

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 ALEXANDRA SCHWARZMAN**

Syncora Guarantee Inc. – as the saying goes – wants to have its cake and it eat it too.

Having designated one of its own attorneys in this case as a rebuttal witness, Syncora wants to selectively choose which questions on the designated topics the attorney will be allowed to answer, while hiding behind the attorney-client privilege on those questions Syncora doesn't wish to answer.

Alexandra Schwarzman, a first-year associate at Kirkland & Ellis LLP, participated in some (but not all) discussions between Syncora and the City regarding a proposed non-disclosure agreement. Syncora proposes to call Ms.

Schwarzman to testify about those discussions at the hearing on the Motion of Debtor for Entry of an Order (I) Authorizing the Assumption of that Certain Forbearance and Optional Termination Agreement (the “Agreement”) Pursuant to Section 365(a) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant to Rule 9019, and (III) Granting Related Relief (the “Assumption Motion”).

As an initial matter, Ms. Schwarzman’s testimony is utterly irrelevant to the relief sought by the City in the Assumption Motion. Even if it were relevant, the gross misapplication of the attorney-client privilege and work product doctrine by Syncora’s counsel at Ms. Schwarzman’s deposition would be ample grounds for excluding her testimony.

Accordingly, the City of Detroit respectfully moves *in limine* to exclude the testimony of Ms. Schwarzman from the hearing on the Assumption Motion.

I. MS. SCHWARZMAN’S TESTIMONY FAILS THE TEST FOR RELEVANT EVIDENCE

Under Rule 402 of the Federal Rules of Evidence, only relevant evidence is admissible in court. Rule 401 provides the test for relevant evidence: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; *and* (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401 (emphasis added).

Ms. Schwarzman's testimony fails this test. While her testimony would tend to make more probable the facts that Syncora and the City engaged in negotiations regarding a potential non-disclosure agreement, and that those negotiations ultimately did not come to fruition, those facts are of no consequence in determining whether the City should be permitted to assume an unrelated agreement with the Swap Counterparties.

Syncora's own objection to the Assumption Motion demonstrates the irrelevance of Ms. Schwarzman's testimony. Syncora's objection identifies three bases on which, it argues, the Court should deny the Assumption Motion: (1) the Agreement allegedly impairs third party rights; (2) the Agreement is not fair and equitable or to the economic advantage of the City; and (3) even if the Court approves assumption of the Agreement, such order should be stayed pending resolution of various disputes relating to the certificates of participation and interest rate swaps. *See* Objection, Docket No. 366, at ¶¶ 49-51. Conspicuously absent from Syncora's recitation of its objections is any argument that the Assumption Motion should be denied because the City did not enter into an unrelated non-disclosure agreement ("NDA") with Syncora. Indeed, there is no mention anywhere in Syncora's 52-page brief of an NDA.

Ms. Schwarzman testified at her deposition that the purpose of the proposed NDA was twofold: Syncora wanted to know the terms that the City was

discussing with the Swap Counterparties, and Syncora wanted to make some kind of unspecified proposal to the City.¹ *See* Schwarzman Dep. Tr., attached hereto as Exhibit 6, at 63-65. Even if we were to assume that this alleged potential proposal could have some arguable relevance to the Assumption Motion, Ms.

Schwarzman's testimony does not. In the first place, Ms. Schwarzman refused to testify about the terms or purpose of the alleged proposal:

Q. . . . Do you have any personal knowledge of what this potential proposal was to be?

A. Yes.

Q. . . . And your – even though this is the – the whole reason for the existence of a potential nondisclosure agreement, which is the heart of your testimony, you are refusing to answer any questions regarding this potential proposal?

A. Yes.

Schwarzman Dep. Tr., Exhibit 6 at 79-80.

Second, Ms. Schwarzman testified that she did not know whether Syncora actually would have made a proposal to the City upon execution of an NDA:

Q. Okay. So based on this language, it appears that once the agreement was finalized, Syncora wanted to make a

¹ Of course, to the extent that Ms. Schwarzman's knowledge of what Syncora wanted or intended is based on statements that were made to her by others, her testimony in that regard is hearsay and is inadmissible. *See* Fed. R. Evid. 802.

proposal to the City and intended to do so; is that accurate?

A. I don't – it's true that Syncora had a desire to make a proposal. I can't tell you what would or would not have happened upon execution.

Id. at 88.

Finally, Ms. Schwarzman testified that Syncora eventually did make a proposal to the City, notwithstanding the fact that an NDA was never executed:

Q. And now, just to circle back to something you said before, you said that your understanding is that Syncora has made a proposal to the City.

A. Yes.

Q. And by "proposal," you mean something in the nature of what it wanted to make subject to the NDA, correct?

A. Correct.

Q. And it did so without the NDA, correct?

A. Correct.

Id. at 136-37.

Accordingly, even if Syncora's proposal to the City were somehow germane to the Assumption Motion, Ms. Schwarzman's testimony, about an unexecuted NDA that turned out to be unnecessary, plainly is not.

II. MS. SCHWARZMAN'S TESTIMONY SHOULD BE EXCLUDED BECAUSE IT WILL CAUSE UNFAIR PREJUDICE AND/OR WASTE TIME

Even if the Court were to find that Ms. Schwarzman's testimony about her involvement in the failed negotiation of an unnecessary NDA is relevant to the determination of the Assumption Motion, such testimony should nonetheless be excluded. Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Here, Ms. Schwarzman's testimony necessarily would either waste the time of the Court and the parties, or else cause unfair prejudice to the parties who were unable to obtain meaningful testimony at her deposition.

Ms. Schwarzman testified to little of substance at her deposition due to extraordinarily broad and improper assertions of the attorney-client privilege and work product doctrine made by her and her colleague at the deposition, William Arnault.² Those wrongful assertions of privilege and protection made it

² Mr. Arnault is an associate at Kirkland & Ellis. Mr. Arnault identified himself for the record as counsel only for Syncora, and Ms. Schwarzman initially testified that he did not represent her as her counsel at her deposition. Ms. Schwarzman later changed her mind and testified that Mr. Arnault was, after all, her lawyer. Schwarzman Dep. Tr., Exhibit 6 at 12-14.

extremely difficult to obtain even the most basic factual information from Ms.

Schwarzman at her deposition. For example:

- Ms. Schwarzman refused to answer, based on the work product doctrine, a yes-or-no predicate question as to whether she has an understanding of the relief sought by the City in the Assumption Motion. *Id.* at 31-32.
- Mr. Arnault instructed Ms. Schwarzman, based on the work product doctrine, to refuse to answer whether she understands that the hearing on the Assumption Motion will be an evidentiary hearing. *Id.* at 34.
- Mr. Arnault instructed Ms. Schwarzman not to reveal who she was referring to when she used the term “Swap Counterparties”:

Q. When you say “the Swap Counterparties,” who are you referring to?

MR. ARNAULT: Objection. I’m going to object on the grounds that this is just – this is all work product information, discussions you’ve had with your attorney and your client. I’m going to instruct the witness not to answer.

MS. KOVSKY-APAP: You’re going to instruct her not to answer who is referred to by the term “Swap Counterparties”?

MR. ARNAULT: Yes, I am because you’re delving into information about our objection, what the strategy was in filing this objection.

Id. at 41-42.

- Ms. Schwarzman refused to state whether, if she were called as a witness, her testimony would be used in support of Syncora’s objection to the Assumption Motion. *Id.* at 43-44.
- Mr. Arnault instructed Ms. Schwarzman, based on the attorney-client privilege and work product doctrine, to refuse to answer whether the bases for denial of the Assumption Motion identified by Syncora in its

publicly-filed objection have anything to do with the negotiation of an NDA. *Id.* at 46-47.

- Mr. Arnault further instructed Ms. Schwarzman to refuse to state whether any words that she read aloud from Syncora’s publicly-filed objection “indicated a nondisclosure agreement without using those specific words” because, Mr. Arnault asserted, “to the extent you’re using ‘indicated,’ this could reveal work product information.” *Id.* at 49.
- Mr. Arnault instructed Ms. Schwarzman not to identify the attorneys who were involved in the preparation of Syncora’s proposal to the City because the identity of Kirkland & Ellis’ lawyers “delves into attorney-client privilege and work product information.”
- Ms. Schwarzman refused to testify, based on the attorney-client privilege, about information regarding the proposed NDA conveyed to her by another associate at Kirkland & Ellis, even though she admitted that she shared that information with counsel for the City. *Id.* at 116-119.
- Ms. Schwarzman refused to testify, based on the work product doctrine, as to her understanding of the damages provision in the draft NDA that she negotiated and about which she may be called as a witness at the hearing. *Id.* at 125-26.

Ms. Schwarzman’s deposition transcript is replete with such improper objections and refusals to answer, which have no basis in the Federal Rules or applicable case law. The attorney-client privilege attaches to confidential communications relating to *legal advice* sought from a professional legal adviser in his capacity as such. *Reed v. Baxter*, 134, F.3d 351, 355-56 (6th Cir. 1998). Courts strictly construe the attorney-client privilege because it comes with the substantial cost of obstructing the quest for truth. *Id.* at 356 (explaining that the

attorney-client privilege is “in derogation of the search for truth”). Not all communications between a client and its attorney are privileged; rather, the privilege extends only to those communications where legal advice is sought or obtained. *Id.* at 355-56. The party asserting the protection of the privilege bears the burden of establishing its applicability. *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir. 1983).

