UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THE CITY OF NEW ORLEANS	*	
	*	
Plaintiff,	*	CIVIL ACTION NO. 08-3949
	*	
	*	SECTION “N” (1)
VERSUS	*	
	*	JUDGE KURT D.
	*	ENGELHARDT
AMBAC ASSURANCE CORPORATION,	*	
AMBAC FINANCIAL SERVICES, LLC,	*	MAGISTRATE JUDGE
PAINEWEBBER CAPITAL SERVICES,	*	SALLY SHUSHAN
INC., AND UBS SECURITIES LLC	*	
	*	
Defendants	*	
	*	

* *

MEMORANDUM IN OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

In 1999, UBS Securities LLC (formerly PaineWebber and hereinafter "UBS") approached the City of New Orleans and offered to provide advice and expertise regarding the City's obligation to fund its firefighters' pension. UBS recommended the City fund the obligation with pension obligation bonds--something the City had never previously done. Once the City accepted the pension obligation bond idea, shortly before closing, UBS suddenly recommended the City scrap the traditional fixed-rate structure and employ a complex structure involving an interest rate swap between the City and UBS' affiliate PaineWebber Capital Services, Inc. ("PWCSI")--also something the City had never previously done. UBS pushed the City into this novel and complex structure at the eleventh hour to maximize its own profits, and failed to disclose material facts, including the catastrophic risks of the structure and that PWCSI had entered into a secret swap transferring all control of the City's swap to an Ambac affiliate, a third party with adverse interests ("Reciprocal Swap"). In 2008, the Ambac affiliate exerted the transferred control, causing the complex bond structure to collapse. In the end, the issuance was a financial disaster for the City.

UBS contends there are no genuine issues of material fact to be tried and judgment should be rendered against the City as a matter of law. UBS says (1) it did not owe the City any duty to disclose the transaction's risks, (2) it made appropriate disclosures to the City, (3) the facts it failed to disclose were immaterial to the City's decision-making, and (4) the City cannot prove loss causation or legal cause. This opposition rebuts those contentions and establishes genuine issues of material fact on each element of the City's claims.

UBS' own compliance documents establish that it knew it had a duty to disclose: a 1998 UBS compliance bulletin requires that all communications [redacted]

[redacted][1] Numerous UBS witnesses agree such a duty exists. UBS advised on the transaction for ten months before the City even sought an underwriter, continued to provide advice and make recommendations through the closing, and should not now be allowed to walk away from the specific promises and undertakings it made to the City.

The evidence also shows UBS failed to outline the catastrophic risks of the structure that it proposed. In particular, the City will show UBS did not disclose that the synthetic structure: (1) foreclosed any economical way to refinance the bonds, for example if Ambac ran into problems or if interest rates declined and the City could borrow at a rate lower than 7.9% (2) exposed the City to credit risk for the thirty year life of the bonds; and (3) left the City vulnerable to various undisclosed event risks outlined herein when those risks would have been borne by the bondholders not the City in a fixed rate issuance.

The City will also show Defendants failed to disclose PWCSI served merely as a middleman on the interest rate swap despite a specific promise to notify the City of this plainly material fact. Due to a secret joint venture with Ambac, UBS immediately pocketed a risk-free $2 million at the City's expense, and Ambac received full control of the City's swap. This assignment of control left the City exposed to a substantial conflict of interest because Ambac, a bond insurer with distinct interests from UBS, had every incentive to force the City to refinance and used its undisclosed control rights to do so.

[1] PaineWebber February 23, 1998 Compliance Bulletin #MSG 98-01 (Exh. 33 to Deposition of Milton Brown), attached as Pl. Exh. 33 at 3 (FILED UNDER SEAL)(emphasis added). Indeed, these types of policies were required by the MSRB rules. In the context of municipal underwriting, underwriters have fair dealing duties pursuant to rules promulgated by the MSRB. In particular, the MSRB has proclaimed since at least 1997 that Rule G-17 "requires dealers to deal fairly with issuers in connection with the underwriting of their municipal securities.…if the dealer knows the issuer is unsophisticated or otherwise depending on the dealer as its sole source of market information, the dealer's duty…is to ensure that the issuer is treated fairly, specifically in light of the relationship of reliance that exists between the issuer and the underwriter." December 1, 1997, MSRB Interpretive Letter, Purchase of new issue from issuer (available at http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=3).

The City will show the omitted facts were important, subjectively and objectively, to anyone deciding whether to agree to UBS' recommended financing structure. The City needed complete information about the risks of this structure to weigh against the potential benefits, which here were nonexistent or at best minimal by UBS' own expert's admission. Indeed, key decision-makers offered unambiguous testimony that the omitted information—including that the synthetic structure recommended by UBS would collapse if the undisclosed risks materialized—would have been important in deciding whether and how to finance the Bonds. As John Kennedy, Louisiana State Treasurer and Chairman of the State Bond Commission since 1999 explained:

> [H]ere, where UBS was recommending that they do the synthetic fixed-rate, a good underwriter is going to sit them down and say, now, here's the advantage of doing the synthetic fixed-rate. You might be able to save a few basis points, but there are risks. There are a lot of risks. And just like a doctor has an obligation to tell patients about the risks of surgery, I think an underwriter has an obligation, particularly when you're a first-time issuer, to tell the City the risks of this synthetic fixed-rate structure.[2]

The City will show that "loss causation," a federal securities law concept, has no application here. The relevant inquiry is whether Defendants' omissions were a "but-for" cause of the City's execution of the bond transaction structured by UBS. On this point, there are substantial disputed issues of material fact. Even if the loss causation standard cited by UBS does apply, the City can demonstrate genuine issues of fact about whether Ambac's assertion of control rights under the Reciprocal Swap caused the undisclosed risks to materialize in February 2008, significantly injuring the City.

Finally, the City will demonstrate PWCSI breached its swap agreement with the City (the "Swap Agreement") by transferring control of the City's swap to Ambac without the City's consent or prior notice through the Reciprocal Swap. The testimony and evidence clearly

[2] Deposition of John Kennedy (December 16, 2014)("Kennedy Depo.")(Pl. Exh. 2) at 16:14-25.

demonstrate (1) the required disclosure was not made, (2) this failure is a breach of an express obligation of the Swap Agreement, (3) the omission was material, according to the decision makers involved, and (4) the breach caused enormous damages to the City. Not only have several City witnesses testified that knowing this fact would have changed their view on the transaction, Treasurer Kennedy who has evaluated "14, 15,000 deals that have come before the Bond Commission"[3] and was directly involved with the approval of this transaction testified he regarded the Reciprocal Swap as "a very, very material risk."[4] He was concerned about Ambac's dual role as both swap counterparty and insurer because the Reciprocal Swap created a misalignment of and conflict of interest. Treasurer Kennedy testified "if we had known that the City didn't know about the risks or they hadn't explained it to them, if we'd known about the novation to Ambac… I probably wouldn't have put this on the agenda. I would have said, whoa, time-out, we['ve] got to have a meeting about this stuff. I['ve] got to make sure… everybody understands this deal."[5] The foregoing is supported by affidavits and excerpts from depositions establishing that disputed material facts abound in this case and that a trial is clearly appropriate.[6]

[3] *Id*. at 52:10-12.
[4] *Id*. at 51:17.
[5] *Id*. at 98:5-14.
[6] Based upon this Court's ruling on the Defendants' Motion in Limine (Rec. Doc. 248), this Opposition does not include evidence related to the following misrepresentations by Defendants: (1) the trading spread on the City's bonds and the pricing of the Swap; (2) the illusory and exaggerated savings the City would earn through the Bond Transaction; (3) the reasonable rate of return the City could expect on its investments of the proceeds of the Bonds; and (4) the novelty of the transaction. While the City submits that the evidence presented in this Memorandum is sufficient to create a genuine issues of material fact such that this Court should deny the Defendants' motion, the City believes the excluded evidence further supports its claims and will proffer the evidence set forth in its Opposition to the Motion in Limine (Rec. Doc. 242) pursuant to Fed. R. Evid. 103.

I. FACTUAL BACKGROUND

A. UBS Was Deeply Involved in Initiating and Shaping this Transaction and Advising the City Long Before It Became Underwriter.

Despite UBS' effort to minimize its role in the transaction, its role was critical from the start. UBS, *not the City*, initiated the transaction. In 1999, UBS, through Clarence Armbrister, a management-level investment banker, approached the City to discuss whether it was [redacted][7] Prior to this solicitation, the City had for decades made pay-as-you-go payments out of general revenues to cover the liabilities of the Old Firefighters' Pension Fund.[8] UBS' bond proposal offered the possibility of borrowing money and investing it to earn returns and reduce the accrued unfunded liability.

Not only did UBS propose the bond transaction, it advised the City on the best structure for the transaction. In a July 1999 presentation, [redacted][9] UBS also presented [redacted][10] [redacted][11]

Over the next eighteen months, Armbrister and UBS worked closely with the City to

[7] *See* PaineWebber July 29, 1999 Presentation to the City, (Def. Exh. 21 to Depo. of Tina Owen (Sept. 27, 2011), Def. Exh. 18 (FILED UNDER SEAL) Pl. Exh. 9 at UBS-CNO_0002505; PaineWebber February 9, 1999 Presentation to the City, Pl. Exh. 29 at 1-2; Deposition of Clarence Armbrister (September 30, 2014), Pl. Exh. 3 ("Armbrister Depo.") at 21:2-22. Prior to this deal, Armbrister had no experience underwriting pension obligation bonds and did not serve the Southeast region. *Id*. at 14:3-8 and 16:2-15.
[8] Deposition of Andy Kopplin (December 2, 2014) Pl. Exh. 7 ("Kopplin Depo.") at 40:7-16.
[9] Pl. Exh. 9 at UBS-CNO_0002505-0002506 (emphasis added).
[10] *Id*. at UBS-CNO_0002506.
[11] *Id*. at UBS-CNO_0002515-0002519.

structure a bond deal they said was for the City's "optimal benefit."[12] UBS assured the City that UBS would provide the "structuring advice and financial analysis to ensure the best result for the City."[13] The City properly depended on UBS for UBS' advice and analysis. For UBS to claim it acted solely "as an underwriter in this transaction, rather than in some other role," is revisionist history.[14]

B. In May 2000, after UBS had advised the City for ten months about the bonds structure, it was selected as underwriter for a negotiated underwriting.

In spring of 2000, the City issued a Request for Qualifications ("RFQ") for an underwriter in a negotiated underwriting. In UBS' proposal, it again promised to "assist the City in developing a plan to fund the remaining obligations of the [Pension Plan]," "apply our unparalleled experience in completing these transactions to the complex issues involved in crafting a solution" and "assist the City in meeting its objectives to fund the remaining obligations of the [Pension Plan]."[15] UBS further described how it helped other issuers by crafting legislative amendments, leading presentations to rating agencies, negotiating with bond insurers, and "structur[ing] the debt service for the bond issue in a manner that was optimal for [the issuer]."[16] UBS assured the City UBS was well equipped to "advise [issuers] to move forward with transactions"[17] and was committed to spend "a considerable amount of time with [an issuer] analyzing break-even rates of return and ***reviewing the risks and potential benefits of the transaction***."[18] In May 2000, the City selected UBS as underwriter.

The City reasonably expected UBS would undertake the advisory role described in its

[12] Armbrister Depo. at 72:19-73:12.
[13] PaineWebber May 24, 2000 Response to RFQ for Underwriter for the City (Def. Exh. 23 to Owen Depo.)("May 24 RFQ Response"), Pl. Exh. 11 at UBS-CNO_0000002-0000003.
[14] Rec. Doc. 252-1 ("Defendants' Memo.") at 12.
[15] May 24 RFQ Response, Pl. Exh. 11 at UBS-CNO_0000002-0000003.
[16] *Id*. at UBS-CNO_0000006-0000010.
[17] *Id*. at UBS-CNO_0000009.
[18] *Id*. at UBS-CNO_0000010.

RFQ response consistent with the parties' course of conduct and industry norms at the time of the issuance.[19] And UBS did undertake an advisory role. Both Armbrister and other UBS bankers, including Timothy Hoover, regularly met with and called the City and its outside professionals. Armbrister represented the City to explain the transaction at the August 24, 2000 Bond Commission meeting, where he told state officials he had looked at various scenarios for the City and the City's bond counsel, Meredith Hathorn, deferred to him to explain the workings of the bond transaction.[20] At the September 21, 2000 City Council meeting, Armbrister also led the discussion; Cedric Grant, then the City's Chief Administrative Officer, even introduced Armbrister to the Council as the "expert."[21] In contrast, the City's financial advisor Tina Owen and swap advisor, Jeff Pearsall of PFM, never made such presentations on the City's behalf.

UBS also served as the City's agent in negotiations with the rating agencies and Ambac, the City's bond insurer.[22] Importantly, UBS was separately compensated for its efforts providing the City advice about the structure of the transaction.[23]

Sometime after November 1, 1999, the City retained Tina Owen of Lotus Capital Management to serve as financial advisor for the transaction. She had the added role of ensuring UBS' fees for the transaction were reasonable.[24] Neither Owen nor the City believed her role

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[19] Gerald Miller, *Handbook of Debt Management* (1996) at 405 ("1996 Handbook")("In a negotiated issue, ***the underwriter will act in some aspects as a financial advisor***, assisting the issuer in all phases of the structuring process.").

[20] Transcript of Bond Commission Meeting (Aug. 24, 2000)(Exh. 24 to Armbrister Depo.), Pl. Exh. 12 at 16, 17-20.

[21] Transcript of City Council Meeting (September 21, 2000), Def. Exh. 16 at 85-86.

[22] *See, e.g.*, August 4, 2000 AMBAC Underwriting Application (Exh. 8 to Deposition of Bruce Mattaway)(FILED UNDER SEAL), Pl. Exh. 13 ([redacted]).

[23] *See* May 24 RFQ Response, Pl. Exh. 11 at UBS-CNO_0000041 (quoting management fee of $0.50/bond, or around $85,000); 1996 Handbook at 397 (management fee compensates investment bankers for development and implementation of financing).

[24] Letter from Tina Owen to Marlin Gusman (Nov. 1, 1999), Def. Exh. 19.

supplanted UBS' advisory role, and both relied on UBS' information,[25] particularly when, as discussed below, UBS abruptly changed course and recommended the City undertake a more complex synthetic fixed rate transaction. [26]

Troy Carter, a City Councilmember when the transaction was presented and approved, testified the Council "relied on the whole team of… people" to provide complete and accurate information and "[i]t would have been a collective effort of all the participants, PaineWebber included in addition to Foley Judell—and others."[27]

C. UBS initially proposed a traditional fixed rate bond issuance and shortly before the closing proposed a novel synthetic structure.

From July 1999 on, UBS worked with the City on a fixed-rate transaction with steady interest like a fixed-rate mortgage. These efforts culminated in a presentation to the City Council on September 21, 2000, where UBS sought Council approval for issuance of traditional fixed rate bonds.[28] The transaction presented investment return risk; if the investment of the bond proceeds returned less than 10 percent, the City could lose tens of millions of dollars.[29] Nonetheless, the fixed-rate structure had the advantage of certainty of fixed, as opposed to variable, debt payments for the bonds' life. The City Council and the Bond Commission approved the fixed-rate transaction.[30] The financing team, including UBS, thereafter began drafting documents, including a Preliminary Official Statement, for a fixed-rate bond issuance.[31]

In mid-October 2000, less than two months before scheduled closing, representatives of

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[25] Owen Depo., Def. Exh. 18 at 42:3-9 ("The City was relying on me as well as what's been proposed by PaineWebber. I rely on PaineWebber's information.").
[26] *Id*. at 44:14-24.
[27] Deposition of Troy Carter (December 8, 2014), Pl. Exh. 6 ("Carter Depo.") at 107:7-19 and 129:6-130:1.
[28] *See* September 21 Transcript, Def. Exh. 16. These fixed rate bonds would be insured by AMBAC, and an insurance commitment was applied for from AMBAC on or about August 4, 2000. *See* Ambac Underwriting Application, Pl. Exh. 13.
[29] September 21 Transcript, Def. Exh. at 86-87.
[30] *See* August 24 Transcript, Pl. Exh. 14 at 26-27.
[31] *See* Sept. 26, 2000 Email attaching Drafts of Preliminary Official Statement (Exh. 13 to Armbrister Depo.)(FILED UNDER SEAL), Pl. Exh. 35.

