statement of uncontroverted facts and all the Busch and Simpson  
24 declarations do for that statement is they identify the reports  
25 that were prepared by either staff or the consultant and

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1 presented to the City Council: the budget report, the fiscal-  
2 emergency budget, the pre-pendency budget, the pendency plan,  
3 the further budgeting that happened after the first of the  
4 year; and that is the only thing those declarations do support.  
5 So there isn't anything that is genuine issue of fact to  
6 discover from either Mr. Busch or Mr. Simpson. So I would  
7 think that their depositions aren't pertinent on any subjects  
8 before the Court.

9 In the declaration, there are some things set forth in  
10 paragraph 16 they want to discover about the knowledge of the  
11 City about its financial problems earlier. I've already said  
12 what I think of the remote facts. They are not relevant, and I  
13 will take it as a fact that the City knew it had financial  
14 problems way before they filed. And besides, if it is an issue  
15 at all, it's a 109(c)(2) issue. And therefore, I don't think  
16 they need discovery on that.

17 There is no pre-filing plan to operate without paying  
18 administrative expenses. Again, it assumes a legal conclusion  
19 that I haven't reached, that there are any. And I take it as  
20 true that they didn't plan to pay those expenses after July 1.  
21 And they didn't. That there was not enough money to pay them  
22 and CalPERS I think is undisputed and not at issue.

23 That they -- they want discovery on the pre-petition  
24 cash-outs. Again, I will assume they did that, and if it had a  
25 legal impact on my ruling, I would take that into



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1 consideration. And I will, when I rule on the law.

2 Also in that paragraph in Mr. Lubic's declaration, the  
3 authorization of Ms. Travis-Miller, they want to depose her  
4 about her authority. I think the resolution in the charter  
5 make it clear she had the authority.

6 Again, Simpson's -- Simpson again; he was in there a  
7 couple times. The only thing he did was authenticate the  
8 reports that were placed before the City Council that they  
9 considered. They want to take these five -- five or six  
10 depositions of Kennedy, Passion (ph.), McNeely, Wilson,  
11 Weinberg, Majaj, who are all remote and not relevant to what  
12 was in the City's desire on the day they filed their petition.

13 Again the -- and here's where I'm gonna, just because  
14 it's in my notes here -- talk a little bit more about the  
15 subjective intent, which I guess is why they want to take those  
16 depositions. They imply that they want to inquire into why  
17 things were being done. Why doesn't matter. They were being  
18 done is what matters. State of mind is not an issue.

19 In the Stockton case, Judge Klein said the state of  
20 mind of an individual or an employee is not relevant to  
21 anything that is an act of the City. And then he talks about  
22 the legislative privilege would prevent inquiry into those  
23 areas anyway. Pierce County supports that state of mind is not  
24 an issue. The Ninth Circuit cases, Arnold and Marsh, which are  
25 Chapter 11 cases, say a debtor's subjective intent is not at

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1 issue. And on top of that, in closed session we have the  
2 closed-session privilege, we have the legislative privilege,  
3 none of which can be discovered about. So there is nothing to  
4 be discovered in taking depositions of any of these City  
5 employees or staff members or consultants on any issues that  
6 have to do with the intent of the City.

7 And finally, I have Exhibit A to Mr. Lubic's  
8 declaration, the documents they want from the City. I have  
9 categorized them in four or five different categories as to why  
10 I think they are not likely to lead to any genuine issues, or  
11 not going to lead to any genuine issues.

12 The following documents were about issues that I have  
13 assumed are true, or are about (c) (2) or (c) (5); that is  
14 request 3, 4, 5, 6, 7, 9, 10, 11, and 13. Documents 8 and 12  
15 are legal conclusion type of documents and there wouldn't be  
16 anything pertinent to discover there.

17 Other documents that are either in the public record  
18 of the City Council in open meetings -- or Common Council -- I  
19 will do that throughout; I'm sorry -- or they would be in  
20 closed session and then therefore be subject to a legislative  
21 privilege or a closed-session privilege. And those are  
22 requests 1, 2, 8, 16, 17, 18, 19, 20, and 21.

23 Those documents which might be about facts that I am  
24 assuming are true against the City are document categories 9,  
25 10, 11, 23, 24 and 36.

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1           And then a whole group of documents that they -- there  
2 isn't even an argument from CalPERS anywhere in their papers  
3 that I could figure out why they thought they were relevant:  
4 14, 15, 16, 25, 26, 27, 28, 29, 30, and 31 through 35. So  
5 there's nothing raised in the document request that needs  
6 discovery for the Court to make the legal conclusions on  
7 109(c)(4) or 921.

8           Then with regard to the evidentiary objections, I  
9 would sustain all of them because it doesn't matter except for  
10 the following things that support the uncontroverted facts that  
11 the City has filed in support of its motion.

12           Ms. Hanna, who is the city clerk, has essentially laid  
13 the foundation for and authenticated the agendas and minutes of  
14 the City Council meetings that occurred in July and other  
15 times -- July of 2012 and subsequent months, at the relevant  
16 meetings where they heard the reports, discussed them in open  
17 session, adopted the resolutions. The city clerk is obviously  
18 the right person to authenticate the agendas and the minutes  
19 and the reports that were in the agenda packages that were  
20 presented to the Common Council. She authenticated, and she  
21 and Ms. Travis-Miller also authenticated the July fiscal-  
22 emergency plan, the cash-flow projections that were presented  
23 to the budget. There is no question that have the foundation  
24 to authenticate those documents. And to the extent they were  
25 both sitting in the meetings, if there was some comment like a

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1 meeting took place, and it was in open session, and everybody  
2 was there, they were there; they have personal knowledge, it's  
3 not hearsay, and they may testify to those facts.

4           Mr. Busch also authenticated the various financial  
5 documents that his firm presented to the City which I think  
6 entailed the July fiscal-emergency plan, the cash-flow  
7 projections, the pre-pendency plan that was adopted in August.  
8 I think there were some updates to the pre-pendency plan,  
9 although I'm not sure that was in the statement of  
10 uncontroverted facts. The pendency plan, all he did was  
11 authenticate those things. They were prepared by his firm,  
12 presented to the City. They are what they are and I would  
13 overrule any objection to his doing that.

14           The Dubrow (ph.) and Lubic (ph.) declarations, about  
15 all I'm going to take out of them is there was some attempt to  
16 talk to the unions about what they were going to impose. Maybe  
17 it wasn't a negotiation, but they met with them, they tried to  
18 meet with them, and they basically said this is what the City  
19 has to do to balance its budget, and there's nothing else that  
20 their declarations support in the statement of uncontroverted  
21 facts. So anything else they said I would grant your objection  
22 and I would not consider it. And I have not.

23           And then there's another Busch authentication of the  
24 April 22nd budget that was adopted by the City, again the  
25 Common Council, in an open meeting. And his firm, as now

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1 essentially the head of the financial department, as  
2 consultants, prepared that budget. He clearly had the personal  
3 knowledge to authenticate that document.

4 Those are the only things in any of those declarations  
5 that the City has relied on in its statement of uncontroverted  
6 facts. So I will sustain any other objections because it  
7 doesn't matter. And so that's how I rule on the evidentiary  
8 objections.

9 With regard to the City's, I would let everything in  
10 because there's nothing in there that I have put in the pile of  
11 facts that have been -- either I'm going to assume what was put  
12 in their declaration is true and I will rule it doesn't matter  
13 on the legal issues. So I didn't even go through them in  
14 detail. It is perhaps improper to not do that, but I didn't,  
15 and I'm not going to rule on those objections.

16 So that's why I am denying the Rule 56(d) motion. I  
17 have come to the conclusion that this matter can be decided as  
18 a matter of law on the statement of uncontroverted facts, and  
19 that there are no general issues to be discovered.

20 What that means is my ruling would be up or down for  
21 the City. And I said that when I set this up as a summary  
22 judgment motion on eligibility. If I really thought the facts  
23 were undisputed, and again I am assuming many of the assertions  
24 of CalPERS to be true, and will analyze them in my ruling, I  
25 would rule one way or the other, up or down for the City today.

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1           Once I get here, I either have to say the City is  
2 eligible or they will never be eligible, and therefore, the  
3 case should be dismissed. And my ruling is the City's eligible  
4 but if I didn't weigh the facts as I weigh them, under the case  
5 law that I have read, I would have to rule for CalPERS that the  
6 City is ineligible and the case would be over.

7           And that is exactly the cross-summary judgment motion  
8 that I told CalPERS would be implied if, in fact, I went the  
9 way I did, and that is where I'm at right now. So I am ruling  
10 as a matter of law, based on the facts that are either  
11 uncontroverted or asserted to be true by CalPERS, that the City  
12 is eligible on the issues, addressing again only (c)(4) and  
13 921.

14           Here's what the City has said are their uncontroverted  
15 facts in support of their desire to effect a plan of  
16 adjustment: the budget report prepared on July 9th, 2012; the  
17 staff report prepared on July 18th, 2012; the conclusion of  
18 those reports that the City was in a dire cash-flow position;  
19 that they had exhausted their general fund reserve; they had a  
20 negative cash balance going forward; and that if they paid  
21 every due obligation in the 2012-2013 fiscal year, there would  
22 be a 45.8-million-dollar deficit. Again, those numbers could  
23 be somewhat different. And the outcome would be the same. I  
24 mean, maybe it's not forty-five; maybe it's forty. That  
25 wouldn't matter.

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1           That the City had already depleted any reserves it had  
2 in its general fund; had cut jobs and services because they had  
3 laid off the staff or the employees of the City that did  
4 essential services to the City, including safety, police and  
5 fire. They don't really argue it, but I can't imagine the  
6 streets don't have potholes. I mean all cities' streets have  
7 potholes, but the less staff you have to fix them, the more  
8 there are. And other just kind of things that happen around a  
9 City when it doesn't have enough money.

10           They had made some preliminary efforts with the  
11 unions, I think over a couple of years before they filed, as  
12 almost every City has been doing between 2008 and 2012. Rather  
13 than lay off their employees, see if they can get some contract  
14 budget concessions. I'm not saying any of those were  
15 necessarily successful, but the City had cut some pay or laid  
16 some people off.

17           Again, the budget report indicated they had sold  
18 whatever liquid assets they thought they could. I mean not  
19 necessarily liquid but they had liquidated what assets they  
20 could. And they had taken the very limited steps that they  
21 could do in a short-term basis to raise their revenues. It is  
22 not easy for a City to raise their revenues. You know, if they  
23 want to impose a tax, they needed to get a vote. Almost no  
24 City ever does that because they don't get the vote. And so  
25 their opportunities to get financing from some outside source

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1 were extremely limited.

2 They also asserted as an uncontroverted fact that  
3 before August 1st, they did not pay CalPERS. They didn't,  
4 after July 1. They didn't pay their retiree health benefits.  
5 They had defaulted on making their regular bond payments on the  
6 pension obligation bonds. They had defaulted in paying the  
7 civil rights judgments that they had settlements on, and they  
8 had defaulted in paying some of their trade debt or at least  
9 were late paying on it. And so therefore, on the petition  
10 date, it was not paid.

11 They assert they adopted the Resolution 2012-206, that  
12 they authorized the filing of Chapter 9 on July 18th, after, I  
13 believe, three open Common Council meetings. And they made  
14 their statement of qualifications from the authorized City  
15 manager that was filed with this Court in August. They adopted  
16 their fiscal emergency plan, I think July 24th, at a Common  
17 Council meeting. They adopted their pre-pendency plan on  
18 August 30th, 2012.

19 Again I note, by reading the pendency plan, that there  
20 was some further adoptions that had to do with the pre-pendency  
21 plan that occurred in October, and actually the City asserted  
22 that but there was a flowing process about the pre-pendency  
23 plan. They adopted their pendency plan on November 26th, 2012,  
24 and they adopted their budget on April 22nd, 2013.

25 They asserted as an uncontroverted fact that each plan



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1 or budget showed they didn't have enough money to pay all their  
2 contracts as they came due; that they had no choice other than  
3 to cut expenses, a lot of it kind of across the board, because  
4 of the forty-five million dollar shortfall, and they, post-  
5 petition, had attempted to get the unions to agree -- maybe  
6 I'll use those words --- to the provisions that affected the  
7 sharing of the CalPERS pay that, in fact, were accepted by four  
8 unions and not accepted but imposed on January 28th, 2013, that  
9 allowed them to be able to perform that number that was in the  
10 pre-pendency plan with regard to payments. And they also  
11 assert that with regard to when anything was due with regard to  
12 a pre-pendency plan, they met any deadline imposed by the  
13 Court.

14 CalPERS asserts as the facts that are uncontroverted,  
15 and again, I am assuming many of the facts that they wanted  
16 discovery on to be true, the City knew of impending doom -- my  
17 word -- 2007 and onward. The City settled the civil rights  
18 cases when they should have known they didn't have the money to  
19 pay them. The City had cash in the water department. The City  
20 paid a few -- the City says two; it could more than that but it  
21 wasn't a major number -- of pre-petition creditors post-  
22 petition. The City didn't have a plan in place, even a term  
23 sheet, prior to filing. There were not meaningful negotiations  
24 with the major creditors or creditor groups prior to filing.  
25 They filed their pre-pendency and pendency plan late, not

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1 timely. The City didn't pay the "administrative expense" to  
2 CalPERS post-petition. The City did not have the ability to do  
3 cash forecasts until April 2013. The City has inadequate staff  
4 in its fiscal department to prepare all the reports that  
5 CalPERS wants: do cash-flow analysis, prepare pendency  
6 budgets, and adopt a budget. And CalPERS didn't get all the  
7 reports it wanted. And that the City finances are unreliable.  
8 I think that was their word. I am -- again, I'm willing to  
9 assume all those things are true.

10           The case law on desire to effect a plan under  
11 109(c)(4) is kind of all over the place. It's all of my peers,  
12 except for Vallejo; there are no other reported appellate  
13 cases, other than the one I wrote on this issue. And I will  
14 say there's certainly -- Vallejo did a lot more than San  
15 Bernardino did. So it isn't -- I can't say that with the  
16 Bible, and that's what San Bernardino is going to have to do.  
17 Again, the ruling by the appellate court was to affirm the  
18 subjective finding which we found to be factual. So it was a  
19 clearly erroneous standard.

20           There's no question that there's no bright-line rule  
21 because the inquiry is subjective in nature; that is -- Vallejo  
22 says that. But again, the cases that talk about the subjective  
23 inquiry all rely on objective facts. It is not an inquiry into  
24 the minds of the City Council -- Common Council or any City  
25 Council or the authorizing body, but the acts that were done by

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1 the petitioning Chapter 9 debtor, not the state of mind that go  
2 into the subjective inquiry as to whether a City desires to  
3 effect a plan.

4 That also is supported by the Stockton case, the  
5 Pierce County case, the Arnold and Marsh again are Chapter 11  
6 cases, but the subjective intent is not at issue in determining  
7 the intent or the good faith, and that they cannot inquire into  
8 the state of mind of the Common Council because of the  
9 legislative privilege, the closed-session privilege. But  
10 again, the City acts as a body so I don't -- even if you could  
11 inquire, I think their state of mind is irrelevant, so as long  
12 as the evidence show, and this is critical, that the purpose of  
13 filing Chapter 9 is not simply to buy time or evade creditors.  
14 That statement is in Vallejo; we got it from Colliers. And it  
15 is recited in another of other cases that look at this issue.  
16 Colliers implies it's filing a statement of qualification and  
17 almost nothing else is needed, that that's enough. That's a  
18 pretty low bar and none of the cases have done it that simply.  
19 But that the statement of qualification as certainly a piece  
20 has been adopted by the New York Off-Track Betting case, the  
21 Pierce County case in western Washington. And again they're  
22 all looking at objective facts.

23 What is critical to this Court is there's no case out  
24 there, even a suggestion in Collier, that for (c)(4), one, the  
25 City must have drafted this plan before it filed. If anything

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1 it's a (c) (5) (A) or (B) issue that there's a deadline for  
2 filing the pendency plan in order to show a desire. That the  
3 City must have negotiated with the major creditors pre-  
4 petition, that's a (c) (5) issue or a (c) (2) issue under the  
5 state authorization.

