

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

Expedited Consideration Requested

**MOTION *IN LIMINE* TO EXCLUDE TESTIMONY
OF SHARON McPHAIL**

Interested party David Sole seeks to call Sharon McPhail, a former member of the Detroit City Council, as a rebuttal witness at the hearing (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 [Docket Nos, 17, 157] (the “Assumption Motion”) and the Motion of the Debtor for a Final Order Pursuant to 11U.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 [Docket No. 1520] (the “Post-Petition Financing Motion”). *See* Docket No. 2063.

As an initial matter, it is clear from Mr. Sole’s amended witness list that Ms. McPhail would be called to testify only with respect to the Assumption Motion and not with respect to the Post-Petition Financing Motion. *See id.* (“Ms McPhail was a city employee involved in the hearings when the Pension Obligation Certificates and Interest Rate Swaps were adopted in 2005-2006 and can rebut testimony as to conduct of the counter-parties and ratings agencies in connection with pushing for their adoption.”).

However, discovery on the Assumption Motion has long since closed. This Court’s Order Regarding Debtor’s Motion to Assume Lease or Executory Contract [Docket No. 684] provided that “[d]iscovery depositions of rebuttal witnesses shall be completed by September 19, 2013.” Mr. Sole, without seeking leave of the Court, disclosed Ms. McPhail as a rebuttal witness with respect to the Assumption Motion December 12, 2013, almost three months after the deadline for rebuttal witness depositions. Mr. Sole’s unexcused tardiness in disclosing Ms. McPhail is grounds for striking her from the witness list. *See, e.g., Whyte v. United States Postal Serv.*, 2012 U.S. Dist. LEXIS 59854, *2-4 (S.D. Fla. Apr. 30, 2012) (striking additional witnesses who were not disclosed timely under the court’s

scheduling order). In *Whyte*, the court found that the plaintiff was prejudiced by the late disclosure of witnesses two months before the start of trial. Here, the City is even more clearly prejudiced by the late disclosure of Ms. McPhail *two business days* before the start of trial.

Nonetheless, in an attempt to mitigate that prejudice in the event that the Court were inclined to excuse Mr. Sole's dilatory tactics, the City on Friday, December 13, noticed Ms. McPhail's deposition for the following Monday – the only remaining day before the start of trial. [Docket No. 2104.]

On Sunday afternoon, December 15, 2013, counsel for the City received an email from counsel for Mr. Sole, stating that he would be unable to produce Ms. McPhail for her deposition. *See Ex. 6(a), J. Goldberg Email.*¹ The City is thus doubly prejudiced: Not only was Ms. McPhail disclosed almost three months late, but the City is unable to depose her prior to trial. Under the circumstances, the Court should preclude Ms. McPhail from testifying.

CONCURRENCE

Counsel for the City sought the concurrence of counsel for Mr. Sole in the relief sought in this motion, but such concurrence was not obtained.

¹ At 7:25 p.m. on Sunday Evening, counsel for Mr. Sole provided the City with an unsworn statement from Ms. McPhail. *See Ex. 6(b), Email Attaching Statement.* Ms. McPhail's unsworn statement confirms that Ms. McPhail's proposed testimony relates solely to the Assumption Motion.

CONCLUSION

For the reasons stated herein, the City respectfully requests that the Court enter an order, in the form attached hereto as Exhibit 1, excluding Ms. McPhail from testifying at the Hearing.

Dated: December 16, 2013

Respectfully submitted,

/s/ Deborah Kovsky-Apap
Robert S. Hertzberg (P30261)
Deborah Kovsky-Apap (P68258)
PEPPER HAMILTON LLP
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Southfield, MI 48075
Telephone: (248) 359-7300
Fax: (248) 359-7700
hertzbergr@pepperlaw.com
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- and -

Thomas F. Cullen, Jr.
Gregory M. Shumaker
Geoffrey S. Stewart
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

**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 EXCLUDING TESTIMONY OF SHARON McPHAIL

This matter having come before the Court on the motion (the “Motion”)¹ of the Debtor, City of Detroit, for entry of an order excluding the testimony of Sharon McPhail at the Hearing on the Debtor’s Assumption Motion and Post-Petition Financing Motion, and the Court being otherwise advised in the premises;

IT IS HEREBY ORDERED that the Motion is granted.

¹ Capitalized terms not otherwise defined herein shall have the meanings set forth in the Motion.