The work-product doctrine is a qualified protection codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. The work-product doctrine is “meant to shelter the mental processes of the attorney providing a privileged area within which he can analyze and prepare his client’s case.” *U.S. v. Nobels*, 422 U.S. 225, 238 (1975). Work-product protection applies to documents and tangible things “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative.” Fed. R. Civ. P. 26(b)(3). “Opinion” work product consists of tangible and intangible material which reflects an attorney's efforts at investigating and preparing a case, including one’s pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions. *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 393, 91 L. Ed. 451 (1947).

The City is mystified how, for example, a yes-or-no answer as to whether Ms. Schwarzman, as a fact witness, has an understanding of what the Forbearance and Optional Termination Agreement is, could possibly reflect Ms. Schwarzman's "efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions." Similarly, the City cannot fathom how the bases of Syncora's objection that are spelled out in a *publicly filed document* constitute, in the minds of Syncora's counsel, "confidential communications relating to legal advice sought from a professional legal adviser in his capacity as such."

The novel positions taken by Ms. Schwarzman and Mr. Arnault on the attorney-client privilege and work product doctrine would be untenable in any event, but all the more so here, where Syncora chose to file a declaration by its attorney and to designate her as a witness, thus waiving privilege as to the topics of her testimony. *See, e.g., Witmer v. Acument Global Techs., Inc.*, 2010 U.S. Dist. LEXIS 100663, *7-8, *11 (E.D. Mich. Sept. 23, 2010) (agreeing that "defendants waived the attorney-client privilege by 'submitting an affidavit of their General Counsel testifying about matters which they now claim are privileged'").

Nonetheless, it is clear that if Ms. Schwarzman is permitted to testify, one of two things will happen. First, Syncora's counsel may hold fast to the

position they have staked out, and will waste the very limited time of the Court and the parties at the hearing by improperly instructing the witness not to answer questions and arguing that the identity of the “Swap Counterparties” is somehow privileged information.

Alternatively, Syncora may decide to waive privilege and permit Ms. Schwarzman to testify fully – thereby unfairly prejudicing the parties who were unable to obtain such testimony at Ms. Schwarzman’s deposition. Courts have found that this kind of sword-and-shield approach to privilege is impermissible. *See, e.g. Galindo v. Vanity Fair Cleaners*, 2012 U.S. Dist. LEXIS 91005 (S.D.N.Y. June 29, 2012) (“It is certainly the case that if there are areas into which plaintiffs prevented inquiry at a deposition on the basis that they were protected from disclosure by the attorney-client privilege, plaintiffs may not at trial attempt to present evidence on those precise areas.”).

Either potential scenario warrants exclusion of Ms. Schwarzman’s testimony under Rule 403.

III. CONCURRENCE

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

IV. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court enter an order, in the form attached hereto as Exhibit 1, excluding Ms. Schwarzman from testifying at the hearing on the Assumption Motion.

Dated: September 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
Fax: (248) 359-7700
hertzbergr@pepperlaw.com
kovskyd@pepperlaw.com

- 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 ALEXANDRA SCHWARZMAN

This matter having come before the Court on the motion (the “Motion”) of the Debtor, City of Detroit, for entry of an order excluding the testimony of Alexandra Schwarzman 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, and the Court being otherwise advised in the premises;

IT IS HEREBY ORDERED that the Motion is granted.

IT IS FURTHER ORDERED that the testimony of Alexandra Schwarzman 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 ALEXANDRA SCHWARZMAN**

PLEASE TAKE NOTICE that on Sept 16, 2013, the Debtor, City of Detroit, filed its *Motion in Limine to Exclude Testimony of Alexandra Schwarzman* (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 Alexandra Schwarzman at the hearing on the Motion of Debtor for Entry of an Order (I) Authorizing the Assumption of that Certain Forbearance and Optional Termination Agreement (the "Agreement") Pursuant to Section 365(a) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant to Rule 9019, and (III) Granting Related Relief, set to take place in the Bankruptcy Court on September 23, 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 **October 3, 2013 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: Christopher DiPompeo

-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 *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.

¹ Concurrently herewith, the Debtor is seeking expedited consideration and shortened notice of the Motion *in Limine*. If the Court grants such expedited consideration and shortened notice, the Debtor will file and serve notice of the new response deadline.

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

Dated: September 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
Fax: (248) 359-7700
hertzbergr@pepperlaw.com
kovskyd@pepperlaw.com

- 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 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 September 16, 2013, I electronically filed the Debtor's Motion *in Limine* to Exclude the Testimony of Alexandra Schwarzman 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: September 16, 2013

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

EXHIBIT 5

**Affidavits
(Not Applicable)**

EXHIBIT 6

**Excerpts from Transcript of Deposition
of Alexandra Schwarzman**

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4 _____
5 In re) Chapter 9
6)
7 CITY OF DETROIT, MICHIGAN,) Case No. 13-53846
8)
9 Debtor.) Hon. Steven W. Rhodes
10 _____)

11
12
13 The videotaped deposition of ALEXANDRA SCHWARZMAN,
14 called by the City of Detroit for examination, taken
15 pursuant to notice, agreement and by the provisions of
16 the Federal Rules of Civil Procedure 26 and 30 and
17 Federal Rules of Bankruptcy Procedure 7026 and 7030
18 pertaining to the taking of depositions, taken before
19 DEBORAH HABIAN, Registered Merit Reporter, Certified
20 LiveNote Reporter, a Notary Public within and for the
21 County of Cook, State of Illinois, and a Certified
22 Shorthand Reporter of said State, at the offices of
23 Jones Day, 77 West Washington Street, Chicago,
24 Illinois, on Thursday, the 12th day of September,
25 2013, at 12:00 p.m. CST.

Page 10

1 the limited categories of information that
 2 Miss Schwarzman -- Schwarzman may testify about, any
 3 questions should be limited to these narrow
 4 categories.
 5 Third and last, Miss Schwarzman is an
 6 attorney at Kirkland & Ellis who has been providing
 7 legal advice to Syncora. So I want to be very clear
 8 up front that by putting her up for this deposition we
 9 are not waiving any protections afforded by the
 10 attorney-client privilege or the work product doctrine
 11 and she will not be providing answer -- or providing
 12 answers to any questions that require her to divulge
 13 any privileged or otherwise-protected information.
 14 Thanks, Deb.
 15 MS. KOVSKY-APAP: Okay. Well, we'll
 16 respond to those objections in due course, I'm sure.
 17 MR. ARNAULT: Sure.
 18 ALEXANDRA SCHWARZMAN,
 19 called as a witness herein by the City of Detroit,
 20 having been first duly sworn, was examined and
 21 testified as follows:
 22 EXAMINATION
 23 BY MS. KOVSKY-APAP:
 24 Q. Okay. Ms. Schwarzman, as I mentioned
 25 before my name is Deb Kovsky and my firm is special

Page 11

1 litigation counsel to the City of Detroit and I'll be
 2 asking you some questions under oath today.
 3 My first question for you is, have
 4 you ever been deposed before?
 5 A. No.
 6 Q. Have you ever attended a deposition?
 7 A. No.
 8 Q. So I just want to give you some real
 9 basic what I call rules of road, just so that we're on
 10 the same page and so that the court reporter is able
 11 to get down your answers clearly.
 12 First, I -- I'd ask that you give
 13 verbal answers to questions since the court reporter,
 14 even though we're videotaping, this the court reporter
 15 still needs to be able to record your verbal answers.
 16 If you need a break at any point or
 17 if you need to consult with your colleague for any
 18 reason, that's fine, just let us know. But what I'd
 19 ask is if there was a pending question to first answer
 20 the question then we can take a break. Okay?
 21 A. Okay.
 22 Q. If I ask a question and you don't
 23 understand what I mean, will you ask me to rephrase
 24 if?
 25 A. Yes.

Page 12

1 Q. Okay. And if you don't ask me to
 2 rephrase the question, I'm going to assume you
 3 understand it.
 4 A. Okay.
 5 Q. And if you answer the question, I
 6 will assume that you've understood what the question
 7 is asking. Okay?
 8 A. Okay.
 9 Q. Is there any reason that you're
 10 unable to testify fully and accurately today?
 11 A. No.
 12 Q. Are you taking any medications?
 13 A. No.
 14 Q. Are you under the influence of
 15 alcohol or any drugs?
 16 A. No.
 17 Q. Are you represented here by counsel
 18 today?
 19 A. Yes. Well, my firm.
 20 Q. Well, when Mr. Arnault introduced
 21 himself for the record, he indicated that he
 22 represents Syncora.
 23 A. That's correct.
 24 Q. And he does not represent you
 25 personally; is that correct?

