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

SYNCORA GUARANTEE INC. AND SYNCORA CAPITAL ASSURANCE INC.'S SECOND SUPPLEMENTAL OBJECTION TO THE DEBTOR'S PLAN OF ADJUSTMENT

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Syncora Guarantee Inc. and Syncora Capital Assurance Inc. (together, "Syncora")[1] submit this second supplemental objection (this "Second Supplemental Objection") to the Debtor's Plan to raise objections that were unripe, unknown, or unknowable when Syncora filed its Initial Plan Objection.[2] In further support of its Objections, Syncora respectfully states as follows:

PRELIMINARY STATEMENT

1. Despite the passage of time, and despite the City's opportunity to remedy key defects, the Plan has no chance of surviving the adversarial process—it is unconfirmable under settled bankruptcy principles. Indeed, in light of the shortcomings discussed below and those raised in Syncora's other Objections, the Court should deny confirmation ***summarily*** and send the City back to the drawing board. If the Court declines and proceeds to trial, the parties—***including the***

[1] Capitalized terms used but not otherwise defined herein have the meanings given to them in the *Corrected Fifth Amended Plan for the Adjustment of Debts of the City of Detroit* [Docket No. 6379] (including all exhibits and attachments thereto, and as may be further amended or modified, the "Plan") or *Syncora Capital Assurance Inc. and Syncora Guarantee Inc.'s Objection to the Debtor's Plan of Adjustment* [Docket No. 4679] (the "Initial Plan Objection"), as applicable.

[2] In response to the Court's *Order Identifying Legal Issues, Establishing Supplemental Briefing Schedule and Setting Hearing Dates and Procedures* [Docket No. 5235] (the "Legal Issues Order"), Syncora filed *Syncora's First Supplemental Objection Regarding Certain Legal Issues Relating to Confirmation* [Docket No. 5706] (the "First Supplemental Objection," together with the Initial Plan Objection and this Second Supplemental Objection, collectively, the "Objections").

City—will waste significant sums litigating a plan that is, at best, a model for transgressing virtually every cardinal principle of federal bankruptcy law. And, if the Court confirms ***this*** Plan, it will permit the City to squander a once-in-a-lifetime opportunity to revitalize one of America's most treasured cities.

2. Specifically, the DIA Settlement—part of the so-called "Grand Bargain"—is the product of a mediation process fraught with defects. While no one questions that the mediators, in their own eyes, pursued what they believed was the best course for the City, the road to an unconfirmable plan is paved with good intentions. The plain truth is that the mediators in this case acted improperly by orchestrating a settlement that alienates the City's most valuable assets for the sole benefit of one creditor group. Moreover, if approved, the DIA Settlement will in essence give rise to a judicially sanctioned fraudulent transfer. The Plan, therefore, has not been proposed in good faith under the law and cannot be confirmed for this independent failing alone.

3. The Plan also cannot be confirmed for the independent reason that the City has violated creditors' fundamental due process rights. With the Court's assistance, the City has pursued confirmation at a break-neck pace. Yet the City has had more than sufficient time, had it chosen to do so, to satisfy its obligation to fully disclose key agreements that underpin the Plan. Instead, the City has refused to provide timely and full documentation regarding settlements imbedded in the

Plan. It has, thus, failed to provide affected creditors with adequate notice and deprived creditors of their opportunity to present their case at trial. Moreover, the City employed an amorphous mediation privilege that lead-lined the mediation itself and deprived creditors of information necessary to evaluate whether their property interests are affected by the Plan.

4. The Plan also purports to exculpate certain creditors in contravention of controlling law. At a minimum, the Court must require the City to meet its burden of proving that the Plan's exculpation provisions satisfy the standard for non-consensual, third-party releases in the Sixth Circuit. Of course, because the City cannot satisfy this burden as to the Exculpated Parties, especially the COP Swap Counterparties, the Plan independently cannot be confirmed for this reason.

5. The Plan's amended definition of "COP Claims" amounts to an improper objection to Syncora's Other Unsecured Claims by lumping Syncora's Class 14 Claims into Class 9 but not providing a corresponding treatment for Syncora's Class 14 Claims. Additionally, the Plan's confluence of Syncora's Class 9 and Class 14 Claims—without providing a mechanism for treating the latter—runs afoul of Bankruptcy Code section 1123. As a result, for these independent reasons, the Plan does not comply with the Bankruptcy Code and cannot be confirmed.

6. Last, the Court should deny confirmation for the independent reason that the outcomes of Syncora's appeals could materially alter the assets available for distribution under the City's Plan. If, for example, Syncora prevails in its appeal regarding the casino revenue, the City will be forced to re-write its Plan so as not to rely on that revenue source. Indeed, Syncora has four well-founded appeals pending, any one of which may tear the fabric of the Plan at its seams. Prudence, therefore, counsels that the Court deny Plan confirmation.

RELEVANT BACKGROUND

7. To frame this Second Supplemental Objection, Syncora provides a brief summary of its Initial Plan Objection as well as a chronology of the material events in the Chapter 9 Case relevant to Syncora's Objections.

I. Initial Plan Objection

8. As set forth more fully in its Initial Plan Objection, Syncora asserts multiple fundamental objections to the Plan, most of which independently require denial of confirmation. Discovery has confirmed that those objections remain valid, despite the City's attempts to amend the Plan. Specifically, Syncora objects to the Plan on the following bases, among others:

- ***Best Interests***. The Plan fails the best interests test because holders of COP Claims and Other Unsecured Claims would receive a greater recovery if the Chapter 9 Case was dismissed.[3]

[3] *See* Initial Plan Objection ¶¶ 14–27.

- ***Unfair Discrimination***. The Plan fails the unfair discrimination test because holders of COP Claims and Other Unsecured Claims are treated far worse than Pension Claim holders, notwithstanding that holders of such claims sit *pari passu* with respect to the City.[4]

- ***Fairness and Equity***. The Plan fails under Bankruptcy Code section 1129(b) because creditors can reasonably expect to be paid more if the Plan was structured differently.[5]

- ***Compliance with State Law***. The Plan fails under Bankruptcy Code section 943(b)(4) because the UTGO Settlement violates applicable state law.[6]

- ***Good Faith***. The Plan fails because it has not been proposed in good faith. Specifically, the Plan is inconsistent with the principles underlying chapter 9 of the Bankruptcy Code and does not treat creditors with fundamental fairness.[7]

II. Chronology of Material Events

9. Although the Court is well-aware of the history of the Chapter 9 Case, Syncora here presents a succinct chronology of events germane to the arguments below:

- ***Automatic Stay Order***. On August 28, 2013, the Court entered an order holding that certain casino revenues were property of the

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[4] *See id.* ¶¶ 28–60. Since Syncora's Initial Plan Objection, the City and certain counterparties entered into the LTGO Settlement. Based on the treatment afforded to LTGO Claim holders, the Plan unfairly discriminates between holders of such claims and holders of COP Claims. Accordingly, Syncora objects to the LTGO Settlement.

[5] *See id.* ¶¶ 61–72.

[6] *See id.* ¶¶ 73–75; *see generally* First Supplemental Objection.

[7] *See* Initial Plan Objection ¶¶ 76–27.

Debtor and subject to the automatic stay under Bankruptcy Code section 362.[8] Syncora timely appealed the Automatic Stay Order.[9]

- ***PLA Transaction***. On December 6, 2013, the Court entered an order permitting the City to consummate a transaction with the Public Lighting Authority (the "PLA"), under which transaction the City is authorized to transfer up to $12.5 million each calendar year on account of its obligations under the transaction.[10] Syncora timely appealed the PLA Order.[11]

- ***First Plan and Disclosure Statement***. The City first filed its Plan and Disclosure Statement on February 21, 2014.[12]

- ***Solicitation Procedures***. On March 11, 2014, the Court entered an order approving the solicitation procedures to be used in connection with Plan voting.[13]

- ***Amended Plan and Disclosure Statement***. On March 31, 2014, the City filed an amended Plan and Disclosure Statement.[14]

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[8] *Order Regarding Casino Revenues and Automatic Stay* [Docket No. 670] (the "Automatic Stay Order").

[9] *See Notice of Appeal from Order Regarding the Automatic Stay* [Docket No. 797] (the "Automatic Stay Appeal").

[10] *Order (I) Authorizing the Debtor to Enter Into and Perform Under Certain Transaction Documents with the Public Lighting Authority and (II) Granting Related Relief* [Docket No. 1955] (the "PLA Order").

[11] *See Notice of Appeal from Order Authorizing the Public Lighting Authority Transaction* [Docket No. 2273] (the "PLA Appeal").

[12] *See Plan for the Adjustment of Debts of the City of Detroit* [Docket No. 2708]; *Disclosure Statement with Respect to Plan for the Adjustment of Debts of the City of Detroit* [Docket No. 2709].

[13] *Order (I) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan of Adjustment and (II) Approving Notice Procedures Related to Confirmation of the Plan of Adjustment* [Docket No. 2984].

- ***DIP Financing***. On April 2, 2014, after a storied history, the Court entered an order permitting the City, among other things, to incur $120 million of senior secured debt through debtor-in-possession financing.[15] Syncora timely appealed the DIP Order.[16]

- ***COP Swap Settlement***. On April 15, 2014, the Court entered an order approving a settlement and plan support agreement among the COP Swap Counterparties and the City.[17] Syncora timely appealed the Swap Settlement Order.[18]

- ***Second Amended Plan and Disclosure Statement***. The City filed a second amended Plan and Disclosure Statement on April 16, 2014.[19]

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[14] *See Am. Plan for the Adjustment of Debts of the City of Detroit (Mar. 31, 2014)* [Docket No. 3380]; *Am. Disclosure Statement with Respect to Am. Plan for the Adjustment of Debts of the City of Detroit* [Docket No. 3382].

