

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

In re	)
	) Chapter 9
	)
CITY OF DETROIT, MICHIGAN,	) Case No. 13-53846
	)
Debtor.	) Hon. Steven W. Rhodes
	)
	) <b>Expedited Consideration</b>
	) <b>Requested</b>

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**THE OBJECTORS' MOTION *IN LIMINE* TO PRECLUDE DEBTOR  
FROM OFFERING EVIDENCE REGARDING THE LIKELIHOOD OF  
SUCCESS, COMPLEXITY, AND EXPENSE OF CLAIMS THE CITY  
SEEKS TO SETTLE WITH THE FORBEARANCE AND OPTIONAL  
TERMINATION AGREEMENT**

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**Preliminary Statement**

By this motion, the Objectors<sup>1</sup> seek to preclude the introduction of evidence by the debtor, the City of Detroit (the “City” or the “Debtor”), supporting the complexity, expense, inconvenience, delay, or probability of success in potential litigations arising from the claims purportedly being resolved in connection with the Debtor’s motion to approve the Forbearance and Optional Termination Agreement (“Forbearance Agreement”).<sup>2</sup> While these are required factors that

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<sup>1</sup> This motion is joined by Syncora Capital Assurance and Syncora Guarantee Inc. (“Syncora”), Erste Europäische Pfandbriefund Kommunalkreditbank Aktiengesellschaft in Luxemburg S.A., DEPFA Bank PLC, Retiree Association Parties, Retired Detroit Police Members Association, Ambac Assurance Corporation, National Public Finance Guarantee Corporation, Assured Guaranty Municipal Corp., Financial Guaranty Insurance Company, the Police and Fire Retirement System of the City of Detroit and the General Retirement System of the City of Detroit, and the Official Committee of Retirees.

<sup>2</sup> This motion relates to the September 23, 2013 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*

both the City and the Court, in deciding this motion, must evaluate, the City has failed and refused to provide any evidence regarding the claims purportedly being settled by the Forbearance Agreement or its evaluation of those claims. Neither the exhibits nor the sworn declarations submitted by the City in support of its motion provide the necessary information. And, when questioned on the subjects in depositions, the City's representatives asserted broad claims of attorney-client privilege over all aspects of their evaluation of the potential claims by or against the City resolved by the Forbearance Agreement. In so doing, the City has blocked the Objectors from obtaining discovery regarding the justification for the settlement presented to the Court under Rule 9019. Because the City has shielded its analysis of the merits, complexity, and related cost of litigation of claims resolved by the Forbearance Agreement, it should be precluded from introducing such evidence at the hearing on the Assumption Motion.

### **Background**

#### **I. The City's Motion and Supporting Documents Contain No Evidence Regarding the Probability Of Success, Complexity, and Expense of the Claims that the Forbearance Agreement Purports to Settle**

While the City's motion asserts in a conclusory fashion that the settlement embodied in the Forbearance Agreement is justified, not a shred of evidence supporting this has been provided. Specifically, the City has not provided any

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*Section 365(a) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant [to] Rule 9019, and (III) Granting Related Relief (the "Assumption Motion") [Docket No. 17].*

analysis in any of its filings regarding the probability of success of the claims by or against the City that are being settled. It has similarly not provided any analysis of the cost, delay, expense, and burden of litigating the claims that the City purports to settle with the Forbearance Agreement. Instead, the City's filings merely contain general statements regarding the "protracted" and "uncertain" nature of any litigation surrounding those claims. The sum total of the evidence provided by the City regarding its determination to settle rather than litigate can be found in just three generally-worded paragraphs:

- "The Forbearance Agreement allows the City to access much needed cash flows, provides for a workable unwind of its swap obligations at a discounted price, and avoids potentially protracted litigation involving the swap transactions." (Assumption Mot. ¶ 41.)
- "Further, while the City has examined whether there are viable actions to challenge the Swap Contracts or the City's pledge of the Casino Revenue to secure its obligations to the Swap Counterparties, litigation would be protracted, expensive and, in terms of success, uncertain." (Assumption Mot. ¶ 47.)
- "The Swap Contracts and related documents are exceedingly complex, as is any determination of the amounts owing and the rights of the parties thereunder. While certain creditors have informed the City of their views on these arrangements, regardless of the merits of these positions, the issues are extremely complicated and, accordingly, subject to a high degree of uncertainty." (Assumption Mot. ¶ 47.)

No evidentiary citations accompany the aforementioned paragraphs. And the City has not identified even a single piece of evidence that supports these bare bones contentions that a litigation analysis was actually performed. Indeed, the

City's motion never even identifies *what claims* are being settled by the Forbearance Agreement.

The declaration provided by Mr. Orr in support of the City's First Day Filings is similarly vague:

- "I believe that the assumption and approval of the compromise is fair, reasonable, equitable and in the best interests of the City and its creditors. The compromise, if approved, will allow the City access to much needed cash flows, provide for a workable unwind of its unfavorable swap obligations at a discounted price and avoid potentially protracted litigation involving the swap transactions." (Orr Dec. ¶ 12.)

But here again, no analysis of the "potentially protracted litigation" is indicated. In short, the paper record provided by the City in its Assumption Motion does not contain specific detail regarding the probability of success in litigation, nor does it address the complexity, expense, inconvenience and delay of the litigation resulting from the claims that the Forbearance Agreements proposes to resolve.

## **II. The City Has Invoked the Attorney-Client Privilege with Respect to all Evidence Regarding the Probability of Success, Complexity, and Expense of the Claims the Forbearance Agreement Proposes to Resolve**

In an effort to understand the City's reasoning, the Objectors deposed Emergency Manager Kevyn Orr and lead negotiator of the Forbearance Agreement, Kenneth Buckfire. In the depositions, these witnesses testified that the *only* assessment of legal claims and defenses was made by the City's counsel —

neither Mr. Orr nor Mr. Buckfire independently analyzed the strengths of the City's position vis-à-vis the Swap Counterparties with which they were negotiating and settling:

MR. HACKNEY: And just for the record, if I asked . . . you [to] assess the likelihood of success of all of the different claims that are being resolved by the forbearance agreement, you would assert the attorney-client privilege and refuse to answer?

MR. ORR: That is correct. I have made no independent assessment outside of any conversation I would have had with counsel and my advisors.

(Orr Dep. 142:16-23.)

MS. ENGLISH: Did you make an independent assessment apart from advice of counsel as to the strengths -- strengths or weaknesses of the City's claims against the Swap counterparties?

MR. ORR: Not without the advice of counsel, no.

(Orr Dep. 278:23-279:2.)

When asked, for instance, about the time and expense associated with litigation with the Swap Counterparties, the city's counsel made very clear that no information would be provided regarding those issues because no such information was available for which the City was not claiming privilege:

MR. SHUMAKER: . . . I allowed you to go forward with whether he considered the length of litigation in his answer, but I don't want him to go into the specifics of any sort of analysis that was done by counsel.

(Orr Dep. 286:4-12.)

As Objectors' counsel sought to learn the elements of the analysis that was done — assuming one was actually done — the City invoked the attorney-client privilege at least thirty times and directed its witnesses not to answer any questions regarding the merits and costs of the claims purportedly being settled by the Forbearance Agreement. This included even the evaluation of *what claims* might be settled by the Forbearance Agreement:

MR. HACKNEY: And if I ask you to tell me what claims you have, will you tell me . . . or will you assert the privilege?

MR. SHUMAKER: I would instruct the witness that may implicate attorney-client communications.

MR. ORR: I would have no independent knowledge of what claims [the City] may have other than discussions I've had with counsel so I wouldn't answer.

(Orr Dep. 140:4-10.)

Similarly, when asked about the validity of the pledge of casino revenues, Mr. Orr admitted he would decline to answer on the basis of the attorney-client privilege.

MR. HACKNEY: If I ask you your view on the likelihood that the pledge of the gaming revenues under the Michigan Gaming Act is an invalid pledge, you'll assert the attorney-client privilege, correct?

MR. ORR. Yes, more than likely.

(Orr Dep. 14:9-13.)

And again, when asked about the claims that the Swap Counterparties may have against the City, Mr. Orr declined to respond on the basis of attorney-client privilege:

MR. HACKNEY: Have you evaluated . . . whether there are other tort or contract claims that the Swap counterparties may have against the City?

MR. ORR. I think there were discussions, but, here again, those would be wrapped up in attorney-client communications.

(Orr Dep. 136:19-24.)

The City's counsel clarified that it would instruct Mr. Orr not to answer any questions regarding the content of the factors considered by the City in reaching its decisions, and Mr. Orr agreed that he would not provide conclusions regarding multiple factors underlying the approval of the Forbearance Agreement.<sup>3</sup>

MR. SHUMAKER: Let me state for the record you can ask questions as to whether those -- those factors were considered by Mr. Orr, but obviously if you're going to ask what he was -- what he was advised by counsel, then I'm going to instruct him not to answer.

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<sup>3</sup> Mr. Buckfire was similarly instructed by counsel not to answer any questions regarding the substance of legal advice received from counsel on question related to the COPs, Swaps, and various rights thereunder.

MR. HACKNEY: Did you take legal advice, you personally as the lead negotiator for the City, did you take legal advice from Jones Day in advance of the June 4 meeting?

MR. BUCKFIRE: Yes.

MR. HACKNEY: Would you disclose to me the legal advice you obtained from them?

MR. CULLEN: I'll instruct him not to answer.

MR. HACKNEY: So, if I ask questions about the legal advice you had been given about the COPs Swap structure or various parties' rights thereunder, you would instruct the witness not to answer those questions?

MR. CULLEN: Right.

(Buckfire Dep. 109:22-110:14.)

Buckfire claimed privilege regarding, among other things, the nature and validity of the Swap Counterparties' liens. (Buckfire Dep. 203:21-23; Orr Dep. 14:9-12).

MR. ORR: When I say more than likely, that's -- that's exactly the distinction that I'm trying to make. Did I have discussions with my counsel? Yes. Did those discussions take into consideration some of those factors? Yes. Am I going to tell you what those discussions were and what, if any, conclusions were made? No.

(Orr Dep. 14:24-15:1-11.)

Though Mr. Orr listed certain issues the City may have considered, he would only state that particular issues were “probably” or “more than likely” considered by the City in reaching its decision to enter into the Forbearance Agreement, not the issues that the City conclusively analyzed to reach its decision to enter into the Forbearance Agreement.<sup>4</sup> When asked directly about one of the issues he did not list, Mr. Orr would not commit to its having played a role in the City’s analysis and decisions:

MS. ENGLISH: Was Act 34 [one of the issues explored with counsel]?

MR. ORR: More than likely, yes.

MS. ENGLISH: More than likely? You don’t know?

MR. ORR: No, sitting here today, I just said to you, for instance, that many of the issues, without being a compendium or being exhaustive, were examined. Act 34 was probably one of them.

(Orr Dep. 276:3-9.)

The City and its representatives thus repeatedly claimed attorney-client privilege on multiple issues and declined to describe in detail the content of the

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<sup>4</sup> Mr. Orr listed certain issues that he stated the City may have considered. (*See, e.g.*, Orr Dep. 273:21-274:8.) However, Mr. Orr provided no further detail regarding any of these issues or what claims they may be referring to, and admitted that the list was not inclusive of all the issues actually considered. (Orr Dep 277:23-24.)



City's conclusions and considerations. Privilege was claimed with respect to the following issues:

- Legal advice rendered to Mr. Orr in connection with the Forbearance Agreement's negotiation and execution. (Orr Dep. 13:16-24.)
- Likelihood of success of all claims being resolved by the Forbearance Agreement. (Orr Dep. 142:16-23.)
- Likelihood that the City's swap and validity arguments would prevail. (Orr Dep. 14:4-8.)
- Existence of City claims against Swap Counterparties. (Orr Dep. 140:4-10.)
- Likelihood that the City would prevail on a claim or defense against the Swap Counterparties. (Orr Dep. 14:13-18; 140:12-14.)
- Legal merits of the insurers' contentions regarding their consent rights under the Swap Agreements, Collateral Agreement, and Contract Administration Agreement. (Orr Dep. 85-88.)
- Likelihood of success of the City's argument that the operation of the Collateral Agreement's cash trapping provision is not automatic. (Orr Dep. 115:5-10.)
- Existence of defaults under the agreements where the Swap Counterparties are the defaulting parties. (Orr Dep. 134:4-20.)
- Existence of tort or contract claims that the Swap Counterparties may have against the City. (Orr Dep. 136:19-24.)
- Likelihood that the automatic stay applies to the casino revenues in the General Receipts Subaccount. (Orr Dep. 151:6-11.)
- Whether the casino revenues are "property of the estate" for purposes of the Bankruptcy Code. (Orr Dep. 153:8-18.)
- Validity of the Swap Agreements. (Orr Dep. 161:5-13.)

- Validity of the Certificates of Participation (“COPs”). (Orr Dep. 163:1-4.)
- Claims arising from the Forbearance Agreement’s potential violation of the Service Contracts’ priority scheme (or “waterfall”). (Orr Dep. 165: 7-21.)
- Claims of COP holders against Swap Counterparties if the Forbearance Agreement optional termination right is exercised. (Orr Dep. 166:4-12.)
- Whether and how much creditor recoveries would be enhanced if Forbearance Agreement is approved. (Orr Dep. 216:15-25.)
- Whether the Forbearance Agreement is part of an integrated transaction with the Amended Swap Agreements. (Orr Dep. 105:1-106:8.)
- Interaction between rights granted under the Contract Administration Agreement and rights granted by the Forbearance Agreement. (Orr Dep. 124:1-22.)

Additionally, the City has refused to provide any evidence that would either (a) support the City’s contention that an analysis of the litigation factors was actually performed, or (b) support the City’s contention that a privilege claim is warranted. Following the depositions, the Objectors submitted a request for any and all documents showing the purported analysis or, at a minimum for a privilege log showing the analytical documents. The City flatly refused to produce either. (See Email Correspondence From G. Shumaker Dated September 6, 2013, attached herein as Exhibit 6-C.)

Thus, in the course of the very limited discovery granted to Objectors in this matter, the City has either 1) made conclusory statements regarding the

complexity, merits, and costs associated with the claims being settled by the Forbearance Agreement without even a shred of evidentiary support or 2) shielded the substance of the evaluation of any such claims and litigation by invoking the attorney-client privilege. It has not offered any other witnesses who would testify about these issues, and the witnesses it has offered have formed no independent view regarding the probability of success of the claims by or against the City and the cost, delay, and inconvenience of litigating those claims.

### **Argument**

#### **I. The City Must Provide Detailed Evidence Regarding the Probability of Success, Complexity, and Expense of the Claims that the Forbearance Agreement Purports to Resolve.**

In order to approve a settlement as fair and equitable under Rule 9019 of the Bankruptcy Code, a court must apprise itself of the underlying facts of the settlement. *Reynolds v. Comm'r*, 861 F.2d 469, 473 (6th Cir. 1988) (“The court is not permitted to act as a mere rubber stamp . . . .”). The Supreme Court has made clear that “[T]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.” *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). Thus, a court must have a factual record before it that is sufficient for the

court's own evaluation of the fairness and equity of the settlement a party seeks to approve.

In deciding whether a proposal is fair and equitable, Courts in the Sixth Circuit must consider four factors: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views. *In re Haven, Inc.*, 326 B.R. 901 (B.A.P. 6th Cir. 2005) (internal quotations omitted). The City has the burden to establish that a settlement is appropriate with respect to these considerations. *See In re Hallet*, 33 B.R. 564, 565 (Bankr. D. Me. 1983).

The evidence submitted in support of a 9019(a) settlement must be detailed and must provide the court with enough information to assess each of the above four factors. *See In re Haven, Inc.*, 326 B.R. 901 (B.A.P. 6th Cir. 2005) (reversing a bankruptcy court's approval of a settlement where "the order approving the compromise does not make any specific findings of fact regarding any of [the] four factors."); *see also In re W. Pointe Properties, L.P.*, 249 B.R. 273, 285 (Bankr. E.D. Tenn. 2000) (denying a motion to approve a settlement under the four Rule 9019 approval factors after assessing detailed testimonial record regarding the merits of the claims being settled).

For example, in *In re Spansion, Inc.*, the court denied a settlement under Rule 9019 where the debtors provided no detailed information regarding the likelihood of success on the claims being settled, and the complexity, expense, inconvenience and delay attending litigation of those claims. *In re Spansion, Inc.*, 09-10690 (KJC), 2009 WL 1531788 (Bankr. D. Del. June 2, 2009). In considering these factors, the court noted that “the Debtors have provided little information as to the specifics of the Actions to provide a basis for evaluating the strengths and weaknesses of the litigation. . . . This likewise makes it difficult to conclude that the settlement is preferable to the expense, inconvenience and delay of litigation.” *Id.* at \*7-\*8. Because of the impoverished factual basis provided to the court regarding the four required factors for 9019 settlement approval, the court declined to approve the settlement. *Id.* at \*9.

**II. The City Has Not Provided Any Evidence of the Probability of Success, Complexity, and Expense of the Claims That the Forbearance Agreement Purports to Resolve and Has Systematically Blocked the Objectors’ Efforts to Discover Its Views Regarding the Claims Being Settled.**

To date, the City and its representatives have not provided any evidence to support their statements that, for example, “while the City has examined whether there are viable actions to challenge the Swap Contracts or the City's pledge of the Casino Revenue to secure its obligations to the Swap Counterparties, litigation would be protracted, expensive and, in terms of success, uncertain.” (Assumption

Mot. ¶ 47.) The City does not at any point, in pleadings, affidavits, or declarations provide the facts necessary to determine whether 1) the City would be successful on any of its or other parties' claims or 2) the litigation the Forbearance Agreement purports to settle is sufficiently complex, expensive, or inconvenient to merit approval of the Forbearance Agreement. Instead, the City has relied exclusively on vague assertions that the litigation would be "potentially protracted" and "uncertain." (Assumption Mot. ¶ 41, ¶ 47; *see also* Orr Dec. ¶ 12.) And, in fact, the City never even identifies what claims are being settled by the Forbearance Agreement.