IT IS FURTHER ORDERED that the testimony of Sharon McPhail is excluded from being presented at the Hearing.

EXHIBIT 2

Notice of Motion and Opportunity to Object

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

Expedited Consideration Requested

NOTICE OF DEBTOR CITY OF DETROIT'S MOTION *IN LIMINE*
TO EXCLUDE TESTIMONY OF SHARON MCPHAIL

PLEASE TAKE NOTICE that on December 16, 2013, the Debtor, City of Detroit, filed its *Motion in Limine to Exclude Testimony of Sharon McPhail* (the "**Motion in Limine**") in the United States Bankruptcy Court for the Eastern District of Michigan (the "**Bankruptcy Court**") seeking entry of an order excluding the testimony of Sharon McPhail at the hearing on at the hearing (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 [Docket Nos, 17, 157] (the "Assumption Motion") and the Motion of the Debtor for a Final Order Pursuant to 11U.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 [Docket No. 1520] (the "Post-Petition Financing Motion"), set to take place in the Bankruptcy Court on December 17, 2013.

PLEASE TAKE FURTHER NOTICE that your rights may be affected by the relief sought in the *Motion in Limine*. 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 *in Limine*, or you want the Bankruptcy Court to consider your views on the Motion *in Limine*, by **January 2, 2014 at 4:00 p.m. (EDT)**¹ you or your attorney must:

1. File a written objection or response to the Motion *in Limine* 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:²

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

¹ Concurrently herewith, the Debtor is seeking expedited consideration and shortened notice of the Motion *in Limine* so that the Court may consider the Motion to exclude Ms. McPhail before she is called as a witness.

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

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

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 *in Limine* and may enter an order granting such relief.

Dated: December 16, 2013

Respectfully submitted,

/s/ Deborah Kovsky-Apap
Robert S. Hertzberg
Deborah Kovsky-Apap
PEPPER HAMILTON LLP
4000 Town Center, Suite 1800
Southfield, MI 48075
Telephone: (248) 359-7300
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gstewart@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 December 16, 2013, I electronically filed the Debtor's Motion *in Limine* to Exclude the Testimony of Sharon McPhail 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: December 16, 2013

/s/ Deborah Kovsky-Apap
Deborah Kovsky-Apap (68258)

EXHIBIT 5

**Affidavits
(Not Applicable)**

EXHIBIT 6

Documentary Exhibits

(a) J. Goldberg Email

(b) J. Goldberg Email Attaching Statement

EXHIBIT 6(a)

Kovsky-Apap, Deborah

From: Jerome Goldberg <apclawyer@sbcglobal.net>
Sent: Sunday, December 15, 2013 1:16 PM
To: Hertzberg, Robert S.; Kovsky-Apap, Deborah
Cc: tfcullen@jonesday.com; gshumaker@jonesday.com; gstewart@jonesday.com
Subject: Mcphail depostion

Counsel,

This is to inform the parties that I am unable to produce Sharon McPhail for a deposition Monday morning at 9:00 am. I am not certain if I will be producing her as a rebuttal witness. I am attempting to secure an affidavit from her.

Feel free to call me with any questions at 313-393-6001.

Jerome D. Goldberg

EXHIBIT 6(b)

Kovsky-Apap, Deborah

From: Jerome Goldberg <apclawyer@sbcglobal.net>
Sent: Sunday, December 15, 2013 7:25 PM
To: Kovsky-Apap, Deborah; Hertzberg, Robert S.
Cc: 'tfcullen@jonesday.com'; 'gshumaker@jonesday.com'; 'gstewart@jonesday.com'
Subject: Re: Mcphail depostion
Attachments: mcphail 034.pdf

I am sending you a statement from Ms. McPhail. She is in the process of signing it in front of a notary and I will forward that when I get it. Ms. McPhail is the superintendent of a charter school district and it being the week before break her time is very limited, as will be her testimony as you can see from her statement. File whatever you feel is appropriate.

Jerome Goldberg

From: "Kovsky-Apap, Deborah" <kovskyd@pepperlaw.com>
To: 'Jerome Goldberg' <apclawyer@sbcglobal.net>; "Hertzberg, Robert S." <Hertzber@pepperlaw.com>
Cc: "'tfcullen@jonesday.com'" <tfcullen@jonesday.com>; "'gshumaker@jonesday.com'" <gshumaker@jonesday.com>; "'gstewart@jonesday.com'" <gstewart@jonesday.com>
Sent: Sunday, December 15, 2013 1:28 PM
Subject: RE: Mcphail depostion

Mr. Goldberg,

Per our conversation I am writing to confirm that we will be moving to exclude McPhail. It will not be feasible to attempt to depose her in the midst of trial.