[15] *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* [Docket No. 3607] (the "DIP Order")

[16] *See Notice of Appeal From Order Granting the Motion of the Debtor for a Final Order Approving Postpetition Financing* [Docket No. 4101] (the "DIP Appeal").

[17] *Order (I) Approving Settlement and Plan Support Agreement with UBS AG and Merrill Lynch Capital Services, Inc. Pursuant to Bankruptcy Rule 9019 and (II) Granting Related Relief* [Docket No. 4094] (the "Swap Settlement Order").

[18] *See Notice of Appeal from Order Granting the Motion of the Debtor for an Order Approving a Settlement and Plan Support Agreement* [Docket No. 4028] (the "Swap Appeal").

[19] *See Second Am. Plan for the Adjustment of Debts of the City of Detroit (Apr. 16, 2014)* [Docket No. 4140]; *Second Am. Disclosure Statement with Respect to Second Am. Plan for the Adjustment of Debts of the City of Detroit* [Docket No. 4141].

- ***Third Amended Plan and Disclosure Statement***. On April 25, 2014, the City filed a third amended Plan and Disclosure Statement.[20]

- ***Disclosure Statement Approved***. On May 5, 2014, the Court entered an order approving the City's disclosure statement.[21]

- ***Fourth Amended Plan and Disclosure Statement***. On May 5, 2014, after the Court's order approving the Disclosure Statement, the City filed its fourth amended Plan and Disclosure Statement.[22] The City commenced solicitation on the Plan shortly thereafter.

- ***Scheduling Orders***. Since February 24, 2014, the Court has entered eight scheduling orders in connection with Plan confirmation. The operative order provides that the confirmation trial will commence on August 21, 2014.[23]

- ***Syncora's Opposition to the Confirmation Schedule***. At various times since the City first proposed a plan of adjustment, Syncora has opposed the schedule sought by the City and ordered by the Court. Most recently, on July 18, 2014, Syncora sought a 45-day continuance of the confirmation hearing. Syncora's request was based largely on the facts that (a) the City had yet to file a complete plan of adjustment (including all associated

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[20] *See Third Am. Plan for the Adjustment of Debts of the City of Detroit (Apr. 25, 2014)* [Docket No. 4271]; *Third Am. Disclosure Statement with Respect to Third Am. Plan for the Adjustment of Debts of the City of Detroit* [Docket No. 4272].

[21] *Order Approving the Proposed Disclosure Statement* [Docket No. 4401].

[22] *See Fourth Am. Plan for the Adjustment of Debts of the City of Detroit (May 5, 2014)* [Docket No. 4392] (the "Fourth Amended Plan"); *Fourth Am. Disclosure Statement with Respect to Fourth Am. Plan for the Adjustment of Debts of the City of Detroit* [Docket No. 4391].

[23] *See Seventh Amended Order Establishing Procedures, Deadlines and Hearing Dates Relating to the Debtor's Plan of Adjustment* [Docket No. 6560] (the "Seventh Scheduling Order").

documentation), and (b) the City blew past the court-ordered deadline of June 20, 2014, to complete document production.[24] After the City filed its fifth amended Plan, the Court adjourned the confirmation hearing for one week.[25]

- ***Status of Appeals***. As noted above, Syncora has sought appellate review in at least four instances in this case:[26] the Automatic Stay Appeal; the PLA Appeal; the DIP Appeal; and the Swap Appeal. On April 4, 2014, the District Court *sua sponte* entered an order staying each of these appeals pending the Sixth Circuit's review of the Court's eligibility determination. On June 10, 2014, Syncora filed a petition for writ of mandamus regarding the Automatic Stay Appeal. On July 2, 2014, the Sixth Circuit found that mandamus was justified and issued the writ, directing the District Court to adjudicate the Automatic Stay Appeal by July 14, 2014.[27] On July 11, 2014, the District Court affirmed the Automatic Stay Order, and Syncora filed a notice of appeal to the Sixth Circuit on the same day. The Sixth Circuit held oral argument on July 30, 2014; a decision has not yet been issued. The PLA Appeal and the DIP Appeal are pending in the District Court, and, as to the Swap Appeal, the District Court granted Syncora's motion for a direct appeal to the Sixth Circuit.

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[24] *See generally Motion of Syncora Guarantee Inc. and Syncora Capital Assurance Inc. to (I) Continue Hearing to Consider Confirmation of Debtor's Plan of Adjustment and (II) Extend Related Deadlines* [Docket No. 6136].

[25] *See* Seventh Scheduling Order.

[26] In addition to the appeals noted here, Syncora sought appellate review in connection with the Court's *Order Denying Mot. of Creditors to View Or, in the Alternative, Unseal Supplemental Order Regarding Mediation Confidentiality (#5358)* [Docket No. 5746] (the "Motion to View Order"). *See Notice of Appeal from Order Denying Motion of Creditors to View or, in the Alternative, Unseal Supplemental Order Regarding Mediation Confidentiality* [Docket No. 5759] (the "Sealed Order Appeal").

[27] *See generally In re Syncora Guarantee Inc.*, No. 14-1719, 2014 WL 2959242, at *1 (6th Cir. July 2, 2014).

- ***Fifth Amended Plan***. On July 25, 2014, the City filed its fifth amended Plan. On July 29, 2014, the City filed the "corrected" version of its fifth amended Plan.[28]

ARGUMENT

10. The proposed Plan cannot be confirmed for the multiple and independent reasons set forth below and those presented in Syncora's other Objections. Through discovery, and in light of material events since its Initial Plan Objection, Syncora has identified additional reasons that require denial of Plan confirmation.

11. ***First***, the Plan is not proposed in good faith because the Grand Bargain is the invention of mediators—who have pursued a sympathetic but legally untenable agenda—seeking to benefit pensioners unfairly while transferring the City's art collection to the detriment of all other creditors and the City itself. Moreover, the transfer of the Museum Assets contemplated by the Grand Bargain is tantamount to a fraudulent transfer. ***Second***, in prosecuting Plan confirmation, the City trampled fundamental notions of due process. ***Third***, the Plan purports to exculpate certain creditors in contravention of controlling authority. ***Fourth***, the Plan's amended definition of "COP Claims" is a *de facto* claim objection in contravention of bankruptcy law and, separately, violates Bankruptcy Code section

[28] *See Corrected Fifth Am. Plan for the Adjustment of Debts of the City of Detroit (July 29, 2014)* [Docket No. 6379].

1123. And, ***fifth***, the outcome of Syncora's pending appeals could affect key assumptions that underpin the Plan.

12. For these reasons, each of which independently precludes confirmation, the Court must deny the City's proposed Plan.

I. The Grand Bargain Is the Product of an Improper Mediation.

13. This Court and others within this circuit have held that Bankruptcy Code section 1129(a)(3)—which requires a plan to be "proposed in good faith"[29]—permits confirmation only if a plan: "will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code" and if the plan evidences the debtor's "fundamental fairness in dealing with [its] creditors."[30] Here, the Plan fails the good-faith test because the DIA Settlement is (a) the product of agenda-driven, conflicted mediators who colluded with certain interested parties to benefit select favored creditors to the gross detriment of disfavored creditors and, remarkably, the City itself, and (b) it amounts to a fraudulent transfer of the Museum Assets that is prohibited under Michigan law. The Plan, therefore, does not comport with good faith, as that term is understood in bankruptcy jurisprudence.

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[29] 11 U.S.C. § 1129(a)(3).

[30] *In re Gregory Boat Co.*, 144 B.R. 361, 366 (Bankr. E.D. Mich. 1992).

A. The Grand Bargain was orchestrated to maximize recoveries for politically favored, insider creditors while protecting the Museum Assets from all other creditors and the City itself.

14. A plan born from collusion and unfairness *per se* is not proposed in good faith.[31] Collusion is "[a]n agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law . . . A secret combination, conspiracy or concert of action between two or more persons for fraudulent or deceitful purpose."[32] In chapter 9, it is a "general rule that a Chapter 9 plan proposed in good faith must treat all interested parties fairly and that the efforts used to confirm the plan must comport with due process."[33] This case reveals a stark departure from this general rule.

15. On August 13, 2013, the Court appointed the Hon. Gerald E. Rosen, Chief United States District Judge for the Eastern District of Michigan, to serve as judicial mediator in this case and granted Judge Rosen authority to designate other

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[31] *In re Tribune Co.*, 464 B.R. 126, 155 *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011); *see also In re Am. Capital Equip., Inc.*, 405 B.R. 415, 422 (Bankr. W.D. Pa. 2009) *aff'd sub nom. Skinner Engine Co. v. Allianz Global Risk U.S. Ins. Co.*, No. 09-0886, 2010 WL 1337222 (W.D. Pa. Mar. 29, 2010) *aff'd sub nom. In re Am. Capital Equip., LLC*, 688 F.3d 145 (3d Cir. 2012); *cf. In re Made in Detroit, Inc.*, 414 F.3d 576, 581 (6th Cir. 2005) (discussing collusion in connection with a debtor's sale of assets); *In re Condere Corp.*, 228 B.R. 615, 631 (Bankr. S.D. Miss. 1998) (same).