Page 13

1 A. Correct.
 2 Q. Okay. So you are not actually
 3 represented by counsel today?
 4 A. Correct.
 5 Q. Okay. Did you have any discussions
 6 with anyone in preparation for this deposition?
 7 A. Yes.
 8 Q. Who did you have discussions with?
 9 A. Mr. Arnault and Steve --
 10 MR. ARNAULT: Well, sorry. I'll just
 11 interject for the record. We do -- I do represent
 12 Miss Schwarzman in her -- into the capacity that she's
 13 testifying today.
 14 MS. KOVSKY-APAP: Well, she's
 15 testified that she believes she's not represented by
 16 you, so...
 17 MR. ARNAULT: Well, I mean, we can
 18 take this off the record or -- do you believe --
 19 sorry. Go ahead.
 20 We can take this off the record
 21 quickly.
 22 THE VIDEOGRAPHER: Now going off the
 23 record at 12:07 p.m.
 24 (Recess taken from 12:07 p.m. to 12:09 p.m.)
 25 THE VIDEOGRAPHER: Now going back on

Page 14

1 the record at 12:09 p.m.
 2 BY MS. KOVSKY-APAP:
 3 Q. Miss Schwarzman, is there any
 4 testimony that you've already given that you would
 5 like to correct?
 6 A. Yes.
 7 Q. And what is that testimony?
 8 A. I am being represented by
 9 Mr. Arnault.
 10 Q. Do you have an engagement letter with
 11 Mr. Arnault?
 12 A. No.
 13 Q. But it's your testimony that an
 14 attorney-client relationship exists between you and
 15 Mr. Arnault.
 16 MR. ARNAULT: You can answer "yes" or
 17 "no."
 18 THE WITNESS: Yes.
 19 BY MS. KOVSKY-APAP:
 20 Q. Did you have any discussions with
 21 anyone in preparation for your deposition?
 22 A. Yes.
 23 Q. And who did you have those
 24 discussions with?
 25 A. Mr. Arnault.

Page 15

1 Q. Did you have discussions with anyone
 2 else?
 3 A. Yes.
 4 Q. Who else did you have discussions
 5 with?
 6 A. Steve Hackney.
 7 Q. And do you have an attorney-client
 8 relationship with Mr. Hackney as well?
 9 MR. ARNAULT: You can answer "yes" or
 10 "no."
 11 THE WITNESS: Yes.
 12 BY MS. KOVSKY-APAP:
 13 Q. Do you have -- have you entered into
 14 an engagement letter with Mr. Hackney?
 15 A. No.
 16 Q. Did you review any documents in
 17 preparation for your deposition?
 18 A. Yes.
 19 Q. What documents did you review in
 20 preparing for this deposition?
 21 A. My affidavit.
 22 Q. Did you review any other documents?
 23 A. No.
 24 Q. Okay. Backtracking a little bit just
 25 to get some background, could you actually state your

Page 16

1 full name for the record.
 2 A. Alexandra Schwarzman.
 3 Q. I apologize if I've been
 4 mispronouncing your last name.
 5 What's your current address?
 6 A. 747 North Wabash, Apartment 1903,
 7 Chicago, Illinois, 60611.
 8 Q. I want to talk to you a little bit
 9 about your educational and your work background. You
 10 went to college?
 11 A. Yes.
 12 Q. Where did you go?
 13 A. Vanderbilt University.
 14 Q. And when did you graduate from
 15 Vanderbilt?
 16 A. 2007.
 17 Q. Did you have a major there?
 18 A. Political science.
 19 Q. And what kind of degree did you
 20 graduate with?
 21 A. A B.A.
 22 Q. Did you receive any honors while were
 23 you in college?
 24 A. Yes.
 25 Q. Can you describe them?

Page 17

1 A. Magna cum laude.
 2 Q. And after you graduated from
 3 Vanderbilt College, did you take a job?
 4 A. Yes.
 5 Q. How long after you graduated from
 6 college did you start your first job?
 7 A. Three months.
 8 Q. And what was that job?
 9 A. I was a sales assistant at Real
 10 Simple Magazine.
 11 Q. Okay. And can you describe to us
 12 what is Real Simple Magazine?
 13 A. Real Simple Magazine was under a Time
 14 Inc. brands, I think they've been sold since, it's a
 15 women's lifestyle magazine.
 16 Q. And what were your job
 17 responsibilities as a -- you said you were a sales
 18 assistant?
 19 A. Um-hum.
 20 Q. What were your job responsibilities?
 21 A. Correspondence with clients,
 22 preparations for meetings, selling ad pages.
 23 Q. And where did you work when you were
 24 working at Real Simple? Where is that located?
 25 A. New York.

Page 30

1 question again?
 2 BY MS. KOVSKY-APAP:
 3 Q. My question is, were you aware,
 4 before this was filed, that you might be called as a
 5 witness?
 6 MR. ARNAULT: You can answer "yes" or
 7 "no."
 8 THE WITNESS: Yes.
 9 BY MS. KOVSKY-APAP:
 10 Q. And how did you come by that
 11 awareness? * * * *
 12 A. I don't want to reveal any
 13 communications.
 14 MR. ARNAULT: Yes. Objection. This
 15 is -- objections, this would be internal Kirkland
 16 communications and work product.
 17 Instruct the witness not to answer.
 18 BY MS. KOVSKY-APAP:
 19 Q. Now, the first paragraph of this
 20 document makes reference to "the motion of Debtor for
 21 entry of an order: (I) authorizing the assumption
 22 about certain forbearance and optional termination
 23 agreement pursuant to Section 365(a) of the Bankruptcy
 24 Code (II) approving such agreement pursuant to
 25 Rule 9019 and (III) granting related relief."

Page 31

1 Do you see that?
 2 A. Yes.
 3 Q. Now do you understand in that
 4 reference, the Debtor that's being referred to is the
 5 City of Detroit?
 6 A. Yes.
 7 Q. Are you familiar with the motion that
 8 is referenced in the first paragraph of what I'll call
 9 this disclosure?
 10 A. Yes.
 11 Q. Have -- and just because it's a real
 12 mouth-full of a motion, if I refer to that as "the
 13 Assumption Motion," would that be okay?
 14 A. Yes.
 15 Q. Okay. Have you reviewed the
 16 Assumption Motion?
 17 A. Yes.
 18 Q. Do you have an understanding of what
 19 relief the Debtor is seeking by the Assumption Motion?
 20 * * * *
 21 MR. ARNAULT: Objection. This calls
 22 for work product information.
 23 I'll instruct the witness not to
 24 answer.
 25 MS. KOVSKY-APAP: Mr. Arnault, she's

Page 32

1 testifying as to -- as a rebuttal witness with respect
 2 to the motion.
 3 MR. ARNAULT: No. She's actually
 4 testifying as a rebuttal witness with respect to the
 5 negotiations that she had surrounding the TRO, and
 6 with respect to her declaration. She doesn't mention
 7 the forbearance agreement or the order.
 8 MS. KOVSKY-APAP: Well, this -- this
 9 is -- this is the Amended Disclosure of Rebuttal
 10 Witnesses and Documents In Advance of the September 23
 11 Hearing and it makes specific reference to the
 12 Assumption Motion. There is no hearing pending
 13 regarding a nondisclosure agreement.
 14 MR. ARNAULT: But if you look at what
 15 she is -- what we specifically --
 16 MS. KOVSKY-APAP: We're going to move
 17 on.
 18 MR. ARNAULT: Okay.
 19 BY MS. KOVSKY-APAP:
 20 Q. So you decline to -- to state whether
 21 you have an understanding of what relief the Debtor is
 22 seeking? * * * *
 23 A. Correct.
 24 Q. Are you aware that your firm's
 25 clients, Syncora Guarantee Inc. and Syncora Capital

Page 33

1 Assurance Inc. have objected to the Assumption Motion?
 2 MR. ARNAULT: You can answer "yes" or
 3 "no."
 4 THE WITNESS: Yes.
 5 MS. KOVSKY-APAP: Unless you have an
 6 objection to state for the record, I'd appreciate it
 7 if you don't instruct the witness how to answer.
 8 MR. ARNAULT: Okay. But I'm
 9 telling -- because you're wading into potentially --
 10 MS. KOVSKY-APAP: If you -- if you
 11 want to state an objection for the record, you can
 12 state an objection for the record. But I have to ask
 13 you to stop instructing the witness how to answer my
 14 questions.
 15 MR. ARNAULT: Understood.
 16 BY MS. KOVSKY-APAP:
 17 Q. So just to ask the question again:
 18 You're aware that these two entities which I'll
 19 refer -- convenience refer to as "Syncora," unless I'm
 20 specifically referring to one or the other of them.
 21 Is that okay if I refer to them collectively as
 22 "Syncora"?
 23 A. Yes.
 24 Q. You are aware that they have objected
 25 to the Assumption Motion, correct?

Page 34

1 A. Yes.

2 Q. And you understand that a hearing is

3 going to be held in the bankruptcy court on

4 September 23rd to address, among other things,

5 Syncora's objection to the Assumption Motion, correct?

6 A. Yes.

7 Q. You understand that the

8 September 23rd, hearing in the bankruptcy court on the

9 Assumption Motion will be an evidentiary hearing,

10 correct?

11 MR. ARNAULT: Objection. Again,

12 you're delving into what her understanding is and is

13 work product information. So I'm going to instruct

14 her not to answer this question.

15 MS. KOVSKY-APAP: I'm asking her if

16 she's aware of a public hearing.

17 MR. ARNAULT: You're asking her

18 understanding of what is going to occur at that

19 hearing. You just -- you asked her if her

20 understanding is that it will be an evidentiary

21 hearing.

22 MS. KOVSKY-APAP: That's public

23 information. I'm just asking if she's aware of the

24 public information that the Court has permitted

25 parties to call witnesses at the hearing.

Page 35

1 MR. ARNAULT: Okay.

2 BY MS. KOVSKY-APAP:

3 Q. Are you aware of the public

4 information, that has been disclosed to the public,

5 which is public and nonprivileged, which is that the

6 hearing on September 23rd will be what is commonly

7 known as an evidentiary hearing?

8 A. Yes.

9 Q. Do you know what an evidentiary

10 hearing is?

