

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

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|----------------------------|---|-----------------------|
| In re:                     | : | Chapter 9             |
|                            | : |                       |
| CITY OF DETROIT, MICHIGAN, | : | Case No. 13-53846     |
|                            | : |                       |
| Debtor.                    | : | Hon. Steven W. Rhodes |
|                            | : |                       |

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**MOTION FOR COSTS RELATING TO CLAWBACK  
OF DEBTOR’S DOCUMENT PRODUCTION**

Pursuant to this Court’s *Order Granting Motion to Compel Full Clawback of Debtor’s Document Production and Related Relief* dated May 13, 2014 [Docket 4710] (the “Clawback Order”), Assured Guaranty Municipal Corp., formerly known as Financial Security Assurance Inc. (“Assured”), hereby moves this Court for entry of an Order requiring Debtor City of Detroit, Michigan (the “City”) to pay the reasonable expenses that Assured incurred in (a) seeking the Clawback Order in order to remedy the City’s improper production on May 6, 2014 of privileged mediation-related documents, and (b) complying itself with the requirements of the Clawback Order.

**JURISDICTION**

1. This Court has jurisdiction to consider 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)(A) and (L). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### **GENERAL BACKGROUND**

2. On May 6, 2014, the City produced documents in response to requests that it received from all parties (the “Production”). The Production, however, contained numerous privileged and confidential documents related to mediation efforts between the City and various parties, in violation of this Court’s August 13, 2013 *Mediation Order* [Docket No. 322], which provided that “[a]ll proceedings, discussions, negotiation, and writings incident to mediation shall be privileged and confidential, and shall not be disclosed, filed or placed in evidence.” (Emphasis added).

3. After the City failed to properly and timely claw back the Production notwithstanding Assured’s demand that it do so, Assured was forced to file a *Motion To Compel Full Clawback Of Debtor’s Document Production And Related Relief* [Docket No. 4560] (the “Clawback Motion”) on May 9, 2014, with an accompanying *Ex Parte Motion for Shortened Notice and Expedited Hearing with Respect to Motion To Compel Full Clawback Of Debtor’s Document Production And Related Relief* [Docket No. 4559]. The Clawback Motion was filed on behalf of several creditors, but Assured took the lead with respect to drafting and filing

the Clawback Motion. The Clawback Motion was set for hearing on May 12, 2014.

4. After hearing oral argument from counsel to Assured and the City on May 12, 2014, this Court granted the Clawback Motion and on May 13, 2014 entered the Clawback Order. The Clawback Order ordered all parties that had received the Production with 24 hours after the entry of the Clawback Order to return the original of the Production, to purge all electronic copies thereof, destroy all physical copies thereof, and to destroy work product reflecting the contents of documents from the Production (subject to certain exceptions), and to file certifications of having done so. (Clawback Order ¶¶ 2-4.)

5. The Clawback Order also specifically provided that “[a]ny party who seeks reimbursement of expenses resulting from the recall of the Production, including all fees and expenses incurred in connection with bringing the [Clawback Motion], including without limitations conferring with the debtor and prosecuting the [Clawback Motion]” to file a motion with the Court. (Clawback Order ¶ 9.)

6. Assured incurred expenses resulting from the recall of the Production, including the fees and expenses of its counsel incurred (a) in connection with bringing the Clawback Motion, (b) conferring with the City in connection with the Clawback Motion, (c) prosecuting the Clawback Motion, (d) complying with the Clawback Order, and (e) in the wasted time and effort to process and load the

electronic Production onto its computer systems, which had to be repeated when the City later made a replacement production in response to the Clawback Order.

7. Assured's foregoing expenses totaled \$45,038.54. A breakdown of these expenses is attached as Exhibit A. This breakdown shows expenses for attorneys' fees with detail for date, narrative description, number of hours, billing rate and total; similar detail for expenses of time spent by counsel's technical personnel; and out-of-pocket expenses.

#### **RELIEF REQUESTED**

8. Assured respectfully requests that the Court issue an Order requiring the City to pay Assured's expenses resulting from the recall of the Production, in the amount of \$45,038.54.

#### **BASIS FOR RELIEF**

9. The Clawback Order expressly provided that parties by motion could "apply for reimbursement of expenses resulting from the recall of the Production, including all fees and expenses incurred in connection with bringing the [Clawback Motion], including without limitations conferring with the debtor and prosecuting the [Clawback Motion]." (Clawback Order ¶ 9.) As detailed above, Assured has incurred such expenses and thus is entitled to reimbursement thereof.

