

<p>FILED</p> <p>JUL 13 2012</p> <p>UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF CALIFORNIA</p>
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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 12-32118-C-9
)	
CITY OF STOCKTON, CALIFORNIA,)	DC No. OHS-4
)	
Debtor(s).)	

OPINION
ON MOTION FOR LEAVE TO INTRODUCE EVIDENCE
RELATING TO NEUTRAL EVALUATION PROCESS UNDER
CALIFORNIA GOVERNMENT CODE § 53760.3(q)

Marc A. Levinson (argued), Norman C. Hile, John W. Killeen, Orrick, Herrington & Sutcliffe LLP, Sacramento, California, for debtor

CHRISTOPHER M. KLEIN, Chief Bankruptcy Judge:

This case of first impression involves the boundaries, the interplay, and the common ground between federal law and state law in the context of the confidentiality requirement in California's new statute channeling a municipality through a neutral evaluation process before filing a chapter 9 case to adjust debts under the U.S. Bankruptcy Code.

Upon filing this chapter 9 case, the City of Stockton filed the instant motion invoking the part of California Government Code § 53760.3(q) that authorizes a bankruptcy judge to lift the shroud of confidentiality from the pre-filing neutral evaluation

1 for the limited purpose of establishing the City's eligibility
2 for chapter 9 relief. This court accepts the invitation only
3 with respect to the one chapter 9 eligibility element for which
4 state law provides the rule of decision and otherwise declines
5 because state evidence law does not govern evidence in federal
6 court on issues when federal law provides the rule of decision.

7 Nevertheless, federal policy encouraging settlement also
8 favors preserving confidentiality of compromise discussions and
9 permits federal trial judges to ration the disclosure of
10 confidential settlement discussions on their own authority.
11 Hence, this court will impose a confidentiality protective order
12 and take an incremental approach to disclosure as there is no
13 indication in the case as yet that detailed evidence of
14 confidential discussions will be needed in order to determine
15 chapter 9 eligibility.

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17 Facts

18 The City of Stockton, California, filed this chapter 9 case
19 on June 28, 2012, following the conclusion of the newly-enacted
20 pre-filing neutral evaluation required by California Government
21 Code § 53760 as a precondition for permitting a California
22 municipality to file a chapter 9 case.

23 The next day, the City filed this Emergency Motion For Leave
24 To Introduce Evidence Relating To Neutral Evaluation Process
25 Under Government Code § 53760.3(q) seeking permission to
26 introduce evidence as to: (1) the number and length of meetings
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1 between the City and its creditors; (2) the identity of the
2 participants at such meetings; (3) the types of issues discussed;
3 (4) the financial and other information shared; (5) the offers
4 exchanged and the discussions between the parties; and (6) the
5 status of negotiations between the City and each interested party
6 as of the petition date.

7 Oral argument was entertained in open court on July 6, 2012.
8 This decision memorializes the ruling made from the bench at the
9 end of that hearing.

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Analysis

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Chapter 9 is peculiar in that the filing of a voluntary
petition does not constitute an order for relief. 11 U.S.C.
§ 921(d). Rather, the municipality must be prepared to litigate
its way to an order for relief in its voluntary case by
demonstrating its eligibility to be a chapter 9 debtor and
establishing that it filed the petition in good faith. 11 U.S.C.
§§ 109(c) & 921(c).

1 A

2 Five essential elements for eligibility to be a chapter 9
3 debtor are set forth at 11 U.S.C. § 109(c), to which is appended
4 a good faith filing requirement by 11 U.S.C. § 921(c). 2 COLLIER
5 ON BANKRUPTCY ¶ 109.04 (Alan N. Resnick & Henry J. Sommer eds. 16th
6 ed. 2011) ("COLLIER").

7 First, there must be a "municipality," which is defined as a
8 "political subdivision or public agency or instrumentality of a
9 State." 11 U.S.C. §§ 101(40) & 109(c)(1); 2 COLLIER
10 ¶ 109.04[3][a].

