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HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. EC-08-1244-JuMkMo  
)  
CITY OF VALLEJO, ) Bk. No. 08-26813  
)  
)  
Debtor. )

INTERNATIONAL ASSOCIATION OF )  
FIREFIGHTERS, LOCAL 1186; )  
VALLEJO POLICE OFFICERS' )  
ASSOCIATION; INTERNATIONAL )  
BROTHERHOOD OF ELECTRICAL )  
WORKERS LOCAL 2376, )

Appellants, )

v. )

O P I N I O N

CITY OF VALLEJO; UNION BANK, )  
N.A.; WELLS FARGO BANK, N.A., )

Appellees. )

Submitted on April 23, 2009  
at Pasadena, California

Filed - June 26, 2009

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Hon. Michael S. McManus, Bankruptcy Judge, Presiding.

Before: JURY, MARKELL, and MONTALI, Bankruptcy Judges.

1 JURY, Bankruptcy Judge:  
2

3 After months of fiscal manipulations to increase its  
4 worsening cash flow and ultimately unsuccessful negotiations  
5 with its labor unions, the City of Vallejo ("Vallejo") filed a  
6 chapter 9 bankruptcy petition.<sup>1</sup> Vallejo asserted it was  
7 insolvent and otherwise met the eligibility requirements under  
8 § 109(c).

9 Appellants<sup>2</sup>, some of Vallejo's unions, appeal the  
10 bankruptcy court's order that Vallejo was eligible to file under  
11 chapter 9.

12 We conclude that, based on admissible evidence, the  
13 bankruptcy court correctly found that Vallejo was insolvent. In  
14 addition, we hold that the record supports the bankruptcy  
15 court's finding that Vallejo desired to effectuate a plan under  
16 § 109(c)(4). We determine that the bankruptcy court erred in  
17 concluding that Vallejo satisfied § 109(c)(5)(B) by employing an  
18 incorrect legal standard. This error, however, was harmless  
19 because the bankruptcy court's finding that the provisions of  
20 § 109(c)(5)(C) were met was correct and this alternative finding  
21 satisfies the statutory eligibility requirements. Accordingly,  
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23 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

25 <sup>2</sup> The International Association of Firefighters, Local 1186,  
26 the Vallejo Police Officers' Association and the International  
27 Brotherhood of Electrical Works, Local 2376 are collectively  
28 referred to as the "Unions". The Vallejo Police Officers'  
Association reached an agreement with Vallejo and withdrew from  
this appeal.

1 we AFFIRM.<sup>3</sup>

2 **I. FACTS**

3 On paper, Vallejo appeared financially sound in July 2007.  
4 Its audited financial statement (called a Comprehensive Annual  
5 Financial Report ("CAFR")) for the fiscal year that ended on  
6 June 30, 2007,<sup>4</sup> showed nearly \$1 billion in total assets and  
7 \$624.5 million in net assets in excess of liabilities. Its  
8 financial statement also reported \$211 million of cash and  
9 investments as of June 30, 2007, of which nearly \$137 million  
10 was characterized as "unrestricted" and "available for  
11 operations".<sup>5</sup>

12 Vallejo's use of general labels like "unrestricted" and  
13 "available for operations" failed to convey restrictions on many  
14 of the underlying funds. Consequently, the CAFR's snapshot of  
15 Vallejo's financial health was initially misleading. Closer  
16

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17 <sup>3</sup> We also certify the bankruptcy court's order to the Ninth  
18 Circuit Court of Appeals under 28 U.S.C. § 158(d)(2) and Rule  
19 8001(f)(4) because the order involves a matter of public  
20 importance. Ransom v. MBNA Am. Bank, N.A. (In re Ransom), 380  
B.R. 809, 811-813 (9th Cir. BAP 2007).

21 <sup>4</sup> Vallejo operated on a non-calendar fiscal year which began  
22 on July 1st and ended on June 30th. Vallejo filed for bankruptcy  
23 near the end of the 2007-2008 fiscal year. The CAFR for fiscal  
year ending on June 30, 2007 referred to the 2006-2007 fiscal  
year.

24 <sup>5</sup> Vallejo reported its finances in multiple funds because  
25 generally accepted accounting principles ("GAAP") as promulgated  
26 by the Governmental Accounting Standards Board ("GASB") require  
27 municipalities to account for their activities in separate funds.  
The segregation permits a transparent reporting process that  
28 reflects the financial activities of each fund and complies with  
restrictions placed on the funds.

1 examination revealed that much of Vallejo's surplus cash and  
2 investments belonged to funds that were restricted by law or  
3 grant to specific uses and could not be used for operational  
4 costs.

5 The evidence presented at trial showed that Vallejo held  
6 most of its unrestricted funds in its General Fund, which could  
7 be used for any purpose, including operations and labor costs  
8 such as the salaries of firefighters or city electricians. The  
9 General Fund shouldered most of the costs of municipal services  
10 and was the purse of last resort.

11 In prior fiscal years, Vallejo used its General Fund  
12 reserves to cover shortfalls in other funds. For that reason,  
13 the General Fund had suffered multimillion dollar deficits in  
14 the prior three fiscal years. By the end of the 2007-2008  
15 fiscal year, the reserves were exhausted. Vallejo projected the  
16 General Fund deficit at \$17 million for the 2007-2008 fiscal  
17 year, with labor costs alone outstripping its revenues. It also  
18 projected that the General Fund would bleed into a deficit of  
19 \$22.7 million by November 2008.

20 The record also shows that Vallejo estimated its General  
21 Fund revenues would be about \$77.9 million in the 2008-2009  
22 fiscal year (\$5.3 million less than the prior fiscal year) as a  
23 result of falling sales taxes, real property taxes, and motor  
24 vehicle license fees, among others. Conversely, Vallejo  
25 estimated that its General Fund expenditures for the upcoming  
26 2008-2009 fiscal year would be \$95 million (\$7 million more than  
27 in the 2007-2008 fiscal year).

28

1 Vallejo prepared a new budget projection shortly before  
2 filing its petition based on a \$1.4 million infusion and an  
3 absence of union contracts. Despite the liberal assumptions  
4 employed, the 2008-2009 fiscal year General Fund deficit  
5 remained at over \$10 million.

6 Due to the deficits, the General Fund could not borrow  
7 funds from other, restricted, city funds for periods less than a  
8 year because city funds could not borrow money from other city  
9 funds unless the city had a balanced budget or a demonstrated  
10 ability to repay the borrowed money within the fiscal year. The  
11 General Fund also could not borrow from private credit markets  
12 because it had no reserves and insufficient cash flow to pay  
13 back loans. As a result, Vallejo was unable to pay General Fund  
14 obligations in the 2008-2009 fiscal year. In the end, due to an  
15 inability to borrow, Vallejo's fiscal situation became bleak.<sup>6</sup>

16 Vallejo searched for ways to improve its financial  
17 situation, but various state laws limited its ability to  
18 generate new revenues.<sup>7</sup> It considered a number of proposals,  
19 including increasing the garbage franchise fees, selling surplus  
20 real estate, charging a fee for false 911 calls, and filing  
21 claims with the State of California. Vallejo concluded,

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22  
23 <sup>6</sup> By early July 2008, Vallejo's General Fund cash flow was  
24 \$1.6 million short of covering the 2008-2009 fiscal year's first  
payroll.