When questioned directly regarding the merits and substance of the various claims in the course of deposition testimony, the City and its representatives declined to provide the basis for any of their assertions, choosing instead to withhold their analysis as protected by the attorney-client privilege. (*See supra* Background II). Moreover, Mr. Orr said, repeatedly, that he had no independent basis for any views regarding the likelihood of success of any claims, the cost and complexity of any litigation, outside of his discussions with counsel. (*See, e.g.,* Orr Dep. 271:23-272:5.)

In claiming attorney-client privilege over all analysis regarding the merits, complexity, and expense of the claims the City is attempting to resolve, the City has not given the Objectors (nor the Court) the opportunity to evaluate, or even

understand, the rationale for the settlement purportedly effected by the Forbearance Agreement.

**III. Having Blocked the Objectors' Efforts to Discover the City's Specific Analysis of the Probability of Success, Complexity, and Expense of the Claims Being Settled, the City Should Not Be Permitted to Introduce Evidence on These Points at Trial.**

It is foundational that a party is not permitted to use the attorney-client privilege as both a sword and a shield. *In re Lott*, 139 F. App'x 658, 660 (6th Cir. 2005) (“[L]itigants cannot hide behind the privilege if they are relying upon privileged communications to make their case. ‘The attorney-client privilege cannot at once be used as a shield and a sword.’”) *quoting United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). If a party intends to rely on the advice of counsel as evidence at trial, it is required to permit discovery of that advice or waive its use at trial. *See Arista Records LLC v. Lime Grp. LLC*, 06 CV 5936 KMW, 2011 WL 1642434 (S.D.N.Y. Apr. 20, 2011) (“[A] party who intends to rely at trial on the advice of counsel must make a full disclosure during discovery; failure to do so constitutes a waiver of the advice-of-counsel defense . . . .”); *see also Trouble v. Wet Seal, Inc.*, 179 F. Supp. 2d 291, 304 (S.D.N.Y. 2001) (“[Defendant] waived any available advice of counsel defense by objecting, based on the attorney-client privilege, to [Plaintiff’s] discovery requests . . . .”).

Conversely, where a litigant uses the attorney-client privilege to prevent an adversary’s inquiry regarding the content of communications with counsel, he is

not permitted to use the substance of those communications to support claims at trial. *See In re Residential Capital, LLC*, 491 B.R. 63, 72 (Bankr. S.D.N.Y. 2013) (“[A]fter having asserted the attorney-client privilege throughout discovery, the Debtors cannot now introduce the substance of whatever advice it sought and received . . . .”). Multiple courts have explicitly excluded the presentation of evidence based on counsel’s advice at trial where a party claimed privilege over that advice in discovery. *See, e.g., E.G.L. Gem Lab Ltd. v. Gem Quality Inst., Inc.*, 90 F. Supp. 2d 277, 296 (S.D.N.Y. 2000) *aff’d*, 4 F. App’x 81 (2d Cir. 2001) (“Having blocked his adversary from conducting discovery on this issue, he will not now be heard to advance reliance on counsel.”); *McLean v. Garage Mgmt. Corp.*, 10 CIV. 3950 DLC, 2012 WL 1358739 (S.D.N.Y. Apr. 19, 2012) (“GMC has invoked, as it is entitled to do, its attorney-client privilege. But absent a waiver of the privilege, GMC cannot sustain a defense based on good faith reliance on the advice of counsel.”)

In *In re Residential Capital*, a debtor sought court approval of a settlement with certain parties under Rule 9019. 491 B.R. 63, 65 (Bankr. S.D.N.Y. 2013). In the discovery phase leading up to the hearing on its 9019 motion, the debtor claimed privilege throughout its document productions and depositions. *Id.* In deposition, the debtor’s CEO was instructed by counsel not to reveal the substance of any of the communications forming the basis for the approval of the settlement,



including legal defenses, liabilities, operation of the underlying agreements, and other related issues. *Id.* Objectors to the settlement argued that the debtor should be precluded from introducing the substance of the advice of its counsel because the debtor had claimed attorney client privilege over that advice throughout the discovery period. *Id.* The court agreed, and ruled that “A court should exclude any testimony or evidentiary presentations by the Defendants at trial if that same testimony or evidence was withheld from Plaintiffs during discovery based on attorney-client privilege.” *Id.* at 69.

As in *Residential Capital*, here, the City should not be permitted to introduce evidence or argument regarding its analysis of the probability of success in the litigation and the complexity, expense, inconvenience and delay attending litigation of those claims purportedly being resolved by the Forbearance Agreement. The City has entirely blocked the Objectors from the *only* source of information regarding these factors, stripping the Objectors of the opportunity to understand, consider, and rebut this evidence at the hearing. Because the City’s representatives testified that they have no independent knowledge or judgment regarding the evaluation of such claims outside of the advice of counsel, the Objectors would be unfairly prejudiced if the City were permitted to introduce the substance of these communications for the first time at the hearing on the Assumption Motion. The City should thus be precluded from introducing any

evidence regarding the first and third factors used to evaluate Rule 9019 Settlements in the Sixth Circuit — evaluations regarding the merits of the litigations being settled and compromised, and evidence of the complexity, expense, and burden associated with those litigations.<sup>5</sup>

### **Conclusion**

For the foregoing reasons, the Objectors respectfully request that this Court preclude the City from introducing evidence concerning the likelihood of success on the merits, complexity, and cost of the litigation of claims being released by the Forbearance Agreement and enter an order substantially similar to that attached herein as Exhibit 1.

*[Remainder of this page intentionally left blank]*

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<sup>5</sup> The second factor of the four-factor Rule 9019 test relating to difficulty in collection is typically construed as relating to the successful collection of amounts owed under a judgment. *See, e.g., In re Aldrich*, 325 B.R. 493, 498 (Bankr. D. Mass. 2005) (denying a motion under Rule 9019 in part on the grounds that the evidence suggested that the settling party could satisfy a judgment amount in excess of the settlement). To the extent it is construed here to relate to the City's ability to obtain *interim* access to the casino revenues, the City should be barred from introducing such evidence because it refused to answer questions regarding the likelihood of success in obtaining such access through litigation or by way of the automatic stay. (Orr Dep. 151:6-11.)

Dated: September 18, 2013

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### **Summary of Attachments**

Exhibit 1 - Proposed Order

Exhibit 2 - Notice

Exhibit 3 - Brief [Not Required]

Exhibit 4 - Certificate of Service [To be Filed]

Exhibit 5 - Affidavits [Not Applicable]

Exhibit 6-A - Excerpts of Deposition of Kevyn D. Orr

Exhibit 6-B - Excerpts of Deposition of Kenneth Buckfire

Exhibit 6-C - Email from G. Shumaker to S. Hackney dated September 6, 2013

**Exhibit 1**  
**Proposed Order**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

)

) Chapter 9

)

) Case No. 13-53846

)

) Hon. Steven W. Rhodes

)

---

**ORDER GRANTING THE OBJECTORS' MOTION *IN LIMINE* TO  
PRECLUDE DEBTOR FROM OFFERING EVIDENCE REGARDING THE  
LIKELIHOOD OF SUCCESS, COMPLEXITY, AND EXPENSE OF  
CLAIMS THE CITY SEEKS TO SETTLE WITH THE FORBEARANCE  
AND OPTIONAL TERMINATION AGREEMENT**

---

This matter having come before the Court on the motion of the Objectors for the entry of an order precluding the City of Detroit from offering evidence regarding the likelihood of success, complexity, and expense of claims it seeks to settle with the Forbearance and Optional Termination Agreement, the Court having reviewed the Objectors' motion; and the Court having determined that the legal and factual bases set forth in the motion establish just cause for the relief granted herein;

**IT IS HEREBY ORDERED THAT:**

1. The Objectors' Motion *in Limine* to Preclude Debtor from Offering Evidence Regarding the Likelihood of Success, Complexity, and Expense of Claims the City Seeks to Settle with the Forbearance and Optional Termination Agreement is GRANTED.

2. The Debtor, the City of Detroit, is precluded from introducing evidence regarding the likelihood of success, complexity, and expense of the claims the Debtor seeks to settle with the Forbearance and Optional Termination Agreement 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 Pursuant to Section 365(a) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant to Rule 9019, and (III) Granting Related Relief.

3. The joining Objectors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the motion.

4. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

5. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

**IT IS SO ORDERED.**

---

STEVEN W. RHODES  
United States Bankruptcy Judge

**Exhibit 2**

**Notice of Motion and Opportunity to Object**

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN**

In re

CITY OF DETROIT, MICHIGAN,

Debtor.

)  
) Chapter 9  
)  
) Case No. 13-53846  
)  
) Hon. Steven W. Rhodes  
)

---

**NOTICE OF THE OBJECTORS' MOTION *IN LIMINE* TO PRECLUDE DEBTOR  
FROM OFFERING EVIDENCE REGARDING THE LIKELIHOOD OF SUCCESS,  
COMPLEXITY, AND EXPENSE OF CLAIMS THE CITY SEEKS TO SETTLE  
WITH THE FORBEARANCE AND OPTIONAL TERMINATION AGREEMENT**

---

**PLEASE TAKE NOTICE** that on September 18, 2013, the Objectors, filed *The Objectors' Motion in Limine to Preclude Debtor from Offering Evidence Regarding the Likelihood of Success, Complexity, and Expense of Claims the City Seeks to Settle with the Forbearance and Optional Termination Agreement* (the "Motion in Limine") in the United States Bankruptcy Court for the Eastern District of Michigan (the "Bankruptcy Court") seeking entry of an order to preclude the introduction of evidence by the debtor, the City of Detroit (the "City" or the "Debtor"), supporting the complexity, expense, inconvenience, delay, or probability of success in potential litigations arising from the claims purportedly being resolved in connection with the Debtor's motion to approve the Forbearance and Optional Termination Agreement.

**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 Objectors 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)** you or your attorney must:<sup>1</sup>

---

<sup>1</sup> Concurrently herewith, the Objectors are seeking expedited consideration and shortened notice of the Motion *in Limine*. If the Court grants such expedited consideration and shortened notice, the Objectors will file and serve notice of the new response deadline. The Motion *in Limine*. If the Court grants such expedited consideration and shortened notice, the Objector will file and serve notice of the new response deadline.

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

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

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

James H.M. Sprayregen, P.C.  
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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.**

---

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



Dated: September 18, 2013

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**Exhibit 3**

**None [Brief Not Required]**



**Exhibit 4**

**None [Separate Certificate of Service to be Filed]**

**Exhibit 5**

**None**

**Exhibit 6A**

**Excerpts of Deposition of Kevyn D. Orr**

1 Jones Day.  
2 **A. Absolutely.**  
3 Q. You may have or did from local counsel.  
4 **A. Yes.**  
5 Q. And you can't recall whether you did from the City's  
6 law department.  
7 **A. Yes.**  
8 Q. Are you waiving the attorney-client privilege in  
9 connection with the motion to assume the forbearance  
10 agreement?  
11 **MR. SHUMAKER:** Objection, could call for  
12 the revelation of attorney-client communication.  
13 You can answer the question, but yes or no.  
14 **A. No.**  
15 **BY MR. HACKNEY:**  
16 Q. If I ask you questions regarding the legal advice  
17 rendered to you in connection with the forbearance  
18 agreement's negotiation or execution, you will refuse  
19 to answer those questions on the grounds of the  
20 attorney-client privilege; is that correct?  
21 **MR. SHUMAKER:** If you're asking what the  
22 advice is, certainly. The communications between  
23 counsel and what he was -- what he was advised on,  
24 certainly.  
25 **THE WITNESS:** Right.

1 factors were considered by Mr. Orr, but obviously if  
2 you're going to ask what he was -- what he was advised  
3 by counsel, then I'm going to instruct him not to  
4 answer.  
5 **A. When I say more than likely, that's -- that's exactly**  
6 **the distinction that I'm trying to make. Did I have**  
7 **discussions with my counsel? Yes. Did those**  
8 **discussions take into consideration some of those**  
9 **factors? Yes. Am I going to tell you what those**  
10 **discussions were and what, if any, conclusions were**  
11 **made? No.**  
12 **BY MR. HACKNEY:**  
13 Q. Okay. Fair enough.  
14 On July 15, 2013, the City entered into  
15 what we're going to call the forbearance agreement  
16 with the Swap counterparties and the service  
17 corporations; is that correct?  
18 **A. Yes.**  
19 Q. When did negotiations around that agreement with the  
20 Swap counterparties begin after your appointment?  
21 **A. I think there were discussions about negotiations**  
22 **almost immediately after my appointment. My specific**  
23 **knowledge -- when you say negotiations, what do you**  
24 **mean?**  
25 Q. Well, let me -- let me ask it a different way, which

1 **BY MR. HACKNEY:**  
2 Q. Okay. That's correct?  
3 **A. Yes. That is correct.**  
4 Q. So if I ask you what your view is on the likelihood  
5 that the City's Swap and validity arguments will  
6 prevail, you will assert the attorney-client  
7 privilege; is that correct?  
8 **A. Yes, more than likely.**  
9 Q. If I ask you your view on the likelihood that the  
10 pledge of the gaming revenues under the Michigan  
11 Gaming Act is an invalid pledge, you'll assert the  
12 attorney-client privilege, correct?  
13 **A. Yes, more than likely.**  
14 Q. If I ask you questions regarding the likelihood that  
15 the City would prevail on a claim or defense against  
16 the Swap counterparties, you'll assert the  
17 attorney-client privilege, correct?  
18 **A. Yes, more than likely.**  
19 Q. And I guess I gotta clarify. When you say more than  
20 likely, I mean are you asserting the privilege with  
21 respect to those types of questions? I'm trying to  
22 save having to --  
23 **A. Sure.**  
24 **MR. SHUMAKER:** Let me state for the record  
25 you can ask questions as to whether those -- those

1 is isn't it true that Mr. Buckfire was the lead  
2 negotiator for the City on the business terms of what  
3 became the forbearance agreement?  
4 **A. Yes.**  
5 Q. And Mr. Buckfire has testified that the negotiations  
6 in earnest regarding what became the forbearance  
7 agreement were conducted between June 4th and  
8 June 11th of 2013?  
9 **A. I don't recall those specific dates, but I think**  
10 **that's the right time frame. Let me -- let me try to**  
11 **be as clear as I can so we can move on. We began**  
12 **talking, discussing ways with my advisors, without**  
13 **discussing what we discussed, to provide the City with**  
14 **liquidity almost immediately upon my appointment. The**  
15 **negotiations that you're referring to I believe did**  
16 **occur within that time frame.**  
17 Q. Okay. So you don't have a basis as you sit here today  
18 to contradict Mr. Buckfire's recollection of when the  
19 key negotiations over the business terms of the  
20 forbearance agreement were conducted?  
21 **A. No. It might be earlier, but that's the approximate**  
22 **time frame.**  
23 Q. And as he was the lead negotiator, he's probably the  
24 guy who would know, right?  
25 **A. Sure, absolutely.**

1 various obligations both under the COPs and the Swap?  
2 **A. I believe that's true.**  
3 Q. They don't have any independent sources of income?  
4 **A. To the best of my knowledge, they do not.**  
5 Q. And your view today is that the City of Detroit is  
6 insolvent, correct?  
7 **A. Yes, yes.**  
8 Q. And fair to assume that by extension the service  
9 corporations are also insolvent, too?  
10 **MR. SHUMAKER:** Objection, calls for  
11 speculation.  
12 **A. I don't know if that's true or not.**  
13 **BY MR. HACKNEY:**  
14 Q. Now, isn't it true that the composition of the service  
15 corporations' boards of directors includes three City  
16 officers and at least one City Council member?  
17 **A. Yes. I think I said before there are City employees**  
18 **and City representatives on the boards.**  
19 Q. And in fact the person who signed the forbearance  
20 agreement on behalf of the service corporations was  
21 the president of both service corporations, correct?  
22 **A. Yes, I believe so.**  
23 Q. And her name is Cheryl Johnson, right?  
24 **A. Yes.**  
25 Q. And she is also the City's finance director, correct?