6 If, in fact, the City had to do those things, I'd rule  
7 for CalPERS and the case would be dismissed. I am not going to  
8 be the judge that makes the case law that says the City must do  
9 those to desire to effect a plan. If there's case law that  
10 tells me that then I would dismiss the case, but there's not.

11 What I think is pertinent here, the cases, the few  
12 cases that scrutinized before and might have dismissed a case  
13 for that -- and I don't think there were any that dismissed a  
14 case under (c) (4) and only that ground -- the City wasn't  
15 evading a creditor. Maybe they were on August 1st, after they  
16 adopted the resolution to file on July the 18th, because then  
17 they had their civil rights judgment and people chasing them.  
18 Where they -- where they have -- cases I've looked at, this is  
19 a wrong coverage for filing a Chapter 9, is where there's like  
20 a single creditor that was about to execute in the City's  
21 account, and that was the only reason to file a Chapter 9.  
22 They might have been solvent. And it was a litigation tactic;  
23 they were evading the creditor. I don't see anybody  
24 foreclosing on any property of the City. If there were civil  
25 cases for collection against the City, I -- nobody's ever

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1 brought them to my attention -- you haven't paid our bill, I'm  
2 going to sue you in civil court. Certainly, nobody's ever  
3 argued that there was somebody like that out there with a  
4 judgment that was trying to collect that from the City. Maybe  
5 there was, but nobody's ever argued that. So there's no  
6 evidence before the Court at all that the City failed -- filed  
7 to evade creditors.

8           The buy time of it -- what reorganization law under  
9 the Bankruptcy Code isn't there some buy time aspect to --  
10 Chapter 13 filed to save your house and buy time for the  
11 foreclosing home lender to try to reorganize your financial  
12 situation so you can pay them back over time. Chapter 11 -- I  
13 mean, the precipitating factor of most filings is the  
14 foreclosure is tomorrow, the car is repossessed off my driveway  
15 this morning. So there's always some buy time aspect to the  
16 filing of any Chapter 9, but it's the immediacy -- the buy time  
17 and only buy time, I think, is what they mean when they put  
18 those words in the cases.

19           To get a breathing space is clearly supported by the  
20 law so that we can work out a plan to pay these people back  
21 over time or determine whether we can impair them. And there's  
22 nothing that indicates, through all this objective evidence  
23 that has been presented to the Court, that the City wanted to  
24 do anything other than that, which is to get a balanced ledger  
25 in place and then see whether they can find a way to either

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1 make a deal through negotiation with their creditors or some  
2 ruling from a court that says you don't have to pay them in  
3 full.

4 So the City looked down the -- well, what I put down  
5 as the barrel of the guns and faced reality. Maybe a little  
6 late. Maybe they should have desired earlier what that desired  
7 under the case law and under my finding.

8 They were out of cash and if they paid their bond  
9 obligations and they paid CalPERS, they couldn't pay their  
10 employees, and they thought the only way we can figure out how  
11 to do this is to have a little time to restructure our debt.

12 Admittedly, it was a slow start. It took them a while  
13 to get their books and records in order. The pre-pendency  
14 budget was perhaps intentionally unbalanced and was not  
15 performed. I mean, they couldn't have adopted that plan and  
16 thought they were going to perform it because they didn't have  
17 the money, and that was clear.

18 They eventually got their pendency plan. When they  
19 couldn't get an agreement with the unions, they imposed on them  
20 what they needed to impose in order to have that pendency  
21 budget work.

22 They didn't have access to more money, at least not  
23 more money quickly. They had to make cuts. Those cuts weren't  
24 easy. It's never easy to lay off an employee. It's never --  
25 it's particularly not easy to close fire stations and lay off

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1 police or do those things that the citizens call about when  
2 something isn't being attended to.

3 The police attorney -- police's attorney has stood up  
4 in this court and argued several times, crime is on the rise,  
5 public safety and welfare are at risk, the City needs to get  
6 going to a plan.

7 The objective evidence tells me that the City desires  
8 to formulate a plan. It is their only hope and I recognize  
9 that, and therefore, I find as a matter of uncontroverted fact  
10 that the City desires, under (c) (4), to formulate a plan.

11 We then go to 921, dues. The debtor filed their  
12 petition that they received uncontroverted facts that are  
13 similar to those that they asserted in favor of their 109(c) (4)  
14 argument, and not surprisingly, you can't create objective  
15 evidence. It either happened or it didn't. And in addition,  
16 they point out that Mr. Busch and his firm have gotten the  
17 books in order, can now do cash projections, adopted a budget  
18 in April and are in a position to start moving to a plan of  
19 adjustment.

20 They have pointed out they're trying to get more  
21 people in their financial department so they can, in fact, do  
22 that and they have argued that they needed the breathing space  
23 that is accorded them in Chapter 9.

24 The City is within the four -- they argue that they  
25 are within the four corners of why the legislature enacted

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1 Chapter 9 to allow temporary relief if a City needs financial  
2 rehabilitation. The City was insolvent; everybody admits that.  
3 The budget report of July looked at alternatives again quickly  
4 in the town council looked at them quickly and really said we  
5 got a forty-five million dollar deficit; we need to file.

6 CalPERS' facts on the issue of good faith -- and many  
7 of them are the same, and as I recite them, I am going to  
8 assume the worst of the facts asserted, if they might  
9 discover -- if I allowed them discovery and rule as a matter of  
10 law that it does not mean the City didn't file in good faith.

11 There are a couple -- the water fund issue. Again,  
12 I'm assuming that there are money in the water fund, but the  
13 City couldn't spend it so I tilt again that -- against that one  
14 legally.

15 And the other fact that I'm about to recite that I  
16 think there's some countering evidence on is that the -- there  
17 weren't any alternatives considered by the town council.  
18 There, again, briefly, in the budget report there were, but it  
19 was a very brief consideration of alternatives and CalPERS  
20 appropriately raises that, because the case law brings up how  
21 much did the City think about doing something else other than  
22 filing, and it matters in those cases.

23 Again, they argue there was no plan pre-petition;  
24 admitted they did not negotiate pre-petition. Admitted they  
25 knew of their insolvency long ago. Admitted they negotiated



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1 the civil rights settlements when they didn't have the money to  
2 pay. Admitted they paid cash out to terminated employees,  
3 preferential transfers of two million dollars between May and  
4 July of 2012. Admitted they paid some pre-petition claims  
5 post-petition. They didn't plan on how they're going to pay  
6 their administrative expense, CalPERS, post-petition if there  
7 is such a thing, they did not really negotiate with the unions  
8 post-petition before they imposed the contract. Well, they  
9 actually don't have to get four of them to agree so they did  
10 something and they didn't get an agreement from the other  
11 three. Those are the CalPERS that -- or there are a few more.

12 The City didn't have enough staff, so you couldn't do  
13 a cash flow projection until April. The City approved cash  
14 post-petition. They didn't use that cash to pay CalPERS. Fire  
15 fund had money; I already said what I have to say about that  
16 and that is not an issue.

17 Now, I look at the case law in light of the  
18 uncontroverted facts that I'm willing to consider.

19 Stockton really didn't have a 109(c) good faith. I  
20 guess they did. I guess I would -- maybe I just thought they  
21 were fighting that.

22 Judge Klein -- I'm not sure I really adopt -- Judge  
23 Klein says if you meet eligibility under 109(c), then the  
24 presumption is you filed in good faith. He doesn't have the  
25 parsing of the words. I don't have to adopt that burden shift

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1 and I don't adopt it because I -- I don't want to take the  
2 problematic outcome of shifting the burden on that. I'm  
3 willing to say the City still has a preponderance under 921(c)  
4 to show it filed in good faith. But it points out the good  
5 faith inquiry is again subjective but found by objective  
6 evidence and I have, again, looked at the objective evidence.

7 Sullivan County is the one case we could find where  
8 they actually dismissed the case under 921(c). That's an older  
9 case from the '80s, '90s; long before any of the others, and  
10 what happened in Sullivan County is they didn't agendize a  
11 consideration of filing Chapter 9. There were no written  
12 reports, there were being pursued by the creditor and as a  
13 litigation strategy, to stop the creditor from doing something,  
14 they filed -- they authorized after an oral motion at their  
15 board meeting to file Chapter 9 and they filed and the Sullivan  
16 County judge kicked it out for lack of good faith. And  
17 basically what he said is the integrity of the reorganization  
18 process is being impinged upon by this filing because they  
19 didn't consider anything else and they did it by oral motion  
20 and they had no intention of doing anything other than stopping  
21 the creditor as a litigation strategy.

22 The Pierce County case makes a list -- BAP loves  
23 lists; is the trial judge making a list -- "the debtor's  
24 subjective belief" -- there's that word "subjective" again,  
25 whether the debtor's financial problems fall within situations

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1 contemplated by Chapter 9, whether the filing was consistent  
2 with the purposes of Chapter 9, whether there were pre-petition  
3 negotiations, whether the City considered alternatives, and the  
4 scope and nature of the financial problems faced by the City  
5 that the City should look at an objective axis. Also supported  
6 by Town of Westlake City in Texas, the Stockton case.

7 Judge Klein said these are the things that one should  
8 look at in determining whether a city filed in good faith.  
9 Have they cut spending? Is there cash and service insolvency?  
10 Have they negotiated? Is there an ability to achieve  
11 significant reductions without impairing the contract? These  
12 are very important considerations to Judge Klein and to me.

13 And then finally, and then I'll discuss this in a  
14 moment, the Court's power to dismiss under 921 is permissive,  
15 not mandatory. Pierce County, New York Off-Track Betting,  
16 Collier's and other cases point that out.

17 None of these cases are dismissing for most of the  
18 CalPERS factual assertions. The evidence is objective. None  
19 of them ever say you must have prepared a plan or a term sheet  
20 pre-petition in order to have a good faith reason for filing.

21 Nothing about they have to really have gotten their  
22 act together on their finances before they filed. Believe me,  
23 if that was a requirement -- I realize this is a bad analogy  
24 for most debtors, many debtors can file -- many debtors could  
25 not have their financial -- their financial statements in order

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1 and I'm going to assume that there was some late audits being  
2 done by the City and that their records were unreliable.

3 That they could not do a cash flow projection at the  
4 time they filed was never addressed by any of the case law.

5 There's no discussion that the pre-petition transfers  
6 that could be avoided would prevent there from being in good  
7 faith.

8 There's no discussion about they didn't have money to  
9 pay administrative expenses post-petition. Probably because if  
10 they were looking at Collier's, Collier's says there are none.  
11 None of them complain that there weren't enough people on the  
12 financial staff.

13 I have looked at these six factors and Pierce County,  
14 my peer, making the list and weigh them because they are --  
15 it's a pretty good list -- desire subjective relief.

16 I consider objective information and ask that the  
17 City -- county -- council, when they adopted their resolution  
18 file on July the 18th, they were broke. They subjectively  
19 believed that they could not pay their employees on July 1st  
20 without impairing the contract. I weigh that factor in favor  
21 of finding good faith.

22 The financial problems fall within the contemplation  
23 of Chapter 9 -- yes, they do, in spades. There is no way,  
24 without reorganizing their debt, the City can ever balance its  
25 budget, because if it paid everything that was due on the date

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1 it was due it was cash insolvent and would remain so.

2           Whether their filing was consistent -- not just the  
3 financial problems, now, the filing was consistent with the  
4 purpose of Chapter 9, yes, that was their only hope. They need  
5 to reorganize. They need to have a plan. They need to  
6 negotiate a plan with their creditors to the extent they can,  
7 and if they can't, they need a bankruptcy court to rule on  
8 whether they can impair a contract unless they're -- I'm not  
9 looking forward to making that ruling, but we're here for  
10 that -- only because I hope we can negotiate it but -- and,  
11 quite frankly, the ones that have confirmed plans they have all  
12 been negotiated. That's why there's no court that has ruled on  
13 that.

14           Again, there were no pre-petition negotiations. I  
15 would answer that one no.

16           And were there alternatives, I answered that one  
17 maybe.

18           And then number 6, the scope and nature of their  
19 financial problems. Again, yes, in spades. I'm not quite sure  
20 how that's different than 2 in the list, but they definitely  
21 have problems.

22           So it's, four, one, one; four up, one down, one a tie.  
23 Under the Pierce County factors, does it define -- insure the  
24 integrity of this system -- I think it does. This isn't  
25 abusive. The City needed breathing space. It could not pay

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1 its employees, its bond creditors, its CalPERS obligations,  
2 without doing something. That's what bankruptcy is for. They  
3 needed the breathing space. Although there wasn't a creditor  
4 on July 18th breathing down their neck, but all the civil  
5 rights judgment they did is make the City file a little earlier  
6 than it wished to and slightly more -- I don't -- disarray is  
7 probably too strong a term -- but not as organized as I'm sure  
8 their attorneys and staff would have liked, but that was after  
9 it. They already adopted their resolution to file the Chapter  
10 9 and was clearly moving in that direction, so they weren't  
11 just avoiding that creditor and they needed the breathing space  
12 for other reasons like everything.

13           They had done some steps to cut their expenses.  
14 Couldn't happen quickly, but because they had collective  
15 bargaining agreements with -- what is it -- eighty-five percent  
16 of the budget? I forgot. It's a large number; that is their  
17 employees. And they had seven unions and you don't just cut  
18 pay when you have CBAs that affect how you pay your employees  
19 and pay their retirement and pay their health benefits.

20           So there's a lot they could do to cut other than lay  
21 people off and lack of provision of services, as the service  
22 insolvency issue. I thought that Judge Klein made it up and  
23 then I saw it was a term that was in the pre-pendency plan so  
24 he didn't make it up.

25           I think all these weigh in favor of a -- finding the

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1 City filed in good faith.

2 So finally, there's the aspect that my ruling is -- if  
3 I were to dismiss under 921 -- is permissive, not mandatory.  
4 And I think that's where I get to look at the entire picture of  
5 what happens if I dismiss the case for lack of good faith.

6 The City has five groups of major creditors -- and I  
7 may be missing some, but what I can see, they have the unions,  
8 they have the bond guarantors, they have the retirees, they  
9 have the trade creditors and they have CalPERS. There's only  
10 one that has objected, and I get the sense from the others that  
11 they would really like to get onto a plan. Certainly, many of  
12 their attorneys have indicated that in the statements they've  
13 made in court. The bond guarantors are supporting the City's  
14 motion in a joinder and they have never objected and they have  
15 said every time they showed up in court, they need to move  
16 toward a plan. And they're being impaired, not paid, and  
17 CalPERS is being impaired not paid.

18 There are many places in the Bankruptcy Code that ask  
19 us to look for the best interest of the creditor body when I  
20 make a ruling. I don't know why I can't look at that issue  
21 when I consider the permissive or requests to dismiss the case,  
22 and I think I can. And I think the entire creditor body is  
23 benefited by my finding eligibility and allowing the City to  
24 move to a plan of adjustment. They will all be served by  
25 Chapter 9 if a plan can be negotiated or otherwise confirmed by

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1 the Court, and who would it serve if I dismiss the case.

2 I guess CalPERS thinks it would be, because they're  
3 the ones asking me to do it. I don't -- not sure how; they  
4 can't make cash where it isn't, and they can't balance a budget  
5 that's imbalanced on a cash basis. And they -- if they got all  
6 the money that they want under what they say is their  
7 contracting statutory right, who isn't going to get paid? All  
8 the employees? I don't know, how does that help CalPERS if the  
9 employees aren't paid? I mean, obviously, they want to balance  
10 their actuarial figures that allow them to not have unfunded  
11 liabilities from cities, but I have no idea why dismissal of  
12 this case will help that.

13 So even the one creditor that wants me to dismiss the  
14 case, I don't know why because I don't know how it would help  
15 them. Then we have a free-for-all. I can't see anything other  
16 than dissolving the City if they can't reorganize in Chapter 9.  
17 And, my heavens, I used to represent LA Co., not San Bernardino  
18 County, but LA and Riverside county; none of them would even  
19 know how to do it, because they'd never dissolved a city of  
20 this size that's been around for a hundred years.

21 I'm not saying necessarily that would happen, but it  
22 might. Then I guess the City becomes a county, and I would  
23 like to avoid that possibility. I'm not going to dismiss this  
24 case.