25 <sup>7</sup> Proposition 13 capped property tax rates to 1% of full  
26 cash value. Proposition 218 limited Vallejo's ability to raise  
27 any other taxes without a majority vote. Article XVI, section 18  
28 of the California Constitution also restricted its ability to  
borrow funds. The provision barred Vallejo from incurring a debt  
which it could not repay from revenues attributable to the same  
year without voter approval.

1 however, that the proposed revenue enhancements provided only  
2 insignificant new revenues, were too costly or speculative to  
3 implement immediately, or provided one-time boosts at best.

4 The timing for receiving the bulk of revenues was also  
5 problematic. Vallejo's primary source of revenue was property  
6 taxes, and these were received only twice a year, in April and  
7 December. Additionally, many of Vallejo's funds that relied on  
8 federal or state grants had to spend the money before seeking  
9 reimbursement. Thus, many of Vallejo's funds operated at a  
10 deficit for parts of the year.

11 Vallejo also began to cut expenses. Since 2003, Vallejo  
12 eliminated eighty-seven employee positions and severely reduced  
13 or eliminated numerous community services such as infrastructure  
14 programs. In the 2007-2008 fiscal year, Vallejo cut about \$10  
15 million in funding for programs and services not mandated by  
16 contract.

17 Next, Vallejo attempted to address its largest liability,  
18 labor costs, which it projected to make up \$79.4 million of its  
19 \$95 million expenditures in 2008-2009 fiscal year. Accordingly,  
20 Vallejo opened discussions with the Unions to alter their  
21 collective bargaining agreements ("CBAs") in November 2007.

22 In March 2008, after negotiating for several months,  
23 Vallejo and the Unions agreed to temporary modifications of the  
24 CBAs.<sup>8</sup> The modifications would be effective through the end of  
25 Vallejo's 2007-2008 fiscal year, terminating on June 30, 2008.

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27  
28 <sup>8</sup> Vallejo's city staff recommended to the city council that  
Vallejo file for bankruptcy before it modified the CBAs with the  
Unions in early March.

1 The savings and a one-time \$2.4 million transfer from non-  
2 restricted funds permitted Vallejo to avoid projected insolvency  
3 through June 30, 2008.

4 In the interim, Vallejo and the Unions agreed to mediate a  
5 long-term solution. The parties met with a mediator eleven  
6 times, corresponded informally and exchanged several written  
7 proposals between March and mid-May 2008. No agreement was  
8 reached.

9 Vallejo also began discussions with Union Bank, N.A.  
10 ("Union Bank") in March 2008. As the holder of \$47 million in  
11 Vallejo's bonds, Union Bank was Vallejo's largest single  
12 creditor. Union Bank also acted as the Indenture Trustee for  
13 the holders of three other bond issuances.<sup>9</sup>

14 The parties discussed lowering the interest rate on the  
15 bonds. Customarily, Union Bank would not support these changes  
16 unless Vallejo provided a multi-year cash flow projection.  
17 Vallejo could not formulate a reliable projection for Union Bank  
18 until it reached an agreement with the Unions. Ultimately,  
19 absent an agreement with the Unions, Vallejo's discussions with  
20 Union Bank stalled in April 2008.

21 With the fiscal year and interim agreements with the Unions  
22 ending and no prospect of extension, the city council authorized  
23 Vallejo to file a petition under chapter 9 on May 6, 2008. The  
24 Unions responded with a counteroffer two days later.

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26  
27 <sup>9</sup> Wells Fargo Bank, N.A. ("Wells") is an indenture trustee  
28 for approximately \$100 million of municipal bonds and other debt  
instruments Vallejo had issued prior to filing its chapter 9  
case.

1 Vallejo's last proposal to the Unions was made on May 14,  
2 2008 and the Unions' counteroffer two days later. The  
3 counteroffer included one-time pay cuts and deferred previously  
4 owed pay raises, but included onerous terms like a four-year  
5 extension of the CBAs with corresponding salary increases for  
6 those years and eventual reinstatement of the deferred salary  
7 increases. The Unions also offered to extend the interim  
8 agreements through the 2008-2009 fiscal year. Vallejo rejected  
9 the counteroffer because it could not meet the terms and the  
10 counteroffer did not provide a long-term solution.

11 During its negotiations with the Unions, Vallejo never  
12 discussed a plan of adjustment under chapter 9. Rather, the  
13 evidence shows the parties discussed how a bankruptcy would  
14 affect the Unions; i.e., what claim the Unions would have and  
15 how their claim could be augmented by extending the CBAs before  
16 the petition date. The Unions proposed a four-year extension of  
17 the CBAs in their last counteroffer to ensure a larger claim if  
18 Vallejo accepted the counteroffer but later filed for  
19 bankruptcy.

20 With no agreement with the Unions in place, Vallejo filed  
21 its petition on May 23, 2008. The Unions objected to the  
22 petition on the ground that Vallejo did not meet the eligibility  
23 requirements under § 109(c).

24 After an eight day trial, the court ruled that Vallejo was  
25 insolvent as of the petition date because the city's General  
26 Fund would (1) begin the fiscal year 2008-2009 with no reserves  
27 (and possibly with a negative balance); (2) operate at a multi-  
28 million dollar deficit in fiscal year 2008-2009; and (3) would

1 not have sufficient available funds and cash flow to pay  
2 Vallejo's debts as they became due – in particular, Vallejo  
3 "would not have been able to pay the General Fund payroll that  
4 became due on July 11, 2008." The court also observed that  
5 without a balanced budget for the fiscal year 2008-2009, Vallejo  
6 "could not demonstrate the ability to pay back any loan with  
7 revenues generated in fiscal year 2008-09." Thus, it could not  
8 "lawfully borrow from the private market or other city funds."

9 The court also determined that the "evidence established  
10 the City desires to effect a plan . . . ." and that "to the  
11 extent possible, the City negotiated with its creditors prior to  
12 filing its petition." Based on its careful consideration of the  
13 testimony and documents submitted into evidence, the bankruptcy  
14 court held that Vallejo had satisfied the requirements under  
15 § 109(c) and entered an order for relief.<sup>10</sup>

16 The Unions timely appealed that order. Following oral  
17 argument, we requested, and the parties provided us, with  
18 additional information and briefing.<sup>11</sup>

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23  
24 <sup>10</sup> Shortly after its filing, Vallejo was able to balance its  
25 budget and borrow funds by implementing a Pendency Plan. The  
26 Pendency Plan modified salaries, fringe benefits, staffing  
27 requirements and work rules, froze all employee compensation at  
28 the levels paid as of the petition date and cut spending for  
community services.