1 **course and scope of their employment as employees of**  
2 **the City.**  
3 Q. Okay. So as you sit here today, you can't say that  
4 that indemnification policy would extend to City  
5 employee actions taken in their capacity as service  
6 corporations --  
7 **A. Correct.**  
8 **MR. SHUMAKER:** Objection, calls for a legal  
9 conclusion.  
10 **BY MR. HACKNEY:**  
11 Q. I will -- I'm sorry.  
12 **A. Okay.**  
13 Q. As emergency financial manager, you control the salary  
14 of all City employees; isn't that correct?  
15 **A. As emergency manager.**  
16 Q. As emergency manager, right.  
17 **A. Right.**  
18 Q. Sorry. Is that the proper --  
19 **A. It changed with Public Act 436. Public Act 72 was EFM**  
20 **and now I'm an EM.**  
21 Q. Okay. Got to get my lingo.  
22 **A. Yeah.**  
23 Q. And you do, as emergency manager, control the salary  
24 of all City employees, correct?  
25 **A. I have the authority to control the salary of all City**

1 **A. Yes.**  
2 Q. Okay. Portia Roberson --  
3 **A. Um-hm.**  
4 Q. -- is the City's corporation counsel, right?  
5 **A. Yes.**  
6 Q. And she's also on the board of both service  
7 corporations, correct?  
8 **A. To the best of my knowledge, that's true.**  
9 Q. Do you know who made the decision at the service  
10 corporations to enter into the forbearance agreement?  
11 **A. I do not.**  
12 Q. Did you have any conversations with either Ms. Johnson  
13 or Ms. Roberson about the service corporations  
14 entering into the forbearance agreement?  
15 **A. No.**  
16 Q. Isn't it true that the policy of the City is to  
17 indemnify the service corporation directors for  
18 actions they take in their capacity as City employees?  
19 **A. I don't know that.**  
20 Q. You don't know if that's the policy of the City?  
21 **A. I do not. I know the City has an indemnification**  
22 **policy. I don't know if it applies to the service**  
23 **corporations.**  
24 Q. Okay, but does it apply to the City employees?  
25 **A. It applies to City employees acting within their**

1 **employees. I have not exercised that authority for**  
2 **all City employees.**  
3 Q. Okay. And you have the power to reduce those City  
4 employee salaries to zero if you choose, correct?  
5 **A. I think I do, yes.**  
6 Q. And you have done that on at least one prior occasion,  
7 I believe, correct?  
8 **A. Yes, I did do that.**  
9 Q. Okay. Now, are you aware that the insurers, the Swap  
10 insurers, like Syncora and FGIC, contend that the  
11 hedges cannot be terminated without their consent  
12 where there are termination events or events of  
13 default?  
14 **A. I have heard that. I m -- I have no independent**  
15 **awareness of that.**  
16 Q. So when did you first hear that?  
17 **A. I think it was all caught up in this time frame of**  
18 **the -- of the discussion after the agreement in**  
19 **principle, before the forbearance agreement was**  
20 **reached.**  
21 Q. Your best recollection is that you heard that prior to  
22 the execution of the forbearance agreement?  
23 **A. I believe it may have been prior to execution.**  
24 Q. But you have taken -- you have taken no steps to  
25 evaluate whether the City concurs with the insurers'

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1 construction on this point?

2 **A. No. I don't think that's exactly true. I think there**  
3 **were -- as I said before, there were a series of**  
4 **letters and discussions that went on from the second**  
5 **week of June throughout some point in July where I**  
6 **believe there may have been discussions in that**  
7 **regard, validity of that point.**

8 **Q. Okay. But if I ask you to express the City's view on**  
9 **the legal merits of the insurers' contention that they**  
10 **have the right to consent, you'll decline to answer**  
11 **those questions because it tends to reveal the**  
12 **attorney-client privilege.**

13 **MR. SHUMAKER: That's right and also calls**  
14 **for a legal conclusion, yes.**

15 **MR. HACKNEY: But you'll -- I want to save**  
16 **a big string of questions, so if I want to ask him**  
17 **what are the pros and cons of the argument, who's**  
18 **likely to win, how will it all come out --**

19 **BY MR. HACKNEY:**

20 **Q. You won't answer those questions on the grounds of**  
21 **the -- because it would tend to reveal attorney-client**  
22 **advice, correct?**

23 **MR. SHUMAKER: Well, I don't want to**  
24 **prevent you from asking any questions and I don't --**  
25 **but if he has an understanding independent of advice**

1 **A. I will assert the privilege.**

2 **Q. And if I ask you what are the arguments for and**  
3 **against this point, you'll assert the privilege.**

4 **A. I will assert the privilege, but I am aware there are**  
5 **a number of objections that have been filed in the**  
6 **case that have addressed those issues and none of them**  
7 **have caused me any surprise.**

8 **Q. If I said that the City -- if I asked you what the**  
9 **City's view is on -- well, let me take a step back.**

10 **Do you agree that the insurers can block an**  
11 **early termination of the Swap, that this would be**  
12 **important to assessing whether the City was in danger**  
13 **of owing a termination payment?**

14 **MR. SHUMAKER: Objection, calls for a legal**  
15 **conclusion.**

16 **A. Yes, same thing. I'd only have a response to that**  
17 **based upon discussions I've had with counsel.**

18 **BY MR. HACKNEY:**

19 **Q. Do you agree that the insurers can block a**  
20 **termination, that it would make sense to negotiate**  
21 **with the insurers to determine whether you can secure**  
22 **their agreement not to consent to any termination?**

23 **MR. JURGENS: Objection, form.**

24 **MR. SHUMAKER: Same objection.**

25 **A. Same response. It would only be based upon**

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1 **he's given -- but clearly to the extent it's going to**  
2 **reveal attorney-client communication, I will tell him**  
3 **not to answer.**

4 **MR. HACKNEY: Okay. I'll ask him that.**

5 **BY MR. HACKNEY:**

6 **Q. Does the City concur in the insurers' view?**

7 **MR. SHUMAKER: Objection, calls for a legal**  
8 **conclusion and could ask for attorney-client**  
9 **communications.**

10 **MR. HACKNEY: Are you instructing him not**  
11 **to answer?**

12 **MR. SHUMAKER: To the extent that the**  
13 **question goes to that, yes.**

14 **A. Maybe I can help out in this line of questioning.**  
15 **Any -- I have not acted as an attorney on this job for**  
16 **the aforementioned reasons, so any opinion that I**  
17 **would express on behalf of the City in this regard**  
18 **would be solely as a result of communications with**  
19 **counsel and discussions.**

20 **BY MR. HACKNEY:**

21 **Q. That was my expectation. So if I ask you if the City**  
22 **concurred, that's going to get into what your lawyer**  
23 **thinks.**

24 **A. That's exactly right.**

25 **Q. So you -- you will assert the privilege.**

1 **discussions I've had with counsel.**

2 **BY MR. HACKNEY:**

3 **Q. Are you aware that the insurers contend that they have**  
4 **the right to control all actions that may be taken by**  
5 **the Swap counterparties in connection with the -- with**  
6 **the Swaps?**

7 **A. I am aware of that, yes.**

8 **Q. When did you first develop that awareness?**

9 **A. During some course of the correspondence that occurred**  
10 **during this time frame that we previously discussed**  
11 **today.**

12 **Q. And have you taken steps to evaluate whether the City**  
13 **concurs with the insurers' construction of the**  
14 **operative documents on this point?**

15 **A. Have we taken steps? Yes.**

16 **Q. Yeah. And what is the City's position?**

17 **MR. SHUMAKER: Objection, calls for the**  
18 **provision of attorney-client communications, and I**  
19 **will instruct him not to answer.**

20 **BY MR. HACKNEY:**

21 **Q. Yeah, I'm just going -- I'm making a record here.**

22 **Okay? I don't want to have -- I tried to --**

23 **A. I'm with you. I'm with you.**

24 **Q. And if I ask you what the arguments are on both sides**  
25 **of this point, you'll also refuse to answer on the**

1 Q. And what advisors did you rely upon in making this  
2 decision?

3 **A. My attorneys, Mill -- my investment banker, Miller**  
4 **Buckfire; our accountants, Ernst & Young; virtually --**  
5 **virtually -- Conway McKenzie, our operational advisor,**  
6 **virtually all of them.**

7 Q. All of your third party advisors?

8 **A. Yes, yes.**

9 Q. And anyone else that you relied upon in making the  
10 decision?

11 **A. Oh, probably members of my immediate staff such as my**  
12 **senior advisor, chief of staff, but less so. More of**  
13 **my outside third party advisors.**

14 Q. What documents did you rely upon in making the  
15 decision, if any?

16 **A. We looked at a number of -- the term sheet, the actual**  
17 **draft of the forbearance agreement. There may have**  
18 **been some e-mails. I just recall a lot of telephone**  
19 **calls. There may have been some forecast, cash**  
20 **forecast, and actuals, and some of the public reports**  
21 **I had issued regarding our cash position.**

22 Q. Any other documents you can remember considering as  
23 part of this decision to enter into the forbearance  
24 agreement?

25 **A. There may have been correspondence. As I said, there**

1 **were letters that were exchanged between Mr. LeBlanc**  
2 **and myself, and others, the letter you showed me**  
3 **today. I'm just trying to capture the universe of**  
4 **what would have been included, but any -- any and all**  
5 **documents related to this that I would have seen would**  
6 **probably fall under that characterization.**

7 Q. Any legal memoranda from Jones Day that you considered  
8 in making this decision?

9 **A. Yes, probably.**

10 Q. Okay. Written legal memoranda that you reviewed?

11 **A. Yeah, including e-mails. Yeah.**

12 Q. Now, did you take time to familiarize -- to  
13 familiarize yourself with any of the legal documents  
14 relating to the COPs Swap structure in connection with  
15 your decision to execute the forbearance agreement?

16 **A. I relied -- I may have seen them, but I relied upon**  
17 **consultation with my counsel and investment bankers.**

18 Q. The documents I'm referring to are -- can we agree  
19 they're relatively complicated legal documents?

20 **A. Yeah, I'd say they're not simple documents. It's not**  
21 **a -- you know, an auto purchase contract, yeah.**

22 Q. Right. So can I fairly characterize that -- that you  
23 may have looked at the documents, but you didn't  
24 attempt to master -- master them in terms of their  
25 legal ins and outs?

1 **A. Yeah. That's a --**  
2 **MR. SHUMAKER:** Object to form.

3 **A. That's a fair characterization. As I said, I'm trying**  
4 **to stay away from acting as an attorney in this job.**

5 **BY MR. HACKNEY:**

6 Q. Okay.

7 **A. For a number of reasons.**

8 Q. So you relied on your advisors to explain to you how  
9 the COP Swap agreements worked?

10 **A. Yes.**

11 Q. And you also relied on them to explain to you how the  
12 COP Swap agreements worked in conjunction with the  
13 forbearance agreement that you were about to execute?

14 **MR. JURGENS:** Object to form.

15 **A. Yes.**

16 **BY MR. HACKNEY:**

17 Q. So what is the relationship between the forbearance  
18 agreement and the COPs Swap structure?

19 **A. Well, my understanding is that the forbearance**  
20 **agreement is related to the Swaps structure, but that**  
21 **the COPs structure is unrelated.**

22 Q. Okay. So the forbearance agreement is part of the  
23 same subject matter as the collateral agreement and  
24 the Swaps agreement, but not the COPs part of the  
25 structure?

1 **A. That's my understanding.**

2 Q. Okay. In your legal career, have you come across the  
3 concept of the idea that two different contracts can  
4 be part of one integrated transaction?

5 **A. Sure. Yes.**

6 Q. You're familiar with that as an idea?

7 **A. Oh, yeah, sure.**

8 Q. Okay. What do you understand that to mean?

9 **MR. SHUMAKER:** Objection, form.

10 **A. There are a number of ways that two different**  
11 **documents were -- may refer to the other, as simple as**  
12 **attachments, exhibits, the master -- the master**  
13 **service agreement on a loan, for instance. There are**  
14 **a number of ways that one document can relate to**  
15 **another as explicitly expressed and intended.**

16 **BY MR. HACKNEY:**

17 Q. Yeah, and I know this is a -- you know, we're not  
18 talking about was the stoplight red or green here, but  
19 you are also a lawyer with a relatively --

20 **A. I was.**

21 Q. -- sophisticated clientele and experience?

22 **A. Well --**

23 Q. You understand the idea that two different contracts  
24 can form part of one larger agreement?

25 **A. Oh, sure. Yeah.**

1 Q. Is the forbearance agreement part of an integrated  
2 transaction with the amended Swap agreements?  
3 **MR. SHUMAKER:** Objection, calls for a legal  
4 conclusion.  
5 **A.** Yeah, I'm going to stay away from characterizing it as  
6 an integrated transaction. That may have legal  
7 consequence. I know they are related.  
8 **BY MR. HACKNEY:**  
9 Q. Okay. They are related, but you can't answer today  
10 whether they're part of an integrated transaction as  
11 the person who executed it on behalf of the City?  
12 **A.** Yeah.  
13 **MR. SHUMAKER:** Same objection.  
14 **A.** Yeah, because -- because of legal implications of  
15 using that nomenclature.  
16 **BY MR. HACKNEY:**  
17 Q. Okay. So it may be, it may not be, you just don't  
18 know?  
19 **A.** Precisely. I'll rely on the attorneys to characterize  
20 that.  
21 Q. Is the forbearance agreement part of an integrated  
22 transaction with the collateral agreement?  
23 **MR. SHUMAKER:** Same objection.  
24 **A.** Same answer. I'll rely on the attorneys to  
25 characterize it as integrated. I know I signed the

1 legal question?  
2 **A.** I'm saying I can't reveal attorney-client  
3 communications, and based upon the characterization, I  
4 have formed no independent decision outside of  
5 discussions with my attorney as to whether or not  
6 they're integrated.  
7 Q. Okay. Let me ask you the reverse question, which is,  
8 is the forbearance agreement a separate agreement from  
9 the collateral agreement?  
10 **A.** Is it a separate agreement?  
11 Q. Yeah.  
12 **A.** I believe it's related to it, but yeah, it was a  
13 separate agreement, sure. It wasn't entered into  
14 contemporaneously.  
15 Q. Meaning one that does not form part of a common  
16 agreement with the collateral agreement?  
17 **A.** Here again, you're using a characterization as common  
18 agreement or integrated. I'm going to stay away  
19 because those may have legal connotations. What I  
20 know is the forbearance agreement was entered into in  
21 2009, and the collateral agreement attempts to resolve  
22 issues of default that are raised by the forbearance  
23 agreement and also including obligations of the City.  
24 Q. Isn't it -- I'd like to shift and ask you a question  
25 about the service agreements between the City and the

1 forbearance agreement.  
2 **BY MR. HACKNEY:**  
3 Q. You did?  
4 **A.** Yes.  
5 Q. So it may be, it may not be, you don't know?  
6 **A.** Correct.  
7 Q. And did you consider any of those questions when you  
8 entered into the forbearance agreement?  
9 **A.** We may have had some discussions. The question such  
10 as whether they're integrated or supersede or are  
11 related may have been discussed.  
12 Q. But as you sit here today, you can't answer my  
13 question about whether it is integrated into other  
14 agreements or not?  
15 **A.** True. I'm going to re -- because of the possible  
16 legal implications of anything I say, I'm going to  
17 rely on our counsel.  
18 Q. Okay. Well, I guess there are legal implications of  
19 all of the testimony that you give today --  
20 **A.** Yeah.  
21 Q. -- both good and bad.  
22 **A.** Right.  
23 Q. So I guess are you saying that you can't reveal  
24 attorney-client communications or are you saying that  
25 you just don't know the answer to this particular

1 service corporations.  
2 **A.** Okay.  
3 Q. Isn't it true that the City is in default of its  
4 obligations under the service agreements because it  
5 missed the --  
6 **A.** June 14th payment?  
7 Q. That's right.  
8 **A.** We're in default.  
9 Q. Okay. And isn't it also true that the City is not  
10 proposing to cure those defaults in connection with  
11 the assumption of the forbearance agreement?  
12 **A.** I believe that's true.  
13 Q. And you would agree that the City is not going to  
14 provide assurances that it will perform with the  
15 service agreements in the future, correct, as part of  
16 the assumption motion?  
17 **A.** I'm going to be careful here because we're -- we're  
18 trying to have discussions about what we're going to  
19 do with regard to the proposal, so I don't want to say  
20 now something that may or may not occur in the future,  
21 but there is no present intent -- in response to your  
22 question, no present intent to do that.  
23 Q. You certainly haven't represented that you will as  
24 part of the assumption motion?  
25 **A.** Yes.



