

**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
	)	

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**SYNCORA CAPITAL ASSURANCE AND SYNCORA GUARANTEE  
INC.’S RESPONSE TO DEBTOR’S MOTION *IN LIMINE* TO EXCLUDE  
TESTIMONY OF ALEXANDRA SCHWARZMAN**

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**I. Introduction**

The City of Detroit (the “City”) staggered into Chapter 9 with no executable deals with any of its creditors for a simple reason: the City’s negotiating philosophy is “my way or the highway.” In the course of attempting to negotiate with the City over its access to the Casino Revenues<sup>1</sup> that lie at the heart of the Forbearance Agreement, Syncora experienced first-hand the City’s heavy-handed approach to negotiation. After signaling its desire to make a proposal that would facilitate the City’s access to cash, Syncora was subjected to a bewildering game in which the City pretended to negotiate a non-disclosure agreement (“NDA”) while it readied papers for an *ex parte* Temporary Restraining Order (“TRO”). After the City obtained a TRO without notice to the Syncora attorneys with whom it was corresponding, Syncora once again attempted to engage with the City in

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<sup>1</sup> Capitalized terms not defined herein have the definitions given to those terms in Syncora’s Objection to the Motion to Assume the Forbearance and Optional Termination Agreement [Docket No. 366].

negotiation — only to see the City refuse to sign a fully negotiated NDA that addressed all of the City's concerns. When asked about the matter in his deposition, Emergency Manager Kevyn Orr complained that it was Syncora that had refused to execute an NDA. (Orr Dep. 93:21-94:3, attached herein as Exhibit 6-B.) His testimony is directly contradicted by not only Ms. Schwarzman, but also by the testimony of the City's Investment Banker Kenneth Buckfire, who admitted that it was the City that had refused to sign an NDA with Syncora. (Buckfire Dep. 136:13-15, attached herein as Exhibit 6-C.) Mr. Orr conceded that there was no reason for the City to refuse to sign an NDA with Syncora — a view Syncora shares. (Orr Dep. 99:5-7.) As a result of the gamesmanship, Syncora and the City never engaged in substantive negotiations in advance of the Forbearance Agreement. (Buckfire Dep. 138:7-14.)

In proffering Ms. Schwarzman's testimony, Syncora seeks to question whether the process by which the City negotiated the Forbearance Agreement is worthy of the deference called for by the business judgment rule, as the City has suggested. After all, in order to invoke the business judgment rule, a party must demonstrate that it complied with its duty to act with care. Here, the City has not proffered any logical reason why it would refuse to enter into an NDA in connection with a proposal from Syncora — a proposal that might have been better than the one it had negotiated with the Swap Counterparties. Ms. Schwarzman's

testimony regarding the City's illogical and uncommercial response to Syncora's simple request for an NDA is thus relevant to Syncora's contention that the City's "my way or the highway" approach to the Forbearance Agreement should not be accorded any deference under the business judgment rule pursuant to section 365 of the Bankruptcy Code. The Court should thus deny the City's motion *in limine* seeking to exclude Ms. Schwarzman's testimony.

## **II. Background**

Ms. Schwarzman will testify at the hearing on the Assumption Motion for the limited purpose of establishing the perplexing manner in which the City handled the NDA negotiations with Syncora. She is not being called as an opinion witness.

Ms. Schwarzman's testimony will show that the City would not cooperate with Syncora's attempts to negotiate and complete an NDA so that Syncora could make a proposal. (Schwarzman Dep. 9:12-10:13, attached herein as Exhibit 6-A.) Even though the City proposed changes to the NDA which Syncora accepted, and even though the City and Syncora exchanged drafts that culminated in an NDA signed by Syncora that the City's counsel represented was acceptable to the City, the City refused to sign its own proposed NDA. (Schwarzman Dec. ¶ 10, attached herein as Exhibit 5.) Even after repeated inquiry, the City would not return an executed NDA. (*Id.*) This run-around regarding the NDA stymied Syncora's

ability to make a proposal and negotiate meaningfully with the City. Emergency Manager Kevyn Orr could think of no reason why the City would not enter into an NDA with Syncora, and erroneously blamed Syncora for its refusal to sign. (Orr Dep. 99:5-7; 93:19-94:3.)

### **III. Argument**

#### **A. Ms. Schwarzman’s Testimony is Clearly Relevant to Whether the City is Entitled to the Protection of the Business Judgment Rule**

A debtor’s decision to assume or reject a contract under section 365 of the Bankruptcy Code is reviewed under the “business judgment” standard. *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993). The business judgment rule is a rule by which courts will defer to the judgment of a debtor — but only where the debtor first shows that it has exercised its fiduciary duty of due care. *See In re Innkeepers USA Trust*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010). The duty of due care includes deliberate evaluation of available alternatives to the course of action that is ultimately adopted. *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 275 (2d Cir. 1986) (the “paucity of information and . . . swiftness of decision-making strongly suggest a breach of the duty of due care. . . . the Board appears to have failed to ensure that alternative bids were negotiated or scrutinized.”).

Here, Ms. Schwarzman’s testimony calls into question the City’s exercise of due care, because it suggests that the City refused to consider alternative proposals

from Syncora that might have been better than those offered by the Swap Counterparties. Mr. Orr admitted in his deposition testimony that the City has entered into “many” nondisclosure agreements. (Orr Dep. 98:17-99:2.) Mr. Orr could think of no reason why the City would not sign an NDA with Syncora. (Orr Dep. 99:5-7.)