<sup>11</sup> In light of our ruling on Ms. Mayer's testimony, it is  
unnecessary to decide the motion to strike.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
3 § 1334 over this core proceeding under § 157(b)(2). We have  
4 jurisdiction under 28 U.S.C. § 158(a)(3).<sup>12</sup>

5 **III. ISSUES**

6 A. Whether the bankruptcy court erred in finding  
7 Vallejo was insolvent under § 109(c)(3).

8 B. Whether the bankruptcy court erred in finding that  
9 Vallejo desired to effect a plan to adjust its debts under  
10 § 109(c)(4).

11 C. Whether the bankruptcy court erred in finding that  
12 Vallejo negotiated with its creditors in good faith under  
13 § 109(c)(5)(B).

14 D. Whether the bankruptcy court erred in finding that  
15 Vallejo was unable to negotiate with its creditors because to do  
16 so was impracticable under § 109(c)(5)(C).

17 E. Whether Union Bank and Wells have standing as  
18 appellees.<sup>13</sup>

19 **IV. STANDARDS OF REVIEW**

20 We review the bankruptcy court's conclusions of law and  
21 questions of statutory interpretation de novo and its factual

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22  
23 <sup>12</sup> The order appealed is interlocutory. Silver Sage  
24 Partners, Ltd. v. City of Desert Hot Springs (In re City of  
25 Desert Hot Springs), 339 F.3d 782, 792 (9th Cir. 2003). We thus  
granted leave to hear this appeal under 28 U.S.C. § 158(a)(3).

26 <sup>13</sup> Union Bank and Wells (collectively the "Banks") requested  
27 leave to participate in this appeal; the Unions opposed. By  
28 order entered on December 17, 2008, we authorized the Banks to  
file briefs, but deferred the question of whether they have  
standing to participate in this appeal until after the hearing.

1 findings for clear error. Clear Channel Outdoor, Inc. v.  
2 Knupfer (In re PW, LLC), 391 B.R. 25, 32 (9th Cir. BAP 2008).

3 We review the bankruptcy court's insolvency decision under  
4 the clearly erroneous standard. See Arrow Elecs., Inc. v.  
5 Justus (In re Kaypro), 218 F.3d 1070, 1073 (9th Cir. 2000). A  
6 factual determination is clearly erroneous if the appellate  
7 court, after reviewing the record, has a definite and firm  
8 conviction that a mistake has been committed. Anderson v. City  
9 of Bessemer City, N.C., 470 U.S. 564, 573 (1985). If the  
10 bankruptcy court's account of the evidence is plausible in light  
11 of the record viewed in its entirety, we may not reverse it even  
12 though convinced that we might have weighed the evidence  
13 differently. Id. at 574.

#### 14 V. DISCUSSION

15 Section 109(c) provides in relevant part: "[A]n entity may  
16 be a debtor under chapter 9 if and only if such entity . . .  
17 -(3) is insolvent; (4) desires to effect a plan to adjust such  
18 debts; and . . . (5) (B) has negotiated in good faith with  
19 creditors and has failed to obtain agreement of creditors  
20 holding at least a majority in amount of the claims of each  
21 class that such entity intends to impair under a plan in a case  
22 under such chapter; [or] (C) is unable to negotiate with  
23 creditors because such negotiation is impracticable . . . ."  
24 Chapter 9 petitioners must meet the mandatory provisions of  
25 § 109(c) (1)-(4) and one of the requirements under § 109(c) (5) to  
26 be eligible for an order for relief.

27 Section 921(c) provides that the bankruptcy court may  
28 dismiss the petition if the debtor does not meet the

1 requirements under § 109(c). Despite the permissive statutory  
2 language, courts have construed § 921(c) to require the  
3 mandatory dismissal of a petition filed by a debtor who fails to  
4 meet the eligibility requirements under § 109(c). See In re  
5 County of Orange, 183 B.R. 594, 599 (Bankr. C.D. Cal. 1995);  
6 See also 6 Collier on Bankruptcy ¶ 921.04[4] at 921-7 (Alan N.  
7 Resnick & Henry J. Sommer eds., 15th ed. 2009) [hereinafter  
8 Collier]. Therefore, we consider whether the bankruptcy court  
9 should have dismissed Vallejo's petition.

10 "The burden of establishing eligibility under § 109(c) is  
11 on the debtor." In re Valley Health Sys., 383 B.R. 156, 161  
12 (Bankr. C.D. Cal. 2008).<sup>14</sup> We construe broadly § 109(c)'s  
13 eligibility requirements "to provide access to relief in  
14 furtherance of the Code's underlying policies.'" Id. at 163  
15 (quoting Hamilton Creek Metro. Dist. v. Bondholders Colo.  
16 Bondshares (In re Hamilton Creek Metro. Dist.), 143 F.3d 1381,  
17 1384 (10th Cir.1998)).

18 **A. Insolvency: Section 109(c) (3)**

19 A municipality is insolvent if it is not paying its debts  
20 as they come due or is unable to do so. See § 101(32)(C)(i) and  
21 (ii). The bankruptcy court concluded that insolvency under

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23 <sup>14</sup>The Unions assert the more rigorous clear and convincing  
24 burden of proof should apply in the context of chapter 9  
25 eligibility determinations. Their reasoning for applying the  
26 higher burden of proof is that municipal bankruptcies raise  
27 important constitutional issues and do not provide much creditor  
28 protection. The Unions cited no case law in support of their  
position, and we have found none. If Congress wished to impose a  
special heightened burden of proof in this context, we would have  
some indication from the language of the statute or its  
legislative history. See Grogan v. Garner, 498 U.S. 279, 286  
(1991). There is none here.

1 § 101(32)(C)(ii) is determined on a cash flow basis, which  
2 required Vallejo to demonstrate an inability to pay its debts  
3 due within the next year.

4 The Unions argue that the bankruptcy court erred in its  
5 insolvency analysis and determination for several reasons.  
6 First, they contend that Vallejo had enough cash on hand to  
7 continue operating without changing its budget. The Unions  
8 maintain that the bankruptcy court should have extrapolated from  
9 the CAFR that Vallejo was solvent because it had \$137 million in  
10 cash and investments in funds that were "unrestricted" and  
11 "available for operations".<sup>15</sup> Next, the Unions argue that there  
12 is no admissible evidence supporting Vallejo's assertion that  
13 some of its funds were restricted. Lastly, the Unions assert  
14 Vallejo could have avoided its deficits by: (1) making more  
15 budget cuts; (2) employing more realistic staffing level  
16 assumptions in its projections; and (3) accepting the Unions'  
17 offer to extend the March 2008 modification to the CBAs.