11 Second, the municipality must be specifically authorized, in
12 its capacity as a municipality or by name, to be a debtor under
13 chapter 9 by state law, or by a governmental officer or
14 organization empowered by state law to authorize such entity to
15 be a debtor under such chapter. 11 U.S.C. § 109(c)(2); 2 COLLIER
16 ¶ 109.04[3][b].

17 Third, the municipality must be "insolvent," which is
18 specially defined for chapter 9 purposes as "(i) generally not
19 paying its debts as they become due unless such debts are the
20 subject of a bona fide dispute; or (ii) unable to pay its debts
21 as they become due." 11 U.S.C. §§ 101(32)(C) & 109(c)(3); 2
22 COLLIER ¶ 109.04[3][c].

23 Fourth, the municipality must desire to effect a plan to
24 adjust the debts it is generally not paying or unable to pay. 11
25 U.S.C. § 109(c)(4); 2 COLLIER ¶ 109.04[3][d].

26 Fifth, a creditor negotiation requirement may be satisfied
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1 by one of four alternatives. The municipality must have: (A)
2 obtained the agreement of creditors holding at least a majority
3 in amount of the claims of each class that it intends to impair
4 under a chapter 9 plan; or (B) negotiated in good faith with
5 creditors and have failed to obtain the agreement of creditors
6 holding at least a majority in amount of the claims of each class
7 that it intends to impair under a chapter 9 plan; or (C) be
8 unable to negotiate with creditors because such negotiation is
9 impracticable; or (D) reasonably believe that a creditor may
10 attempt to obtain a transfer that is avoidable as a preference.
11 11 U.S.C. § 109(c)(5); 2 COLLIER ¶ 109.04[3][e].

12 Here, the City relies on the good-faith negotiation prong at
13 § 109(c)(5)(B) of the creditor negotiation requirement.

14 If the five essential elements are satisfied, then the court
15 must order relief unless the debtor did not file the petition in
16 good faith. Thus, this latter "good faith filing" element can be
17 regarded as a sixth essential element for chapter 9 relief in the
18 sense that relief will not be ordered if the case was not filed
19 in good faith. Compare 11 U.S.C. § 921(c), with id. § 921(d).

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21 B

22 The burden of proof, at least as to the five § 109(c)
23 elements, is on the municipality as the proponent of voluntary
24 relief.¹ Int'l Assn. of Firefighters, Local 1186 v. City of

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26 ¹Given that the City is relying in this instance on the
27 good-faith negotiation prong of § 109(c)(5)(B), debate about who
has the good-faith filing burden under § 921(c) can safely be

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1 Vallejo (In re City of Vallejo), 406 B.R. 280, 289 (9th Cir. BAP
2 2009) ("Vallejo"); In re Valley Health Sys., 383 B.R. 156, 161
3 (Bankr. C.D. Cal. 2008) ("Valley Health"); In re County of
4 Orange, 183 B.R. 594, 599 (Bankr. C.D. Cal. 1995) ("Orange
5 County"); 2 COLLIER ¶ 109.04[2].

6 The quantum of proof, there being no contrary indication in
7 statute or in controlling decisional law, is the familiar
8 preponderance-of-evidence standard of basic civil litigation.
9 Nothing suggests there should be a higher burden. This
10 conclusion comports with the argument by the authors of the
11 Collier treatise that the burden should be liberally applied in
12 favor of granting relief. 2 COLLIER ¶ 109.04[3].

13 Clarifying that the quantum of the burden is preponderance
14 of evidence matters in the present instance because the logic
15 behind the breadth of the City's request to dispense with
16 confidentiality of the pre-filing neutral evaluation appears to
17 rest on the incorrect premise that the City will be subjected to
18 some higher standard of proof than preponderance of evidence.

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20 C

21 The procedure for resolving the eligibility question
22 resembles ordinary federal civil litigation. The petition and
23 supporting materials function as the equivalent of a complaint
24 and objections to the petition as the answer. Material factual

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26 left to another day as it seems improbable (but not impossible)
27 that good-faith negotiations would precede a filing that is made
28 not in good faith.