UBS' derivatives desk, Peter Ghavami and Milton Brown, reached out to Armbrister and Hoover to see if the City had considered bonds with a derivative product called an interest rate swap.[32] This novel "synthetic fixed rate" structure called for the City to issue variable-rate bonds coupled with a "cost of funds" interest rate swap, an unusual financial derivative under which the City would make fixed-rate payments to a counterparty and the counterparty would pay the City the amount it owed on its bonds.[33] As incentive for UBS, the transaction generated approximately six times the revenue for UBS compared to a traditional fixed-rate issuance.[34] Ghavami and Brown proposed that Armbrister and Hoover recommend this transaction to the City based on purported interest rate savings.[35]

Notwithstanding Defendants' unsupported post-hoc justifications for the structure,[36] the only potential advantage presented to the City was purported interest rate savings.[37] The City's expert, former MSRB[38] Chairman Michael Bartolotta, has calculated that the synthetic structure did not generate any cost savings for the City.[39] Even UBS' expert estimated the structure saved the City 8 basis points (less than one tenth of a percent, or ~$136,000 a year), approximately $1

[32] *See* October 10, 2000 Email from Milton Brown to Timothy Hoover (Exh. 30 to Depo. of Milton Brown (Nov. 6, 2014)(FILED UNDER SEAL), Pl. Exh. 15.
[33] *See* Synthetic Fixed Rate Primer ("October 16, 2000 Primer"), Def. Exh. 38.
[34] Expert Report of Mike Bartolotta ("Bartolotta Report") Pl. Exh. 16 at 5 ("So as compared to a traditional fixed rate issuance, PW made approximately six times their expected revenue on a fixed-rate transaction.").
[35] *See* Brown Depo. at 48:1-17; Deposition of Peter Ghavami (Nov. 13, 2014)(FILED UNDER SEAL), Pl. Exh. 5 ("Ghavami Depo.) at 21:5-16. In 2010, Ghavami was indicted, ultimately serving over a year in federal prison for defrauding municipalities in connection with derivatives, including interest rate swaps. *See United States v. Peter Ghavami et. al.*, No. 10-01217 (S.D.N.Y. December 9, 2010) ("Ghavami Indictment").
[36] While Defendants offer the post-hoc justifications that variable-rate debt opened "the issuance to a wider pool of investors" (Defendants' Memo. at 4), there is no evidence that this post-hoc justification was of any concern to the City or even discussed at the time of the issuance.
[37] *See* Internal PaineWebber Memo Dated Nov. 30, 2000 (Exh. 31 to Brown Depo.)(FILED UNDER SEAL), Pl. Exh. 17 ("Internal PaineWebber Memo."); Deposition of Christopher Laursen, (December 19, 2014), Pl. Exh. 32 ("Laursen Depo.") at 194:18-195:2.
[38] The Municipal Securities Rulemaking Board ("MSRB") is a "self-regulatory organization created under the Securities Act Amendments of 1975." See MSRB Website: About MSRB at www.msrb.org/About-MSRB.aspx.
[39] Bartolotta Report, Pl. Exh. 16, at 9-10 ("A traditional taxable AMBAC insured non-callable or bonds subject to a make whole call is estimated to have an all-in-interest cost of approximately 7.70% . . .the estimated all-in-interest cost of the synthetic fixed rate bonds is estimated at 7.93%.").

million in present value savings over the thirty-year life of the transaction.[40] By comparison, the City's annual debt service on the bonds was in excess of $15 million.[41]

D. The synthetic structure was novel at the time and posed numerous, inapparent, catastrophic risks.

In exchange for this nonexistent or little to no savings, the synthetic structure presented the City with multiple undisclosed risks, each of which could, and ultimately did, cost the City tens of millions of dollars if they materialized during the outstanding bond issuance.[42] The risks of the new structure included lack of financial flexibility, credit risk, event risk, liquidity rollover risk, and basis risk. None of these risks were present in a fixed-rate transaction. In recommending this transaction to the City, UBS never disclosed these catastrophic risks.

The first and only written material UBS sent the City on the synthetic structure were delivered on October 16, 2000.[43] This primer listed several generic risks (credit rollover risk, basis risk, and swap counterparty risk) of the synthetic transaction without significant description of those risks or their magnitude.[44]

In November, Armbrister presented to the City Council the benefits of the new structure and advised the City to execute a cost of funds swap that would ensure the City received what it paid on the bonds, eliminating basis risk, the risk that the City would have to make payment due to a spread between what the City received from its swap counterparty and owed to its

[40] Laursen Depo. at 194:18-195:2. Kennedy testified that while "[s]waps can work. You just have to…understand the risks and you have to take the benefit that you're going to get out of the swap, the potential benefit, the upside, and…weigh that against the risk….if you can save 200 basis points on a deal, a swap may be worth the risk. If you're going to save ten basis points on a deal…[t]he risk may not be worth it." Kennedy Depo. at 106:21-107:6.
[41] *See* Official Statement, Def. Exh. 1.
[42] UBS' Hoover and Brown, involved in the transaction in 2000, agree this structure imposed greater risks upon the City than a fixed rate issuance. *See* Deposition of Timothy Hoover (Oct. 1, 2014), Def. Exh. 48 ("Hoover Depo.) at 41:7-44:5 and Brown Depo. at 99:22-102:1.
[43] *See* October 16, 2000 Primer, Def. Exh. 38.
[44] *Id*. at UBS-CNO_0005196.

bondholders.[45] Armbrister recommended the structure, representing it would generate interest rate savings.[46] Troy Carter asked Armbrister about the risks of the synthetic structure, Armbrister only discussed the investment risks.[47]

The synthetic structure was distinct from the fixed-rate bond issuances with which the City was familiar, and, as UBS knew, Tina Owen was inexperienced with this more complex transaction. UBS had serious doubts about Owen's competency to advise the City on the Swap[48] and Ghavami handpicked PFM to assist Owen and verify the correct pricing on the Swap.[49] At UBS' suggestion, in November 2000, Owen retained PFM's Jeff Pearsall as swap advisor, with PFM's fee paid out of Owen's fee.[50] Pearsall had nearly no contact with the City, and his report to Owen focused on the pricing of the swap.[51] At Ghavami's deposition, when asked about his interactions with swap advisors generally or the services provided by PFM specifically, Ghavami invoked his Fifth Amendment privilege not to testify.[52]

Defendants focus on the contracts underlying the synthetic fixed-rate issuance, suggesting they are standard bond issuance documents. But in a fixed-rate issuance, none of these documents are needed.[53] In prior bond issuances, the City never signed such documents.

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[45] *See* Transcript of Recording, New Orleans City Council Meeting (November 16, 2000), Def. Exh. 37 at 64-65.
[46] *Id.* at 65-66.
[47] *Id.* at 71-73.
[48] Deposition of Jeff Pearsall (May 31, 2011), Def. Exh. 17 ("Pearsall Depo.") at 22:2-8.
[49] *Id.* at 21:7-22.
[50] *See* Letter from Jeff Pearsall to Tina Owen (Nov. 2, 2000), Def. Exh. 23; New Client/Prospect Memo., Def. Exh. 22 (showing client as Tina Owen and fee of $25,000).
[51] PFM Report (Dec. 4, 2000), Def. Exh. 39 .
[52] Deposition of Peter Ghavami (November 13, 2014) (FILED UNDER SEAL), Pl. Exh. 5 at 32:16-33:1 ([redacted]).
[53] Hoover Depo. at 41:17-22; 51:12-14 ("Q. You don't need a remarketing agent for a vanilla rate deal? A. No.").

The City would simply sign a Trust Indenture, agree to pay bondholders a fixed rate semi-annually, then make those payments for the term of the bonds. The UBS-recommended complex structure required the myriad contracts and made the issuance far more complicated than any transaction the City had previously executed.

E. Unbeknownst to the City, UBS, through its affiliate, PWCSI, entered into a secret Reciprocal Swap with an affiliate of Ambac.

As part of the synthetic structure, UBS proposed the City execute a swap with UBS' subsidiary, PWCSI (the "Swap").[54] Unknown to the City until discovery in this case, UBS' derivatives desk was only interested in underwriting the synthetic structure because it could eliminate PWCSI's risk on the Swap by entering into a Reciprocal Swap with Ambac.[55] So when the City executed its swap with PWCSI,[56] PWCSI executed a secret Reciprocal Swap with AFS, a subsidiary of Ambac[57] pursuant to a longstanding joint venture between Ambac and UBS in which PWCSI agreed to enter into swaps with third parties and transfer control of those swaps to AFS.[58] PWCSI would earn a spread between the fixed rate it was paid by the City and the fixed rate PWCSI paid to AFS, serving as a middleman, passing payments through without the right to take action under the swap.[59]

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[54] ISDA Master Swap Agreement among PWCSI and the City of New Orleans (Nov. 16, 2000), Def. Exh. 10.

[55] Brown Depo. at 133:3-18 ([redacted])

[56] Swap Confirmation re: ISDA Master Agreement, dated as of Nov. 16, 2000 between the City of New Orleans, and PWCSI (Dec. 1, 2000), Def. Exh. 11.

[57] Reciprocal Swap Confirmation re: ISDA Master Agreement, dated October 27, 1999 between Ambac Financial Services, L.P. and PaineWebber Capital Services Inc. (December 1, 2000), Def. Exhibit 13.

[58] *See* Internal PaineWebber Memo, Pl. Exh. 17. ("The transaction will be entered into by PaineWebber Capital Services Inc., an entity set up specifically to deal with AMBAC-hedged transactions."); Agreement Relating to Operative Documents (Nov. 16, 2000)(Exh. 46 to Brown Depo.)(FILED UNDER SEAL), Pl. Exh. 22; June 22, 2004 Memo. from AMBAC Capital Markets Dept. to Mark Spinelli (Exh. 14 to Deposition of John Tsigakos)(FILED UNDER SEAL), Pl. Exh. 10 ([redacted]).

[59] Internal PaineWebber Memo, Pl. Exh. 17 ([redacted])

The Reciprocal Swap was entered into at a rate approximately 12.5 basis points lower than the City's fixed rate (~0.125%).[60] As the middleman/payment pass-through, UBS earned a risk-free 12.5 basis points with each payment. UBS' risk-free profit was 50% larger than the City's purported savings of 8 basis points for switching to a synthetic fixed rate transaction.

F. The Undisclosed Risks Manifested Themselves in February 2008 and Ultimately Cost the City Many Millions of Dollars.

The City's bonds were issued in December 2000, at an all-in rate of ~7.9%.[61] This rate was supposed to be fixed for the 30-year term of the bonds.

The catastrophic risks of the synthetic structure that were never disclosed to the City materialized in February 2008. In early 2008, concerns about Ambac grew and investor demand for the City's bonds decreased, although the Bond Insurer Downgrade provisions in the City's bond contracts were not triggered.[62] On February 19, 2008, Ambac exercised its rights under the undisclosed Reciprocal Swap to declare a "market disruption" under the Swap and the City began receiving payments based on LIBOR, rather than the cost of its bonds.[63] The conversion of the Swap caused the City's debt service payments to immediately increase by almost 4%

[redacted]); *see also* Email PWCSI-New Orleans/Ambac – Approval Status (December 1, 2000)(Exh. 37 to Brown Depo.)(FILED UNDER SEAL), Pl. Exh. 34 ([redacted]).

[60] The City's swap with UBS had a 6.95% fixed rate; UBS' swap with Ambac's affiliate had a 6.8268% fixed rate.

[61] PFM Report, Def. Exh. 39.

[62] Although a third rating agency, Fitch, downgraded Ambac in January 2008, S&P actually affirmed Ambac's AAA rating on February 25, 2008. *See* "Insurers MBIA, AMBAC Ratings Affirmed by S&P," February 25, 2008, available at http://www.cnbc.com/id/23338760#. Ambac was not downgraded by S&P until June 2008.

[63] *See* AMBAC Direction Relating to Rate Change Event dated Feb. 19, 2008 (Exh. 36 to Depo. of John Tsigakos)("AMBAC Direction"), Pl. Exh. 20. Actually, neither Ambac nor PWCSI had the right to declare a market disruption on Feb. 25, 2008, because doing so required prior consultation with the City, which never occurred. *See* Def. Exh. 11 at 7 ("'Market Disruption' means a market disruption in general or with respect to the trading of the Bonds has occurred or is occurring, for a period of at least 20 days, which, in the opinion of [PWCSI], in consultation with [the City], had materially adversely affected the trading performance of the Bonds.").

annually, or over $5 million per year.[64] What was supposed to be a 7.9% fixed rate jumped to a variable rate hovering around 12%.