1 **that cash in terms of going forward.**  
 2 Q. Now, if the collateral agreement operates the trapped  
 3 cash automatically upon an event of default under the  
 4 Swap --  
 5 **A. Um-hm.**  
 6 Q. -- is there anything in the forbearance agreement that  
 7 alters that mechanism?  
 8 **MR. SHUMAKER:** Objection, calls for legal  
 9 conclusion.  
 10 **A. Yeah, here again, your conclusion if it acts to trap**  
 11 **automatically, I don't know if I would characterize it**  
 12 **that way. I know that the agreements work that money**  
 13 **comes in on a daily basis. That money is put into I**  
 14 **think one account. At the end of each month, some**  
 15 **portion of that money is sent out to another account,**  
 16 **and every quarter that money is disbursed. I'm not**  
 17 **going to characterize as to whether or not it would --**  
 18 **it would change that mechanism automatically.**  
 19 **BY MR. HACKNEY:**  
 20 Q. Okay. You can't say if it does or it doesn't?  
 21 **A. Correct.**  
 22 Q. And can you say here today whether the collateral  
 23 agreement operates automatically or does not?  
 24 **A. The collateral agreement, it's my understanding, using**  
 25 **your words automatically, operates to trap cash, but**

1 **automatically.**  
 2 Q. Okay. And is that based on conversations you've had  
 3 with counsel?  
 4 **A. Yes.**  
 5 **Q. And if I ask you for the pros and cons of that**  
 6 **argument as to who's likely to win and how the City**  
 7 **came to its view, you would refuse to answer those**  
 8 **questions on the basis of the attorney-client**  
 9 **privilege, correct?**  
 10 **A. Yes, sir.**  
 11 Q. Now, you also mentioned that the forbearance  
 12 agreement -- or we talked about the idea that the  
 13 forbearance agreement provides for a workable unwind  
 14 of the Swap, correct?  
 15 **A. Right.**  
 16 **MR. JURGENS:** Objection to form.  
 17 **BY MR. HACKNEY:**  
 18 Q. How does it do that?  
 19 **A. Well, my understanding, as I said before, in the**  
 20 **forbearance agreement, the parties agree to certain --**  
 21 **certain events that we will pay -- meaning the City --**  
 22 **will pay a discount, an optional termination payment**  
 23 **or cause that payment to be made; that in**  
 24 **consideration for that payment, the parties to the**  
 25 **agreement will release any claims they have to**

1 **maybe not in the way that is detrimental to the City.**  
 2 **It has two accounts, a subrecipient holding account --**  
 3 **COURT REPORTER:** Subrecipient?  
 4 **THE WITNESS:** Subrecipient.  
 5 **A. -- two accounts, an initial general account and then a**  
 6 **subrecipient account. We'll just call them that.**  
 7 **Those monies come in -- so when you use**  
 8 **automatic, those monies come in daily, but they're**  
 9 **disbursed according to the terms, and have been**  
 10 **disbursed according to their terms.**  
 11 Q. I'm not talking about interim trapping that --  
 12 **A. Right.**  
 13 Q. -- happens in the first part of the month until the  
 14 whole bank account builds up.  
 15 **A. Right.**  
 16 Q. I'm talking about what I'll call big time cash  
 17 trapping upon an event of default --  
 18 **A. Right.**  
 19 Q. -- or termination event.  
 20 **A. Right.**  
 21 Q. So let me go back. I guess my question is, like, do  
 22 you have a view on whether that big time cash trapping  
 23 is supposed to happen automatically under the  
 24 collateral agreement?  
 25 **A. My understanding is that it does not happen**

1 **trapping the casino revenue; and, here again, the**  
 2 **parties will release their liens and any potential**  
 3 **claims they have against the insured.**  
 4 Q. The discount that you obtained through the  
 5 negotiations that Mr. Buckfire led --  
 6 **A. Right.**  
 7 Q. -- is a discount to the so-called early termination of  
 8 the Swap.  
 9 **A. Yes.**  
 10 Q. Correct?  
 11 **A. Yes.**  
 12 Q. So if you just read the Swap agreement, it would -- it  
 13 implies a termination value, correct?  
 14 **MR. JURGENS:** Objection, form.  
 15 **MR. SHUMAKER:** Objection, Calls for --  
 16 **BY MR. HACKNEY:**  
 17 Q. It implies an early termination value?  
 18 **MR. JURGENS:** Objection to form.  
 19 **A. We'll use a nomenclature. It implies a value for**  
 20 **termination fee that I understand represents the loss**  
 21 **expectation of the counterparties.**  
 22 **BY MR. HACKNEY:**  
 23 Q. That's exactly right.  
 24 And the discount you negotiated in the  
 25 forbearance agreement is a discount to that amount in

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1 Q. I want to go back to the forbearance agreement. We  
2 were talking about the things that it does in terms of  
3 providing access to casino revenues, allowing for an  
4 unwind of the Swap. These were my descriptions of  
5 it --  
6 **A. Right.**  
7 Q. -- candidly, from your motion --  
8 **A. Right.**  
9 Q. -- but we were talking generally about these things.  
10 The valuable consideration that the City gets under  
11 the forbearance agreement are all things that it can  
12 exercise without any consent from any other party,  
13 correct?  
14 **MR. SHUMAKER:** Objection, calls for a legal  
15 conclusion.  
16 You can answer.  
17 **A. That's my understanding of the way it works, yeah.**  
18 **BY MR. HACKNEY:**  
19 Q. Do you agree that the effect of the forbearance  
20 agreement, if the option is exercised, is to modify  
21 the amount of the termination payment owed under the  
22 Swaps down to whatever percentage is applicable as of  
23 that date?  
24 **MR. JURGENS:** Objection to form.  
25 **MR. SHUMAKER:** Objection, form, calls for a

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1 legal conclusion.  
2 **A. If you're talking about the forbearance agreement and**  
3 **the formula that's involved for the percentage change**  
4 **depending upon -- as linked to time, as well as the**  
5 **requirement that we get approval of the agreement at a**  
6 **certain time period, yes, that's true.**  
7 **BY MR. HACKNEY:**  
8 Q. Okay. I mean the effect of the forbearance agreement  
9 is that instead of owing what the City would owe under  
10 the Swap, which is the hundred percent of the  
11 termination value, it now owes -- only owes the  
12 discounted amount?  
13 **A. Yes.**  
14 Q. So the effect is that it modifies that provision in  
15 the Swap in a way that's favorable for the City?  
16 **MR. JURGENS:** Objection to form.  
17 **A. That's a fair characterization.**  
18 **THE WITNESS:** Sorry.  
19 **BY MR. HACKNEY:**  
20 Q. Now, the forbearance agreement, another part of it,  
21 that it allows the City to direct the Swap  
22 counterparties to terminate the Swap, correct?  
23 **MR. SHUMAKER:** Objection, calls for a legal  
24 conclusion.  
25 **MR. JURGENS:** Objection.

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1 **MR. HACKNEY:** I understand you want to  
2 preserve objections. This is the individual who  
3 signed the agreement --  
4 **A. Yeah, the --**  
5 **MR. HACKNEY:** -- so I'm asking him for his  
6 understanding.  
7 **MR. SHUMAKER:** Okay. That's fine.  
8 **A. Yeah, the mechanism is such that it's not our**  
9 **termination, that it's the parties -- it's the**  
10 **counterparties' termination.**  
11 **BY MR. HACKNEY:**  
12 Q. That's right. It's their termination right, but the  
13 City gets to direct them to exercise it.  
14 **A. Correct.**  
15 Q. Okay. Is that a right that the City currently  
16 possesses under any of the other agreements to the  
17 best of your knowledge?  
18 **A. To the best of my knowledge, no.**  
19 Q. That's a right it obtained as a result of the  
20 forbearance agreement, correct?  
21 **A. Correct.**  
22 Q. And the City's able to exercise that right to direct  
23 the actions of the Swap counterparties without the  
24 consent of any third party, correct?  
25 **A. To the best of my knowledge, that's true.**

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1 Q. Now, if Syncora has the right to control all actions  
2 of the Swap counterparties under the contract  
3 administration agreement, your position is that the  
4 forbearance agreement overrides that provision in the  
5 contract administration agreement; is that correct?  
6 **MR. SHUMAKER:** Objection, calls for  
7 speculation.  
8 **A. I think it calls for speculation and it also**  
9 **essentially implies a legal analysis. I will defer to**  
10 **my counsel as to what our position would be. What I**  
11 **do know is that forbearance agreement gives us certain**  
12 **rights.**  
13 **BY MR. HACKNEY:**  
14 Q. Okay. What if I said that when it comes to the  
15 interaction between Syncora's alleged control rights  
16 under the contract administration agreement and the  
17 City's alleged control right under the forbearance and  
18 optional termination agreement, you would refuse to  
19 answer those questions on the grounds that it would  
20 get into attorney-client advice that you've received  
21 from your counsel, correct?  
22 **A. That is correct.**  
23 **MR. SHUMAKER:** It most likely would,  
24 depending upon how you phrased the question.  
25 **MR. HACKNEY:** I'm asking.

1 any termination events where the Swap counterparty was  
2 the sole affected party?  
3 **MR. SHUMAKER:** Objection, calls for a legal  
4 conclusion.  
5 **A. Yeah.**  
6 **BY MR. HACKNEY:**  
7 Q. I'm not asking for the advice. I'm asking had you  
8 evaluated that.  
9 **A. We had evaluated a number of issues and suffice it to**  
10 **say that was probably one of them.**  
11 Q. You can't remember whether it was or it wasn't?  
12 **A. I can't remember if --**  
13 Q. Pretty technical question?  
14 **A. Yeah. As I said before, I'm not trying to be evasive.**  
15 **It's just that the conversations I have with my**  
16 **counsel, investment banker, you know, on a daily**  
17 **basis, are -- there are days when there are dozens.**  
18 Q. Now, if I asked you whether you had evaluated whether  
19 there were any events of default under the Swap where  
20 the Swap counterparties were the defaulting party --  
21 **A. Sure.**  
22 Q. -- can you answer that question?  
23 **A. Whether I personally or whether it had been done on**  
24 **the payoff of the team?**  
25 Q. Either.

1 **A. I personally don't recall doing that. I do recall**  
2 **that members of the team and I may have had those**  
3 **discussions, yes.**  
4 Q. Is it fair to say that if I ask you to describe to me  
5 what potential events of default or termination events  
6 where the Swap counterparties were the sole affected  
7 party or the defaulting party --  
8 **A. Right.**  
9 Q. -- you would decline to answer those questions on the  
10 basis of the attorney-client privilege?  
11 **MR. SHUMAKER:** To the extent they would  
12 reveal those communications, of course.  
13 **MR. HACKNEY:** Well, I mean --  
14 **A. Yes, I would.**  
15 **BY MR. HACKNEY:**  
16 Q. Okay. Even if I ask you about your understanding of  
17 the position, your position is that you don't have one  
18 independent of your legal advisors.  
19 **A. I -- on this question, I don't have one independent of**  
20 **my legal advisors.**  
21 Q. So I can't ask you what your understanding is --  
22 **A. Right.**  
23 Q. -- because it will necessarily reveal the legal advice  
24 you got.  
25 **A. I'm trying to see if there's a way I can answer your**

1 **question without implicating discussions. No. It**  
2 **might -- it might implicate some discussions I had**  
3 **with counsel.**  
4 Q. Okay. Mr. Orr, is the forbearance agreement a  
5 settlement?  
6 **MR. SHUMAKER:** Objection, calls for a legal  
7 conclusion.  
8 **A. Let me say this. I'm aware that the motion pending in**  
9 **front of the Court is both for -- we call in**  
10 **bankruptcy, what I used to call in bankruptcy, both an**  
11 **assumption of an agreement and a ^ 9019 settlement.**  
12 **BY MR. HACKNEY:**  
13 Q. So it's been held out by the City as a settlement,  
14 correct?  
15 **A. Yeah. I think there's a debate as to whether or not**  
16 **you need to seek settlement approval in a Chapter 9**  
17 **case, but we are.**  
18 Q. Okay. Does the forbearance agreement settle any  
19 claims on a final basis?  
20 **A. I think it does.**  
21 Q. Isn't it true, though, that if the City doesn't  
22 exercise the option, everyone goes back to the status  
23 quo ante?  
24 **A. Yes. That's the contingency, yes.**  
25 Q. Okay. So if that were to happen, everyone's claims

1 would still be in play.  
2 **A. I'm going to be careful with the word claims, but**  
3 **everyone would revert back to the status quo ante.**  
4 Q. Okay. So whatever claims they had at the status quo  
5 ante they'd have again?  
6 **A. Yeah, whatever claims -- technically, whatever claims,**  
7 **colloquially, whatever they had would, revert back to**  
8 **the status quo ante.**  
9 Q. Can we agree that in that eventuality no claims of any  
10 of the parties of the forbearance agreement would have  
11 been finally resolved by the forbearance agreement?  
12 **A. To the best of my knowledge, yes.**  
13 Q. Now, put aside the threat of declaring an early  
14 termination under the Swap --  
15 **A. Right.**  
16 Q. -- which we've discussed extensively today as a right  
17 the Swap counterparties have under the Swap --  
18 **A. Okay.**  
19 Q. -- put that aside. Have you evaluated, separate and  
20 apart from that, whether there are other tort or  
21 contract claims that the Swap counterparties may have  
22 against the City?  
23 **A. I think there were discussions, but, here again, those**  
24 **would be wrapped up in attorney-client communications.**  
25 Q. So if I asked you to reveal the assessment of whether

1 there were other claims that the Swap counterparties  
2 have against the City, you would decline to answer  
3 those questions on the grounds of attorney-client  
4 privilege?  
5 **A. I think I would have to. I do recall discussions, but**  
6 **I think I'd have to decline on the basis of**  
7 **attorney-client privilege.**  
8 Q. Have the Swap counterparties threatened to bring any  
9 claims against the City?  
10 **A. Well, here again, being careful with the word claims,**  
11 **you mean unrelated to the defaults such as tort**  
12 **claims?**  
13 Q. I guess I would say the Swap agreement is one you  
14 understand that's between the Swap counterparties and  
15 the service corporations.  
16 **A. Right.**  
17 Q. Okay. So I'm trying to put that in a box for now.  
18 **A. Right.**  
19 Q. And we've talked about that extensively.  
20 **A. Right.**  
21 Q. So other than any claims they may have against the  
22 service corporations --  
23 **A. Right.**  
24 Q. -- that could absolutely have implications for the  
25 City, but other than that, have the Swap

1 **A. No. I don't recall doing that.**  
2 Q. So you haven't assessed that?  
3 **A. Not me independently, no.**  
4 Q. Okay. And it's not something you took into account as  
5 part of this agreement?  
6 **A. No. We -- there was a discussion about the interest**  
7 **of all the parties. I, independently, did not**  
8 **handicap whether the service corporations might bring**  
9 **a claim against the City. I think there were**  
10 **discussions about it. Many of those discussions would**  
11 **have been caught up in the general discussions that I**  
12 **was having with counsel and my other advisors.**  
13 Q. And you wouldn't be able to discuss them?  
14 **A. No.**  
15 Q. But the service corporations' claims against the City,  
16 those are not resolved by the forbearance agreement,  
17 correct?  
18 **A. If they have any. I don't think they are.**  
19 Q. Let me cut to it. Is it fair to say you haven't given  
20 this any real consideration?  
21 **A. Yeah. We -- it is fair to say that it was -- there**  
22 **was no real deep consideration of it. We did consider**  
23 **it.**  
24 Q. Now, as the City evaluated whether it has claims  
25 against the Swap counterparties --

1 counterparties threatened to bring any other claims  
2 directly against the City?  
3 **A. None that I'm aware of.**  
4 Q. I may have asked you this earlier, but I just -- I  
5 want to make sure that I didn't miss it and so if it's  
6 asked and answered I apologize, but did the City  
7 evaluate whether it is in breach of the collateral  
8 agreement?  
9 **A. Did we evaluate it?**  
10 Q. Yeah.  
11 **A. Yes, I and my consultants evaluated it.**  
12 Q. Is this one where if I asked you the results of those  
13 evaluations you'd decline to answer?  
14 **A. Yes.**  
15 Q. It is true that prior to the forbearance agreement,  
16 the only direct contractual agreement under which both  
17 the City and the Swap counterparties had signed was  
18 the collateral agreement, correct?  
19 **A. To the best of my knowledge, that's correct.**  
20 Q. Now, have the service corporations threatened to bring  
21 any claims against the City?  
22 **A. None that I'm aware of.**  
23 Q. And have you undertaken an assessment of the  
24 likelihood of the service corporations to the extent  
25 they were to assert claims against the City?

1 **A. Um-hm.**  
2 Q. -- okay?  
3 **A. Um-hm.**  
4 **Q. And if I ask you to tell me what claims you have, will**  
5 **you tell me them or will you assert the privilege?**  
6 **MR. SHUMAKER: I would instruct the witness**  
7 **that may implicate attorney-client communications.**  
8 **A. I would have no independent knowledge of what claims**  
9 **may have other than discussions I've had with counsel**  
10 **so I wouldn't answer.**  
11 **BY MR. HACKNEY:**  
12 **Q. Okay. If I ask you what's the likelihood that you'll**  
13 **win on the claims?**  
14 **A. Same answer.**  
15 Q. You would follow the advice --  
16 **A. Yeah.**  
17 Q. -- and assert the privilege?  
18 **A. Yeah.**  
19 Q. Okay.  
20 **A. In my prior life, as an attorney, likely would be a**  
21 **hundred percent.**  
22 Q. Okay.  
23 **A. But I can't say that.**  
24 Q. Well, let me ask you -- let me ask you just a -- sort  
25 of this is your understanding of the forbearance



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1 agreement.  
2 **A. Right.**  
3 Q. What claims are you asking the Court to approve the  
4 settlement of?  
5 **A. In claims that might be had by the parties vis-à-vis**  
6 **each other.**  
7 Q. So any and all claims that they have under the Swaps  
8 or the collateral agreement or the service contracts  
9 or any other contracts --  
10 **A. Yes.**  
11 Q. -- those claims are being resolved by the forbearance  
12 agreement?  
13 **A. To the best of my knowledge, that is true.**  
14 Q. Okay. And the result of the forbearance agreement is  
15 that the City will be able to perform under the  
16 forbearance agreement without being subject to any  
17 liability to any third party?  
18 **A. That is my understanding.**  
19 Q. And so will the Swap counterparties, correct?  
20 **A. That is my understanding.**  
21 Q. It will give you what I'll call a clean closing?  
22 **A. As I said earlier this week, it will bring us to**  
23 **closure and certainty, yes. Earlier today.**  
24 Q. That is also one of the values of this agreement to  
25 both and you the Swap counterparties, you the City?