1 disputes will be resolved by way of trial.

2 Once the petition is filed, notice of commencement of the
3 case must be published for three consecutive weeks in a newspaper
4 of general circulation within the district and a newspaper of
5 general circulation among bond dealers and bondholders. 11
6 U.S.C. § 923. One purpose of such notice is to alert parties in
7 interest to the opportunity to "object" to the petition.

8 The court resolves objections to the petition by following a
9 notice and hearing procedure. 11 U.S.C. §§ 921(c)-(d).

10 By process of elimination, the relevant procedure is the
11 Rule 9014 "contested matter." Fed. R. Bankr. P. 9014. Although
12 the notice-and-hearing requirement of § 921(c) puts the question
13 of the order for relief into a litigation context, the Federal
14 Rules of Civil Procedure do not directly specify a procedure for
15 chapter 9 cases. Neither the contested petition provisions of
16 Rules 1011 and 1018 nor the adversary proceeding rule apply in
17 chapter 9. What remains is the Rule 9014 "contested matter"
18 procedure.

19 Under Rule 9014, aside from the absence of formal pleadings,
20 most of the adversary proceeding rules apply. Fed. R. Bankr. P.
21 9014(c). Testimony of witnesses in any disputed material factual
22 issue in a contested matter must be taken in the same manner as
23 testimony in an adversary proceeding - in other words, a fact-
24 based contest in a contested matter is to be resolved by way of
25 trial. Fed. R. Bankr. P. 9014(d).

26 As the petition and supporting documents function as a
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1 complaint to place before the court the allegations and factual
2 basis for relief, it is appropriate that facts be alleged with
3 respect to each essential element sufficient to make plausible
4 the proposition that the City is entitled to an order for relief.
5 In other words, at least a prima facie case needs to be stated.

6 Indeed, the City urges that its need to assert a plausible
7 case as to each essential element for eligibility justifies
8 dispensing with all of the confidentiality protecting the pre-
9 filing neutral evaluation discussions. As will be explained,
10 however, a more incremental approach is appropriate.

11 The actual nature and extent of the litigation and the
12 increments of disclosure will depend upon the issues that are
13 actually joined by way of objection to the petition. If there
14 are no objections, then the court will be entitled (but not
15 required) to rely on the prima facie case as a basis for ordering
16 relief. If there are objections, a trial will ensue, the
17 complexion of which will depend upon the nature of the dispute
18 and may trigger broader disclosure of pre-filing discussions.

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II

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The state is the chapter 9 gatekeeper by virtue of
§.109(c)(2). But that gatekeeping function ends once the gate is
opened and a chapter 9 case is filed.

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1 A

2 The gate is the requirement that a municipality is eligible
3 to be a debtor in a chapter 9 case only if it is specifically
4 authorized by state law, or by a governmental officer or
5 organization empowered by state law to authorize the municipality
6 to be a debtor under chapter 9. 11 U.S.C. § 109(c)(2).

7 California has engineered the parameters of its gate in
8 California Government Code § 53760, which authorizes any county,
9 city, district, public authority, public agency, or entity that
10 qualifies as a municipality under the Federal Bankruptcy Code,
11 other than a school district,² to be a debtor under chapter 9 but
12 recently imposed preconditions for which this case functions as
13 the maiden voyage. The municipality must either engage in a
14 neutral evaluation process for a specified period or its
15 governing board must declare a fiscal emergency pursuant to
16 specified procedures. CAL. GOVT. CODE § 53760.³

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18 ²The statute applies to any "local public entity," which is
19 defined as:

20 (f) "Local public entity" means any county, city,
21 district, public authority, public agency, or other entity,
22 without limitation, that is a municipality as defined in
23 Section 101(40) of Title 11 of the United States Code
(bankruptcy), or that qualifies as a debtor under any other
24 federal bankruptcy law applicable to local public entities.
25 For purposes of this article, "local public entity" does not
26 include a school district.