18 For the reasons set forth below, we conclude that the  
19 bankruptcy court did not commit any error in its ruling on  
20 insolvency.

21 \_\_\_\_\_  
22 <sup>15</sup> Page 41 of the CAFR, provides in relevant part:

23 Statement of Net Assets

24 Cash and investments available for operation:

25	City		
	General Fund	\$2,609,264	
	Redevelopment Agency	9,402,994	
	Housing Authority	16,627,718	
	Other Funds	<u>60,225,469</u>	
27	Total, City		\$88,865,445
	Marine World JPA		3,335,936
28	Sanitation & Flood Control		<u>44,480,126</u>
			<u>136,681,507</u>

1           **1.    The CAFR Did Not Establish Vallejo Had Sufficient**  
2           **Unrestricted Funds To Operate**

3           The Unions' reliance on the CAFR to prove Vallejo's  
4 solvency is misplaced. The CAFR showed the assets held by  
5 Vallejo's component agencies as of June 30, 2007. It does not  
6 delve into the details of the various funds held by each  
7 component agency. Nor does the report reflect the liabilities  
8 tied to each component agency or its funds. The report  
9 therefore is more akin to the asset side of a balance sheet. As  
10 such, it has limited persuasiveness regarding cash flow  
11 insolvency under § 101(32)(C)(ii). See In re Villages at Castle  
12 Rock Metro. Dist. No. 4, 145 B.R. 76, 84 (Bankr. D. Colo.  
13 1990) (balance sheet assets are not dispositive for insolvency).

14           Moreover, the CAFR's omission of liabilities inflated  
15 Vallejo's financial well-being. It also presented a financial  
16 snapshot as of June 30, 2007, almost a year before Vallejo's  
17 filing date. New facts and circumstances arose between June 30,  
18 2007 and the petition date which rendered the CAFR an imprecise  
19 description of Vallejo's financial situation as of May 23, 2008.  
20 Accordingly, the CAFR alone does not prove that Vallejo was  
21 solvent.

22           **2.    There Was Sufficient Evidence That Showed Many Of**  
23           **Vallejo's Funds Were Restricted**

24           Still, Vallejo cannot squirrel away money it can use for  
25 operations in a fund, argue the fund is restricted and then  
26 claim insolvency.

27           The Unions argue Vallejo could have siphoned money from  
28 certain funds to support its General Fund. Vallejo counters

1 that its funds were restricted by law or grant. The Unions  
2 raise for the first time in their reply brief the argument that  
3 the bankruptcy court erred in making evidentiary rulings which  
4 permitted Vallejo's witness to testify as to whether certain  
5 funds were restricted.<sup>16</sup> The Unions objected to the declarations  
6 of Susan Mayer ("Mayer"), Vallejo's Assistant Finance Director,  
7 on the ground that her testimony constituted improper lay  
8 opinion, was hearsay and violated the best evidence rule.

9 The Unions contend that Mayer's testimony regarding whether  
10 certain City funds were restricted comprised inadmissible legal  
11 opinion. In that regard, the Unions maintain that the issue of  
12 whether Vallejo's cash was restricted by statutes, ordinances,  
13 city council resolutions, and contractual covenants was a legal  
14 question that should have been determined by the bankruptcy  
15 court. The bankruptcy court overruled the Unions' evidentiary  
16 objection to Mayer's declarations, finding that her testimony  
17 did not constitute a legal conclusion and was proper lay  
18 opinion.<sup>17</sup>

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19  
20 <sup>16</sup> An appellant's failure to "specifically and distinctly"  
21 argue an issue in its opening brief constitutes a waiver of that  
22 issue. Alcaraz v. INS, 384 F.3d 1150, 1161 (9th Cir. 2004).  
23 However, if the failure to review an issue would result in  
24 manifest injustice or would not prejudice the defense of the  
25 opposing party, an appellate court may address an issue that was  
26 not raised in an opening brief. Id. Our order permitting  
supplemental briefing on these evidentiary issues precluded any  
possible prejudice because it allowed the parties to fully  
explore the Unions' evidentiary objections. See United States v.  
Gamma Tech Indus., Inc., 265 F.3d 917, 930 (9th Cir. 2001).

27 <sup>17</sup> The court opined that Mayer was "merely setting out her  
28 interpretation. She has to apply the law to Vallejo's finances  
and she's saying how she's done that and how she's interpreted

(continued...)

1 Generally, a witness's legal conclusions are inadmissible  
2 under the Federal Rules of Evidence. Evangelista v.  
3 Inlandboatmen's Union of Pac., 777 F.2d 1390, 1398 n.3 (9th Cir.  
4 1985). The trial court, however, has a "relatively wide degree  
5 of discretion in admitting or excluding testimony which arguably  
6 contains a legal conclusion . . . ." Torres v. County of  
7 Oakland, 758 F.2d 147, 150 (6th Cir. 1985). "This discretion is  
8 appropriate because it is often difficult to determine whether a  
9 legal conclusion is implicated in the testimony." Id.

10 Moreover, in some circumstances, "opinion testimony that  
11 arguably states a legal conclusion is helpful to the jury, and  
12 thus, admissible." 4 Jack B. Weinstein & Margaret A. Berger,  
13 Weinstein's Federal Evidence § 704.04[2][a] (2d ed. 2009);  
14 Compare Peckham v. Cont'l Cas. Ins. Co. 895 F.2d 830, 837 (1st  
15 Cir. 1990 ) (finding expert opinion evidence as to proximate  
16 cause admissible since it could be expected to shed some light  
17 on complex insurance law area) with Torres, 758 F.2d at 150-51  
18 (finding it was error for court to admit lay opinion testimony  
19 couched as legal conclusion because it was not helpful to the  
20 jury, but such error was harmless).

21 We review the bankruptcy court's admission of Mayer's  
22 testimony under an abuse of discretion standard. Johnson v.

23 \_\_\_\_\_  
24 <sup>17</sup>(...continued)  
25 the financial records." The court explained that Mayer's  
26 testimony was "entirely proper given her position with Vallejo.  
27 She's not telling what's in documents. She's saying the impact  
28 of these documents on Vallejo's finances." We need not reach the  
close question whether the court's ruling in this regard was  
correct because we conclude that the court did not abuse its  
discretion in admitting the testimony as it was helpful to it as  
the trier of fact.

1 Neilson (In re Slatkin), 525 F.3d 805, 811 (9th Cir. 2008).<sup>18</sup>

2 "To reverse on the basis of an erroneous evidentiary ruling, we  
3 must conclude not only that the bankruptcy court abused its  
4 discretion, but also that the error was prejudicial." Id.  
5 Under this standard of review, we reject the Unions' claim.