Yet this is precisely what the City did. Ms. Schwarzman will testify that it was the City that refused to sign an NDA with Syncora on at least two occasions. (Schwarzman Dep. 139:19-23; 140:23.) Her testimony, considered along with Messrs. Orr’s and Buckfire’s, demonstrates that the City has not met its burden to act with due care because it has deliberately ignored the overtures and efforts of parties with alternative offers to the one it seeks to assume in the Forbearance Agreement. Having refused to sign a commercially standard agreement that it had executed with countless parties before, the City inexplicably rebuffed Syncora’s effort to make it an offer that could have potentially been significantly better than its deal with the Swap Counterparties. Syncora should be permitted to introduce this evidence in support of its argument that the City cannot now invoke the protections of the business judgment rule in support of the Forbearance Agreement. *See Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 275 (2d Cir. 1986) (finding a violation of due care where proposals were accepted in haste and without careful consideration of alternatives).

**B. Syncora's Assertions of Privilege Were Proper**

Ms. Schwarzman is being called a percipient witness to testify to the existence, duration, and events comprising the negotiation of an NDA between the City and Syncora. At the beginning of the deposition, Ms. Schwarzman's counsel clarified the purpose for Ms. Schwarzman's testimony:

MR. ARNAULT: [W]e may call Miss Schwarzman as a rebuttal witness to testify about topics that are consistent with her declaration and the negotiations that she had with the City regarding an NDA. Given the limited categories of information that . . . Ms. Schwarzman may testify about, any questions should be limited to these narrow categories . . . Miss Schwarzman is an attorney at Kirkland & Ellis who has been providing legal advice to Syncora. So I want to be very clear up front that by putting her up for this deposition we are not waiving any protections afforded by the attorney-client privilege or the work product doctrine and she will not be providing answer — or providing answers to any questions that require her to divulge any privileged or otherwise-protected information.

(Schwarzman Dep. 9:21-10:13.)

Rather than honor Syncora's assurances and take a focused, half-hour deposition on Ms. Schwarzman's communications with the City, the City's counsel instead spent much of Ms. Schwarzman's deposition on a fishing expedition for the mental impressions of Syncora's counsel on issues significantly outside of the scope of her declaration. For example, notwithstanding assurance from Syncora's counsel that Ms. Schwarzman was being offered for the limited purpose of establishing that the City refused to sign an NDA with Syncora, the City's counsel

asked repeatedly about legal conclusions and statements in Syncora's objection to the City's Assumption Motion. (*See, e.g.*, Schwarzman Dep. 46:12-48:2.) The City's counsel also asked for details about legal advice and internal attorney-client communications between Kirkland and Syncora, which are properly protected by the attorney-client privilege and work-product doctrines. (*See, e.g.*, Schwarzman Dep. 30:3-17; 78:4-12.) In response to these improper inquiries, Syncora properly asserted the attorney-client privilege.

The City was not blocked in any way from exploring negotiations of the NDA with Syncora, about which Ms. Schwarzman answered multiple questions. She answered multiple questions in the scope of her testimony regarding the negotiations that led up to an NDA that was signed by Syncora, but not by the City's representatives. (Schwarzman Dep. 139:19-23.) Thus, the City does not have a basis for the claim that Syncora asserted "broad and improper" attorney-client privilege or refused to provide factual information related to the basis and scope of her testimony.

#### **IV. Conclusion**

For the foregoing reasons, Syncora respectfully requests that the City's Motion *in Limine* to Exclude Testimony of Alexandra Schwarzman be denied.

Dated: September 18, 2013

Respectfully submitted,

**KIRKLAND & ELLIS LLP**

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## Summary of Attachments

Exhibit 1 - Proposed Order

Exhibit 2 - Notice

Exhibit 3 - Brief [N/A]

Exhibit 4 - Certificate of Service [To be Filed]

Exhibit 5 - Declaration of Alexandra Schwarzman

Exhibit 6-A - Excerpts of Deposition of Alexandra Schwarzman

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

Exhibit 6-C - Excerpts of Deposition of Kenneth Buckfire

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

**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
	)

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**ORDER DENYING THE DEBTOR’S MOTION *IN LIMINE* TO EXCLUDE  
TESTIMONY OF ALEXANDRA SCHWARZMAN**

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This matter having come before the Court on the motion (the “Motion”) of the Debtor, City of Detroit, for entry of an order excluding the testimony of Alexandra Schwarzman at the hearing (the “Hearing”) on the Motion of Debtor for Entry of an Order (I) Authorizing the Assumption of that Certain Forbearance and Optional Termination Agreement Pursuant to Section 365(a) of the Bankruptcy Code, (II) Approving Such Agreement Pursuant to Rule 9019, and (III) Granting Related Relief, and the Court being otherwise advised in the premises;

**IT IS HEREBY ORDERED:**

1. That the Debtor’s Motion *in Limine* to Exclude Testimony of Alexandra Schwarzman is DENIED.
2. That the testimony of Alexandra Schwarzman will be permitted at the Hearing.

**IT IS SO ORDERED.**

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STEVEN W. RHODES  
United States Bankruptcy Judge

**Exhibit 2**  
**Notice [N/A]**

**Exhibit 3**  
**Brief [N/A]**

**Exhibit 4**  
**Certificate of Service [To be Filed]**

**Exhibit 5**

**Declaration of Alexandra Schwarzman**

**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
	)	

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**DECLARATION OF ALEXANDRA SCHWARZMAN**

I, Alexandra Schwarzman, hereby declare that I am an adult and have personal knowledge of the following:

1. I am an associate with Kirkland & Ellis LLP.
2. I was involved in the discussions between Syncora Guarantee Inc. and its affiliates (“Syncora”) and the City of Detroit (the “City”) regarding the terms of a non-disclosure agreement (“NDA”). My declaration describes these negotiations and the events surrounding them.
3. It is my understanding that representatives from the City were unwilling to provide Syncora with additional data about the City’s discussions with the Swap Counterparties unless the City and Syncora first entered into an NDA. As a result, on June 29, 2013, the City and its attorneys began drafting an NDA that it planned to circulate to Syncora and its representatives.
4. On June 30, 2013, the City provided a draft of its proposed NDA. On July 2, 2013, the parties participated in two more calls regarding the terms of the proposed NDA.
5. At the conclusion of the second call on July 2, 2013, the parties still had not been able to reach an agreement on a few issues. In particular, the attorney for the City (a) did not

know whether an NDA was executed with the Swap Counterparties (and, if so, whether Syncora could see it) and (b) was not willing to agree to maintain the confidentiality of Syncora's proposal without further discussion with the City.