Concerned about further deterioration in Ambac's condition, UBS ceased remarketing efforts and tendered the City's bonds to the standby bank, JPMorgan. This further increased the City's debt service and meant the City was required to refund the bonds within five years, even though there were twenty-two years remaining on the Swap. The City had no choice but to refinance the bonds and terminate the interest rate swap, which caused it to incur massive damages, including a swap termination fee of nearly ***$45 million***.[65]

Ultimately, this transaction was a financial catastrophe for the City. Prior to the transaction, the City was making annual payments of around $17 million from its general revenues to fund pension payments. The transaction was intended to generate sufficient investment earnings on the bond proceeds such that the City would no longer have to make (the majority of) these annual payments. Essentially, the City was trading its existing pension payments for lower debt service payments. But by 2008, with the collapse of the synthetic structure, the City found itself paying over $20 million in annual debt service, significantly more than the original pension payments.[66] By 2009, the proceeds of the bonds had been completely dissipated due to investment losses, so the City was forced to resume pay-as-you-go payments in addition to the debt service. By 2010, the City was paying annual debt service on the bonds of around $20 million[67] plus annual pension payments of an *additional* nearly $20 million,[68] and faced the specter of a costly refinancing and a $45 million termination fee. The total additional

[64] *See, e.g.*, June 2008 Memo from JPMorgan ("JPMorgan Memo"), Pl. Exh. 24 at 1 ("In addition to the 6.00% interest rate on the bank bonds, the City faces an additional cost resulting from the swap associated with the Series 2000 bonds. . . resulting in a current additional net payment of 4.49% on the total par outstanding.").
[65] Official Statement for $195,885,000 City of New Orleans, Louisiana, Taxable Limited Tax Refunding Bonds, Series 2012 (Oct. 11, 2012), Def. Exh. 33.
[66] *See*, JPMorgan Memo, Exh. 24 at 1.
[67] *Id.*
[68] Appendix C to Official Statement of City of New Orleans Bond Series 2012, Pl. Exh. 23 at 56.

cost to the City of the bond transaction has been calculated in excess of $165 million.[69]

If UBS had disclosed the catastrophic risks and the Reciprocal Swap, the City would have never taken these risks. It would have taken other available courses of action: continuing as-is, funding the pension fund with general revenues; issuing traditional fixed rate bonds; or, at a minimum, entering into a swap directly with Ambac and cutting out the middle-man. Any of these approaches would have saved the City millions of dollars compared to the synthetic structure UBS recommended.[70]

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is improper unless there "is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A fact is material if it "might affect the outcome of the suit under the governing law."[71] A summary judgment is not a proper substitute for a trial of disputed issues of fact.[72] The Court views the evidence in the light most favorable to the nonmoving party,[73] and draws all reasonable inferences in its favor.[74]

III. DEFENDANTS FRAUDULENTLY INDUCED THE CITY TO ENTER INTO THE TRANSACTION

A. Elements of fraudulent inducement

There are four elements of an action for fraud in the inducement of contract: (1) a misrepresentation, suppression, or omission of true information; (2) in an omission case, a duty to speak; (3) an intent either to obtain an unjust advantage or to cause damage or inconvenience

[69] Bartolotta Report, Pl. Exh. 16, at 11.
[70] *Id*.
[71] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[72] *Jackson Tool & Die. Inc. v. Smith*, 339 F.2d 88, 91 (5th Cir. 1964)("Summary Judgment can be granted only if there is no genuine dispute as to any material fact. This requirement is to be strictly construed as to insure that factual issues will not be determined without the benefit of the truth-seeking procedures of a trial."); *see also Gross v. Southern Railway Co.*, 414 F. 2d 292 (5th Cir. 1969). The Fifth Circuit has not mandated a different standard for non-jury trials. *See US F&G Co. v. Planters Bank and Trust Co.*, 77 F.3d 863, 866 (5th Cir. 1996).
[73] *Gills v. Louisiana*, 294 F.3d 755, 758 (5th Cir. 2002).
[74] *Hunt v. Rapides Healthcare System, L.L.C.*, 277 F.3d 757, 764 (2001).

to the other party; and (4) materiality, that the error induced by the fraud relates to a circumstance substantially influencing consent to the contract.[75]

B. There are genuine issues of material fact whether the risks of the synthetic structure were disclosed to the City.[76]

Defendants argue all of the risks of the synthetic structure were adequately disclosed. The evidence is to the contrary. "Although a party may keep absolute silence and violate no rule of law or equity... if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to [disclose] the whole truth" and "assume[s] a duty to insure that the information volunteered [is] correct."[77] Defendants failed to disclose completely or accurately several catastrophic risks of the synthetic structure to the City and its advisors. Defendants focus on the disclosure of investment risk, ignoring that the synthetic structure created serious additional risks. There are genuine issues of material fact about whether the additional catastrophic risks of the synthetic structure were disclosed.

1. Flexibility, credit, and event risk of the synthetic structure were not disclosed to the City.

Several risks attendant to the synthetic structure including lack of financial flexibility, credit risk, and event risk were never disclosed to the City. First, the lack of financial flexibility

[75] *See* La C.C. art 1953; *Shelton v. Standard/700 Associates*, 798 So. 2d 60 (La. 2001); *In re Ford Motor Co. Paint Litig.*, 1997 WL 539665, at *3 (E.D. La. 8/27/1997). Alternately stated in *Chrysler Credit Corp. v. Whitney Nat. Bank*, 824 F.Supp. 587, 598 (E.D. La. 4/22/93), a plaintiff alleging fraud by omission must show: "(1) the information that was withheld, (2) the general time period during which the fraudulent conduct occurred, (3) the relationship giving rise to the duty to speak, and (4) what the person or entity engaged in the fraudulent conduct gained by withholding the information." *See* Rec. Doc. 129 at 52 ("When the alleged fraud is based on suppression of information, the City, as I have already cited the Chrysler Credit Corporation case, the City must show that the information was withheld, the general time period during which the fraudulent conduct occurred, the relationship giving rise to the duty to speak. And, fourth, what the person or entity engaged in the fraudulent conduct gained by withholding the information.").

[76] Defendants admit that there are genuine issues of material fact regarding whether they disclosed the Reciprocal Swap and the conflicts of interest it created. Defendants' Memo. at 29. Notably, Defendants neither argue, nor provide evidence that the Reciprocal Swap was disclosed.

[77] *Kadlec Med. Ctr. v. Lakeview Anesthesia Associates*, 527 F.3d 412, 416 (5th Cir. 2008)(citations omitted); see also, *Ethyl Corp. v. Gulf States Utilities, Inc.*, 2001-2230 (La. App. 1 Cir. 10/2/02), 836 So. 2d 172, 178 (La. Ct. App.) *writ denied*, 2002-2709 (La. 12/19/02), 833 So. 2d 340 (upholding judgment on negligent misrepresentation claim and rejecting defendant's assertion that "a failure to disclose complete information and the act of advocating a resolution most favorable to it do[es] not constitute a breach of that duty.").

was never disclosed to the City. The City issued its bonds at an all-in rate around 7.9%. With fixed-rate bonds, the City could have opted to refinance the bonds after 10 years, to take advantage if rates declined below 7.9%. With the synthetic structure, refinancing to take advantage of lower interest rates required a swap termination fee that would offset any advantage of lower rates. And if the City needed to refinance because of credit or event risks, refinancing would be considerably more difficult as the City could face a hefty swap termination payment. This is precisely what occurred in 2008 and the reason that the City was not able to refinance the bonds until 2012.

Second, the City was never informed about the credit risks associated with the synthetic structure. In a traditional fixed-rate transaction, similar to a fixed rate mortgage, the City pays the same interest rate for the life of the bonds regardless of credit concerns; the risks of concerns about credit are on the bondholder.[78] With a synthetic structure, the City bears the risk of any such concerns for the bonds' 30-year life. Concerns about the City's or the bond insurer's credit could cause a lack of demand for the bonds, making them more difficult to remarket, and ultimately requiring refinancing and swap termination.

Although Defendants contend that the bond contracts explain the role of Ambac's credit rating, the contractual terms do not fully inform the City of the credit risks.[79] With this complex structure, concerns about Ambac's credit, even concerns not triggering a contractual provision, could cause the bonds to fail. Significantly, the bond structure fell apart in February 2008, months before there was a credit rating downgrade as defined in the bond contracts.[80] S&P

[78] Deposition of Michael Bartolotta, Def. Exh. 42, at 46:25-47:5 ("if they would have sold fixed rate transaction they would have sold that credit risk of the insurance company to an investor instead of taking it back onto their own balance sheet. So, yes, there was alternative, less risky transaction available for the city.").
[79] *See e.g. id.* at 62:6-62:16.
[80] Pursuant to the Bond Documents, only AMBAC's ratings from S&P and Moody's had an effect on the City's Bonds. *See, e.g.*, Standby Bond Purchase Agreement among City of New Orleans, Louisiana, Bank One, Louisiana, N.A. and Bank One Trust Company, N.A. (December 1, 2000), Def. Exh. 15 at 31.

actually affirmed the AAA rating of Ambac Financial Group on February 25, 2008, the same date PWCSI informed the City that the swap rate would be converted and three days before UBS stopped remarketing activities on the bonds.[81] Credit concerns outside the scope of the bond contracts led to the collapse of the bonds' structure, which is nowhere apparent in the contracts.

Third, event risk was never disclosed to the City. Under the synthetic structure, a discrete event outside the City's control (such as a national financial crisis) would affect the bonds by reducing demand for them, making them more difficult to remarket, and ultimately require refinancing and swap termination. In a traditional fixed-rate transaction, events occurring after issuance, even financial crises, do not affect an issuer's debt payments.

UBS' witnesses testified that credit risk, flexibility risk, and event risks are among the risks of a synthetic structure.[82] Treasurer Kennedy testified those risks were attendant to a synthetic structure and highly material.[83] These risks appear nowhere in the October 16, 2000 primer UBS provided to the City or any materials by Owen or Pearsall.[84] This evidence creates a genuine issue of material fact on risk disclosure; summary judgment should be denied.

2. Other disclosures about market disruption, termination payments, and an Ambac downgrade were incomplete or inaccurate.

Defendants argue the City was aware of three other risks of the synthetic structure: market disruption; high termination payment; and Ambac's ratings downgrade. They argue that awareness came from one written presentation, the bond contracts, and advice from Owen and Pearsall. This argument fails.

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[81] *See* Insurers MBIA, AMBAC Ratings Affirmed by S&P, February 25, 2008, available at http://www.cnbc.com/id/23338760#.

[82] Hoover Depo. at 41:7-44:5; Brown Depo. at 99:22-102:1.

[83] Kennedy Depo. at 21:4-11 ("Given the fact that the City had never issued variable-rate debt and given the fact that it never issued a swap and given the City's concern about doing pension obligation bonds as expressed at the City Council meeting, in my opinion, a reputable underwriter would sit down and explain the risks of a synthetic fixed rate structure to the issuer."); *id*. at 17-33.

[84] October 16, 2000 Primer, Def. Exh. 38; November 6, 2000 Letter from Tina Owen to Cedric Grant, Def. Exh. 40; PFM Report, Def. Exh. 39.

Because the City did not know of the Reciprocal Swap, the City was not fully apprised of the risks posed by market disruption. Specifically, the City had no knowledge Ambac/AFS had the right to declare a market disruption under the Reciprocal Swap. The disclosure in the October 16, 2000 primer does not explain the circumstances in which market disruption could be declared, and most importantly, that ***Ambac,*** a third party with potentially adverse interests, would get to declare a market disruption.[85]

The City was also unaware of all the situations in which the termination payment would become due.[86] The October 16, 2000 primer and Owen's November 6, 2000 letter only mention that termination of a cost-of-funds swap may be more expensive, but do not provide information about when the termination payment may occur.[87] Neither document suggests that a termination payment could be tens of millions of dollars, nor how that magnitude compares to the relatively paltry savings UBS projected.

There are genuine issues of material fact whether the City was notified of the risks by individuals other than Defendants. Owen provided no independent advice about the termination payment as she did nothing more than relay what UBS informed her:

> Q. Wasn't the City relying on you to provide an independent opinion with respect to the bond structure that was proposed by the underwriters?
> A. You kept saying independent, but independent of what? I have to take what's been presented to me to look at and if–You know, I can only take the face value of what been presented to me if I–And then the underwriter is always there to, to guide us through the process.[88]

[85] *See* October 16, 2000 Primer, Def. Exh. 38. Those materials mentioned that the "cost of funds" swap could revert back to LIBOR in an "unusual market or credit event" but did not discuss how credit concerns would affect the bonds (they become unmarketable and require early refinancing and swap termination).
[86] *See* Grant Aff. ¶ 19.
[87] *See* Oct. 16, 2000 Primer, Def. Exh. 38; Nov. 6, 2000 Memo, Def. Exh. 40.
[88] Owen Depo., Def. Exh. 18 at 44:14-24.

Owen testified she was not qualified to explain the synthetic fixed rate transaction and UBS knew this.[89] Regarding her November 6 memorandum,[90] Owen stated she only copied UBS' October 16th primer.[91] UBS knew Owen was unfamiliar with synthetic fixed rate bonds, and recommended the City retain Pearsall to ensure correct pricing on the Swap.[92]

Pearsall is clear he and PFM had no role in the transaction and was not the City's financial advisor on the transaction. [93] He testified that "the deal was relatively far along and the primary purpose for our being hired was on the price verification aspect of it."[94] Although he testified he believed he did his best to make sure Owen and the City were aware of the risks associated with the swap,[95] there is no evidence he communicated those risks to anyone at the City or that he spoke to anyone at the City other than the pricing call. Owen testified she had no recollection of PFM providing her with advice about the swap other than the December 14, 2000 PFM Report.[96] City 30(b)(6) witness Andy Kopplin, the City's current CAO, understood PFM's role as only advising as to the swap pricing.[97] Finally, contrary to Defendants' suggestion, the City's bond counsel had no role in advising of the risks of the synthetic fixed rate transaction.[98] The City engaged several advisors to provide their relevant expertise on this important transaction. Each advisor, as is typical, lent his or her expertise. UBS, as the entity that structured

[89] *Id*. at 36:5-23.
[90] November 6 Memo, Def. Exh. 40.
[91] Owen Depo. at 68:3-75:25.
[92] *See* Pearsall Depo. at 22:2-8.
[93] *Id*. at 20:18-24 and 54:21-24.
[94] *Id*. at 90:19-91:4.
[95] *Id*. at 91:5-92:23.
[96] Owen Depo., Def. Exh. 18 at 66:19-67:1 ("Q. Okay. Now, did you get any advice on the swap from PFM other than the portion of the December 14, 2000 letter from Mr. Pearsall to you or the attached two paragraphs to that letter? A. Any other advice besides this? Q. From PFM. A. From PFM. I don't recall.").
[97] Kopplin Depo.at 29:8-14 ("It's -- it's my understanding [PFM was] only advising the City on the pricing of the swap" and it was a "mischaracterization" of PFM's role to say that they were the City's advisor with respect to some aspect of the swap).
[98] *See* Grant Aff. at ¶ 16 ("The City's bond counsel, Foley & Judell, L.L.P. and the Cantrell Law Firm, did not provide advice to the City on the structure of the bonds or the advantages and disadvantages of the structure" but rather "work[ed] with all of the parties, including the underwriter, to draft the legal documents necessary for the transaction."); Foster Depo. at 113:22-25; Kennedy Depo. at 87:10-18.

the transaction, certainly was the advisor on the benefits and risks of the structure. Tina Owen, Jeff Pearsall and bond counsel were not.

3. There was no discussion of the risks of the synthetic structure at the City Council meetings.

In his November 16, 2000 presentation to the City Council, Armbrister touted the benefits of the revised structure and noted the "cost of funds" swap would ensure the City would receive from PWCSI what it paid on the bonds, eliminating "basis risk.".[99] He did not discuss any other risks; in response to questions posed by Troy Carter regarding risks, Armbrister directed attention only to the investment risks.[100] Carter testified that when he asked Armbrister to weigh the benefits of the overall transaction to the risks, he was asking about all of the risks, including the risks of the synthetic structure, but Armbrister never fully answered the question.[101] Likewise, there was no discussion of the risks of the synthetic structure at the September 21, 2000 Council meeting where only a traditional fixed-rate structure was contemplated.[102]

The above evidence establishes there are genuine issues of material fact as to whether the risks of the synthetic structure were disclosed. Summary judgment should be denied.

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[99] *See* November 16 Transcript, Def. Exh. 37 at 64-65.

[100] *Id.* at 71-72: ("COUNCILMEMBER CARTER: And obviously there's not. Is it your position that the level of risk that we take under your suggested plan is equal to or less than the level of risk we have currently? MR. ARMBRISTER: Well, I'll say this and I may just change the, if you don't mind, the premise slightly as opposed to risk. Your opportunity to reduce-- COUNCILMEMBER CARTER: Risk, opportunity. MR. ARMBRISTER: Okay. Your opportunity to reduce the cost of this is forgone if you did not take advantage of this. If you go pay as you go, you will continue to pay as you go. COUNCILMEMBER CARTER: …. Is the benefit, the potential benefit greater than the risk? I see some heads going yes. I see some eyes rolling back like I don't know. And I understand that the questions that I'm asking are not ones that are very easy to just pop out because they're speculative but I'm trying to determine some decent level. Obviously, when we're talking about the taxpayers' money and we're talking about a pension fund we need to make sure that we do all of our due diligence and we are as thoughtful and as careful in how we move forward as we possibly can. And I know that these questions are not ones that a finite answer is easy to give. MR. ARMBRISTER: That's right, that's right. And I guess what, again, what I would say to you and I hope this is responsive, councilman. I apologize if it's not. Is that the opportunity for the city to save money is within the context of this financing. That if the city did not do this, that the opportunity to save money in the long run would not be available to it…").