11 A. One in which evidence is presented.

12 Q. And do you have an understanding of

13 what that means when evidence is presented?

14 A. No.

15 Q. Have you ever been to something that

16 would commonly be called an "evidentiary hearing"?

17 A. Potentially.

18 Q. You've potentially been to one?

19 A. Correct.

20 Q. Can you explain what that means?

21 A. I've attended several hearings as a

22 law student and as a summer associate. And I could

23 not tell you with certainty whether they were

24 evidentiary or nonevidentiary hearings.

25 Q. Okay. I'll represent to you that

Page 36

1 when I say "evidentiary hearing," what I mean is a

2 hearing where witnesses are called to present

3 testimony and where documents are admitted into the

4 record. Okay?

5 A. Okay.

6 Q. And do you understand that, at the

7 evidentiary hearing, the City will have the

8 opportunity to put on evidence to try to persuade the

9 court to grant the Assumption Motion?

10 A. Yes.

11 Q. And that would be called, commonly,

12 the City's case in chief, right?

13 A. Sure.

14 Q. Okay. So just going back to the

15 disclosure statement, you see on -- at the bottom of

16 Page 1, it says "Syncora may call the following

17 witnesses in rebuttal to the City's case in chief."

18 Do you see that?

19 A. Yes.

20 Q. And on Page 2 you're listed as a

21 rebuttal witness, right?

22 A. Yes. For limited purpose.

23 Q. Right. Do you have an understanding,

24 generally, of what the role of a rebuttal witness is?

25 A. Yes.

Page 37

1 Q. Can you tell me what your general

2 understanding is?

3 A. To rebut the evidence that's put --

4 been put forward by the other side.

5 Q. And do you agree that it's not

6 uncommon in litigation to designate potential rebuttal

7 witnesses, even before the other side puts on any

8 evidence at all, before the hearing even begins?

9 MR. ARNAULT: Objection, form.

10 BY MS. KOVSKY-APAP:

11 Q. Do you understand the question?

12 A. Yes, I -- I think that's probably

13 normal.

14 Q. And in fact, that's what Syncora has

15 done in this case, correct?

16 A. Yes.

17 Q. And when rebuttal witnesses are

18 designated ahead of time, it's because the designating

19 party expects that the other side will try to

20 demonstrate certain facts that they want to rebut,

21 correct?

22 MR. ARNAULT: Objection, form,

23 foundation, and to the extent that you're asking for

24 what Syncora's planning to do at the hearing.

25 MS. KOVSKY-APAP: No. I'm asking her

Page 38

1 generally what her understanding is of how rebuttal
 2 witnesses work.
 3 MR. ARNAULT: Okay.
 4 Objection, form and foundation.
 5 THE WITNESS: Can you repeat the
 6 question.
 7 BY MS. KOVSKY-APAP:
 8 Q. Is it your understanding that when
 9 rebuttal witnesses are designated ahead of time, it's
 10 because the party designating those witnesses
 11 anticipates that certain testimony or evidence will be
 12 put in and the designating party wants to rebut it?
 13 A. That seems like a reasonable reason.
 14 Q. So the designating party then figures
 15 out who they would want to call to rebut that
 16 anticipated testimony.
 17 MR. ARNAULT: Objection, foundation.
 18 THE WITNESS: I suppose. I have
 19 never been part of the process so I can't say with any
 20 certainty.
 21 BY MS. KOVSKY-APAP:
 22 Q. Well, if you are called as a rebuttal
 23 witness in this case, what facts do you expect to
 24 rebut?
 25 MR. ARNAULT: Objection. I'm going

Page 39

1 to object on the grounds here that this calls for a
 2 work product information, attorney-client information
 3 to be protected.
 4 And I'll instruct the witness not to
 5 answer to the extent that the information has not
 6 already been provided in the filing.
 7 BY MS. KOVSKY-APAP:
 8 Q. Well, to the extent that the
 9 information has already been provided, why don't you
 10 tell me.
 11 A. Well, looking at Paragraph 2 on
 12 Page 2, I would imagine that I am going to rebut facts
 13 regarding the negotiations of that NDA.
 14 Q. Well, what facts about the
 15 negotiations of the NDA do you anticipate would be put
 16 into evidence?
 17 MR. ARNAULT: Objection.
 18 THE WITNESS: I have no way to know.
 19 MS. KOVSKY-APAP: I'm going to have
 20 this Objection marked. And I, hopefully, have a copy
 21 for myself here somewhere.
 22 For those on the phone we're marking
 23 as Exhibit 2 a document entitled "Objection of Syncora
 24 Guarantee Inc. and Syncora Capital Assurance Inc. to
 25 motion of debtor for entry of an order (I) authorizing

Page 40

1 the assumption of that certain forbearance and
 2 optional termination agreement pursuant to Section
 3 365(a) of the bankruptcy code, (II) approving such
 4 agreement pursuant to Rule 9019 and (III) granting
 5 related relief."
 6 (Schwarzman Exhibit 2 was marked for ID.)
 7 BY MS. KOVSKY-APAP:
 8 Q. Miss Schwarzman, please take a moment
 9 to look at the document and let me know when you're
 10 ready to talk about it.
 11 A. I'm ready.
 12 Q. Are you familiar with this document?
 13 A. Yes.
 14 Q. And what is it?
 15 A. It is my client's objection to the
 16 Debtor's motion to assume the forbearance agreement.
 17 Q. Do you have an understanding of what
 18 that forbearance agreement is?
 19 MR. ARNAULT: Objection. This is
 20 work product information, attorney-client.
 21 I would instruct the witness not to
 22 answer.
 23 MS. KOVSKY-APAP: It's a factual
 24 question. I want to know if she's familiar with the
 25 document.

Page 41

1 MR. ARNAULT: Well, okay. Then ask
 2 her if she's familiar with the document.
 3 MS. KOVSKY-APAP: I just did.
 4 MR. ARNAULT: You asked her what her
 5 understanding was.
 6 MS. KOVSKY-APAP: No, I did not.
 7 BY MS. KOVSKY-APAP:
 8 Q. Are you aware of what the forbearance
 9 agreement is?
 10 A. Yes.
 11 Q. Can you tell me, when your client
 12 objects to the forbearance agreement, what exactly is
 13 that agreement that they're objecting to?
 14 A. The agreement is a agreement between
 15 the City and the Swap Counterparties to -- for early
 16 termination of the swaps.
 17 Q. When you say "the Swap
 18 Counterparties," who are you referring to?
 19 MR. ARNAULT: Objection. I'm going
 20 to object on the grounds that this is just -- this all
 21 work product information, discussions you've had with
 22 your attorney and your client.
 23 I'm going to instruct the witness not
 24 to answer.
 25 MS. KOVSKY-APAP: You're going to

Page 42

1 instruct her not to answer who is referred by the term
 2 "Swap Counterparties"?

3 MR. ARNAULT: Yes, I am because
 4 you're delving into information about our objection,
 5 what the strategy was in filing this objection.

6 MS. KOVSKY-APAP: There's no --
 7 Mr. Arnault, there's no strategy question here. I'm
 8 asking her to factually identify which entities are
 9 intended by the words "Swap Counterparties," which she
 10 just used.

11 MR. ARNAULT: Okay. You can answer
 12 that. You can answer who are the Swap Counterparties.

13 MS. KOVSKY-APAP: That was my
 14 question.

15 THE WITNESS: UBS and Merrill Lynch.
 16 BY MS. KOVSKY-APAP:

17 Q. Are there any other parties that are
 18 referred to by the term "Swap Counterparties"?

19 A. Yeah, there used to be.

20 Q. And who are they?

21 A. SBS.

22 Q. Okay. Did you assist in preparing
 23 this objection?

24 A. Yes.

25 Q. Did you perform any of the legal

Page 43

1 research that went into drafting it?

2 A. Yes.

3 Q. And did you actually take part in
 4 drafting it?

5 A. Yes.

6 Q. Have you reviewed the objection in
 7 its entirety before today?

8 A. Yes.

9 Q. Are you aware that the objection
 10 purports to set out specific bases on which Syncora
 11 argues that the Assumption Motion should be denied?

12 A. That's what the document says.

13 Q. And if you are called as a rebuttal
 14 witness, your rebuttal testimony would be used in
 15 support of this objection, correct? * * * *

16 MR. ARNAULT: Objection. This calls
 17 for work product information and attorney-client.
 18 Instruct the witness not to answer.
 19 (Telephonic announcement: Joining the meeting.)

20 MS. KOVSKY-APAP: Who just joined?

21 MS. KAUFMAN: This is Dana Kaufman
 22 from Weil. Sorry. I got disconnected before.

23 MS. KOVSKY-APAP: Okay. Not a
 24 problem.

25 BY MS. KOVSKY-APAP:

Page 44

1 Q. Ms. Schwarzman, your client has
 2 objected to the Assumption Motion, correct?

3 A. Yes.

4 Q. And your client has designated you as
 5 a potential rebuttal witness for the hearing on that
 6 Assumption Motion, correct?