6. At the conclusion of the parties' July 2, 2013 discussions, the Jones Day attorney for the City stated that he needed to further consider and discuss the few outstanding issues internally but would get back to us shortly.

7. While we were waiting for the City's attorney to contact us and resume the discussions regarding the NDA, the City filed its Motion for an *Ex Parte* Temporary Restraining Order and an Order to Show Cause Why a Preliminary Injunction Should Not Issue (the "Motion"). Before filing the Motion, the City and its attorneys did not inform Syncora or its attorneys that the City would be filing a motion and requesting an *ex parte* hearing. Instead, Syncora and its attorneys learned of the Motion when the City emailed Syncora the temporary restraining order minutes after it was entered.

8. The next time I heard from the City on the issue of the NDA was on July 9th, 2013. The Jones Day attorney for the City sent a revised draft of the NDA.

9. On July 10, 2013, the City's attorney at Jones Day sent a further revised draft of the NDA with additional technical changes. Because the City's proposed NDA was agreeable to Syncora, on this same day, I updated the notice information in the NDA and obtained a signature from Syncora's Chief Financial Office and Chief Restructuring Officer, Claude L. LeBlanc. Finally, the signed NDA was sent back to the City's attorney at Jones Day for execution.

10. I sent follow-up emails regarding the executed NDA on July 11, 2013 and July 12, 2013 to check on the status of a counter signature from the City. The City's attorney at Jones

Day did not respond to either of these correspondences. I never received a version of this NDA that was executed by the City or its advisors.

  
\_\_\_\_\_  
Alexandra Schwarzman

Executed this 18 day of September 2013.

**Exhibit 6A**

**Excerpts of Deposition of Alexandra Schwarzman**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 Q. -- verbally for the record.  
 2 A. No answer.  
 3 Q. Okay.  
 4 A. Can't disclose that.  
 5 Q. Now, other than Paragraph 7 of the  
 6 draft NDA where you said you believed that a  
 7 resolution was reached, do you remember whether  
 8 resolution was reached on any of these other issues  
 9 that were raised?  
 10 A. Yeah. I believe we came to a  
 11 resolution except for the two points that I referenced  
 12 in Paragraph 5 of my declaration.  
 13 Q. What is the resolution with respect  
 14 to Syncora's desire to unilaterally terminate the NDA?  
 15 A. I don't remember the specific  
 16 resolution.  
 17 Q. Well, let's do this, then. I'm going  
 18 to give you a later draft and see if this will refresh  
 19 your recollection. It's being marked as Exhibit 5.  
 20 (Schwarzman Exhibit 5 was marked for ID.)  
 21 MS. KOVSKY-APAP: For those on the  
 22 phone, we're handing the witness a document that's  
 23 also entitled "Confidentiality Agreement," dated July  
 24 10th, 2013. And I'm going to see what I did with my  
 25 copy of it.

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1 THE WITNESS: (Reviewing document.)  
 2 BY MS. KOVSKY-APAP:  
 3 Q. Just let me know when you're done  
 4 reviewing it.  
 5 A. Okay.  
 6 Q. And first, let me ask you: Do you  
 7 recognize this document?  
 8 A. Yes.  
 9 Q. What is it?  
 10 A. This looks like a later in time draft  
 11 of the NDA.  
 12 Q. And this would be after the  
 13 resolution of most of the issues that we've talked  
 14 about so far, correct?  
 15 A. I think so. Although it's not  
 16 red-lined, so I'd have to go searching for all the  
 17 terms, but I would imagine.  
 18 Q. Well, you said that by the end of the  
 19 call on July 2nd everything except two issues were  
 20 resolved, right?  
 21 A. Correct.  
 22 Q. And so leaving those two issues  
 23 aside, one of the issues that you said was resolved  
 24 was the unilateral termination that Syncora was  
 25 requesting, correct?

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1 A. Correct.  
 2 Q. Okay. Do you re- -- looking at this  
 3 document, are you able to tell how that was resolved?  
 4 A. I'll go through the whole thing.  
 5 (Reviewing document.)  
 6 I don't see anything in here.  
 7 Q. So you don't see any unilateral  
 8 termination provision?  
 9 A. No. If you can point me to it, if  
 10 I'm missing it.  
 11 Q. Well, I didn't see one either. I  
 12 just wanted to see if this refreshed your recollection  
 13 of -- of what was negotiated.  
 14 So your client agreed to a proposed  
 15 NDA that did not have the unilateral termination  
 16 provision that was initially requested, correct?  
 17 A. That's what it appears to be.  
 18 Q. And with respect to the  
 19 confidentiality restrictions lifting 90 days after  
 20 termination of the NDA?  
 21 A. I don't see those here either.  
 22 Although I will note that this is not the final  
 23 version of the NDA, so...  
 24 Q. Well, was there a final version that  
 25 was executed by all parties?