25 Now, how far all that impairment of contracts might



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1 happen in a plan, I don't know how far it can be done, and I  
2 don't know whether CalPERS finds a way to get everything or  
3 not. Those are unanswered questions, but it seems like  
4 answering them in an orderly fashion here is better than doing  
5 it in chaos not here. The City deserves a chance, the creditor  
6 body deserves a chance, the citizens of the City deserve a  
7 chance. The purposes of Chapter 9 are met, the integrity of  
8 the system is met, perhaps not so gracefully as one might have  
9 liked, but I find the City is eligible. And it is a tentative  
10 ruling and I will allow CalPERS to argue as much as they wish,  
11 but I think I will rule my tentative at the end of that  
12 argument. I'm quite firm.

13 We'll now take a recess for ten minutes and then we  
14 will resume and we will take argument. Court's in recess.

15 (Recess from 3:04 p.m. until 3:21 p.m.)

16 THE CLERK: Is counsel all present and ready? Yes,  
17 okay, thank you.

18 (Pause)

19 THE CLERK: Remain seated and come to order.

20 THE COURT: All right. We're back on the record in  
21 the summary judgment motion in the City of San Bernardino.

22 It is time for CalPERS to offer argument.

23 MR. GEARIN: Good afternoon, Your Honor. I'm here in  
24 my --

25 THE COURT: Good afternoon, Mr. Gearin.

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1 MR. GEARIN: -- customary position of trying to change  
2 your mind about something.

3 THE COURT: I know.

4 MR. GEARIN: One of these days, I'll --

5 THE COURT: That's what I thought. When you stood up  
6 there I thought, I know what he's going to say first: here I  
7 am again.

8 MR. GEARIN: One of these days I'll win the coin flip  
9 with Mr. Lubic and I'll appear on a matter that you're going to  
10 rule in our favor, Your Honor, so.

11 THE COURT: Yeah, it does seem that you're always the  
12 one. Nothing against you.

13 MR. GEARIN: I understand.

14 Your Honor, I guess I'll start with why is CalPERS  
15 here, and why is CalPERS the sole remaining party that's  
16 objected to eligibility.

17 And I start with where I think we initially introduced  
18 CalPERS and its position and its role, and why it was  
19 participating in this case. And CalPERS has the responsibility  
20 to ensure the integrity of the Public Employees' Retirement  
21 System for the State of California, and it's taking that  
22 responsibility very seriously. And there's an important policy  
23 here regarding the state's ability to protect its Public  
24 Employees' Retirement System, and we believe this case is an  
25 important aspect of that, and the decisions that are made here

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1 can have an impact on that system.

2 And we think that this decision about eligibility is  
3 important. We think the policies here about who is admitted  
4 into Chapter 9, who is a worthy applicant, a worthy participant  
5 in the Chapter 9 system, there needs to be a bar set, there  
6 needs to be a standard, there needs to be some specific  
7 requirements for a debtor to actually move forward in the  
8 Chapter 9 system, and to be eligible for relief.

9 CalPERS is not here for the purpose of obstructing the  
10 City's reorganization. CalPERS supports the City's  
11 reorganization. CalPERS is interested in finding a way to make  
12 sure the City can improve its financial affairs, provide  
13 services to its citizens, fulfill its obligations to the Public  
14 Employees' Retirement System, to its employees, to other  
15 creditors and other parties-in-interest to the City. We  
16 support those efforts, and our behavior and our participation  
17 in this case to this point has actually been consistent with  
18 that. We did not intend to have a fight over eligibility with  
19 this debtor. We deferred the evidentiary hearing and those  
20 disputes for many months to allow us to try to get the City to  
21 provide meaningful financial information and information about  
22 its intent and its efforts to move forward with a plan process.  
23 That the City never did, and the City insisted on moving  
24 forward with an eligibility fight, and that's why we're here  
25 today.

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1           So I want to go back, Your Honor, I want to talk about  
2 what's the standard? There has to be a bar, there has to be  
3 some level of expectancy for a city, for a municipality, to do  
4 something to support its efforts to confirm a plan. It's not  
5 enough for the City to say we need relief, it's not enough for  
6 the City to say we have an urgent need, we have a fiscal crisis  
7 on our hands. We've got creditors who are beating our doors  
8 down. The City actually has to do something to come forward  
9 and say we have a plan that we are considering, we are going to  
10 work with our creditors, we're going to negotiate with parties,  
11 we're going to work in good faith with you to collaborate, to  
12 find a way to put a plan on the table that everybody can live  
13 with. That's what Chapter 11's about, that's what Chapter 9 is  
14 about, that's what restructuring is about.

15           This City hasn't done that, this City has not come  
16 forward with a plan. In fact, it hasn't even thought about  
17 assigning somebody the task of doing that. It hasn't provided  
18 information -- financial information, to its creditors; in  
19 fact, it's purposely withheld certain financial information.  
20 And if you allowed us to conduct certain discovery one of the  
21 things we would look at is the August 5 recent city council  
22 meeting, at which comments were made in response to one of the  
23 citizens of San Bernardino who asked why the City wasn't  
24 presenting financial information to the citizens. And the  
25 answer to that question was, well, once we get past the

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1 eligibility and we don't have to worry about what CalPERS is  
2 going to think about this information we'll present financial  
3 information to the citizens. That's the kind of information,  
4 if we had an opportunity to present evidence to you about the  
5 City's withholding financial information, I think would be  
6 relevant to whether the City has a desire to effect a plan, and  
7 whether it is conducting itself in good faith in this case.

8           The City has to show an earnest effort to proceed  
9 expeditiously and in good faith towards the confirmation of a  
10 plan of adjustment. The City needs to move forward and say  
11 we've got some idea of what we're going to do. Here we are now  
12 thirteen months into this case and this City hasn't done  
13 anything to even think about the concept of a plan, the outline  
14 of the plan, the things that you said, back in a status  
15 conference in November, that the City was required to do. Your  
16 words to the City at that point were you need to have a concept  
17 or an outline; you need to be thinking about what you're going  
18 to do. And if you don't have a pendency plan that's an  
19 indication to me that you really don't want to do that. And in  
20 response the City ran out, and thinking that you had ordered  
21 them to confirm and adopt the pendency plan, they adopted a  
22 pendency plan.

23           In order to support a finding that the City is  
24 conducting its restructuring effort in good faith, the City  
25 needs to negotiate fairly, it needs to be open in the sharing

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1 of its information with the parties in the case, it needs to  
2 refrain from preferring some creditors over others, it needs to  
3 pay timely its post-petition debt, and it needs to move forward  
4 with a plan process. And this City has failed to do all of  
5 those things.

6 I want to go back and talk for a couple of minutes,  
7 Your Honor, about allegations that CalPERS has held the process  
8 up here. That's not true.

9 THE COURT: I didn't say that in my ruling.

10 MR. GEARIN: I don't think you did and --

11 THE COURT: I did not.

12 MR. GEARIN: -- but I understand the City has  
13 suggested that in the past, and I think that I've heard you say  
14 in prior status conferences that you'd ask us to stipulate to  
15 relief because you thought that we were responsible for some  
16 delay in this case.

17 THE COURT: Well, I said one of the reasons we're not  
18 negotiating a plan is because we haven't determined  
19 eligibility, the only person between them and eligibility was  
20 you, I did say that.

21 MR. GEARIN: So my point there, Your Honor, is I don't  
22 think it is inconsistent for the City to come forward with some  
23 notion of what its plan would look like pending a determination  
24 of eligibility.

25 THE COURT: Well, certainly many have.

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1 MR. GEARIN: Right. And this contest about  
2 eligibility has not diverted resources from the City towards  
3 its efforts to go try to put some kind of an idea what the plan  
4 would look like, and get the financial information together  
5 that it needs to do that.

6 One of the issues I heard you talk about was whether  
7 the City had sufficient resources to go formulate forecasts.  
8 And one of the things we've talked about is whether the City  
9 can provide forecasting information about what its future  
10 revenues might look like. They have to have that information  
11 in order to be able to formulate a plan. Any debtor does that;  
12 any debtor goes out and creates future forecasts of revenues in  
13 order to support its thinking about what its plan is going to  
14 look like. Until this debtor has an ability to go put that  
15 forecast information together, it's incapable of moving forward  
16 with a plan process. And the fact that they have not done  
17 that, that they did not allocate resources to the finance  
18 department that allows them to create those forecasts, that's  
19 the City's intentional decision to do that, and that is an  
20 indicator that they are not serious about moving this plan  
21 process forward.

22 Before I turn, Your Honor, and I will not belabor the  
23 issues about whether CalPERS has an ability to object on  
24 109(c)(2) basis or 109(c)(5); I understand the Court has ruled  
25 on those issues. We are -- all we will say is that CalPERS has

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1 not waived those rights, and we've consistently asserted that  
2 we should be allowed to broach the issues about 109(c)(5) or  
3 about 109(c)(2) should certain developments occur in the case.  
4 But I understand that the Court has ruled previously that the  
5 objection deadline bars the discussion of those issues and I  
6 will not focus my comments on those any longer. I will confine  
7 myself to talking about 109.

8 THE COURT: I take it that you dispute it, but you  
9 don't wish to argue. That's fine.

10 MR. GEARIN: Correct. Correct.

11 Likewise, Your Honor, I don't think I need to get into  
12 the discovery issues in great detail either. Suffice it to say  
13 that CalPERS believes that --

14 THE COURT: Yeah, you think the things that I said  
15 were undisputed rule in your favor.

16 MR. GEARIN: Well, I know I --

17 THE COURT: I mean, I said I'll assume that they don't  
18 have a staff, and they haven't decided on somebody to do a  
19 plan, and all those things. And I do assume that. I assumed  
20 everything as badly for the City as I could that you might have  
21 done discovery on those areas I thought were relevant. But  
22 I'll take it that you probably dispute my ruling.

23 MR. GEARIN: And I think that's right, Your Honor. I  
24 think, that without belaboring the point, I think that --

25 THE COURT: I think everything I ruled on, if I rule



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1 my tentative, I'll assume you disagree with.

2 MR. GEARIN: I understand. All I'd like to say is --

3 THE COURT: Other than are they insolvent, you agree  
4 with that?

5 MR. GEARIN: Your Honor, I would not dispute the City  
6 is in fiscal crisis.

7 THE COURT: All right, thank you.

8 MR. GEARIN: I think that they've provided a  
9 sufficient basis, and the financial records we've seen they  
10 were running low on cash. I mean, we do have issues about  
11 should the City have done something more about that earlier;  
12 you've talked about that. Could the City have done something  
13 else? Should the City have considered other alternatives? We  
14 definitely think the City should have considered --

15 THE COURT: Yeah, if I find that that was necessary  
16 then when should they ever file? I mean, you know, because,  
17 okay, they couldn't file now; they knew now. They didn't file  
18 in 2008; they knew then. In 2018 is that going to be okay for  
19 them to have known and by then they could file? That's my  
20 problem with that. If you set that up they didn't do it as  
21 soon as they should have then they never can.

22 MR. GEARIN: Well, I don't know if that's quite where  
23 we'd want to be, Your Honor. I think that what CalPERS' point  
24 is that if the City intentionally puts itself in a position  
25 where it's created a fiscal crisis, and that creates the need

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1 for the City's resort to bankruptcy that, alone, cannot be  
2 sufficient to support its eligibility.

3 THE COURT: Um-hum.

4 MR. GEARIN: And once the City puts itself in that  
5 position willfully that, frankly, is an indicia of the City's  
6 lack of good faith. So that's our only point about the delay.

7 THE COURT: I understand.

8 MR. GEARIN: As for the alternatives, I think that is  
9 a more difficult issue for the City, I think that the City is  
10 required to consider other alternatives. And I could go into  
11 that in a little bit more detail when I get to the discussion  
12 about what the factors are in determining good faith.

13 But back to the discovery point, Your Honor, I do want  
14 to mention this. I think that if we did have an opportunity to  
15 conduct additional discovery the facts could be worse for the  
16 City, because we could actually be taking testimony that would  
17 determine that the City, in fact, filed for the purpose of  
18 delay, solely for the purpose of delay. And that is, frankly,  
19 where we think we are. We think that the City is in this case,  
20 at this point, languishing in bankruptcy without any intention  
21 of moving things forward. That's why we're here.

22 So if the City is going to move forward with this  
23 process, is going to be eligible it needs to move forward much  
24 quicker, much more quickly and with more -- more of an evident  
25 desire to work with its creditors and to create something that

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1 people can live with.

2 I guess I'll go and talk a bit about the desire to  
3 effect a plan and your ruling on that point, Your Honor. I  
4 think this issue about the subjective standard and the  
5 objective standard, I agree with you, those terms are confusing  
6 and I don't know whether subjective/objective really is that  
7 helpful in the analysis. I actually think --

8 THE COURT: I don't think it helps a lot other than  
9 I -- none of the cases have looked at anything other than what  
10 I consider objective.

11 MR. GEARIN: Yeah. I think that the real focus is on  
12 direct evidence versus circumstantial evidence. I think that's  
13 really what we're talking about here.

14 THE COURT: I agree with that.

15 MR. GEARIN: So I think the point is that the City --  
16 when the City steps in and makes a direct statement and says we  
17 have a desire to effect a plan you can consider that evidence.  
18 But I think those cases that talk about subjective evidence is  
19 not relevant or not determinative, those are cases where, you  
20 know, the debtor -- of course the debtor's going to say I have  
21 a desire to effect a plan, that's not particularly -- you can't  
22 have a whole lot of weight with that, and you have to look to  
23 other factors, other --

24 THE COURT: I agree.

25 MR. GEARIN: -- objective evidence to determine

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1 whether the City really has a desire to effect a plan or it  
2 doesn't. So I think the focus is really on you have to  
3 determine what the City's intent is. And what we talk about as  
4 subjective intent, I think it means the City actually has to  
5 have an intent to move forward with a plan; that's what that  
6 means.

7 THE COURT: I don't know why they'd be fighting so  
8 hard to get this far if they didn't.

9 MR. GEARIN: Because -- well, you know, this --

10 THE COURT: And when I get to talking about the  
11 mediator later on, believe me they're going to have to do it.

12 MR. GEARIN: I'm glad to hear that, Your Honor, and I  
13 think the mediator could be very helpful to that process and  
14 you know we've supported that. You know, that CalPERS --

15 THE COURT: I agree with that.

16 MR. GEARIN: -- has been supportive of that.

17 THE COURT: But I'll discuss that in detail at the end  
18 of the ruling when I get there.

19 MR. GEARIN: So why would the City move into this  
20 process if it didn't have a desire to effect a plan? That's a  
21 legitimate question, it's a good question.

22 THE COURT: Um-hum.

23 MR. GEARIN: We've been asking ourselves that  
24 question. There may come a point --

25 THE COURT: But deciding it differently than I did.

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1 MR. GEARIN: I think that's right; I think that's  
2 correct, Your Honor.

3 THE COURT: Which you're entitled to. But I have a  
4 little more power in that area than you do.

5 MR. GEARIN: Of course you do, Your Honor; that's been  
6 made very clear to us on a couple of occasions, Your Honor.

7 I think that the City may at some point have a desire  
8 to effect a plan, but I think as it filed its petition, and as  
9 we sit here today, I don't think there's evidence before you  
10 that supports that conclusion. I don't think there is  
11 circumstantial evidence there that is supportive of the City's  
12 position that it has a desire to effect a plan.

13 Your Honor, I think your comments in the November 5  
14 status conference were, you know, you have to have something in  
15 mind when you come into bankruptcy.

16 THE COURT: I said -- I think I said "endgame", I  
17 think that the word I used.

18 MR. GEARIN: An endgame, right. That's true, that is  
19 the term you used.

20 THE COURT: I did say that. I agree I said that.  
21 Maybe it takes a little longer to get to the endgame.

22 MR. GEARIN: I think you have an endgame that you're  
23 working towards almost when you file, right; those are the  
24 terms, I think.

25 THE COURT: Yeah.

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1 MR. GEARIN: So, Your Honor, I think that the City  
2 here doesn't have an endgame. They didn't have an endgame when  
3 they filed, and they still don't have an endgame here today.  
4 They haven't put anything in the record to supports that  
5 they've thought about what creditors are going to impair.  
6 That's a significant issue. And when we talk about the  
7 negotiation issue and who you're going to negotiate with, the  
8 reason 109(c) (5) has those discussions of the need to have a  
9 concept of a plan in that prong of eligibility is that it's  
10 tied to the plan concept.