6 Under Federal Rule of Evidence 701, lay opinion testimony  
7 must be helpful to the trier of fact.<sup>19</sup> FED. R. EVID. 701.  
8 Mayer's opinion regarding the restrictions put on certain funds  
9 was helpful to the fact finder because of the complexity of  
10 municipal accounting practice. This practice includes a mix of  
11 laws authorizing the creation of funds; laws restricting the use  
12 of funds; facts as to the current amounts available in  
13 particular funds; laws de-authorizing the funds; laws loosening  
14 the restrictions; laws tightening the restrictions; laws and  
15 facts regarding the source of financing for the funds; and facts  
16 as to Vallejo's discretionary allocation of amounts in the  
17 funds. Further, some of the legal enactments were municipal,

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19  
20 <sup>18</sup> Although the admission of evidence is reviewed under an  
21 abuse of discretion standard, the bankruptcy court's  
22 interpretation of the Federal Rules of Evidence is subject to de  
23 novo review. See Pierce v. County of Orange, 526 F.3d 1190,  
1200-01 (9th Cir. 2008). The panel finds that the bankruptcy  
court made no errors of law in its interpretation of the  
evidentiary rules.

24 <sup>19</sup> Fed. R. Evid. 701 also requires that the opinion testimony  
25 be rationally based on the perception of the witness. Mayer's  
26 testimony was based on her perceptions as the City's Vallejo's  
Assistant Finance Director since 2005 and her other experience.  
27 E.g., Bank of China v. NBM LLC, 359 F.3d 171, 181-182 (2d Cir.  
2004) (permitting perceptions based on role in enterprise). In  
28 its findings, the bankruptcy court highlighted the "thorough  
knowledge of municipal accounting and Vallejo's finances in  
particular" that Mayer displayed during cross-examination.

1 some state and some federal. In total, the enactments covered a  
2 time spectrum of approximately 30 years.<sup>20</sup>

3 Finally, Mayer's testimony was helpful in terms of judicial  
4 efficiency. Instead of Mayer's summary testimony, the evidence  
5 would have entailed presenting law that showed why each single  
6 fund was restricted. The court would have needed to rule on  
7 whether each and every one of Vallejo's myriad funds was  
8 restricted in the pertinent time frame. The most concise manner  
9 for Vallejo to prove that many of its funds were restricted was  
10 through Mayer's testimony.

11 Admission of this evidence is supported by Ninth Circuit  
12 law:

13 Opinions of non-experts may be admitted where the facts  
14 could not otherwise be adequately presented or described to  
15 the jury in such a way as to enable the jury to form an  
16 opinion or reach an intelligent conclusion. If it is  
17 impossible or difficult to reproduce the data observed by  
18 the witness, or the facts are difficult of explanation, or  
19 complex, or are of a combination of circumstances and  
20 appearances which cannot be adequately described and  
21 presented with the force and clearness as they appeared to  
22 the witness, the witness may state his impressions and  
23 opinions based on what he observed.

19 United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982).

20 These principles apply to a bench trial as well.

21 We also observe that the Unions had the opportunity to  
22 reveal defects in Mayer's judgment or the inaccuracy of her  
23 perceptions by conducting cross examination and presenting their  
24 own evidence.

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27  
28 <sup>20</sup>This complexity was amply illustrated by the table of  
legal restrictions submitted by Vallejo in response to our second  
request for supplemental briefing.

1 Under these circumstances, even if Mayer's testimony  
2 arguably contained legal conclusions, given a court's wide  
3 latitude in this arena, we cannot unequivocally say the  
4 bankruptcy court abused its discretion. Unitec Corp. v. Beatty  
5 Safway Scaffold Co. of Or., 358 F.2d 470, 478 (9th Cir. 1966)  
6 (noting that it is more difficult to find an abuse of discretion  
7 in a bench trial than a jury trial).

8 Based on Mayer's testimony, Vallejo prepared a chart  
9 summarizing its various funds and the restrictions on each fund.  
10 The Unions failure to object to the admissibility of the chart  
11 further supports our conclusion. For all these reasons, we are  
12 satisfied that the bankruptcy court properly admitted her  
13 testimony regarding the restrictions on certain City funds.<sup>21</sup>

14 **3. The Bankruptcy Court's Findings Regarding Vallejo's**  
15 **Fiscal Prudence Are Not Clearly Erroneous**

16 According to the Unions, Vallejo should have pillaged all  
17 of its component agency funds, ignoring bond covenants, grant  
18 restrictions, and normal GASB and GAAP practices, to subsidize

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19  
20 <sup>21</sup> Mayer's discussion of several documents did not violate  
21 the best evidence rule. Her testimony was offered to prove the  
22 cumulative effect of documents on Vallejo's finances, i.e., that  
23 Vallejo had financial obligations in excess of its ability to  
24 pay, and not to prove the contents of a particular document. See  
25 Seiler v. Lucasfilm, Ltd., 808 F.2d 1316, 1318-19 (9th Cir.  
26 1986). Mayer's testimony was not hearsay either. Hearsay is "a  
27 statement other than one made by the declarant while testifying  
28 at the trial or hearing, offered in evidence to prove the truth  
of the matter asserted." FED. R. EVID. 801(c). Mayer's testimony  
regarding documents not introduced into evidence was relevant to  
establish the obligations they created for Vallejo; it was not  
for the purpose of advancing the truth of the statements made in  
the documents. See, e.g., NLRB v. H. Koch & Sons, 578 F.2d 1287,  
1290-91 (9th Cir. 1978) (permitting testimony introduced to  
demonstrate legal effect).

1 its General Fund. The bankruptcy court found that taking such  
2 actions defied fiscal prudence.

3 Our role is not to reweigh the evidence presented to the  
4 bankruptcy court. Here, the bankruptcy court's "account of the  
5 evidence is plausible in light of the record when viewed in its  
6 entirety." Anderson, 470 U.S. at 574. The Unions' suggestion  
7 would leave Vallejo more debilitated tomorrow than it is today.  
8 Under their reasoning, the assets of restricted funds would be  
9 spent, yet revenues would continue plummeting and expenses would  
10 continue surging.

11 The Unions' own expert witness testified the General Fund  
12 would experience another deficit in fiscal 2008-2009. The  
13 Unions' expert further admitted that Vallejo had to comply with  
14 GASB when doing financial planning and preparing its financial  
15 statements. Moreover, the Unions' expert did not identify a  
16 single fund Vallejo could use to unravel its solvency crisis.  
17 Effectively, raiding funds for short-term needs would simply  
18 cripple Vallejo more.

#### 19 **4. Vallejo Could Not Avoid Deficits**

20 Alternatively, the Unions argue Vallejo could have avoided  
21 bankruptcy if it had made many minor changes. The Unions assert  
22 that if Vallejo had taken the Unions' final offer to extend the  
23 March 2008 modification of the CBAs, Vallejo could have operated  
24 for another year. The Unions also contend that Vallejo's  
25 projections were based on an erroneous assumption that the  
26 police and firefighters would be fully staffed. Lastly, the  
27 Unions assert Vallejo could trim its budget by cutting quality  
28 of life programs like Meals on Wheels and deferring maintenance

1 on its vehicle fleet. For several reasons, the bankruptcy court  
2 found the Unions' contentions illusory.