[32] *UAW v. Gen. Motors Corp.*, No. 05-CV-73991, 2006 WL 334283, at *1, *3 (E.D. Mich. Feb. 13, 2006).

[33] *In re Mount Carbon Metro. Dist.*, 242 B.R. 18, 39 (Bankr. D. Colo. 1999).

judicial or non-judicial mediators.[34] The Court also ordered that all "non-judicial mediators appointed under this order shall function as quasi-judicial officers under the authority of the court."[35]

16. On August 20, 2013 and September 3, 2013, the Court ordered the City's creditors to mediation under the Original Mediation Order.[36] Also on August 20, 2013, Judge Rosen appointed Detroit attorney Eugene Driker as a member of the mediation team.[37] In the press release announcing Mr. Driker's appointment, Judge Rosen represented that the mediation would be a "confidential, neutral forum" with the goal of "providing the best opportunity for the successful resolution of as many disputes as possible."[38]

17. Of course, a mediator's impartiality is essential to a fair mediation process. The "fundamental ethical guidelines" for mediators are contained in the

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[34] *See generally Mediation Order* [Docket No. 322] (the "Original Mediation Order").

[35] *Id.* ¶ 9.

[36] *See generally Am. Order to Certain Parties to Appear for First Mediation Session* [Docket No. 527]; *Order Directing Additional Parties to Appear for First Mediation Session* [Docket No. 704].

[37] *See generally Detroit Chapter 9 Mediation Team Announced* [Docket No. 542].

[38] *Id.* at 1.

Model Standards of Conduct for Mediators.[39] According to those standards, impartiality is so central to a mediator's duties that "a mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner."[40] Impartiality "means freedom from favoritism, bias or prejudice."[41] "All mediation standards ***require*** the mediator to disclose any facts or circumstances that even reasonably create a presumption of bias."[42]

18. To ensure a mediator's impartiality and guard against impropriety, the Model Standards prohibit conflicts of interest or the appearance thereof.[43] A conflict of interest may arise from "any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality."[44] Mediators have a duty to disclose conflicts or biases to the parties.[45]

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[39] *See* Am. Arbitration Ass'n *et al.*, *Model Standards of Conduct for Mediators* Preamble (September 2005) (the "Model Standards").

[40] *Id.* § II.A.

[41] *Id.*

[42] *CEATS, Inc. v. Cont'l Airlines, Inc.*, No. 2013–1529, 2014 WL 2848630, at *1, *5 (Fed. Cir. June 24, 2014) (emphasis in original).

[43] Model Standards § III.

[44] *Id.*

[45] Model Standards § III.E.

19. Neither Judge Rosen nor Mr. Driker ever disclosed any biases or conflicts of interest that might affect their ability to serve as impartial mediators in this case, but, while Syncora takes no pleasure in saying it, both were biased and conflicted from the beginning. Mr. Driker is conflicted and certainly, at a minimum, would appear to be so to an objective observer—***his wife is a longtime member (now emeritus) of the Board of Directors of the Detroit Institute of Arts***, an active party in this case that asserts an implied charitable trust over the City's most valuable assets and one of the parties to the DIA Settlement that is the linchpin of the Grand Bargain.[46] Courts have found mediators or arbitrators should have been disqualified for far less glaring conflicts of interest than Mr. Driker's here.[47]

20. Similarly, Judge Rosen stated that he is strongly biased in favor of one set of stakeholders in this case—City pensioners—to whom he feels a deep debt of

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[46] *See* Detroit Institute of Arts, *Media Room: Board of Directors*, www.dia.org/about/board-of-directors.aspx (last visited Aug. 9, 2014).

[47] *See, e.g.*, *Morelite Const. Corp. (Div. of Morelite Elec. Service, Inc.) v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84–85 (2d Cir. 1984) (concluding that a father-son relationship between an arbitrator and an officer of an international union of which the party to arbitration was a union local rose to the level of evident partiality because "we are bound by our strong feeling that sons are more often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers"); *Hartman v. Hartman*, No. 304026, 2012 WL 3194068, at *1 (Mich. Ct. App. Aug. 7, 2012) (mediator who vacationed with defense counsel was not impartial and should have been removed).

gratitude,[48] which does not comport with his duty to avoid "favoritism, bias or prejudice."[49] In a vacuum, Mr. Driker's and Judge Rosen's conflicts of interest and biases might not have mattered. But here, their actions speak volumes about their partiality.

21. During the second half of 2013, Judge Rosen and Mr. Driker acted by developing a master plan—the Grand Bargain. That plan would accomplish the mediators' two core and non-negotiable pillars of any plan of adjustment proposed by the City: (a) preserving the Museum Assets for public benefit by transferring them permanently beyond the City's reach and the reach of its creditors; and (b) elevating the claims of retirees by funneling every dime of proceeds from the transfer to City pensioners at the exclusion of all other creditors of equal rank.[50]

22. In January of 2014, Judge Rosen and his team took the extra step of issuing a press release that made it seem as if ***the non-profit foundations*** were

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[48] *See* Next Chapter Detroit, *Detroit's Chief Mediator: Judge Gerald Rosen Speaks About the Bankruptcy Process*, http://www.nextchapterdetroit.com/detroits-chief-mediator-judge-gerald-rosen-speaks-about-the-bankruptcy-process (last visited Aug. 9, 2014) (audio recording of Judge Rosen's remarks) (the "Rosen Remarks"); *cf.* Model Standards § II.A.

[49] Model Standards § II.A.

[50] *See Update 1-Philanthropists Pledge Over $330 mln to Help Detroit Art Museum*, Reuters (Jan. 13, 2014, 11:16 a.m. (ET)), http://www.reuters.com /article /2014/01/13/ usa-detroit-idUSL2N0KN14S20140113.

driving a settlement toward the "twin goals" of protecting the art from creditors and funding pensions:

> [I]t bears emphasis that the foundations' agreement to participate is specifically conditioned upon all of their funds being committed to the twin goals of helping the city's recovery from bankruptcy by assisting the funding of the retirees' pensions and preserving the DIA's art collection as part of an overall balanced settlement of disputes in the bankruptcy.[51]

23. Contrary to the implications of the mediators' press release, the record shows it was Judge Rosen and Mr. Driker—***not the foundations***—who hatched the idea of marrying up the twin imperatives. Indeed, those two individuals aggressively lobbied the foundations—and the ***Michigan State Senate***—to condition their gifts on advancing the mediators' agenda.[52] As Judge Rosen recently explained, the Grand Bargain

> all started with a chance meeting, running into each other actually, with [Mariam Noland] from the Community Foundation and she said probably as a throwaway line, 'let me know if there's anything that we can do to help.' Well, two days later she was in my office and I sort of, ***Eugene [Driker] and I sort of spun out this idea,*** and when she picked herself up off the floor she said, well, let's think about that! And, within three weeks we had 13 foundation leaders[.][53]

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[51] *Id.*

[52] Syncora is informed and believes that Judge Rosen personally lobbied the Michigan State Senate.

[53] *See* Rosen Remarks.

24. Regrettably, but truly, it could not be clearer that the mediators—rather than mediating discrete disputes—designed and later executed a transaction in furtherance of their own personal vision of what was important to protect and for whom. Notably, although the DIA Settlement purports to settle "any dispute regarding the ownership of the Museum Assets,"[54] that self-serving verbiage is and was nonsensical; nothing in the record suggests there was ever a dispute about the State's or the pensions' interests in the Museum Assets or any indication that the State or the pension systems asserted an interest in the Museum Assets. And the foundations had (and continue to have) no dispute with anyone concerning any part of this bankruptcy proceeding. The DIA Settlement, therefore, is a settlement in search of a dispute.

25. What brought the strange bedfellows of the Grand Bargain together was not an unbiased attempt to resolve genuine disputes among the parties; it was a quasi-political maneuver by Judge Rosen and Mr. Driker to pick winners and losers in the bankruptcy (pensioners and mostly suburban patrons of the art versus other creditors) while simultaneously transferring the Museum Assets beyond the reach of all present and future creditors other than the chosen winners. Worse still, Judge Rosen and Mr. Driker will have caused the City—with its acquiescence—to

[54] Plan Ex. I.A.103 (filed Aug. 7, 2014) [Docket No. 6576] (the "DIA Settlement Agreement").

alienate billions of dollars of assets forever.[55] If the Court confirms the Plan (and such confirmation order withstands appellate scrutiny), the City will permanently lose access to resources that it may need in the future to correct for the Plan's shortcomings.

26. The foundations themselves have repeatedly debunked the notion that the structure of the Grand Bargain—including the ring fencing of the City's art from creditors and funneling all of the proceeds to pensioners—was their plan, as opposed to Judge Rosen's and Mr. Driker's. For example:

- The Knight Foundation explained that the Grand Bargain was "a plan proposed by Chief Judge Gerald Rosen and his bankruptcy mediation team, to help Detroit honor its commitment to retirees and protect the remarkable DIA collection in perpetuity."[56]
- General Motors and the General Motors Foundation, which are contributing $10 million dollars to the Grand Bargain, explained that the Grand Bargain "was proposed by the mediators of city's bankruptcy and led by Chief Judge Gerald Rosen of the U.S. District Court for the Eastern District of Michigan, and attorney Eugene Driker."[57]

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[55] *See* Plan Art. IV.E.2 ("On the Effective Date, the City shall irrevocably transfer all of its right, title and interest in and to the DIA Assets to DIA Corp., as trustee, to be held in perpetual charitable trust, and within the City limits, for the primary benefit of the residents of the City and the Counties and the citizens of the State.").