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1 **A. Right.**  
2 Q. Which is that it absolves you for any liability in  
3 connection with the relevant agreements?  
4 **MR. SHUMAKER: Objection to form.**  
5 **BY MR. HACKNEY:**  
6 Q. As a result of performance under the forbearance  
7 agreement, correct?  
8 **MR. SHUMAKER: Objection calls for**  
9 **speculation.**  
10 **A. My understanding is that it provides us with closure**  
11 **and finality regarding any claims and relationships**  
12 **that the parties have.**  
13 **BY MR. HACKNEY:**  
14 Q. Okay. And there's no trailing liability?  
15 **A. That is correct.**  
16 **Q. And just for the record, if I asked to you assess the**  
17 **likelihood of success of all of the different claims**  
18 **that are being resolved by the forbearance agreement,**  
19 **you would assert the attorney-client privilege and**  
20 **refuse to answer?**  
21 **A. That is correct. I have made no independent**  
22 **assessment outside of any conversation I would have**  
23 **had with counsel and my advisors.**  
24 Q. Now, Mr. Orr, I'm going to speculate you may have  
25 negotiated a settlement or two in your life as a

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1 lawyer.  
2 **A. That's a fair statement.**  
3 Q. And isn't it also fair -- I will tell you I have as  
4 well, but --  
5 **A. Right.**  
6 Q. Isn't it common that settlement agreements typically  
7 involve releases of liability by the parties against  
8 one another?  
9 **A. It is not uncommon for there to be releases in**  
10 **settlement agreements.**  
11 Q. And I will tell you I actually was racking my brain to  
12 see whether I ever entered into a settlement agreement  
13 that didn't have a release. I couldn't think of one.  
14 Have you ever entered into a settlement agreement that  
15 didn't have a release?  
16 **A. Yes.**  
17 Q. Okay. You have?  
18 **A. Yes, I have.**  
19 Q. Okay. Do you know whether the forbearance agreement  
20 contains a release of claims by the parties against  
21 one another?  
22 **MR. SHUMAKER: Objection, calls for legal**  
23 **conclusion.**  
24 You can answer.  
25 **A. Okay. I'd have to read through it and consult with my**

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1 **counsel to make sure. I know the agreement speaks for**  
2 **itself.**  
3 **BY MR. HACKNEY:**  
4 Q. It does, but as you sit here today, I take it you  
5 reviewed the forbearance agreement in connection with  
6 the preparation for your deposition?  
7 **A. Maybe not as in depth as you might think.**  
8 Q. Okay. I know you have a lot on your plate.  
9 **A. I have a lot on my plate.**  
10 Q. But I guess I'm saying are you seriously unaware as to  
11 whether there's a release in the forbearance  
12 agreement?  
13 **A. Seriously or not, I think the forbearance agreement**  
14 **resolved all claims between the parties. Sitting here**  
15 **today without examining it, I'm not aware as to**  
16 **whether or not it specifically has a release.**  
17 Q. Okay. So the -- whether it's in the forbearance  
18 agreement or in the effect of its approval, it  
19 operates as a release for everyone involved?  
20 **A. Yeah. The reality is -- when you asked me the**  
21 **question before as to whether or not it has a release,**  
22 **the reality is that to the extent you asked -- I**  
23 **believe in the motion you asked for assumptions and**  
24 **9019 settlement that the order might well contain a**  
25 **release so -- I wasn't trying to be truculent with**

1 **you. I'm just saying that, yes, the effect of the**  
 2 **approval of the agreement should have that impact.**  
 3 Q. I'm not going to try to go claim by claim because your  
 4 understanding is it releases all claims of the Swap  
 5 counterparties, the service corporations, and the City  
 6 against one another?  
 7 **A. Yes.**  
 8 Q. Now, the Swap insurers, as part of the forbearance  
 9 agreement, they get a release of their insurance  
 10 obligations under the Swap in the event the City  
 11 directs an optional termination, correct?  
 12 **A. Yes, I believe that's true.**  
 13 Q. And this was one of the things that the City has  
 14 touted, which is to say, hey, Swap insurers, pipe down  
 15 this is good for you, right?  
 16 **MR. SHUMAKER:** Objection to form.  
 17 **A. Yeah, without characterizing, you know, the colloquial**  
 18 **characterization, yes, we think that's a benefit.**  
 19 **BY MR. HACKNEY:**  
 20 Q. That's a concept that you've argued in your papers --  
 21 **A. Yes.**  
 22 Q. -- as to why the Swap insurers should be happy?  
 23 **A. Yes.**  
 24 Q. Now, do you understand you -- you have argued that  
 25 this is a benefit to the Swap insurers under the

1 under the agreement?  
 2 **A. As a layperson, I really haven't examined it.**  
 3 Q. So don't know one way or the other?  
 4 **A. Don't know one way or the other.**  
 5 Q. Do you have a view as to whether Syncora or FGIC, for  
 6 that matter, can sue to enforce the agreement?  
 7 **A. I don't have one way or the other.**  
 8 Q. They may have, they may not have?  
 9 **A. Yeah. I'd probably weigh on the side of they don't,**  
 10 **but I -- I don't have a view one way or the other.**  
 11 Q. And have you considered the possibility that if they  
 12 don't have the right to sue to enforce the agreement,  
 13 that they also would not have the right to sue to  
 14 enforce the release that's in the agreement?  
 15 **MR. SHUMAKER:** Objection --  
 16 **A. They might or they might --**  
 17 **MR. SHUMAKER:** -- calls for a legal  
 18 conclusion.  
 19 **A. They might or they might not.**  
 20 **BY MR. HACKNEY:**  
 21 Q. And let's be frank. That's not your concern, right?  
 22 **A. Well, to be honest with you, you know, without getting**  
 23 **into whether or not there may be equitable rights,**  
 24 **estoppel, third party intended, unintended beneficiary**  
 25 **rights, things along those lines, what I do know --**

1 forbearance agreement, correct?  
 2 **A. Yes, I believe so.**  
 3 Q. Are the swap insurers third party beneficiaries as you  
 4 understand it as the signatories to the agreement --  
 5 of the agreement?  
 6 **MR. SHUMAKER:** Objection, calls for a legal  
 7 conclusion.  
 8 **A. Here, I'm not acting as a lawyer as I understand it.**  
 9 **I'll have to decline from answering whether or not**  
 10 **they're third party beneficiaries. As you know,**  
 11 **they're intended beneficiaries, incidental**  
 12 **beneficiaries. A lot of these questions are questions**  
 13 **of fact, so that would draw me into a legal analysis**  
 14 **and I'll stay away from that.**  
 15 **BY MR. HACKNEY:**  
 16 Q. Let me -- let me -- let me -- what I'll do then is  
 17 I'll ask you your understanding as a layperson --  
 18 **A. Okay.**  
 19 Q. -- because you are -- you can say that you're acting  
 20 as a layperson --  
 21 **A. I am.**  
 22 Q. -- so to speak.  
 23 **A. Yes.**  
 24 Q. Okay. As a layperson person, do you have a view one  
 25 way as to whether Syncora is a third party beneficiary

1 **incidental benefits -- what I do know is the**  
 2 **agreement, and what we've said is it provides a**  
 3 **benefit to the insured.**  
 4 Q. That's right, but you obviously don't represent the  
 5 insured, you represent the City?  
 6 **A. I am employed by the governor on behalf of the City,**  
 7 **that is correct.**  
 8 Q. And so if the insurer can't enforce the agreement to  
 9 take advantage of the release, that's the insurer's  
 10 problem, correct?  
 11 **A. Well, without characterizing whether or not it's their**  
 12 **problem or so, my fiduciary duty runs to the City in**  
 13 **its interest; it does not necessarily run to Syncora.**  
 14 Q. Yeah. Can we agree that you certainly didn't  
 15 negotiate into the agreement any specific provision  
 16 granting the insurers the right to sue to enforce that  
 17 provision?  
 18 **A. I made no instruction to my team to negotiate such a**  
 19 **provision.**  
 20 **Q. In entering into the forbearance agreement, did you**  
 21 **consider whether or not the automatic stay would apply**  
 22 **to cash trapping if the City filed for bankruptcy?**  
 23 **MR. SHUMAKER:** Objection, calls for a legal  
 24 **conclusion.**  
 25 **A. Without getting -- here again, there were discussions**

1 because, quite frankly, at the time we were in  
2 negotiating this agreement in June, we were hoping  
3 that this agreement and its announcement was for other  
4 creditors to -- and other stakeholders, including the  
5 labor side, to come in and negotiate additional  
6 agreements. So we may have had discussion about what  
7 the impact, if we filed bankruptcy, would have been,  
8 but, frankly, at this time we were hoping we were  
9 going to get a round of agreements in place.

10 BY MR. HACKNEY:

11 Q. You knew that as of July 15th, when you executed the  
12 forbearance agreement, that bankruptcy was possible?

13 A. Oh, sure. We knew it was possible, yeah.

14 Q. Fair to say that by July 15th, given all the work that  
15 was going on, you were of the view that it was likely?

16 A. No, not really. We had been sued -- the governor and  
17 the treasurer had been sued a few weeks before that.  
18 The following week I believe one union had joined in  
19 that suit and the Monday of the week after that, the  
20 governor and I were sued, and I believe July -- I  
21 don't have a calendar. I believe July 15th was that  
22 Monday.

23 Q. It was.

24 A. Yes. So we signed this agreement and, frankly, even  
25 at that time, because there was a whole lot of things

1 A. No. I -- let's be clear. I think we had them before.  
2 I think we had them around that time because in that  
3 week, when I was sued that Monday, there were  
4 discussions about what they may be and we were signing  
5 this agreement at the time.

6 Q. If I ask you about the specifics of the conversations  
7 you had about whether the automatic stay applied and  
8 the likelihood that it would or wouldn't, you'll  
9 decline to answer those questions on the basis of the  
10 attorney-client privilege, correct?

11 A. Yes, again, today I would have to do that.

12 Q. The one thing I will say that we can agree on, though,  
13 is that if the automatic stay did bar cash trapping,  
14 that would be valuable to the City because at least  
15 during the pendency of the bankruptcy it would then  
16 have access to the casino revenues, correct?

17 A. Well, it's -- here again, it's a hypothetical and  
18 contingent question, but I take your meaning, and what  
19 I would say is I think certainly one of the benefits  
20 of the automatic stay is that you maintain the status  
21 quo and access to cash. There are also provisions  
22 however in the bankruptcy code -- I'm not acting as an  
23 attorney, but I am aware -- of Safe Harbor provisions  
24 related to certain financial instruments and you have  
25 to factor that in as well.

1 going on, there was litigation, there were stays in  
2 place, there were appeals to the state court, it  
3 certainly was possible and we were with doing  
4 contingency planning given the paper, but we have not  
5 made any determination at that point as to whether or  
6 not, excuse me, we were going to file.

7 Q. It was certainly possible enough that it behooved you  
8 to analyze whether the automatic stay might be a way  
9 to get access to the casino revenues, correct?

10 A. Yeah, I don't recall whether or not we did it then or  
11 before or just during that week, but -- but we --  
12 there was some discussion about the impact of the  
13 automatic stay, yes.

14 Q. So is it possible that you did not evaluate the  
15 applicability of the automatic stay in the event of a  
16 bankruptcy prior to executing the forbearance  
17 agreement?

18 MR. SHUMAKER: Objection --

19 A. No.

20 MR. SHUMAKER: -- asked and answered.

21 A. No. What I said is at some point during that time or  
22 even prior we had to have those discussions.

23 BY MR. HACKNEY:

24 Q. You may have had them in advance of July 15th, you may  
25 not have, you just can't remember?

1 Q. And those are?

2 COURT REPORTER: Can you please slow down?

3 THE WITNESS: I'm sorry.

4 BY MR. HACKNEY:

5 Q. Those are risk factors that might make the automatic  
6 stay not applicable?

7 A. That's correct.

8 MR. SHUMAKER: Objection, calls for a legal  
9 conclusion.

10 A. I was informed without telling specific --

11 BY MR. HACKNEY:

12 Q. Right.

13 A. -- conversations that those are issues you have to  
14 take into consideration.

15 Q. And so let me try and collapse this if I can. If I  
16 ask you about whether the casino revenues are special  
17 revenues being applied to indebtedness, you will  
18 refuse to answer?

19 MR. SHUMAKER: You can ask him whether he  
20 considered them, but in terms of likelihood of success  
21 or communication between --

22 BY MR. HACKNEY:

23 Q. I'll do it that way.

24 Did you consider whether there were special  
25 revenues that were accepted from the automatic stay

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1 under 922(d)?  
2 **A. We considered all of these issues including the**  
3 **interaction 922(d) with 362 and I considered them in**  
4 **the context with my counsel.**  
5 Q. Okay. You considered whether 362(b)(17) exception for  
6 Swap collateral applied?  
7 **A. Yes.**  
8 **Q. Did you consider whether the collateral account --**  
9 **rather, the gaming revenues were even property of the**  
10 **estate at all?**  
11 **A. Yes.**  
12 **Q. So you considered all those questions.**  
13 **A. Um-hm.**  
14 **Q. Your counsel rendered advice to you about the**  
15 **likelihood, the pros and cons of the arguments, and**  
16 **you're not at liberty to provide that advice to us**  
17 **because it would invade the attorney-client privilege?**  
18 **A. Yes, I believe that's correct.**  
19 Q. But I do want to get -- I do want to just get your  
20 agreement that the question is important to at least  
21 one of the benefits of the forbearance agreement which  
22 was the interim access to cash during the optional  
23 termination period.  
24 **A. I think the question is relevant.**  
25 Q. Yeah.

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1 **A. Yes.**  
2 Q. In fact the optional termination period, it could end  
3 as soon as on September 16th; at the latest it goes to  
4 June 30, 2014, right?  
5 **A. Correct.**  
6 **MR. SHUMAKER:** Objection, document speaks  
7 for itself.  
8 **A. Yeah, the document --**  
9 **BY MR. HACKNEY:**  
10 Q. Whatever it says --  
11 **A. Yeah.**  
12 Q. -- that's your understanding?  
13 **A. Yes.**  
14 Q. So that -- the forbearance agreement -- let's put it  
15 this way, Mr. Orr. The forbearance agreement gets you  
16 access to cash during the optional termination period.  
17 **A. Yes, I believe that's true.**  
18 Q. If the automatic stay applied, it might get access to  
19 the casino revenue during the whole bankruptcy,  
20 correct?  
21 **A. It might.**  
22 Q. Yeah. We're talking about different things that you  
23 consider as you're analyzing your options, right?  
24 **A. Yeah, correct.**  
25 Q. And this is -- this is a potentially important one

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1 because you might be able to get longer access to cash  
2 from the automatic stay than you were getting from the  
3 forbearance agreement, correct?  
4 **A. Here again, that's a contingent it might, but that has**  
5 **to be drawn up also in discussion of potential risk**  
6 **that Safe Harbor provision would allow the**  
7 **counterparties to exercise their rights and therefore**  
8 **obviate any benefits the City could receive from the**  
9 **automatic stay.**  
10 Q. That's right.  
11 **A. So we considered all of those.**  
12 Q. So just to be clear, if I ask you about the specific  
13 ins and outs of all those potential arguments,  
14 likelihoods of success and so forth, you will not  
15 answer those questions on the basis of the  
16 attorney-client privilege, correct?  
17 **A. That is correct.**  
18 Q. Oh, I know. The City recently argued in court against  
19 yours truly that the automatic stay bars the cash  
20 trapping provisions of the collateral agreement. Are  
21 you aware of that?  
22 **A. I believe I am, yes.**  
23 Q. Yeah. In fact, I think that your spokesman,  
24 Mr. Nowling, may have made statements in the press  
25 about the impact of the judge's rulings. Are you

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1 familiar with those statements?  
2 **A. I am.**  
3 Q. Did the Swap counterparties give their consent to the  
4 City to make those arguments in court?  
5 **A. I don't know.**  
6 Q. And -- so you don't know whether they did or they  
7 didn't?  
8 **A. That is correct.**  
9 Q. You understand that as originally designed the Swaps  
10 were designed to hedge against interest rate risk on  
11 the floating COPs?  
12 **MR. SHUMAKER:** Objection, calls for a legal  
13 conclusion.  
14 **MR. JURGENS:** Objection to form as well.  
15 **A. That is my understanding.**  
16 **BY MR. HACKNEY:**  
17 Q. And I can unpack it if you want. I know we get into  
18 the --  
19 **A. That's my understanding.**  
20 Q. Yeah, okay. Let's just do basics of interest rate  
21 risk, which is if the interest rates go above the  
22 hedge rate, then now the Swap counterparties have to  
23 pay the difference to the service corporations so that  
24 they can pay the difference to the floating rate COPs,  
25 correct?



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1 **MR. SHUMAKER:** Objection, form.  
2 **A. That is my understanding.**  
3 **BY MR. HACKNEY:**  
4 Q. That's how the hedge works.  
5 Now, interest rates do not favor the City  
6 in the Swaps -- we asked that earlier.  
7 **A. Right.**  
8 Q. I will strike that.  
9 But more basics of interest rate hedging,  
10 so as the interest rates go up and start to approach  
11 the hedge, the amount the City owes under the Swap via  
12 service corporations goes down?  
13 **A. That -- that is my understanding.**  
14 Q. And as it crosses over the hedge line, the service  
15 corporation could actually be in the money?  
16 **MR. JURGENS:** Objection to form.  
17 **A. Yeah, here again, we had the discussion about in the**  
18 **money or not, but to the extent your point is saying**  
19 **that they would benefit more from the hedge than the**  
20 **counterparties would, that is my understanding.**  
21 **BY MR. HACKNEY:**  
22 Q. When the interest rates get above the hedge line?  
23 **A. (Nods head).**  
24 Q. That's right.  
25 Okay. Now, when you were entering into the

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1 forbearance agreement on July 17th, what steps did you  
2 take personally to evaluate future -- I'm sorry. I  
3 misspoke, didn't I?  
4 **A. Yeah.**  
5 Q. When you entered into the forbearance agreement on  
6 July 15th --  
7 **A. Right.**  
8 Q. -- what steps did you take prior to that time to  
9 evaluate future interest rate moves?  
10 **A. Any discussions in those -- that regard would have**  
11 **been with our investment bankers and generally with**  
12 **our attorneys. What I'm trying to think of is were**  
13 **there any discussions that I had with Miller Buckfire**  
14 **which would not have been confidential in that regard.**  
15 **I don't think that there were. What I can say is that**  
16 **we evaluated the potentiality of the -- of the**  
17 **interest rate fluctuation as indexed to LIBOR going up**  
18 **or down, but I think most of those, if not all of**  
19 **them, were in communications with one or more of my**  
20 **attorneys.**  
21 Q. And when you say we evaluated the interest rate  
22 fluctuations, that would have been tasked to Miller  
23 Buckfire to do?  
24 **A. Yes, Miller Buckfire in conjunction with folks from**  
25 **Jones Day. Yeah, sure.**

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1 Q. Okay. No disrespect to the fine lawyers at Jones Day.  
2 I don't know if I can calculate future interest rates  
3 as a lawyer.  
4 It was in Miller Buckfire's province to do  
5 it. They may have done it in conjunction with Jones  
6 Day?  
7 **A. Yes, yes.**  
8 Q. Okay. And any review of forward curves or different  
9 interest rate implications currently existing in the  
10 market would have been done by Miller Buckfire?  
11 **A. Yes.**  
12 Q. And your recollection is that it was done and it was  
13 something that you considered as part of the decision  
14 entering into this agreement?  
15 **A. I believe so.**  
16 Q. You're aware, for example, that the Federal Reserve  
17 has indicated intent to scale back its monthly bond  
18 purchases?  
19 **A. I heard that.**  
20 Q. And --  
21 **A. Quantitative reasoning --**  
22 Q. Yeah.  
23 **A. Yeah.**  
24 Q. And you're aware that many people believe that that  
25 may lead interest rates to rise; isn't that right?