27 CAL. GOVT. CODE § 53760.1(g).

28 ³The basic authorization is:

A local public entity in this state may file a petition
and exercise powers pursuant to applicable federal

1 B

2 If the neutral evaluation process concludes without having
3 resolved all pending disputes with creditors, the municipality
4 may file a chapter 9 petition. CAL. GOVT. CODE § 53760.3(u).⁴

5 The municipality and all interested parties participating in
6 the neutral evaluation process have a duty to negotiate in good
7 faith. CAL. GOVT. CODE § 53760.3(o).

8 The parties must maintain the confidentiality of the neutral
9 evaluation process and "not disclose statements made, information
10 disclosed, or documents prepared or produced, during the neutral
11 evaluation process, at the conclusion of the neutral evaluation
12 process," or during any bankruptcy proceeding except upon

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15 bankruptcy law if either of the following apply:

16 (a) The local public entity has participated in a neutral
17 evaluation process pursuant to Section 53760.3.

18 (b) The local public entity declares a fiscal emergency
19 and adopts a resolution by a majority vote of the governing
20 board pursuant to Section 53760.5.

21 CAL. GOVT. CODE § 53760, as amended by Assembly Bill 506, approved
22 by Governor, October 9, 2011, effective January 1, 2012.

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115 CAL. GOVT. CODE § 53760.3(u).

1 agreement of all parties or, for the limited purpose of
2 determining chapter 9 eligibility under § 109(c), upon permission
3 of the bankruptcy judge. CAL. GOVT. CODE § 53760.3(q).⁵

4
5 III

6 The question becomes the extent to which the California
7 confidentiality provision applies in the conduct of this chapter
8 9 case and, to the extent it does not apply, how to deal with
9 matters warranting confidentiality.

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11 A

12 A chapter 9 case is, by definition, a federal proceeding in
13 a federal court. One particular consequence is that the Federal
14 Rules of Evidence apply to this bankruptcy case. E.g., Fed. R.
15 Evid. 1101(b).

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17 ⁵The precise statutory language is:

18 (q) The parties shall maintain the confidentiality of the
19 neutral evaluation process and shall not disclose statements
20 made, information disclosed, or documents prepared or
21 produced during the neutral evaluation process, at the
22 conclusion of the neutral evaluation process or during any
23 bankruptcy proceeding unless either of the following occur:

24 (1) All persons that conduct or otherwise participate in
25 the neutral evaluation expressly agree in writing, or orally
26 in accordance with Section 1118 of the Evidence Code, to
27 disclosure of the communication, document, or writing.

28 (2) The information is deemed necessary by a judge
presiding over a bankruptcy proceeding pursuant to Chapter 9
of Title 11 of the United States Code to determine
eligibility of a municipality to proceed with a bankruptcy
proceeding pursuant to Section 109(c) of Title 11 of the
United States Code.

29 CAL. GOVT. CODE § 53760.3(q).

1 With respect to privileges – and California's
2 confidentiality requirement arguably in the nature of a privilege
3 under California Evidence Code § 1119⁶ – the controlling federal
4 provision is Federal Rule of Evidence 501:

5 Rule 501. Privilege in General

6 The common law – as interpreted by United States courts
7 in the light of reason and experience – governs a claim of
8 privilege unless any of the following provides otherwise:

- 9 • the United States Constitution;
- 10 • a federal statute; or
- 11 • rules prescribed by the Supreme Court.

12 But in a civil case, state law governs privilege
13 regarding a claim or defense for which state law supplies
14 the rule of decision.

15 Fed. R. Evid. 501.

16 The rules on privilege apply to all stages of this chapter 9
17 case. Fed. R. Evid. 1101(c).

18 It follows that the confidentiality provision of California
19 Government Code § 53760.3(q) apply only to the extent that this
20 bankruptcy court confronts a question governed by a state rule of
21 decision.

22 In the context of chapter 9 eligibility, state law provides
23 the rule of decision only for § 109(c)(2): whether the entity
24 "is specifically authorized, in its capacity as a municipality or
25 by name, to be a debtor under such chapter by State law, or by a
26 governmental officer or organization empowered by State law to
27 authorize such entity to be a debtor under such chapter;[.]"