[56] Knight Blog, *Proposed DIA Deal an Important Step for Detroit's Future* (Jan. 14, 2014, 9:48 a.m. (ET)) http://www.knightfoundation.org/blogs/knightblog/2014/1/14/deal-detroits-future/.

[57] GM News, *GM and GM Foundation Lead Auto Sector Support of 'Grand Bargain' to Help Secure DIA Future* (June 9, 2014),

- On April 7, 2014, Mr. Rip Rapson, President and CEO of The Kresge Foundation, spoke at Wayne State University. During his speech, Mr. Rapson stated, "[s]o [Judge Rosen] said, what I want to propose is that the Foundations come to the table with a solution that helps avoid having to litigate those two issues. And the solution of course that you all have become familiar with since then is sort of the Grand Bargain or what he for a while was calling the art trust, in which we would try to identify [an] amount of money that would be sufficient to help soften the blow that the pensioners might be forced to take, and we would also try to figure out an amount that would . . . constitute sufficient consideration for the transfer of the art into a new non-profit entity, and sort of take those issues off the table."[58]

27. More recently, Judge Rosen has discarded any pretense of impartiality among the creditors and acknowledged that the Grand Bargain was conceived and executed for pensioners' benefit:

> I saved the best for last, and ***none of this would be possible without all of us keeping a clear vision firmly in mind about who this is really about. It's about Detroit's retirees*** who have given decades and decades of their lives devoted to Detroit, whether it's the uniforms—the police and firefighters and the medical folks, or the non-uniform folks who work every day in the sanitation and the water department doing all the things that a municipality requires. And then they retire with the hopes and the promise of their pensions. ***And that's what this is really all about.***[59]

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http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2014/Jun/0609-dia.html.

[58] Detroit Bankruptcy & Beyond, *Remarks of Rip Rapson*, https://www.youtube.com/watch?v=z7nXphsL_QA (last visited Aug. 9, 2014).

[59] Rosen Remarks (emphasis added).

28. As a direct result of Judge Rosen's and Mr. Driker's efforts, the City's Plan proposes to treat Pension Claim holders ***substantially*** better than all other unsecured creditors.[60] This discriminatory treatment flowed directly from Judge Rosen's efforts to, as he put it, "accomplish the very best deal that we could do for Detroit's retirees, to whom all of us here owe so much."[61]

29. Judge Rosen's admitted bias in favor of retirees violated the Model Standards. The same is true of Mr. Driker's undisclosed personal interest in protecting the interests of the DIA, based on the fact that his wife was and is a longtime board member of the DIA. Of course, mediators—and judges—are human beings with personal sympathies like everyone else. But the job of a mediator is to put those sympathies aside and not to let them impact the way they go about their business. Here, the mediators ***have not*** set aside their sympathies. Their sympathies in fact animated—or at a very minimum, objectively appear to have animated—material actions that they took during this case.

30. Regrettably, this Court added to the appearance of impropriety in the mediation by *sua sponte* entering an order under seal amending and supplementing

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[60] *See* Initial Plan Objection ¶¶ 28–60.

[61] Rosen Remarks.

the Mediation Order.[62] Inexplicably, this Court refused to unseal the Supplemental Order or allow Syncora to access it.[63] This sealed order amounts to an *ex parte* communication with an unknown number of parties to the mediation and, while Syncora respects the Court and assumes the substance of the order is not improper, the highly unusual *ex parte* nature of the order naturally raises important questions about what the Court communicated to certain (unidentified) parties. The Supplemental Order reinforces the sense that the mediation process was and is intended to favor some "insiders" and disfavor other "outsiders" like Syncora.

31. Based on the foregoing, the proposed Plan cannot satisfy the "general rule that a Chapter 9 plan proposed in good faith must treat all interested parties fairly and that the efforts used to confirm the plan must comport with due process."[64] The Grand Bargain at the heart of the Plan was not proposed in good faith to settle a dispute—as discussed, there was no actual ownership dispute between the City, on the one hand, and the foundations and State, on the other—but rather was engineered by two mediators who colluded with a select group of interested, insider parties to accomplish their discriminatory agenda in violation of

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[62] *Supplemental Order Regarding Mediation Confidentiality* [Docket No. 5294] (the "Supplemental Order").

[63] *See* Mot. to View Order.

[64] *In re Mount Carbon*, 242 B.R. at 39.

basic standards of conduct for mediators.[65] The strongest indictment of the Grand Bargain and the clearest evidence that the Plan was not proposed in good faith comes from Judge Rosen himself at the conclusion of his lobbying efforts in Lansing: "***[N]one of this would be possible without all of us keeping a clear vision firmly in mind about who this is really about. It's about Detroit's retirees . . . that's what this is really all about***."[66]

32. It would be an affront to the notion of good faith for this Court to place its imprimatur on a Plan conceived by biased mediators and that exhibits such naked favoritism to favored, insider creditors. Federal bankruptcy law—indeed, the rule of law—is meant to insulate the judicial process from political considerations, and it is meant to protect the unpopular and those without political influence. The Court must reject the Plan to preserve the integrity of judicial and mediation processes.

B. The Grand Bargain, if approved, amounts to a judicially sanctioned fraudulent transfer.

33. Perhaps unsurprisingly, the tainted mediation process bore tainted fruit: the Plan also cannot be confirmed because the mediators' plan to transfer the

[65] Syncora is informed and believes that Judge Rosen ordered the Court's independent expert to attend mediation sessions, off-the-record and *ex parte*, despite the fact that the Court's independent expert is not a mediation party, and, as a representative of the Court, should adhere to the same rules against *ex parte* communications.

[66] Rosen Remarks (emphasis added).

Museum Assets beyond creditors' and the City's reach is tantamount to a fraudulent transfer prohibited by the Michigan Uniform Fraudulent Transfer Act (the "UFTA").

34. A plan cannot be confirmed if it employs "means forbidden by law,"[67] or if the debtor is "prohibited by law from taking any action necessary to carry out the plan."[68] The UFTA prohibits as fraudulent any "transfer made or obligation incurred by a debtor . . . if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any creditor of the debtor."[69] The Grand Bargain's transfer of the Museum Assets falls squarely within these prohibitions.

35. ***First***, the DIA Settlement Agreement explicitly states that the transfer is intended to render the Museum Assets "free and clear of all security interests, liens, encumbrances, claims and interests of the City and its creditors."[70] This is unacceptable in light of the rock-bottom price ascribed to the Museum Assets as well as the skewed use of the proceeds.

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[67] 11 U.S.C. § 1129(a)(3).

[68] 11 U.S.C. § 943(b)(4).

[69] Mich. Comp. Laws § 566.34(1)(a).

[70] DIA Settlement Agreement § 2.1.

36. ***Second***, as discussed above, virtually everyone involved in the Grand Bargain has acknowledged openly that the purpose of the transfer is to hinder present and future creditors.[71]

37. Judge Rosen and Mr. Driker, in their January 2014 press release, confirmed that one of the Grand Bargain's "twin goals" is "preserving the DIA's art collection," a euphemism for placing the art beyond the reach of "outsider" creditors and, equally important, the City itself.[72]

38. The John S. and James L. Knight Foundation, one of the largest contributors to the Grand Bargain, eschewed euphemism and conceded that the art would be transferred to "***prevent the museum's world-class collection from any potential sale to satisfy the city's creditors now or at any time in the future***."[73] The Knight Foundation's director, Alberto Ibarguen, likewise confirmed not only the fraudulent intent of the transfer, but that it was the mediators' suggestion: "the suggestion was, well, what if we had an additional pool of money that could buy

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[71] *See generally supra* Section I.A.

[72] *Update 1-Philanthropists Pledge Over $330 mln to Help Detroit Art Museum*, Reuters (Jan. 13, 2014, 11:16 a.m. (ET)), http://www.reuters.com/article /2014/01/13/ usa-detroit-idUSL2N0KN14S20140113.

[73] Knight Blog, *Proposed DIA Deal an Important Step for Detroit's Future* (Jan. 14, 2014, 9:48 a.m. (ET)) http://www.knightfoundation.org/blogs/knightblog/ 2014/1/14/deal-detroits-future/ (emphasis added).

the art, put it in trust, so that it stays as a cultural asset of Detroit and the State of Michigan?"[74]

39. The W.K. Kellogg Foundation acknowledged that it agreed to contribute money for the City's unfunded pension debt "***in order to safeguard the city-owned art collection at the Detroit Institute of Arts museum[]***"[75]—that is, safeguarded from claims of the City's legitimate creditors and the City's present and future use of those assets to satisfy claims.

40. General Motors and the General Motors Foundation explained in a press release that the Grand Bargain is an effort to "protect the museum's art collection" that "was proposed by the mediators of city's [sic] bankruptcy and led by Chief Judge Gerald Rosen of the U.S. District Court for the Eastern District of Michigan, and attorney Eugene Driker."[76]

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[74] E. Blair, *Foundations Keep Detroit Art Off the Auction Block*, NPR: All Things Considered (Jan. 13, 2014 4:00 p.m. (ET)), http://www.npr.org/2014/01/13/262185978/foundations-keep-detroit-art-off-the-auction-block.

