

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

Chapter 9

Case No. 13-53846

Hon. Steven W. Rhodes

**CITY OF DETROIT'S MOTION FOR ENTRY OF AN ORDER  
ESTABLISHING PRE-TRIAL AND TRIAL PROCEDURES  
AND SETTING ADDITIONAL HEARINGS**

Debtor City of Detroit respectfully submits this motion for the purpose of simplifying and clarifying the procedures for conducting matters relating to the upcoming hearings on December 10, 11 and 12 on the City's two pending motions.

**Background**

On November 7, 2013, the Court entered on the docket a Notice of Hearing and Deadlines [Dkt. #1564] with respect to the City's Assumption Motion [Dkts. #17, #157]; certain evidentiary motions related to the Assumption Motion [Dkts. #893, #933, #935, #944, #954]; and the City's Motion to Approve Post-

Petition Financing [Dkt. #1520]. All of the foregoing motions are to be heard beginning at 9:00 a.m. on December 10, 2013, with the evidentiary hearing on the Assumption Motion and Post-Petition Financing Motions continuing through December 11 and 12, as needed. By this Motion, the City respectfully requests entry of an order (1) establishing procedures to streamline pre-trial and trial proceedings; and (2) setting hearings on related matters so that they may be heard together with the hearings on the Assumption Motion and Post-Petition Financing Motion.

In support of this Motion, the City respectfully states as follows:

**A. The Court Should Set Certain Pre-Trial Deadlines**

**1. Disclosure of Rebuttal Witnesses and Proposed Exhibits**

The initial deadline for objections to the Post-Petition Financing Motion is November 22, 2013. The City extended that deadline to November 27, 2013 for certain parties who are expected to engage in discovery with respect to the Post-Petition Financing Motion. Because of the intervening holiday weekend after November 27, the City's only realistic opportunity to depose objectors' rebuttal witnesses prior to hearing would be during the first week in December. To give the City adequate time to prepare for, schedule and take those depositions, we would ask that objectors to the Post-Petition Financing Motion be required to file by the close of business on November 29, 2013, a list of (1) their will-call and

may-call witnesses and (2) any exhibits the objectors intend to move into evidence at the hearing.

The City's witnesses related to both the Assumption Motion and the Post-Petition Financing Motion are disclosed herein. The City proposes that it file and serve its list of proposed exhibits at the same time (November 29) as the objectors.

## **2. Completion of Depositions**

The City submits that all witnesses, including rebuttal witnesses, should be made available for deposition so that those depositions can be completed no later than December 9, 2013.

## **3. Briefing the Scope of Review of the Post-Petition Financing Motion**

At a hearing on November 14, 2013, the Court requested briefing on the scope of its review of the Post-Petition Financing Motion under 11 U.S.C. § 364(c), but did not set a separate deadline for such briefing. We believe that any objectors who intend to address the scope of the Court's review should do so when they file their objections to the Post-Petition Financing Motion. The City's response regarding the scope of the Court's review would be included in its responses to objections generally, currently due on December 4, 2013 at noon.

#### **4. Preparation of a Consolidated Exhibit List and Joint Statement of Facts**

To simplify the admission of exhibits at the hearing, by December 6, 2013, we submit that the parties should prepare and file with the Court (1) a joint, consolidated exhibit list, indicating with respect to each exhibit (a) which party seeks its admission; (b) whether the parties stipulate to the authenticity of the exhibit; and (c) whether any parties object to the admission of the exhibit, and on what grounds; and (2) a joint statement of stipulated facts as to each of the Assumption Motion and the Post-Petition Financing Motion.