10. The reimbursement of such costs is required under Federal Rule of Civil Procedure 37(a)(5), made applicable in bankruptcy by Federal Rule of

Bankruptcy Procedure 7037 and 9014. If a Civil Rule 37 motion is granted, the court “must” award the movant’s attorney fees incurred in making the motion unless, among other things, the non-moving party’s failure was “substantially justified.” *See Beltran v. McLean*, 2014 U.S. Dist. LEXIS 37283, \*17 (E.D. Mich. Mar. 21, 2014). The Court need not determine that the non-moving party acted out of willfulness or bad faith in order to find a lack of substantial justification. *See DeVaney v. Continental Am. Ins. Co.*, 989 F.2d 1154, 1162 (11th Cir. 1993); *Stratton v. Lister (In re Lister)*, 2010 Bankr. LEXIS 6444 (Bankr. E.D. Cal. Mar. 22, 2010) (“‘Excusable neglect’ is not ‘substantial justification.’”).

11. The award of Assured’s reasonable expenses in bringing the Clawback Motion and in complying with the Clawback Order is appropriate here. As stated on the record on May 12, 2014 (*see* 5/12/14 Tr. at 28-29), the City produced at least 120 privileged documents in direct violation of this Court’s Mediation Order. It appears from the City’s subsequent re-production, however, that the City may have removed in the range of some 1,800 documents, replacing them with pages bearing the notation “Intentionally Left Blank”. There was no substantial justification for the City’s improper production of documents in violation of the Court’s Mediation Order, nor any justification for the City’s failure to timely cure its errors in response to Assured’s demand.

WHEREFORE, Assured respectfully requests that the Court issue an Order requiring the City to pay Assured's reasonable expenses incurred in making the Clawback Motion and in complying with the Clawback Order, including attorneys' fees, in the amount of \$45,038.54.

Dated: June 16, 2014

Respectfully submitted,

By: /s/ Lawrence A. Larose

Lawrence A. Larose

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Municipal Corp.*

| <u>Date</u> | <u>Attorney/Staff</u> | <u>Description</u>   | <u>Time</u> | <u>Billing Rate</u> | <u>Total Costs</u> |
|-------------|-----------------------|--|-------------|---------------------|--------------------|
| 5/7/2014    | Jason Lopez           | Extracting and uploading POA document production to network; Loading documents and images into production database and image collection. QC'ing images and data.   | 4.1         | \$255.00            | \$1,045.50         |
| 5/8/2014    | Lawrence Larose       | Review mediation order regarding confidentiality (0.3); Attention to e-mails from AF regarding production of mediation documents (0.5).  | 0.8         | \$950.00            | \$760.00           |
| 5/8/2014    | Samuel Kohn           | Review and analyze documents and correspondence regarding City's breach of privileged mediation documents (.4); teleconferences and correspondence with insurer counsel regarding same (.5); office conferences with L. Larose and CP team regarding scope and procedure forward regarding same (.4); review and revise communication to City's counsel regarding same (.4); office conferences with CP team regarding same (.2); review and analyze documents and correspondence regarding procedure forward regarding same (.3)  | 2.2         | \$805.00            | \$1,771.00         |
| 5/8/2014    | Robert Schwinger      | Investigating City's improper production of mediation-related communications, including meetings, e-mails and TCs with L. Schapira re same (1.8); Draft demand letter to City re its improper production of mediation-related communications (0.6); E-mails internally and with UTGO mediation parties re demand letter to City (0.4); Review City's clawback request letter (0.3); E-mails, TCs with Sidley, Arent Fox re reaction to City's clawback request letter (0.5); Supervise drafting of motion to compel re City's production of mediation-related communications (0.7); Editing M. Bhargava's draft of motion to compel re City's production of mediation-related communications (1.0); Meetings with L. Schapira re draft of motion to compel re City's production of mediation-related communications (0.2). | 5.5         | \$835.00            | \$4,592.50         |
| 5/8/2014    | Michael Bhargava      | Draft and revise motion to compel City of Detroit to claw back documents (2.8); phone conferences with L. Schapira, B. Schwinger, S. Kohl re same (.5); case law research re same (.4); review documents re same (.2).   | 3.9         | \$705.00            | \$2,749.50         |
| 5/8/2014    | Lata Nott             | Drafting ex parte motion for motion to compel clawback of improperly produced documents (1.1); drafting notice of motion (0.5); proofreading and editing (0.5).  | 2.1         | \$505.00            | \$1,060.50         |
| 5/8/2014    | Lisa Schapira         | Respond to inquiries regarding mediation-related communication (3.0); draft clawback motion (3.0).   | 6.0         | \$615.00            | \$3,690.00         |
| 5/8/2014    | Robin Ball            | Emails re City's mediation document breach, conferred re same with R. Schwinger and L. Schapira (.4); conference call with Sidley re City's mediation document breach (.4); reviewed draft letter re mediation document breach, emails re same (.3); emails re additional mediation documents (.1).  | 1.2         | \$705.00            | \$846.00           |
| 5/8/2014    | Seth Bloomfield       | Confer with L. Schapira regarding mediation privilege and mediation orders (.1).   | 0.1         | \$405.00            | \$40.50            |
| 5/9/2014    | Lawrence Larose       | Attention to e-mails regarding motion to compel (0.2); Review and revise motion regarding Clawback (0.5); Document review of mediation documents (1).  | 1.7         | \$950.00            | \$1,615.00         |
| 5/9/2014    | Samuel Kohn           | Review and finalize motion to compel clawback of City's document production and reproduce expeditiously (.5); teleconferences and correspondence with insurer counsel regarding same (.4); review and analyze documents and correspondence regarding same (.3); office conferences with CP team regarding same and ex parte order regarding same (.4).   | 1.6         | \$805.00            | \$1,288.00         |
| 5/9/2014    | Robert Schwinger      | Finalizing motion re full clawback of City's document production in light of its including privileged mediation-related documents, including internal TCs, meetings, e-mails and edits (3.4) ; TC, e-mails with Sidley, Arent Fox re finalization of motion re full clawback of City's document production (0.4)   | 3.8         | \$835.00            | \$3,173.00         |
| 5/9/2014    | Michael Bhargava      | Phone conference with B. Schwinger, L Schapira re clawback motion (.3)   | 0.3         | \$705.00            | \$211.50           |
| 5/9/2014    | Lata Nott             | Revisions to motion to clawback, ex parte motion to expedite, and accompanying exhibits (1.5)  | 1.5         | \$505.00            | \$757.50           |

