

**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 TO COMPEL THE PRODUCTION OF
PRIVILEGE LOG**

The Objectors¹ submit this motion to compel the production of a privilege log by the Debtor City of Detroit (the “City”) in connection with the City’s document production 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* [Doc. No. 1520] (the “DIP Motion”) and pursuant to this Court’s November 15, 2013 Order [Doc. No. 1743], Syncora’s Request for the Production of

¹ Syncora Guarantee Inc. and Syncora Capital Assurance Inc. (collectively, “Syncora”). Ambac Assurance Corporation, the Retiree Association Parties, Hypothekenbank Frankfurt AG, Hypothekenbank Frankfurt International S.A., and Erste Europäische Pfandbrief- und Kommunalkreditbank Aktiengesellschaft in Luxemburg S.A. (collectively “EEPK”), the Detroit Retired City Employees Association (“DRCEA”), the Retired Detroit Police and Fire Fighters Association (“RDPFFA”) (collectively the “Retiree Associations”), the Police and Fire Retirement System of the City of Detroit and the General Retirement System of the City of Detroit, and Financial Guaranty Insurance Company.

Documents [Doc. No. 1775], and Federal Rule of Bankruptcy Procedure 7026. In support of this motion, the Objectors respectfully represent as follows:

BACKGROUND

1. On November 5, 2013, the City of Detroit filed the DIP Motion requesting approval for postpetition financing. In connection with the DIP Motion, certain objecting parties filed a Motion for Leave to Conduct Limited Discovery (the “DIP Discovery Motion”) [Doc. No. 1640]. The City opposed certain of the Objectors’ requested discovery.

2. On November 14, 2013, this Court held a hearing on the DIP Discovery Motion and issued an Order granting in part the DIP Discovery Motion [Doc. No. 1743]. Consistent with this Court’s Order granting in part the Objectors’ DIP Discovery Motion, Syncora filed its Request for the Production of Documents (“Document Requests”) with the Court pursuant to Local Bankruptcy Rule 7026-1 [Doc. No. 1775]. As part of its Document Requests, Syncora requested that, “[i]f the Debtor claims any that any privilege or protection excuses production of any document or part thereof, the Debtor must expressly make such claim in writing and provide a general description of the categories of documents being withheld and the basis for doing so, sufficient in detail for Syncora to determine whether there is an adequate basis for invoking privilege or protection.” (Document Requests at 5.)

3. The City produced documents to the Objectors on November 20, 2013. As part of this production, the City withheld multiple documents on privilege grounds. The City did not, however, provide a corresponding privilege log.

4. On December 2, 2013, counsel for Syncora requested that the City provide a privilege log in order to assess the City's privilege claims. In response to this request, counsel for the City stated that it had not planned to provide a privilege log. Counsel for Syncora noted that (a) it was entitled to receive such a log under the relevant Federal Rules of Bankruptcy Procedure and Federal Rules of Discovery and (b) a log was necessary, as a practical matter, to assess the City's privilege claims. The City ultimately stated that it did not intend to provide a privilege log, claiming that it had not agreed to do so and that it was not required to do so "under the rules."

5. In light of the City's refusal to comply with the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the instructions in Syncora's Document Requests, the Objectors now seek to compel the production of a privilege log relating to the City's production of documents in connection with the DIP Motion.

JURISDICTION

6. 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

7. The Objectors respectfully request the entry of an order substantially in the form of Exhibit 1 attached herein compelling the City to produce a privilege log or, in the alternative, finding that the City has waived privilege with respect to the documents withheld on that basis.

BASIS FOR RELIEF

8. Rule 26(b)(5) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7026, requires that a party claiming privilege must “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” *In re Cont'l Capital Inv. Servs., Inc.*, BR 03-3370, 2011 WL 4624678 (Bankr. N.D. Ohio Sept. 30, 2011).

9. A privilege log satisfies the requirements of Rule 26(b)(5). *See Hoxie v. Livingston Cnty.*, CIV.A. 09-CV-10725, 2009 WL 5171845 (E.D. Mich. Dec.

22, 2009) *objections overruled*, 09-CV-10725, 2010 WL 457104 (E.D. Mich. Feb. 3, 2010) (“The [Defendants] must produce an adequate privilege log listing any and all documents which they withhold by claiming a privilege. . . . The [Defendants’] privilege log should contain sufficient information for the Court and Plaintiff to determine whether the withheld documents are properly subject to a privilege or protection.”) (internal quotations and citations omitted). Moreover, in the absence of a privilege log, a court may consider the privilege claimed by party waived. *Id.* (“The Court can reject the claim of privilege where the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege.”)

10. Although the City has withheld a number of responsive documents on privilege grounds, it has not provided any reason or basis for its privilege claims. In so doing, the City has violated Federal Rule of Civil Procedure 26(b)(5) and Federal Rule of Bankruptcy Procedure 7026.

11. Thus, while the City is intent on moving forward with the DIP Motion in an expedited fashion — and has objected to the Objectors’ attempts to obtain all of the discovery that is necessary to adequately assess the transaction at issue — it remains unwilling to comply with its most basic discovery obligations vis-à-vis the limited discovery it has agreed to provide.

12. Accordingly, the Objectors respectfully request that the Court compel the production of a privilege log that contains sufficient information to meet the requirements of Rule 26(b)(5) or, in the alternative, reject the City's claim of privilege given the City's failure to demonstrate any basis for its claims.

STATEMENT OF CONCURRENCE SOUGHT

13. 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).

14. Counsel for Syncora sought concurrence from opposing counsel for the relief requested in this motion on December 2, 2013. Counsel for the City did not agree to produce a privilege log.

RESERVATION OF RIGHTS

15. 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.

Dated: December 2, 2013

/s/ Stephen C. Hackney

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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 Certificate of Service
- Exhibit 5 Affidavits [Not Applicable]
- Exhibit 6 Documentary Exhibits [Not Applicable]

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 THE OBJECTORS' MOTION
TO COMPEL THE PRODUCTION OF A PRIVILEGE LOG**

This matter coming before the Court on the motion of the Objectors¹ to compel production of a privilege log 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 compelling the production of a privilege log; 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 is GRANTED.

¹ Capitalized terms not otherwise defined herein have the meanings given to them in the Objectors' Motion to Compel the Production of a Privilege Log.

2. The City must produce a privilege log setting forth the reasons for claiming privilege over any documents produced to the Objectors in connection with the DIP Motion.

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 TO
COMPEL THE PRODUCTION OF PRIVILEGE LOG**

PLEASE TAKE NOTICE that on December 2, 2013, the Objectors filed the *Motion of the Objectors to Compel the Production of Privilege Log* (the “Motion”) in the United States Bankruptcy Court for the Eastern District of Michigan (the “Bankruptcy Court”) seeking entry of an order compelling the City of Detroit (the “City”) to produce a privilege log or, in the alternative, finding that the City has waived privilege with respect to the documents withheld on that basis.

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 **December 17, 2013**, you or your attorney must:¹

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

File with the Bankruptcy Court a written response to the Motion, explaining your position, 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:

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

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

Dated: December 2, 2013

/s/ Stephen C. Hackney

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*Attorneys for Syncora Guarantee Inc. and Syncora
Capital Assurance Inc.*

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]**