3 First, to the extent the Unions' offer would keep Vallejo  
4 out of bankruptcy for the next fiscal year, the offer would not  
5 provide long term solvency beyond the first year. The offer  
6 imposed new onerous terms like 3-5% annual salary increases on  
7 top of the deferred 6.5% increase. The deferred 6.5% increase,  
8 suspended by the March 2008 modification, would either be  
9 reinstated by the start of the 2009-2010 fiscal year or by March  
10 1, 2009. Once reinstated, the 6.5% increase would drive the  
11 General Fund back into a deficit. Thus, the bankruptcy court  
12 found Vallejo's acceptance of the offer would not have balanced  
13 its budget.

14 Second, the bankruptcy court found Vallejo did not  
15 erroneously over-budget based on an assumption of full staffing.  
16 Due to the minimum staffing requirements for firefighters and  
17 the overtime paid to meet those requirements, Vallejo would not  
18 have realized any cost savings. The court noted the Unions'  
19 evidence failed to account for lost revenue based on vacant,  
20 reimbursable positions.<sup>22</sup> Some of those reimbursable positions  
21 came from the police and fire departments. Also, due to the  
22 unprecedented number of employee departures, Vallejo had to pay  
23 \$5.3 million in payout obligations. Yet, the Unions' witness  
24 did not account for the costs of anticipated departures in his  
25 staffing analysis.

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26  
27  
28 <sup>22</sup> If the vacant positions had been filled, Vallejo would  
have been entitled to reimbursement, so there would be no net  
effect on the cash flow.

1 Third, Vallejo already cut much of its discretionary  
2 budget. Vallejo reduced employee rolls and continuously cut  
3 funding to services like the senior center, library and parks.  
4 Alarminglly, most of Vallejo's vehicles were near the end of  
5 their expected lives and many of the vehicles had already been  
6 extended past that life. Vallejo could have cut more services,  
7 but the court found that it had reduced expenditures to the  
8 point that municipal services were underfunded. More  
9 importantly, the court found further funding reductions would  
10 threaten Vallejo's ability to provide for the basic health and  
11 safety of its citizens.

12 In sum, whether Vallejo was insolvent is a factual finding  
13 reviewed for clear error. The existence of contrary but equally  
14 plausible inferences does not render the bankruptcy court's  
15 findings of fact clearly erroneous. Anderson, 470 U.S. at 574  
16 ("Where there are two permissible views of the evidence, the  
17 factfinder's choice between them cannot be clearly erroneous.").  
18 The court properly admitted Mayer's testimony, which it found  
19 credible. Our review of the record shows that the Unions did  
20 not provide evidence that conclusively contradicted her  
21 testimony nor do they point out to us any such evidence for our  
22 consideration in this appeal. The bankruptcy court's findings  
23 that Vallejo could not have avoided the deficits it faced for  
24 the 2008-2009 fiscal year is supported by the record and cannot  
25 be overturned. In short, we hold that the record as a whole  
26 supports the court's inferences and findings that as of the  
27 petition date, Vallejo was unable to pay its debts as they  
28 became due.

1           Accordingly, we perceive no error in the bankruptcy court's  
2 rulings.

3 **B.    Desire to Effect a Plan:   Section 109(c) (4)**

4           "An entity may be a debtor under chapter 9 of this title if  
5 and only if such entity . . . desires to effect a plan to adjust  
6 such debts." § 109(c) (4). The Unions assert that the  
7 bankruptcy court erred in finding Vallejo met this requirement  
8 because: (1) Vallejo took no post-petition actions to confirm a  
9 plan of adjustment; and (2) the evidence demonstrated Vallejo  
10 filed the case in bad faith to simply break union contracts.

11           Few published cases address the requirement that a chapter  
12 9 petitioner "desires to effect" a plan of adjustment. Those  
13 cases that have considered the issue demonstrate that no bright-  
14 line test exists for determining whether a debtor desires to  
15 effect a plan because of the highly subjective nature of the  
16 inquiry under § 109(c) (4). Compare In re County of Orange, 183  
17 B.R. 594, 607 (Bankr. C.D. Cal. 1995) (proposal of a  
18 comprehensive settlement agreement among other steps taken  
19 demonstrated efforts to resolve claims which satisfied  
20 § 109(c) (4)) with In re Sullivan County Reg'l Refuse Disposal  
21 Dist., 165 B.R. 60, 76 (Bankr. D.N.H. 1994) (post-petition  
22 submission of a draft plan of adjustment met § 109(c) (4)).

23           Petitioners may satisfy the subjective requirement with  
24 direct and circumstantial evidence. They may prove their desire  
25 by attempting to resolve claims as in County of Orange; by  
26 submitting a draft plan of adjustment as in Sullivan County; or  
27 by other evidence customarily submitted to show intent. See  
28 Slatkin, 525 F.3d at 812. The evidence needs to show that the

1 "purpose of the filing of the chapter 9 petition not simply be  
2 to buy time or evade creditors." See Collier ¶ 109.04[3][d], at  
3 109-32.

4 Based on these parameters, we discern no clear error with  
5 the bankruptcy court's conclusion that Vallejo had the requisite  
6 desire to effect a plan. There is ample evidence in the record  
7 to support the subjective inquiry.

8 First, Vallejo submitted a Statement of Qualifications (the  
9 "Statement"), which stated "[Vallejo] desires to effect a plan  
10 to adjust its debts." The record shows that the city manager  
11 certified the Statement under oath. Moreover, Unions deposed  
12 the city manager and subpoenaed him for trial, but chose not to  
13 call him as a witness or cross examine him regarding the  
14 Statement.

15 The record also shows that Vallejo filed its petition not  
16 to buy time, but because it ran out of time. Collier  
17 ¶ 109.04[3][d], at 109-32. It negotiated with the Unions  
18 regarding the CBAs from December 2007 until days before its  
19 filing in May 2008. Its city staff first recommended that the  
20 city council file for bankruptcy in March 2008. Even so,  
21 Vallejo continued its negotiations with Unions. With a cash  
22 crunch approaching, the city council authorized Vallejo's filing  
23 on May 6, 2008, seventeen days before it actually filed for  
24 bankruptcy. Vallejo only filed its petition when its interim  
25 agreement with the Unions was about to expire, the mediation  
26 efforts with the Unions had failed and no other agreement could  
27 be reached. As of the petition date, the record shows that  
28 Vallejo had exhausted all other avenues.

1 Finally, Vallejo's postpetition efforts in implementing its  
2 Pendency Plan sufficiently demonstrate that its petition was  
3 designed to result in an eventual plan of adjustment of debts by  
4 which creditors' claims would be satisfied or discharged. We  
5 conclude that in light of this ample evidence, Vallejo met its  
6 burden of proving that it desired to effect a plan.