| <u>Date</u> | <u>Attorney/Staff</u> | <u>Description</u>   | <u>Time</u> | <u>Billing Rate</u> | <u>Total Costs</u> |
|-------------|-----------------------|--|-------------|---------------------|--------------------|
| 5/9/2014    | Lisa Schapira         | Revise and finalize clawback motion (1.5); revise motion to expedite re clawback motion (1.5)  | 3.0         | \$615.00            | \$1,845.00         |
| 5/9/2014    | Robin Ball            | Reviewed drafts of clawback motion (0.4); emails re same, strategic issues (0.2); conference call with R. Schwinger et al. re clawback motion and discovery issues (0.5).  | 1.1         | \$705.00            | \$775.50           |
| 5/9/2014    | Abbe Lowell           | Review motions regarding wrongful disclosure (0.4).  | 0.4         | \$995.00            | \$398.00           |
| 5/9/2014    | Jason Lopez           | Exporting set of "clawback" documents from production database.  | 0.7         | \$255.00            | \$178.50           |
| 5/12/2014   | Lawrence Larose       | Finalize Claw Back Order.  | 0.5         | \$950.00            | \$475.00           |
| 5/12/2014   | Samuel Kohn           | Participate telephonically on portion of bankruptcy court hearing related to the clawback motion and court ruling (1); conferences and correspondence with CP team regarding same and meet and confer with City regarding same (.5); review and revise draft proposed order regarding clawback (.4); communicate with CP team regarding same (.3). | 2.2         | \$805.00            | \$1,771.00         |
| 5/12/2014   | Robert Schwinger      | Attend/argue at court hearing on motion to compel clawback of City's documents and on discovery matters, and conferences with other counsel re same during break periods (0.6); Review drafts of proposed order on clawback motion and e-mails re comments on same (0.3).  | 0.9         | \$835.00            | \$751.50           |
| 5/12/2014   | Lisa Schapira         | Telephone with R. Schwinger and S. Kohn regarding clawback order and draft order (2.2).  | 2.2         | \$615.00            | \$1,353.00         |
| 5/13/2014   | Robert Schwinger      | Meetings with L. Schapira re compliance with clawback order (0.8); TCs with L. Schapira re next steps on review of City's documents in light of interruption caused by clawback order (0.3); Purging personal electronic and paper material per clawback order (0.4); Review, mark up draft of compliance certification re clawback order (0.5).   | 2.0         | \$835.00            | \$1,670.00         |
| 5/13/2014   | Lisa Schapira         | Conference with R. Schwinger regarding compliance with Clawback order (.3); draft instructions instructing compliance with clawback order and correspond with attorneys and litigation support regarding attaining compliance (2.5); draft certification of compliance with clawback order (.4).   | 3.2         | \$615.00            | \$1,968.00         |
| 5/13/2014   | Robin Ball            | Reviewed clawback order, L. Schapira memo re materials to be deleted/destroyed, and deleted/destroyed affected materials (0.7); t/c, emails w/L. Schapira re same (0.2).   | 0.9         | \$705.00            | \$634.50           |
| 5/13/2014   | NA                    | Federal Express delivery charge for returning the hard drive to the City.  | NA          | NA                  | \$18.54            |
| 5/14/2014   | Samuel Kohn           | Review City's document production for deletion in accordance with clawback order (.6); conferences and correspondence with L. Schapira regarding same (.4)   | 1.0         | \$805.00            | \$805.00           |
| 5/14/2014   | Robert Schwinger      | E-mails internally re clawback compliance (0.2).   | 0.2         | \$835.00            | \$167.00           |
| 5/14/2014   | Nicholas Chandler     | Reviewed all stored documents and communications in accordance with clawback procedure established by L. Schapira (0.4); corresponded with L. Schapira about same (0.2).   | 0.6         | \$405.00            | \$243.00           |
| 5/14/2014   | Lisa Schapira         | Confirm with attorneys and staff re compliance with Clawback order and finalize certification (1.6).   | 1.6         | \$615.00            | \$984.00           |
| 5/14/2014   | Robin Ball            | Reviewed drafts of clawback certification and emails w/L. Schapira re same (0.4).  | 0.4         | \$705.00            | \$282.00           |
| 5/14/2014   | Seth Bloomfield       | Comply with clawback order (0.1).  | 0.1         | \$405.00            | \$40.50            |
| 5/14/2014   | Jason Lopez           | Deleting all POA production images and data from production database; Locating and deleting POA production images and data from network and workstation locations.   | 2.6         | \$255.00            | \$663.00           |
| 5/19/2014   | Lisa Schapira         | Review clawback certifications and follow-up with delinquent parties (1.0).  | 1.0         | \$615.00            | \$615.00           |
| 5/21/2014   | Michael Bhargava      | Draft and revise motion for costs (2.2); case law research re same (0.4); email communications with L. Schapira re same (0.1)  | 2.7         | \$705.00            | \$1,903.50         |
| 5/23/2014   | Robert Schwinger      | Review M. Bhargava's draft motion to recover costs associated with clawback of mediation-privileged material (0.4); E-mail with M. Bhargava re draft motion to recover costs associated with clawback of mediation-privileged material (0.2).  | 0.6         | \$835.00            | \$501.00           |
| 5/28/2014   | Michael Bhargava      | Draft and revise motion for costs for clawback motion (1.6); email communications with R. Schwinger re same (0.1).   | 1.7         | \$705.00            | \$1,198.50         |