[101] *See* Carter Depo. at 83:14-84:2.

[102] *See* September 21 Transcript, Def. Exh. 16.

C. Defendants Had a Duty to Disclose All Material Facts.

Defendants owed the City a duty to disclose all material facts about the structure they recommended. The City does not base its claim against UBS solely on allegations of fiduciary duty, but more broadly on UBS' role in advising and making recommendations to the City. Louisiana courts recognize the duty to speak does not require a fiduciary or confidential relationship; it can arise in other situations**.** As to PWCSI, the City alleges that its duty to disclose arose from its contractual agreement with the City.

1. UBS Had a Duty of Disclosure to the City.

a. Louisiana law regarding duty to disclose

Louisiana law does not limit a duty to disclose solely to formal fiduciary relationships. Courts recognize a duty to disclose in "confidential relationships," which is "not restricted to any specific association of the parties" but includes "generally all persons who are associated by any relation of trust and confidence."[103] Even without a fiduciary relationship or confidential relationship, Louisiana courts tend "to impose a duty when the circumstances are such that the failure to disclose would violate a standard requiring conformity to what the ordinary ethical person would have disclosed."[104] Louisiana law requires examination of the circumstances of a case,[105] such as where one party has superior knowledge regarding risks.[106]

The same rules apply in UBS' underwriting relationship. A fact-specific inquiry is

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[103] *Bunge Corp. v. GATX Corp.*, 557 So. 2d 1376, 1383 (La. 1990); *See also, e.g., In re Ford Motor Co. Vehicle Paint Litig.*, No. MDL 1063, 1997 WL 539665, *3 (E.D. La. 8/ 27/97).

[104] *Id.*

[105] *Green v. Gulf Coast Bank*, 593 So. 2d 630, 632 (La. 1992)(duty to disclose arises from special circumstances or relationships); *Trans-Global Alloy Ltd. v. First Nat'l Bank of Jefferson Parish*, 583 So. 2d 443, 452 (La. 1991)(example of fiduciary duty where bank customer "reposes trust in a bank and relies on the bank for financial advice, or in other special circumstance").

[106] *In re Ford Motor Co.*, 1997 WL 539665 at *3 (duty to disclose when manufacturer had superior knowledge regarding defect, manufacturer knew plaintiffs had no reasonable way of learning of the defect, no sign of the defect at time of purchase, and affirmative steps were taken to hide defect including misleading statements).

necessary to determine whether fiduciary or general duties to disclose exist.[107] Courts find that fiduciary duties arise where the underwriter takes an advisory role,[108] has a multi-faceted relationship that places it in a position of higher trust,[109] or has superior knowledge, information, and experience concerning the underwriting.[110] When the issuer produces "substantial evidence" that it relied on the underwriter "to advise [the issuer] and act in [the issuer's] best interests," a fiduciary duty will be found.[111] Moreover, courts hold where an underwriter profits from a proposal it made in an advisory relationship prior to entering into an underwriting contract, a duty to disclose exists.[112]

The Louisiana Supreme Court's analysis of duty in *Barrie* is instructive.[113] Based on the following factors, the Court found termite inspector defendants owed a duty to plaintiff home purchasers even though there was no "privity of contract or direct or indirect contact:"

1) The defendants' knowledge of the "ultimate purpose for the report";
2) That the defendants "gathered and conveyed the information in the context of a business transaction for which [the defendants] received compensation"; and
3) The defendants "held themselves out as specialists."[114]

"The theme in [Louisiana cases] is that one is liable for negligent disclosure if he has superior knowledge and knows the other party is relying upon him for such knowledge.'"[115]

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[107] *See Seven Seas Petroleum, Inc. v. CIBC World Mkts.*, Corp., 2010 U.S. Dist. LEXIS 54946, at *21-*23 (S.D. Tex. 6/4/10); *Xpeditor Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 399 F. Supp. 2d 375, 385 (S.D.N.Y. 2005)(issue of material fact existed regarding breach of fiduciary duty where plaintiff alleged it relied on its underwriter to act in its best interest).

[108] *See In re Merrill Lynch Auction Rate Sec. Litig.*, 758 F. Supp. 2d 264, 281-82 (S.D.N.Y. 2010)(fiduciary relationship may exist between underwriter and issuer under Louisiana law where complaint alleged advisory relationship beyond underwriter-issuer contractual relationship); *Pergament v. Roach*, 18 Misc. 3d 1141(A), (N.Y. Sup. Ct. 2008).

[109] *See In re DVI, Inc*., 2008 WL 4239120 at *10 (Bankr. D. Del. Sept. 16, 2008).

[110] *Breakaway Solutions, Inc. v. Morgan Stanley & Co.*, 2005 WL 3488497, *2-3 (Del. Ch. Dec. 8, 2005).

[111] *Xpedior* 399 F.Supp.2d at 385.

[112] *In re: Oakwood Homes Corp. v. Credit Suisse First Boston*, 340 B.R. 510, 519 (Bankr. D. Del. 2006); *Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 351 F. Supp. 2d 79, 102 (S.D.N.Y. 2004); *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 21-22 (N.Y. 2005)("to the extent that underwriters function, among other things, as expert advisors to their clients on market conditions, a fiduciary duty may exist" and refusing to dismiss allegation that parties "created their own relationship of higher trust beyond that which arises from the underwriting agreement alone, which required [defendant] to deal honestly… and disclose its conflict of interest[.]").

[113] 625 So.2d 1007.

[114] *Id*. at 1016-18.

b. There are genuine issues of material fact whether UBS owed a fiduciary duty and/or a general duty of disclosure to the City.

Defendants argue they did not serve as a "financial advisor" on the date of the bond issuance and therefore owed the City no duties. Yet UBS need not serve as a "financial advisor" to offer advice about structuring a transaction on which the City relies. UBS indisputably advised the City about the structuring of the transaction. UBS was more than just an arms-length underwriter, had superior knowledge of the proposed structure and risks, and knew the City was relying on it for this knowledge. [redacted][116] UBS worked with the City on the structuring of the pension bond issue for ten months before being selected as underwriter. In responding to the RFQ, UBS highlighted its work during those ten months as "structuring advice and financial analysis to ensure the best result for the City."[117] UBS also served as the City's agent in negotiations with Ambac and the rating agencies; under Louisiana law, agency relationships create fiduciary duties of disclosure.[118]

UBS' expert Laursen agreed an investment banker should not mislead or fail to provide specific information to the issuer.[119] UBS' Hoover, who worked with Armbrister and the City to

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[115] *Schaumburg v. State Farm Mut. Auto. Ins. Co.*, 421 Fed. Appx. 434, 441 (5th Cir. 2011)(quoting Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law* § 5.07[8] (2d ed. 2004)(citations omitted).

[116] *See* July 1999 Presentation, Pl. Exh. 9 at UBS-CNO_0000002-0000003 (emphasis added). Armbrister agreed that this was his role for the City. Armbrister Depo. at 72:19-73:12.

[117] *See* May 24 RFQ Response, Pl. Exh. 11 at UBS-CNO_0000002-0000003.

[118] *See, e.g., Cousins v. Realty Ventures, Inc.*, 01-1223 (La. App. 5 Cir. 1/14/03), 844 So. 2d 860, 872 (approving of instruction that "A real estate agent has a fiduciary duty to fully inform his client of all facts relating to the subject matter of the agency which are material for the client to know for protection.").

[119] *See* Laursen Depo. at 42:7-25 ("Q. So you would agree that if –if you're making some statements about a particular subject matter as an underwriter to your issuer client, that you need to make those statements be fair and balanced based on the information that is known to you as an underwriter? . . . THE WITNESS: Yes, I think that's the fair- fair and balanced is the way things are presented in terms of if you're talking about specific issue or asked to give your opinion on a certain issue or a certain topic. As an underwriter, you should give your truthful opinion

structure the transaction agreed investment bankers have a duty "not to mislead or not provide specific information to the issuer" and "should discuss the appropriate risks with their [issuers'] advisors and the client."[120] Armbrister, the head UBS banker working with the City, testified [redacted]

[redacted]"[121]

Internal UBS compliance documents such as the 1998 compliance bulletin, state that all [redacted][122] The same bulletin states, [redacted][123] Milton Brown, a current UBS employee who worked on the City's deal, [redacted][124]

Treasurer Kennedy testified unequivocally that he:

> "expect[s] them [underwriters] to deal fairly and to disclose everything we need to know and – and to tell us any risks that – that are not apparent to us. That's what…the duty of fair dealing and fiduciary obligation means. I mean,

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and fair and balanced is fine, yes. That's appropriate.").

[120] Hoover Depo. at 82:11-83:9. Hoover recognized that investment bankers like UBS have superior market information because "[w]e're interacting in the markets on a day-to-day basis, typically, the bank is, so they would have a better idea as to potentially what interest rates are for comparable transactions." *Id*. at 84:6-11.]

[121] Armbrister Depo. at 72:19-73:12 ([redacted]).

[122] PaineWebber Compliance Bulletin, Pl. Exh. 33 at 3.

[123] *Id*. (emphasis added).

[124] *See* Brown Depo. at 98:13-21; 105:14-23 ([redacted]); 108:10-109:12 ([redacted]).

> underwriters are – it's not supposed to be like dealing with used-car salesm[e]n. You know, they have a fiduciary obligation under the federal securities laws."[125]

Treasurer Kennedy explained that this duty to disclose risks exists even if the issuer has a financial advisor and swap advisor and that, in fact, most underwriters abide by this duty:

> **Whether you call it a fiduciary obligation or a duty of fair dealing, underwriters are supposed to tell you the truth, and they're supposed to tell you the advantages of a deal and the disadvantages of a deal**. If – if you're meeting with these underwriters a lot and structuring a deal and a negotiated transaction, so, you're having a lot of back and forth, if an underwriter sees that you're not – you are the issuer are not aware of a particular risk, I expect the underwriter to say, hey, you know, in the interest of full disclosure, I want you to know that there's this risk, too, that you're not considering. It's like going to any other professional. There's this give-and-take and you expect full disclosure.
>
> And let me tell you, most underwriters do that. Most underwriters will sit down and say, hey, look, here's the upside, but I want you to understand the downside here because there is a downside and we hope to do business with you a long time.
>
> Most – so, even, if you have – even if – even if we have a financial advisor, and we do, and we use a swap advisor, and we do, **I expect the underwriter to go the extra mile and tell us any risks that aren't apparent to us because they know the deal better than anybody else. There's not financial advisor or swap advisor you can hire that will know that deal as well as the underwriter, I can tell you**.[126]

UBS' role as an advisor to the City is perhaps best shown by its presentations to the City Council in connection with approval of the transaction. At the November 2000 meeting, Armbrister was the principal presenter of the transaction; he personally explained the new synthetic structure, answered Councilmembers' questions, and recommended the City engage in the transaction.[127] More broadly, by devising and then recommending the synthetic structure, UBS assumed a duty to provide the City with complete and accurate information, including all of the risks. Like the defendants in *Barrie*, UBS held itself out as a specialist;[128] knew the City and

[125] Kennedy Depo. at 67:13-21.
[126] *Id*. at 67:7-68:12 (emphasis added)
[127] November 16 Transcript, Def. Exh. 37 at 64-65.
[128] *See* May 24 RFQ Response, Pl. Exh. 11 at UBS-CNO_0002515 ("PaineWebber Expertise . . . PaineWebber has been the leading senior manager (by number of transactions) of Pension Obligation Bonds. As of February 1999, PaineWebber has senior managed 11 POB transactions exceeding $2.9 billion.").

its financial advisor did not have sufficient expertise in synthetic bond transactions or swaps;[129] and was compensated for services it provided in structuring the transaction.[130]

There is ample evidence the City believed UBS had a duty to provide it with complete and accurate information. Cedric Grant believed UBS "owed a duty to the City to provide complete and accurate information about the bond transaction" and "failed to disclose or fully disclose to the City many of the risks of the transaction, including the situations in which the synthetic structure would fail resulting in a substantial termination payment by the City, the Reciprocal Swap, and the conflicts of interests as a result of the Reciprocal Swap."[131] Carter testified he and his colleagues believed "that you're [PaineWebber] presenting something to us that would be beneficial to us" and "assume[d] and… expect[ed] that your credibility in the marketplace and your presentation is that of a responsible party."[132] This evidence creates at a minimum a genuine issue of material fact as to whether UBS owed a fiduciary duty and/or a general duty of disclosure to the City.

2. There are genuine issues of material fact as to whether PWCSI owed a contractual duty of disclosure to the City.

As explained below regarding contractual breach, PWCSI had a contractual obligation to disclose the Reciprocal Swap to the City. However, PWCSI did not disclose the transfer—in order to induce the City to enter into the swap confirmation.

[129] *See* Pearsall Depo. at 22:2-8, 25:21-25 and 40:5-14 ("Q. Lotus Capital, why did it need a swap advisor? A. . . .I believe it was because he didn't think that Lotus Capital had the technical expertise, the specialization to price the swap, advise on the swap. When I say he, I mean UBS.").
[130] *See* May 24 RFQ Response, Pl. Exh. 11 at UBS-CNO_0000041; 1996 Handbook at 397.
[131] *See* Affidavit of Cedric Grant ("Grant Aff.") at ¶ 19, Pl. Exh. 8.
[132] *See* Carter Depo. at 122:6-10 and 129:6- 130:1 (agreeing that he expected Armbrister, PaineWebber to present complete and accurate information to him and the other members of the City Council).

D. The City Can Demonstrate a Genuine Issue of Material Fact as to UBS' Fraudulent Intent.

Defendants do not appear to contest this element in their motion because there is ample evidence of their fraudulent intent. "Knowingly selling an unwitting client an allegedly more profitable but flawed financial product raises an inference of an intent to obtain an unjust advantage."[133] The evidence shows what Defendants gained by withholding the information regarding the Reciprocal Swap, risks of the structure, and conflicts of interest: they generated substantial additional profit from the synthetic transaction.[134] The synthetic structure generated approximately **six times** the amount of revenue for UBS than a traditional fixed-rate issuance.[135] Under a traditional fixed-rate structure, UBS would have received a one-time underwriting fee to be split between itself and the co-underwriters.[136] Under the synthetic structure, UBS was paid an underwriter's discount of $567,561.12 (including a management fee of $85,330), and a remarketing fee of 10 basis points (approximately $170,000) annually.[137] Further, UBS served as the investment advisor for the proceeds of the funds, which paid ongoing fees of 6 basis points, $90,000 annually.[138] Finally, UBS made a significant profit on the Swap with the City of over $2 million, which could be booked as immediate revenue due to the Reciprocal Swap.[139] Before closing the transaction, UBS anticipated that through the Reciprocal Swap, it would generate "[redacted]" for only serving as

[133] *In re Merrill Lynch Auction Rate Sec. Litig.*, 758 F. Supp. 2d 264, 284 (S.D.N.Y. 2010)(*citing* as example, *Shelton v. Standard/700 Assocs.*, 798 So.2d 60, 65–66 (La.2001)).
[134] Fraudulent intent is an element of the City's fraud in inducement of contract claim. While Defendants do not address fraudulent intent at all in their memorandum in support, there is evidence of this element.
[135] Bartolotta Report, Pl. Exh. 16, at 5**.**
[136] *Id*. at 4.
[137] *See*, *e.g.*, Estimated Costs of Issuance (December 15, 2000), Def. Exh. 21; Remarketing Agreement Between City of New Orleans and PaineWebber Inc. (Dec. 1, 2000), Def. Exh. 8.
[138] *See* Prime Asset Consulting Service Agreement (Exh. 12 to Foster Depo.), Pl. Exh. 25; Resolution by Board of City Trust to Employ PaineWebber as Investment Manager (Exh. 21 to Armbrister Depo.), Pl. Exh. 26.
[139] Bartolotta Report, Pl. Exh. 16, at 11 ("Calculating the interest differential during the variable rate period ending in 2012, the increased cost was approximately $2 million and calculated in terms of present value to November 1, 2014, the increased cost was approximately $2,960,790.")

a middleman and passing credit risk and market risk over to Ambac.[140] The actual profit was twice that. UBS witnesses agreed that the synthetic fixed rate deal was far more lucrative for UBS than the originally-proposed traditional fixed rate deal.[141] In addition, PWCSI and Ambac's joint venture that preexisted the City transaction demonstrates that defendants intended to transfer their rights under the swap to Ambac.