11 THE COURT: It is.

12 MR. GEARIN: It's tied to the idea that you're going  
13 to think about what your plan is, you're going to think about  
14 who you're going to impair --

15 THE COURT: (c) (5) (a).

16 MR. GEARIN: -- and then you're going to go negotiate  
17 with those creditors.

18 THE COURT: (c) (5) (a).

19 MR. GEARIN: (c) (5) (a).

20 THE COURT: Right.

21 MR. GEARIN: So --

22 THE COURT: I know. I wrote Vallejo; I know about  
23 that.

24 MR. GEARIN: And I appreciate that, and I know we --

25 THE COURT: I mean, clearly, I mean we reversed on

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1 that one issue because they didn't have a term sheet  
2 essentially, they didn't have their classes of creditors. And  
3 I agree with you, if you're using that prong you have to have a  
4 plan.

5 MR. GEARIN: And -- and --

6 THE COURT: In the sense of classifying your creditor,  
7 which they didn't have in Vallejo, nor do they have here. I  
8 agree with you, not close.

9 MR. GEARIN: Right. So and our point, Your Honor, is  
10 I think -- we think likewise under 109(c)(4) you also need to  
11 do that kind of thinking.

12 THE COURT: Um-hum.

13 MR. GEARIN: You need to have thought before you  
14 filed, and the policy supporting the purposes of Chapter 9 is  
15 supported by compelling debtors to actually do some thinking  
16 about this before they knock on the door of the bankruptcy  
17 court and ask for protection. It's not furthered by allowing a  
18 debtor to do nothing to think about what its plan would look  
19 like, either before it files or even after it files, even  
20 thirteen months after it files. This debtor's sitting here  
21 telling you we're not even sure when we are going to think  
22 about filing a plan, or putting somebody to work to create a  
23 plan; that's what they're telling you today.

24 So we believe that the standards should be the debtor  
25 must come up with some concept, they must think about what its

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1 plan would look like, and must think about what its objectives  
2 will be in filing the plan, what it can accomplish, and does it  
3 have an ability to propose a plan of adjustment that is  
4 feasible, that is confirmable. It needs to think about that  
5 before it files the plan, before it files the bankruptcy case.  
6 It's not proper for a debtor to file solely for the purpose of,  
7 as I think you point out, precluding a foreclosure from going  
8 forward. If that's the only purpose that you filed the case  
9 for, was for a delay and to create a -- to provide the benefits  
10 of being in Chapter 11 for purposes of stringing things out,  
11 that's not -- that is not in support of the principles behind  
12 the purposes of Chapter 9.

13 I compare this case to -- I think you've mentioned a  
14 couple of other cases that we've talked about before --  
15 Stockton. Stockton, the debtor there, the 790-page ask. The  
16 debtor did a lot of thinking there about what its post-petition  
17 plan would look like, and it had an outline -- a serious  
18 outline, and it spoke with the creditors there pre-petition for  
19 months, for about ninety days pre-petition. And now it has  
20 been involved in mediation with its principal creditors that it  
21 seeks to impair in Stockton since it filed a case in June of  
22 2012. So that outline of a plan has been in place since long  
23 before the case was filed.

24 In Detroit, which was filed in July, Detroit presented  
25 a -- I think they call it a proposal for creditors. It



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1 presented that to its creditors before it filed. It has  
2 committed to file its plan before the end of the year.

3 THE COURT: Um-hum.

4 MR. GEARIN: So in less than five months, little more  
5 than five months, the City of Detroit which is far more -- far  
6 bigger city, billions of dollars of debt, very complicated  
7 problems, it is moving its case forward, and it has a concept  
8 of what it intends to do with respect to its plan.

9 So what has the City put forward, and I think you  
10 looked at some of the evidence that the City put forward in  
11 support of its intent to effect a plan. It puts forth the  
12 statement of the city manager, Ms. Andrea Travis-Miller, and I  
13 think we have that fact, I suppose that falls into the category  
14 of the kinds of direct evidence we just talked about a little  
15 while ago; it may not be particularly probative, it can't have  
16 a whole lot of weight. But, of course --

17 THE COURT: I agree with you; any City, anybody could  
18 do what they did here, or that has been done, the statement of  
19 qualifications, how you need that, but who wouldn't do that.

20 MR. GEARIN: Correct. And I think our point about Ms.  
21 Andrea Travis-Miller's foundation, I mean the City says, well,  
22 she was authorized to file whatever pleadings were necessary to  
23 file the plan -- to file a petition, excuse me. Well, that may  
24 be true, but there's nothing in the record that supports the  
25 idea that she was authorized to speak for the City in

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1 determining the City had an intent to move forward with a plan,  
2 the desire to effect a plan. There's nothing that supports  
3 that, that she had authority or been instructed, or given  
4 evidence to back up --

5 THE COURT: The City gave her the authority to do  
6 whatever was necessary; I don't follow your argument on that.

7 MR. GEARIN: Okay. I guess the issues about the  
8 pendency plan, Your Honor, I think that the only one I will  
9 focus on is this -- the adoption of the pendency plan. What  
10 they say is that's a factor supporting the City's desire to  
11 effect a plan. What we've told you there is that, first of  
12 all, they didn't have the pendency plan in place when they  
13 filed, it took them months to get there, they filed August 1st  
14 and they didn't adopt the pendency plan until November 26th of  
15 2012. They only did that because, if you look in the minutes  
16 of the city council meeting, they thought that you had ordered  
17 them to file a pendency plan, and that you were threatening to  
18 dismiss their case if they did not do so. That's why they  
19 filed the plan; that's consistent with our arguments --

20 THE COURT: Well, if you get the facts in order here,  
21 we had a hearing at which Mr. Glassman told me the time frame  
22 in which they were considering their pendency plan. And it was  
23 clear to me there was a time that he needed to file some  
24 further report with the Court, or response to your opposition  
25 or something, that in the time frame they were moving for he

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1 wasn't going to have a pendency plan, because the scheduling of  
2 their meetings was such that it wasn't going to get it off in  
3 time. It wasn't like they were doing nothing before I made  
4 those statements in court, but it wasn't going to get done  
5 before he had to file what he was going to file. So whatever  
6 they might have said, I don't know; I wasn't there. But it  
7 wasn't like they started the process after those comments in  
8 court; they already had it in their agenda to consider.

9 MR. GEARIN: I suppose, Your Honor. I mean, I guess  
10 there's been some suggestion --

11 THE COURT: Again, it was four months into the case  
12 before they put it on their agenda, and that is certainly a  
13 factor that I get to consider.

14 MR. GEARIN: Right, understood.

15 I guess the other factor the Court -- that the City  
16 points to is that it adopted budgets and it adopted -- excuse  
17 me, let me go back to this point.

18 With respect to the pendency plan and the pre-pendency  
19 plan, what we know is that the City adopted some of these  
20 measures. What we don't know because we've not been provided  
21 any discovery, any information about this from the City, is  
22 whether -- what they implemented, what did they actually do to  
23 go forward with those plans. There are some questions about  
24 whether the City, when it adopted the pendency plan, did it  
25 actually go forward and pay in the cost-cutting that it

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1 suggested it would do in the pendency plan. So we still have  
2 major issues about whether the City actually implemented the  
3 things that its public statements indicate they adopted.

4           You know the budgets, Your Honor, the City wants to  
5 say that the adoption of its budget in April of this year is  
6 evidence of its intent to effect a plan. The City's required  
7 to adopt a balanced budget. It has to do that every year, so  
8 it adopted a budget retroactively for 2012/'13, and then  
9 prospectively going forward '13/'14. It was required to do  
10 that. It's not inconsistent; it's not particularly supportive  
11 of the idea that they intended to use that to support their  
12 going forward with a plan process.

13           The contravening evidence that's out there, Your  
14 Honor, is, frankly, overwhelming that the City does not have a  
15 desire to effect a plan. And the contravening evidence that we  
16 point to is the City actually authorized the filing of its  
17 bankruptcy case on July 10th, in the July 10th city council  
18 meeting. That's reflected, I think, in Ms. -- I can't remember  
19 which declaration it is; I apologize for that.

20           THE COURT: I was looking at the resolution --

21           MR. GEARIN: Right.

22           THE COURT: -- which is, I think, July 18th.

23           MR. GEARIN: Well, there's a July --

24           THE COURT: I spent a lot of time trying to find that  
25 date and the resolution.

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1 MR. GEARIN: Right. I'll see with we can find the --

2 THE COURT: I had both those dates in my notes. And  
3 the resolution itself, I have; it was attached to something  
4 filed with the Court. It says it was adopted on the 18th.

5 MR. GEARIN: And I think you're right, Your Honor. I  
6 think --

7 THE COURT: Uh-huh.

8 MR. GEARIN: -- there's actually two resolutions.

9 THE COURT: Right.

10 MR. GEARIN: There's a July 10 resolution that  
11 authorizes the City to file the bankruptcy case. Then there is  
12 a July 18 -- there was a meeting on the 16th -- July 16th. And  
13 then there was a resolution on July 18 that directs the city  
14 manager to go forward to file the petition --

15 THE COURT: Okay.

16 MR. GEARIN: -- and to move forward with the process.

17 THE COURT: All right. I may have a --

18 MR. GEARIN: So I think there's a nuance there.

19 THE COURT: -- the authorization may have come, or --  
20 because I do have that date. I don't disagree that that date  
21 was important, but I couldn't find the document that the  
22 City -- what the City did as a resolution.

23 MR. GEARIN: There is a point of that. The point of  
24 that --

25 THE COURT: Um-hum.

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1 MR. GEARIN: -- is that the chronology that's laid out  
2 by the City is that Mr. Simpson created a budget report. And  
3 it took him seven weeks to do that. He concluded it on July  
4 9th.

5 THE COURT: Right. That's when it was given to --

6 MR. GEARIN: And he presented it --

7 THE COURT: -- that's when it was filed with the City,  
8 essentially.

9 MR. GEARIN: He presented it to the City Council on  
10 July 10th. And the City Council had a four-hour City Council  
11 meeting on July 10th. And at the conclusion of that meeting,  
12 they voted to authorize the City to file.

13 That is a very hasty decision --

14 THE COURT: Um-hum.

15 MR. GEARIN: -- in moving forward. It does not  
16 reflect a discussion of any plan ideas, or an intent to affect  
17 the plan, or what the responsibilities of the debtor would be  
18 once they got into bankruptcy.

19 It reflects a very snapshot, knee-jerk, we need to get  
20 into bankruptcy in a hurry because we need to hold people off;  
21 that's what that reflects.

22 We've already gone through, I think, the -- and I  
23 don't know how many times I need to say this, but the City  
24 still has no thought of preparing a plan. It certainly did not  
25 at that point. It did not as of July 10, it did not as of July

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1 18 when it directed its manager to move forward with filing of  
2 the petition. It didn't as of August 1st when it filed the  
3 petition. And at present, it -- frankly, it does not have,  
4 today, any evidence that it is concretely moving forward with a  
5 plan process.

6 It still has not produced financial reports and  
7 analyses that would allow it to move forward with the plan  
8 process. It hasn't done that; it didn't do that when it was  
9 considering filing, and it hasn't done that as we sit here  
10 today.

11 THE COURT: I assume when you say that, you're  
12 referring to revenue projections that would allow it know how  
13 much money it was going to have in 2018 and other time frames.

14 MR. GEARIN: I think that --

15 THE COURT: What else, besides revenue, do you say  
16 that they haven't got?

17 MR. GEARIN: Well, those are the principal. The other  
18 key component --

19 THE COURT: I mean -- and that goes in with the  
20 projections your expert and you have talked about.

21 MR. GEARIN: There's really three things that I think  
22 we've talked about in prior status conferences with you, and  
23 that we've talking to the debtor about. There are cash  
24 reporting, what the City's present cash availability is,  
25 balanced or reconciled bank statement kind of --

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1 THE COURT: Right.

2 MR. GEARIN: -- information. And I think we --

3 THE COURT: When they do that, do they give you fifty  
4 different bank statements for all of the restricted funds?

5 MR. GEARIN: That's above my pay grade, Your Honor.

6 THE COURT: Yeah.

7 MR. GEARIN: I'm -- and I should --

8 THE COURT: I know.

9 MR. GEARIN: I'd have to talk to our --

10 THE COURT: Because it isn't like there's just a bank  
11 statement from a city because of the restricted funds. And it  
12 may be that they have all of their money in one account, and  
13 then they just account for it with the different accounting  
14 entries, but I don't think the bank statement itself is going  
15 to give you much information.

16 MR. GEARIN: No. It's not the bank statements that  
17 we're -- I think we're talking about a cash reconciliation.

18 THE COURT: Okay.

19 MR. GEARIN: And it's sort of a --

20 THE COURT: As to --

21 MR. GEARIN: -- monthly report --

22 THE COURT: -- which funds they belong to, you mean.

23 MR. GEARIN: Well, that is a separate -- that's a  
24 second report that I think we've been trying to -- they call it  
25 -- I think the City calls it a cross-fund report, which is



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1 a --

2 THE COURT: Okay.

3 MR. GEARIN: -- an analysis what the balances are in  
4 the --

5 THE COURT: I understand that.

6 MR. GEARIN: -- restricted funds and so forth. And I  
7 do think you're right that it is one bank account, as I  
8 understand it --

9 THE COURT: Um-hum.

10 MR. GEARIN: -- that the City puts all of its funds  
11 into and then it accounts for which --

12 THE COURT: Right.

13 MR. GEARIN: -- ones are allocated to the certain  
14 funds.

15 But that information's not been provided to us. And  
16 that information is essential for the debtor's understanding of  
17 its own financial affairs, such that it knows that -- when we  
18 filed this case, Your Honor, the City did not know what it  
19 could afford to pay on a daily basis. They had Mr. Simpson who  
20 was sitting there with his finger on a button determining what  
21 checks could be paid and which ones couldn't because they  
22 didn't have an understanding of what their cash is. And that's  
23 what we've been facing in trying to find a way to work with the  
24 debtor to understand that they really are moving forward with  
25 an ability to promote a plan.

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1           So I think the three categories really are -- it's  
2 restricted funds; it's cash -- present cash needs; and it's  
3 forecast.

4           THE COURT: I understand.

5           MR. GEARIN: Those are the three things.

6           Now, I guess I -- I think I already talked about the  
7 timing of the Detroit filing and the Stockton filing. And in  
8 the Pierce County case, you've talked about that case, Your  
9 Honor. It's my neck of the woods, as a matter of fact, and  
10 Judge Snyder is a --

11          THE COURT: Judge Snyder, right.

12          MR. GEARIN: It was Judge Snyder's case, and --

13          THE COURT: Yeah.

14          MR. GEARIN: -- in Pierce County, the bankruptcy plan  
15 there was filed seven months after the case was filed.

16          THE COURT: Hm.

17          MR. GEARIN: And there had been years of pre-petition  
18 negotiation between the principal creditors in that case who  
19 were, I think, parties that were claiming that there had been  
20 mold infestations in certain apartments that were owned by the  
21 Pierce County Housing Authority.

22          THE COURT: Right. It was the Housing Authority, not  
23 really the County that filed. I mean we --

24          MR. GEARIN: Right.

25          THE COURT: -- all use -- we all call it Pierce

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1 County, which implies -- Orange County -- the whole county  
2 filed it, but you are correct; it was just the Housing  
3 Authority.

4 MR. GEARIN: Right. It was the Housing Authority,  
5 right. But the point there is that the debtor immediately  
6 moved forward with a plan, filed it within seven months, and  
7 was working on negotiations with the principal creditor long  
8 before and after the case was filed.

9 I'll turn to good faith and talk about that for a  
10 minute, Your Honor. I think that I'll take the City's  
11 articulation of the standard for measuring good faith. And  
12 they talk about a couple of cases, Orange County being one of  
13 them. And I think the standard that's articulated -- the  
14 purpose of Chapter 9 is a temporary breathing spell so that  
15 a party can work out a repayment plan with its creditors.