#### **B. The Hearings on the Assumption Motion and Post-Petition Financing Motion Should Be Consolidated**

As the Court has previously stated, the Assumption Motion and the Post-Petition Financing Motion are closely interrelated and the proofs and arguments overlap in some places. While certain of the City's witnesses will testify primarily as to assumption, the City wishes to designate them as witnesses with respect to both motions out of an abundance of caution, to streamline the hearing, and to avoid potential objections. Specifically, the City intends to call the following witnesses, and reserves the right to seek to qualify any of them to give expert testimony at the hearing:

1. Kevyn Orr
2. Ken Buckfire
3. Gaurav Malhotra

4. James Doak – Post-Petition Financing Motion only
5. Charles Moore – Post-Petition Financing Motion only

To avoid duplication, we would suggest that each witness would be called only once and testify, if needed, regarding both motions.

Mr. Orr, Mr. Buckfire and Mr. Malhotra all have been deposed at length in connection with the Assumption Motion, but the City is prepared to offer each of them again for short depositions, solely with respect to the post-petition financing. The City has already agreed to produce Mr. Doak and Mr. Moore for depositions during the first week in December.

Because the objectors will have the opportunity to complete the depositions of all of the witnesses with respect to the Post-Petition Financing Motion prior to the start of the hearing, they will not be prejudiced if those witnesses testify regarding both Motions at once.

**C. Time at the Hearing Should Be Budgeted and the Objectors Should Be Required to Coordinate Their Arguments and Examinations**

Approximately twelve parties objected to the Assumption Motion. Although the time to object to the Post-Petition Financing Motion does not expire until November 27, 2013, the City anticipates that a similar number of objections may be filed with respect to that motion. Because of the large number of parties who may seek to be heard, we believe that the Court should establish time

limitations for each side and require the objectors to coordinate their arguments and examinations of witnesses to avoid duplication and delay.

### **1. Time Limitations**

When it was originally anticipated that the Assumption Motion would be tried by itself, the Court budgeted nine hours for the hearing, with four hours allotted to the City and five to the objectors. The City anticipates that, with the consolidation of the hearings on the two Motions, it can complete its case in chief, including opening statements and closing arguments, and cross-examine any rebuttal witnesses in seven hours. The City proposes that eight hours be budgeted to the objectors collectively, thereby keeping roughly the same percentage of time as originally allocated.

### **2. Designation of Lead Counsel for the Objectors**

As the Manual for Complex Litigation notes, in multi-party lawsuits, “[t]raditional procedures in which . . . each attorney . . . presents arguments, and conducts witness examinations, may result in waste of time and money, in confusion and indirection, and in unnecessary burden on the court. Special procedures for coordination of counsel are therefore needed. . . .” *Manual for Complex Litigation, Third* at 26 (Federal Judicial Center 1995). One suggested procedure is the designation of one attorney to “serve[] as principal attorney for the group at trial in presenting arguments, making objections, conducting examination

of witnesses, and generally organizing and coordinating the work of the other attorneys on the trial team.” *Id.* at 27.

The City recognizes that given the divergent interests of the objectors, the designation of a single lead attorney at trial may not be feasible. However, the objectors do fall naturally into certain groups or categories (for example, unions, monoline insurers and retirees). The designation of a lead attorney for each group, who are then directed to coordinate among themselves to the extent possible, will do much to streamline arguments and examinations by preventing redundancies and duplication.

**D. Hearings on the City’s Motion to Intervene in the Syncora Adversary Proceeding and the Swap Counterparties’ Motion to Dismiss the Adversary Proceeding Should Be Scheduled in Connection with the Assumption Motion and Post-Petition Financing Motion**

After this bankruptcy case had commenced, on July 31, 2013, Syncora Guarantee Inc. sued the Swap Counterparties (UBS AG, Merrill Lynch Capital Services, Inc. and SBS Financial Products Company, LLC) in state court in New York. The Swap Counterparties removed the case to federal court, and the district court for the Southern District of New York transferred it to the district court for the Eastern District of Michigan, where it has been pending as Case No. 4:13-cv-14293-MAG-PJK (the “Adversary Proceeding”). On November 19, 2013, the

district court referred the Adversary Proceeding to this Court pursuant to L.R. 83.50. *See* Adversary Proceeding, Dkt. #24.