7 A. Yes.

8 Q. Is it not a fair statement to say
 9 that your rebuttal testimony, whatever it may be, will
 10 be in support of your client's objection, as opposed
 11 to, for example, in support of assumption? * * * *

12 A. I --

13 MR. ARNAULT: Object -- Objection,
 14 form. And objection, you know, to the extent that
 15 this is what would require you to disclose any work
 16 product or attorney-client --

17 BY MS. KOVSKY-APAP:

18 Q. Well, to the --

19 MR. ARNAULT: -- instruct you not to
 20 answer.

21 BY MS. KOVSKY-APAP:

22 Q. -- to the extent that you can answer
 23 it without disclosing work product or attorney-client
 24 information?

25 A. I'm not going to answer that.

Page 45

1 Q. Can you take a look at Paragraph 48
 2 of the objection.

3 A. (Reviewing document.)

4 Q. And please read the last sentence of
 5 Paragraph 48 aloud.

6 A. "The court should deny the Assumption
 7 Motion for three principal reasons."

8 Q. Okay. And it appears that the next
 9 three paragraphs, 49, 50 and 51, which begin with the
 10 words "First," "Second," and "Third," respectively,
 11 those appear to summarize the three reasons that
 12 Syncora argues justify denial of the Assumption
 13 Motion. Do you agree?

14 MR. ARNAULT: Objection, the document
 15 speaks for itself.

16 And to the extent that you would need
 17 to divulge any attorney-client information or work
 18 product, I instruct you not to answer.

19 BY MS. KOVSKY-APAP:

20 Q. To the extent that you can look at
 21 this document and tell me whether those three
 22 paragraphs appear to summarize the three reasons
 23 referenced in Paragraph 48, I would appreciate an
 24 answer.

25 MR. ARNAULT: Objection, the document

Page 46

1 speaks for itself.
 2 MS. KOVSKY-APAP: Your objection is
 3 noted counsel. Thank you.
 4 MR. ARNAULT: Um-hum.
 5 THE WITNESS: I believe that that's
 6 an accurate reading one can make.
 7 BY MS. KOVSKY-APAP:
 8 Q. Okay. And take a moment, please, to
 9 review paragraphs 49, 50 and 51, if you would.
 10 A. (Reviewing document.)
 11 Okay.
 12 Q. None of those reasons that are
 13 identified in those three paragraphs, those paragraphs
 14 that summarize the reasons for denial of the
 15 Assumption Motion, none of those has anything to do
 16 with the negotiation of an NDA; is that correct?
 17 * * * *
 18 MR. ARNAULT: Objection, the document
 19 speaks for itself. And this would require the witness
 20 to make a legal conclusion which would invade the work
 21 product doctrine and attorney-client privilege.
 22 I instruct the witness not to answer.
 23 MS. KOVSKY-APAP: As far as the
 24 document speaking for itself, your objection is noted.
 25 BY MS. KOVSKY-APAP-APAP:

Page 47

1 Q. However, to the extent that all I am
 2 asking is, looking at the words on the page, do you
 3 agree that there's nothing in those three paragraphs
 4 that references a nondisclosure agreement? * * * *
 5 MR. ARNAULT: Objection. This would
 6 require analysis of those three paragraphs which is
 7 work product and attorney-client. And I instruct the
 8 witness not to answer.
 9 MS. KOVSKY-APAP: Mr. Arnault, I
 10 would hate to have to get the judge on the phone on
 11 such a simple matter, although he did invite us to do
 12 so.
 13 I am not asking her to analyze. If
 14 she -- fine. Let's do this -- we'll do it the hard
 15 way.
 16 BY MS. KOVSKY-APAP:
 17 Q. Miss Schwarzman, please read
 18 Paragraph 49 out loud.
 19 A. "First, the Forbearance Agreement
 20 purports to impair significant third-party rights and
 21 seeks to mute state law contractual disputes of third
 22 parties. Neither Section 365 nor Bankruptcy Rule 9019
 23 allow the Court to adjudicate complicated state law
 24 issues that bear on third parties who are not parties
 25 to the settlement or contract. Instead, the

Page 48

1 impairment of third-party rights is a clear basis to
 2 deny the Assumption Motion."
 3 Q. Now, none of those words that you
 4 just read included the words "nondisclosure
 5 agreement," correct?
 6 A. Correct.
 7 Q. And using your basic understanding of
 8 English and not any legal analysis, do any of those
 9 sentences refer to the negotiation of a nondisclosure
 10 agreement?
 11 MR. ARNAULT: Objection, form. And
 12 objection to the extent that you can separate out your
 13 basic understanding of English and legal analysis
 14 but --
 15 MS. KOVSKY-APAP: Mr. Arnault, I have
 16 to ask you to stop with the speaking objections.
 17 MR. ARNAULT: Well, you're trying to
 18 delve into what is clearly work product information.
 19 You're going after strategy information and her
 20 analysis of what the reasons are that Syncora's
 21 objecting to -- to the Assumption Motion. It's
 22 clearly work product information and I'm going to
 23 continue objecting and instructing the witness not
 24 to -- not to answer.
 25 BY MS. KOVSKY-APAP:

Page 49

1 Q. To the extent that you are able to
 2 answer based on your understanding of the English
 3 language -- which as a graduate of Vanderbilt and NYU,
 4 I assume is pretty good -- are you able to tell me
 5 whether any of these sentences that you just read in
 6 Paragraph 49 refer to the negotiation of a
 7 nondisclosure agreement?
 8 MR. ARNAULT: Objection, the document
 9 speaks for itself.
 10 THE WITNESS: I did not read the
 11 words "nondisclosure agreement."
 12 BY MS. KOVSKY-APAP:
 13 Q. Did you read any words that indicated
 14 a nondisclosure agreement without using those specific
 15 words? * * * *
 16 MR. ARNAULT: Objection, form and,
 17 again, this would, to the extent you're using
 18 "indicated," this could reveal work product
 19 information.
 20 I'll instruct the witness not to
 21 answer.
 22 BY MS. KOVSKY-APAP:
 23 Q. Without revealing work product
 24 information, do you see any reference to a negotiation
 25 of a nondisclosure agreement? * * * *

Page 62

1 provide Syncora with additional data about the City's
 2 discussions with the Swap Counterparties."
 3 What was the basis of your
 4 understanding that that was the issue?
 5 A. There was a meeting on June 27th
 6 between the City's advisors and advisors for Syncora
 7 along with the client. At the end of that meeting,
 8 statements were made to the extent that a proposal
 9 would be forthcoming from Syncora to the City. And I
 10 believe statements were made at that meeting that the
 11 City was unwilling to provide us information about an
 12 agreement in principal the City had with the Swap
 13 Counterparties.
 14 Q. Okay. And that was a meeting you
 15 attended?
 16 A. Yes.
 17 Q. Okay. And where was that meeting?
 18 A. At Jones Day's New York offices.
 19 Q. Okay. You then say that "As a
 20 result, the City and its attorneys began drafting an
 21 NDA."
 22 And what's the basis of your
 23 knowledge that happened –
 24 A. I received a copy of the NDA.
 25 Q. Okay. But you didn't talk to – you

Page 63

1 didn't sit with anyone during the drafting process?
 2 This wasn't a joint effort?
 3 A. Correct.
 4 Q. Okay. So you surmised, based on the
 5 fact that you received it, that that was when they
 6 started drafting it?
 7 A. Yes.
 8 Q. And when you say the "Swap
 9 Counterparties," again, you're referring here to the
 10 same Swap Counterparties that you previously
 11 identified?
 12 A. Yes.
 13 Q. And that was UBS and Merrill Lynch?
 14 A. Yes. And formerly, SBS.
 15 Q. Okay. So based on your understanding
 16 from this meeting that you attended between the City
 17 and Syncora, Syncora wanted information from the city
 18 about the City's negotiations with the Swap
 19 Counterparties?
 20 A. My impression was that Syncora was
 21 willing to make a proposal which was really the basis
 22 of, you know, our moving forward with the City.
 23 Additionally, Syncora had requested from the City,
 24 information.
 25 Q. Well, what information was Syncora

Page 64

1 requesting from the City?
 2 A. Terms of the City's agreement with
 3 the Swap Counterparties.
 4 Q. And how do you know that that's the
 5 information that they wanted?
 6 A. That's what they said.
 7 Q. Okay. What did they want that
 8 information for? * * * *
 9 MR. ARNAULT: Objection to the extent
 10 that it would reveal attorney-client privilege or work
 11 product.
 12 Instruct you not to answer.
 13 MS. KOVSKY-APAP: This goes to the
 14 heart of the NDA negotiations. What they're
 15 negotiating for.
 16 MR. ARNAULT: Well, you're asking why
 17 Syncora wanted that information and that would reveal
 18 attorney-client privilege and –
 19 MS. KOVSKY-APAP: You've – you have
 20 opened the door to that. Your client has opened the
 21 door to that. Your client put it at issue. You can't
 22 call an attorney to provide fact testimony and then
 23 hide behind the attorney-client privilege.
 24 MR. ARNAULT: Well, if you're – you
 25 can ask questions about facts that were revealed in

Page 65

1 her declaration, but to the extent that you're asking
 2 for why Syncora wanted to do certain things, that goes
 3 to the heart of the attorney-client privilege and work
 4 product.
 5 MS. KOVSKY-APAP: Her declaration
 6 reveals that Syncora was demanding data from the City
 7 about its discussion with the Swap Counterparties.
 8 That makes that entire topic fair game.
 9 MR. ARNAULT: I disagree.
 10 MS. KOVSKY-APAP: Well, we'll have to
 11 let the court decide.
 12 MR. ARNAULT: That's fine.
 13 BY MS. KOVSKY-APAP:
 14 Q. Okay. You said it was your
 15 impression that Syncora wanted to make a proposal to
 16 the City?
 17 A. I said Syncora stated to the City
 18 that they were willing to make a proposal.
 19 Q. So it wasn't just your impression,
 20 you heard words to that effect; is that correct?
 21 A. I heard words to that effect.
 22 Q. And that was at that meeting on, you
 23 said it was June 29th?
 24 A. 27th.
 25 Q. I'm sorry. June 27th.