[75] C. Devitt, *Kellogg Foundation Pledges $40M to Detroit's Pensions*, Bond Buyer (Jan. 29, 2014 4:30 p.m. (ET)), http://www.bondbuyer.com/issues/123_19/kellogg-foundation-pledges-40m-to-detroits-pensions-1059364-1.html (emphasis added).

[76] GM News, *GM and GM Foundation Lead Auto Sector Support of 'Grand Bargain' to Help Secure DIA Future* (June 9, 2014), http://www.http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2014/Jun/0609-dia.html.

41. And notably, the transfer is to a quasi-insider: the Museum Assets will be transferred to the DIA Corp. "to be held in perpetual charitable trust for the benefit of the citizens of the City and the State of Michigan."[77] The UFTA provides that a transfer to an insider is evidence of intent to defraud creditors.[78]

42. ***Third***, the City cannot expunge the taint of fraud simply because Judge Rosen arranged for the meager proceeds of the transfer to flow to pensioners—proceeds sufficient to ensure pensioners would be paid in full, yet leaving nothing for other creditors. Its actions are still fraudulent as to the City's other creditors, including Syncora.[79]

43. ***Fourth***, as discussed more fully below in connection with the City's disregard for due process, the City's aggressive use of the mediation privilege to prevent discovery into the intent behind the Grand Bargain further buttresses the overwhelming direct evidence that the Grand Bargain's *raison d'etre* was to place the Museum Assets beyond the reach of the City's creditors. The City and the foundations asserted the mediation privilege broadly in a variety of contexts: to

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[77] DIA Settlement Agreement, Annex C at 1.

[78] Mich. Comp. Laws § 566.34(2)(a).

[79] *See, e.g., Dearborn St. Bldg. Associates LLC v. D & T Land Holdings, LLC*, No. 1:07-cv-1056, 2009 WL 3011245, at *7, *9 (W.D. Mich. Sept. 16, 2009) (finding that debtor made transfer with actual intent to defraud creditors, despite the fact that debtor used a portion of the proceeds from transfer to pay off a different creditor).

avoid answering interrogatories about monetization of the art; to quash subpoenas to the foundations seeking documents and testimony related to the Grand Bargain; and to avoid answering questions during depositions.[80] In similar circumstances, the Western District of Michigan Bankruptcy Court ruled that a party's effort to conceal the intent behind a transfer is ***itself*** evidence of fraudulent intent.[81]

44. ***Fifth***, even if one assumed (counterfactually) that the Grand Bargain was not motivated by actual intent to defraud creditors, it still is constructively fraudulent because the City will receive less than reasonably equivalent value for the art. As discussed in Syncora's Initial Plan Objection, the DIA Settlement is prohibited under section 5 of the UFTA because: (a) creditors' claims predate the transfer; (b) the City will be insolvent at the time of the transfer; and (c) the City will receive less than reasonably equivalent value in exchange for the Museum Assets.[82] Accordingly, the Grand Bargain displays the *prima facie* elements of a constructively fraudulent transfer, in addition to the clear record showing actual intent to defraud creditors.

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[80] *See, e.g.*, *City of Detroit's Statement in Support of the Foundation's Joint Motion to Quash Syncora's Subpoenas Duces Tecum* [Docket No. 5300]; Erickson Dep. Tr. at 184, 11–25; 185, 1–3 (July 22, 2014).

[81] *See Official Unsecured Creditors Comm. of Long Dev., Inc. v. Oak Park Village Ltd. P'Ship* (*In re Long Dev., Inc.*), 211 B.R. 874, 888 (Bankr. W.D. Mich. 1995).

[82] Initial Plan Objection, ¶ 75 at n.59; *see also* Mich. Comp. Laws § 566.35(1).

45. ***Finally***, the City has asserted—and will likely continue to assert—that it cannot be compelled to monetize its assets. But that argument fails in the face of two important facts: (a) the City ***chose*** to monetize the Museum Assets; and (b) the entire DIA Settlement is predicated on the notion that unsecured creditors (the pensioners) have at least a colorable claim against those assets. The City cannot assert that the Museum Assets are beyond any creditor's reach, while simultaneously invoking this Court's jurisdiction to bless the DIA Settlement. Given the City's acknowledgment in the DIA Settlement that creditors ***do*** have potential claims against the Museum Assets, the UFTA prohibits the City from transferring those assets for the purpose of hindering or defrauding the City's creditors.[83]

46. Although the City and the mediators cloaked their machinations in secrecy behind the lead-lined mediation privilege, the public record demonstrates that the Grand Bargain was engineered by purpose-driven, result-oriented mediators to commit a fraudulent transfer of multi-billion dollar assets and ensure wildly favorable treatment of a politically popular creditor group. The Grand Bargain is procedurally and substantively antithetical to the concept of good faith and, accordingly, the Court cannot confirm the Plan.

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[83] *See* Mich. Comp. Laws §§ 566.31 (f), (i) (stating that "debtor" includes a "government or governmental subdivision or agency").

47. After all, even a casual observer of Detroit history can see the Grand Bargain for what it truly is: the further impoverishment of Detroit's rich history and treasures by residents of affluent suburban towns and cities. As noted above, the transfer of the Museum Assets under the DIA Settlement is ***irrevocable***. Thus, should the Plan fail to revitalize the City sufficiently —and it will fail as presently proposed—Detroit will have forever lost significant assets that could be used in the future to satisfy the City's obligations. In sum, the Grand Bargain is not so grand and, if it is a bargain, it is not one for the City or its citizens—let alone its creditors.

II. The City Has Failed to Satisfy Due Process Requirements.

48. The proposed Plan independently cannot be confirmed because, in prosecuting the Plan and confirmation process, the City has not satisfied a fundamental tenet of federal adjudication—the requirement to provide due process. As the Supreme Court has observed, "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[84] The district court in this district, too, has held that "an elementary and fundamental requirement of due process in any proceeding which

[84] *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and ***afford them an opportunity to present their objections***."[85] Of course, the notice provided must give interested parties enough information so that they can adequately defend their rights.[86] Put another way, for a party to present its objections, the party must know—with specificity—all of the ways in which their rights will be affected by the proposed action.

49. In the context of plan confirmation, the Due Process Clause of the Fifth Amendment applies with equal force.[87] After all, a court-adjudicated plan of adjustment by its very nature deprives creditors of their rights in property.[88] The

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[85] *In re Dow Corning Corp.*, 255 B.R. 445, 473 (E.D. Mich. 2000) (quoting *Mullane*; emphasis added) *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002).

[86] *See id.* (citing *Mullane*).

[87] *See, e.g., In re Wolf Creek Valley Metro. Dist. No. IV*, 138 B.R. 610, 614 (D. Colo. 1992) (quoting *Mullane* in finding that modifying a chapter 9 plan must comply with due process); *In re Newstar Energy of Texas, LLC*, 280 B.R. 623, 627 (Bankr. W.D. Mich. 2002) ("If a creditor does not receive adequate notice, that creditor is not bound by the confirmation order."); *In re Menden*, No. 07-33707, 2011 WL 4433621, at *4 (Bankr. N.D. Ohio Sept. 21, 2011) ("It is clear that Debtors were required to provide National Auto adequate notice of their proposed Amended Plan in order to apprise it that its rights may be altered and to afford it the opportunity to present any objection to the treatment of its claim in the Amended Plan").

[88] *See, e.g., In re Rapp*, 16 B.R. 575, 579 (Bankr. S.D. Fla. 1981) ("There is a deprivation of property in any bankruptcy action whereby a creditor is not paid the entire amount of its claim.").

Fifth Amendment, moreover, is not the end of the analysis. The Bankruptcy Code is laced with notice and process provisions regarding plan confirmation.

50. Specifically, Bankruptcy Code section 1123(a)(5) protects creditors by requiring that a plan "tell creditors what they [are] going to get and how they [are] going to get it."[89] This disclosure is a critical component of the bankruptcy process, and a court may not confirm a plan that does not comply with section 1123(a)(5).[90] Indeed, courts recognize that plans that fail to include the disclosure required by section 1123(a)(5) also unfairly inhibit creditors from raising, and courts from evaluating, objections to other Bankruptcy Code confirmation requirements.[91]

51. Yet, in this case, creditors still do not have adequate information regarding material transactions contemplated by the Plan and the related Plan changes affecting creditors' property interests. Specifically, creditors require more

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89 *In re Pac. Gas & Elec. Co.*, 273 B.R. 795, 808 (Bankr. N.D. Cal. 2002).

90 *See* 11 U.S.C. § 1129(a)(1).

91 *See, e.g.*, *In re Walker*, 165 B.R. 994, 1004 (E.D. Va. 1994) (stating that "speculative, indefinite plans will necessitate objections by the creditors who have no reasonable means by which to assess whether a plan can achieve the results contemplated by the Code, and because the courts will have no objective criteria by which to make confirmation judgments"); *see also In re Moritz Walk, LP*, No. 10-41069, 2011 WL 4372405 (Bankr. S.D. Tex. Sept. 19, 2011) ("In the instant case, the plan lacks adequate means for its implementation. First, Debtor's proposed post-confirmation capital structure is not clear . . . This vagueness undercuts the means for the plan's implementation, and also is not consistent with the interests of creditors.").

information regarding the following to adequately press their objections at the confirmation trial:

- ***Terms and Documents Regarding New Labor Agreements***. The City has announced new collective bargaining labor agreements (the "CBAs") with certain of its employees represented by labor unions. Yet, the City has not provided all of the proposed new CBAs to Syncora or other creditors. The CBAs that remain undisclosed include the City's agreements with significant labor unions. This information is necessary for assessing whether the plan is feasible and it is relevant to the unfair discrimination analysis.