The Adversary Proceeding represents another attempt by Syncora to prevent the implementation of the Forbearance and Optional Termination Agreement. In the Adversary Proceeding, Syncora seeks injunctive and declaratory relief determining that it has “consent rights” that would bar termination of the Swap Agreements (as provided under the Forbearance and Optional Termination Agreement) unless Syncora consents. As the Court is aware from the pleadings filed with respect to the Assumption Motion, Syncora’s claim to “consent rights” is disputed by the Swap Counterparties and the City. In the Assumption Motion, Syncora attacks the Forbearance and Optional Termination Agreement itself, while in the Adversary Proceeding it attacks the ability of the parties to perform the Forbearance and Optional Termination Agreement – but the two proceedings are two halves of the same coin.

The Swap Counterparties have filed a motion to dismiss the Adversary Proceeding, and Syncora has filed its response. *See* Adversary Proceeding, Dkts. #18, #19. Given the identity of the issues in the Motion to Dismiss and the Assumption Motion, the two motions should be heard together. Indeed, resolution of the Adversary Proceeding may facilitate the resolution of the Assumption Motion, since Syncora attempts in the Adversary Proceeding to



prevent the performance of the Forbearance and Optional Termination Agreement even if it is assumed.

The City suggests that since all parties involved will be in Detroit in any event for the hearing on the Assumption Motion and Post-Petition Financing Motion, and the motion to dismiss only raises purely legal issues, convenience would be best served by holding the hearing on the motion to dismiss immediately before or after the hearings. If the motion to dismiss is heard immediately prior to the start of the hearing, under the Local Bankruptcy Rules, the Swap Counterparties' reply in support of their motion to dismiss would be due on December 5, three business days prior to the hearing.

In addition, the City (which was not named as a party in the Adversary Proceeding) filed a motion to intervene in the Adversary Proceeding. That motion is fully briefed and ready for hearing. *See* Dkts. #5, #13, #16. The City respectfully suggests that its motion to intervene should be heard on December 4, 2013 so that, if the motion is granted, the City has the opportunity to participate in the completion of the briefing and the hearing on the motion to dismiss the Adversary Proceeding.

### **CONCURRENCE**

The City sought concurrence in this Motion from Syncora but such concurrence was not obtained. Given the large number of objectors and potential objectors (some of whom are not yet known to the City), it is not feasible for the City to seek concurrence in this Motion from all parties. Accordingly, the City respectfully requests that such requirement be waived as to those additional parties.

### **CONCLUSION**

For the foregoing reasons, the City respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit 1, establishing pre-trial and trial procedures and setting hearings on the City's motion to intervene and the Swap Counterparties' motion to dismiss the Adversary Proceeding.

Dated: November 22, 2013

Respectfully submitted,

/s/ Deborah Kovsky-Apap

Robert S. Hertzberg (P30261)  
Deborah Kovsky-Apap (P68258)  
PEPPER HAMILTON LLP  
4000 Town Center, Suite 1800  
Southfield, MI 48075  
Telephone: (248) 359-7300  
Fax: (248) 359-7700  
hertzbergr@pepperlaw.com  
kovskyd@pepperlaw.com

- and -

Thomas F. Cullen, Jr.  
Gregory M. Shumaker  
Geoffrey S. Stewart  
Geoffrey S. Irwin  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001.2113  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700  
tfcullen@jonesday.com  
gshumaker@jonesday.com  
gstewart@jonesday.com  
gsirwin@jonesday.com

**ATTORNEYS FOR THE CITY OF  
DETROIT**

**EXHIBIT 1**  
**Proposed Order**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

Chapter 9

Case No. 13-53846

Hon. Steven W. Rhodes

**ORDER ESTABLISHING PRE-TRIAL AND TRIAL PROCEDURES  
AND SETTING ADDITIONAL HEARINGS**

This matter having come before the Court on the motion of the Debtor, and the Court being otherwise advised in the premises;