| <u>Date</u> | <u>Attorney/Staff</u> | <u>Description</u>   | <u>Time</u> | <u>Billing Rate</u> | <u>Total Costs</u> |
|-------------|-----------------------|--|-------------|---------------------|--------------------|
| 5/29/2014   | Robert Schwinger      | Revise M. Bhargava's draft motion to recover costs re clawback (0.6); Follow-up with Lisa Schapira re additional information needed for motion for costs re clawback (0.1).                                | 0.7         | \$835.00            | \$584.50           |
| 6/6/2014    | Lisa Schapira         | Revise M. Bhargava's draft motion to recover costs re clawback to incorporate comments of R. Schwinger (0.8).  | 0.8         | \$615.00            | \$492.00           |
| 6/12/2014   | Lisa Schapira         | Revise M. Bhargava's draft motion to recover costs re clawback to incorporate comments of R. Schwinger (0.8); Revise draft motion to recover costs re clawback to incorporate comments of L. Larose (0.9). | 0.9         | \$615.00            | \$553.50           |
| 6/13/2014   | Nicholas Chandler     | Review time entries and finalized Exhibit A. (1.4).  | 1.4         | \$405.00            | \$567.00           |

**TOTAL = \$45,038.54**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

In re:

Chapter 9

CITY OF DETROIT, MICHIGAN

Case No. 13-53846

Debtor.

Hon. Steven W. Rhodes

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of June 2014, I caused the *Motion for Costs Relating to Clawback of Debtor's Document Production* to be filed with the Clerk of the Court using the CM/ECF system, which provides electronic notification of such filing to all counsel of record.

Dated: New York, New York

June 16, 2014

/s/ Lawrence A. Larose

Lawrence A. Larose

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