- ***DWSD Issues***. On August 6, 2014, the City announced in open court that it had reached a settlement with certain DWSD parties. On August 11, 2014, less than ten days before the start of the trial, the City filed a motion for approval of certain postpetition financing related to a DWSD tender offer.[92] Syncora is evaluating all issues related to the DWSD deal, and it reserves its rights to present objections at trial based on its analysis.

- ***Exit Financing***. In her report regarding the Plan's feasibility, Ms. Kopacz stated that the success of the Plan depends on the City's ability to access sufficient exit financing.[93] The City filed a one-page summary of the principal terms of its exit facility late on

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[92] *See Motion of the Debtor for a Final Order Pursuant to (I) 11 U.S.C. §§ 105,364(c), 364(d)(1), 364(e), 902, 904, 921, 922 and 928 (A) Approving Postpetition Financing and (B) Granting Liens and (II) Bankruptcy Rule 9019 Approving Settlement of Confirmation Objections* [Docket No. 6644].

[93] *Expert Report of Martha E.M. Kopacz Regarding the Feasibility of the City of Detroit Plan of Adjustment* 195 ("In the event that this financing is unavailable to the City on reasonable terms, is significantly lower in terms of facility amount, or is otherwise different than the assumptions in the POA, it is unlikely the City will have sufficient liquidity to operate and satisfy its obligations.").

August 11, 2014.[94] This filing is insufficient to give creditors adequate notice of the City's proposed financing.

52. The City's abuse of the mediation privilege further deprived creditors of information necessary to evaluate the extent to which their property interests are affected by the Plan. For example, the City has claimed the mediation privilege in response to discovery requests, including:

- ***Objection to Syncora's First Interrogatories.*** The City made a general objection to the extent any request seeks information subject to privileges, including the mediation privilege, noting that "[t]he City objects to each and every one of these Interrogatories, and the instructions and definitions therein, to the extent that they seek information subject to the attorney-client privilege, attorney work product doctrine, the settlement or mediation privilege."

- ***Discovery of the Foundations.*** Syncora served deposition and document subpoenas on the Foundation funders of the Grand Bargain. Both the City and the Foundations invoked the mediation privilege to support the Foundations' motion to quash.[95]

53. Further, the City has used the mediation privilege as a shield from deposition testimony as far back as December 2013, notwithstanding that the City itself has selectively ***revealed*** certain aspects surrounding the mediation to justify its business judgment. In connection with Plan confirmation itself, the City has

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[94] *See Notice of Filing Plan Supplement: Exhibit I.A.146 (Principal Terms of Exit Facility); Exhibit I.A.255 (Form of Restoration Trust Agreement); Exhibit II.D.5 (Schedule of Postpetition Collective Bargaining Agreements); Exhibit III.D.2 (Retained Causes of Action)* [Docket No. 6647].

[95] *Foundations' Joint Motion to Quash Subpoena Duces Tecum* [Docket No. 5300]; *City's Statement in Support of Motion to Quash* [Docket No. 5494].

invoked the mediation privilege in virtually every deposition by holders of COP Claims to date, including the depositions of Glenn Bowen, Michael Hall, Ken Buckfire, Gaurav Malhotra, John Hill, Kevyn Orr, James Craig, Charles Moore, and Sonya Mays.

54. Despite this extensive limiting of discovery under the mediation privilege, the Court has refused creditors' requests for production of a privilege log.[96] As an initial matter, such a ruling flies in the face of the notion that "[p]reparation of a privilege log is a critical step in discharging one's burden of establishing the existence of a privilege."[97] It also flies in the face of well-settled Supreme Court jurisprudence that privileges are exceptions to the general principle that parties are entitled to relevant evidence, and that any party asserting a privilege must defend and justify it if challenged—that is, the existence of

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[96] Hr'g Tr. 269, May 22, 2014 [Docket No. 5203]

[97] *Breon v. Coca-Cola Bottling Co. of New England*, 232 F.R.D. 49, 55 (D. Conn. 2005); *see also Miner v. Kendall*, No. 96-1126, 1997 WL 695587 (D. Kan. Sept. 17, 1997) ("This court has set forth in detail what is required of a party making a claim of privilege. This includes the preparation of a privilege log that provides the court with sufficient information to enable the court to determine that each element of the privilege is satisfied as to each document for which a privilege is claimed. It is important for the privilege log to be complete; . . . the court will not do the work of the party claiming the privilege.")

applicable privilege must be demonstrated if challenged and not presumed.[98] This failure to produce a privilege log compounds the due process violations already plaguing confirmation of the Plan; here, creditors do not even know what it is that they do not know.

55. Accordingly, creditors have not been given the necessary notice and opportunity to object to the Plan that due process requires.[99] Therefore, the Plan cannot be confirmed for this independent reason.

III. In Direct Contravention of Applicable Law, the City Seeks to Exculpate Certain Creditors Under the Plan.

56. The Plan's exculpation provisions, taken together, violate applicable law. As noted in its Initial Plan Objection, Syncora objects to the breadth and scope of the parties exculpated under the Plan.[100]

57. The Plan's definition of "Exculpated Parties" includes a laundry list of creditors. Specifically, the following are exculpated under the Plan:

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[98] *See, e.g.*, *Herbert v. Lando*, 441 U.S. 153, 175 (1979) (stating that "[e]videntiary privileges in litigation are not favored . . . [and a]s we stated, in referring to existing limited privileges against disclosure, '[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'" (citation omitted)).

[99] *See In re Abrams*, 305 B.R. 920, 924 (Bankr. S.D. Ala. 2002) (allowing reconsideration of confirmation order because creditor "had no way of knowing" that its rights were impaired under plan and had no opportunity to object to its treatment).

[100] *See* Initial Plan Objection ¶ 70 n.56.

> (a) the RDPFFA and its board of trustees/directors, attorneys, advisors and professionals, (b) the DRCEA and its board of trustees/directors, attorneys, advisors and professionals, (c) the postpetition officers of the Detroit Police Lieutenants and Sergeants Association, (d) the postpetition officers of the Detroit Police Command Officers Association, (e) GRS and its postpetition professional advisors, (f) PFRS and its postpetition professional advisors, (g) Gabriel, Roeder, Smith & Company, (h) the COP Swap Exculpated Parties, (i) the LTGO Exculpated Parties and (j) the UTGO Exculpated Parties.[101]

58. Most recently, by an order dated July 11, 2014, the Court approved a stipulation among the City and the COP Swap Counterparties.[102] That stipulation, while nominally settling disputes among the parties, creates a bigger problem than those it resolves. Pursuant to the Swap Stipulation, the Plan now purports to exculpate the COP Swap Counterparties from

> any liability to any person or Entity for any act or omission in connection with, relating to or arising out of the City's restructuring efforts and the Chapter 9 Case, including the authorization given to file the Chapter 9 Case, the formulation, preparation, negotiation, dissemination, consummation, implementation, confirmation or approval (as applicable) of the Plan, the property to be distributed under the Plan, the settlements

[101] Plan Art. I.A.143.

[102] *Order Modifying the Order Identifying Legal Issues, Establishing Supplemental Briefing Schedule and Setting Hearing Dates and Procedures [Docket No. 5235]* [Docket No. 5924]; *see generally Stipulation Regarding Proposed Order Modifying the Order Identifying Legal Issues, Establishing Supplemental Briefing Schedule and Setting Hearing Dates and Procedures [Docket No. 5235]* [Docket No. 5907] (the "Swap Stipulation").

> implemented under the Plan, the Exhibits, the Disclosure Statement, any contract, instrument, release or other agreement or document provided for or contemplated in connection with the consummation of the transactions set forth in the Plan or the management or operation of the City.[103]

59. The import of the exculpation provisions is clear: the impermissible, nonconsensual release of claims held by creditors against certain other creditors, including the COP Swap Counterparties. Such a nonconsensual third-party release may only be approved where "unusual circumstances"—not at all present here—exist.[104]

60. More specifically, under *Dow Corning*, "unusual circumstances" exist only if all of the following seven factors are present:

- an identity of interest between the debtor and the non-debtor exists such that a suit against the non-debtor is functionally a suit against the debtor that will deplete the estate of assets;
- the non-debtor contributed substantial assets to the estate;
- the injunction is essential to the reorganization;
- the impacted class has overwhelmingly voted in favor of the plan;
- the plan provides a mechanism to pay for all, or substantially all, of the classes affected by the injunction;

[103] Plan Art. III.D.6.

[104] *See Class Five Nevada Claimants, et al. v. Dow Corning Corp., et al.* (*In re Dow Corning Corp*.), 280 F.3d 648, 658 (6th Cir. 2002).

- the plan provides an opportunity for non-settling claimants to recover in full; and

- the bankruptcy court made specific factual findings to support its approval of the releases.[105]

61. Here, the City has not attempted to satisfy the standard with respect to the Exculpated Parties. And, as shown below, it cannot satisfy the standard with respect to the COP Swap Counterparties.