**IT IS HEREBY ORDERED** as follows:

1. Any party that objects to the Debtor's Post-Petition Financing Motion shall, not later than 5:00 p.m. on November 29, 2013, file and serve on the Debtor a list of (i) all witnesses that the objector will or may call at the hearing on the Post-Petition Financing Motion; and (ii) all exhibits that the objector will or may seek to have admitted at the hearing. Not later than November 29, 2013 at

5:00 p.m., the City shall file and serve on all known objectors a document listing of all exhibits that the City may seek to have admitted at the hearing.

2. Any witnesses who will or may be called at the hearing on the Post-Petition Financing Motion shall be made available for deposition so that such depositions can be completed no later than December 9, 2013.

3. Any objector that wishes to address the scope of the Court's review of the Post-Petition Financing Motion under 11 U.S.C. § 364(c) shall do so as part of its objection to the Post-Petition Financing Motion. The City's response, if any, regarding the scope of the Court's review of the Post-Petition Financing shall be included in its responses to objections. Nothing herein shall modify the dates already set for objections and responses to the Post-Petition Financing Motion or the page limits for such briefs.

4. By December 6, 2013, the Debtor and the objectors shall prepare and file with the Court (1) a joint, consolidated exhibit list, indicating with respect to each exhibit (a) which party seeks its admission; (b) whether the parties stipulate to the authenticity of the exhibit; and (c) whether any party objects to the admission of the exhibit, and on what grounds; and (2) a joint statement of stipulated facts as to each of the Assumption Motion and the Post-Petition Financing Motion.

5. The hearings on the Assumption Motion and the Post-Petition Financing Motion shall be consolidated, so that any witness who is called with respect to both Motions will be called to the stand only once, for all purposes. An exhibit that is admitted with respect to either Motion shall be deemed admitted with respect to both Motions.

6. The Debtors shall be allotted seven hours at the consolidated hearing, and the objectors, collectively, shall be allotted eight hours.

7. The objectors shall make a good faith effort to designate one attorney to act as lead counsel for the objectors. If the designation of a single lead counsel is not feasible, the objectors shall organize themselves into groups and shall designate up to three attorneys to act as lead counsel for the respective groups. The attorney(s) designated as lead counsel shall serve as the principal attorney(s) for the group at trial in presenting arguments, making objections, conducting examination of witnesses, and generally organizing and coordinating the work of the other attorneys on the trial team. The identity of the attorney(s) designated to serve as lead counsel shall be disclosed to the Court and the Debtor no later than December 6, 2013.

8. The Debtor's motion to intervene in the adversary proceeding captioned *Syncora v. UBS AG et al.*, referred to this Court on November 19, 2013 (the "Adversary Proceeding"), shall be heard on December 4, 2013.

9. Reply briefs in support of the defendants' motion to dismiss the Adversary Proceeding shall be filed on or before December 5, 2013. The defendants' motion to dismiss the Adversary Proceeding shall be heard immediately prior to the start of the consolidated hearing on the Assumption Motion and Post-Petition Financing Motion on December 10, 2013.



# **EXHIBIT 2**

## **Notice**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

Chapter 9

Case No. 13-53846

Hon. Steven W. Rhodes

**NOTICE OF MOTION AND OPPORTUNITY TO RESPOND**

**PLEASE TAKE NOTICE** that on November 22, 2013, the Debtor, City of Detroit, filed its *Motion For Entry Of An Order Establishing Pre-Trial And Trial Procedures And Setting Additional Hearings* (the “**Motion**”) in the United States Bankruptcy Court for the Eastern District of Michigan (the “**Bankruptcy Court**”) seeking entry of an order setting certain pre-trial and trial procedures relative to the hearing on the Motion of Debtor for Entry of an Order (I) Authorizing the Assumption of that Certain Forbearance and Optional Termination Agreement Pursuant to Section 365(a) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant to Rule 9019, and (III) Granting Related Relief and the hearing on the Motion of the Debtor For a Final Order Pursuant to 11 U.S.C. §§ 105, 362, 364(C)(1), 364(C)(2), 364(E), 364(F), 503, 507(A)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay, set to take place in the Bankruptcy Court on December 10, 2013.