Page 78

1 BY MS. KOVSKY-APAP:
 2 Q. Yes, you do have an understanding?
 3 A. Yes.
 4 Q. So there was presumably some benefit
 5 that Syncora would achieve by offering a proposal to
 6 the City? * * * *
 7 MR. ARNAULT: I'm going to object on
 8 the grounds that, again, you're delving into her
 9 mental impressions and her communications with our
 10 client.
 11 So I'm going to instruct the witness
 12 not to answer.
 13 BY MS. KOVSKY-APAP:
 14 Q. Is Syncora in the business of
 15 altruism?
 16 A. You would have to ask them.
 17 MR. ARNAULT: Objection, form.
 18 BY MS. KOVSKY-APAP:
 19 Q. In your experience, does a business
 20 party typically make a proposal that does not benefit
 21 itself?
 22 MR. ARNAULT: Objection, form,
 23 foundation.
 24 BY MS. KOVSKY-APAP:
 25 Q. You can answer.

Page 79

1 A. I suppose it depends on the business.
 2 Q. In your discussions with counsel for
 3 the City regarding a nondisclosure agreement, was this
 4 proposal -- this potential proposal was discussed?
 5 A. Not the terms.
 6 Q. But, yes, this pro -- was this
 7 potential proposal discussed in any form?
 8 A. The existence of a proposal was
 9 discussed.
 10 Q. Well, tell me what you said about the
 11 potential proposal.
 12 A. We wanted the City to keep the terms
 13 of the proposal confidential from the Swap
 14 Counterparties.
 15 Q. Did you give the City any indication
 16 of what the proposal might be about?
 17 A. I did not discuss what the proposal
 18 would be about, no.
 19 Q. Did Mr. Bennett discuss, in your
 20 hearing, anything about the proposal?
 21 A. No.
 22 Q. So you have no personal knowledge --
 23 well, let me ask you: Do you have any personal
 24 knowledge of what this potential proposal was to be?
 25 A. Yes.

Page 80

1 Q. You do have personal knowledge of
 2 that. And your -- even though this is the -- the
 3 whole reason for the existence of a potential
 4 nondisclosure agreement, which is the heart of your
 5 testimony, you are refusing to answer any questions
 6 regarding this potential proposal?
 7 A. Yes.
 8 MR. ARNAULT: And I'll note for the
 9 record that this -- during the depositions of Mr. Orr
 10 and Mr. Buckfire, they refused to answer questions
 11 about the DIP or the DIP proposal on the grounds that
 12 it was commercially sensitive information and --
 13 MS. KOVSKY-APAP: Counsel, you really
 14 need to make stop making talk speaking objections.
 15 We're not arguing the motion in front of the court
 16 right now. I'm asking questions of the witness.
 17 MR. ARNAULT: I'm simply telling you
 18 that we will be objecting on the same grounds.
 19 MS. KOVSKY-APAP: Counsel, if you
 20 have an objection to state for the record, by all
 21 means, do so.
 22 MR. ARNAULT: Okay. Objection. That
 23 question would call for commercially sensitive
 24 information that we will not be disclosing, much as
 25 the City did not disclose in its --

Page 81

1 MS. KOVSKY-APAP: Counsel, you can
 2 state your objection for the record. You do not need
 3 to make arguments. We're not deposing Mr. Orr today,
 4 nor are we arguing before the court.
 5 BY MS. KOVSKY-APAP:
 6 Q. Without going into what that
 7 potential proposal might actually contain, are you
 8 aware -- was -- are you aware if a written proposal
 9 was actually prepared?
 10 A. Yes.
 11 Q. Were you involved in the preparation
 12 of such a proposal?
 13 A. No.
 14 Q. Do you know who was involved?
 15 A. Yes.
 16 Q. Were there attorneys from Kirkland
 17 who were involved?
 18 A. Yes.
 19 Q. Do you know which attorneys were
 20 involved in the preparation of that proposal?
 21 A. Yes.
 22 Q. Who were they? * * * *
 23 MR. ARNAULT: Objection. This delves
 24 into attorney-client privilege and work product
 25 information.

Page 86

1 subject to the execution and delivery of this
 2 agreement."
 3 Do you agree that those "Whereas"
 4 clauses indicate the reason for the parties entering
 5 into negotiation of this NDA?
 6 MR. ARNAULT: Objection, the document
 7 speaks for itself. Asking the witness to draw a legal
 8 conclusion and -- which would divulge attorney-client
 9 information and work product in her impression of this
 10 document, I'm going to instruct the witness not to
 11 answer.
 12 MS. KOVSKY-APAP: You're going to
 13 instruct the witness not to tell me what these words
 14 say, and -- and based on our --
 15 BY MS. KOVSKY-APAP:
 16 Q. All right. Not based on -- on any
 17 advice that you have provided to your client and not
 18 based on any communications with your client, based
 19 solely on your knowledge of the English language, does
 20 it appear that these two paragraphs set forth the
 21 reason that the parties entered into negotiation of an
 22 NDA?
 23 MR. ARNAULT: Objection, the document
 24 speaks for itself.
 25 MS. KOVSKY-APAP: Your objection is

Page 87

1 noted.
 2 BY MS. KOVSKY-APAP:
 3 Q. You can answer.
 4 A. It would appear that they also set
 5 two points when the state of the world.
 6 Q. I'm sorry. Say that again?
 7 A. If these are all the of the state of
 8 the world, it would appear that these are both also
 9 the state of the world at the time.
 10 Q. And by "state of the world at the
 11 time," what do you mean?
 12 A. Well, you and I just agreed that
 13 "Whereas" clauses give you the background on the state
 14 of the world when this agreement is being negotiated.
 15 So assuming that's true, these things would also be
 16 part of that state of the world.
 17 Q. And when you say "state of the
 18 world," part of the state of the world is reasons for
 19 doing something, correct?
 20 A. It would appear.
 21 MR. ARNAULT: Objection, form.
 22 BY MS. KOVSKY-APAP:
 23 Q. You can answer.
 24 A. Yeah. It would -- it would appear
 25 those are both reasons.

Page 88

1 Q. Okay. So these are the reasons
 2 why -- these are reasons, maybe not all of the
 3 reasons, but these are at least part of the reason why
 4 the parties decided to enter into negotiations.
 5 So based on this, which obviously
 6 went back and forth between you and Jones Day since
 7 this appears to have come from Jones Day to you --
 8 well, actually let me ask: Was this sent directly to
 9 you?
 10 A. No.
 11 Q. How did you receive a copy of it?
 12 A. It was forwarded to me.
 13 Q. By whom?
 14 A. Ryan Bennett.
 15 Q. Okay. So based on this language, it
 16 appears that once the agreement was finalized, Syncora
 17 wanted to make a proposal to the City and intended to
 18 do so; is that accurate?
 19 A. I don't -- it's true that Syncora had
 20 a desire to make a proposal. I can't tell you what
 21 would or would not have happened upon execution.
 22 Q. Okay. Do you recall, on the second
 23 July 2 phone call, Ryan Bennett suggesting that
 24 Syncora might be willing to share noneconomic terms of
 25 its proposal without signing an NDA?

Page 89

1 A. Yes.
 2 Q. But Syncora didn't do that, right?
 3 A. I'm not sure.
 4 Q. Well, do you know whether, to this
 5 day, Syncora has made its quote/unquote "proposal" to
 6 the City?
 7 A. Yes.
 8 Q. You do know?
 9 A. I do.
 10 Q. And has a proposal to the City been
 11 made?
 12 A. Yes.
 13 Q. Can you tell me the terms of that
 14 proposal?
 15 A. No.
 16 MR. ARNAULT: Same objection.
 17 THE WITNESS: It's commercially
 18 sensitive.
 19 BY MS. KOVSKY-APAP:
 20 Q. Has Syncora entered into a
 21 nondisclosure agreement with the City?
 22 A. Yes.
 23 Q. With respect to the proposal?
 24 A. No.
 25 Q. So any nondisclosure agreement that

Page 114

1 too.

2 BY MS. KOVSKY-APAP:

3 Q. There's nothing in here giving

4 assurance that any NDA -- that this NDA is no less

5 favorable than any NDA that the City may have signed

6 with the Swap Counterparties, correct?

7 A. Correct.

8 Q. And so that was another provision

9 that Syncora had originally asked for that it then

10 dropped that request, correct?

11 A. Correct.

12 Q. Do you know why Syncora was willing

13 to drop that request?

14 A. No.

15 Q. Now, you notice that this agreement

16 is not between Syncora and the City, correct?

17 A. (Reviewing document.)

18 Q. Looking at -- at exhibit --

19 A. Yes.

20 Q. Shoot. What number is this?

21 THE REPORTER: Six.

22 BY MS. KOVSKY-APAP:

23 Q. Sorry. Looking at Exhibit -- I'm

24 referring to Exhibit 6.

25 Who are the proposed parties to this

Page 115

1 agreement?

2 A. The advisors to the City of Detroit

3 and Syncora Guarantee Inc. and Syncora Capital

4 Assurance.

5 Q. And by "advisors to the City of

6 Detroit," who you referring to?

7 A. I believe Jones Day and Miller

8 Buckfire.

9 Q. And Jones Day is the City's legal

10 counsel, correct?

