

**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
)

MOTION OF THE OBJECTORS FOR LEAVE TO CONDUCT LIMITED DISCOVERY IN CONNECTION WITH MOTION OF THE DEBTOR FOR A FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105, 362, 364(C)(1), 364(C)(2), 364(E), 364(F), 503, 507(A)(2), 904, 921 AND 922 (I) APPROVING POST-PETITION FINANCING, (II) GRANTING LIENS AND PROVIDING SUPERPRIORITY CLAIM STATUS AND (III) MODIFYING AUTOMATIC STAY

The Objectors¹ submit this motion for leave to conduct limited discovery relating to the *Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§105, 362, 364(c)(1), 364(c)(2), 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay* (the “DIP Motion”) pursuant to Local Rule 7026-3 of the United States Bankruptcy Court of the Eastern District of Michigan. In support of this motion, the Objectors respectfully represent as follows:

¹ Syncora Guarantee Inc. and Syncora Capital Assurance Inc. (collectively, “Syncora”), Ambac Assurance Corporation, and Hypothekenbank Frankfurt AG, Hypothekenbank Frankfurt International S.A., and Erste Europäische Pfandbrief- und Kommunalkreditbank Aktiengesellschaft in Luxemburg S.A. (collectively “ECPK”), and David Sole, Party in Interest, join in this motion.



BACKGROUND

1. On November 5, 2013, the City of Detroit (the “City”) filed the DIP Motion, requesting approval for postpetition financing in the form of two series of secured bonds: the Swap Termination Bonds and the Quality of Life Bonds,² described generally as “financial recovery bonds” under Michigan law. (DIP Mot. ¶ 42.) The City intends to utilize the DIP financing proceeds to 1) terminate certain Swap Agreements pursuant to the Forbearance Agreement³ and 2) to advance “certain key investment initiatives of the City.” (DIP Mot. ¶ 6.)

2. The terms of the financing are, broadly, as follows: the sum of the financing is \$350 million, with the proceeds split between bonds intended to finance the termination of certain Swap Agreements, and the balance consisting of bonds to finance certain City improvement projects. (DIP Mot. ¶ 47.) The DIP financing is projected to result in anywhere from \$110 million in Quality of Life financing and \$240 million in Swap Termination financing depending on the price of the Swap Termination. (DIP Mot. ¶ 16.) The interest rate is 250 basis points plus 1-month LIBOR and the purchaser, Barclays Capital Inc. (“Barclays”), will

² Capitalized terms not defined in this motion have the meanings given to them in the DIP Motion.

³ The Forbearance Agreement is the subject of another contested matter in these Bankruptcy proceedings. Pursuant to the Court’s November 7, 2013 Order, the hearing on a motion to assume the Forbearance Agreement is scheduled to occur at the same time as the hearing related to the DIP Motion. [Doc. No. 1564]. Multiple parties have filed objections to the City’s motion to assume the Forbearance Agreement [Doc. No. 157].

receive a first priority lien on the City's casino revenues⁴ and a second priority lien on the City's income tax revenues. (*Id.*) Barclays will also purportedly receive super-priority status over administrative expenses, postpetition claims, and all prepetition unsecured claims. (*Id.*)

3. The City seeks to use the proceeds of the Swap Termination Bonds to exercise an option under the Forbearance Agreement that allows the City to terminate the Swaps. (DIP Mot. ¶¶ 9–11.) Though the status of the Forbearance Agreement is in question and will be addressed by this Court at a hearing on December 10, 2013, the City has stated in its DIP Motion that the City will save “approximately \$50 million in obligations owing” as a result of the City's termination of the Swap Agreements pursuant to the Forbearance Agreement. (DIP Mot. ¶ 15.)

4. The City asserts that the Quality of Life Bond proceeds will be used for some, but not all, of the City's reinvestment program. (DIP Mot. ¶ 22.) The City has also stated that “the City may ultimately decide to apply the proceeds of the Quality of Life Financing to pursue an array of specific projects,” but that the City's current focus includes public safety, information technology upgrades, and blight removal. (DIP Mot. ¶ 23.)

⁴ This lien is currently held by parties to the Swap transaction that the City seeks to terminate via the DIP financing. *See* Ex. 6 p 1 to Debtor's Mot. to Assume Forbearance Agreement [Doc. No. 157].