16 So it's really a couple of prongs there. First of  
17 all, it's temporary. Secondly, the purpose of that is to move  
18 forward with creating an agreement with the creditors. That's  
19 why you file the case. If there's no evidence going forward  
20 that there have been negotiations, discussion with creditors,  
21 and there's no evidence that there's some kind of a formulation  
22 of what plan concept would look like, I don't know how it  
23 furthers the purpose of Chapter 9 to remain in bankruptcy.

24 The Pierce County factors, I think you walked through,  
25 Your Honor; the debtor's subjective intent, and again, I think

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1 we go back and talk about does the debtor really have a true  
2 intent to move forward with the plan and to use the process as  
3 it was intended to be used. Some of the things we talk about  
4 there, we talk about the pre-petition preference issue.

5 THE COURT: Um-hum.

6 MR. GEARIN: And think that is an indicia of the  
7 City's lack of good faith.

8 You have to recall, the City is telling you that one  
9 of the reasons it had to file was because it was concerned  
10 about paying preferences to some parties that held judgments,  
11 civil rights judgments, for some pretty egregious acts,  
12 frankly. And the City was concerned about --

13 THE COURT: No. I don't think --

14 MR. GEARIN: -- making preferential payments --

15 THE COURT: -- they said that was reason they filed.  
16 I think they said that was one of the things that would have  
17 satisfied (c) (5) (D). But remember, nobody was trying to  
18 exercise those judgments at the time when they adopted the  
19 resolution to file; it was later. I mean, maybe they set that  
20 up. I don't think they intended to set it up because why would  
21 they have filed earlier than they wanted to file?

22 But they didn't say that's the reason the filed. I  
23 have never seen them argue we filed -- we filed that day  
24 because of that, but we didn't file because of that.

25 MR. GEARIN: I understand that distinction, Your

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1 Honor. I think that's probably right. I think the City has  
2 said that it governed the timing of its filing --

3 THE COURT: It did.

4 MR. GEARIN: -- but not necessarily -- it's  
5 actually --

6 THE COURT: It definitely was the timing, but not --  
7 because the decision happened -- they were already in default  
8 under those -- because it says they were in default under other  
9 things, but they had -- there was no threatened execution at  
10 the time they -- nor did I think they thought that could  
11 happen. I would have thought that could happen. I guess  
12 federal law is different than state.

13 MR. GEARIN: Right. I still think there's some  
14 question about whether it could or it could not have happened,  
15 and when it would have happened --

16 THE COURT: Right.

17 MR. GEARIN: -- and how much notice the City would  
18 have had, and all those sorts of things. But the point I want  
19 to get to is how do you square that up with the City paying two  
20 million dollars in preference payments in the month -- in the  
21 ninety-day period prior to the filing, including 600,000  
22 dollars on the day before it filed? If that's something  
23 they're really concerned about --

24 THE COURT: Um-hum.

25 MR. GEARIN: -- they're concerned about making

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1 preferential payments, how -- why did they pay 1.2 million  
2 dollars in the month of July, a great portion of that after  
3 they decided they were going to file the bankruptcy case, and  
4 600,000 dollars on the day they filed?

5 That issue is important. It's important as a factor  
6 in determining whether the debtor really intends to use this  
7 process appropriately. And the fact that the debtor still  
8 won't give us the information that we've been asking for to  
9 analyze those and determine which one are recoverable, which  
10 ones aren't, that's a further factor in --

11 THE COURT: Um-hum.

12 MR. GEARIN: -- the Court considering whether the City  
13 is really operating in good faith here.

14 The other Pierce County factors, I think, we talked  
15 about the extent of pre-petition negotiations. I think I heard  
16 you say --

17 THE COURT: They have none.

18 MR. GEARIN: Yeah. You've assumed there's none.

19 THE COURT: None meaningful.

20 MR. GEARIN: Right. And I think that the declarations  
21 of the Firefighters Union that we filed with you are telling  
22 you that there really aren't any meaningful negotiations going  
23 on post-petition either.

24 THE COURT: Well, there sort of haven't been for a  
25 while. And whether there were negotiations is a term of art

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1 that I need to avoid here.

2 MR. GEARIN: So that --

3 THE COURT: They managed to convince four unions to  
4 accept what they imposed in the other three. That didn't  
5 happen by osmosis. They talked to them. Maybe they didn't  
6 negotiate. And they talked the same way to the three that  
7 didn't accept.

8 I don't know whether that's meaningful, but four  
9 unions did it, so it couldn't have been meaningless.

10 MR. GEARIN: Well, I acknowledge, Your Honor, that  
11 they reached agreements with unions. Now, what we've told  
12 you --

13 THE COURT: They didn't do it pre-petition. That was  
14 my statement. There was none of that pre-petition.

15 MR. GEARIN: Right. I also think we told you that  
16 those unions are management --

17 THE COURT: Um-hum.

18 MR. GEARIN: -- and the agreements that are reached  
19 are temporary.

20 THE COURT: Um-hum.

21 MR. GEARIN: They are agreements really that'll get  
22 them through the end of this year.

23 THE COURT: Um-hum.

24 MR. GEARIN: So they're not longstanding agreements;  
25 they're not agreements that are going to be --

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1 THE COURT: They allowed them to balance the pendency  
2 budget, which is just that; something through the end of the  
3 year.

4 MR. GEARIN: Right. You know the other factors, I  
5 think, that Pierce County looks to are the extent of  
6 consideration of alternatives.

7 We've had this dialogue about the water department and  
8 the City says, well, we're precluded by law and by the  
9 California Constitution from using the revenues in the water  
10 department. That's not the point. First of all, I don't know  
11 what the contours of those limitations are. The point is that  
12 the City never explored any of those alternatives, whether  
13 there were any abilities to use the water department resources;  
14 a transaction that could have been conducted with the water  
15 department, for example.

16 There's a contract between the City and the water  
17 department that the City had, pre-petition, advanced the  
18 payments on in order provide liquidity to the City at an  
19 earlier date. There certainly seems like there can be things  
20 that could have been considered with the water department and  
21 the resources that are there, which is an aspect of the City  
22 itself. And the fact that the City never considered any of  
23 those things or thought about alternatives that involved the  
24 water department's assets, that is a signal that the City  
25 didn't desire -- was not going to conduct itself in good faith



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1 and it was not going to consider other alternatives to filing  
2 the bankruptcy case or things that might be beneficial to  
3 furthering the plan process.

4 (Pause)

5 MR. GEARIN: I'm going to conclude, Your Honor, with  
6 this. I think if you allow this debtor -- if you find that  
7 this debtor is eligible, it will be unlike any other precedent  
8 that has been established in a Chapter 9 case before. And what  
9 you'll be holding this that a debtor that, based on its own  
10 self-inflicted crisis, without consideration of any  
11 alternatives, without the development either before it filed or  
12 after it filed of any concept of plan, while it withholds  
13 material financial information from its creditors, while it  
14 fails to negotiate with its creditors pre-filing and post-  
15 filing, and while it refuses to commit to a timetable for even  
16 proposing a plan, that that debtors is eligible for relief  
17 under Chapter 9.

18 And we think that's a dangerous precedent. We think  
19 it is unprecedented at this point. We think it's a dangerous  
20 precedent. It's going to create incentives for debtors to  
21 create a crisis, to determine that they have an inability to  
22 negotiate with the creditors because they've got a large number  
23 of creditors, and then to walk into the bankruptcy court  
24 without any intention of moving the plan process forward.

25 We don't think that's a proper precedent. We think

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1 that's bad policy. And that's why CalPERS continues to object  
2 to eligibility.

3 Your Honor, I will go back to, I think, a last couple  
4 of comments. What should the Court do? And I heard what you  
5 said about dismissal and what the consequence of dismissal  
6 might be. And I think I have a couple points with respect to  
7 that.

8 One is, you are correct that the dismissal prong of  
9 921 is permissive, and you're not required to dismiss the case.  
10 You can impose -- you could deny summary judgment. You could  
11 defer the decision on eligibility and you could impose  
12 requirements that the City would have to meet to provide  
13 meaningful information, to participate in mediation, to propose  
14 a plan by a certain date. And those could be conditions to  
15 your willingness to keep the case in this Court and not to  
16 dismiss the case.

17 You're right. You can't order the City to do -- under  
18 Section 904, we think we agree with you that you cannot require  
19 the City or force the City to do anything -- to do any of these  
20 things. But you can use those as conditions to your  
21 willingness to not to dismiss the case.

22 So for those reasons, Your Honor, we think that -- we  
23 request that the Court deny the City's summary judgment motion.

24 And if you're not willing to dismiss the case today,  
25 we'd ask you to set over the decision on eligibility and

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1 require the City to comply with its obligations to support its  
2 side of the bargain in supporting its eligibility to be a  
3 debtor, and to have the benefits of being under the protection  
4 of this Court.

5 Thank you, Your Honor.

6 THE COURT: Thank you very much. A very fine  
7 argument, Mr. Gearin. Mr. Glassman, do you wish to respond?

8 MR. GLASSMAN: Your Honor, let me first ask whether  
9 there's any particular points the Court would like to hear  
10 response. Otherwise, I would simply make statements to --

11 THE COURT: I think --

12 MR. GLASSMAN: -- clarify the record.

13 THE COURT: -- the last statement by Mr. Gearin was  
14 the significant one. Does this set a really bad precedent?

15 If all the things he just recited -- although I don't  
16 agree that I would make a finding the City created the crisis.  
17 By inattention they got insolvent, but I'm not sure I call that  
18 creating a crisis. But the other summary of things that he  
19 stated are all things that I have assumed to be true, or are  
20 true without even assuming anything.

21 There's a pretty good laundry list of not very pretty  
22 things about the City's filing. So respond to that, if you  
23 can, and then you can go anywhere else.

24 MR. GLASSMAN: Your Honor, I received a note from Mr.  
25 Penman, and I'm going to start by reading this note.

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1 THE COURT: All right.

2 MR. GLASSMAN: "None of us would put ourselves through  
3 the daily recurring pain if we didn't have to. The public  
4 outcry against city officials is a stronger deterrent than  
5 anything else.

6 "It has been an extremely painful process being in  
7 insolvency and in Chapter 9 for the City. It is an emergency  
8 room, not a health spa. And to suggest that any city would  
9 subject itself to the process unless it had to is simply  
10 disingenuous."

11 Also bear in mind that the City had to declare a  
12 fiscal emergency -- abruptly declare a fiscal emergency under  
13 state law before -- and to correct the record on that, the  
14 declaration was on July 18th, but there were three days of  
15 hearings before the initial --

16 THE COURT: I think the 10th, the --

17 MR. GLASSMAN: The 10th, the 16th --

18 THE COURT: -- 16th --

19 MR. GLASSMAN: -- and the 18th.

20 THE COURT: -- and the 18th. Right.

21 MR. GLASSMAN: So yes, it was submitted -- it's true  
22 that the report was submitted --

23 THE COURT: On the 9th.

24 MR. GLASSMAN: -- on the 9th. And then there --

25 THE COURT: There was meeting on the 10th, on the 16th

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1 and on the 18th.

2 MR. GLASSMAN: -- the disclosure of the City's  
3 insolvency -- because when the City discovered it -- maybe it  
4 should have been discovered before, but that's when it became  
5 public that it was insolvent. Just like a municipal entity,  
6 like a public corporation, has to disclose that it is  
7 insolvent. And that's what the report -- and there was a cash  
8 crisis, and that's what the report indicated after that. And  
9 like in any situation where that occurs, as we know from our  
10 many, many years of practice, that it becomes a death spiral at  
11 that point.

12 The only way that the City can protect itself and  
13 preserve assets and work out a plan to restructure its debts  
14 and deal with the insolvent situation is through a filing  
15 which, in this case, occurred sooner rather than later because  
16 of the severity of the problem and the fact that once the  
17 financial condition of the City was disclosed, then it  
18 precipitated creditor action, as happens in -- just like in a  
19 Chapter 11 case.

20 And so there was no ability for the City to do  
21 anything but plan for a hastily filed Chapter 9 proceeding at  
22 this point, indeed, as the Court has pointed out. It would  
23 have been a more orderly filing, certainly one that counsel  
24 would have preferred to be more orderly had there been such a  
25 short time. July 8 -- for a case like this, July 18th to

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1 August 1st, the time of the authorization and the filing of the  
2 fiscal emergency is a very, very short time, and most of the  
3 time between those two dates is dealt with dealing with  
4 emergencies and crises every day and not preparing for filings.  
5 And when the notice came on July 31st that there was going to  
6 be an attachment of the City bank account -- it has one  
7 account, many separate accounts, but just one --

8 THE COURT: Um-hum.

9 MR. GLASSMAN: -- bank account, so that would have  
10 stopped payroll. There was a face sheet filing made the next  
11 day in my handwriting because there was a crisis, and no one,  
12 even though the City had to file, no -- in my -- there was no  
13 city -- it's not a decision that was taken lightly or that any  
14 city would do in a deed, it's not as if there have been a  
15 cascade of municipal filings; there's still very, very, very  
16 few filings and there are a lot of good reasons for that. And  
17 the biggest reason is because cities don't want to file unless  
18 they absolutely have to.

19 THE COURT: It is expected.

20 MR. GLASSMAN: I hear about that every day. As you  
21 can see the City -- this is an extremely challenging case.  
22 One of the cases that Mr. Gearin mentioned, the Orange County  
23 case, well under his standard of having a notion to plan, that  
24 case couldn't have been filed. It was the biggest -- until  
25 recently, the biggest case, I spent a considerable amount of

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1 time working that case. In Mr. Gearin's world there's no  
2 Orange County case. The county -- the pool -- there would have  
3 been a cascade of filings, of bankruptcy filings of school  
4 districts and cities. I represent the City of Irvine and the  
5 Orange County Cities in that case. Some of the Cities have  
6 borrowed to invest in the pool, and there would have been a  
7 cascade of filings if there wasn't the breathing room to work  
8 that out. But in Mr. Gearin's world, that case couldn't have  
9 been filed, because they hadn't thought about a plan before  
10 they filed, because it was an emergency.

11 Was it an emergency that Orange County should have  
12 known about sooner? That their -- Mr. Citron was borrowing  
13 well -- was speculating with twenty-two billion dollars of  
14 borrowed money? Probably so, but like in any Chapter 11 case,  
15 Chapter 11 cases occur because human beings are not perfect and  
16 they make mistakes and make bad decisions and that's how these  
17 cases result. And this is no different than any other  
18 situation. And so I submit that it is --

19 THE COURT: What about the post-petition? They were  
20 thirteen months in and there's not even a term sheet or a draft  
21 of a plan. Because you bring up Orange County and they got  
22 into a -- at least a concept of how they were going to do  
23 that -- five months? I forgot. I think it was Judge Ryan's  
24 decision. Wasn't here.

25 MR. GLASSMAN: Well, it certainly the City has limited

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1 re -- this City has -- we talk about Detroit, in fact, they are  
2 on a fast pace. Well, even though Detroit has billions of  
3 dollars of debt, they also have considerably more resources  
4 that apparently -- and more access to consultants and  
5 financial --

6 THE COURT: And somebody that was employed by them  
7 full time to do nothing other than figure out how they would  
8 restructure.

9 MR. GLASSMAN: And apparently more financial help as  
10 well than the City has.

11 THE COURT: Um-hum.

12 MR. GLASSMAN: This is not an easy case.

13 THE COURT: Um-hum.

14 MR. GLASSMAN: Make no question about that. We're  
15 dealing with a situation where the City has limited resources.  
16 And also when you're talking about a city as opposed to some of  
17 the other entities that might file, they're much more complex.  
18 They have to do a pen -- the budgetary process and dealing with  
19 all the constituencies. It's much larger than many of the  
20 municipal cases where they have much simpler problems.

21 THE COURT: Um-hum. Cities are complicated.

22 MR. GLASSMAN: They're complicated and you have to do  
23 a pendency plan. Indeed one of the things -- when the  
24 City -- and I'm looking at the July 23rd fiscal emergency  
25 operating plan that the document that was submitted before in a



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1 part of the record in the case; it's Exhibit L and was  
2 submitted for the council meeting when the fiscal emergency  
3 plan was approved. And it actually talks about the fact that  
4 the fiscal emergency plan is a precursor to a pendency plan  
5 that will lead to a plan of adjustment to comprehensively  
6 restructure the debts of the City, set it on the path of  
7 solvency to develop in discussions with groups. So it was  
8 something that was contemplated before the bankruptcy, but the  
9 process of getting there has been more difficult.