7 The Unions also assert we should imply a good faith  
8 requirement into § 109(c)(4). We decline to do so for two  
9 reasons. First, § 921(c) already separately provides creditors  
10 with the ability to test filings for good faith. The Unions did  
11 not preserve that issue on appeal. Second, it "is generally  
12 presumed Congress acts intentionally and purposely when it  
13 includes particular language in one section of a statute but  
14 omits it in another." BFP v. Resolution Trust Corp., 511 U.S.  
15 531, 537 (1994). As shown by § 109(c)(5)(B), where Congress  
16 meant to add a further, specific good faith review, it did so.  
17 Since § 109(c)(4) does not similarly provide for "good faith,"  
18 we conclude Congress did not inject another good faith review  
19 into § 109(c)(4).

20 **C. The Good Faith Creditor Negotiation Requirement Under**  
21 **§ 109(c)(5)(B)**

22 Section 109(c)(5)(B) requires that Vallejo demonstrate that  
23 it "has negotiated in good faith with creditors and has failed  
24 to obtain the agreement of creditors holding at least a majority  
25 in amount of the claims of each class that [Vallejo] intends to  
26 impair under a plan . . . ."

27 The Unions contend the bankruptcy court erred as a matter  
28 of law in finding that Vallejo's prepetition negotiations, which

1 were directed at attempting to resolve its escalating labor  
2 costs outside of bankruptcy, met the statutory requirements  
3 under § 109(c)(5)(B). Relying on In re Cottonwood Water and  
4 Sanitation Dist., Douglas County, Colo., 138 B.R. 973, 974  
5 (Bankr. D. Colo. 1992), and Sullivan, 165 B.R. at 78, they argue  
6 the statute requires that the negotiations concern the possible  
7 terms of a plan. Vallejo counters that the plain language of  
8 the statute does not require negotiations over plan terms.  
9 Here, Vallejo did not discuss or negotiate with the Unions or  
10 any other creditors over the possible terms of a plan of  
11 adjustment.

12 The bankruptcy court's construction and interpretation of  
13 the statute is subject to de novo review. The starting point  
14 for our interpretation of a statute is its language. When a  
15 statute's language is plain, we enforce it according to its  
16 terms, unless such a reading would render it absurd. Lamie v.  
17 United States Trustee, 540 U.S. 526, 534 (2004). Congress "says  
18 in a statute what it means and means in a statute what it says  
19 there." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254-54  
20 (1992). But to determine if the language is unambiguous we  
21 refer to "the language itself, the specific context in which the  
22 language is used, and the broader context of the statute as a  
23 whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

24 Section 109(c)(5)(B)'s plain language does not explicitly  
25 state whether the negotiations with creditors must concern a  
26 proposed plan of adjustment. Nor do § 109(c)(5)(B)'s sister  
27 provisions, §§ 109(c)(1)-(4), clearly and unambiguously support  
28 a conclusion that the negotiations must concern a plan.

1 Cottonwood, 138 B.R. at 975. Our plain language inquiry,  
2 however, is not limited to the single phrase “negotiated in good  
3 faith with creditors”. Rather, we give it a meaning consistent  
4 with the remaining language in the statute. See Marek v.  
5 Chesny, 473 U.S. 1, 16 n. 5 (1985) (Brennan, J., dissenting)  
6 (“[W]hile the starting point in interpreting statutes . . . is  
7 always the plain words themselves, ‘[t]he particular inquiry is  
8 not what is the abstract force of the words or what they may  
9 comprehend, but in what sense they intended to be understood or  
10 what understanding they convey when used in the particular  
11 act.’”).

12 The full text of the statute provides us with a clue as to  
13 how we should determine what is required under the statute. The  
14 statute references adverse treatment (“impairment”) to the  
15 interests of numerically important creditors (“majority . . . of  
16 each class”) and specifically calls out creditors holding at  
17 least a majority in the amount of claims of each class that a  
18 petitioner intends to impair under a plan. The statute then  
19 adds that a petitioner satisfies this subsection if it is unable  
20 to obtain agreement from those particular creditors after the  
21 negotiations. In the end, the negotiations referred to in the  
22 statute cannot be separated from its context, which clearly and  
23 unambiguously refers to the treatment of impaired creditors  
24 under a plan.

25 The significance the Code places on the lack of agreement  
26 with creditors identified by § 109(c)(5)(B) bolsters our  
27 interpretation that the negotiations must cover their treatment  
28 under a plan. The creditors identified by § 109(c)(5)(B) are

1 those necessary to confirm a consensual plan of adjustment.<sup>23</sup> It  
2 is not by coincidence that Congress centered § 109(c)(5)(B)  
3 around the most critical creditors to confirming a plan, i.e.,  
4 the majority of the impaired in every class.

5 Finally, because § 109(c)(5)(B) involves classification and  
6 impairment, it would be difficult for a municipality to prove  
7 that it negotiated in good faith with creditors it intends to  
8 impair unless the municipality had a plan of adjustment drawn or  
9 at least outlined when it negotiated with the creditors. Thus,  
10 we conclude that the plain language of § 109(c)(5)(B) requires  
11 negotiations with creditors revolving around a proposed plan, at  
12 least in concept.

13 We do not mean to discourage or undermine prepetition  
14 negotiations with major creditors that are aimed at avoiding  
15 bankruptcy altogether with this result. Indeed, under these  
16 circumstances it has been observed that most chapter 9  
17 bankruptcies occur because of failed negotiations, not a lack of  
18 them. Ryan Preston Dahl, Collective Bargaining Agreements and  
19 Chapter 9 Bankruptcy, 81 Am. Bankr. L.J. 295, 336 (2005).

20 We emphasize that while a complete plan is not required,  
21 some outline or term sheet of a plan which designates classes of  
22 creditors and their treatment is necessary. See Sullivan  
23 County, 165 B.R. at 78 (noting a formal plan is not required);  
24 see also Cottonwood, 138 B.R. at 979.

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25  
26 <sup>23</sup> Section 901(a) incorporates certain provisions of §§ 1126  
27 and 1129(a) into chapter 9, in particular, §§ 1126(c) and  
28 1129(a)(8). Those provisions provide the backbone of consensual  
confirmation and determine when each class of claims accepts a  
plan.

1           Accordingly, we conclude that the bankruptcy court erred in  
2 deciding that Vallejo satisfied § 109(c)(5)(B). While Vallejo  
3 unsuccessfully negotiated with Unions regarding the alteration  
4 of the CBAs, the evidence was undisputed that Vallejo never  
5 negotiated with Unions or any of its creditors over the possible  
6 terms of a plan of adjustment.<sup>24</sup> This error was harmless,  
7 however, because the alternative statutory requirement was met.