5. In the course of the solicitation and negotiation of the DIP financing, the City has stated that it “formally approached over 50 potential financing sources” and eventually received 16 lending proposals. (DIP Mot. ¶ 35–36.) Of these 16, the City chose four “Final Prospective Lenders.” According to the City, Barclays’ proposal was the “best available.” (DIP Mot. ¶ 39.)

6. The City claims that it sought approval from the City Council and Emergency Loan Board for the DIP financing transaction. (DIP Mot. ¶ 41.) On October 25, 2013, the City Council rejected the City’s proposal on October 25, 2013. (DIP Mot. ¶ 45.) The City then submitted the proposal to the Emergency Loan Board simultaneously with its submission of the DIP Motion. (*Id.*)

7. On October 23, 2013, approximately two weeks prior to the filing of the City’s DIP Motion, Syncora sought the Court’s permission to seek more information about the DIP financing pursuant to Bankruptcy Rule 2004 (“2004 Motion”).⁵ On November 7, two days after it filed its DIP Motion, the City filed an objection to Syncora’s 2004 Motion (“2004 Objection”).⁶

⁵ *Motion of Syncora Guarantee Inc. and Syncora Capital Assurance Inc. for Authority to Issue Document and Deposition Subpoenas to the Debtor, the Emergency Manager, and Certain of the Debtor’s Advisors Pursuant to Federal Rule of Bankruptcy Procedure 2004* [Docket No. 1342].

⁶ *City of Detroit’s Objection to Rule 2004 Motion of Syncora Guarantee Inc. and Syncora Capital Assurance Inc. (D.E. 1342)* [Doc. No. 1568].

8. On November 7, 2013, this Court scheduled a hearing on the DIP Motion for December 10, 2013 [Doc. No. 1564]. Objections to the City's DIP Motion are due on November 22, 2013. (*Id.*) The Objectors intend to file objections to the City's DIP Motion.

JURISDICTION

9. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue for this matter is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

10. The Objectors respectfully request the entry of an order granting the Objectors leave to conduct limited discovery relating to the DIP Motion.

BASIS FOR RELIEF

A. The Objectors' Request for Leave to Conduct Limited Discovery Relating to the DIP Motion.

11. Local Rule 7026-3 states that "[d]iscovery in a contested matter is permitted only upon a court order for cause shown." E.D. Mich. LBR 7026-3. The Objectors submit that, in this case, good cause exists for limited discovery surrounding the DIP Motion.

12. Courts consider the following factors to determine whether the terms of a postpetition financing transaction under section 364 of the Bankruptcy Code are appropriate: (a) whether the proposed transaction is an exercise of the debtor's

reasonable business judgment; (b) whether alternative financing is available on any other basis; (c) whether the proposed transaction is in the best interests of both the estate and its creditors; (d) whether any better offers, bids, or timely proposals are before the court; (e) whether the transaction is necessary, essential, and appropriate to preserve estate assets and for the continued operation of a debtor's business; (f) whether the terms of the proposed financing are fair, reasonable, and adequate given the circumstances; and (g) whether the proposed transaction was negotiated in good faith and at arm's length. *In re Farmland Industries, Inc.*, 294 B.R. 855, 879–80 (Bankr. W.D. Mo. 2003). Here, discovery is necessary in order to competently assess whether the DIP financing proposed by the City in its DIP Motion meets these requirements.

13. Syncora sought permission to investigate the terms of the DIP financing approximately two weeks in advance of the City's DIP Motion, after the proposal was made available to the City Council. In its 2004 Objection, the City suggests that Syncora improperly used Rule 2004 to "jump the queue" in seeking this information. (2004 Obj. p 2.) However, in its DIP Motion, the City states that "time is of the essence with respect to the relief sought in this Motion." (DIP Mot. ¶ 18.) Notwithstanding the City's selective approach to the importance of timing in relation to its DIP financing, discovery remains necessary with respect to

significant aspects of the DIP financing even following the City's filing of the DIP Motion.

14. *First*, Syncora and other creditors have little information regarding the solicitation and negotiation of the DIP financing. The City's statements in its motion and attached declarations are general and do not provide sufficient information to evaluate the propriety of the City's solicitation and negotiation process. For example, the City states that the process it engaged in was "robust and subject to significant market testing." (DIP Mot. ¶ 35.) However, the City primarily recites the number of institutions it approached for financing as evidence that its process was robust. (*Id.*) It states that it believes that the lending proposals from the final four lenders represented the best potential structures and that the final proposal it chose was the best in terms of "overall pricing, certainty of closing and other structural aspects." (DIP Mot. ¶ 39.) However, the City does not provide sufficient detail regarding the other proposals to evaluate whether those proposals were superior. As a result, further discovery is necessary to evaluate whether the process the City engaged in was reasonable, in good faith, at arm's length, and whether the alternative proposals the City entertained were inferior to the Barclays proposal.