28 Indeed, § 109(c)(2) presents a question of pure state law.
Under that provision, it has been determined as a matter of New

⁶Cf. Government Code § 53760.3(q) (specifically
incorporating Cal. Evid. Code § 1118).

1 York State constitutional law that the Governor of New York had
2 the authority to authorize an entity to file a chapter 9 case.
3 In re N.Y.C. Off-Track Betting Corp., 427 B.R. 256, 264 (Bankr.
4 S.D.N.Y. 2010). By the same token, nothing in New York law
5 empowered the Suffolk County (N.Y.) Legislature to authorize a
6 chapter 9 filing. In re Suffolk Regional Off-Track Betting
7 Corp., 462 B.R. 397, 414-21 (Bankr. E.D.N.Y. 2011).

8 Here, California constructed its own gate at the entrance to
9 the chapter 9 arena and is entitled to have it construed as a
10 matter of state law.

11 All other eligibility questions under § 109(c) – § 109(c)(1)
12 municipality; § 109(c)(3) insolvent; § 109(c)(4) desire to effect
13 plan of adjustment; and § 109(c)(5) creditor negotiation – and
14 the good faith question under § 921(c) are federal questions
15 based on, and created by, the federal Bankruptcy Code and subject
16 to a federal rule of decision as to which the California
17 confidentiality provision does not control.

18 In short, the only portion of California Government Code
19 § 53760.3(q) that applies to the chapter 9 eligibility analysis
20 in this instance is the question whether the City complied with
21 the neutral evaluation requirement.

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B

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25 Having concluded that the California statutory
26 confidentiality requirement applies to § 109(c)(2), but only to
27 § 109(c)(2), the focus shifts to what the City wants permission

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1 to disclose, which begins with a focus on the precise terms and
2 meaning of the confidentiality statute in order to ascertain what
3 is and is not protected.

4 The terms of California Government Code § 53760.3(q) provide
5 (with the critical terms emphasized):

6 (q) The parties shall maintain the confidentiality of the
7 neutral evaluation process and shall not disclose statements
8 made, information disclosed, or documents prepared or
9 produced during the neutral evaluation process, at the
conclusion of the neutral evaluation process or during any
bankruptcy proceeding unless either of the following occur:

10 (1) All persons that conduct or otherwise
11 participate in the neutral evaluation expressly agree
12 in writing, or orally in accordance with Section 1118
13 of the Evidence Code, to disclosure of the
14 communication, document, or writing.

15 (2) The information is deemed necessary by a judge
16 presiding over a bankruptcy proceeding pursuant to
17 Chapter 9 of Title 11 of the United States Code to
18 determine eligibility of a municipality to proceed with
19 a bankruptcy proceeding pursuant to Section 109(c) of
20 Title 11 of the United States Code.

21 CAL. GOVT. CODE § 53760.3(q) (emphases supplied).

22 The important question relates to the meaning of the phrase
23 "maintain the confidentiality of the neutral evaluation process."
24 It is noteworthy that the remainder of the section refers only to
25 specific categories of statements, communications, information,
26 and documents and is followed by a temporal clause extending the
27 protection beyond the conclusion of the neutral evaluation
28 process. Further, the part that provides that all parties can
agree to disclosure of communications, documents, or writings
says nothing about the process itself. CAL. GOVT. CODE
§ 53760.3(q) (1).

The analysis is informed by two findings made by the

1 California legislature in Assembly Bill 506 ("AB 506"), which
2 enacted the amendments to Government Code § 53760 creating the
3 neutral evaluation process. First, it found that "allowing the
4 interested parties to exchange information in a confidential
5 environment with the assistance and supervision of a neutral
6 evaluator" assists in determining whether obligations can be
7 renegotiated on a consensual basis.⁷ Second, it made findings
8 designed to excuse the neutral evaluation process from open
9 meeting laws, which findings focused on the need for "secure
10 documents."