10 And frankly if this -- it would also, because of the  
11 City's limited resources, if we weren't here, you asked me at  
12 an earlier time, Your Honor, what would you -- what would I be  
13 doing if the City wasn't fighting eligibility, wasn't  
14 litigating with its unions, or the City wasn't in this state?  
15 It would be working on a plan. And the City has limited  
16 resources, and as soon -- and the City is anxious to move the  
17 process along as soon as it is able to, given its resources.

18 THE COURT: Thank you.

19 Mr. Gearin, anything further you wish to say?

20 MR. GEARIN: No, I don't think so.

21 THE COURT: All right.

22 MR. DUBROW: Your Honor, I'm sorry. This is David  
23 Dubrow. Could I make a couple of remarks?

24 THE COURT: Yes, you may.

25 MR. DUBROW: Thank you very much. One of our clients,

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1 Ambac, is involved in unfortunately, each of the municipal  
2 bankruptcies that have occurred, including Central Falls, which  
3 is a case that hasn't come up in this discussion which is a  
4 case that went in and out in about one year. But we're  
5 involved in Detroit and also in Stockton, Jefferson County. So  
6 we have, and think a lot about precedent and we're concerned  
7 about precedent that might encourage future Chapter 9 filings  
8 as well, just like CalPERS is, at least in California for  
9 CalPERS. And so we thought quite a bit about this, and I  
10 think -- I just want to share how we look at this case and look  
11 at this situation, is that we see it as, first of all, as  
12 somewhat of an outlier, for reasons which I'll express in one  
13 minute.

14 But what we think overall about the requirements for  
15 filings, the biggest hurdle that a city has to pass, in our  
16 mind, is that after you get beyond authorization, which is  
17 something that's being contested in other cases a lot, is  
18 insolvency. And once you get over the insolvency hurdle, when  
19 you look -- when you review all the case law, there aren't many  
20 cases that have gotten kicked out based on not filing in good  
21 faith, the negotiation factors or desire to effectuate a plan.

22 THE COURT: I agree with you, totally.

23 MR. DUBROW: And so once you get over insolvency, our  
24 view is that there aren't many cities that are going to pass  
25 the insolvency test plus does not want to go through a

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1 bankruptcy with all the problems it poses, unless they feel  
2 like they really have to and unless they actually meet these  
3 other qualifications of desire to effect a plan and filing in  
4 good faith because they realize they're at the end of the road  
5 and they've got to do something extreme that is politically  
6 something they'd rather not do but they just have to do it. So  
7 that's our big picture, first of all.

8           Second of all, only in the case we looked at we should  
9 challenge eligibility. And we decided obviously not to after  
10 we looked at it. And we thought about some of the things that  
11 CalPERS thought about, and we just -- we came down once -- we  
12 came down in a difference place. And we looked at San  
13 Bernardino as an outlier for the following reasons. First of  
14 all, unlike Detroit, unlike Central Falls, where there -- in  
15 both of those cities we have an emergency manager who was  
16 appointed with professional staff who can act in a way that any  
17 democratic re-elected city officials cannot act. It's in  
18 essence, if you will, a form of -- I don't want to --

19           THE COURT: Nepotism?

20           MR. DUBROW: Yeah. And so you have a central --  
21 unlike other cases, you have a centralized authority who can be  
22 decisive and act and not have to worry about political  
23 ramifications of decisions and divisions among politicians, and  
24 they can act decisively. That is what Detroit is all about,  
25 that is what Central Falls was largely about, and that's why

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1 Central Falls went in and out in a year, and we'll see what  
2 happens in Detroit, but clearly they're on a fast track. Even  
3 Stockton, which did have a big ask going through the 506  
4 process, they're still in. Took them about year, just like  
5 this case, if you step back and think about it, to have their  
6 eligibility decision. Now they've been negotiating for a  
7 number of months on a plan which hasn't been filed yet. And I  
8 think they expect to file a plan soon, but just to put some  
9 perspective on that.

10 Now, so then in this case, why we see it as an  
11 outlier, you have, unfortunately, when you look at the history  
12 of the City, and this is not uncommon unfortunately, too, you  
13 have what we would characterize, what I would characterize as  
14 political dysfunction, division within the city, which makes it  
15 hard to make consistent decisions. You seem to have had a  
16 history of -- and I'm not pointing fingers at any particular  
17 individuals here, but then again, reading the history of what  
18 happened here -- financial incompetence among certain parties  
19 in the city in terms of what happened with the financial  
20 records and keeping track of their money. And so all of a  
21 sudden, basically they realized -- and they knew there were  
22 signs, and they knew they had problems but the problems were  
23 materially worse than they even knew they were, when they had  
24 new people come in to take over the financial recordkeeping.  
25 And those people said, hey, we've got this huge problem, we've

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1 got to deal with this, and it was, in our mind, a pretty  
2 extreme situation. And as CalPERS said, they didn't know what  
3 they had to pay on a daily basis. So if the City didn't know  
4 what it could pay on a daily basis -- and I think that's an  
5 accurate statement -- how are they going to formulate a plan of  
6 adjustment. And how are they going to come up with a process  
7 from here to there? They were in a state of extreme emergency.  
8 And that was our view; that's why we didn't object. We think  
9 their financial records were in disarray, and we think they've  
10 been working to -- not as fast as we would like and we don't  
11 like all the problems that have been identified, but the  
12 problems are what they were going into this case. And we've  
13 got to get on track where the records can be put together, the  
14 projections can be put together; and we believe the City is  
15 working on putting on projections together so that we can move  
16 toward formulating a plan. But that's our perspective on this.  
17 That's how we see it.

18           The last thing I would just add, and I've struggled  
19 with why CalPERS has opposed this and what -- as you posed the  
20 question, what would they look to get out of a dismissal. I  
21 think that they're frustrated, which they have expressed, at  
22 the pace of this, and we certainly understand that.

23           I will just observe, and I think this is an objective  
24 observation, so I'm not saying anything about anyone's intent  
25 or motivation. But it is has struck me that, if this case did

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1 get dismissed, there is one creditor who would have tremendous  
2 leverage outside of a bankruptcy if they were to terminate the  
3 pension plan, and that's CalPERS because they would get a lien  
4 on all the City's assets by statute. And that threat of a  
5 termination outside of a bankruptcy and the threat of that lien  
6 would give CalPERS tremendous leverage outside of bankruptcy.  
7 And that certainly has been something that has struck me,  
8 anyway, in trying to figure out what might be going on here in  
9 terms of at least what the impact would be of a dismissal vis-  
10 a-vis CalPERS and the City.

11 So that's all I have to say, Your Honor. Thank you  
12 for letting me speak. I appreciate it.

13 THE COURT: Thank you very much.

14 MR. GLASSMAN: Your Honor --

15 THE COURT: Mr. Glassman.

16 MR. GLASSMAN: -- I just had a couple things to add --

17 THE COURT: You may.

18 MR. GLASSMAN: -- on the specifics of the discussion  
19 of the financials. The statement was made that no financial  
20 information was provided to CalPERS and that the City isn't  
21 working --

22 THE COURT: They didn't say no, they said you have  
23 withheld some financial information.

24 MR. GLASSMAN: Your Honor, they said they didn't have,  
25 for example, projections. They said they did not receive --

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1 they wanted financial projections is what Mr. Gearin said.

2 THE COURT: Yeah, okay. That -- yeah, he did say.

3 MR. GLASSMAN: And also bank reconciliations, I want  
4 to -- although the City is not required under any court order  
5 to provide the bank reconciliations they've continued to  
6 provide reconciliations for -- February, March and April were  
7 provided on July 22nd, July 29th and August 22nd. And they  
8 continue to provide them as they're able to do so. They're  
9 prepared by the staff and reviewed by counsel. And Mr. Busch  
10 advises me that he sent an e-mail to CalPERS consultant, Mr.  
11 Crisafulli on April 11th at 4:03 p.m. with ten-year forecasts  
12 of cash flow. And the City is working --

13 THE COURT: I thought his declaration said he got it  
14 in April. I thought that was in his declaration. So I said in  
15 my assumed facts that until April there were no cash  
16 projections, but my understanding from his declaration is they  
17 had them after that.

18 MR. GLASSMAN: And, Your Honor, they City is  
19 working -- we mentioned in another hearing, the City's  
20 financial staff is working with their auditors on the --  
21 they're catching up. They're still behind on the fiscal year  
22 audit for 2011-'12, and 20- -- which is to be complete  
23 relatively soon.

24 UNIDENTIFIED SPEAKER: In a month.

25 MR. GLASSMAN: In a month. And the fiscal year, '12-

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1 '13 will be prepared within a few months, I believe, or a  
2 little bit later in the year, hopefully. So they're working --  
3 this financial information will be helpful as part of the plan  
4 formulation process and although the situation is clearly not  
5 ideal or perfect with respect to the financials it is  
6 improving. And the City is collecting its financial  
7 information, is now -- the situation that was described earlier  
8 in the case has changed dramatically in terms of the City's  
9 ability to provide financial information and forecast, although  
10 it is still perhaps not able to do so at the pace that some  
11 creditors would prefer in the case.

12 But in any event, so there is progress being made, and  
13 that's why I would urge the Court not to set any specific  
14 deadlines because we're moving as fast as we can and we'll see  
15 how -- I would like to see how the process develops and leave  
16 some flexibility, the assurance that we're doing everything we  
17 can as quickly as we can. And the City doesn't want to stay in  
18 bankruptcy a moment longer than it has to, but on the other  
19 hand, as we've seen from the case, because of just part of the  
20 process and the realities of the City, certain things take  
21 time. And the legal -- you asked why plans cannot be  
22 formulated and such. Well, they depend, of course, on  
23 financial information. So until you have the financial  
24 information in place, it is difficult to formulate the legal  
25 proposals that flow from that. So that's -- I would urge the



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1 Court not to set any deadlines at this time, although clearly  
2 it's in all of our minds that this process needs to move along  
3 quickly.

4 THE COURT: All right, thank you.

5 Mr. Gearin?

6 MR. GEARIN: Your Honor, if I could?

7 THE COURT: Yes, you may. You have two people that  
8 you may respond to.

9 MR. GEARIN: Thank you, Your Honor. And I'll be very  
10 brief. I guess I'll start with the financial information  
11 issue. Two points there. One, we're happy to have the Court  
12 take testimony on whether the City has intentionally withheld  
13 financial information from CalPERS. And we think we could talk  
14 to Mr. Busch, we'll do a short deposition, and we'll figure out  
15 whether that's intentionally been done or not, and we'll  
16 present that evidence to the Court. We think the evidence is  
17 there that the City has purposely has withheld cash reports  
18 that are available today, forecasts that are available today as  
19 a litigation tactic so that they don't have to share that  
20 information in advance of this eligibility hearing. So we're  
21 happy to provide that. That's a serious issue going forward in  
22 this case. If you're going to find this debtor is eligible,  
23 they have to share real information with their creditors.

24 THE COURT: Of course they do.

25 MR. GEARIN: And they can't hide behind

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1 confidentiality protections and barriers to producing  
2 information.

3 Second point. This debtor says, well, we don't have  
4 the resources to go forward with producing these reports and  
5 we're moving as fast as we can.

6 THE COURT: They didn't say they didn't have resources  
7 to ever do them; they said they are doing them as quick as they  
8 can.

9 MR. GEARIN: I think that's right, Your Honor. And I  
10 got to tell you, I'm sorry, I don't think that's true. Their  
11 most recent cash report forecast indicated at the end of the  
12 fiscal year they had forty million dollars of cash. Forty  
13 million dollars. They don't have the resources to go hire the  
14 people to create forecasts and present a plan? I cannot  
15 understand why that could be true. They have accrued a huge  
16 amount of cash during the time they have not been paying their  
17 creditors while they're in this bankruptcy case.

18 I want to go back and talk about Mr. Dubrow's comments  
19 very briefly as well. Mr. Dubrow says, well, CalPERS is going  
20 to be benefitted by dismissal. That's not true. We actually  
21 think that all of the creditors in this case will be benefitted  
22 by dismissal. It's not going to be the end of the world for  
23 the debtor; the debtor is not going to necessarily going to  
24 have to dissolve. What it's going to have to do, is it's going  
25 to have to go back and come up with a concept of a plan and do

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1 the things it should have done before it came in the doors of  
2 this Court. It's going to have to negotiate in good faith with  
3 its creditors. It's going to have to have fair discussions  
4 with people about how a plan can actually move forward. If you  
5 tell the debtor it's okay to come into these doors right now  
6 without doing those things, I'm telling you, we're going to  
7 have a very difficult time prying information and getting this  
8 debtor to move forward with a real plan process.

9 Last point. Your Honor, one of the reasons that  
10 eligibility is an important decision for the Court in a Chapter  
11 9 case is that you really only have a couple of tools. You've  
12 got eligibility and plan confirmation, and once you determine  
13 eligibility, you cannot unring that bell. You cannot convert  
14 the case; you can't appoint a trustee. So those would be the  
15 kinds of things you would do if your case moved forward in  
16 Chapter 11 and things were not proceeding in good faith and the  
17 debtor was not complying with its responsibilities to its  
18 creditors. You're not going to be able to do those things if  
19 you determine this debtor is eligible. So the proper course  
20 from CalPERS perspective is, don't make that decision, don't  
21 ring that bell because they have not come forward with  
22 sufficient evidence to prove their worth, to prove that they're  
23 actually fulfilling their obligations to their creditors thus  
24 far in the case.

25 Thank you, Your Honor.

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1 THE COURT: Although CalPERS may say a compelling  
2 argument that this debtor is certainly different than many of  
3 the other debtors that have been found eligible and that it is  
4 slow, that its financial records were in disarray when they  
5 filed, that it has taken a long time getting them in order.  
6 But it appears to have come a fairly long way based on their  
7 getting their cash projections out in April and doing the other  
8 things they have done.

9 I do think that the characterization of this case as  
10 an outlier is a correct characterization. And although I would  
11 regret setting a precedent -- and of course, I have no powers  
12 to do that as a trial judge -- but an example that other cities  
13 could look at and thing let's follow the roadmap of San  
14 Bernardino, I cannot imagine any city choosing to do that. It  
15 is too painful.

16 I'm going to rule my tentative. I'm going to grant  
17 eligibility for all the reasons I shared before. And I'm going  
18 to ask that the order issue as quickly as possible. I'm not  
19 going to condition the order.

20 I have some things to say about what happens after  
21 that order is entered when we talk about mediation. And they  
22 might help CalPERS swallow the ruling that I'm making. I have  
23 made my decision -- there aren't any findings and conclusions  
24 in a summary judgment. So I've made my statement about my  
25 analysis of the law and the record; however -- and I will enter

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1 the order -- I do intend to write a written opinion, but it  
2 will not hold up the order at all because I think doing that  
3 would just be a delay that's unwarranted in this case.

4 Judge Klein ruled and wrote months later, and I intend  
5 to do the same thing because I think I need to explain in  
6 writing what happened here, and I will try do that and why I  
7 ruled the way I did, although I think the record I made is  
8 pretty clear.

9 So I will grant the motion. I will find eligibility,  
10 and I will ask Mr. Glassman to circulate a simple order as to  
11 form only, granting the order for relief. And if you cannot,  
12 in a short period of time, get agreement on that order, then  
13 lodge it, and I will follow the lodgment procedure and taking  
14 challenges.

15 That, having been said and done, I want to talk about  
16 the mediator next. And therefore, there are a lot of people  
17 that are not -- have not been appearances yet that maybe we  
18 should make an appearance. So I'll open the podium to that.

19 MR. OLINER: Thank you, Your Honor. Ron Oliner, Duane  
20 Morris, counsel for the San Bernardino Police Officers  
21 Association. In the courtroom with me today are Detective  
22 Steve Turner, president of the association, and I believe the  
23 vice president of the association, Mr. Brian Lewis, is milling  
24 about somewhere. I don't see him in the courtroom at this  
25 moment.

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1 THE COURT: Thank you.

2 MR. GLAVE: Good afternoon, Your Honor. Corey Glave,  
3 on behalf of the San Bernardino City Professional Firefighters.