E. There are Genuine Issues of Material Fact whether Failure to Disclose the Existence of the Reciprocal Swap and the Catastrophic Risks was Material, and Summary Judgment Should be Denied.

The final element of the City's fraud claim is materiality: "the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to (a cause of) the contract."[142]

> [F]or fraud or deceit to have caused plaintiff's damage, he must at least be able to say that had he known the truth, he would not have acted as he did to his detriment. Whether this element is labeled reliance, inducement, or causation, it is an element of a plaintiff's case for fraud.[143]

Defendants seek to break this element into separate discussions of reliance, materiality, and causation, but the final element of a fraud claim is whether the omissions were material, that substantially influenced the City's consent, to its detriment. Materiality of an omission must be determined based upon all relevant circumstances and assessed from the perspective of a

[140] *See* Internal PaineWebber Memo, Pl. Exh. 17; *see also* Email Approval Status, Pl. Exh. 34. ("[redacted]").
[141] *See* Hoover Depo. at 49:3-51:14; Brown Depo. at 206:14-208:20.
[142] *Shelton v. Standard/700 Associates*, 2001-0587 (La. 10/16/01), 798 So. 2d 60, 64.
[143] *Sun Drilling Products Corp. v. Rayborn*, 2000-1884 (La. App. 4 Cir. 10/3/01), 798 So. 2d 1141, 1152-53 (internal citations omitted); *see also Carlisle v. Sotirin*, 2005 WL 78938, *7 (E.D. La. 1/11/2005).

reasonable individual in the plaintiff's position.[144] The Supreme Court has emphasized the determination of materiality "requires delicate assessments of the inferences" an individual would draw from a given set of facts and "the significance of those inferences to him."[145]

Defendants do not contest that the catastrophic risks of the transaction were material, but claim only that the existence of the Reciprocal Swap was not material. Genuine issues of material fact exist regarding the materiality of the existence of the Reciprocal Swap, the catastrophic risks, and the conflicts of interest.[146] As such, summary judgment is inappropriate.

1. The evidence shows the City would not have entered into the transaction as structured had it known the truth.

The Defendants claim the City was risk-conscious and knew of the investment risks.[147] Knowledge of the additional risks to the transaction would have prompted the City to reconsider the total mix of information regarding the transaction's risks and benefits. The evidence shows the City would not have entered into the transaction as structured had Defendants disclosed the omitted facts. At a minimum, there are genuine issues of material fact on the materiality element.

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[144] The "materiality of a statement or omission cannot be determined in a vacuum," because materiality "necessarily depends on all relevant circumstances." *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 428, 463 (S.D.N.Y. 2013)(citations omitted); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 362 (5th Cir. 2004)(quoting *Grigsby v. CMI Corp.*, 765 F.2d 1369, 1373 (9th Cir. 1985))("A fact is material if there is 'a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.")(internal quotation marks omitted); *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009) ("in order for the misstatement to be material, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available. … [T]he determination of whether an alleged misrepresentation is material necessarily depends on all relevant circumstances.")(internal citations omitted).

[145] *Kadlec Med. Ctr. v. Lakeview Anesthesia Associates*, 2005 WL 1309153, *8-9 (E.D. La. 5/19/2005)(*citing TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)(addressing materiality in a securities context)).

[146] Defendants also subtly suggest the City had knowledge of the Reciprocal Swap prior to 2008. There is no evidence of this. *See, e.g.*, Foster Depo. at 31:6-18 ("Q. …. Do you believe that PWCSI, because it entered into this reciprocal swap arrangement, created a conflict with respect to its obligations to the city? Or is that something you don't know about one way or the other? A. … from the city's point of view, the city was not aware until 2008 that the reciprocal swap existed, so the city did not have the full information to make that judgment… Or to potentially think through the potential conflicts."); Owen Depo. at 76:9-14. In fact, UBS' bankers who interacted with the City didn't have knowledge of the Reciprocal Swap. *See* Hoover Depo. at 57:4-59:12; Armbrister Depo. at 47:22-48:10.

[147] Defendants' Memo at 34, fn. 121.

a. The City had other alternatives at the time.

Importantly, three alternatives were available to the City at the time of the bond transaction that the City could have pursued had it known the truth. First, the City could have continued making pay-as-you-go payments to the pension fund of approximately $17.9 million a year, just as it had done for thirty years prior.[148] This would have saved the City approximately $165 million, the amount of rescissionary damages that would restore the City to the position it was in before it was fraudulently induced to execute the transaction.[149] Second, the City could have issued traditional fixed-rate bonds. Had the City done this, as it intended when it initially approved the transaction prior to UBS' recommended change in mid-October 2000,[150] the City's debt service would not have increased in 2008 regardless of Ambac's troubles, the City would never have had to refinance the bonds or pay a swap termination fee, and the City would have saved at least $38 million and as much as $58 million depending on the terms of the fixed-rate

[148] Cedric Grant, the City's CAO during the bond issuance, has indicated the transaction was not necessary and that the City could have continued with pay as you go. *See* Grant Aff. at ¶ 6: (" Prior to 2000, the City had been funding the Old Firefighters' Pension Fund on a pay as you go basis, and although the City was looking into bond transactions to create a corpus to fully fund the Pension Fund, continuing pay as you go remained a viable option for the City."). Troy Carter testified the City could have continued pay as you go and was "under no particular forced measure" to issue the Bonds. Carter Depo. at 130:9-16. Kopplin testified not entering into the transaction would have been the most attractive alternative for the City and the City had been doing pay-as-you-go since 1968 without any problems, and has resumed making pay-as-you-go payments since 2009. Kopplin Depo. at 26:10-21, 40:7-16.

[149] *See* Bartolotta Report, Pl. Exh. 16, at 11. Rescissionary damages are available for the City's fraud claim. *See Montet v. Lyles*, 638 So. 2d 727, 731 (La. Ct. App.) writ denied, 94-1985 (La. 11/18/94), 646 So. 2d 377.

[150] There is no dispute that fixed-rate bonds were an option. Several drafts of the preliminary official statement with the bonds structured as traditional fixed-rate had been circulated to the bond group. *See* Pl. Exh. 35; Oct. 8, 2000 Email with Draft of Preliminary Official Statement (Exh. 42 to Brown Depo.)(FILED UNDER SEAL), Pl. Exh. 36. The City's resolutions contemplated a fixed-rate transaction. *See* Aug. 24, 2000 Resolution No. R-00-553 (Exh. 6 to Foster Depo.), Pl. Exh. 27. Official proceedings had taken place contemplating a fixed-rate structure, including the Aug. 24, 2000 State Bond Commission meeting and the Sept. 20, 2000 City Council meeting. Nov. 16 Transcript, Def. Exh. 37 at 64:7-12 ("MR. ARMBRISTER: When we were last before the Council we presented the Council with a proposal to do a fixed rate taxable bond issue in order to finance a portion of the unfunded liability of the old Firefighter's Pension Fund."). Foster testified the City had never done a variable rate transaction prior to the transaction and was accustomed to issuing fixed-rate bonds, which municipalities generally prefer. Foster Depo. at 115:10-117:1. Kopplin testified if the City had known of the Reciprocal Swap, the risks created by the Reciprocal Swap, and the catastrophic risks of the bond structure, it would have definitely issued fixed-rate bonds, preferably with a call. Kopplin Depo. at 25:2-26:9.

deal.[151] Third, if UBS had disclosed the Reciprocal Swap and the City was willing to proceed with Ambac as swap counterparty, the City could have opted to swap directly with Ambac rather than paying PWCSI to serve as a middleman, and saved at least $4 million.[152]

b. The testimony in this case shows that had the City known the omitted facts, it would not have done the transaction as structured.

City witnesses testified that, had the City known of the omitted information, they would have gone with the less risky alternatives available at the time of issuance. City 30(b)(6) witness Kopplin testified he believed had all of the risks been disclosed to the City, "the City likely would have pulled the plug on the whole deal, as many other jurisdictions did, because it didn't make economic sense."[153] City 30(b)(6) witness Norman Foster testified had the City known of the Reciprocal Swap, it would have at least negotiated with PWCSI.[154] Carter testified had he known of the Reciprocal Swap and the other risks associated with the synthetic structure, he would have voted for a less risky alternative, such as fixed-rate bonds with which the City was familiar.[155] Treasurer Kennedy testified had he known the City was not adequately informed of

[151] Bartolotta Report, Pl. Exh. 16, at 11. *See also* Kennedy Depo. at 156:14-18)("When things went sour with the banking crisis, the fixed-rate bonds…weren't impacted nearly as much…as these complex deals that blew up.").
[152] Kopplin Depo. at 23:17-24:1 ("Q. …Do you think that that was a possibility, that, in effect, the City could have bypassed PaineWebber and dealt directly with Ambac in the swap, or is that something you know about? A. …If the City could have entered into a more economically advantage – advantageous swap with a different counter party other than UBS, and saved, you know, $4.2 million, we obviously should have done so.… And had it been disclosed to us that they – that UBS was doing that, any rational person would have objected to that strenuously because it was a lost revenue from the outset."). Pearsall of PFM testified that AFS entered into swaps with issuers. *See* Pearsall Depo. at 145:1-8. During discovery, UBS has produced evidence of a bond issuance it underwrote in 1999 where the bonds were insured by Ambac and UBS' client entered into a cost of funds swap directly with AFS. *See* Official Statement for Triborough Bridge and Tunnel Authority General Purpose Revenue Bonds, Series 1999C, at 4 (available at http://emma.msrb.org/MS162959-MS138267-MD268439.pdf).
[153] Kopplin Depo. at 38:4-24.
[154] *See* Foster Depo. at 50:24-51:17 ("Q. Okay. But you're not, today, able to say that you would have done differently. A. Unquestionably, we would have been able to negotiate with the first party, PWCSI. We would have been able – Q. Yes. A. I mean, later on in this sequence of events – I'll give you an example; the bank bonds. Chase Bank now has our bonds. Last summer we were able to talk with them and they were able to make an adjustment on the interest rate. They had the authority and power to do that. We could have a discussion with them. Q. Right. A. It appeared with this arrangement that we couldn't have a discussion with PWCSI, which is what we thought we had in the deal, because another party had that decision making authority.").
[155] *See* Carter Depo. at 117.

the risks of the synthetic fixed rate transaction or the Reciprocal Swap, he would have not placed the bonds on the agenda for the November 30, 2000 Bond Commission meeting.[156]

City witnesses also testified the omission of the Reciprocal Swap was material as it concealed the real decision-maker under the Swap from the City. Foster testified the Reciprocal Swap was material to the City because it shifted the decision-making authority from UBS/PWCSI to Ambac/AFS under the Swap Agreement.[157] As a result of the transfer of control, the City would have to deal with not only UBS/PWCSI, but also Ambac. Carter regarded the Reciprocal Swap as material to his decision because he would have wanted to know who the City was facing, *i.e.* who were the counterparties to the City's Swap.[158] And former CAO Grant indicated he would not have supported the change of the bonds from a traditional fixed-rate structure to a synthetic structure had he known of the Reciprocal Swap.[159]

The Reciprocal Swap was material because it misaligned the interests of Ambac and the City. According to Foster, while Ambac as bond insurer would have always cared about the City fulfilling its obligations, the Reciprocal Swap created situations in which Ambac's interests were not aligned.[160] The conflict of interests and risks created by the transfer of control were not hypothetical, and manifested when Ambac declared a market disruption.[161] Kopplin testified the

[156] Kennedy Depo. at 98:5-14 ("A. Look, if we had known that the City didn't know about the risks or they hadn't explained to them, if we'd known about the novation to AMBAC, okay, I can tell, you we – I probably wouldn't have put this on the agenda. I would have said, whoa, time-out, we got to have a meeting about this stuff. I got to make sure – I got to make sure everybody understands this deal.").
[157] *See* Foster Depo. at 37:13-39:10 ("I think one of the issues with the reciprocal is it appears the decision-making authority moved to AMBAC/AFS.…So I think one of the things that's different with the reciprocal swap, it appears from the documents I've reviewed, that AMBAC now had the authority to direct PWCSI to take certain actions at certain times.").
[158] *See* Carter Depo. at 118-119 ("I would have wanted to know all of the players regardless. That's paramount. That's a fundamental part of a decision-making process, knowing who you're doing business with.").
[159] *See*, Grant Aff. at ¶ 20 ("Had I known of the Reciprocal Swap, the conflicts of interest it caused and the risks that the new structure exposed the City to, I would not have supported the change from the fixed rate structure."
[160] *See* Foster Depo. at 34:9-36:5 (the Reciprocal Swap "potentially could create situations where conflicts exist that the city was not well placed to make the assessments about because it was not aware of the reciprocal swap until 2008" and the negotiations the City was in at the time (2011) demonstrated how those conflicts had arisen).
[161] *Id.* at 41:15-42:12; 43:20-44:8 ("…the city was not aware that that relationship existed so it could be in a position

Reciprocal Swap created a conflict of interest because the City was "no longer negotiating with a counterparty who was in the municipal securities business, who had an interest in our business."[162]

The Reciprocal Swap, and the risks and conflicts of interests it created, was also material to the State Bond Commission.[163] Treasurer Kennedy, who has evaluated "14, 15,000 deals that have come before the Bond Commission,"[164] testified he regarded the Reciprocal Swap as "very material."[165] He explained that the fact Ambac was both swap counterparty and insurer for the transaction would concern him because the Reciprocal Swap created a misalignment of interest and conflict for the City.[166] Treasurer Kennedy testified that, in his experience with a bond transaction on behalf of the State of Louisiana where Ambac was bond insurer, bond insurers are notoriously difficult to work with.[167] He testified that knowledge of the Reciprocal Swap would have prompted him to act differently as Chairman, including not placing the bond issuance on the agenda and ensuring the City fully understood the Reciprocal Swap and the risks.[168] This evidence establishes a genuine issue of material fact whether the Reciprocal Swap, catastrophic risks, and conflicts of interest were material. Summary judgment should be denied.

2. Objectively, the Reciprocal Swap and the conflicts it created were material.

Objectively, the Reciprocal Swap was material because it shifted the decision-making authority from one party, PWCSI/UBS, who the City knew it faced, to another party, Ambac, who the City thought was merely an insurer. Ambac gained key rights it lacked prior to the

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to judge whether or not that conflict was something they needed to take some actions to mitigate.").
[162] Kopplin Depo. at 97:1-20.
[163] The State Bond Commission is vested with the authority to approve all debt issuances in the State of Louisiana, including bonds. La. Rev. Stat. Ann § 39:1404(A)(emphasis added).
[164] Kennedy Depo. at 52:10-12.
[165] *Id*. at 160-161, 116-117.
[166] *Id*. at 116-117.
[167] *Id*. at 119:11-120:20.
[168] *Id*. at 98:5-14.

