7

WINSTON & STRAWN LLP
Richard A. Lapping (SBN: 107496)
rlapping@winston.com
101 California Street
San Francisco, CA 94111-5802
Telephone: (415) 591-1000
Facsimile: (415) 591-1400

WINSTON & STRAWN LLP
Lawrence A. Larose (admitted pro hac vice)
llarose@winston.com
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-2700
Facsimile: (212) 294-4700

Attorneys for Creditor
NATIONAL PUBLIC FINANCE
GUARANTEE CORPORATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION

In re:	**Case No. 08-26813**
CITY OF VALLEJO, CALIFORNIA,	Chapter 9
Debtor.	DC No. WS-1
	Date: July 26, 2010 Time: 9:00 a.m. Dept: A Judge: Hon. Michael McManus

OPPOSITION OF NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION TO CITY'S MOTION TO RECONSIDER ORDER GRANTING NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION'S *EX PARTE* APPLICATION FOR AN ORDER PURSUANT TO BANKRUPTCY RULE 2004 AUTHORIZING EXAMINATION OF DEBTOR AND PRODUCTION OF DOCUMENTS

National Public Finance Guarantee ("National") files this opposition (the "Opposition") to the Debtor City of Vallejo, California's (the "Debtor" or the "City") Motion to Reconsider Order (the "Order") Granting National Public Finance Guarantee Corporation's *Ex Parte* Application (the "Application") for an Order Pursuant to Bankruptcy Rule 2004 Authorizing Examination of Debtor

and Production of Documents (the "Motion to Reconsider"). In support of this Opposition, National respectfully represents as follows:

Preliminary Statement

National, through a reinsurance agreement, insures[1] the Vallejo Public Financing Authority Certificates of Participation (1999 Capital improvements Project) (the "1999 COPs"), for which Wells Fargo Bank, N.A. acts as trustee (the "1999 Trustee"). See Declaration of Gary Saunders in support of the Application (the "Saunders Decl.") at ¶ 4 [Docket Nos. 701 and 702]. National has also issued a Debt Service Reserve Surety Bond (the "Surety Bond") pursuant to a Financial Guaranty Agreement with the City dated as of July 13, 1999 (the "Financial Guaranty Agreement"). Id. National has been impaired by the City in this chapter 9 case as described below.

The 1999 COPs are secured pursuant to statute by Motor Vehicle License Fees and successor taxes ("VLFs") allocated from time-to-time by the State of California. Id. The City notified the Controller of the State of California (the "State Controller") under California Government Code § 37351.5 (the "Intercept Act") that it had elected to guarantee the lease payments supporting the 1999 COPs from VLFs otherwise allocable to the City. Thus, in the event of a payment default on the 1999 COPs by the City the State Controller is automatically required by the Intercept Act to make payments of VLFs otherwise allocable to the City to the 1999 Trustee. Commencing in May, 2009, payments under the City's leases were unilaterally stopped or reduced and a payment default under the 1999 COPs occurred and is continuing. Id. at ¶ 5. Despite the default, the State Controller has not intercepted the VLFs and directed them to the 1999 Trustee as required by the Intercept Act and has, instead, continued to pay the VLFs to the City.

Due to the City's failure to make required payments of the 1999 COPs, the 1999 Trustee has filed claims with National that National has paid as draws on the Surety Bond[2] held in the Debt Service Reserve established under the Trust Agreement. Id. It is expected that substantial additional

[1] National Public Finance Guarantee Corporation, a stock insurance corporation, duly organized and existing under the laws of the State of New York, is the reinsurer pursuant to the Quota Share Reinsurance Agreement, effective as of January 1, 2009, by and between MBIA Insurance Corporation ("MBIA") and MBIA Insurance Corp. of Illinois, now known as National Public Finance Guarantee Corporation. MBIA insured the 1999 COPs and issued the Surety Bond upon their original issuance.

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Application.

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claims will be presented to and paid by National under both the Statement of Insurance and the Surety Bond as a result of this case and the City's actions herein. Id. Accordingly, a payment default by the City under the 1999 COPs has occurred, holders of 1999 COPs are receiving their full contractual principal and interest because of the payments by National and National has subrogation claims against the City on behalf of such holders and is a creditor in this case. Id. As of the filing of this Opposition, National has made claim payments in the aggregate amount of approximately $141,492.23, and the City has failed to indemnify and reimburse National for such claim payments under the Financial Guaranty Agreement. Id. Thus, National has clearly been impaired in this case.