15. *Second*, the Objectors and other creditors have little information regarding the City and Emergency Manager's compliance with P.A. 436. Under

P.A. 436, the City was required to seek approval from the City Council and the Emergency Loan Board before it could incur any debt. (DIP Mot. ¶ 41.) To date, the City Council has rejected the proposal and the Emergency Loan Board has not released an opinion. (DIP Mot. ¶ 41.) In the first instance, the City's authorization to borrow money depends on its meeting the requirements of P.A. 436. Moreover, compliance with this legislation is also central to the City's consideration of the best interests of its "estate," the public, and its creditors. The City's statements regarding its compliance and its steps to evaluate the requirements of P.A. 436 are thus essential to determine whether the City is eligible to receive financing. Thus, good cause exists for the Objectors to conduct discovery relating to the City's compliance with PA 436.

16. *Third*, to date, the City has failed to provide any detailed information regarding the use of and need for the proceeds from the Quality of Life Bonds. Though the City notes that these expenditures will be part of its desire to "aggressively pursue" reinvestment initiatives in the City, the City alleges these proceeds will most likely be used to advance "investments in blight removal, public safety and technology infrastructure." (DIP Mot. ¶ 23.) However, the City concedes that it may change the use of the proceeds at any time, and does not articulate why it needs these proceeds specifically at this time. (*Id.*) Because the use of financing by the City can be approved only when it is necessary and

reasonable, the Objectors are entitled to understand exactly how the City intends to use the proceeds from the Quality of Life bonds and why these proceeds are needed. Given that the City has not yet provided that information, there is good cause for discovery on this issue.

17. Given the limited information that is currently available to the Objectors on the aforementioned issues, the Objectors request leave to seek limited discovery on topics to include the following:

- (a) The DIP solicitation process;
- (b) The DIP negotiation process;
- (c) The process the City undertook to comply with PA 436;
- (d) The uses the City contemplates for the proceeds of the sale of Quality of Life notes;
- (e) All documents and communication relating to the Barclay's DIP, including but not limited to the Fee Letter, the Engagement Letter, and any other documents relating to any fees the City has agreed to pay to Barclays in connection with the DIP and/or any exit financing, and any documents made available to Barclays or other potential Bondholders via a virtual data room established in connection with the Post-Petition Facility.

The Objectors may also request depositions of:

- (a) James Doak, an employee of Miller Buckfire;

- (b) Charles Moore, an employee of Conway Mackenzie;
- (c) A representative of Barclays;
- (d) A representative of Ernst and Young;
- (e) A member of the Detroit City Council;
- (f) A representative of the Swap Counterparties.

STATEMENT OF CONCURRENCE SOUGHT

18. Local Bankruptcy Rule 9014-1 provides that “in a bankruptcy case unless it is unduly burdensome, the motion shall affirmatively state that concurrence of opposing counsel in the relief sought has been requested on a specified date and that the concurrence was denied.” Local Rule 9014-1(g).

19. Counsel for Syncora sought concurrence from opposing counsel for the relief requested in this motion on November 11, 2013. Counsel for the City agreed that the Objectors were entitled to certain discovery regarding the DIP Motion. Specifically, counsel for the City stated that it had no objection to the scope of discovery contained in Syncora’s 2004 Motion (*i.e.*, the process and negotiation surrounding the DIP Financing). The City also stated that it would not move to quash or object to any of the Objectors’ proposed depositions.

20. However, counsel for the City stated that the City would object to any discovery relating to the City’s need for, or intended use of, the DIP Financing proceeds. According to the City’s counsel, information relating to the need for and

use of the DIP Financing proceeds is irrelevant and not something that the Court can consider.

RESERVATION OF RIGHTS

21. The Objectors file this motion without prejudice or waiver of their rights under the Bankruptcy Code.

WHEREFORE, the Objectors respectfully request that this Court (a) enter an order substantially in the form attached hereto as Exhibit 1, granting the relief sought herein; and (b) grant such other and further relief as the Court may deem proper.