Reciprocal Swap including the rights to (1) demand a conversion of the swap to LIBOR upon a rate change event, (2) demand a bond mode conversion, and (3) demand that the City take actions to lower the rate on the bonds. Ambac's rights as bond insurer only vested if the City failed to make a payment under the bonds or the swap.[169] The rights conferred in the Reciprocal Swap included the right to demand conversion of the Swap or the bonds *without* any default by the City, giving Ambac leverage it could exert to force the City into a refinancing.

PWCSI and AFS had very different interests in the transaction. PWCSI was a subsidiary of UBS, an investment bank that provided a broad range of services to municipalities like the City. UBS served as underwriter, remarketing agent, and investment advisor. UBS earned fees throughout the life of the bonds, a pecuniary motive to keep the transaction functioning to continue to earn fees. UBS had other financial services to sell, and an incentive to maintain a relationship to sell those services.[170] As UBS describes in its derivative training materials:

[redacted][171]

If the City's financing became troubled, UBS would want to be accommodating to continue the profitable services that it was providing to the City.

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[169] *See* ISDA Master Agreement, Schedule to Master Agreement, Insurance Provision, Confirmation (Exh. 48 to Brown Depo.)(FILED UNDER SEAL), Pl. Exh. 1 at 6(a) and Insurance Provisions (a)(B)(granting AMBAC the right to terminate the swap following an event of default by declaring a termination date, and the right to terminate following a termination event). The only exception is the right to demand removal of the remarketing agent, which is expressly granted to the bond insurer in the swap confirmation. Def. Exh. 11, at 8(c)(i).

[170] Remarketing Agreement, Def. Exh. 8; Prime Asset Consulting Service Agreement, Pl. Exh. 25.

[171] PaineWebber November 2000 Derivatives Training Module 2: Basic Swap Applications (Exh. 36 to the Brown Depo.)(FILED UNDER SEAL), Pl. Exh. 19 at 5 (emphasis in original). *See also id.* [redacted]

In contrast, Ambac is a bond insurer whose sole business line is bond insurance, with no other services to sell the City.[172] Ambac was paid its entire $6 million premium up front for a 30-year bond insurance obligation. If the bonds were refinanced before the 30 years expired, Ambac would no longer be liable and could recognize the remaining premium as immediate revenue. Given this incentive, bond insurers have a reputation for being extremely hard to negotiate with.[173] Once the premium is paid, they have little incentive to be accommodating.

The City was blind as to who could trigger contractual rights and exercise control over its fate and was denied the opportunity to understand the major risks and conflicts arising from the synthetic structure. The Reciprocal Swap was material.

3. Defendants' argument against materiality is premised on the mischaracterization that the Reciprocal Swap was simply a hedge.

Defendants' argument that the Reciprocal Swap was immaterial is premised on the mischaracterization of the Reciprocal Swap as merely a hedge transaction. Unlike a typical hedge, the Reciprocal Swap transferred ***control rights*** to the swap counterparty, meaning the counterparty to the hedge would have the right to control the City's swap with PWCSI. In a typical hedging transaction, the original transaction is not affected.[174] Here, Ambac gained control of PWCSI's side of the Swap, and exercised that control to the City's great detriment.

[172] Bartolotta Depo., Def. Exh. 42, at 64:9-23.

[173] Kennedy Depo. at 119:11-120:20 ("A. Yeah. We had a really bad experience with AMBAC on Tallulah. . . .Well, you know, AMBAC was the insurer. If something went wrong, they were supposed to pay. That's the way it works. So, the legislature took the position, and we at the Bond Commission, we're just not going to appropriate any more money for this deal. Well, AMBAC got really aggressive. I mean, they -- they said, you know, you better not -- you better -- you know, this is going to affect your credit rating and, you know, we're going to have to talk to the rating agencies. And they were just very, very, very aggressive. So, we ended up -- I mean, the bond -- the bond insurance basically became worthless.").

[174] Ghavami Depo. at 39:20-40:8; Kennedy Depo. at 17:12-22 ("Q. Hold on for a second. The—under the synthetic fixed-rate deal here, the counterparty to the swap was PaineWebber Capital Services. Is that your understanding? A. No, because PaineWebber did a novation – I know it's been called a hedge, but they – it looks closer to a novation to me when they did the side deal with AMBAC. They transferred control of the deal to AMBAC. It wasn't just a hedge. PaineWebber gave all of its rights under the swap to AMBAC.").

A comparison of the Reciprocal Swap to the AFS Swap with Barclays that Defendants reference demonstrates the difference between a transfer and a hedge.[175] [redacted] That is completely different from the Reciprocal Swap here, which conveys to AFS control over all discretionary decisions relating to the City's Swap with PWCSI.

PWCSI relies heavily on Pearsall's testimony to argue the Reciprocal Swap was immaterial. Pearsall testified he had no prior knowledge of the Reciprocal Swap and saw the swap confirmation between PWCSI and AFS for the first time at his deposition.[178] Although Pearsall opined that the control provisions in the Reciprocal Swap were "common" in deals where Ambac wrote the surety bond and also participated as counterparty on the swap, he provided no explanation of the basis for this statement, which is undermined by his other testimony.[179] Other witnesses with experience in derivatives have testified these provisions were not common.[180] PWCSI also relies on the testimony of John Tsigakos of AFS.[181] Tsigakos'

[175] Letter Agreement between AFS and Barclays re: Re-Amended Rate Swap Confirmation (January 2, 2001), Def. Exh. 36.
[176] *Id.* at 2-3.
[177] *See id.*
[178] Pearsall Depo. at 143:3-14; 153:7-12.
[179] Pearsall expressed surprise to hear that John Tsigakos, one of AFS' swap desk managers, testified at his deposition that this was the first and only swap that AFS entered into with PWCSI. Pearsall Depo at 168:11-169:14. In light of his lack of knowledge of the limited extent of AMBAC and PW's relationship, it is hard to understand how he could support the claim that these provisions were common.
[180] *See* Ghavami Depo. at 38:4-12 ([redacted]); Kennedy Depo. at 39:21 to 40:1 ("What was unusual to me about this deal is that it wasn't just a hedge. It was transfer of control. In other words, PaineWebber gave all of its rights to terminate the deal to Ambac, and that, to me, is -- at least in 2000, was fairly unusual.").

testimony that hedges are not typically disclosed ignores the unique transfer of control provisions and notice obligations.[182] His testimony the Reciprocal Swap would have been disclosed if the City had asked ignores that PWCSI had an affirmative duty to provide written notice through its contract with the City, rather than the City having an affirmative duty to inquire.[183]

Finally, testimony from Foster that he would not be surprised if UBS hedged the Swap is taken out of context from his overall testimony that the Reciprocal Swap was material to the City because it constituted a transfer of control.[184] As discussed above, key decisionmakers in the Bond Transaction testified the Reciprocal Swap was material.

In short, there is abundant evidence supporting the materiality element of the City's claim. At a minimum, there are genuine issues of material fact as to materiality, i.e., what the City would have done if Defendants had disclosed the omitted facts.

4. Reliance is not an element of a fraudulent omission claim.

Reliance is not a separate element of a fraudulent concealment claim in Louisiana, distinct from the question of whether the omitted facts are material. This Court has explained:

> While federal courts applying Louisiana case law indicate that reliance is an element of a claim for fraudulent *misrepresentation*, **the Court has been unable to find, and Ford has not cited any, Louisiana case law that squarely holds that reliance is an element of a fraudulent concealment case.**[185]

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[181] Defendants' reference to Tsigakos as one of the City's "own witnesses" is obviously incorrect; AFS was a defendant in this case, and as such, Tsigakos has an incentive to give testimony unhelpful to the City.
[182] *See* Defendants' Memo. at 30.
[183] Defendants also argue there is no evidence the Defendants sought to keep the Reciprocal Swap secret. To the contrary, there is evidence that UBS/PWCSI intended for the Reciprocal Swap to be kept secret because it was not an ordinary hedge, but part of a secret joint-venture between UBS and Ambac created before the bond transaction. *See* Internal UBS PaineWebber Memo, Pl. Exh. 17. ([redacted]). Brown testified [redacted]. Brown Depo. at 64:5-21. None of the "confidential" joint-venture documents or UBS/PWCSI approval memos were disclosed to the City until well into this litigation.
[184] *See* Foster Depo. at 37:13-39:10.
[185] *In re Ford Motor Co.*, 1997 WL 539665, at *2 (emphasis added).

Further, as explained below in Section V(B), reliance is presumed in an omission case, and even if reliance were required, the City can demonstrate there are genuine issues of material fact regarding whether it relied on Defendants.

5. "Loss Causation" does not apply to claims of fraudulent omissions.

Similarly, causation is not a separate element of a fraudulent concealment claim, distinct from whether the omitted facts are material.[186] Defendants incorrectly suggest the City's fraud claims must demonstrate "loss causation," a higher standard of causation applicable to federal securities law claims. Loss causation is an element of a securities fraud claim under 17 C.F.R. § 240.10b-5.[187] The requirement of loss causation originated in federal case law[188] and is now codified by federal statute.[189] This specialized federal securities concept does not apply to the City's state law fraud and negligent misrepresentation claims.[190] There is no Louisiana statute or case law requiring proof of loss causation.[191]

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[186] *See Sun Drilling*, 798 So. 2d at 1152-53.
[187] *See generally Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 345 (2005).
[188] *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748-49 (1975).
[189] 15 U.S.C. § 78u-4(b)(4).
[190] *See In re Merrill Lynch Auction Rate Sec. Litig.*, 758 F. Supp. at 280-81 ("Louisiana law generally requires a causal nexus between the alleged unlawful conduct and the harm, but Louisiana law requires no showing of 'loss causation' as defined in the federal securities laws. Indeed, loss causation is a specialized federal securities law concept. Therefore, the Court's loss causation analysis is not applicable in wholesale to these state-law claims.").
[191] If this court concludes loss causation does apply, there is a genuine issue of material fact about whether Defendants' fraudulent omissions caused the City's loss sufficient to meet the element of loss causation. For loss causation, the Fifth Circuit applies the standard "that a plaintiff must allege that his loss was 'foreseeable' and that it was caused by the 'materialization of the concealed risk.'" *In re Enron Corp. Sec., Derivative & ""ERISA" Litig.*, 439 F. Supp. 2d 692, 706 (S.D. Tex. 2006)(citing *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005)("[A] misstatement or omission is the 'proximate cause' of an investment loss if the risk that caused the loss was within the zone of risk *concealed* by the misrepresentations and omissions alleged by a disappointed investor."). As described above, the catastrophic risks that were not disclosed by the Defendants – including credit risk, event risk, and flexibility risk – were precisely the risks that materialized in 2008, when investors became concerned about the City's bond insurer, demand for the City's bonds declined, and UBS as remarketing agent tendered the bonds to the liquidity facility. At that point, due to the inflexible synthetic structure, the City had no choice but to refinance the bonds and terminate the swap, incurring the damages complained of in this lawsuit. Notably, the City's bond structure collapsed four months prior to Ambac being downgraded as contemplated by the bond contracts, belying UBS' argument that the City's excess expenses were caused by a mechanical application of the contracts' provisions. There is also considerable evidence Ambac's control through the undisclosed Reciprocal Swap caused the collapse of the City's bonds in February 2008. The City's swap was converted based on a direction dated February 19, 2008 by Ambac (Pl. Exh. 20), exercising its rights under the Reciprocal Swap. *Id.* Although UBS had

IV. DEFENDANTS ARE LIABLE FOR NEGLIGENT MISREPRESENTATION

A. Elements of Negligent Misrepresentation

There are three elements for a claim for negligent misrepresentation: (1) a legal duty to supply correct information; (2) breach of that duty; and (3) damages from justifiable reliance on the misrepresentation.[192] For the reasons discussed above regarding the City's fraud claim, there are genuine issues of material fact about whether Defendants had a legal duty to disclose the Reciprocal Swap,[193] the conflicts of interest it created, and the catastrophic risks of the structure to the City, and about whether they failed to do so. The remaining elements of the City's negligent misrepresentation claim are whether the City suffered damages due to justifiable reliance on the Defendants' duty to disclose.

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been discussing the transaction at that point, UBS had taken no action towards declaring a market disruption. *See* February 21, 2008 Email Among UBS employees about Market Disruption (Exh. 13 to Depo. of Margaret Lezcano), Pl. Exh. 21 ([redacted]); Feb. 22, 2008 Emails between Margaret Lezcano and others at UBS (Exh. 14 to Depo. of Margaret Lezcano), Pl. Exh. 22 ([redacted]). [redacted] Brown Depo. at 244:1-10.

After the market disruption was declared, the effect of the Reciprocal Swap also affected the City's ability to refinance the bonds. When the City approached UBS to discuss refinancing options and possible concessions by UBS, UBS repeatedly suggested that the City had to negotiate directly with Ambac, because PWCSI had no control over the Swap. *See* Foster Depo. at 34:9-36:5 ("A. I think we're sort of in an example [of the conflicts of interest] right now. We're in discussions with UBS business people a few weeks ago, and they advised us strongly to talk to AMBAC about trying to mitigate the amount of the termination value on the swap. And so it appears that our credit enhancer is really – has an incentive to have a larger termination payment; their interests are no longer completely aligned with us in the way that when the deal was originally structured the city believed AMBAC's incentives mirrored the city's. Q. Okay. A. So because of this arrangement, there's at least the potential that they're looking at this whole arrangement not with exactly the same incentives as the city."). PWCSI dubiously asserts the transfer had no legal effect on the City's rights against PWCSI, but the transfer had the practical effect on the ability of the City to negotiate an economic resolution to its failing bonds. The Reciprocal Swap directly affected the City's ability to obtain relief through refinancing after its bonds failed.

[192] *City Blueprint & Supply Co. v. Boggio*, 3 So. 3d 62, 66 (La. App. 4 Cir. 12/17/08).

[193] The legal duty for the tort of negligent misrepresentation "has not been restricted to a set theory… The case by case application of the duty/risk analysis, presently employed by our courts, adequately protects the misinformer and the misinformed because the initial inquiry is whether, as a matter of law, a duty is owed to this particular plaintiff to protect him from this particular harm." *Barrie*, 625 So. 2d at 1016.

B. In an Omission Case, Reliance on the Omitted Information is Presumed. Nonetheless, the City has established that There Are Genuine Issues of Material Fact regarding whether It Relied on Defendants.

1. In an omission case, reliance on the omitted information is presumed.

Defendants' argument that the City must show "proof of actual reliance"[194] fails because this is an omission case, not a misrepresentation case. The Supreme Court held in *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972) that a plaintiff in an omission case is entitled to a presumption of reliance. The Fifth Circuit has explained that, following *Ute*, "where the gravamen of the fraud is a failure to disclose, as opposed to a fraudulent misrepresentation, a plaintiff is entitled to a rebuttable presumption of reliance. The presumption is a judicial creature. **It responds to the reality that a person cannot rely upon what he is not told.**"[195]

2. Nonetheless, the City has established that it did rely on Defendants.

The City has established it relied on Defendants, and Defendants cannot rebut the presumption of reliance. As noted above in the discussion of duty, UBS undertook to advise the City about the appropriate structure in which to issue its bonds for the City's "optimal benefit," and the City reasonably relied on UBS to disclose all material risks to the City.