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1 A. By Syncora. The City never returned  
 2 it.  
 3 Q. Okay. How are you able to tell that  
 4 this was not the final version?  
 5 A. Because it's not the signature block  
 6 that's on the final version.  
 7 Q. Okay. Let me see I may have that  
 8 one.  
 9 MS. KOVSKY-APAP: Let's mark this as  
 10 Number 6.  
 11 (Schwarzman Exhibit 6 was marked for ID.)  
 12 MS. KOVSKY-APAP: We're marking as  
 13 Exhibit 6 a "Confidentiality Agreement," also, dated  
 14 as July 10th, 2013. It is -- it's a version that is  
 15 appears to have two Syncora entities on the signature  
 16 block, executed by Syncora.  
 17 THE WITNESS: (Reviewing document.)  
 18 BY MS. KOVSKY-APAP:  
 19 Q. Is this what, in your mind, would be  
 20 the last version that was exchanged between the  
 21 parties?  
 22 A. Yes.  
 23 Q. And does this version have a  
 24 unilateral termination provision?  
 25 A. You don't happen to have a red-line,

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1 BY MS. KOVSKY-APAP:  
 2 Q. In the end, since Syncora made a  
 3 proposal along the same lines as the proposal that it  
 4 was originally contemplating with respect to the NDA,  
 5 it went ahead and made the proposal without an NDA.  
 6 So ultimately the NDA was kind of irrelevant, wasn't  
 7 it?  
 8 A. Well, there's two questions in there.  
 9 But as to irrelevance, I'm going to say, no, it was  
 10 not irrelevant.  
 11 Q. So Syncora couldn't make its proposal  
 12 without the NDA?  
 13 A. I don't want to reveal any  
 14 confidential communications, but suffice it to say  
 15 it's very different circumstances between the initial  
 16 time of what was going on here and what was happening  
 17 in the world when Syncora ultimately made the  
 18 proposal.  
 19 Q. Yeah. But ultimately, Syncora was  
 20 able it make its proposal without benefit of any NDA  
 21 being signed.  
 22 A. Correct.  
 23 Q. Okay.  
 24 MS. KOVSKY-APAP: I'd like to go off  
 25 the record for a couple of minutes and take a short

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1 break.  
 2 THE VIDEOGRAPHER: Sure. This ends  
 3 Disk Number 2. Now going off the record at 2:14 p.m.  
 4 (Recess taken from 2:14 p.m. to 2:38 p.m.)  
 5 THE VIDEOGRAPHER: This begins Disk  
 6 Number 3. Now going back on the record at 2:38 p.m.  
 7 BY MS. KOVSKY-APAP:  
 8 Q. Miss Schwarzman, do you recall that  
 9 you testified earlier that you have negotiated two  
 10 NDAs in your career so far?  
 11 A. Correct.  
 12 Q. And you said that Jones Day was the  
 13 counterparty to both of those NDAs; is that correct?  
 14 A. Correct.  
 15 Q. By "counterparty," do you mean the  
 16 signatory?  
 17 A. By "counterparty," I mean the firm  
 18 with which I was negotiating.  
 19 Q. Okay. So it's not your testimony  
 20 that Jones Day actually ever signed an NDA with  
 21 Syncora?  
 22 A. No. I don't remember who signed the  
 23 other one. They never signed this.  
 24 Q. Okay. And the other NDA was with  
 25 respect to what has been referred to as the City's

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1 data room; is that correct?  
 2 A. Yes.  
 3 Q. And would it -- well, I'll just  
 4 refresh your recollection.  
 5 MS. KOVSKY-APAP: Let's have this  
 6 marked as 7.  
 7 (Schwarzman Exhibit 7 was marked for ID.)  
 8 BY MS. KOVSKY-APAP:  
 9 Q. I've handed you what's titled  
 10 "Confidentiality Agreement." It's dated July 9th. Do  
 11 you recognize this as the confidentiality agreement  
 12 related to the Data Room?  
 13 A. Yeah.  
 14 Q. And if you turn to the last page  
 15 where the signature blocks are --  
 16 A. Um-hum.  
 17 Q. -- you see that this was executed by  
 18 the City of Detroit and Syncora Capital Assurance Inc.  
 19 A. Yes.  
 20 Q. So Jones Day was not a party to this  
 21 agreement, correct?  
 22 A. They are who I negotiated this  
 23 agreement with. But they did not sign the agreement.  
 24 Q. Are you suggesting that,  
 25 notwithstanding the fact that they didn't sign the

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1 agreement, they were somehow a party to the agreement?  
 2 A. No.  
 3 Q. So Jones Day was not a party to this  
 4 agreement; is that correct?  
 5 A. Correct.  
 6 Q. Thank you.  
 7 Earlier I asked you some questions  
 8 about what has been called the "forbearance and  
 9 optional termination agreement."  
 10 Do you remember that?  
 11 A. Yeah.  
 12 Q. And you're aware of what agreement  
 13 I'm referring to when I say "forbearance and optional  
 14 termination agreement"?  
 15 A. Yes.  
 16 Q. Is my understanding correct that you  
 17 will refuse, on the basis of attorney-client privilege  
 18 and/or work product, to testify any further than  
 19 you've already done regarding your understanding of  
 20 what that agreement means and what its purpose is?  
 21 A. Correct.  
 22 MS. KOVSKY-APAP: Okay. I will pass  
 23 the witness, if anyone else wants to ask any  
 24 questions. I think most of the people on the phone  
 25 indicated they did not.

**Exhibit 6B**

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

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1 grounds of the privilege.  
 2 **A. Here again, there are objections in the case that make**  
 3 **some of those arguments, but I will not specifically**  
 4 **answer.**  
 5 Q. Because of the privilege.  
 6 **A. Because of the attorney-client privilege and it calls**  
 7 **for a legal conclusion.**  
 8 Q. And if I ask you who had the better side of the  
 9 argument, you would say the same thing?  
 10 **A. Same thing.**  
 11 **MR. SHUMAKER:** Same objection, same  
 12 instruction.  
 13 **A. I would say the same thing. I would say the same**  
 14 **thing.**  
 15 **BY MR. HACKNEY:**  
 16 Q. Do you agree that the insurers can control all actions  
 17 of the Swap counterparties in connection with the  
 18 Swaps, that this would be important in terms of  
 19 assessing whether the City should negotiate with the  
 20 insurers?  
 21 **MR. SHUMAKER:** Objection, foundation, calls  
 22 for a legal conclusion.  
 23 You can answer to the extent you have an  
 24 understanding.  
 25 **A. It's also a little speculative because it's a**