11 A. Yes.

12 Q. Do you know who Miller Buckfire is?

13 A. Yes.

14 Q. And who is Miller Buckfire?

15 A. They are, like, financial advisors.

16 Q. To the City?

17 A. To the City.

18 Q. Okay. Do you have an understanding

19 for the reason why the advisors were substituted in as

20 the counterparty under this confidentiality agreement?

21 A. No. Jones Day made that change.

22 Q. Did you discuss with Syncora whether

23 that change was acceptable?

24 A. I did not discuss directly with the

25 client.

Page 116

1 Q. Are you aware of discussions with the

2 client whether this change was acceptable?

3 A. Again, they signed the agreement, so

4 I have to assume they were okay with it.

5 Q. But are you aware of whether

6 discussions took place with Syncora as to whether it

7 would be acceptable to have the City's advisors as the

8 counterparties?

9 A. No. No firsthand knowledge.

10 Q. Did you ask any questions of Jones

11 Day when you received a draft showing that the

12 counterparty had been changed from the City of Detroit

13 to the advisors?

14 A. I don't recall.

15 Q. Did you have an understanding of the

16 impact or what the impact would be of changing the NDA

17 party from the City to the City's professionals?

18 A. No. I don't think I did.

19 Q. Did you have a discussion with anyone

20 about that issue?

21 A. Not that I recall.

22 Q. Do you recall that, on or around

23 July 10th, 2013, you conveyed to counsel for the City

24 that Syncora Capital Assurance Inc. would be the

25 signatory to the NDA?

Page 117

1 A. Yes.

2 Q. Was that change your idea?

3 A. No.

4 Q. Whose idea was it?

5 A. Someone else at Kirkland.

6 Q. Do you recall who?

7 A. Yes.

8 Q. Well, who at Kirkland?

9 A. Noah Orstein.

10 Q. Who is Noah Orstein?

11 A. He's an associate at Kirkland &

12 Ellis.

13 Q. And what practice group is he in?

14 A. Restructuring.

15 Q. Do you understand -- do you have an

16 understanding why suggested that that change be made?

17 A. Yes.

18 Q. What was your understanding?

19 MR. ARNAULT: Objection.

20 To the extent that this would reveal

21 attorney-client privilege or work product information,

22 instruct the witness not to answer.

23 THE WITNESS: It's part of internal

24 con -- conversations.

25 BY MS. KOVSKY-APAP:

Page 118

1 Q. Well, did you make a proposal to the
 2 City's attorneys that the signature block be changed?
 3 A. Yes.
 4 Q. Did you explain to them why?
 5 A. Yes.
 6 Q. What was your explanation?
 7 A. Because Syncora Capital Assurance
 8 Inc. was the entity that has engaged its advisors.
 9 Q. I – I'm sorry. I don't understand.
 10 A. Syncora Capital Assurance Inc. is the
 11 named party on the engagement letter between Syncora
 12 and Syncora's advisors.
 13 Q. Between Syncora and?
 14 A. Syncora's advisors.
 15 Q. Being Kirkland?
 16 A. Among others.
 17 Q. Okay. And is that the same
 18 information that was conveyed to you by Noah Omstein?
 19 A. Yes.
 20 Q. So when you're asserting the
 21 attorney-client privilege as to that information, this
 22 was actually information you'd already conveyed to the
 23 City, correct?
 24 A. Now – yes, it went from Noah to me
 25 and then to the City.

Page 119

1 Q. Okay. Miss Schwarzman, do you
 2 understand when you convey information to a third
 3 party, it loses its status as attorney-client
 4 privileged?
 5 A. Yes, thank you.
 6 Q. Okay. What is the -- what is the
 7 relationship in terms of corporate structure between
 8 Syncora Guarantee Inc. and Syncora Capital Assurance
 9 Inc.?
 10 A. They're affiliates of one another.
 11 Q. Are they -- do you know, are they
 12 under common ownership? Is one a subsidiary of the
 13 other?
 14 A. I do not know the exact corporate
 15 structure of Syncora.
 16 Q. Did you have an understanding of the
 17 effect of having the NDA signed by Syncora Capital
 18 Assurance Inc. and not by Syncora Guarantee Inc.?
 19 A. Jones Day, in response to our
 20 proposal to change the signature block, indicated to
 21 us that they were unwilling to not have -- or they
 22 needed Syncora Guarantee Inc. to be a signatory as
 23 Syncora Guarantee Inc. held positions related to --
 24 financial positions related to the City.
 25 Q. All right. Prior to having that

Page 120

1 conversation with Jones Day, did you give any
 2 consideration to what effect it might have on the
 3 proposed NDA to have only one of the Syncora entities
 4 sign it?
 5 A. Well, the first draft only had one
 6 Syncora entity on there. We switched the entity and
 7 then we put both of them on there.
 8 Q. Okay. So did you give any
 9 consideration to what practical effect it would
 10 have -- it would have on the NDA to have one Syncora
 11 entity versus the other?
 12 A. Yes. I told Jones Day that we wanted
 13 Syncora Capital Assurance Inc. to sign because they
 14 were the entity with whom the advisors were engaged.
 15 Q. Why would that matter?
 16 A. We wanted it to be consistent.
 17 Q. But this NDA isn't an engagement
 18 letter for a professional advisor, correct?
 19 A. Correct.
 20 Q. So how is it consistent to have the
 21 party that happens to be the one that employs the
 22 lawyers be the one to sign the NDA?
 23 MR. ARNAULT: I'm just going to
 24 caution the witness here. To the extent it would
 25 require her to reveal any work product information or

Page 121

1 attorney-client, instruct you not to answer.
 2 THE WITNESS: I can't tell you any
 3 more than that we wanted it to line up.
 4 BY MS. KOVSKY-APAP:
 5 Q. So you don't actually have a personal
 6 understanding of what difference it would make?
 7 MR. ARNAULT: Objection, form.
 8 THE WITNESS: To the extent I have a
 9 personal understanding, it's conversations between
 10 myself and other Kirkland attorneys and it was not
 11 ever communicated to Jones Day.
 12 BY MS. KOVSKY-APAP:
 13 Q. Okay. So you're unable to explain
 14 why -- the fact that Syncora Capital Assurance
 15 employed the professionals made them the appropriate
 16 party to sign the NDA?
 17 A. I believe I told you the reason we
 18 gave Jones Day was that that was the entity that had
 19 engaged us and that was the entity that we wanted to
 20 sign this NDA. Anything beyond that, I cannot --
 21 either don't know or can't tell you.
 22 Q. Well, which is it?
 23 A. I don't know what you're looking for,
 24 so I don't know what -- if I know whatever it is that
 25 you're looking for.

Page 122

1 Q. I'm just trying to see the connection
 2 between the fact that Syncora Capital Assurance Inc.
 3 signed the engagement letter with the attorneys,
 4 that's one fact over here, and here's an unrelated
 5 nondisclosure agreement. Why would Syncora Capital
 6 Assurance, in your mind, be the appropriate entity?
 7 What's -- what's the connection there?
 8 MR. ARNAULT: Objection, asked and
 9 answered.
 10 THE WITNESS: I told you the reason
 11 that we gave. That was the reason I was told, change
 12 the signature block. Syncora Capital Assurance Inc.
 13 was a signatory to these other ones, it's going to
 14 stay consistent, send it across.
 15 BY MS. KOVSKY-APAP:
 16 Q. When you say "these other ones," you
 17 mean the other nondisclosures agreements?
 18 A. No. The engagement letters.
 19 Q. In your mind is an engagement letter
 20 equivalent to a nondisclosure agreement?
 21 A. No.
 22 Q. Okay. And you mentioned before that
 23 you were not involved in all of the negotiations
 24 regarding the nondisclosure agreement, correct?
 25 A. Correct.

Page 123

1 Q. For example, there were some e-mails
 2 that you were not copied on, correct?
 3 A. Correct.
 4 Q. And there were phone conversations
 5 between the two sides that you didn't participate in,
 6 correct?
 7 A. Correct.
 8 Q. For example, a July 8th phone call
 9 between Ben Rosenblum and Ryan Bennett, you were not
 10 involved in that phone conversation, correct?
 11 A. Correct.
 12 Q. And to the extent that there were
 13 voicemails and e-mails on July 14th between Jamie
 14 Sprayregen and David Heiman, you were not involved in
 15 those, correct?
 16 A. Correct.
 17 Q. Who is Jamie Sprayregen?
 18 A. Jamie Sprayregen is the head of the
 19 restructuring practice at Kirkland & Ellis.
 20 Q. So, basically, your ultimate boss?
 21 A. Sure.
 22 Q. And do you know who David Heiman is?
 23 A. Yes.
 24 Q. And who is he?
 25 A. He's a partner at Jones Day.