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1 **A. Yes.**  
2 Q. Okay. Did you analyze the likelihood that the  
3 interest rates would rise or was that also tasked to  
4 Miller Buckfire?  
5 **A. I didn't do it independently. That would have been**  
6 **tasked to Miller Buckfire.**  
7 Q. And if I asked what that analysis showed, I would have  
8 to ask Mr. Buckfire that?  
9 **A. Yes, you would.**  
10 Q. Okay.  
11 **A. Yes, you would.**  
12 Q. Let me ask you about -- in the motion to assume the  
13 forbearance agreement, the City states that it has  
14 examined whether there are viable actions to challenge  
15 the Swap contracts. Do you recall that?  
16 **A. Yes.**  
17 Q. Under what theory could the City challenge the  
18 validity of the Swap contracts?  
19 **A. Any theories that we discussed -- I'll give you two**  
20 **answers. One, many of the theories, my understanding**  
21 **is and somebody -- I haven't read all of the**  
22 **objections, but I've read some of them. Some of the**  
23 **objections in this case have discussed some of those**  
24 **theories.**  
25 **Two, any theories which we would have**

1 examined, either independently or in the context of  
2 reviewing and handicapping the probability of success  
3 of some of the objections, would have been done with  
4 counsel.  
5 Q. And so you'll refuse to describe both the theories and  
6 their likelihood of success because it would invade  
7 the attorney-client privilege; is that correct?  
8 A. Yes. Unfortunately, yes.  
9 Q. If I asked you what likelihood of success the City  
10 attributes to an action seeking to declare the Swaps  
11 invalid, you'll decline to answer that on the  
12 attorney-client privilege?  
13 A. Yes.  
14 Q. Can we agree that if the Swaps are not valid, it  
15 wouldn't make sense for you to enter into the  
16 forbearance agreement?  
17 A. No, not necessarily. There may be other prudential  
18 reasons that the City might want to be bring closure  
19 and certainty is access to its cash flow irrespective  
20 of the probability that the Swaps are valid or not  
21 valid.  
22 Q. In your proposal for creditors on June 14, 2013, you  
23 said that the City has identified certain issues  
24 related to the validity and/or enforceability of the  
25 COPs --

1 Q. Okay. And you'll assert the attorney-client privilege  
2 as a protection against describing the invalidity of  
3 the COPs analysis?  
4 A. Yes, because I did no independent analysis.  
5 Q. Has the City completed its investigation into this  
6 issue?  
7 A. No. The City's investigation into a number of things  
8 are ongoing.  
9 Q. Okay. And this is one of them?  
10 A. This is one of them, yeah.  
11 Q. Okay. So the City hasn't reached a conclusion on this  
12 subject because it hasn't concluded its investigation  
13 into the subject, correct?  
14 A. It -- I think that's fair, yes.  
15 Q. And has the City considered whether the service  
16 agreements between the service corporations and the  
17 City are lawful?  
18 A. I don't recall if we looked into that.  
19 Q. So that's one that you --  
20 A. I just don't recall if that was one.  
21 Q. You may have investigated, you may have not?  
22 A. Correct. I don't recall that one.  
23 Q. If you have investigated, do you know if the  
24 investigation has concluded or do you not know?  
25 A. No. If we had investigated or are investigating it,

1 A. Yes.  
2 Q. -- that may warrant further investigation.  
3 A. Yes.  
4 Q. Do you remember that?  
5 A. Yes.  
6 Q. I'm saving us from having to go through that --  
7 A. Yeah, yeah. No. I remember.  
8 Q. What issues has the City identified?  
9 MR. SHUMAKER: Again, I'm going to caution  
10 the witness --  
11 A. Yeah.  
12 MR. SHUMAKER: -- if this is going to  
13 reveal attorney-client communications to not answer.  
14 Subject to that, you can answer.  
15 A. Here again, there would be no issues that -- and I  
16 hate to keep saying this. There'd be no issues that I  
17 independently would have identified because I'm trying  
18 very hard not to act as a lawyer. I would have only  
19 identified those issues and had discussions of them in  
20 consultations with my attorneys. So whether there are  
21 issues such as void ab initio, fraud, any of the other  
22 issues that typically go to contracts, I would only  
23 have had those discussions with counsel, so  
24 consequently I can't speak to this.  
25 BY MR. HACKNEY:

1 my understanding it would not have been concluded.  
2 Q. Okay. So much like with the COPs, generally the  
3 validity of the service contracts with the City is a  
4 subject of ongoing investigation that has not yet  
5 concluded.  
6 A. It may be the subject of ongoing investigation which  
7 has not yet concluded.  
8 Q. Okay. If I asked you how either of those two  
9 investigations, the one into the COPs validity or the  
10 one into the service contracts validity, impacted your  
11 decision to enter into the forbearance agreement, you  
12 will decline to answer because it would tend to reveal  
13 attorney-client communications?  
14 A. For all the reasons we discussed today, the -- yes, I  
15 would have to.  
16 Q. Mr. Orr, let me ask you about under section 803 of the  
17 service contracts --  
18 A. Yeah.  
19 Q. -- I'm going to save us both from having to go through  
20 them --  
21 A. Yeah.  
22 Q. -- so I'll represent to you what it relates to and see  
23 if you've heard of it.  
24 A. Okay.  
25 Q. Okay?

1 Under section 803 of the service contracts  
2 payments by the City to the service corporations are  
3 classified according to a waterfall.  
4 **A. Um-hm.**  
5 Q. Have you heard of this waterfall?  
6 **A. Yes.**  
7 **Q. Okay. Did you evaluate whether there were any claims**  
8 **that any parties to the structure might have against**  
9 **one another if the forbearance agreement leads to the**  
10 **payment of monies outside of the waterfall?**  
11 **A. I assume you're alluding to prioritization or**  
12 **subordination in claims along those regards, and the**  
13 **answer: I think there probably was, but, here again,**  
14 **I would -- I did not do it independently. It would**  
15 **have been done by my counsel.**  
16 **Q. Okay. So you can't tell me the fruits of the analysis**  
17 **or the City's position on the likelihood of success on**  
18 **the issue because it's protected by the**  
19 **attorney-client --**  
20 **A. That is --**  
21 **Q. -- privilege?**  
22 **A. -- correct.**  
23 Q. If I ask you how it impacted your decision to enter  
24 into the forbearance agreement, you'd also not be able  
25 to answer that on the basis of the attorney-client

1 privilege?  
2 **A. That is correct. In addition, that's part of the**  
3 **deliberative process.**  
4 **Q. Have you analyzed whether or not COP holders might**  
5 **have claims against the Swap counterparties if the**  
6 **City exercises the optional termination right?**  
7 **A. There -- have we analyzed it? The answer is yes, I**  
8 **believe so.**  
9 **Q. Okay. What's the result of that analysis?**  
10 **A. Here again, any discussion would have been caught up**  
11 **in discussions I would have had with my counsel in**  
12 **that regard, so I decline to answer the question.**  
13 Q. Okay. Have you analyzed whether those potential  
14 claims may have an impact on whether the Swap  
15 counterparties go forward with the optional  
16 termination amount -- optional termination?  
17 **A. I don't recall if we did that specific analysis. I --**  
18 **I think that was probably caught up in the whole**  
19 **universe of analyses of potential claims, pros and**  
20 **cons analyses, but I don't recall that one**  
21 **specifically.**  
22 Q. We've just been talking now about the COPs. We've  
23 talked about the Swaps a lot. I'm going to for a  
24 moment reference the 2006 COPs Swap transaction  
25 documents.

1 **A. Okay.**  
2 Q. Do you know generally what I mean when I say that?  
3 **A. Yes. The original documents by which the City**  
4 **borrowed money, 1.4 billion, for the unfunded**  
5 **actuarial liability --**  
6 **COURT REPORTER: For the --**  
7 **A. For the unfunded actuarial liability involve -- the**  
8 **organic documents.**  
9 **BY MR. HACKNEY:**  
10 Q. That is exactly correct. And, to name a few, there  
11 are the service contracts, the contract administration  
12 agreement, the trust agreement, and the master and --  
13 and amended Swap agreements, correct?  
14 **A. Yes.**  
15 Q. You've heard of all of those?  
16 **A. Yes.**  
17 Q. And there are multiple versions of them?  
18 **A. There are multiple versions of them.**  
19 Q. For example, there are two service contracts --  
20 **A. That's right.**  
21 Q. -- because there are two service corporations.  
22 **A. That's right.**  
23 Q. Now, your understanding is that some of these  
24 documents were amended in 2009 in connection with the  
25 addition of the collateral agreement to the package,

1 correct?  
2 **A. Yes. I'm going to take your meaning -- the amendment**  
3 **to mean that's the -- yes, the net effect of what**  
4 **happened in 2009.**  
5 Q. Okay. Did you know, for example, that the service  
6 contracts were also literally amended --  
7 **A. Yes.**  
8 Q. -- as part of that?  
9 **A. Yes. We're talking generally about all the documents**  
10 **without specifically going into each one.**  
11 Q. Although I did -- I did in that last one.  
12 **A. Yeah, you did, and so I'm following your lead on what**  
13 **we're talking about.**  
14 Q. Okay.  
15 **A. Okay.**  
16 Q. The Swaps were also themselves amended in addition to  
17 the collateral agreement being created?  
18 **A. I believe so.**  
19 Q. Now, you're aware that these contracts that form the  
20 2006 COPs Swap transaction documents were contracts  
21 that were entered into the same day back in 2006? I  
22 know you weren't there.  
23 **A. Yeah, I wasn't there, and I have seen them. I just**  
24 **don't recall sitting here today if they're the same**  
25 **day. If you're representing to me that is a fact, I**

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1 monthly basis under the forbearance agreement --  
2 **A. Yes.**  
3 Q. -- you net about 11 million?  
4 **A. I think that's correct.**  
5 Q. Okay. Your claim is that these revenues are necessary  
6 to the operation of the City. I think we discussed  
7 that earlier.  
8 **A. Yes.**  
9 Q. And in fact it's your expectation that you will use  
10 these revenues to fund the reinvestment program that  
11 you have planned with respect to the 1.25 billion  
12 dollars of reinvestment in the City over the next ten  
13 years?  
14 **A. Yes, that's correct. An average of 125 million a year**  
15 **which a big component of it is this revenue.**  
16 Q. Okay. So fair statement, you're going to take the  
17 casino revenues and you're going to plow them into the  
18 City, correct?  
19 **A. More -- I mean, money goes into a bathtub, but yes.**  
20 **The casino -- we don't have the casino revenue. We**  
21 **have no other source to make reinvestment in the City.**  
22 Q. And that's what you want to do?  
23 **A. Yes.**  
24 Q. And so as a creditor, I'm going to make the obvious  
25 point that you don't plan to take the casino revenues

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1 and give them to the unsecured creditors, correct?  
2 **A. I think that's generally a fair characterization.**  
3 Q. So isn't it fair that other than perhaps certainly  
4 benefitting the people of Detroit if you reinvested in  
5 the City, the creditors themselves will not see their  
6 recoveries enhanced by the fact that the City has  
7 gained access to these casino revenues, correct?  
8 **MR. SHUMAKER:** Objection, calls for  
9 speculation.  
10 **A. Yeah, I'm going to be careful here because one of the**  
11 **things we've offered in our proposal, June 14th**  
12 **proposal, is a 2 billion dollar note that has some**  
13 **capacity to fluctuate. Generally speaking, your**  
14 **statement is true, but there's another concept that**  
15 **without this reinvestment there's a very real chance**  
16 **that the City will have no chance to stabilize and**  
17 **grow and the creditors will see no opportunity for any**  
18 **benefit because the City would have an inability of --**  
19 **continue to decline, quality of life will continue to**  
20 **decline, revenue from other streams will continue to**  
21 **decline, and the City's ability to satisfy its**  
22 **obligations to the creditors will continue to decline.**  
23 Q. Now, I understand that distinction, and we're talking  
24 now about the proposal you've made to creditors that  
25 you would give all of the unsecureds --

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1 **A. Yes.**  
2 Q. -- effectively a pot of 2 billion dollars of bonds.  
3 **A. Correct.**  
4 Q. And I want to distinguish between two concepts and  
5 make sure that we're on the same page because I think  
6 that we are.  
7 **A. Right.**  
8 Q. The first point is that you do agree that you're not  
9 going to take the casino revenues and put it on top of  
10 the 2 billion pot to make a larger recovery for  
11 creditors.  
12 **A. Yes, that's fair.**  
13 Q. But you are saying that there could be some value to  
14 the creditors of a revitalized Detroit because that  
15 Detroit will be more able to perform under the  
16 2 billion dollars in bonds that you're going to give  
17 them as part of your proposal?  
18 **A. That's correct.**  
19 Q. Okay. Did I summarize accurately the distinction you  
20 were trying to draw there?  
21 **A. Yes. Yes. There's a broader concept about the need**  
22 **to revitalize the City and grow beyond just the**  
23 **interest of the creditors. It's also for the citizens**  
24 **and residents and future of the City.**  
25 Q. Oh, absolutely. I understand that.

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1 **A. But, yes, that's generally -- no direct benefit from**  
2 **the casino revenue.**  
3 Q. Consistent with what we've just discussed then, you  
4 haven't undertaken an analysis to show how much  
5 creditor -- unsecured creditor recoveries will be  
6 enhanced if the forbearance agreement is approved,  
7 because you intend to use the money to reinvest in the  
8 City.  
9 **A. No. I'm not sure that's true. I mean, that's why I**  
10 **was saying before, part of it is enhancing the**  
11 **stability of the City and its ability to meet or**  
12 **actually to provide for that 2 billion dollar note.**  
13 **It depends on large part on the ability to stabilize**  
14 **the City.**  
15 **Q. I understand that as a general concept, but I meant**  
16 **have you undertaken actually any actual analysis of**  
17 **the potential Delta 2 creditor recovery?**  
18 **A. Oh, from the 120 -- from the casino revenue?**  
19 **Q. Right.**  
20 **A. Yes, I believe we have.**  
21 **Q. And what does it show?**  
22 **A. Here again, that's -- it's sensitive and, in addition,**  
23 **I believe those discussions were caught up in**  
24 **discussions I had with counsel, so I'm going to have**  
25 **to decline.**

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1 as has been reported. We're currently doing an  
2 analysis of our grants administration and application  
3 process to make it better, and I think we're also  
4 reviewing it for making specific grant requests, I  
5 think some specifically related to public safety.  
6 So I don't know if -- sitting here today if  
7 actual documents have been submitted, but I know we  
8 are mining the federal programs with an eye toward  
9 making applications and some have been made or some  
10 are near to being made.  
11 Q. Are there specific grants you're targeting in this  
12 application process?  
13 A. That's handled by the folks in the City bureaucracy  
14 and consultants, so I -- as I said, health, safety and  
15 welfare, meaning police, fire, EMT, City grants  
16 meaning blight, HUD grants and others, yes, but  
17 sitting here today, I don't know which specific ones  
18 have been submitted.  
19 Q. And who was handling that process?  
20 A. Ultimately, in my office, it would be a combination of  
21 the existing -- hopefully in the City as well --  
22 existing grant procurers, you know, whether they're at  
23 different departments in planning and development,  
24 police and fire. It would be at that level, at a line  
25 level, would be applying for grants.

1 A. You asked me if there were any new ones going in.  
2 Q. Okay.  
3 A. We -- the City has received, in past years and  
4 currently, almost 300 million dollars in federal  
5 grants.  
6 Q. Okay.  
7 A. Okay. We hoped -- and they're being administered  
8 through 71 different programs in the City. I think  
9 that's been publicly discussed before. We hope to  
10 apply for even more grants. So I can be clear, what  
11 we are trying to do is to get some assistance so that  
12 we can get better at this process, this administration  
13 application process, so we would be eligible for more  
14 federal assistance that's already existing.  
15 Q. And how much do you estimate that more federal  
16 assistance to be?  
17 A. I have no idea. Whatever -- whatever we can get. If  
18 it's several millions more, if it's several hundreds  
19 millions more, we're going to apply for it.  
20 Q. Do you think it's a possibility it could be hundreds  
21 of millions more?  
22 A. Possibility it could be.  
23 Q. Earlier in your testimony you were asked a lot of  
24 questions about legal analyses or legal claims that  
25 might have been made, and on those questions you

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1 Q. Is that going to happen under your supervision?  
2 A. I certainly hope so, yes.  
3 Q. Do you have any idea of how much money in grant  
4 programs might be available to the City?  
5 A. Well, the City has already applied of somewhere in the  
6 neighborhood of 300 million in 71 programs. We have  
7 been told that none of those 71 programs are in  
8 compliance. Some of those programs we're receiving  
9 technical assistance from HUD --  
10 COURT REPORTER: I need you to slow down.  
11 THE WITNESS: I'm sorry.  
12 A. Some of those programs we're receiving technical  
13 assistance, for instance, from HUD, and our intent is  
14 to get our grants administration and application  
15 process more up to date and streamlined so we can  
16 apply for as many grants as we can possibly get our  
17 hands on.  
18 BY MS. ENGLISH:  
19 Q. Okay. You confused me there for a minute because  
20 you've said you've got a bunch of grant applications  
21 already in with respect to programs that are  
22 noncompliant, but I thought you said earlier you don't  
23 have any grant applications in.  
24 A. No, no, no.  
25 Q. Okay.