62. ***First***, the City and COP Swap Counterparties do not share an identity of interest. That is, a suit against the COP Swap Counterparties on account of their acts and omissions in connection with the Chapter 9 Case does not give rise to any indemnity obligations on the part of the City. ***Second***, the COP Swap Counterparties have not made a substantial contribution to the Plan—indeed, the opposite is true: the City is paying the COP Swap Counterparties $85 million.[106] ***Third***, the exculpation of the COP Swap Counterparties is not ***essential*** to the reorganization—in fact, under the plain terms of the Swap Settlement, the City could have excluded the COP Swap Counterparties from the Plan's exculpation provision if that provision did not include other creditors of the City. ***Fourth***,

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[105] *Id.*

[106] *See* Swap Settlement Order; *see also In re Dow Corning Corp.,* 287 B.R. 396, 405 (E.D. Mich. 2002) ("The Shareholders' contribution of over two billion dollars of their equity to pay contested claims under the Joint Plan without requiring proof of disease causation is a substantial contribution to the Debtor's reorganization.")

holders of COP Claims and Other Unsecured Claims, which would be affected by the release of their claims against the Exculpated Parties, categorically rejected the Plan.[107] ***Fifth***, holders of COP Claims and Other Unsecured Claims are not paid in full under the Plan.[108] ***Sixth***, the Plan makes no provision regarding non-settling claimants, such as Syncora, to recover in full. And, ***seventh***, the City has not put forth any basis, legal or factual, upon which the Court can make the necessary findings. There are no bases whatsoever for this Court to grant the COP Swap Counterparties—or any of the Exculpated Parties—a non-consensual third-party release.

63. In response to this straightforward application of the Sixth Circuit's test, the City and COP Swap Counterparties will likely contend that Syncora is carved out of the exculpation provision.[109] But this contention is meritless. The Plan contains text limiting the COP Swap Counterparties' exculpation vis-à-vis Syncora. But that text is imprecise and narrow, relating only to the Swap Settlement.[110] To be sure, Syncora has claims against the COP Swap

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[107] *See Declaration of Michael J. Paque Regarding the Solicitation and Tabulation of Votes on, and the Results of Voting with Respect to, Fourth Amended Plan for the Adjustment of Debtors of the City of Detroit* ¶¶ 26, 43 [Docket No. 6179].

[108] *See* Plan Art. II.B.3.p.

[109] *See id.* Art. III.D.6.

[110] *Id.*

Counterparties arising in tort and contract that go beyond any general reference to the Swap Settlement.[111] Accordingly, the modified exculpation provision does not pass muster, and the Plan cannot be confirmed.

IV. The Fifth Amended Plan's Definition and Treatment of COP Claims Violates the Bankruptcy Code.

64. The City's fifth amended Plan contains a number of substantive changes. Among the most perplexing is the City's revised definition of "COP Claim":

> COP Claim means a Claim under or evidenced by the COP Service Contracts. For the avoidance of doubt, except as provided in any Final Order of the Bankruptcy Court, the definition of COP Claim shall include any Claim (other than a COP Swap Claim) on account of any act, omission or representation (however described) based upon, arising out of or relating to: (a) the issuance, offering, underwriting, purchase, sale, ownership or trading of any COPs (to the extent any such Claim is not a Subordinated Claim); (b) the COP Service Corporations; (c) any COP Service Contracts; (d) the 2005 COPs Agreement; (e) the 2006 COPs Agreement; (f) the Detroit Retirement Systems Funding Trust 2005; (g) the Detroit Retirement Systems Funding Trust 2006; (h) the Contract Administration Agreement 2005; (i) the Contract Administration Agreement 2006; (j) any allegations that have been made or could have been made by or against the City or any other person in the COP Litigation; or (k) any policy of insurance relating to the COPs.[112]

[111] *See* First Supplemental Objection ¶¶ 33–37.

[112] Plan Art. I.A.67.

65. The new definition of COP Claims is far more expansive than the definition contained in the Fourth Amended Plan: "'COP Claim' means a Claim under or evidenced by the COP Service Contracts."[113]

66. Based on a plain and fair reading of the new COP Claim definition versus the prior definition, it is clear the City is reclassifying creditors' claims—Syncora's Other Unsecured Class Claims as COP Claims—in an attempt to disallow those claims. While the COP Claim definition is now sweepingly broad, the COP Claim treatment only accounts for COP ***principal-based*** claims. Accordingly, the new COP Claim definition, read in conjunction with COP Claim treatment, establishes that the Plan violates Bankruptcy Code section 1123(a)(4).

67. Specifically, Syncora's claims against the City for (a) fraud and fraudulent inducement, (b) unjust enrichment and restitution, (c) abuse of process, and (d) fees and expenses were Other Unsecured Claims under the Fourth Amended Plan. Because these claims did not fall within the definition of COP Claim under that plan (i.e., claims "under or evidenced by the COP Service Contracts") or any other defined claim class, these claims fell squarely within the Fourth Amended Plan's definition of Other Unsecured Claims (i.e., claims not otherwise included in an unsecured claim class).

[113] *See* Fourth Am. Plan I.A.57.

68. Syncora's fraud-related claims arise because of false or misleading statements and omissions in the COP offering materials. These claims do not arise under, and are not evidenced by, the Service Contracts and thus were not COP Claims under the prior definition. But the new definition includes the following text to capture these claims: "For the avoidance of doubt, except as provided in any Final Order of the Bankruptcy Court, the definition of COP Claim shall include any Claim . . . on account of any act, omission or representation . . . relating to: (a) the issuance, offering, underwriting, purchase, sale, ownership or trading of any COPs . . . ."[114]

69. Syncora's fees and expenses claims arise in Class 3 and, in the Fourth Amended Plan, in Class 14. Such claims in Class 14 arise under the Contract Administration Agreement—not the Service Contracts. Here again, the City has changed the COP Claims definition to cover Syncora's Class 14 claims: "For the avoidance of doubt, except as provided in any Final Order of the Bankruptcy Court, . . . the definition of COP Claim shall include any Claim . . . relating to . . . (h) the Contract Administration Agreement 2005; (i) the Contract Administration Agreement 2006 . . . ."[115]

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[114] Plan Art. I.A.67.

[115] *Id.*

70. Syncora's unjust enrichment and restitution claims also exist in the absence of the Service Contracts and could not be COP Claims under the prior definition. Syncora believes the new COP Claim definition does not cover these claims, but it is not clear. It is possible the City intended to cover such claims by including sweeping references to claims relating to the "the COP Service Corporations," the "Detroit Retirement Systems Funding Trust 2005," and the "Detroit Retirement Systems Funding Trust 2006," each of which may tangentially "relate" to an unjust enrichment or restitution claim.[116] And if that is the case, Syncora objects.

71. In substance, the City's reclassification of Syncora's Other Unsecured Claims is tantamount to a claims objection. As addressed above, the new COP Claim definition covers a wide swath of claims other than COP principal claims. Yet, the COP Claim treatment under the Plan only accounts for COP principal:

> Each beneficial holder shall be deemed to receive such COP Claims or portions thereof in ***an amount equal to the proportion that the unpaid principal amount of such holder's COPs bears to the aggregate unpaid principal amount of all COPs*** . . . . On the Effective Date, the City shall establish the Disputed COP Claims Reserve. The Disputed COP Claims Reserve shall contain: (a) an Unsecured Pro Rata Share of New B Notes calculated as

[116] Syncora also believes that its abuse of process claim—which arises from the City's unjustified and improper use of the legal process in response to Syncora's assertion of its rights—is a Class 14 claim even under the new COP Claim definition.

> if such Disputed COP Claims ***were Allowed in an amount equal to the aggregate unpaid principal amount as of the Petition Date for the COPs***.[117]

72. Because treatment of COP Claims ***is not*** coterminous with the COP Claim definition, the Plan operates as an objection to all other COP-related claims, including accrued and unpaid interest as of the Petition Date and Syncora's Other Unsecured Claims. The City cannot amend its Plan to object to a claim and then ask the Court to bless its actions through the plan confirmation process. Doing so circumvents bankruptcy law.[118] Moreover, to the extent the City assumes that Syncora's claims will be disallowed, the Plan is based on flawed data, and the Court cannot confirm the Plan.[119]

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[117] Plan Art. II B.3.p.ii–iii.A (emphasis added).

[118] *See, e.g.*, *In re Dynamic Brokers, Inc.*, 293 B.R. 489, 497 (B.A.P. 9th Cir. 2003) ("Moreover, utilizing a plan confirmation proceeding as a method of objecting to a claim presents troubling policy issues in the face of rules of procedure that appear to require formal objections to claims . . . . Neither the statute nor the rules say, 'oh, by the way, we can also sandbag you by sneaking an objection into a reorganization plan and hoping you do not realize that we can use this device to circumvent the claim objection procedure mandated by the rules.' That is not the law, and if it were the law, it would be a material disservice to public confidence in the integrity of the bankruptcy system.").

[119] *See id.* at 499 ("Because the court erred in effectively disallowing Varela's 'deemed allowed' claim without the benefit of a claim objection, the court's consideration of the confirmation requirements, based at least in part on Varela's erroneously reduced claim, was fatally flawed. Therefore, we must reverse the confirmation order . . . .").

73. Additionally, the COP Claim treatment violated section 1123(a)(4) of the Bankruptcy Code under the Fourth Amended Plan because it provided no recovery on account of Syncora's claims for past paid COP interest. By lumping Syncora's Other Unsecured Claims into the COP Claim definition—yet not providing any treatment for such claims—the Plan further violates Bankruptcy Code section 1123(a)(4) by treating Syncora's "new" Class 9 claims differently.[120] For these independent reasons alone, the Plan continues to fail section 1129(a)(1)'s requirement that it comply with the provisions of the Bankruptcy Code.[121] This flaw is fatal, and for this independent reason, the Court cannot confirm the Plan.