Defendants' primary argument against reliance is to suggest, without legal authority, that the existence of other advisors to the City absolves them from liability. Underpinning that argument is the idea Defendants had no obligation to tell the truth because it was the City's advisors' job (and theirs alone) to study the transaction and advise the City about it. That idea is contrary to the above cases establishing UBS' duty and to longstanding case law holding contributory negligence is not a defense to an intentional tort.[196]

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[194] Defendants' Memo. at p. 19, ¶ 72.
[195] *Smith v. Ayres,*845 F.2d 1360, 1363 (5th Cir. 1988)(emphasis added).
[196] See *S. Texas Lloyds v. Jones,* 273 So. 2d 853, 855 (La. Ct. App. 1973); *Young v. First Nat. Bank of Shreveport,* 34,214 (La. App. 2 Cir. 8/22/01), 794 So. 2d 128, 147. *See also In re Mercer,* 246 F.3d 391, 421 & n. 44 (5th Cir. 2001)("Fraud being an intentional tort, a victim's contributory negligence is *not* a defense.")(citations omitted);

Moreover, Defendants ignore the testimony of several witnesses that shows the City did rely on Defendants to provide accurate information and further that PFM and Foley & Judell's roles were quite different than Defendants suggest. Owen[197] and the City[198] looked to UBS for advice about the transaction, particularly when UBS changed its recommendation to a more complex synthetic fixed rate structure, including a swap, with which the City had no prior experience. Neither Owen nor the City thought that Owen's role supplanted UBS' advisory role.

> Q. And you understood that the City was relying on you as its financial advisor to provide an explanation of the risks and benefits of the proposed bond structure?
> [OWEN]: **The City was relying on me as well as what's been proposed by PaineWebber. I rely on PaineWebber's information.**[199]

While Defendants make much of PFM's role, it was paid only $25,000 for its work.[200] There is a genuine issue of material fact about PFM's role. Pearsall is clear that he and PFM had no role in the transaction and they were not the City's financial advisor on the transaction,[201] He testified that "the deal was relatively far along and the primary purpose for our being hired was on the price verification aspect of it."[202] Although he also said he believed he did his best to make sure Owen and the City were aware of the risks associated with the Swap,[203] there is no evidence Pearsall communicated those risks to anyone at the City. Further, Owen testified she had no recollection of PFM providing her with advice on the risks of the swap other than the

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Mayer v. Spanel Int'l Ltd., 51 F.3d 670, 675 (7th Cir. 1995).
[197] Owen Depo., Def. Exh. 18 at 36:5-23.
[198] Carter Depo. at 107:7-17; *Id*. at 129:6- 130:1.
[199] Owen Depo., Def. Exh. 18 at 42:3-9 (emphasis added). Also, Grant stated: "Tina Owen was the City's financial advisor for the transaction, but this did not change my opinion that PaineWebber was also advising the City on a structure that was in the City's best interest." Grant Aff. at ¶ 13. Treasurer Kennedy agreed with this assessment: "…**just because we have a financial advisor or a swap advisor, we still expect the underwriter to deal with us fairly**….just like a doctor's talking to another doctor who's going to have surgery, if you're a doctor and you need gallbladder surgery and you go to another doctor, that doctor is still going to sit down and explain to you the risks of gallbladder surgery." Kennedy Depo. at 65:22-66:5 (emphasis added).
[200] Pearsall Depo. at 90:21-91:4 ("…despite our having provided the scope of services as that the deal was relatively far along and the primary purpose for our being hired was on the price verification aspect of it.") and 93:19-22.
[201] *Id*. at 20:18-24 and 54:21-24.
[202] *Id*. at 90:19-91:4.
[203] *Id*. at 91-92.

December 14, 2000 PFM Report.[204] Defendants also misrepresent the role of bond counsel. Treasurer Kennedy, speaking on his own prior experiences with the City's bond counsel, Meredith Hathorn and her firm, Foley & Judell, stated that Hathorn's familiarity with the structure of bond issuances is limited to her role as a bond lawyer, "not a financial advisor and … not a swap advisor."[205] Margaret Lezcano, formerly of UBS, testified the role of bond counsel was to "put together and review bond documents" and bond counsel "is considered to be independent."[206] Similarly, Grant confirmed that bond counsel "did not provide advice to the City on the structure of the bonds or the advantages or disadvantages of the structure."[207]

While the City is entitled to a presumption of reliance, the evidence would still create a genuine issue of material fact on reliance such that summary judgment should be denied.

C. There Is a Genuine Issue of Material Fact regarding whether Defendants' Negligent Misrepresentations Caused the City's Damages.

1. Under Louisiana law, negligent misrepresentation claims require a showing of causation-in-fact, not legal causation

To prove a claim of negligent misrepresentation, a plaintiff must demonstrate that the defendant's breach of its duty was a cause-in-fact or "but-for" cause of the plaintiff's harm;

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[204] Owen Depo., Def. Exh. 18 at 66:19-67:1.
[205] Kennedy Depo. at 87:10-18.
[206] Deposition of Margaret Lezcano, (November 21, 2014), Def. Exh. 27 ("Lezcano Depo.") at 34:12-35:2.
[207] *See* Grant Aff. at ¶ 16; Foster Depo. at 47:18-25. Defendants' argument that "a party cannot prevail on a fraud claim when it conducts its own investigation, instead of relying on defendant's representations" (Defendants' Memo. at 28, fn. 97) is unsupported by law and the cases they cite. In *La Croix v. Recknagel*, 89 So. 2d 363, 367 (1956), plaintiff alleged that through defendants' fraudulent representations he was induced into purchasing equipment and entering into a lease. The court held that "plaintiff sought and obtained advice and made an independent investigation of the possibility and probability of the box office receipts and revenues of said theater." "[P]laintiff was cautioned [by defendants as well as two independent advisors] that the theater was not a profitable business venture" but "was totally indifferent to and unaffected by all this advice given to him and disregarded it, being confident that with good management and advertisement he could successfully operate said theater." *La Croix's* holding was reached after trial and appeal, not on summary judgment, and it was a misrepresentation case, not an omission case. Further, the City, unlike the *La Croix* plaintiff, did not enter into this transaction with full knowledge of its risks and choose to disregard those risks; rather, material facts were fraudulently concealed from the City to induce the City to enter into the transaction. Defendants further grasp at straws in citing *Adams v. Harrah's Bossier City Inv. Co., L.L.C*, 41,468 (La. App. 2 Cir. 1/10/07), 948 So. 2d 317, 326. That case is entirely inapposite as it was a malicious prosecution case.

"[l]egal cause" is not necessary.[208] "The inquiry to be made is whether the harm would have occurred ***but for*** the defendant's alleged substandard conduct or, when concurrent causes are involved, whether defendant's conduct was a ***substantial factor*** in bringing about the harm."[209]

Defendants' cases on legal causation are inapposite. *Teague v. St. Paul Fire & Marine Ins. Co.*, 2006-1266 (La. App. 1 Cir. 4/7/09), 10 So. 3d 806, 832, taken out of context by Defendants, was a malpractice case that quoted a statement in the Louisiana Civil Law Treatise that "[a]s in any tort claim, the plaintiff in a malpractice claim must establish that the attorney's breach was not only the factual cause but also the legal cause of any injury." Similarly, the cited premise from *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 249 (5th Cir. 2008) is dicta; the case does not provide any analysis of legal cause and instead stops at duty, upon finding the defendants in that case had no duty. *Lemann v. Essen Lane Daiquiris, Inc.*, 2005-1095 (La. 3/10/06), 923 So. 2d 627, 630, which is relied on by the Fifth Circuit in *Audler*, merely provides a simple negligence analysis and does not apply in a negligent misrepresentation case.[210]

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[208] *Granger v. Christus Health Cent. La.*, 144 So. 3d 736 (La. 2013); *see also Williams v. Dean*, 694 So. 2d 1195 (La. Ct. App. 1st Cir. 1997)(finding that cause-in-fact is generally a "but-for" inquiry, that is, if the plaintiff probably would not have been injured but for the defendant's substandard conduct); *Philippe v. Lloyd's Aero Boliviano*, 710 So. 2d 807 (La. Ct. App. 1st Cir. 1998)(same).

[209] *Id*. Cause-in-fact is a factual determination to be made by the trier of fact. *See Toston v. Pardon*, 2003-1747 (La. 4/23/04), 874 So. 2d 791, 799 (Whether an action is the cause-in-fact of the harm is a factual determination that is left to the factfinder).

[210] To the extent the Court finds legal causation is required in this case, that standard is met here. "Regardless if stated in terms of proximate cause, legal cause, or duty, the scope of the duty inquiry is ultimately a question of policy as to whether the particular risk falls within the scope of the duty." *Roberts v. Benoit*, 605 So. 2d 1032, 1044 (La. 1991). "In short, the scope of protection inquiry asks 'whether the enunciated rule or principle of law extends to or is intended to protect *this plaintiff* from *this type of harm* arising in *this manner*.'" *Id*, at 1044-45 (internal citations omitted, emphasis in original). The analysis in *Kadlec Med. Ctr. v. Lakeview Anesthesia Assoc.*, 527 F.3d 412 (5th Cir. 2008), cited by Defendants, supports a finding of legal causation. *Kadlec* held that a doctor's negligence due to drug addiction was not an intervening cause but rather was foreseeable based on defendants' omissions about their knowledge of the doctor's addiction. Relying on *Roberts v. Benoit*, the *Kadlec* court held that "[w]hether an intervening act absolves a prior negligence actor from liability depends on the foreseeability of the act from the perspective of the original tortfeasor and whether the intervening act is 'easily associated' with the risk of harm brought about by the breach of the original duty. *Id*. at 424. Just as there was an "ease of association" between a negligent act by a drug addicted doctor and the failure to disclose the doctor's drug addiction, there is certainly an "ease of association" between the duty to disclose risks and the occurrence of those risks.

2. The causation element for negligent misrepresentation is met as the City would not have entered the Bond Transaction as structured had it known of the Reciprocal Swap, catastrophic risks, and conflicts of interest.

As discussed in Section on Materiality above, the evidence shows the City would not have entered into the transaction as structured had Defendants disclosed those facts. At the very least, there are genuine issues of material fact as to what the City would have done and summary judgment is inappropriate.

V. PWCSI Breached the Swap Agreement

A. Elements of Breach of Contract

The elements of a breach of contract are substantively similar in New York and Louisiana. In Louisiana, "in order to prevail on a breach of contract claim, the plaintiff must demonstrate three elements:

(1) that the obligor undertook an obligation to perform;
(2) that the obligor failed to perform the obligation (the breach); and
(3) that the failure to perform resulted in damages to the obligee."[211]

There is no dispute in this case that the Swap Agreement is a valid contract between PWCSI and the City, thus the first element is met.

B. PWCSI Breached the Swap Agreement by Transferring its Rights under the Agreement to AFS Without Notice to the City.

At issue in the present case is PWCSI's breach of the following provision:

[redacted]

[211] *Walker v. Pelican Pub. Co., Inc.*, 2011 WL 2976271, *6 (E.D. La. 2011). Per Defendants' Memo., New York law introduces a further element of "(2) performance by plaintiff." There is no dispute in this case that the City rendered the performance required under the Swap contract, and Defendants do not contend otherwise.

[redacted][212].

Two weeks after the City signed the Swap Agreement and two weeks before the closing of the transaction, PWCSI executed a Reciprocal Swap with AFS, Ambac's affiliate, pursuant to the "ISDA Master Agreement, dated as of October 27, 1999."[213] The Reciprocal Swap included "Special Provisions" transferring control of the Swap to Ambac:

[redacted]

(ii) [redacted][214]

[redacted][215] PWCSI had expressly agreed not to transfer "any interest" in the swap without consent or, at the very least, prior written notice to the City. By executing the Reciprocal Swap without notice to or consent of the City, PWCSI breached the Non-Transferability provision.

The purpose of this provision was previously explained by the Court: "to give the City a chance to decide whether it wished to exercise its option to terminate the Swap at a time that might be advantageous to the City."[216] As the Court recognized, in these transfer restrictions, the City contracted to have input (or at least knowledge) about who controlled these rights, so it

[212] ISDA ["International Swaps and Derivatives Association"] Master Swap, Pl. Exh. 1 at AMBAC00003450 (emphasis added).
[213] Reciprocal Swap Confirmation re: ISDA Master Agreement, dated October 27, 1999 between AMBAC Financial Services, L.P. and PaineWebber Capital Services Inc. (December 1, 2000), Def. Exh. 14.
[214] *Id*.
[215] *Id*.
[216] *See* Rec. Doc. 127 at 57.

could choose to terminate the Swap or take other protective action if it concluded it was no longer comfortable with the party who controlled these rights. Where parties grant options or other executory rights to their contractual counterparty, it is not uncommon for the parties to want input into who will control the option. For example, lessors typically include clauses requiring consent or notice prior to a sub-lease, in recognition of the fact that a sub-lessee could take action that would affect the lessor even if the lessor is not in contractual privity with that lessee.[217] A lessee could not defend a claim that it breached a sublease prohibition by arguing that it remained on the hook for payments, had not transferred his obligations, and that the lessor could recover for any damages caused by the sub-lessee from the lessee.[218] The lessee still would have breached the sublease prohibition. Yet this is the argument PWCSI attempts here, and it should be rejected.

1. The Non-Transferability Provision forbids transfer of not just the entire Agreement, but also any interest in or under the Agreement

Defendants repeatedly assert the strawman arguments that there was no transfer because "[t]he Reciprocal Swap did not 'transfer' the Swap Agreement" and "PWCSI did not attempt to relieve itself of any obligations under the Swap Agreement."[219] The plain language of the Non-Transferability provision makes clear it forbids not only transfers of the Agreement and obligations under the Agreement, but also transfers of "any interest… in or under the Agreement." The "any interest" language shows the provision is not concerned solely with transfers of the entire Agreement or PWCSI's obligations, but also with transfers of an interest in

[217] *See, e.g., Bordelon v. Bordelon*, 434 So. 2d 633, 636 (La. App. 3d Cir. 1983). *See* Kennedy Depo. at 71:11-72:7.
[218] *See, e.g., Abbott Paul Oak, LLC v. Sampedro*, 2010-1701 (La. App. 1 Cir. 5/12/11), 2011 WL 2623550 (affirming partial summary judgment finding lessees liable in solido for breaching no-sublease provision in a lease agreement); *Allain v. Shell W. E & P, Inc.*, 1999-0403 (La. App. 1 Cir. 5/12/00), 762 So. 2d 709, 713 (holding lessee who subleases property is liable for failing to pay rent and that sub-lessee is not an indispensable party to the eviction proceeding: "One who subleases property is held to know what the penalty will be if the lessee breaches his contract of lease by not paying his rent.")(internal quotations omitted).
[219] Defendants' Memo. at 42, 47- 48.

the Agreement.[220] PWCSI's contrary interpretation is implausible, as it renders the "any interest" language inoperable.[221] City and UBS witnesses agree the transfer of control rights made the Reciprocal Swap more than an ordinary hedge.[222]

Where a party grants control rights or options under an agreement to a third party, it is generally understood to be a transfer of an interest under the agreement.[223] For example, in *Levine v. First Nat. Bank of Commerce*, a mortgagee had executed a mortgage with a "due on sale" clause, which would make the entire mortgage note immediately due upon the transfer of the Property or "any interest" in the Property.[224] The mortgagee executed a bond for deed, in which a third party took possession of the property and agreed to make the mortgage payments, but would not obtain title until conclusion of a seven-year term. The court held:

> Although the Levine/Carraras bond for deed did not convey full ownership, it did convey rights in the subject property, *i.e.*, the right of immediate and exclusive possession coupled with the right to demand specific performance. Thus, in the words of the due-on-sale clause previously quoted, the Levine/Carraras bond for deed 'transferred' an 'interest' in the property.[225]

2. Contrary to PWCSI's argument, the Reciprocal Swap was not "merely a hedge."

PWCSI argues the Reciprocal Swap was merely a hedge. As discussed above, the Reciprocal Swap went beyond an ordinary hedge, in that it gave AFS control rights under the

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[220] *See e.g. Levine v. First Nat. Bank of Commerce*, 2006-0394 (La. 12/15/06), 948 So. 2d 1051, 1059 (holding that where mortgage prevented sale of "all of any part of the Property or *any interest in it*," "a sale of the entirety of the mortgaged property was not necessary" to trigger the non-transferability provision)(emphasis in original).