4 THE COURT: Good afternoon.

5 MR. GOODRICH: Good afternoon, Your Honor. Dave  
6 Goodrich, on behalf of the Firefighters as well.

7 MS. UYEDA: Good afternoon, Your Honor. Anne Uyeda  
8 and Bienert, Miller & Katzman, on behalf of Certain Retired  
9 Employees of the City of San Bernardino.

10 THE COURT: Thank you.

11 MR. LUBIC: Good afternoon, Your Honor. Michael Lubic  
12 of K&L Gates for CalPERS.

13 THE COURT: Is there -- I think there's one other  
14 person approved live on the phone besides Mr. Dubrow.  
15 Apparently, that --

16 MS. DANDENDAU: Good af --

17 THE COURT: Yes, no?

18 MS. DANDENEAU: Good afternoon, Your Honor. Debra  
19 Dandeneau from Weil, Gotshal & Manges, for National Public  
20 Finance Guarantee Corporation.

21 THE COURT: I thought you were --

22 MS. DANDENEAU: Although we do not intend to make any  
23 comments with respect to --

24 THE COURT: All right.

25 MS. DANDENEAU: -- mediation.

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1 THE COURT: That's fine. Thank you.

2 I would like to address -- and this is a matter that  
3 is actually number 27 on the Court's calendar, which is the  
4 status conference on the main case here. I spoke to Judge Zive  
5 after he returned from Europe last Monday, and he said he was  
6 willing to undertake assistance as a negotiator -- a mediator  
7 in this case. But there are two conditions that I have to ask  
8 for before he is willing to undertake that.

9 Number one, it really is an afterword, just a  
10 statement of fact, and it may not matter in the timing of  
11 what's going on here. He's really not available with time  
12 until the end of September, early October.

13 But the second condition will make that probably not a  
14 problem compared to the second condition. The second condition  
15 is he will not start a negotiation without a draft plan before  
16 him because -- and I agree with him. How could he do it if  
17 there are no concepts on the table?

18 So to the extent that CalPERS wants to see that plan  
19 or an outline of the plan, so does the mediator and so does  
20 this judge.

21 I am not going to set a deadline for filing a plan  
22 because that's different than Judge Zive is asking for. But I  
23 need some commitment from the City before I sign the order  
24 appointing Judge Zive that they will have some term sheet --  
25 which I think is another term of art for something, a precursor

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1 to a plan -- available at some foreseeable future time because  
2 he cannot negotiate an essentially -- an empty -- I don't know  
3 what word is -- he can't negotiate without something to  
4 negotiate about.

5           You need a minute to confer with your people, Mr.  
6 Glassman, to answer that question?

7           MR. OLINER: May I be heard before --

8           THE COURT: Yes, you may.

9           MR. OLINER: Thank you.

10           MR. DUBROW: Your Honor, before -- I'm sorry. This is  
11 David Dubrow. Can I make one comment before --

12           THE COURT: Yes, you may.

13           MR. DUBROW: Thank you. I would suggest that besides  
14 a term sheet, for it to be meaningful for creditors, that it  
15 would need to be accompanied by some multiyear projection.

16           THE COURT: Yeah, it needs to project, clearly.

17           MR. DUBROW: That --

18           THE COURT: I agree with you, a hundred percent.

19           MR. DUBROW: Okay.

20           MR. OLINER: Thank you, Your Honor. I'll be brief.  
21 But my thinking of interrupting what was going to be a short  
22 minute for counsel to confer with the City representatives was  
23 that it might be constructive -- who knows? They'll decide  
24 after I finished talking, and I'll be very brief now. There  
25 are some other -- absolutely, I am a pro-deadline kind of a



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1 guy, notwithstanding your comments. And I keep citing back --  
2 harking back to Vallejo. I draw a smirk from Fires' counsel  
3 because I do it all the time, but that's exactly what Judge  
4 McManus did when very able counsel at Orrick -- I won't say  
5 they were drifting necessarily, but the case was drifting.

6 So I'm a big believer in deadlines.

7 THE COURT: Yeah, I'm not going to leave this open.

8 MR. OLINER: That's --

9 THE COURT: I'm setting another --

10 MR. OLINER: -- that's where we're going.

11 THE COURT: -- status conference for me to think about  
12 setting the deadline for supplying the plan. But I think it's  
13 a little premature for me --

14 MR. OLINER: But --

15 THE COURT: -- to do that today.

16 MR. OLINER: Agree. But consistent with your last  
17 comment, let's -- and Mr. Glassman began to talk about a period  
18 of a month while looking back at somebody, and then said three  
19 months after looking back at someone else on a different issue.  
20 I think we should get a fix, and particularly --

21 THE COURT: Yeah.

22 MR. OLINER: -- given Judge Zive's second condition,  
23 on when we're going to see this thing. And it makes eminent  
24 sense for the judge not to walk in cold with way too many  
25 lawyers --

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1 THE COURT: Right.

2 MR. OLINER: -- and to say okay, where do we start.

3 It begins with the --

4 THE COURT: Yeah. And he may decide after he's seen  
5 it that he starts with a piece or a piece or a piece or many --

6 MR. OLINER: That's how you move the case along.

7 Absolutely. That's how you move the case along.

8 Two other preliminary comments -- because, depending  
9 on how the mediation part of today's event goes, I may have  
10 much more to say -- are these. And I've participated as best I  
11 could in phone calls putting lawyers in the same phone line  
12 anyway to discuss the parameters of a mediator. You've  
13 indicated you're going to do what you're going to do vis-a-vis  
14 the mediator's powers.

15 Here are my last two points. Don't tie the mediator's  
16 hands.

17 THE COURT: I'm not going to.

18 MR. OLINER: Excellent. Let the mediator decide what  
19 he mediates, whatever it may be, because everyone is trying to  
20 say give him this piece but not that piece.

21 Secondly --

22 THE COURT: Well, my comment at the last status  
23 conference about the interplay between the Lisco motions, as I  
24 call them, and the plan terms -- I haven't forgotten the  
25 comment, and I totally believe it, because the short-term

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1 rejection or imposing of the collective bargaining agreement is  
2 only a piece of the long term --

3 MR. OLINER: Absolutely.

4 THE COURT: -- with the same people.

5 MR. OLINER: Now --

6 THE COURT: And if you're talking about the plan with  
7 those parties, although I know the City's proposed order was  
8 only if they agree, well, you know, a mediation with a  
9 nonagreeing party --

10 MR. OLINER: It's --

11 THE COURT: -- is not very helpful. But I can't  
12 imagine that long term -- the short term isn't going to come up  
13 in the long-term discussion.

14 MR. OLINER: Now, that's a -- now, I have a subpoint  
15 before I get to my --

16 THE COURT: Okay.

17 MR. OLINER: -- final point. Mr. Glassman has  
18 previously told the Court, and I suspect he'll do so again  
19 today, let's move out on the 365, 362 motions.

20 THE COURT: Well, I was going to --

21 MR. OLINER: Let's go. Let's go. Let's go.

22 THE COURT: That's why I went to the mediator first.

23 MR. OLINER: And if we go there, that may be where we  
24 have to go. But precisely the point, what do you -- okay.  
25 Whoever gets a incremental victory there, you've still got fire

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1 and police coming to work every day looking for contracts.  
2 It's sort of like a -- it may be high five among some of the  
3 City Council that the City got the contracts rejected or vice-  
4 versa, if you were to rule in favor of the unions, the public  
5 safety. Whether they're going to push forward on that or not  
6 aside, the second thing that mediator needs to have is a gag  
7 order.

8 This is a politically charged case. Some would say a  
9 political train wreck of a case. There are media -- and I'm  
10 not suggesting media can't be our friends -- all around and  
11 there are people who talk.

12 THE COURT: They've already reported my tentative  
13 decision.

14 MR. OLINER: I'm quite sure if I were to --

15 THE COURT: I went back in there on the break, and I  
16 pulled up --

17 MR. OLINER: They Googled --

18 THE COURT: We get a thing every day; it's called  
19 "Bankruptcy in the News". And it's put together by clerks in  
20 Washington State.

21 MR. OLINER: Yeah.

22 THE COURT: And the fir -- and it came on my computer  
23 sometime while I was on the bench.

24 MR. OLINER: Imagine if --

25 THE COURT: And the first article was about me.

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1 MR. OLINER: -- imagine if Mr. Gearin had turned your  
2 tentative around. Boy, would they be wrong. It would have --  
3 heads would have rolled in the world of journal -- so --

4 THE COURT: No, they reported it correctly as a  
5 tentative ruling made at 1:30 today.

6 MR. OLINER: All right. Well, so --

7 MR. GLASSMAN: Those Washington sources are really  
8 accurate.

9 MR. OLINER: So the mediator --

10 THE COURT: No, the -- it's a wonderful service they  
11 do for us. But I couldn't believe they picked that up that  
12 quickly.

13 MR. OLINER: So my point's made; to summarize are, let  
14 the --

15 THE COURT: Right.

16 MR. OLINER: -- mediator have unfettered discretion to  
17 decide what he mediates. After all, a mediator doesn't have  
18 binding authority.

19 THE COURT: Right.

20 MR. OLINER: It's not an arbitrator. He's not --

21 THE COURT: And they -- and the City --

22 MR. OLINER: -- sitting as a judge.

23 THE COURT: -- can come in and say we don't want to  
24 talk about that. And maybe he'll convince them they do. And  
25 I'm not going to tie his hands from trying to convince the City

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1 they should talk about that, which is why I think I would do it  
2 unfettered.

3 MR. OLINER: Secondly, given his unavailability for  
4 another month and change, that should be plenty of time. And  
5 I'd like to hear Mr. Glassman say yes, I agree; for them to get  
6 at least a term sheet out.

7 THE COURT: Right.

8 MR. OLINER: And we'll talk about deadlines down the  
9 road when it begins to drift again. Today was a huge day, as I  
10 suggested it might be two hearings ago, were you to rule this  
11 way. Let's get to it.

12 Three, an appropriate gag order needs to be included  
13 in whatever order you grant.

14 THE COURT: This is a gag on all parties, I assume,  
15 not a gag on the --

16 MR. OLINER: All parties to the --

17 THE COURT: I mean, the media are going to talk  
18 anyway, but --

19 MR. OLINER: If you're going to be --

20 THE COURT: I know. I -- they're losing their  
21 mediator confidentiality if they talk, so they shouldn't be  
22 talking. But maybe we need that in writing.

23 MR. OLINER: That's enough for now. Thank you, Your  
24 Honor.

25 THE COURT: Okay. Thanks. Mr. Glassman, do you need

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1 a minute, or have you already talked?

2 MR. GLASSMAN: No, Your Honor. We need probably more  
3 than a minute to --

4 THE COURT: Okay. How many minutes? My problem is if  
5 I let people out of the courtroom, it'll be longer to get you  
6 back than I intend.

7 MR. GLASSMAN: We do need about fifteen minutes.

8 THE COURT: All right. You need that long. Okay.  
9 Then, I better let you go do that. We'll take a recess until 5  
10 o'clock. Off the record.

11 (Recess from 4:44 p.m. until 5:17 p.m.)

12 THE CLERK: Remain seated and come to order.

13 THE COURT: All right. We're back on the record in  
14 the City of San Bernardino. This is the status conference of  
15 the main case. Mr. Glassman.

16 MR. GLASSMAN: Your Honor, I would like to raise -- to  
17 respond to the -- to your question and raise a few issues. And  
18 then, after doing so, I'm going to ask for a short continuance  
19 of the matter. And let me tell you the considerations with  
20 respect to the timing.

21 THE COURT: Okay.

22 MR. GLASSMAN: First, there -- I understand that in  
23 one of the items that Mr. Busch will need in order to prepare  
24 projections in connection with the plan will be the CalPERS  
25 actuarial report, which is given to the cities in mid-October.

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1 And with -- Mr. Busch advises that that is a document that he  
2 must have.

3 THE COURT: Did he get one last year, mid-October?

4 MR. GLASSMAN: Every year, they're given all of it.

5 THE COURT: How about working off the one from last  
6 year? CalPERS is shaking their head that that would be  
7 reasonable.

8 MR. GLASSMAN: Your Honor, Mr. Busch advised me that  
9 he expects that the numbers -- well, because of all of the  
10 changes that the City and the number of employees and such,  
11 because of layoffs and such, that the numbers and changes in  
12 the plans that -- in the cost sharing -- that it's anticipated  
13 that the numbers will change significantly. And they will need  
14 that information in order to formulate a proposal. That's  
15 number one.

16 Number two, they will need the starting cash balances  
17 which will be derived from the closing from the 2011-2012  
18 audit, which, I indicated earlier, they expect that to be  
19 completed in about thirty days. And they will need to have the  
20 information from that audit in order to prepare projections and  
21 have the starting cash balances.

22 So from a financial standpoint, those are two items  
23 that are significant.

24 THE COURT: Does he think that the audit's going to  
25 change the ones in the unaudited? This is a delay I'm not



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1 liking to hear, Mr. Glassman.

2 MR. GLASSMAN: Your Honor, he advised me that they do  
3 have trial balances, that they need that information to verify  
4 the trial balances, but they can certainly begin work --

5 THE COURT: That's what I'm --

6 MR. GLASSMAN: -- they can work with trial balances.

7 THE COURT: -- we're at the stage you don't need these  
8 exact numbers. I can't imagine you can't get a ballpark number  
9 from CalPERS that would allow you to not have to wait until  
10 October to do this. And I can't imagine you don't have  
11 tentative numbers from the 2011-2012 audited financials that  
12 wouldn't be enough information for you to start a term sheet.

13 MR. GLASSMAN: Your Honor, if CalPERS is willing to  
14 give the City the data earlier, then that --

15 THE COURT: Or some --

16 MR. GLASSMAN: -- would change things.

17 THE COURT: -- just a number? Is it a complicated  
18 number, or is it like one sum? Complicated number?

19 MR. GLASSMAN: Certainly, it's that -- the answer  
20 would change if the information could be obtained earlier.

21 THE COURT: Okay. Well --

22 MR. GLASSMAN: With respect to one additional item, of  
23 course, a component of the City's plan is the rejection of the  
24 union contracts. So that matter would -- the City is assuming  
25 would have to be determined, and the City would have to know

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1 the outcome of that in order to --

2 THE COURT: I'm not going to delay your doing a plan  
3 until I rule on that motion. If you have to, put it in the  
4 alternative in your term sheet. Yes and no.

5 MR. GLASSMAN: Then, lastly, Your Honor, kind of the  
6 elephant in the room is that the City is a political body. And  
7 Chapter 9 anticipates that the political process will continue.  
8 And as the Court may be aware, this time of year is an --  
9 there's an election in early November, and also there are  
10 elections for mayor, several councilmembers, and there's also a  
11 recall so that at this particular -- the period of time in  
12 September and October is one that we're, just as a practical  
13 matter because of the political process, a lot of the time of  
14 the City Councilmembers will be spent in dealing with the  
15 election. So that also has an impact on the timing.

16 So we're -- preliminarily, we're looking at, with  
17 these items that we need, we're thinking that the end of the  
18 year for a -- looking at the end of year -- December, January,  
19 for a term sheet is what we're looking at.

20 THE COURT: I don't think that's reasonable.

21 MR. GLASSMAN: Or --

22 THE COURT: You're going to make my ruling look bad in  
23 December, Mr. Glassman.

24 MR. GLASSMAN: Early December -- okay.

25 THE COURT: You're going to dig yourself in a hole,

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1 and I'm going to get a reconsideration.

2 MR. GLASSMAN: Okay.

3 THE COURT: So think some more.

4 MR. GLASSMAN: Okay. Your Honor, given the comments  
5 about the actuarial protections, I would say then  
6 approximately -- if we get those in October, then, say, in --  
7 say, within thirty to -- thirty days or so after that time.