8 **D. The Alternative Creditor Negotiation Requirement:  
9 Impracticable Under § 109(c)(5)(C).**

10           As an alternative to § 109(c)(5)(B), the bankruptcy court  
11 concluded Vallejo satisfied § 109(c)(5)(C). Section  
12 109(c)(5)(C) provides that “[a]n entity may be a debtor under  
13 chapter 9 of this title if and only if such entity . . . is  
14 unable to negotiate with creditors because such negotiation is  
15 impracticable.” Whether the chapter 9 petitioner’s negotiations  
16 with creditors is impracticable is reviewed for clear error.  
17 In re Greene County Hosp., 59 B.R. 388, 391 (Bankr. S.D. Miss.  
18 1986).

19           The Unions argue that the court erred because it relied on  
20 Vallejo’s List of Creditors Holding the 20 Largest Unsecured  
21 Claims and Calpers’ Statement of Position to the Unions’ Motion  
22 for Order Appointing Unions as Retiree Benefit Representatives.  
23 The Unions complain Vallejo never submitted the documents into  
24 evidence. The Unions add that neither Vallejo nor the court  
25 explained how the documents showed which creditors Vallejo

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26  
27 <sup>24</sup> We observe that the bankruptcy court did not use the  
28 words “class” or “impair” when it made its findings and  
conclusions on this issue.

1 sought to impair or how negotiations with the creditors listed  
2 in the documents were impracticable.

3 Whether negotiations with creditors is impracticable  
4 depends upon the circumstances of the case. “‘Impracticable’  
5 means ‘not practicable; incapable of being performed or  
6 accomplished by the means employed or at command; infeasible.’  
7 In the legal context, ‘impracticability’ is defined as ‘a fact  
8 or circumstance that excuses a party from performing an act,  
9 esp. a contractual duty, because (though possible) it would  
10 cause extreme and unreasonable difficulty.’” Valley Health Sys.,  
11 383 B.R. at 163.

12 Petitioners may demonstrate impracticability by the sheer  
13 number of their creditors or by their need to file a petition  
14 quickly to preserve their assets. Id. Petitioners may also  
15 show impracticability by their need to act quickly to protect  
16 the public from harm. Given the broad definition of  
17 impracticable, however, these examples are not exclusive. Id.  
18 (noting that the ordinary meaning of the word “impracticable”  
19 belies any notion that the reach of § 109(c)(5)(C) requires a  
20 debtor to either engage in good faith pre-petition negotiations  
21 with its creditors to an impasse or to satisfy a numerosity  
22 requirement before determining that negotiation is  
23 impracticable).

24 The court found Vallejo could not meaningfully negotiate  
25 with Union Bank unless it could submit a viable long term  
26 financial plan based on adjustments to its labor costs. Even if  
27 Vallejo could identify its unknown creditors, including  
28 retirees, the court found it would have been fruitless to

1 include them in the complex, on-going negotiations with Unions.<sup>25</sup>  
2 Since the labor costs comprised the largest slice of Vallejo's  
3 budget, it would have been futile to negotiate with other  
4 creditors without an agreement with the Unions. Finally,  
5 Vallejo had to preserve its ability to continue providing the  
6 community uninterrupted services, and the court found a delay in  
7 filing to locate and negotiate with unknown creditors would have  
8 put those functions at risk.<sup>26</sup>

9 We conclude that the bankruptcy court's decision that  
10 Vallejo was unable to negotiate with creditors because such  
11 negotiation was impracticable is amply supported by the evidence  
12 in the record. No error occurred.

13 **E. The Banks Standing as Appellees**

14 The Unions challenged the Banks' standing to participate in  
15 this appeal as appellees on the ground that they do not meet the  
16 "person aggrieved" test for bankruptcy appellate standing set  
17 forth in Fondiller v. Robertson (In re Fondiller), 707 F.2d 441,  
18 443 (9th Cir. 1983). Under the "person aggrieved" test, a party  
19 must demonstrate that they are directly and adversely  
20 pecuniarily affected by the order at issue. Such a  
21 demonstration may be made by showing the order diminished the  
22

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23 <sup>25</sup> Vallejo did not negotiate with its retirees, who hold  
24 claims of about \$215 million. Vallejo never contacted the  
25 retirees because, as with unknown bondholders and potential tort  
claimants, it could not effectively identify them.

26 <sup>26</sup> We do not need to address here whether it was appropriate  
27 for the bankruptcy court to take judicial notice of Calpers'  
28 Statement of Position or Vallejo's List of Creditors Holding 20  
Largest Unsecured Claims. The bankruptcy court based its ruling  
on a number of other factual findings.

1 party's property, increased its burdens or impaired its rights.  
2 Id. at 442.

3 The oft-cited rationale for this restrictive approach to  
4 bankruptcy appellate standing is the concern that if appellate  
5 standing is not limited, bankruptcy litigation will become mired  
6 in endless appeals brought by the myriad parties who are  
7 indirectly affected by every bankruptcy court order. Id. at  
8 443. Accordingly, a common scenario for invoking the "person  
9 aggrieved" test is when "the appellant is a party other than the  
10 moving party." Sherman v. Sec. and Exch. Comm'n (In re  
11 Sherman), 491 F.3d 948, 957 n. 8 (9th Cir. 2006).

12 Whether a person is "aggrieved" for purposes of appellate  
13 standing is an issue of fact. Paine v. Dickey (In re Paine),  
14 250 B.R. 99, 104 (9th Cir. BAP 2000). While the Banks are  
15 undisputedly creditors, we cannot conclude that they qualify as  
16 "persons aggrieved" by the court's order for relief, which  
17 simply allows Vallejo's bankruptcy case to go forward. See  
18 Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.),  
19 177 F.3d 774, 778 (9th Cir. 1999) (finding that creditor must  
20 have a direct pecuniary interest in a bankruptcy court's order  
21 before it has standing to appeal).

22 Courts have granted creditors standing to appeal orders  
23 that result in the transfer of assets of the estate or competing  
24 claims to a limited fund, reasoning that such orders directly  
25 and adversely pecuniarily affect them. Id. Here, there have  
26 been no determinations regarding the transfers of assets from  
27 this estate nor at this stage of the proceedings does this  
28 appeal involve competing claims to a limited fund. Accordingly,

1 whatever claims the Banks may have against Vallejo were not  
2 foreclosed or impaired by the court's entry of the order for  
3 relief in this case.

4 We conclude that the pecuniary interests of the Banks were  
5 not adversely affected by the entry of the order for relief, nor  
6 did they show that the order diminished the Banks' property,  
7 increased their burdens or impaired their rights. Thus they  
8 lack standing as appellees before us and we have not considered  
9 their briefs or their oral arguments. To hold otherwise opens  
10 the door for the possibility that all creditors have the right  
11 to participate in an appeal as appellees when the only question  
12 at issue is the debtor's eligibility to file its petition.

13 **VI. CONCLUSION**

14 For the reasons set forth above, we AFFIRM.  
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