Page 124

1 Q. A very senior partner?
 2 A. Well, he seems very old, so I would
 3 assume very senior.
 4 Q. You realize we're going to tell him
 5 that, right?
 6 A. That's okay.
 7 Q. So to the extent that there were
 8 direct negotiations going on between Mr. Sprayregen
 9 and Mr. Heiman, it would be fair to say that there
 10 were negotiations going on at the highest levels of
 11 the two firms, correct?
 12 A. Correct.
 13 Q. And to put it colloquially, that was
 14 above your pay grade?
 15 A. Yes. Above my pay grade and after
 16 they'd taken out a TRO against us.
 17 Q. And you don't have any personal
 18 knowledge of the communications where you weren't a
 19 participant, correct?
 20 A. I wasn't a participant, no.
 21 Q. I'm sorry. Could you speak up?
 22 A. I wasn't a participant, no.
 23 Q. Okay. Thank you.
 24 Taking a look at Exhibit 6, could you
 25 turn to page -- let me find it -- Page 4, Section B,

Page 125

1 "Damages"?
 2 A. Yep.
 3 Q. Could you read that out loud.
 4 A. "Damages. The Receiving Party
 5 understands and agrees that money damages will not be
 6 a sufficient remedy for its breach of any provision of
 7 this Agreement and that the Providing Party shall be
 8 entitled to seek specific performance and injunctive
 9 or other equitable relief as a remedy for any breach
 10 of this Agreement (regardless of whether damages may
 11 or may not be readily quantifiable and without posting
 12 a bond or other security). Such remedy shall be in
 13 addition to all other remedies available at law or
 14 equity to the Providing Party."
 15 Q. When you were negotiating this
 16 agreement, did you review that provision?
 17 A. I read the whole agreement.
 18 Q. Did you form an understanding what
 19 that provision meant?
 20 A. Yes.
 21 Q. Can you tell me what your
 22 understanding of that provision is? * * * *
 23 MR. ARNAULT: Objection, calls for
 24 work product information.
 25 I instruct the witness not to answer.

Page 126

1 **THE WITNESS: No.**

2 BY MS. KOVSKY-APAP:

3 Q. Do you agree that this provision

4 would impose certain remedies on a party that breached

5 a fully-executed nondisclosure agreement? * * * *

6 MR. ARNAULT: Objection, the document

7 speaks for itself and it also calls for work product

8 information to the extent that you're asking for her

9 understanding of what this provision requires.

10 I instruct the witness not to answer.

11 THE WITNESS: I'm not going to

12 answer.

13 BY MS. KOVSKY-APAP:

14 Q. Miss Schwarzman, based on your

15 knowledge of the English language --

16 A. Um-hum.

17 Q. -- and the words that you just read,

18 do you agree that this provision provides for remedies

19 for breach of this agreement?

20 MR. ARNAULT: Objection, the document

21 speaks for itself.

22 MS. KOVSKY-APAP: Noted.

23 BY MS. KOVSKY-APAP:

24 Q. You can answer.

25 A. Yes. It talks about remedies for

Page 127

1 breach of the agreement.

2 Q. And those remedies could be imposed

3 on any party that breached this agreement, correct?

4 MR. ARNAULT: Objection, document

5 speaks for itself and --

6 MS. KOVSKY-APAP: Noted.

7 THE WITNESS: And no, I don't think

8 that's how it reads.

9 BY MS. KOVSKY-APAP:

10 Q. Okay. Tell me how you think it

11 reads. * * * *

12 MR. ARNAULT: Objection, calls for

13 work product.

14 MS. KOVSKY-APAP: She just told me

15 she doesn't think that's how it reads. She's already

16 telling me what she thinks of the documents.

17 MR. ARNAULT: So she is definitely

18 just answering "yes" or "no." She's not telling you

19 what exactly it means.

20 I instruct the witness not to answer.

21 THE WITNESS: I'm not going to

22 answer.

23 MS. KOVSKY-APAP: All right. We'll

24 do this the really long way. Good thing I have a late

25 flight.

Page 128

1 BY MS. KOVSKY-APAP:

2 Q. Okay. Let's go back to the first

3 page and we're going to go over some definitions here

4 because I want to make sure we understand who the

5 receiving party is. Okay? Or actually we can first

6 do the providing party.

7 Looking under Section A,

8 "Confidentiality," the first paragraph, do you see

9 "The Advisors (on behalf of the City) and Syncora (as

10 applicable, the 'Providing Party')"?

11 A. Yes.

12 Q. Okay. So that means that either the

13 Advisors or Syncora, as applicable, could be the

14 "Providing Party," correct?

15 A. Yes.

16 Q. Then it says -- oh, "...and

17 Representatives (as such term is defined below)."

18 So it even broadens that term to a

19 bunch of other people. And we can go over that

20 definition if you'd like, if you feel that it's

21 necessary to give you an understanding of what's meant

22 by "Representative".

23 A. No, I'm okay.

24 Q. Okay. So skipping over that part, so

25 the Providing Party "are furnishing the other Party

Page 129

1 (as applicable, the 'Receiving Party')."

2 So that means to the extent that the

3 advisors are receiving information from Syncora,

4 they're the receiving party, correct?

5 MR. ARNAULT: Objection. You're --

6 the document says what it says and you're still asking

7 for her interpretation of this provision which

8 requires her to divulge work product, her mental

9 impressions of this agreement.

10 MS. KOVSKY-APAP: She is a fact

11 witness who is called upon to testify about her

12 negotiation of this agreement and her understanding of

13 what the plain language of this provision is, is fair

14 game.

15 MR. ARNAULT: She was called as a

16 fact witness, now you're asking her for her

17 impressions and her interpretation.

18 MS. KOVSKY-APAP: No. I don't need

19 any impressions or any legal interpretation

20 whatsoever.

21 BY MS. KOVSKY-APAP:

22 Q. Based on your simple, straightforward

23 knowledge of the English language and the terms of

24 these words, this provision here, you already agreed

25 that "Providing Party" could mean Advisors or Syncora,

Page 134

1 A. Okay.
 2 Q. -- just to back up a second --
 3 A. Can you ask me the question again.
 4 Q. And just to make sure that it's
 5 clear: Unless your counsel instructs you not to
 6 answer on the basis of privilege, and that is
 7 assuming, of course, that Mr. Arnault is your counsel,
 8 unless you're instructed not to answer on the basis of
 9 privilege, you do need to answer. And he's making his
 10 objections for the record.
 11 MR. ARNAULT: Oh, and so my objection
 12 is, to the extent that you can answer her question
 13 without revealing attorney-client information or work
 14 product or legally interpreting it, then you can. But
 15 if your interpretation is based upon a legal
 16 interpretation, then I instruct you not to answer.
 17 THE WITNESS: Can you reask the
 18 question.
 19 BY MS. KOVSKY-APAP:
 20 Q. Do you agree that had Jones Day and
 21 Miller Buckfire signed this agreement, that damages
 22 provision that we just discussed a few moments ago
 23 could have subjected them, as receiving parties, to
 24 remedies for breach of this agreement?
 25 MR. ARNAULT: Same objection and

Page 135

1 instruction.
 2 THE WITNESS: (Reviewing document.)
 3 Maybe.
 4 BY MS. KOVSKY-APAP:
 5 Q. Well, you agreed that the damages
 6 provision would subject a receiving party to remedies
 7 if they breached the agreement, correct?
 8 A. Correct.
 9 Q. And those parties would be Miller
 10 Buckfire and Jones Day, right?
 11 A. Right.
 12 Q. Because they're the ones on the
 13 signature block, aren't they?
 14 A. Yep.
 15 Q. And they're the professionals for the
 16 City, who's the plaintiff in a lawsuit against
 17 Syncora, right?
 18 A. Um-hum.
 19 Q. And I'm asking you, in your
 20 experience, would it be common for a plaintiff in the
 21 City's position to go and tell its advisors, its legal
 22 professionals, to enter into an agreement with the
 23 defendant that the City is suing, an agreement that
 24 could subject those advisors to remedies for breach?
 25 MR. ARNAULT: Objection.

Page 136

1 BY MS. KOVSKY-APAP:
 2 Q. Do you think that's a common
 3 situation in your experience?
 4 MR. ARNAULT: Objection, form,
 5 foundation.
 6 THE WITNESS: In my limited
 7 experience, no.
 8 BY MS. KOVSKY-APAP:
 9 Q. As a professional advisor yourself,
 10 would you deem it prudent to enter into an agreement
 11 with your client's adversary in litigation that could
 12 subject your firm to remedies for breach?
 13 MR. ARNAULT: Objection, form,
 14 foundation.
 15 THE WITNESS: No.
 16 BY MS. KOVSKY-APAP:
 17 Q. Have you ever, as a professional
 18 advisor, signed an agreement with your client's
 19 adversary in litigation that could subject your firm
 20 to remedies for breach?
 21 A. No.
 22 Q. Are you aware of any instance in
 23 which Kirkland & Ellis has done so?
 24 A. I'm not aware.
 25 Q. And now, just to circle back to

Page 137

1 something you said before, you said that your
 2 understanding is that Syncora has made a proposal to
 3 the City.
 4 A. Yes.
 5 Q. And by "proposal," you mean something
 6 in the nature of what it wanted to make subject to the
 7 NDA, correct?
 8 A. Correct.
 9 Q. And it did so without the NDA,
 10 correct?
 11 A. Correct.
 12 Q. So whether or not there was an NDA in
 13 place ultimately was irrelevant, correct?
 14 MR. ARNAULT: Objection, form.
 15 And to the extent that it requires
 16 you to reveal attorney-client information or work
 17 product information, instruct you not to answer.
 18 MS. KOVSKY-APAP: I'm not asking for
 19 anything that Syncora said.
 20 MR. ARNAULT: But you are asking for
 21 her mental impressions.
 22 MS. KOVSKY-APAP: No, I'm not.
 23 MR. ARNAULT: Yes -- okay. I
 24 disagree.
 25 THE WITNESS: What was the question?