**PLEASE TAKE FURTHER NOTICE** that your rights may be affected by the relief sought in the Motion. You should read these papers carefully and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

**PLEASE TAKE FURTHER NOTICE** that if you do not want the Bankruptcy Court to grant the Debtor's Motion, or you want the Bankruptcy Court to consider your views on the Motion, within **17 days**<sup>1</sup> you or your attorney must:

1. File a written objection or response to the Motion explaining your position with the Bankruptcy Court electronically through the Bankruptcy Court's electronic case filing system in accordance with the Local Rules of the Bankruptcy Court or by mailing any objection or response to:<sup>2</sup>

**United States Bankruptcy Court**  
Theodore Levin Courthouse  
231 West Lafayette Street  
Detroit, MI 48226

You must also serve a copy of any objection or response upon:

**Jones Day**  
51 Louisiana Ave. NW  
Washington, D.C. 20001-2113  
Attention: Gregory Shumaker

-and-

**Pepper Hamilton LLP**  
Suite 1800, 4000 Town Center  
Southfield, Michigan 48075  
Attn: Robert Hertzberg and Deborah Kovsky-Apap

2. If an objection or response is timely filed and served, the clerk will schedule a hearing on the Motion and you will be served with a notice of the date, time and location of the hearing.

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<sup>1</sup> Concurrently herewith, the Debtor has filed a motion seeking to shorten the notice period and expedite the hearing, if any, on the Motion. If that motion is granted, the Debtor will file an amended Notice of Opportunity to Respond.

<sup>2</sup> A response must comply with F. R. Civ. P. 8(b), (c) and (e).

**PLEASE TAKE FURTHER NOTICE that if you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the Motion and may enter an order granting such relief.**

Dated: November 22, 2013

Respectfully submitted,

/s/ Deborah Kovsky-Apap

Robert S. Hertzberg (P30261)  
Deborah Kovsky-Apap (P68258)  
PEPPER HAMILTON LLP  
4000 Town Center, Suite 1800  
Southfield, MI 48075  
Telephone: (248) 359-7300  
Fax: (248) 359-7700  
hertzbergr@pepperlaw.com  
kovskyd@pepperlaw.com

- and -

Thomas F. Cullen, Jr.  
Gregory M. Shumaker  
Geoffrey S. Stewart  
Geoffrey S. Irwin  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001.2113  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700  
tfcullen@jonesday.com  
gshumaker@jonesday.com  
gstewart@jonesday.com  
gsirwin@jonesday.com

**ATTORNEYS FOR THE CITY OF  
DETROIT**

**EXHIBIT 3**  
**Brief**  
**(Not Applicable)**

**EXHIBIT 4**  
**Certificate of Service**

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

Chapter 9

Case No. 13-53846

Hon. Steven W. Rhodes

**CERTIFICATE OF SERVICE**

I hereby certify that on November 22, 2013, I electronically filed the Debtor's Motion for Entry of an Order Establishing Pre-Trial and Trial Procedures and Setting Additional Hearing Dates with the Clerk of the Court which sends notice by operation of the Court's electronic filing service to all ECF participants registered to receive notice in this case.

Dated: November 22, 2013

/s/ Deborah Kovsky-Apap  
Deborah Kovsky-Apap (P68258)

**EXHIBIT 5**  
**Affidavits**  
**(Not Applicable)**



**EXHIBIT 6**  
**Documentary Exhibits**  
**(Not Applicable)**