V. Confirmation Must Be Denied Because Syncora's Pending Appeals Could Affect the Plan.

A. Prudence dictates that the Court should deny Plan confirmation.

74. Respect to the judicial process dictates that the Court should deny Plan confirmation until Syncora's pending appeals have been resolved. On this point, the Sixth Circuit was clear:

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[120] *See* 11 U.S.C. § 1123(a)(4) ("[A] plan shall . . . provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."); *In re Oakland Care Ctr., Inc.*, 142 B.R. 791, 794 (E.D. Mich. 1992) ("The fundamental policy that similarly situated creditors share pro rata is also reflected in section 1123(a)(4) of the Bankruptcy Code."); *In re Kessler, Inc.*, 142 B.R. 796, 800 (W.D. Mich. 1992) (citing section 1123(a)(4) and stating that a "fundamental policy found in the overall structure of the Bankruptcy Code is the equality of distribution to similarly situated creditors").

[121] 11 U.S.C. § 1129(a)(1).

> If the bankruptcy court confirms the city's plan of adjustment before Syncora obtains judicial review of the merits of its appeal, Syncora may be left with no option but to seek an emergency stay of that plan. That is hardly the process envisioned by the Federal Rules of Bankruptcy Procedure, which seek to expedite bankruptcy appeals by requiring parties to file their appeals within fourteen days rather than the normal thirty days . . . Nor is it consistent with this court's recurrent efforts to facilitate orderly bankruptcy appeals by interpreting the final judgment rule . . . "'to avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved.'" . . . Insofar as a debtor's plan of adjustment incorporates final decisions reached by the bankruptcy court, any appeals from those decisions should generally be reviewed ***before*** the bankruptcy court confirms that plan.[122]

75. As noted above, Syncora is prosecuting four appeals that, if any one of which is resolved in its favor, would compel the City to amend the Plan dramatically.

76. As to the Automatic Stay Appeal, on which the Sixth Circuit heard oral argument on July 30, 2014, if Syncora is successful, the City will lose access to the casino revenues that underpin, in part, distributions to creditors under the Plan. No one can seriously dispute that such an outcome would lead to material

[122] *In re Syncora Guarantee Inc.*, No. 14-1719, 2014 WL 2959242, at *1, *5 (6th Cir. July 2, 2014) (internal citations omitted) (emphasis in original).

modifications of the Plan, which would, in turn, likely necessitate the City's re-solicitation of votes to accept or reject the Plan.[123]

77. The same goes for Syncora's other appeals—namely, the PLA Appeal, the Swap Appeal, and the DIP Appeal. If Syncora is successful on any one of these appeals, the City will be forced back to the drawing board, the negotiating table, and the courtroom before it could reasonably propose another plan that would withstand adversarial scrutiny. Put another way, the City must run the table on four separate appeals to secure the viability of its Plan; if Syncora prevails on just one of its appeals, the City will be forced to make material alterations to the Plan.

78. Under these circumstances, prudence dictates that the Court deny Plan confirmation. After all, "[w]ithout a final decision on [these] question[s], the city will not know what amount its coffers will contribute to the bankruptcy estate, the creditors cannot know the size of the pie they are being asked to share, and the bankruptcy court cannot be confident that it is considering a legally and financially viable plan."[124]

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[123] *See* 11 U.S.C. § 942 ("The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of this chapter. After the debtor files a modification, the plan as modified becomes the plan."); *see also id.* § 901.

[124] *Syncora*, 2014 WL 2959242, at *5.

B. The Plan purports to distribute assets that are not property of the City.

79. As argued more fully in connection with Syncora's Automatic Stay Appeal, the casino revenue is not property of the City until it is released from the holdback account after certain conditions are met. It is a basic tenet of federal bankruptcy law that courts must look to state law to determine the existence and scope of a debtor's property rights, measured as of the date of the bankruptcy filing.[125] The filing of a bankruptcy petition, therefore, does not expand or otherwise modify a debtor's state-law property interests held as of the date of the filing.[126] Moreover, a bankruptcy filing does not "convert a Debtor's contingent right into a non-contingent right."[127]

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[125] *See, e.g.*, *Butner v. United States*, 440 U.S. 48, 55–56 (1979); *Sharp v. Dery*, 253 B.R. 204, 206–07 (E.D. Mich. 2000).

[126] *See, e.g.*, *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984) ("[W]hatever rights a debtor has in property at the commencement of the case continue in bankruptcy—no more, no less."); *Sharp*, 253 B.R. at 209 (stating that a bonus payment not was property of estate because debtor had no legally enforceable pre-petition right to payment).

[127] *In re Dolphin Titan Int'l, Inc.*, 93 B.R. 508, 512 (Bankr. S.D. Tex. 1988); *see also Creative Data Forms, Inc. v. Pennsylvania Minority Bus. Dev. Auth.*, 72 B.R. 619, 623 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1132 (3d Cir. 1986); *Newcomb Carlson v. Farmers Home Admin.*, 744 F.2d 621, at 627 (8th Cir. 1984); *In re Expert South Tulsa, LLC*, 456 B.R. 84, 87 (Bankr. D. Kan. 2011); *Atlantic Gulf*, 369 B.R. at 163; *Royal Bus. Sch.*, 157 B.R. at 942; *In re Cedar Rapids Meats, Inc.*, 121 B.R. 562, 567 (Bankr. N.D. Iowa 1990); *In re AGSY, Inc.*, 120 B.R. 313, 318-19 (Bankr. S.D.N.Y. 1990); *In re Palm Beach Heights Dev. & Sales Corp.*, 52 B.R. 181, 183 (Bankr. S.D. Fla. 1985).

80. As of the Petition Date here, the conditions for release of the casino revenues from the custodial account remained unsatisfied. Accordingly, those funds did not become property of the City, free and clear of the prepetition conditions imposed under the Collateral Agreement. Nevertheless, based on the Automatic Stay Order, the City purports to distribute the casino revenue under the Plan.

81. But Syncora's Automatic Stay Appeal remains pending—indeed, the Sixth Circuit heard oral argument on July 30, 2014. A decision in Syncora's favor could (and likely would) have a material effect on the Plan. Conversely, if the Plan is confirmed before the Automatic Stay Appeal is resolved, Syncora could be deprived of its rights ***without recourse***. In light of this substantial risk, the Court should deny Plan confirmation.

C. The Plan fails to provide for distribution of other assets improperly divested by the City during the Chapter 9 Case.

82. In contrast to the Automatic Stay Appeal, Syncora's other appeals seek to increase the amount of assets available for distribution under the Plan. Specifically, by the PLA Appeal, Syncora seeks to preserve $12.5 million by seeking an order reversing the PLA Order. Likewise, by the Swap Appeal and DIP Appeal, Syncora seeks to preserve an aggregate $205 million for distribution to creditors.

83. With regard to the PLA Appeal, Syncora contends that this Court erred by entering the PLA Order because the City failed to satisfy its burden of proof—and the Court did not make specific, necessary findings—for the relief sought. As such, there was no basis for this Court to enter the PLA Order.

84. With regard to the Swap Appeal, Syncora contends that the Swap Settlement unlawfully impairs third-party rights and attempts to resolve breach-of-contract disputes among parties other than the COP Swap Counterparties and the City. Additionally, Syncora asserts that the plan support aspect of the Swap Settlement is not fair and equitable, nor is it advantageous to the City. Accordingly, the Court erred when it approved the Swap Settlement.

85. With regard to the DIP Appeal, Syncora contends that the City did not seek approval for its debtor-in-possession financing facility through a properly-noticed motion and a hearing, but instead relied solely on a notice of presentment. For this and other reasons, this Court erred when it approved the City's entry into the DIP facility.

86. Of course, the merits of Syncora's appeals will be decided by higher courts. And, to be sure, Syncora is not now seeking to re-litigate those issues in connection with Plan confirmation. Instead, Syncora implores the Court to heed the Sixth Circuit's message: "Insofar as a debtor's plan of adjustment incorporates final decisions reached by the bankruptcy court, any appeals from those decisions

should generally be reviewed ***before*** the bankruptcy court confirms that plan."[128] Such a course will allow a more orderly review in the appellate courts, and it will preserve judicial resources by preventing the substantial litigation of issues that may be mooted by subsequent events on appeal.

87. Accordingly, the Court should deny Plan confirmation until higher courts have finally resolved Syncora's appeals.

CONCLUSION

88. In the final analysis, the City's Plan cannot be confirmed. Its centerpiece—the Grand Bargain—is the product of a flawed mediation process calculated to favor politically popular, insider creditors and to shield valuable assets from outsider creditors; in prosecuting the Plan, the City has run roughshod over fundamental constitutional protections; the Plan impermissibly exculpates certain creditors; the Plan's definition and treatment of COP Claims violates applicable law; and the Plan's key assumptions are subject to ongoing dispute in Syncora's appeals. In sum, there are multiple adequate and independent flaws in the Plan that each preclude confirmation. The Plan requires a complete overhaul before this Court can entertain its confirmation. And that is precisely what this Court should require.

[128] *Syncora*, 2014 WL 2959242, at *5.

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Respectfully submitted,

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