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1 **hypothetical. If then is usually a hypothetical, so I**  
 2 **would -- for the same reasons as we discussed before,**  
 3 **I would say that to the extent it calls for a legal**  
 4 **conclusion, I'll refuse to answer.**  
 5 **I would say as a rational person, if you**  
 6 **were put in a corner, then you might want to consider**  
 7 **your alternatives, including negotiations.**  
 8 **BY MR. HACKNEY:**  
 9 Q. With the insurers?  
 10 **A. With whoever, yes, whoever's --**  
 11 Q. I mean it's just a simple point. We have five minutes  
 12 left. I'm going to milk them.  
 13 **A. Okay.**  
 14 Q. But it's a simple point, which is if the insurers can  
 15 potentially direct, like a marionette, the actions of  
 16 the Swap counterparties, and I understand --  
 17 **A. Right.**  
 18 Q. -- that you're not agreeing with that --  
 19 **A. Right.**  
 20 Q. -- okay, but if they can --  
 21 **A. Um-hm.**  
 22 Q. -- they're a potential party that you can go negotiate  
 23 with to play off against the Swap counterparties,  
 24 correct?  
 25 **MR. SHUMAKER:** Objection, calls for

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1 speculation.  
 2 **A. Yeah, here again, I mean if that happened, possibly,**  
 3 **but that's a speculative question, so I'm going stay**  
 4 **away from it.**  
 5 **BY MR. HACKNEY:**  
 6 Q. It is speculation, but it's logical --  
 7 **A. As I said in my answer, a rational person would make**  
 8 **that --**  
 9 Q. Yeah.  
 10 **A. If you were put in a corner, you'd have to find some**  
 11 **way out, and negotiation might be one of those**  
 12 **sources, but to the extent your question is also**  
 13 **speculation, I'm going to defer from answering.**  
 14 Q. Do you agree that the insurers are entitled to control  
 15 all of the actions of the Swap counterparties; it  
 16 raises the risk that the deal negotiated in the  
 17 forbearance agreement may be for naught?  
 18 **MR. SHUMAKER:** Objection, calls for  
 19 speculation.  
 20 **A. Yeah, here again, maybe not.**  
 21 **BY MR. HACKNEY:**  
 22 Q. Those are things you haven't -- you haven't considered  
 23 prior to today, fair statement?  
 24 **A. That's a fair statement.**  
 25 Q. Okay. Have you ever heard the phrase "play both ends

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1 against the middle"?  
 2 **A. Oh, have I ever heard the phrase?**  
 3 Q. Yes.  
 4 **A. Yes.**  
 5 Q. You're a bankruptcy lawyer, right?  
 6 **A. Yes.**  
 7 Q. You were, I should say.  
 8 **A. I was.**  
 9 Q. And that's one of the time-honored tricks of  
 10 bankruptcy negotiation, right, is to play parties off  
 11 against one another to try and get the best deal?  
 12 **A. I'm not going to call it a trick.**  
 13 Q. Tools.  
 14 **A. Tools, tactics. You know, there -- lawyer, as a**  
 15 **negotiator, getting a yes, discussing a number of**  
 16 **different alternatives.**  
 17 Q. And one of them is playing off both ends against the  
 18 middle?  
 19 **A. Could be. People do that all -- outside of legal**  
 20 **issues, they do that in negotiation.**  
 21 Q. Isn't it true that prior to July 17 the City never  
 22 engaged in substantive negotiations with Syncora?  
 23 **A. I don't know if that's true. You said July 17th?**  
 24 Q. Yeah. That's the date of the execution of the  
 25 forbearance agreement.

1 **A. Right. I don't know if that's true. I believe there**  
 2 **were discussions that may have been, but you**  
 3 **characterize it as substantive negotiations, so I**  
 4 **don't know if that's true.**  
 5 Q. You certainly didn't participate in any substantive  
 6 negotiations with Syncora, correct?  
 7 **A. Well, I -- you know, you say negotiations. I know**  
 8 **there were a series of letters going back and forth**  
 9 **and I know that there was a letter -- I just don't**  
 10 **recall when I sent it -- to Mr. LeBlanc that said if**  
 11 **you want to have serious negotiations, then let's have**  
 12 **a discussion, but let's stop sending these letters**  
 13 **back and forth.**  
 14 Q. But isn't it your position that there were no serious  
 15 negotiations with Syncora because Syncora would not  
 16 make a proposal?  
 17 **A. I believe in one of those letters I expressed that**  
 18 **concern, yes.**  
 19 Q. And to your knowledge Syncora never made a proposal to  
 20 the City of Detroit prior to July 17th, correct?  
 21 **A. Yeah, I believe there was a discussion -- well, there**  
 22 **was discussion about an exchange of NDAs, and Syncora**  
 23 **said they wanted to make a proposal, but they first**  
 24 **wanted to see the proposal from the Swap**  
 25 **counterparties, and I believe in one of my letters to**

1 July 17th, correct?  
 2 **A. I believe -- July 17th?**  
 3 Q. (Nods head).  
 4 **A. I believe that's true. As I said, I think there was**  
 5 **some discussion about a potential offer from Syncora,**  
 6 **but I believe that got caught up in the NDA issue and**  
 7 **that went away, so yes, I believe that's true.**  
 8 Q. And your recollection in the NDA issue is that the  
 9 City wanted an NDA, but Syncora wouldn't sign it?  
 10 **A. My recollection -- no. My recollection was the City**  
 11 **needed an NDA because we were asking all parties --**  
 12 **nondisclosure agreement, we were asking all parties to**  
 13 **sign them. There was some discussion -- I put in a**  
 14 **letter, I seem to recall, that Syncora sign one, but I**  
 15 **don't want to speculate or mischaracterize. There**  
 16 **were some discussion about a NDA before Syncora would**  
 17 **show us their proposal and something about they wanted**  
 18 **to see the Swap counterparties' proposal before**  
 19 **signing an NDA first or something along those lines.**  
 20 Q. You're not aware of any situation where the City  
 21 refused to sign an NDA with Syncora, correct?  
 22 **A. No, not that I'm aware of.**  
 23 Q. In fact, it was the City that wanted an NDA with  
 24 Syncora?  
 25 **A. Yes. I believe that's true.**