The impairment of National's interests does not end there. The Bankruptcy Workout Plan (the "Proposed Plan") approved as draft by the City Council of the Debtor on December 22, 2009 and as amended on March 23, 2010, seeks to further impair National. Id. at ¶ 6. Under the Proposed Plan, holders of the 1999 COPs are not given any value on account of the VLFs. Id. Rather, holders of the 1999 COPs are expected to forgo the VLFs and forgive four years of interest and defer payments of principal for three years in order to fund distributions to other creditors of equal or lesser rank, including distribution on rejection damages claimed by members of various unions. Moreover, the Proposed Plan makes no mention of the Intercept Act or of the State Controller's obligation to intercept VLF payments to the 1999 Trustee. Id.

Accordingly, National filed the Application in order to assess the extent of its actual and proposed impairment. The information is imperative for National to assess and file for damage claims before the August 23, 2010 bar date. As set forth below, Rule 2004 of the Federal Rules of Bankruptcy Procedure clearly applies to chapter 9 debtors. Further, the information requested in the Application directly relates to National's treatment under the Proposed Plan and any plan of adjustment, which the Debtor asserts "[is a] roadmap toward a plan of adjustment" and "will impair National's interests." Although the City complains of the undue burden imposed by the National document request it further states that it has already provided most of the information requested by National. Thus, the purpose of its Motion to Reconsider is solely to avoid any questions on the documents already provided. National is entitled to an examination of the City under Rule 2004. National appreciates the strains on the City's resources and, accordingly, if this Motion to

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Reconsider is denied will confer with the Debtor to limit any such examination to a reasonable period of time and to a reasonable scope.

Argument

A. Rule 2004 Applies to "Any Entity", Including a Chapter 9 Debtor.

In the Motion to Reconsider the Debtor asserts that Rule 2004 does not authorize examinations of chapter 9 debtors. However, the Debtor simply ignores subsection (a) of Rule 2004, which provides that "[o]n motion of any party in interest, the court may order the examination of any entity." Fed. R. Bankr. P. 2004(a). As the Debtor admits, the term "entity" includes a municipality under the Bankruptcy Code. 11 U.S.C. § 101(15). Therefore, by the express wording of the statute and the Debtor's own admission, Rule 2004 authorizes examinations of the City.

The Debtor focuses on subsection (b) of Rule 2004 to support a bald assertion that Rule 2004 does not apply to a chapter 9 debtor. Such reliance is misplaced. Subsection (b) of Rule 2004 deals with the scope of an examination under Rule 2004, not whether the examination itself is permitted. In this context, the Debtor focuses on the provision in subsection (b) which states that "The examination of any entity under this rule or of the debtor under § 343 of the Code may relate only to . . ." Fed. R. Bankr. P. 2004(b) (emphasis added). Section 343 provides that "The debtor shall appear and submit to an examination under oath at the meeting of creditors under section 341(a) of this title. . ." 11 U.S.C. § 343. Thus, Rule 2004(b) regulates the scope of examinations ordered under Rule 2004(a) (of "any entity") or in a 341 meeting of creditors. The Debtor's reading of Rule 2004(b) to bar chapter 9 debtors from examination is unsupported by the express language of the Rule and strains credulity.

Courts in several chapter 9 cases have come to this straight-forward conclusion and allowed Rule 2004 examinations of chapter 9 debtors. See In re Alta Healthcare District, No. 01-17857-A-9 (Bankr. E.D. Cal. July 8, 2003) (order granting application for Rule 2004 examination compelling attendance of past member of debtor's Board of Directors and production of documentary evidence); In re Alta Healthcare District, No. 01-17857-A-9 (Bankr. E.D. Cal. July 22, 2003) (order granting application for examination of debtor's current Administrator under Rule 2004 and production of certain documents for inspection and copying); In re Alta Healthcare District, No. 01-17857-A-9

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101 California Street
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(Bankr. E.D. Cal. December 15, 2003) (order granting application for Rule 2004 examination of City Manager and production of documentary evidence); In re Tri-City Mental Health Center, No. LA 04-13167 BR (Bankr. C.D. Cal. July 30, 2004) (order granting authority to conduct examination of California State Department of Mental Health pursuant to Federal Rule of Bankruptcy Procedure 2004); In re Pierce County Housing Authority, No. 08-45227 (Bankr. W.D. Wash. Jan. 27, 2009) (order authorizing creditor to conduct Rule 2004 examination of city-debtor); In re Pierce County Housing Authority, No. 08-45227 (Bankr. W.D. Wash. Mar. 10, 2009) (order authorizing creditor to conduct Rule 2004 examination of the person who purchased insurance policies for debtor). See National's Request for Judicial Notice and List of Exhibits A through F filed and served herewith. Tellingly, Debtor cites no cases, and National has been unable to find any, supporting the extraordinary proposition that Rule 2004 is inapplicable to chapter 9 debtors.

Accordingly, Rule 2004 is clearly applicable to chapter 9 debtors and reconsideration of the Order should be denied.