1 claimed attorney-client privilege --  
2 A. Yes.  
3 Q. -- and said that you didn't have an independent view  
4 that didn't come from attorney-client communications.  
5 A. Yes.  
6 Q. Okay. I want to ask, without divulging what the  
7 advice was of your counsel, can you just list for me  
8 what the topics were on which you got advice, or would  
9 you claim the privilege as to just the topics as well?  
10 A. Maybe I can do it this way. I think I've said before  
11 that in this case, for instance, your client has filed  
12 an objection.  
13 Q. Yes, it has.  
14 A. And in this case many objections have been filed and  
15 many of the topics listed in those objections, and I  
16 think I said with Mr. Hackney, whether it was  
17 subordination, prioritization, equitable estoppel,  
18 tort, invalidation of liens ab initio, whatever they  
19 were, none of those analyses or claims came as a  
20 surprise to me and that in some fashion -- without  
21 divulging what I had spoken with to my counsel, in  
22 some fashion issues such as those had been discussed  
23 and analyzed with my counsel, attorneys and advisors.  
24 Q. So, for example, if -- as you know, Ambac filed an  
25 objection, and --



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1 **A. Yes.**

2 Q. -- one of the arguments raised was whether the Swap  
3 obligations themselves were void ab initio because  
4 they did not comply with Act 34.

5 **A. Yes.**

6 Q. You're familiar with that argument that we raised?

7 **A. Yeah.**

8 Q. Can you -- and again without asking -- I'm not asking  
9 you to divulge what the advice was or what the  
10 analysis was you got from your counsel, but can you  
11 tell me what issues, just by naming the topics, you  
12 sought advice on with respect to that argument?

13 **MR. SHUMAKER:** Well, the seeking of advice  
14 somewhat implicates communications. If you were to  
15 look at topics perhaps as to whether he regarding your  
16 objection whether he -- they were raised, without  
17 going into the communications, I think he could  
18 respond to that.

19 **BY MS. ENGLISH:**

20 Q. That's exactly what I'm asking.

21 **A. Okay. Well, for instance, whether or not arguments**  
22 **such as that would erase the obligation in toto or**  
23 **subordinate it to a lower level, whether or not an**  
24 **obligation like that would raise defenses on behalf of**  
25 **the obligor of equitable estoppel to the City, whether**

1 **prepared, analyses, I can't give you a compendium or**  
2 **an exhaustive list of things that were considered, so**  
3 **I don't want to leave you with the misimpression that**  
4 **somehow the analysis wasn't complete or we didn't**  
5 **consider more issues than the one I did. We did.**  
6 **Those are just the ones that came, sitting here**  
7 **today -- you asked me a question -- off the top of my**  
8 **head that I remembered for instance.**

9 Q. Did you have legal analysis done on whether the Swaps  
10 transactions complied with Act 34?

11 **A. As I said, without getting into discussions with my**  
12 **counsel, a whole panoply of issues, some of which are**  
13 **contained in the objections filed, including those**  
14 **filed by your client, were examined.**

15 Q. Okay. Now can you answer my question? Did you have  
16 legal analysis done on whether the Swap transactions  
17 complied with Act 34?

18 **A. As I said --**

19 **MR. SHUMAKER:** Objection, asked and  
20 answered.

21 **A. As I said --**

22 **MR. SHUMAKER:** If you want to share with  
23 him the argument, that might help.

24 **A. There are a whole panoply of issues, some of them**  
25 **contained in the objections such as the one filed by**

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1 **or not there are facts surrounding those documents and**  
2 **liens that would equitably raise issues as far as**  
3 **their validity beyond void ab initio, whether or not**  
4 **the law in the district and the circuit supported a**  
5 **clean remedy that could be easily obtained, and**  
6 **whether or not it would be expensive and extensive**  
7 **litigation and appeals over a period of time, things**  
8 **such as those were discussed and examined.**

9 Q. When you say whether there were equitable issues, what  
10 do you mean by that?

11 **A. Here again, without going into discussion, any of the**  
12 **concern -- equity is -- implicates action such as**  
13 **clean hands. Whether there were issues surrounding**  
14 **the City's conduct and issues along those lines, that**  
15 **would be factually intensive and lead to, for**  
16 **instance, increased litigation costs which I think is**  
17 **mentioned in our motion or some of the papers we**  
18 **filed, things along those lines, general equitable**  
19 **concerns.**

20 Q. When you just listed for me the types of concerns and  
21 topics you were exploring with counsel, you didn't  
22 mention Act 34.

23 **A. Well, as I said, I said for instance. I didn't mean**  
24 **for it to be an exhaustive list, and that's why**  
25 **without sitting here today, counsel, memos that were**

1 **your client which were examined and reviewed.**

2 **BY MS. ENGLISH:**

3 **Q. Was Act 34 one of them?**

4 **A. More than likely, yes.**

5 **Q. More than likely? You don't know?**

6 **A. No. Sitting here today, I just said to you, for**  
7 **instance, that many of the issues, without being a**  
8 **compendium or being exhaustive, were examined. Act 34**  
9 **was probably one of them. I did not mean for my**

10 **testimony to be exhaustive because I don't have the**  
11 **analyses or the benefit of discussing them with my**  
12 **client prior to your question today.**

13 Q. I do understand the answers that you're giving me.  
14 They're just not quite answers to the questions I'm  
15 asking.

16 **A. Okay.**

17 Q. So let me -- in your answer right now when I was  
18 trying to hone in on was Act 34 --

19 **A. Um-hm.**

20 Q. -- examined, right?

21 **A. Yes.**

22 Q. You said probably.

23 **A. Yes.**

24 Q. So you're not sure?

25 **A. No. I said --**

1 **MR. SHUMAKER:** Objection, asked and  
2 answered.  
3 **A.** I'll say it again. Probably means that it was, but I  
4 don't want my answer to represent to you that it was a  
5 compendium. If you want to keep asking me about Act  
6 34, that's fine, but I said more likely than not it  
7 was examined. I -- just sitting here right now, I  
8 don't have an independent recollection of all the  
9 things we examined. Act 34 was more than likely one  
10 of them.  
11 **BY MS. ENGLISH:**  
12 Q. Okay. But sitting here today you don't have an  
13 independent recollection for sure that Act 34 was  
14 looked at; is that correct?  
15 **A.** I just said --  
16 **MR. SHUMAKER:** Objection, asked and  
17 answered.  
18 **A.** I just said it's more likely than not.  
19 **BY MS. ENGLISH:**  
20 Q. Sitting here today do you have a recollection as to  
21 whether there was legal analysis done as to the  
22 validity of the pledge of casino revenues under the  
23 gaming act?  
24 **A.** I thought you just asked -- well, suffice it to say I  
25 believe so.

1 counterparties?  
2 **A. Not without the advice of counsel, no.**  
3 Q. Why didn't the City just sue the Swap counterparties  
4 and then negotiate from there?  
5 **A.** You know, one of the things that we have, both in  
6 bankruptcy and in Public Act 436, is that in the  
7 deliberative process the emergency manager has  
8 discretion to make decisions, business judgment  
9 decisions, within that discretion, irrespective of  
10 third parties, the decisions as to how that should  
11 have occurred.  
12 **We made a decision in consultation with**  
13 **counsel that this was the best way to proceed.**  
14 **Commencing litigation might well have created a**  
15 **cascade of other events such as the very event we are**  
16 **trying to avoid which is trapping the casino revenue**  
17 **for time and a number of months and/or years which**  
18 **would have made the probability of me completing my**  
19 **mission within the time frame of the statute**  
20 **difficult.**  
21 Q. If the City couldn't get a deal such as the  
22 forbearance agreement, was the City prepared to sue  
23 the Swap counterparties then?  
24 **MR. SHUMAKER:** Objection to the extent that  
25 question is asking for attorney-client privileged

1 Q. You believe so?  
2 **A. Yes.**  
3 Q. Are you sure?  
4 **A. I believe so.**  
5 Q. Are you sure?  
6 **A. I believe so.**  
7 **MR. SHUMAKER:** Objection, asked and  
8 answered.  
9 **BY MS. ENGLISH:**  
10 Q. Do you recall seeing a legal analysis or memo that was  
11 prepared with respect to the validity of the pledge of  
12 casino revenues under the gaming act?  
13 **A. Ms. English, I see -- I see a lot of memos. As I said**  
14 **before this line of questioning, it's more likely than**  
15 **not that I did, but sitting here today, in an effort**  
16 **to be accurate, I don't specifically recall all of the**  
17 **issues we examined. More likely than not, it included**  
18 **Act 34, it included validity of liens.**  
19 **COURT REPORTER:** It included validity --  
20 **THE WITNESS:** Validity of liens.  
21 **COURT REPORTER:** Thank you.  
22 **BY MS. ENGLISH:**  
23 Q. Did you make an independent assessment apart from  
24 advice of counsel as to the strengths -- strengths or  
25 weaknesses of the City's claims against the Swap

1 communication. I'll object.  
2 If you have some independent understanding,  
3 you can answer.  
4 **A. Mrs. English, I'll say this. Without getting into**  
5 **communications with my counsel, we examined all**  
6 **alternatives, and as I said earlier with Mr. Hackney,**  
7 **including potential litigation.**  
8 **BY MS. ENGLISH:**  
9 Q. If you hadn't gotten a deal, were you prepared to sue  
10 them then?  
11 **MR. SHUMAKER:** Objection, calls for  
12 speculation.  
13 **A. Yeah, I was going to say. I don't know. We'd have to**  
14 **examine the situation on the ground at that time.**  
15 **BY MS. ENGLISH:**  
16 Q. Okay. Let me ask you this. If the forbearance  
17 agreement is not approved by the bankruptcy court,  
18 will the City then sue the Swap counterparties?  
19 **MR. SHUMAKER:** Objection, calls for  
20 speculation.  
21 **A. Here again, it's a different version of the prior**  
22 **question which it calls me to speculate as to what we**  
23 **would do if the Court does not approve the agreement.**  
24 **BY MS. ENGLISH:**  
25 Q. If there were to be litigation with the Swap

1 counterparties, do you have some sense as to what  
2 claims might be asserted against the Swap  
3 counterparties?  
4 **MR. SHUMAKER:** Objection, asked and  
5 answered.  
6 **A.** Yeah, as we said before, those are discussions that  
7 I've had with my counsel. I would consult with them  
8 as to our possible -- I can't tell you in direct  
9 response to your question and this line of questioning  
10 what we would do. What I can tell you is that we  
11 would engage in a process of examining what our  
12 alternatives were and try to make an informed and  
13 reasonable decision based upon the information we had  
14 at that time.  
15 **BY MS. ENGLISH:**  
16 **Q.** Okay. So sitting here today you are not able to tell  
17 me even a single claim that the City might assert  
18 against the Swap counterparties?  
19 **A.** There are a number of claims that the City might  
20 assert. As I said earlier today, some of them might  
21 be framed in some of the objections. Whether or not  
22 we would ultimately assert those, depends upon a  
23 number of different factors that we would have to  
24 examine at that point.  
25 **Q.** Well, in the forbearance agreement, the City is giving

1 **would say that, as I said before this afternoon, there**  
2 **was analysis of the potential claims, strengths and**  
3 **weaknesses and options available to the City.**  
4 **Those -- some of those were prepared in writing, yes.**  
5 **Q.** You just mentioned a draft complaint. Was there ever  
6 a draft complaint prepared?  
7 **MR. SHUMAKER:** I think you mischaracterized  
8 what he said. That's my objection.  
9 **A.** Yeah, as I said, some of those types of things could  
10 include a draft complaint. I don't recall seeing a  
11 draft complaint.  
12 **BY MS. ENGLISH:**  
13 **Q.** Do you recall seeing a memo that outlined strengths  
14 and weaknesses of claims that could be asserted in a  
15 complaint?  
16 **A.** As I said before, I think there were memorandum and  
17 advice that was given regarding the various claims,  
18 defenses and alternatives available to the City which  
19 could have included a memorandum of the nature you're  
20 talking about.  
21 **Q.** It could have included it --  
22 **A.** It could.  
23 **Q.** -- but you're not sure whether it did or not?  
24 **A.** Sitting here today I don't specifically remember all  
25 the memos that would fit the description that you're

1 up the right to assert claims against the Swap  
2 counterparties, correct?  
3 **A.** If the forbearance agreement is approved and we  
4 ultimately execute on the agreement, then yes, the  
5 parties would forebear and would not sue each other.  
6 **Q.** Right. So all I'm asking is give me one example of  
7 one claim you're giving up in the forbearance  
8 agreement.  
9 **A.** I suppose any of the claims that have been implicated  
10 in some of the objections that have been filed and, as  
11 I said earlier today, some of those claims which is  
12 the ones we discussed a few minutes ago, such as  
13 estoppel, ab initio and those others.  
14 **Q.** Did any of your legal counsel ever prepare a memo or a  
15 written analysis for the City that outlined a  
16 litigation strategy against the Swap counterparties?  
17 I'm not asking what would have been in it, if there  
18 was one. I just want to know if there was any written  
19 analysis ever prepared that outlined a litigation  
20 strategy.  
21 **A.** Well, without, here again, drawing into the  
22 nomenclature of a litigation strategy, because that  
23 can mean a number of different things, including up --  
24 up to and through attaching a proposed complaint, for  
25 instance, without getting into the nomenclature, I

1 **making. There were memos discussing the various**  
2 **strengths and weaknesses of the positions.**  
3 **Q.** Did you have any analysis done as to the cost of a  
4 litigation with the Swap counterparties?  
5 **A.** No. I don't recall if any of the documents included  
6 costs. We -- there were discussions about the  
7 potential costs and the timing, but I don't recall if  
8 any of the documents did.  
9 **Q.** Okay. What was your best estimate as to how much a  
10 litigation with Swap counterparties would cost the  
11 City?  
12 **A.** I don't -- I don't remember what the best estimates  
13 were. They -- they ranged from --  
14 **MR. SHUMAKER:** Object. I just want to make  
15 sure you're not going to be revealing any  
16 attorney-client communications with your answer.  
17 **THE WITNESS:** Okay.  
18 **MR. SHUMAKER:** I'll interject that. I'll  
19 let you answer the question as to whether that was  
20 addressed. I don't want you to go --  
21 **THE WITNESS:** Okay.  
22 **MR. SHUMAKER:** -- into anything --  
23 **THE WITNESS:** Okay.  
24 **MR. SHUMAKER:** -- beyond that.  
25 **A.** It was addressed, and suffice it to say I think it's



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1 fair to assume that in litigation in the nature you're  
2 discussing that it could go into millions of dollars.  
3 **BY MS. ENGLISH:**  
4 Q. How about the time it would take to litigate the Swap  
5 counterparties? Did you estimate how long it would  
6 take?  
7 **MR. SHUMAKER:** Same admonition.  
8 **A. Let's -- let's do it this way. I think it's fair to**  
9 **say that there were discussions regarding the time for**  
10 **litigation and/or appeals and the costs that were**  
11 **involved if that tack was taken.**  
12 **BY MS. ENGLISH:**  
13 Q. How long did you estimate it would take to litigate  
14 with Swap counterparties?  
15 **A. I'm not sure the predicate is there that I estimated**  
16 **the length of time.**  
17 Q. Okay. If you didn't estimate the length of time,  
18 that's an okay answer to give.  
19 **A. Yeah. I'm trying to be as clear as I can for you and**  
20 **say that there were discussions, but there's nothing**  
21 **as specific as the lodestar method of analysis which**  
22 **you understand is time times hours billed, so on and**  
23 **so forth. There were discussions and there were**  
24 **analyses about what it could be.**  
25 Q. Now, I have to unpack that a little bit because you

1 Q. Did you have a lodestar analysis performed with  
2 respect to a litigation with the Swap counterparties?  
3 **MR. SHUMAKER:** Again, I'm going to object.  
4 I believe that that question asks the -- asks Mr. Orr  
5 to reveal privileged attorney-client communications  
6 when you get into specific lodestar analysis.  
7 **BY MS. ENGLISH:**  
8 Q. I don't want the analysis. I just want to know  
9 whether had you one done because you mentioned it.  
10 **A. I did mention it, but, here again, I think my response**  
11 **was that there was an analysis that was done. I'm not**  
12 **sure. I don't recall if it was as specific as the**  
13 **type of lodestar analysis to give you an example, and**  
14 **without going into conversation between me and my**  
15 **counsel, I say again, we did an analysis and had**  
16 **discussions regarding potential claims and defenses**  
17 **that could be asserted, the potential length of time**  
18 **it would take and the significant cost that might be**  
19 **incurred by the City.**  
20 Q. I'm going to move on.  
21 **A. Okay. Sure.**  
22 Q. Did the City obtain approval from the Michigan  
23 Department of Treasury for the COPs or the Swap  
24 obligations, do you know?  
25 **A. You mean initially?**

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1 mentioned the lodestar analysis, one of my favorite  
2 friends. Did you have a lodestar analysis done for  
3 litigation with the Swap counterparties?  
4 **MR. SHUMAKER:** Objection, this is getting  
5 into the -- the specific communications between  
6 Mr. Orr and his counsel when you start to go through  
7 what -- what are the particulars of the advice that  
8 was being given. I allowed you to go forward with  
9 whether he considered the length of litigation in his  
10 answer, but I don't want him to go into the specifics  
11 of any sort of analysis that was done by counsel.  
12 With that admonition, you can answer.  
13 **A. Again, without going to the specifics of discussion**  
14 **I've had with counsel, there were discussions about**  
15 **potential length of litigation and appeals and the**  
16 **potential cost. Those discussions included time that**  
17 **may have impaired my ability to complete my obligation**  
18 **within the time frame provided by Public Act 436, as**  
19 **well as significant costs, litigation cost being**  
20 **incurred by the City.**  
21 **BY MS. ENGLISH:**  
22 Q. Okay. Here is my question again, because in your  
23 answer you mentioned lodestar analysis, so I'm just  
24 asking -- it's a yes or no question.  
25 **A. Um-hm.**