1 **Mr. LeBlanc, I said well, the parties need to sign a**  
 2 **NDA, and my understanding was Syncora declined to do**  
 3 **that.**  
 4 **MR. HACKNEY:** Let's actually take a break  
 5 right now in light of the videotape and maybe we can  
 6 use it as a chance to stretch our legs and use the  
 7 restroom.  
 8 **VIDEO TECHNICIAN:** The time is 10:04 a.m.  
 9 This marks the end of tape number 1. We are off the  
 10 record.  
 11 (Recess taken at 10:04 a.m.)  
 12 (Back on the record at 10:14 a.m.)  
 13 **VIDEO TECHNICIAN:** We are back on the  
 14 record at 10:14 a.m. This marks the beginning of tape  
 15 number 2.  
 16 **BY MR. HACKNEY:**  
 17 Q. Mr. Orr, I kind of want to cut through this with  
 18 Syncora. I understand that there were letters back  
 19 and forth between you and Syncora.  
 20 **A. Yes.**  
 21 Q. But I just want to make clear for the record that  
 22 there were not substantive negotiations of the type  
 23 that you engaged in with the Swap counterparties with  
 24 Syncora about an alternative proposal to the  
 25 forbearance agreement prior to its execution on

1 Q. And it's also true that you did not engage in  
 2 substantive negotiations with FGIC about an  
 3 alternative to the forbearance agreement prior to  
 4 July 17th, correct?  
 5 **A. Yeah, with regard to the issue of substantive, I'll --**  
 6 **I'll, you know, caution that I'm not -- I'm not**  
 7 **necessarily characterizing, but to the best of my**  
 8 **knowledge, that's a fair characterization.**  
 9 Q. You didn't make a proposal about an alternative to  
 10 FIGC and FIGC didn't make one to you.  
 11 **A. Yes, to the best of my knowledge, that's true.**  
 12 Q. And that's also true with respect to Syncora, correct?  
 13 **A. Yes, that's true.**  
 14 Q. Now, I think you've testified previously that no  
 15 proposal was forthcoming from Syncora in connection  
 16 with the TRO proceedings.  
 17 **A. Okay.**  
 18 Q. I'll just represent that to you --  
 19 **A. Okay.**  
 20 Q. -- as a way of --  
 21 **A. Yeah. In one of my affidavits --**  
 22 Q. That's right.  
 23 **A. -- or something, yeah.**  
 24 Q. Were you aware that Mr. Buckfire had had a  
 25 conversation with Todd Snyder of Syncora?

1 **A. As I said, there were -- you know, during this --**  
 2 **there were many conversations that were going back and**  
 3 **forth and I wasn't necessarily aware of all of them.**  
 4 **I knew they were -- they were going back and forth,**  
 5 **but it is -- if that's true, it wouldn't surprise me.**  
 6 Q. So you don't remember it as you sit here today?  
 7 **A. No, I do not.**  
 8 Q. Okay. Because this was in the -- this was in the  
 9 period of where the cash was being trapped.  
 10 **A. Right. But, sir, here again, there were so many -- so**  
 11 **many discussions going back and forth about so many**  
 12 **things. I mean in this period we were dealing with**  
 13 **the June 10th meeting, the June 14th creditor's**  
 14 **presentation, trying to do the Swap settlement, the**  
 15 **run up to my quarterly report. There were just --**  
 16 **there were a lot of conversations about a lot of**  
 17 **things. I simply don't remember.**  
 18 Q. Okay. And I take it you don't recall that Mr. --  
 19 whether Mr. Buckfire told you that Syncora had  
 20 described to him the general structure of a proposal  
 21 it wanted to make?  
 22 **A. He may have. I just don't recall it.**  
 23 Q. Okay. It's true, isn't it, that as of the date of the  
 24 execution of the forbearance agreement, your office  
 25 had received multiple calls from Claude LeBlanc at

1 Syncora, correct?  
 2 **A. I'm not aware of that. There may have been multiple**  
 3 **calls, but I'm not aware -- I received no calls.**  
 4 Q. Okay. So you don't -- I take it your secretary --  
 5 **A. My office may have. Yeah, my secretary may have, but**  
 6 **I didn't.**  
 7 Q. So you don't know whether he called you or not?  
 8 **A. If you're representing to me that he did, I have no**  
 9 **reason to believe that that's untrue.**  
 10 Q. Okay. And I take it you have never called personally  
 11 Mr. LeBlanc --  
 12 **A. No.**  
 13 Q. -- isn't that correct?  
 14 **A. No, I don't think so.**  
 15 Q. So you didn't return those calls if they were made?  
 16 **A. No.**  
 17 **Q. I just want -- I guess I -- the City has entered into**  
 18 **numerous nondisclosure agreements --**  
 19 **A. Right.**  
 20 **Q. -- in these cases, correct?**  
 21 **A. Yes.**  
 22 **Q. I mean has it entered into hundreds?**  
 23 **A. I don't know. I don't -- I don't operate the data**  
 24 **room or any others, but I suspect there's certainly**  
 25 **many.**