8 THE COURT: Can you get those to them any earlier, Mr.  
9 Lubic, or something?

10 MR. LUBIC: I don't know. I think --

11 THE COURT: Half?

12 MR. LUBIC: -- it probably can be --

13 THE COURT: I know you don't want to commit.

14 MR. LUBIC: -- expedited, but I'm going to explain why  
15 the City doesn't need to wait until they get --

16 THE COURT: Okay.

17 MR. LUBIC: -- the valuation report.

18 THE COURT: I wondered about that. Tell me.

19 MR. LUBIC: And I'm -- this is where I stand up and  
20 say I'm not an actuary.

21 THE COURT: I know.

22 MR. LUBIC: And I would certainly feel better if I had  
23 a chance to verify this with my client. But with that caveat,  
24 my understanding is that the actuarial reports are done in  
25 arrears so that the report that is due this fall would actually

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1 be for the year ended June 30, '12. Is that right? That's not  
2 right? Well, without regard to what the report has in it --

3 THE COURT: Um-hum.

4 MR. LUBIC: -- the reality is that the public records  
5 of the City of San Bernardino reflect that they engaged Bartell  
6 & Associates as their consulting actuary. They've paid Bartell  
7 & Associates a fair amount of money. He has met with the  
8 actuaries at CalPERS, and they have enough information to take  
9 a stab at the --

10 THE COURT: Okay.

11 MR. LUBIC: -- at the numbers. They don't need this  
12 report.

13 THE COURT: All right.

14 MR. GLASSMAN: Your Honor, I would, again -- I would  
15 ask, in order to have answers to these question, I would -- it  
16 might be helpful to have a short continuance so that we can  
17 answer the question --

18 THE COURT: Yeah, I'm inclined to do that, because I'm  
19 not going to let this thing go out. I hate to make everybody  
20 run back in here, so I'm prepared to do something that a lot of  
21 people could be on the phone for in a fairly short time frame.  
22 If I -- like, maybe next week? Like a week from tomorrow or  
23 maybe even a week from today or even a week from yesterday.  
24 And I would let anybody that can't make it here or doesn't want  
25 to come here be on the phone live to participate because I know

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1 it's an effort to get here from a distance.

2 Because I really think that that's an unreasonable  
3 request. And it --

4 MR. GLASSMAN: Your Honor --

5 THE COURT: -- makes me question whether there ever  
6 was an endgame.

7 MR. GLASSMAN: Your Honor, I would like to come up  
8 with a shorter period. I need an opportunity --

9 THE COURT: I know.

10 MR. GLASSMAN: -- to consult in order to do that  
11 rather than --

12 THE COURT: All right. I'll let you do that.

13 MR. GLASSMAN: -- guess at a time.

14 THE COURT: Because my concept is you don't need that  
15 exact a number to get a concept of a plan drafted. And quite  
16 frankly, although I've certainly heard a lot from CalPERS about  
17 nobody at the City of San Bernardino has enough staff, has been  
18 assigned to draft the plan, attorneys draft plans. Yes, you  
19 need some financial information, but it doesn't have to be the  
20 last dollar. And a lot of what's going to be in that concept  
21 is this is how we intend to treat you, whatever your claim is.

22 So you're getting hung up on detail that I'm not  
23 contemplating would be necessary for you to get something  
24 meaningful for Judge Zive to start mediating about. So I  
25 will -- when next week can we be back? Officially, I can set

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1 it Tuesday or Thursday in the afternoon. And if I do it  
2 Wednesday, it'll be a little later in the afternoon.

3 MR. OLINER: Each or any, on behalf of myself, Your  
4 Honor. And I will --

5 THE COURT: Well, that'll be on the --

6 MR. OLINER: -- I'll be availing myself of a  
7 telephone --

8 THE COURT: That's fine.

9 MR. OLINER: -- versus coming back down for it.

10 THE COURT: Absolutely.

11 MR. GLASSMAN: Your Honor, Thursday and Friday are  
12 Jewish holidays, and Wednesday evening.

13 THE COURT: How about Tuesday afternoon?

14 MR. GLASSMAN: There's a council meeting on Monday.

15 THE COURT: Is that going to work? It's a long  
16 weekend.

17 MR. GLASSMAN: And Tuesday. And Labor Day is Monday.  
18 Is it possible it could be early the following week?

19 MR. OLINER: How about Friday of this week?

20 THE COURT: I have a problem Friday. We have our  
21 quarterly board judges' meeting, so I can't commit Friday, plus  
22 I think he said that that was part of the Jewish holiday.  
23 Right?

24 MR. GLASSMAN: Well, that's next Thursday --

25 THE COURT: Yeah.

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1 MR. GLASSMAN: -- and Friday. But I think we need  
2 an --

3 THE COURT: Oh.

4 MR. GLASSMAN: -- additional --

5 THE COURT: You mean you can't do it on the 5th? Is  
6 he in or out? Is that the Jewish holiday?

7 MR. GLASSMAN: The 5th is a Jewish holiday.

8 THE COURT: That's the -- okay.

9 MR. GLASSMAN: The 5th and 6th are Jewish holidays.

10 THE COURT: Okay. That's what I thought you said.  
11 That Friday's just --

12 MR. GLASSMAN: And Tuesday is a council meeting.

13 MR. OLINER: How about Wednesday, the 4th?

14 THE COURT: That's what I'm thinking, later in the --  
15 I could do it at 1:30. I can do it, like, 2:30.

16 MR. GLASSMAN: Well, in the after -- the Jewish  
17 holiday begins at sundown.

18 THE COURT: How about you be on the phone?

19 MR. GLASSMAN: I'm sorry?

20 THE COURT: How about anybody Jewish can be on the  
21 phone? We'll be done by sundown.

22 MR. GLASSMAN: We -- well, we can do the  
23 morn --

24 MR. LUBIC: The sun will be up at 7:30.

25 MR. GLASSMAN: -- the morning on the --

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1 THE COURT: Oh, I can do it in the morning, actually.

2 MR. LUBIC: Sundown is like 7:30.

3 THE COURT: I can do it -- I --

4 MR. GLASSMAN: The morning on the --

5 THE COURT: I can do it at 10 or 11 on the morning of  
6 the 4th.

7 MR. GLASSMAN: Okay. And then, I guess the 2nd is  
8 Labor Day. So -- okay. Then, 11 o'clock on the 4th.

9 THE COURT: Okay. That's fine. We will continue the  
10 status conference part of what's on today to September 4th at  
11 11 o'clock. And I'm pre-approving anybody that wants to be on  
12 the phone live.

13 MR. OLINER: Thank you, Your Honor.

14 THE COURT: I think we should continue the Lisco  
15 decision until we get this straightened out. But I am going to  
16 enter an order, if I am able to do it, about the mediator that  
17 leaves the ability to negotiate that decision on the table.  
18 And I'll have a little bit more to say about that next week.  
19 But I don't know that it is going to be productive to set up a  
20 whole number of complicated briefing schedules on that before  
21 the parties have had any chance to meet with Judge Zive.

22 So I'm not saying I won't make that decision if the  
23 City absolutely refuses to meaningfully mediate on it, because,  
24 as you can tell, I'm prepared to make decisions when I have to.  
25 But I'm not sure whether that might be obstructive to the



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1 negotiation if people are briefing and trying to talk at the  
2 same time. But I'll address that further next week.

3 So I'm going to continue them all to September 4th at  
4 11 o'clock. That would be the other matters from the calendar  
5 other than the main case and the summary judgment motion -- I  
6 mean the -- other than the summary judgment motion. Is that  
7 okay with everybody that we do that? All right. Fine. That's  
8 what we'll do then.

9 MR. OLINER: Thank you, Your Honor.

10 THE COURT: I think that concludes the matters for  
11 this afternoon. The Court's in recess.

12 MR. OLINER: Thank you for your time today.

13 THE COURT: Thank you. I'll see you next week.

14 (Whereupon these proceedings were concluded at 5:32 PM)

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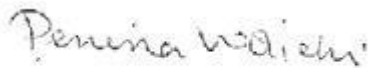
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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.



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PENINA WOLICKI

AAERT Certified Electronic Transcriber CET\*\*D 569

eScribers, LLC

700 West 192nd Street, Suite #607

New York, NY 10040

Date: August 30, 2013

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<b>9 (47)</b> 5:5;7:15,20;10:19; 12:1,21;13:11;25:21; 26:3,5;30:7;31:7; 34:14,24;40:12;43:1, 13;44:19,21;45:16; 47:23;48:1;50:11,15; 51:1,2;52:23;53:4; 54:10;55:25;56:16; 57:7;59:4,5,8;60:13; 71:14;72:12;83:14,23; 89:8,17;92:7;93:21; 98:7;107:11;122:7 <b>904 (2)</b> 27:12;90:18 <b>90s (1)</b> 50:9 <b>921 (11)</b> 8:17,18;9:17;19:7; 20:17;35:7;38:13; 47:11;51:14;55:3;90:9 <b>921c (2)</b> 50:3,8 <b>926 (1)</b> 25:2 <b>9th (4)</b> 38:16;78:4;92:23,24				

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 10100 Santa Monica Blvd., 7th Floor, Los Angeles, CA 90067

A true and correct copy of the foregoing document entitled (*specify*): \_\_\_ CALPERS' MOTION FOR LEAVE TO APPEAL FILED PURSUANT TO FRBP 8001(b)\_\_\_\_\_ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) \_\_\_10/22/12\_\_\_, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Jerrold Abeles abeles.jerry@arentfox.com, labarreda.vivian@arentfox.com
- Franklin C Adams franklin.adams@bbklaw.com, arthur.johnston@bbklaw.com;lisa.spencer@bbklaw.com;bknotices@bbklaw.com
- Joseph M Adams jadams@adamspham.com
- Andrew K Alper aalper@frandzel.com, efilng@frandzel.com;ekidder@frandzel.com
- Thomas V Askounis taskounis@askounisdarcy.com
- Julie A Belezzuoli julie.belezzuoli@kayescholer.com
- Anthony Bisconti tbisconti@bmkattorneys.com, admin@bmkattorneys.com
- Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com
- Brett Bissett brett.bissett@klgates.com, carolyn.orphey@klgates.com;klgatesbankruptcy@klgates.com
- Jeffrey E Bjork jbjork@sidley.com
- Michael D Boutell mdbell@comerica.com
- J Scott Bovitz boviz@boviz-spitzer.com
- John A Boyd fednotice@tclaw.net
- Jeffrey W Broker jbroker@brokerlaw.biz
- Deana M Brown dbrown@milbank.com
- Michael J Bujold Michael.J.Bujold@usdoj.gov
- Shirley Cho scho@pszjlaw.com
- Alicia Clough alicia.clough@kayescholer.com, managingattorneyofficeassignments@kayescholer.com
- Marc S Cohen mcohen@kayescholer.com, dhernandez@kayescholer.com
- Ronald R Cohn rcohn@horganrosen.com
- Christopher H Conti chc@sdlaborlaw.com, sak@sdlaborlaw.com
- Christopher J Cox chris.cox@weil.com, janine.chong@weil.com
- Christina M Craige ccraige@sidley.com
- Alex Darcy adarcy@askounisdarcy.com, akapai@askounisdarcy.com
- Susan S Davis sdavis@coxcastle.com
- Robert H Dewberry robert.dewberry@dewlaw.net
- Todd J Dressel dressel@chapman.com, lubecki@chapman.com
- Chrysta L Elliott elliottc@ballardspahr.com, manthiek@ballardspahr.com
- Scott Ewing contact@omnimgt.com, sewing@omnimgt.com;katie@omnimgt.com
- John A Farmer jfarmer@orrick.com
- Brian W Freeman brian@pedigolaw.com, brian@brianwfreeman.com
- Victoria C Geary victoria.geary@boe.ca.gov
- Paul R. Glassman pglassman@sycr.com
- Robert P Goe kmurphy@goeforlaw.com, rgoe@goeforlaw.com;mforsythe@goeforlaw.com
- David M Goodrich dgoodrich@marshackhays.com, ecfmarshackhays@gmail.com
- Christian Graham cgraham23@dlblaw.net
- Everett L Green everett.l.green@usdoj.gov
- Chad V Haes chaes@marshackhays.com, ecfmarshackhays@gmail.com
- James A Hayes jhayes@jamesahayesapl.com
- M Jonathan Hayes jhayes@srhlawfirm.com,

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

roksana@srhlawfirm.com;carolyn@srhlawfirm.com;shawnj@srhlawfirm.com;rosarioz@srhlawfirm.com;jhayesecf@gmail.com;j@alkazian.com

- D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com
- Eric M Heller eric.m.heller@irscounsel.treas.gov
- Jeffery D Hermann jhermann@orrick.com
- Jeffery D Hermann jhermann@orrick.com
- Bonnie M Holcomb bonnie.holcomb@doj.ca.gov, rosita.eduardo@doj.ca.gov;zenaida.bigno@doj.ca.gov
- Whitman L Holt wholt@ktbslaw.com
- Michelle C Hribar mch@sdlaborlaw.com
- Steven J Katzman SKatzman@bmkattorneys.com, admin@bmkattorneys.com
- Jane Kespradit jane.kespradit@limruger.com, amy.lee@limruger.com
- Mette H Kurth kurth.mette@arentfox.com
- Mette H Kurth kurth.mette@arentfox.com
- Sandra W Lavigna lavignas@sec.gov
- Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com
- Michael B Lubic michael.lubic@klgates.com, jonathan.randolph@klgates.com
- Richard A Marshack rmarshack@marshackhays.com, lbergini@marshackhays.com;ecfmarshackhays@gmail.com
- David J McCarty dmccarty@sheppardmullin.com
- Reed M Mercado rmercado@sheppardmullin.com
- Fred Neufeld fneufeld@sycr.com
- Aron M Oliner roliner@duanemorris.com
- Scott H Olson solson@seyfarth.com
- Mark D Potter mark@potterhandy.com, rhondahandy@potterhandy.com;kevin@potterhandy.com
- Dean G Rallis drallis@sulmeyerlaw.com
- Christopher O Rivas crivas@reedsmith.com
- Kenneth N Russak krussak@frandzel.com, efiling@frandzel.com;dmoore@frandzel.com
- Gregory M Salvato gsalvato@salvatolawoffices.com, calendar@salvatolawoffices.com
- Mark C Schnitzer mschnitzer@rhlaw.com, mcschnitzer@gmail.com
- Diane S Shaw diane.shaw@doj.ca.gov
- Ariella T Simonds asimonds@sidley.com
- Leonard Steiner ls@steinerlibo.com, jasoncarter@steinerlibo.com;aam@steinerlibo.com
- Jason D Strabo jstrabo@mwe.com, cnorris@mwe.com
- Cathy Ta cathy.ta@bbklaw.com, Arthur.Johnston@bbklaw.com;lisa.spencer@bbklaw.com
- Sheila Totorp stotorp@clausen.com, jbrzezinski@clausen.com
- Benjamin R Trachtman btrachtman@trachtmanlaw.com, sstraka@trachtmanlaw.com
- Matthew J Troy matthew.troy@usdoj.gov
- United States Trustee (RS) ustregion16.rs.ecf@usdoj.gov
- Anne A Uyeda auyeda@bmkattorneys.com
- Annie Verdries verdries@lbbslaw.com, Autodocket@lbbslaw.com
- Brian D Wesley brian.wesley@doj.ca.gov
- Kirsten A. Worley kw@wlawcorp.com, admin@wlawcorp.com
- Clarisse Young youngshumaker@psmlawyers.com, sally@psmlawyers.com
- Pamela Jan Zylstra zylstralaw@gmail.com

See NEF for confirmation of electronic transmission to the U.S. trustee and any trustee in this case, and to any attorneys who receive service by NEF.

Service information continued on attached page

**2. SERVED BY UNITED STATES MAIL:**

On (date) 10/22/13, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

City Attorney

300 North "D" Street, Sixth Floor  
San Bernardino, CA 92418

Counsel for Debtor

City of San Bernardino  
Paul R. Glassman  
Fred Neufeld  
Laura L. Buchanan  
Kathleen D. DeVaney  
Stradling Yocca Carlson & Rauth  
100 Wilshire Blvd., Suite 440  
Santa Monica, CA 90401

Trustee

Office of the U.S. Trustee  
3801 University Ave., Suite 720  
Riverside, CA 92501-3200  
(951) 276-6990

Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date)

\_\_\_\_\_10/22/2013\_\_\_\_\_, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Overnight Delivery

Hon. Meredith A. Jury  
US Bankruptcy Court  
Central District of California  
3420 Twelfth Street, Suite 325  
Courtroom 301  
Riverside, CA 92501-3819

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

10/22/13

*Date*

Brett Bissett

*Printed Name*

/s/ Brett Bissett

*Signature*