11 The statute is not ambiguous on what remains confidential
12 after the neutral evaluation process is completed. What remains
13 protected are the more specific items listed in Government Code
14 § 53760.3(q): "statements made," "information disclosed," and
15 "documents prepared or produced" or, as listed later in the
16 provision, "communication," "document," and "writing." This is
17 generally consistent with the "secure document" finding of § 7 of
18 AB 506.

19 _____
20 ⁷The precise finding in AB 506 on this point is:

21 (g) Through the neutral evaluation process, the neutral
22 evaluator, a specially trained, neutral third party, can
23 assist the municipality and its creditors and stakeholders
24 to fully explore alternatives, while allowing the interested
25 parties to exchange information in a confidential
26 environment with the assistance and supervision of a neutral
27 evaluator to determine whether the municipality's
28 contractual and financial obligations can be renegotiated on
a consensual basis.

Cal. Assembly Bill 506, § 1(g), enacted and approved by Governor,
Oct. 9, 2011.

1 But the statute is ambiguous about the temporal aspect of
2 the meaning of the phrase "maintain the confidentiality of the
3 neutral evaluation process" in Government Code § 53760.3(q). In
4 context, the court concludes that it is a reference to the entire
5 process that functions to impose a shroud of secrecy only during
6 the pendency of the process. During the pendency of the process,
7 it is not permissible to reveal the number and length of
8 meetings, the identity of the participants, the types of issues
9 discussed, and the status of negotiations because that
10 information is part of the "confidentiality of the neutral
11 evaluation process." While there may be good reason to continue
12 to protect "statements made," "information disclosed," and
13 "documents prepared or produced" even after the neutral
14 evaluation process concludes, the justification is weaker for
15 protecting the number and length of meetings, identity of
16 participants, types of issues discussed, and status of
17 negotiations when the process concludes.

18 This brings into focus the City's request that this court
19 grant permission under the authority conferred on a bankruptcy
20 judge by Government Code § 53760.3(q)(2) to reveal: (1) the
21 number and length of meetings between the City and its various
22 creditors; (2) the identity of the participants at such meetings;
23 (3) the types of issues discussed; and (4) the status of
24 negotiations between the City and each interested party as of the
25 petition date.

26 While this information was appropriately embargoed during
27

1 the conduct of the neutral evaluation process by virtue of the
2 "maintain the confidentiality" clause, that confidentiality
3 protection ceased, as a matter of California law, once that
4 process ended. Accordingly, there is no present impediment of
5 California law to revelation of that information in and during
6 the chapter 9 case.

7 The remainder of the City's request - to reveal "financial
8 and other information shared, the offers exchanged and the
9 discussions between the parties" - does remain protected by
10 § 53760.3(q) because those categories fit within the statutory
11 categories "statements made, information disclosed, or documents
12 prepared or produced" for which protection unambiguously survives
13 after completion of the neutral evaluation process.

14 This court is not presently persuaded that any of the
15 statements made, information disclosed, or documents prepared or
16 produced during the neutral evaluation process, all of which
17 remain protected under the California confidentiality
18 requirement, are "necessary ... to determine eligibility" under
19 § 109(c)(2). CAL. GOVT. CODE § 53760.3(q)(2). As to eligibility
20 issues under §§ 109(c)(1) and (c)(3), (c)(4), and (c)(5), those
21 are federal issues that will be addressed in the next section.

22 As to the state law issue under § 109(c)(2), the information
23 that either is not, or is no longer, protected (i.e. number and
24 length of meetings, identity of participants, types of issues
25 discussed, and status of negotiations as of petition date) is
26 eligible to be used without restriction and ought to suffice to
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28

1 establish at least a prima facie case that § 109(c)(2) has been
2 satisfied and that, as a matter of California law, the City is
3 permitted to file a chapter 9 case. Indeed, as to status of
4 negotiations, counsel for the City announced during the hearing
5 on the motion that agreements had been reached with two unions to
6 amend collective bargaining agreements.