1 Q. Yeah.  
2 **A. I don't know. Well, wait a minute. Wait a minute.**  
3 **I recall seeing a letter some time ago on**  
4 **official Michigan State letterhead -- well, I recall**  
5 **seeing a letter. It may have been some form related**  
6 **to the COPs. I just don't remember specifically, but**  
7 **I do recall seeing a letter on Michigan letterhead**  
8 **related to the transaction.**  
9 Q. Okay. So I'm going to put in a request to your  
10 counsel.  
11 **MS. ENGLISH:** If there is an approval or a  
12 letter from the Michigan Department of Treasury with  
13 respect to the COPs or the Swaps, we'd like to request  
14 a copy of that.  
15 **MR. SHUMAKER:** We'll look into it.  
16 **MS. ENGLISH:** Thanks.  
17 **BY MS. ENGLISH:**  
18 Q. Here's another one I don't know if you know the answer  
19 to this.  
20 **A. Right.**  
21 Q. Do you know if the City approved the offering circular  
22 that went out with respect to the COPs?  
23 **A. I do not.**  
24 Q. You mentioned earlier that you were on conference  
25 calls with Ken Buckfire and the principals of the Swap

**Exhibit 6B**

**Excerpts of Deposition of Kenneth Buckfire**

1 asked today. I am just here principally to follow up  
2 on certain items and ask about certain other areas  
3 that may be germane to Syncora.  
4 So, as I understood your testimony, you  
5 were the lead negotiator for the City when it came to  
6 negotiating the business deal, is that correct?  
7 **A. Yes.**  
8 Q. Other people were going to paper the business deal in  
9 terms of the legal terms that would embody it,  
10 correct?  
11 **A. Yes.**  
12 Q. Let me ask you a question. The kickoff of the  
13 negotiations that led to the forbearance agreement I  
14 understood you to say began on June 4th, correct?  
15 **A. Yes.**  
16 Q. Who called that meeting?  
17 **A. Counsel to Jones Day called counsel for BAML and**  
18 **invited them to the meeting.**  
19 Q. Fair to say that the meeting was held at the behest of  
20 the City of Detroit?  
21 **A. Yes.**  
22 Q. Did you take legal advice, you personally as the lead  
23 negotiator for the City, did you take legal advice  
24 from Jones Day in advance of the June 4 meeting?  
25 **A. Yes.**

1 Q. Would you disclose to me the legal advice you obtained  
2 from them?  
3 **MR. CULLEN:** I'll instruct him not to  
4 answer.  
5 **MR. HACKNEY:** So, if I ask questions about  
6 the legal advice you had been given about the COPs  
7 Swap structure or various parties' rights thereunder,  
8 you would instruct the witness not to answer those  
9 questions?  
10 **MR. CULLEN:** Right.  
11 **MR. HACKNEY:** And I take it, Mr. Cullen,  
12 that instruction would remain true both from -- at any  
13 time?  
14 **MR. CULLEN:** Right.  
15 **MR. HACKNEY:** Not just with respect to the  
16 June 4 meeting?  
17 **MR. CULLEN:** Precisely.  
18 **BY MR. HACKNEY:**  
19 Q. Okay. Let me ask you, Mr. Buckfire, I'm going to  
20 speculate, perhaps not wildly, that you've negotiated  
21 a few deals in your lifetime.  
22 **A. Yes.**  
23 Q. Isn't it fair to say as a negotiator, you have to have  
24 an understanding of the financial needs and desires of  
25 your client as well as the counterparty with whom you

1 are negotiating?  
2 **A. Yes.**  
3 Q. You also have to have at least some understanding of  
4 the legal framework in order to negotiate effectively,  
5 correct?  
6 **A. Yes.**  
7 Q. You don't have to go to law school, right, but you do  
8 have to understand some of the ins and outs of the  
9 various legal documents that you're negotiating over,  
10 correct?  
11 **A. As well as any layman can be expected to do so.**  
12 Q. Now, I'd like to get a level set as to where you were  
13 on June 4th, 2013 as you're going into this meeting  
14 with BAML.  
15 **A. And UBS.**  
16 Q. And UBS. So, they were there too?  
17 **A. Yes.**  
18 Q. Okay. I want to make sure I have a level set under  
19 the operating assumptions that you had in your mind as  
20 you were going into the meeting to negotiate with the  
21 Swap counterparties, okay?  
22 One of your operating assumptions was that  
23 there were termination events existing under the  
24 Swaps, correct?  
25 **A. There were events of default existing under the Swaps,**

1 **the collateral agreement.**  
2 Q. Okay. So, let's take a step back and let me be more  
3 precise.  
4 **A. Okay.**  
5 Q. So, there is a Swap agreement that the Swap  
6 counterparties are parties to with the service  
7 corporations?  
8 **A. Correct.**  
9 Q. You are aware of that?  
10 **A. I am.**  
11 Q. You are also aware that there is a collateral  
12 agreement that is between among other parties the  
13 City, the service corporations and the Swap  
14 counterparties, correct?  
15 **A. Yes.**  
16 Q. Now, at the time you're going into the June 4 meeting,  
17 one of your operating assumptions was that there were  
18 termination events under the Swap that would give the  
19 Swap counterparties the right to terminate?  
20 **MR. CULLEN:** Objection. Foundation. I  
21 think he said default events.  
22 **MR. HACKNEY:** He said default events under  
23 the collateral agreement. I'm trying to be precise  
24 about --  
25 **A. No, I was focused on the cash issue that would be at**

1 the City is precluded from taking any position  
2 inconsistent with the Swap counterparties and this  
3 applies through March 1st, 2014 when the Chapter 9  
4 plan is filed --  
5 **A. Yes.**  
6 Q. Is there going to be another time where the City can  
7 challenge the liens as invalid once the Chapter 9 plan  
8 is filed?  
9 **MR. CULLEN:** I object to the form of the  
10 question but you can answer if you can --  
11 **BY MS. FORDE:**  
12 Q. Do you see that this agreement forfeits the City's  
13 right to challenge any liens after the Chapter 9 plan  
14 is filed?  
15 **A. I don't see that.**  
16 Q. Can you tell me why you don't see it that way?  
17 **A. Well, I didn't write this agreement.**  
18 Q. Is it your understanding that after March 1st the City  
19 has another opportunity to challenge anything related  
20 to this agreement?  
21 **A. It's not my understanding.**  
22 Q. Okay.  
23 **A. I don't know.**  
24 Q. Okay. Do you recognize there's a possibility then  
25 that the City could be stuck with paying a very large

1 **agreement, I believe it was dated June 18th of 2009,**  
2 **there is attached as an exhibit to that a letter from**  
3 **the Michigan Gaming Control Board saying that they**  
4 **were okay with the arrangements embodied in the**  
5 **collateral agreement.**  
6 Q. Do you know the date of the letter?  
7 **A. I believe it was the same date as the agreement.**  
8 Q. My next question I believe someone may have alluded to  
9 but I don't know that we got this far. You said that  
10 you assumed that the liens were valid in your  
11 negotiations, correct?  
12 **A. Yes.**  
13 Q. Did you also understand that the lien arose solely  
14 from the collateral agreement itself?  
15 **A. That's my understanding.**  
16 **Q. Okay. And as far as the lien -- look at my last page**  
17 **of notes here -- did you discuss with anyone whether**  
18 **pledging the casino revenue was permissible under the**  
19 **Michigan Gaming Act or was the letter the only thing**  
20 **that was relied upon?**  
21 **MR. CULLEN:** Objection to the extent that  
22 it calls for privileged conversations, where we have  
23 directed no inquiry between himself and Jones Day.  
24 **MS. GREEN:** And that is my question so is  
25 he not going to answer that?

1 figure after the Chapter 9 plan and have no ability to  
2 challenge it if -- at some certain stage regardless of  
3 the validity of those liens?  
4 **A. That's a possibility.**  
5 Q. Okay.  
6 **MS. FORDE:** Thank you. No further  
7 questions.  
8 **MS. GREEN:** Good afternoon, my name is  
9 Jennifer Green. I just have a few questions.  
10 **THE WITNESS:** May I ask who you represent,  
11 Counsel?  
12 **MS. GREEN:** Police and Fire Retirement  
13 System and the General Retirement System.  
14 **THE WITNESS:** And you are with what law  
15 firm?  
16 **MS. GREEN:** Clark Hill.  
17 **EXAMINATION**  
18 **BY MS. GREEN:**  
19 Q. I had a hard time hearing down there. I may have  
20 written this down wrong. I thought I heard you say  
21 that you had received a letter from or the City had  
22 received a letter from the Michigan Gaming Control  
23 Board saying that it was okay to pledge the casino  
24 funds.  
25 **A. Well, if you look at the original collateral**


1 **MR. CULLEN:** If he can find in his memory a  
2 nonprivileged conversation that affects --  
3 **THE WITNESS:** With Jones Day, impossible.  
4 **MR. CULLEN:** Not with Jones Day but with  
5 somebody else, a nonprivileged conversation, you can  
6 answer with respect to that.  
7 **BY MS. GREEN:**  
8 Q. Do you have a nonprivileged conversation that you can  
9 recall regarding whether or not you discussed with  
10 anyone whether pledging the casino revenue was  
11 permissible under the Michigan Gaming Act?  
12 **A. No.**  
13 **MS. GREEN:** Thanks. That's my only  
14 question. Thank you.  
15 **MS. NEWBURY:** Good afternoon, Mr. Buckfire.  
16 My name is Karen Newbury. I'm with Schiff Hardin, and  
17 I represent DepfaBank as agent for DFS WertManagement.  
18 **THE WITNESS:** Can you say that really fast  
19 twice?  
20 **MS. NEWBURY:** I said it really fast once.  
21 So, that will be enough.  
22 **THE WITNESS:** Thank you.  
23 **EXAMINATION**  
24 **BY MS. NEWBURY:**  
25 Q. You've testified earlier today that you were the

1 individual largely responsible for the negotiation of  
2 the business terms of the forbearance agreement,  
3 correct?  
4 **A. Yes.**  
5 Q. So, you are familiar with and perhaps even designed  
6 the optional termination provisions?  
7 **A. Yes.**  
8 Q. So, if I ask you to explain to me the way that the  
9 termination amount will be calculated with all the  
10 accompanying definitions such as optional termination  
11 notice on Page 11 of the agreement, then mid-market  
12 amount and optional termination amount on Page 14, you  
13 could walk me through this in plain English without  
14 any trouble, right?  
15 **A. That's a bold statement. I'll do my best.**  
16 Q. Would you please try?  
17 **A. Okay. Well, the calculation of the termination amount**  
18 **is not an easy quantitative exercise because pursuant**  
19 **to the underlying agreement which is not in front of**  
20 **me today so I can't refer you to it, you're supposed**  
21 **to go and seek bids in the market from dealers to find**  
22 **out what the value of the Swap is, and then you figure**  
23 **out from that what the termination amount is.**  
24 **So, it's not a simple calculation that you**  
25 **can just do mathematically on Bloomberg. You could**

1 **get to a pretty good answer because everyone looks at**  
2 **the same LIBOR curves but it is a matter of market**  
3 **checking.**  
4 Q. So, it's your understanding that the optional  
5 termination amount is to be determined on the optional  
6 termination date which is the date that the City gives  
7 notice, is that correct?  
8 **A. That's my understanding.**  
9 **MS. NEWBURY:** Thank you, that's all.  
10 (Discussion held off the record at  
11 3:24 p.m.)  
12 (Back on the record at 3:24 p.m.)  
13 **MR. HACKNEY:** I think we are done.  
14 **VIDEO TECHNICIAN:** This concludes today's  
15 deposition. The time is 3:24 p.m. We are off the  
16 record.  
17 (The deposition was concluded at 3:24 p.m.  
18 Signature of the witness was not requested by  
19 counsel for the respective parties hereto.)  
20  
21  
22  
23  
24  
25

1 CERTIFICATE OF NOTARY  
2 STATE OF MICHIGAN )  
3 ) SS  
4 COUNTY OF WAYNE)  
5

6 I, NORA MORRISSY, certify that this  
7 deposition was taken before me on the date  
8 hereinbefore set forth; that the foregoing questions  
9 and answers were recorded by me stenographically and  
10 reduced to computer transcription; that this is a  
11 true, full and correct transcript of my stenographic  
12 notes so taken; and that I am not related to, nor of  
13 counsel to, either party nor interested in the event  
14 of this cause.  
15  
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NORA MORRISSY, CSR-2642  
Notary Public,  
Wayne, County, Michigan.  
My Commission expires: 9-13-13

**Exhibit 6C**

**Email from G. Shumaker to S. Hackney dated September 6, 2013**

**From:** Gregory Shumaker [gshumaker@JonesDay.com]  
**Sent:** Friday, September 06, 2013 5:45 PM  
**To:** Hackney, Stephen C.  
**Cc:** abyowitz@kramerlevin.com; Alfredo.perez@weil.com; apclawyer@sbcglobal.net; bforde@winston.com; bokeefe@lippittokeefe.com; bweisenthal@schiffhardin.com; carole.neville@dentons.com; caroline.english@arentfox.com; Carol.cohen@arentfox.com; Corinne Ball; chardman@winston.com; claude.montgomery@dentons.com; Dana.Kaufman@weil.com; David.Dubrow@arentfox.com; Daniel T Moss; EJEssad@wwrplaw.com; fguadagnino@ClarkHillThorpReed.com; gneal@sidley.com; Hertzberg, Robert S.; jbjork@sidley.com; JGreen@ClarkHill.com; \*jwagner@kramerlevin.com1; kdenniston@schiffhardin.com; Kelly.DiBlasi@weil.com; knewbury@schiffhardin.com; Gartel, Lally A.; llarose@winston.com; marriott@ballardspahr.com; morris@silvermanmorris.com; mott@schiffhardin.com; mtaunt@strobilpc.com; Bennett, Ryan Blaine; rfrimmer@schiffhardin.com; RGordon@ClarkHill.com; rplecha@lippittokeefe.com; skohn@winston.com; summersm@ballardspahr.com; swahl@schiffhardin.com; Thomas F. Cullen; tmayer@kramerlevin.com  
**Subject:** RE: In re City of Detroit, Michigan, Case No. 13-53846 (SWR)

**Steve:** You're correct in your inference regarding providing additional discovery. As for the term sheet, I am checking on a couple of issues and will respond when I have more information.

Best regards, Greg

**From:** "Hackney, Stephen C." <shackney@kirkland.com>  
**To:** Daniel T Moss <dtmoss@JonesDay.com>, "Gartel, Lally A." <lally.gartel@kirkland.com>, "JGreen@ClarkHill.com" <JGreen@ClarkHill.com>, "abyowitz@kramerlevin.com" <abyowitz@kramerlevin.com>, "Alfredo.perez@weil.com" <Alfredo.perez@weil.com>, "apclawyer@sbcglobal.net" <apclawyer@sbcglobal.net>, "bforde@winston.com" <bforde@winston.com>, "bokeefe@lippittokeefe.com" <bokeefe@lippittokeefe.com>, "bweisenthal@schiffhardin.com" <bweisenthal@schiffhardin.com>, "Carol.cohen@arentfox.com" <Carol.cohen@arentfox.com>, "carole.neville@dentons.com" <carole.neville@dentons.com>, "caroline.english@arentfox.com" <caroline.english@arentfox.com>, "chardman@winston.com" <chardman@winston.com>, "claude.montgomery@dentons.com" <claude.montgomery@dentons.com>, "Dana.Kaufman@weil.com" <Dana.Kaufman@weil.com>, "David.Dubrow@arentfox.com" <David.Dubrow@arentfox.com>, "EJEssad@wwrplaw.com" <EJEssad@wwrplaw.com>, "fguadagnino@ClarkHillThorpReed.com" <fguadagnino@ClarkHillThorpReed.com>, "gneal@sidley.com" <gneal@sidley.com>, "jbjork@sidley.com" <jbjork@sidley.com>, "\*jwagner@kramerlevin.com1" <jwagner@kramerlevin.com>, "kdenniston@schiffhardin.com" <kdenniston@schiffhardin.com>, "Kelly.DiBlasi@weil.com" <Kelly.DiBlasi@weil.com>, "knewbury@schiffhardin.com" <knewbury@schiffhardin.com>, "llarose@winston.com" <llarose@winston.com>,



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Robert S." <Hertzber@pepperlaw.com>

Date: 09/06/2013 10:49 AM

Subject: RE: In re City of Detroit, Michigan, Case No. 13-53846 (SWR)

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Dan and Greg,

Thanks for your letter. Two quick follow ups:

1. Am I correct to infer that the City is declining our suggestion that it provide the other materials referenced in my original letter?
2. Is it correct that this term sheet is unsigned and undated? I just want to make sure we aren't missing a signature page.

Best,

Steve

**From:** Daniel T Moss [<mailto:dtmoss@JonesDay.com>]

**Sent:** Thursday, September 05, 2013 5:31 PM

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**Cc:** Thomas F. Cullen; Gregory Shumaker; Corinne Ball; Hertzberg, Robert S.

**Subject:** In re City of Detroit, Michigan, Case No. 13-53846 (SWR)



Counsel:

Please see attached correspondence from Greg Shumaker.

Best,

Dan

**Dan T. Moss**

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Associate

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