[Remainder of this page intentionally left blank.]

Dated: November 11, 2013

/s/ Stephen C. Hackney

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Attorney for David Sole, Party in Interest

SUMMARY OF ATTACHMENTS

- Exhibit 1 Proposed Form of Order
- Exhibit 2 Notice of Motion and Opportunity to Object
- Exhibit 3 None [Brief not Required]
- Exhibit 4 None [Separate Certificate of Service to be Filed]
- Exhibit 5 None
- Exhibit 6 None

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
)

**ORDER GRANTING LEAVE TO CONDUCT LIMITED DISCOVERY IN
CONNECTION WITH MOTION OF THE DEBTOR FOR A FINAL
ORDER PURSUANT TO 11 U.S.C. §§ 105, 362, 364(C)(1), 364(C)(2), 364(E),
364(F), 503, 507(A)(2), 904, 921 AND 922 (I) APPROVING POST-PETITION
FINANCING, (II) GRANTING LIENS AND PROVIDING
SUPERPRIORITY CLAIM STATUS AND (III) MODIFYING
AUTOMATIC STAY**

This matter coming before the Court on the motion of the Objectors¹ for leave to conduct limited discovery in connection with the *Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§105, 362, 364(c)(1), 364(c)2, 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay* (the “DIP Motion”) and entering an order granting leave to conduct limited discovery relating to the DIP Motion; 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;

¹ Capitalized terms not otherwise defined herein have the meanings given to them in the Objectors’ DIP Discovery Motion.

IT IS HEREBY ORDERED THAT:

1. The Objectors' motion is GRANTED.
2. Good cause exists for the Objectors to conduct limited discovery relating to the DIP Motion. The Objectors may now commence discovery.
3. The 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)	
)	Chapter 9
CITY OF DETROIT, MICHIGAN,)	
)	Case No. 13-53846
)	
Debtor.)	Hon. Steven W. Rhodes
)	

**NOTICE OF MOTION OF THE OBJECTORS FOR LEAVE TO
CONDUCT LIMITED DISCOVERY IN CONNECTION WITH MOTION
OF DEBTOR FOR A FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105, 362,
364(C)(1), 364(C)(2), 364(E), 364(F), 503, 507(A)(2), 904, 921 AND 922 (I)
APPROVING POST-PETITION FINANCING, (II) GRANTING LIENS
AND PROVIDING SUPERPRIORITY CLAIM STATUS AND (III)
MODIFYING AUTOMATIC STAY**

PLEASE TAKE NOTICE that on November 11, 2013 the Objectors filed the *Motion of the Objectors for Leave to Conduct Limited Discovery in Connection with Motion of the Debtor for a Final Order Pursuant to 11 U.S.C. §§105, 362, 364(c)(1), 364(c)2, 364(e), 364(f), 503, 507(a)(2), 904, 921 and 922 (I) Approving Post-Petition Financing, (II) Granting Liens and Providing Superpriority Claim Status and (III) Modifying Automatic Stay* (the “DIP Discovery Motion”) in the United States Bankruptcy Court for the Eastern District of Michigan (the “Bankruptcy Court”) seeking entry of an order to clarify the hearing date on the City of Detroit’s motion seeking an order authorizing it to enter into certain transactions related to the Public Lighting Authority (the “DIP Motion”) and to seek limited discovery related to the City’s DIP Motion.

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

PLEASE TAKE FURTHER NOTICE that if you do not want the Bankruptcy Court to grant the Objectors’ Motion or you want the Bankruptcy

Court to consider your views on the Motion, by **November 25, 2013** you or your attorney must:¹

File with the court a written response to the Motion, 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:²

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

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

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¹ Concurrently herewith, the Objectors are seeking expedited consideration and shortened notice of the DIP Discovery Motion. If the Court grants such expedited consideration and shortened notice, the Objectors will file and serve notice of the new response deadline.

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

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

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

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Dated: November 11, 2013

Respectfully submitted,

KIRKLAND & ELLIS LLP

By: /s/ Stephen C. Hackney

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*Attorneys for Syncora Guarantee Inc. and
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Exhibit 3

None [Brief Not Required]

Exhibit 4

None [Separate Certificate of Service to be Filed]

Exhibit 5
Affidavits
[Not Applicable]

Exhibit 6

**Documentary Exhibits
[Not Applicable]**