7 Accordingly, the City's request under California Government
8 Code § 53760.3(q)(1) will be denied, without prejudice to being
9 revisited in the event a subsequent contest over § 109(c)(2)
10 arises.

11
12 C

13 The analysis now shifts to the federal law facet of the
14 confidentiality issue. All chapter 9 eligibility issues except
15 § 109(c)(2) are creatures of federal law, and federal law
16 provides the rule of decision.

17 Federal policy is as encouraging of settlements as is state
18 law, but it takes the different tack of preferring such tools as
19 limiting admissibility in evidence and the protective order as
20 being able to be fashioned to particular situations with more
21 precision than a blanket privilege.

22
23 1

24 We begin by dispensing with the issue of privilege. Federal
25 Rule of Evidence 501 controls privileges in federal litigation
26 and, as relevant to settlement and mediation discussions, relies
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1 on federal common law.

2 As no settlement discussion privilege or mediation privilege
3 is recognized in either the U.S. Constitution, or a federal
4 statute, or rules prescribed by the Supreme Court, the question
5 becomes whether there is a common-law privilege that has been
6 judicially recognized "in the light of reason and experience."
7 Fed. R. Evid. 501.

8 There is an ongoing debate over whether there should be a
9 federal common law settlement negotiation privilege. In re MSTG,
10 Inc., 675 F.3d 1337, 1342 (Fed. Cir. 2012) ("MSTG"). The
11 circuits that have addressed the question are divided. The Sixth
12 Circuit recognizes such a privilege; the Seventh Circuit and the
13 Federal Circuit do not. Goodyear Tire & Rubber Co. v. Chiles
14 Power Supply, Inc., 332 F.3d 976, 979-83 (6th Cir. 2003)
15 (privilege recognized); In re Gen. Motors Corp. Engine
16 Interchange Litigation, 594 F.2d 1106, 1124 n.20 (7th Cir. 1979)
17 (no privilege); MSTG, 675 F.3d at 1343-48 (no privilege).
18 Although the Ninth Circuit does not appear to have taken a
19 position, district courts within the Ninth Circuit are divided on
20 the question. Matsushita Elec. Indus. Co. v. Mediatek, Inc.,
21 2007 WL 963975 (N.D. Cal. 2007) (no privilege); California v.
22 Kinder Morgan Energy Partners, L.P., 2010 WL 3988448 (privilege
23 recognized).

24 For purposes of the present situation, this court is
25 persuaded by the Federal Circuit's comprehensive analysis that a
26 settlement negotiation privilege is not necessary. In
27

28

1 particular, other tools in the toolbox – especially the
2 protective order – are adequate to protect confidentiality of
3 settlement discussions where necessary to promote settlement.
4 See MSTG, 675 F.3d at 1346-47. Since neither the Ninth Circuit
5 nor the Supreme Court has recognized a settlement negotiation
6 privilege as a matter of federal common law, this court holds
7 that the California neutral evaluation process is not protected
8 by a privilege.

9
10 2

11 The lack of privilege is not the end of the matter. Federal
12 policy favors settlement and disfavors undermining settlement
13 discussions in a manner that could chill the productivity of such
14 discussions in future situations.

15
16 a

17 Federal Rule of Evidence 408 prohibits admission into
18 evidence in civil litigation of compromise offers and statements
19 made in negotiations to prove or disprove the validity or amount
20 of a disputed claim or to impeach by prior inconsistent statement
21 or contradiction. Fed. R. Evid. 408.

22 An objection to the proffer of any evidence in this case of
23 statements made, information disclosed, or documents prepared or
24 produced during the pre-filing neutral evaluation process, either
25 during a hearing or in motion papers and declarations, will have
26 a sympathetic reception in the eyes of the court.

1 b

2 A protective order issued under the court's inherent
3 authority is also appropriate to preserve confidentiality in this
4 chapter 9 proceeding of the statements made, information
5 disclosed, or documents prepared or produced during the pre-
6 filing neutral evaluation process.