[221] "If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, Reading Law: An Interpretation of Legal Texts, (2012) at 174 ("Whenever a reading arbitrarily ignores linguistic components or inadequately accounts for them, the reading may be presumed improbable.")(citing E.D. Hirsch, *Validity in Interpretation* 236 (1967)).

[222] *See* Ghavami Depo. at 39:20-40:8; Kennedy Depo. at 17:12-22.

[223] *See* Black's Law Dictionary, 7th ed. at 1504." *See also* 29 Williston on Contracts § 74:18 (4th ed.)("Some question has at times arisen as to the power of one who holds an option to assign the right to another. … The rule is well stated in these words: '*In the absence of an express provision in the contract prohibiting it* [an] option is assignable.'")(emphasis added). Here of course, transfer or assignment of any interest in the Agreement was expressly prohibited.

[224] 948 So. 2d 1051, 1058.

[225] *Id.* at 1059.

Swap,[226] violating the non-transferability provisions, regardless of whether PWCSI's reason for entering into the Reciprocal Swap was to hedge the transaction.

3. None of PWCSI's authorities suggest the ordinary understanding of "transfer" as "conveying control of" should not apply.

PWCSI suggests the Court refer to the use of the word transfer "in common parlance, in the industry, by the courts, or as it is used by the parties in the Swap Agreement itself" to conclude that assigning all control of the City's Swap to AFS was not a transfer of an interest in the Swap to AFS. The authorities PWCSI cites, however, are simply not on point.

Common Parlance: PWCSI cherry-picks a dictionary definition for the word "transfer" from a non-contemporaneous version of Black's Law Dictionary, focusing on the definition of the noun-form of "transfer" rather than the verb-form used in the Swap Agreement.[227] The edition of Black's Law Dictionary in circulation at the time of the agreement, the Seventh Edition published in 1999, defines the verb "transfer" as "to convey or remove from one place or one person to another; to pass or hand over from one to another, ***esp. to change over the possession or control of***." (emphasis added).[228] Conveying control of the City's Swap to AFS is a transfer per this definition.

PWCSI suggests that the Special Provisions in the Reciprocal Swap do not "give AMBAC or AFS the right to exercise any powers or enforce any remedies under the Swap Agreement," because PWCSI has merely agreed to take Ambac's direction and AFS has not contracted directly with the City.[229] Transfer agreements are typically between the transferring

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[226] *See supra* pp. 36-38.
[227] *See* Defendants' Memo. at 42, citing Black's Law Dictionary (6th ed. 1990). The Seventh Edition of Black's Law Dictionary, published in 1999, actually defines a "transfer" as "any mode of disposing of or parting with an asset or an interest in an asset, including the payment or money, release, lease, or creation of a lien or other encumbrance," which would include conveying control of the asset to a third party.
[228] *See also* Compact Oxford English Dictionary, (3d ed. 2005)(defining transfer, *inter alia*, as "officially pass property, ***or right or responsibility***, to another person")(emphasis added).
[229] Defendants' Memo. at 43.

party and a third party; not the remaining party in the original transaction. Courts routinely recognize agreements with third parties violate non-transferability provisions without any direct contractual relationship between the third party and the remaining party.[230] A transferor cannot defend against breach of a non-transferability provision by claiming he might not honor the contractual obligations of the transfer agreement. PWCSI did not merely agree to allow Ambac input, it agreed to operate under mandates imposed by Ambac. And contrary to PWCSI's assertion that its failure to abide by Ambac's direction would give rise only to an "argument," Ambac could demand specific performance or injunctive relief, which would directly affect the City's Swap.[231]

Industry Use: PWCSI's assertion that "industry use" demonstrates that Section 7 does not apply to transfer of control provisions is likewise unconvincing. PWCSI cites a "User's Guide to the 2004 ISDA Novation Definitions" for the proposition that Section 7 of the generic ISDA Agreement is only concerned with novations, rather than transfers more broadly.[232] The User Guide is a **guide for novations**, so while it unsurprisingly discusses the effect of Section 7 on novations, nothing in the guide suggests that Section 7 is applicable *only* to novations. In fact, Section 7 in the instant Agreement discusses situations that do not implicate novation at all, such as assignment of security interests and transfers in the event of default.[233]

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[230] *See Levine*, 948 So. 2d at 1059; *Wootton v. Bd. of Trustees of Locust Valley Library*, 7 A.D.3d 790, 791 (N.Y. App. Div. 2004)(where contract prohibited Defendant "from assigning its rights under the license without a prior written consent of the [Plaintiff]", agreement between Defendant and third party violated prohibition justifying termination of license); *Karim v. Werner*, 333 N.W.2d 877 (Minn. 1983)(holding that due-on-sale clause contained in contract for deed on investment property and that prohibited vendees from transferring, selling or assigning their interest in contract for deed without prior written consent of vendors prohibited vendees from entering into a second contract with a subvendee with different terms and obligations from those in original contract).

[231] *See, e.g. Levine*, 948 So. 2d at 1059 (finding that although a transfer for a bond for deed "did not convey full ownership, it did convey [to the transferee] rights in the subject property, *i.e.*, the right of immediate and exclusive possession coupled with the right to demand specific performance.")

[232] *See* Defendants' Memo. at 44.

[233] *See* "Insurance Provisions," in Pl. Exh. 1 at AMBAC00003445 at 7(d)(granting PWCSI the right to assign the agreement to the Trustee); Insurance Provisions at 7(c)(recognizing the counterparty surety provider's right to subrogation to the extent of payments made).

Closer review reveals that the ISDA User's Guide cited by Defendants supports the City's position that UBS is not allowed to transfer its rights under the Swap to Ambac without obtaining the City's consent or giving the City notice. The ISDA User's Guide "remind[s] market participants that, under the [standard] ISDA Master Agreement, a party to a transaction must obtain the written consent of the other party to the transaction prior to transferring its rights and obligations under that transaction to a third party."[234] Thus the default in swap transactions is that rights and obligations in swap contracts are non-transferable absent consent. This demonstrates that the provisions in Section 7(a)(iii) are non-standard,[235] creating an exception to the usual non-transferability rule for a transfer of rights or obligations to the Swap counterparty, but only with prior written notice.

Defendants also suggest that all witnesses with experience in swaps have "uniformly" testified the Reciprocal Swap is not a transfer. This is incorrect, as both Treasurer Kennedy and former MSRB Chairman Bartolotta have testified that based on their industry experience the Reciprocal Swap was a clear transfer of control.[236] Internal Ambac correspondence demonstrates Ambac believed the special provisions transferred an interest in the swap to Ambac.[237]

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[234] User's Guide to the 2004 ISDA Novation Definitions ("User's Guide")(2004), at Exh. V, available at http://www.isda.org/publications/pdf/2004ISDANovDefinitionsUG.pdf.

[235] PWCSI asserts, without any citation, that the Section 7 language in the City's Swap Agreement is "form language." In fact, the operative provision, 7(a)(iii) appears to be nonstandard. The User's Guide provides the standard language of Section 7 of the 1992 ISDA Master Agreement, which contains sections 7(a)(i), (a)(ii), and (g) of the City's Swap Agreement, but not any of the other sections including section 7(a)(iii). *See* User's Guide, at Exh. V. There is no evidence these "Special Provisions" were form language typically used in PWCSI's swaps; PWCSI's witnesses testified they had never seen this language in any other swap executed by PWCSI. *See* Tsigakos Depo. at 31:23- 33:21; Brown Depo. at 64:5-23-21. Their inclusion in a "Special Provisions" section added to the end of the PWCSI/AFS swap confirmation belies the idea that these Special Provisions were common terms parties would expect to see in a hedge transaction.

[236] Kennedy Depo., Pl. Exh. 2, at 39:14-40:1; Bartolotta Depo., Def. Exh. 42, at 85:21.

[237] *See* AMBAC June 2004 Internal Memo, Pl. Exh. 10 ([redacted])(emphasis added).

Courts and Commentators: PWCSI's legal authority is readily distinguishable. *In re International Engineers*[238] is a case about priority rights in bankruptcy, and whether those rights were assigned. In defining "assignment" as "a transfer or settling over of property," the court held that an assignment is one type of transfer. The *International Engineers* court did not purport to define "transfer;" it defined "assignment." Likewise, Farnsworth's teaching about transfer of a contract requiring transfer of both rights and duties[239] has little implication where a contract specifically forbids transfer of "any interest or obligation in or under the Agreement," not merely the Agreement itself.[240]

Other references to "transfer" in the Agreement: PWCSI's attempts to use Section 7's other carve-outs to define the meaning of "any interest or obligation" are unconvincing.[241] Just as the provision allowing PWCSI to transfer the Swap to AFS with prior written notice is a nonstandard term, the Agreement also contains non-standard terms allowing PWCSI to assign the contract to the Trustee,[242] or to grant Ambac subrogation rights to the extent of payments made as bond insurer.[243] As the User's Guide demonstrates, each of these terms is an exception to Section 7's general rule that written consent is required before a party can transfer its rights or obligations under a Swap. That the parties created an exception to the non-Transferability provisions for subrogation rights suggests a broad range of transfers would implicate the provision. The other references should not be read as restricting the meaning of "transfer."

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[238] 812 F.3d 78 (2d Cir. 1987); *See* Defendants' Memo. at 45.
[239] 3 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.3 (3d ed. 2004); *See* Def. Memo. at 46.
[240] The example cited from Farnsworth, where B promises to collect funds from A and pay them to C, includes no conveyance of control of the initial contract between A & B akin to the Special Provisions here.
[241] *See* Defendants' Memo. at 47.
[242] *See* "Insurance Provisions" in Pl. Exh. 1 at AMBAC00003445 at 7(d)(granting PWCSI the right to assign the agreement to the Trustee).
[243] *Id*. at AMBAC00003444 7(c)(recognizing the counterparty surety provider's right to subrogation to the extent of payments made).

C. PWCSI's Breach Caused Damages to the City.

Defendants also contend the undisclosed Reciprocal Swap did not cause any damages to the City. This is incorrect. The undisclosed Reciprocal Swap prevented the City from either obtaining better terms on its Swap, as Defendants' expert admitted,[244] or from avoiding the synthetic structure with its conflicts of interest entirely. Defendants' arguments about damages are really arguments about loss causation, inapplicable to a breach of contract claim.

Under Louisiana law, an obligor is liable for the damages caused by his failure to perform a conventional obligation, measured by "the loss sustained by the obligee and the profit of which he has been deprived."[245] Where an obligor is in good faith–questionable here given that PWCSI also committed fraud by failing to disclose the Reciprocal Swap—the damages must be foreseeable.[246] Defendants acknowledge that New York law is substantially in accord.[247]

The timing of PWCSI's breach is significant to the damages here. PWCSI executed the contract covenanting to obtain the City's consent (or at least provide prior written notice) of a transfer of any "interest" in the Swap on November 16, 2000. On December 1, 2000, as the City was executing its Swap confirmation with PWCSI, PWCSI simultaneously executed the Reciprocal Swap confirmation with AFS. Defendants' witnesses have testified they would not have executed the cost-of-funds swap with the City without a Reciprocal Swap with Ambac.[248] Thus PWCSI's breach occurred before the City executed its Swap confirmation.

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[244] Expert Report of Christopher Laursen (Exh. 1 to Depo. of Laursen) Pl. Exh. 18 ("Laursen Report") at 13.
[245] La. C. C. arts. 1994 & 1995.
[246] La. C. C. art. 1996.
[247] Defendants' Memo. at 49. *See, e.g., Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 886 N.E.2d 127, 130 (N.Y. 2008); *Ashland Mgmt. Inc. v. Janien*, 624 N.E.2d 1007, 1010 (N.Y. 1993).
[248] *See* Brown Depo. at 133:3-18.

1. As a result of the breach, the City was deprived of the opportunity to reevaluate the bond issuance and issue either no bonds or fixed-rate bonds.

Knowledge that AFS controlled all rights under the City's swap would have made the City balk at the synthetic fixed rate structure entirely. As noted above, the existence of the Reciprocal Swap was material to the City.[249] Multiple witnesses testified they would not have supported the synthetic fixed rate transaction had they known about the Reciprocal Swap, but would have opted instead for the originally proposed fixed rate transaction.[250] PWCSI's failure to disclose the transfer foreseeably caused the City to enter into the synthetic fixed rate transaction instead of a traditional fixed rate transaction, with the resulting damages the City sustained. Again, this evidence creates at least a genuine issue of material fact as to whether the breach caused damages to the City.

2. As a result of the breach, the City paid a higher rate on the Swap.

Alternatively, had UBS given prior written notice of its intent to pass control of the City's swap to Ambac upon the moment of execution, as required under the Swap Agreement, the City could have executed its Swap directly with Ambac, as noted above.[251]

It is readily foreseeable that a party will request financial concessions, or deal changes, in order to waive a non-transferability clause. The ISDA User's Guide specifically envisions such an outcome: "In particular, because of the economic considerations involved for all three parties (transferor, transferee and remaining party), compensation may be an appropriate matter for discussion in connection with a transfer."[252] The City's expert opined that the City could have transacted directly with AFS on the same terms AFS gave UBS, at a total savings in excess of $4

[249] *See supra*, pp. 29-39.
[250] *See supra*, pp. 31-34.
[251] *See supra* pp. 31-34.
[252] User's Guide at 1-2.

million.[253] UBS' expert admits PWCSI would have likely reduced its profits on the swap in order to keep the business, predicting the City's fixed leg of the Swap would have been reduced at least 5 basis points, resulting in a value to the City significantly in excess of $1 million.[254] Either way, the City plainly sustained damages due to PWCSI's failure to disclose the transfer.

3. Loss Causation is Not an Element of the City's contractual claim

Rather than address that PWCSI's contractual breach allowed it to make millions of dollars for serving as a middleman and induced the City to enter into a catastrophic synthetic transaction, Defendants spend the bulk of their brief arguing PWCSI's contractual breach did not cause the collapse of the bonds in 2008. As discussed above, "loss causation" is inapplicable to state law claims, particularly contract breach claims wherein plaintiffs are entitled to recover both the loss sustained ***and*** the profit of which they are deprived.[255]

VI. CONCLUSION

For the reasons set forth herein, Defendants' motion for summary judgment should be denied. The summary judgment evidence establishes genuine issues of material fact as to each element of the City's claims, rendering summary judgment in favor of Defendants inappropriate. The City should have the opportunity to put on evidence of its claims at trial.

Respectfully submitted,

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[253] Bartolotta Report, Pl. Exh. 16 at 11.
[254] Laursen Report at 63. Laursen calculated the difference in payments to the fixed leg of the swap at $1.3mm, but did not include the effect of this change on the termination value, which would have saved more money for the City.
[255] *See supra*, p. 39.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 8th day of January, 2015, served a copy of the foregoing upon all counsel of record by CM/ECF filing.

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