B. National's Request for Information about the Proposed Plan Seeks Critical Information

The Debtor asserts in the Motion to Reconsider that even assuming the City is subject to a Rule 2004 examination, that the information requested by National is "irrelevant" and "premature." Such assertions are incorrect and ignore the purpose and scope of Rule 2004. The purpose of Rule 2004 is to allow broad inquiry into the nature of the estate and "to assist . . . in revealing the nature and extent of the estate, and to discover assets of the debtor which may have been intentionally or unintentionally concealed." In re Bennett Funding Group, Inc., 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) (citing In re Drexel Burnham Lambert Group, Inc., 123 B.R. 702, 708 (Bankr. S.D.N.Y. 1991)). The scope of a Rule 2004 examination is "unfettered and broad," and has been termed "a quick 'fishing expedition.'" In re Dinubilo, 177 B.R. 932, 930-42 (Bankr. E.D. Cal. 1993); see also Drexel Burnham, 123 B.R. 702; In re Johns-Manville Corp., 42 B.R. 362, 364 (S.D.N.Y. 1984). Further, a Rule 2004 examination can be used "to show the condition of the estate and to enable the Court to discover its extent and whereabouts, and to come into possession of it, so that the rights of the creditor may be preserved." In re Coffee Cupboard, Inc., 128 B.R. 509, 514

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101 California Street
San Francisco, CA 94111-5802

(Bank.E.D.N.Y. 1991).

The examination and documents requested by National in the Application relate directly to the treatment of both VLFs and of National's claim under the Proposed Plan. Under the Proposed Plan, holders of the 1999 COPs are not given any value on account of the VLFs and are expected to forgo intercept of the VLFs and forgive four years of interest and defer payments of principal for three years in order to fund distributions to other creditors of equal or lesser rank, including distribution on rejection damages claimed by members of various unions. Saunders Decl. at ¶ 6. Further, there is no mention of the Intercept Act in the Proposed Plan or even in the case to date. The City has already impaired National by failing to pay claims under the 1999 COPs and seeks to further impair it with the Proposed Plan, a precursor to a plan of adjustment, which the City admits "[is a] tentative roadmap toward a plan of adjustment" and "will impair National's interests..." National is entitled to seek documents and ask questions about the sources and extent of such impairment.

The Debtor's effort to categorize National's request as "irrelevant" or "premature" is simply an attempt to play "hide the ball" with creditors to avoid an examination and ignores the purpose and scope of Rule 2004.

C. The Debtor's Own Actions Prove That National's Request is Not Unduly Burdensome.

National has attempted to obtain the information that is the subject of the Application from the Debtor beginning in March of 2010. National's requests were for the most part ignored by the Debtor, despite repeated inquiries. Having no other options for obtaining key information relating to National's treatment under the Proposed Plan, National was forced to file the Application.

On the one hand bemoaning that "National's requests intolerably burden the City's limited resources" the Debtor in the very next sentence informs the Court that they have complied with the document demand in the Order within certain limitations.

Thus, it is abundantly clear that the sole purpose of this Motion to Reconsider is to enable the Debtor to avoid any questions regarding documents the Debtor has already produced. While touting "Congressional intent" as a magic talisman throughout its motion, Debtor cites no support for the

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101 California Street
San Francisco, CA 94111-5802

proposition that a chapter 9 debtor is immune from answering reasonable questions of creditors in a chapter 9 case, which is the result requested by this Motion to Reconsider. Such a reading of chapter 9 goes too far and would result in turning proceedings under chapter 9 into a charade where debtors present documents and plans and creditors are unable to question or challenge in any meaningful way. This is surely not Congress' intent in enacting comprehensive bankruptcy legislation, including chapter 9.

Any reasonable concerns about the "strains" that an examination might put on the City are simply and easily addressed. If this Motion to Reconsider is denied National agrees to confer with the Debtor to reach agreement on the identity of the City official to be examined and a reasonable amount of time and a reasonable scope for the examination.

Despite the requirement of Local Rule 9014-1(d)(6), the City has provided no evidence whatsoever in support of its argument that the examination will be burdensome. It strains credulity to argue that an examination under such circumstances will "unduly burden" the City in any manner not envisioned by chapter 9 – indeed National believes that such an examination is imperative for it to protect and exercise its rights as a creditor under chapter 9.

WHEREFORE, National respectfully requests that this Court issue an Order (i) denying the Motion to Reconsider; (ii) resetting the date for the Debtor's examination; and (iii) granting such other and further relief as is just and proper under the circumstances.

Dated: June 28, 2010

WINSTON & STRAWN LLP

By: /s/ Richard A. Lapping
Richard A. Lapping
Attorneys for
National Public Finance
Guarantee Corporation

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802