-----Original Message-----

From: Jerome Goldberg [apclawyer@sbcglobal.net]
Sent: Sunday, December 15, 2013 01:15 PM Eastern Standard Time
To: Hertzberg, Robert S.; Kovsky-Apap, Deborah
Cc: tfcullen@jonesday.com; gshumaker@jonesday.com; gstewart@jonesday.com
Subject: Mcphail depostion

Counsel,

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Feel free to call me with any questions at 313-393-6001.

Jerome D. Goldberg

This email is for the use of the intended recipient(s) only. If you have received this email in error, please notify the sender immediately and then delete it. If you are not the intended recipient, you must not keep, use, disclose, copy or distribute this email without the author's prior permission. We have taken precautions to minimize the risk of transmitting software viruses, but we advise you to carry out your own virus checks on any attachment to this message. We cannot accept liability for any loss or damage caused by software viruses. The information contained in this communication may be confidential and may be subject to the attorney-client privilege. If you are the intended recipient and you do not wish to receive similar electronic messages from us in the future then please respond to the sender to this effect.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

Chapter 9

Case No. 13-53846

City of Detroit, Michigan,

Debtor.

DECLARATION OF SHARON MCPHAIL

State of Michigan)

County of Wayne)

1. My name is Sharon McPhail. I reside at 567 Fiske, Detroit, MI 49214.
2. I was a member of the Detroit City Council from January 1, 2002 to December 31, 2005.
3. I am currently the Superintendent of Detroit Community Schools located in the City of Detroit. We are currently in the last week before the winter break, an extremely hectic time for the students and administration.
4. I was a member of Detroit City Council when Mayor Kilpatrick brought a proposal for the City Council to approve the issuing of Pension Obligation Certificates, a portion of which included Swap agreements, to City Council for approval.
5. I am not an economist and neither were my fellow City Council members.
6. However, for a period of months I recall raising questions as to the risks associated with these novel economic formations which were supposed to help resolve the City's long-term pension debt.

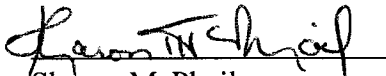
7. I researched other cities that had entered into similar pension obligation certificates and learned that the municipalities' that had entered into them were already encountering financial difficulties as the result. I recall one of the cities was in Pennsylvania but I do not specifically recall the areas involved.
8. During the period of months the City Council was debating the adoption of these financial instruments, I recall representatives of the banking institutions, their law firms and representatives of the ratings agencies appearing before Council. To the best of my recollection, Fitch and Standard and Poors appeared before City Council.
9. The debate between me and them related to the risk associated with Detroit entering into the Pension Obligation Certificates and these financial instruments, in light of the absolute authority of the pension boards to make investments (good and bad) the potential for a financial downturn, and in light of Detroit's precarious financial situation that had existed for years.
10. All of the representatives of the banks continually assured Council members that there would be no risk associated with the City adopting these financial instruments, and they would be a good deal for the City and the only way to address the debt burden of the City.
11. I recall that the City of Detroit Chief Financial Officer, who was a strong proponent of adopting the Financial Obligation Certificates, was Sean Werdlow.
12. After opposing the Pension Obligation Certificates and holding up their adoption for a number of months, under extreme pressure from the media, the Wall Street representatives, and even at the urging of some of the union leadership, and having

been repeatedly reassured by the banks and their agents that these financial instruments carried no risk for the City's future, the Council representatives who had supported me in my opposition to the adoption of the Pension Obligation Certificates, conceded and the administration had the votes for adoption of the issue.

13. This process reminded me of mortgage predatory lending, where unsophisticated homeowners were placed in exotic mortgage loans, assured there was no risk involved, and then lost their homes when the housing bubble burst.

14. After this process was over, Chief Financial Officer Werdlow was given a lucrative job with one of the financial institutions involved in the Pension Obligation Certificates.

FURTHER AFFIANT SAYETH NOT.


Sharon McPhail

DATE: Dec. 15, 2013

Subscribed and sworn to before me
This _____ day of December, 2013.

Notary Public
_____ County, _____
Acting in _____ County
My commission expires: _____