7 Although those pre-filing discussions concluded, the
8 settlement discussions are not finished. Experience of cases
9 such as Vallejo in this judicial district teaches that fashioning
10 a successful plan of adjustment is more of an exercise in
11 negotiation and compromise than a litigation exercise.

12 Accordingly, a sitting bankruptcy judge from another
13 district has been appointed as Judicial Mediator to be available
14 to serve the needs of this case, without prejudice to the ability
15 of the parties also to employ private persons to facilitate
16 discussions. This measure is consistent with the policy inherent
17 in the alternative dispute resolution provisions in the Federal
18 Judicial Code. 28 U.S.C. §§ 651-53. Confidentiality is
19 expressly contemplated. 28 U.S.C. § 652(d).

20 Whatever goodwill, confidence, and lines of communication
21 that may have been established during the pre-filing neutral
22 evaluation process deserve to be fostered with the certainty that
23 will be useful in the discussions during this case. Such
24 discussions will be vital to the formulation of a successful plan
25 of arrangement.

26 In issuing such a protective order, this court is taking an
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1 incremental approach. As the case develops, it may become
2 appropriate to relax the protective order in various respects so
3 that the rights of all parties can be fully examined.

4 As a first increment of disclosure, it is appropriate (and
5 "necessary" if an appellate court were to hold that the
6 California statute applies to all eligibility questions) to
7 authorize the City to release its "790-page 'ask' created by the
8 City that details the City's current situation and lays out a
9 proposed plan - equivalent to a chapter 9 plan - to address the
10 City's financial shortfall."

11 This limited disclosure is necessary in light of the ruling
12 by the Bankruptcy Appellate Panel of the Ninth Circuit in Vallejo
13 that § 109(c)(5)(B), upon which the City relies for eligibility,
14 "requires negotiations with creditors revolving around a proposed
15 plan, at least in concept." Vallejo, 408 B.R. at 297.

16 Disclosure of the proposed plan that formed the basis for
17 discussions during the pre-filing early neutral evaluation is
18 part of the City's prima facie case on the issue of eligibility.

19 As noted, if objections to the petition are made that place
20 various elements of eligibility in actual dispute, then further
21 relaxations of the protective order will be appropriate.

22

23

Conclusion

24 With respect to the question of eligibility under 11 U.S.C.
25 § 109(c)(2), the City's motion will be denied as unnecessary to
26 the extent that it seeks permission to dispense with

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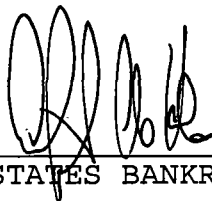
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1 confidentiality of the California pre-filing neutral evaluation
2 process with respect to the number and length of meetings between
3 the City and its creditors, the identity of the participants at
4 such meetings, the types of issues discussed, and the status of
5 negotiations between the City and each interested party as of the
6 petition date. Those matters are no longer confidential under
7 California law. The remainder of the motion, insofar as it is
8 based on California Government Code § 53760.3(q), is denied,
9 without prejudice.

10 With respect to statements made, information disclosed, or
11 documents prepared or produced during the pre-filing neutral
12 evaluation process, they are not privileged but shall be
13 protected from disclosure by a protective order issued by this
14 court forbidding disclosure, which protective order may be
15 adjusted from time to time. The protective order shall not apply
16 to the "790-page 'ask' created by the City that details the
17 City's current situation and lays out a proposed plan -
18 equivalent to a chapter 9 plan - to address the City's financial
19 shortfall."

20 A separate order will issue.

21 Dated: July 13, 2012.



UNITED STATES BANKRUPTCY JUDGE

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28**CERTIFICATE OF SERVICE**

On the date indicated below, I served a true and correct copy(ies) of the attached document by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed and by depositing said envelope in the United States mail or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's Office.

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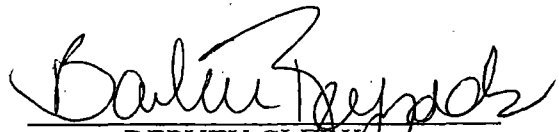
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