1 **Q. We can say that there are lots.**  
 2 **A. There are lots.**  
 3 **Q. Okay.**  
 4 **A. Okay.**  
 5 **Q. And there's no reason you can think of today that the**  
 6 **City wouldn't enter into one with Syncora.**  
 7 **A. No.**  
 8 Q. Were you aware that Syncora wanted a nondisclosure  
 9 agreement so that it could make a proposal that would  
 10 be an alternative to the Swap counterparties?  
 11 **A. As I said, I believe I have a letter that discusses**  
 12 **the NDA issue, but it was caught up in something**  
 13 **related to Syncora -- as I understood it, Syncora**  
 14 **wanting to see the Swap counterparty proposal first**  
 15 **prior to entering an NDA.**  
 16 Q. Did you ever hear that Syncora had gotten over that  
 17 issue and was now willing to just make a proposal to  
 18 the City?  
 19 **A. No.**  
 20 Q. So no one ever told you that?  
 21 **A. No, I don't recall ever hearing that.**  
 22 Q. Okay. Would that have been significant to you if you  
 23 heard that?  
 24 **MR. SHUMAKER:** Objection, calls for  
 25 speculation.

1 **A. Yeah. Here again, it depends upon what point in time,**  
 2 **if we were already bound by the definitive term sheet**  
 3 **and then -- or the agreement, I believe the**  
 4 **forbearance agreement has an obligation we cooperate**  
 5 **with Swap counterparties, so it wouldn't have mat --**  
 6 **no, it would not have mattered at that time, so it**  
 7 **depends on when that would have occurred.**  
 8 **BY MR. HACKNEY:**  
 9 Q. But if it was prior to July 17th, if there were any  
 10 parties that were out there that thought they had a  
 11 good deal for the City, that would have been something  
 12 you wanted to know?  
 13 **A. We are always willing to listen to parties that think**  
 14 **they have a good deal for the City.**  
 15 Q. Isn't it true that the City's decision to enter into  
 16 the forbearance agreement was made by you, in your  
 17 role as emergency manager?  
 18 **A. Yes, after consultation with my -- with my employees,**  
 19 **staff and consultants, yes.**  
 20 Q. And when did you make that decision?  
 21 **A. To enter into the actual agreement?**  
 22 Q. Yes.  
 23 **A. The day I signed it.**  
 24 Q. July 15th, 2013?  
 25 **A. I believe so, yes.**

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 **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 **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. 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.**

**Exhibit 6C**

**Excerpts of Deposition of Kenneth Buckfire**

1 **A. Correct.**  
 2 Q. So, you felt like we had some time to negotiate?  
 3 **A. That's correct.**  
 4 Q. Yeah. Your understanding is that the legal  
 5 negotiations of the forbearance agreement were  
 6 complicated but that they proceeded uninterrupted from  
 7 June 11th to July 15th, correct?  
 8 **A. Correct.**  
 9 Q. And if there had been a serious interruption in these  
 10 negotiations, you would have likely known about this  
 11 as an important advisor to the City, correct?  
 12 **A. Yes.**  
 13 Q. And you are aware of no serious interruption, correct?  
 14 **A. No.**  
 15 Q. That's not correct?  
 16 **A. I'm not aware of any serious interruptions.**  
 17 Q. In late June of 2013 you learned that Syncora wanted  
 18 to make a proposal to the City, isn't that correct?  
 19 **A. Yes.**  
 20 Q. And you had a conversation with Todd Snyder on the  
 21 subject of Syncora's potential proposal on Saturday,  
 22 June 29th, isn't that correct?  
 23 **A. That's correct.**  
 24 Q. Mr. Snyder you understood is a banker at Rothschild's,  
 25 correct?

1 **that would be of benefit to the City in resolving the**  
 2 **Swap matter. I told him that we were always willing**  
 3 **to listen to anything anyone had to say and I asked**  
 4 **him to tell me what he had in mind. He never did.**  
 5 Q. Have you told me everything you can recall about that  
 6 conversation?  
 7 **A. Yes.**  
 8 Q. During that conversation didn't Mr. Snyder describe  
 9 the general structure of a proposal Syncora wanted to  
 10 make?  
 11 **A. No.**  
 12 Q. So, if Mr. Snyder says he did, he's lying or mistaken?  
 13 **A. He never made a specific proposal to me.**  
 14 Q. I'm not saying a specific proposal, I'm saying a  
 15 general structure of a proposal, that's what he  
 16 testified to in his affidavit.  
 17 Did he provide to you the general structure  
 18 of a proposal that Syncora wanted to make?  
 19 **A. Not that I recall.**  
 20 Q. Possible he did, possible he didn't, you just can't  
 21 remember?  
 22 **A. I can't remember.**  
 23 Q. Did he tell you that we'd be able to put specifics  
 24 into the general structure of the proposal if we could  
 25 execute an NDA that would allow us to learn about the

1 **A. Correct.**  
 2 Q. And you also understood that he was representing  
 3 Syncora, correct?  
 4 **A. Yes.**  
 5 Q. And you also understood that at the time that he was  
 6 calling you, that there had been previous  
 7 communications between counsel to Syncora and counsel  
 8 to the City, correct?  
 9 **A. I had heard about it but I wasn't aware of the**  
 10 **specifics.**  
 11 Q. Okay. So, you knew Jones Day and Kirkland and maybe  
 12 others had met and talked about something but you  
 13 didn't know what it was?  
 14 **A. I knew they were talking about the issues raised by**  
 15 **Syncora.**  
 16 Q. Okay. Now, tell me -- so, in terms of Syncora's  
 17 potential proposal, your first percipient knowledge of  
 18 it as a witness happens on that Saturday when you have  
 19 your conversation with Mr. Snyder, is that a fair  
 20 statement?  
 21 **A. Correct.**  
 22 Q. Tell me everything you can recall about that  
 23 conversation.  
 24 **A. It was quite brief. Todd told me he had been retained**  
 25 **by Syncora and that they wanted to propose something**

1 negotiations with the Swap counterparties?  
 2 **A. Yes, he did.**  
 3 Q. What did you tell him in response to that?  
 4 **A. I said he should send us an NDA and we'll take a look**  
 5 **at it.**  
 6 **Q. And you understood that at least as he expressed to**  
 7 **you that he wanted an NDA as a precursor in order to**  
 8 **make a specific proposal, correct?**  
 9 **A. Correct.**  
 10 **Q. Isn't it true that after that time you understood that**  
 11 **an NDA was proposed to the City, correct?**  
 12 **A. Yes.**  
 13 **Q. And the City refused to execute that NDA, isn't that**  
 14 **correct?**  
 15 **A. That's correct.**  
 16 Q. Do you have information about why the City refused to  
 17 execute it?  
 18 **A. Well, as I recall the NDA was not with the City, it**  
 19 **was meant to be with Miller Buckfire and Jones Day and**  
 20 **we would not be able to disclose whatever they told us**  
 21 **to the City which made no sense, and that was the**  
 22 **reason we couldn't sign that NDA and that's why I**  
 23 **testified earlier he didn't really tell me a proposal,**  
 24 **he said I'd like to make a proposal. He said I'll**  
 25 **tell you the proposal if you sign the NDA. So we**

1 **never got a proposal.**  
 2 Q. I want to make that clear that's subject to you saying  
 3 you don't remember whether he provided the general  
 4 outlines of the structure or not, correct?  
 5 **A. No.**  
 6 **MR. CULLEN:** Objection. Foundation. I  
 7 don't know what general --  
 8 **MR. HACKNEY:** Foundation?  
 9 **MR. CULLEN:** Yeah, general outline is my  
 10 problem.  
 11 **A. I can't recall him telling me anything about what he**  
 12 **was going to propose and certainly wasn't specific.**  
 13 **If he had been specific, I probably would remember it.**  
 14 **BY MR. HACKNEY:**  
 15 Q. And that's because -- but you do remember him telling  
 16 you the specifics would come after we sign an NDA?  
 17 **A. I do.**  
 18 Q. Yeah. And then your understanding is that there was a  
 19 problem with the NDA that you couldn't discuss the  
 20 proposal with the EFM?  
 21 **A. That's correct.**  
 22 Q. And that was something that the parties couldn't get  
 23 over?  
 24 **A. I asked Jones Day to go back to Kirkland Ellis and try**  
 25 **to fix the problems we had in the NDA and then I moved**

1 **A. Sometimes.**  
 2 Q. Isn't that something that you'll do in the DIP  
 3 financing which is you'll get all these offers in and  
 4 then you'll make these guys compete with each other in  
 5 order to drive best possible deal for the City,  
 6 correct?  
 7 **A. Only if you assume a level playing field which this**  
 8 **negotiation was not.**  
 9 Q. I'm just asking generally about the idea of trying to  
 10 drive the best deal possible through competition  
 11 amongst different negotiating parties. Can be  
 12 valuable, right?  
 13 **A. Can be under the right circumstances. This was not**  
 14 **one of them.**  
 15 Q. And what was wrong about the circumstances?  
 16 **A. Because we had only two parties to the table, the Swap**  
 17 **counterparties who had signed the collateral**  
 18 **agreement. There was nobody else to negotiate with.**  
 19 Q. That's right, that's right, because your understanding  
 20 was that Syncora had no rights whatsoever under the  
 21 collateral agreement, correct?  
 22 **A. Correct.**  
 23 Q. And your understanding was they had no ability to  
 24 direct the actions of the Swap counterparties,  
 25 correct?

1 **on to other issues.**  
 2 Q. And your understanding was that to the extent those  
 3 problems didn't get fixed it was because Kirkland  
 4 Ellis was being obstinate with respect to the terms of  
 5 NDA?  
 6 **A. I don't know why we never resolved it.**  
 7 Q. So, to this day you don't know whether or not an NDA  
 8 could have been struck that would have allowed Syncora  
 9 to make a rival proposal, correct?  
 10 **A. All I can tell you is that no NDA was entered into**  
 11 **because the terms were unacceptable.**  
 12 Q. And you don't know why one wasn't entered into  
 13 ultimately after that?  
 14 **A. I don't think we could ever resolve the issues.**  
 15 Q. And this was in advance of your having executed the  
 16 forbearance agreement, correct?  
 17 **A. Yes.**  
 18 Q. As a negotiator, don't you agree that it's nice  
 19 whenever you can play two parties off against each  
 20 other?  
 21 **A. I didn't have two parties, I had one party. I had the**  
 22 **Swap counterparties.**  
 23 Q. And I'm not asking about in this case, I'm asking  
 24 about as a general principle, isn't it nice when you  
 25 can play two parties off against each other?

1 **A. I testified earlier that my understanding, I was**  
 2 **advised, the only parties of interest here are the**  
 3 **Swap counterparties.**  
 4 Q. And it was also your understanding that Syncora didn't  
 5 have any rights under the Swaps that would be  
 6 terminated, correct?  
 7 **A. Only talking about the collateral agreement.**  
 8 Q. We talked about the fact that there might be a  
 9 termination event for four hundred million dollars.  
 10 That's not under the collateral agreement, right?  
 11 **A. True.**  
 12 Q. So, we are talking about the Swaps, right?  
 13 **A. Yes.**  
 14 Q. Now, let's put aside what you've been told about who  
 15 the relevant parties were. You did know that Syncora  
 16 was a Swap insurer, right?  
 17 **A. Yes.**  
 18 Q. And you understood as a layperson but a sophisticated  
 19 one that if an insurer makes a payment to the insured  
 20 it becomes subrogated to the rights of the insured  
 21 with respect to that payment, correct?  
 22 **A. Yes.**  
 23 Q. And isn't it true that if the Swap counterparties had  
 24 terminated, they wouldn't have waited around for two  
 25 years to collect the casino revenues, right, they