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SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK CITY

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOME LOANS SERVICING, LP and BANK OF AMERICA CORP.,

Defendants.

Index No.: 602825/08

IAS Part 3 (Bransten, J.)

Motion Sequence No. 54

PROPOSED INTERVENOR BLOOMBERG LP'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO INTERVENE AND FOR CERTAIN RELIEF

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Preliminary Statement

Bloomberg News, part of Bloomberg LP, ("Bloomberg") respectfully submits this memorandum of law in support of its motion for leave to intervene in this litigation and to set forth its support of Plaintiff's Motion to Remove Confidentiality Restrictions, which is scheduled for oral argument on August 29, 2012.

Certain issues in this litigation related to the mortgage crisis are at the very center of a financial crisis that has severely decimated the world's economy. To say that Defendants Countrywide companies (and to a far lesser extent, Bank of America), in particular, have been the center of significant public and media attention over the past several years would be a gross understatement. Though Bloomberg does not have access to the materials discussed in the parties' moving papers, the allegations in the Amended Complaint make clear that the materials sought to be unsealed involve issues of prime importance to the public interest, including, *inter alia*, allegations of fraud and misconduct regarding mortgage-backed securities, allegations regarding the compliance—or lack thereof—with underwriting standards and guidelines for mortgages, and allegations regarding the effects of Countrywide's practices upon borrowers, investors and guarantors. *See* Amended Complaint.

It is undisputed that discovery in these proceedings has been subject to an incredibly broad protective order, which was "so ordered" by the Court and through which the parties may designate documents "Confidential" or "Highly Confidential." According to Plaintiff's moving papers, pursuant to this protective order Defendants have produced over 10 million pages of documents with a Confidential or Highly Confidential designation, Pltf's Br at 4, begging the question of whether any discovery in this matter

has been conducted outside of the order. These documents involve events that are more than four years old and if Plaintiff is correct that these documents contain no trade secrets or proprietary business information (*id.*), then the Court should see the opposition to this motion for what it appears to be: a stonewalling effort designed to make it as difficult as possible for the public to review records that are of significant importance to the public record in these matters.

Now, in preparation for a summary judgment motion due in coming weeks—a motion that would be filed with and argued before the Court and to which the public and the media would have presumptive access—Plaintiff seeks to have this Court remove the confidentiality restrictions on certain groups of documents so that it might proceed without engaging in the burdensome and complex process set forth in the protective order that would have hundreds, if not thousands, of documents filed under seal and reviewed individually by the Court after objection. In view of Defendants' broad over-designation of documents as Confidential, this appears to be a reasonable way to relieve the Court of this tremendous burden, while allowing the public the opportunity to see the documents relied upon by the parties in this matter without undue delay.

Defendants, not surprisingly, object, but they base this objection on circular reasoning: because the documents are protected by the "so ordered" protective order, (despite its sweeping nature without regard to what actually needs to be kept confidential due to trade secrets or proprietary information), and because Defendants relied on that order and because it was utilized according to its terms, and because Plaintiff has not identified every single document it wants to de-designate, then the order thus cannot be challenged.

Although there may not be a presumption of access to materials exchanged in discovery, Defendants' practice of labeling discovery as Confidential in broad, sweeping designations in this matter with an eye toward keeping the documents from public view at trial can only be considered contrary to the policy of this State, which strongly favors open access to courts and proceedings. Under Countrywide/Bank of America's view of the world, despite statutory and case law, the public should lose its presumptive access to the Plaintiff's summary judgment papers when they are filed, as well as its access to any other materials filed with the Court and the trial proceedings, just because the parties agreed to allow self-designation. This is anathema to the whole idea of open courts and court transparency.

Accordingly, Bloomberg requests that it be permitted to intervene in this matter in order to support Plaintiff's motion to remove confidentiality designations so that the parties might publicly file, as part of motions for or against summary judgment, those appropriate documents from the sweeping set of self-designated documents—which have in effect been sealed without individualized assertions of confidentiality—so the public can understand the issues in this case as part of the public discourse regarding the financial crisis.

The Interest of the Proposed Intervenor

Bloomberg provides economic and financial information to the business community and to news organizations worldwide. Bloomberg covers world markets and international news and is the main content provider to Bloomberg television networks, radio operations and publishing. *See* Affidavit of Patrick Oster ("Oster Aff."), submitted

herewith, at ¶ 3. Bloomberg has been covering the MBIA v. Countrywide litigation, and matters related to it, since its inception. Oster Aff. at ¶ 4.

The MBIA v. Countrywide litigation is precisely the type of financial and legal coverage for which Bloomberg is most known and consulted. Oster Aff. at \P 5. Access to documents in MBIA v. Countrywide will assist Bloomberg in reporting to the public, including the financial markets themselves, on what evidence has been presented to the Court concerning the activities of both parties. Oster Aff. at \P 6. Countrywide was right in the middle of the financial crisis and the allegations raised in this lawsuit regarding fraudulent and defective mortgage loans contain issues of significant importance to the public. Oster Aff. at \P 7.

Many details surrounding the financial crisis, including subprime mortgages' role in it, are still unknown as federal and state officials continue to investigate possible wrongdoing in the matter. Oster Aff. at \P 8. There is much civil litigation still pending in the courts on matters related to the financial crisis, and Bloomberg continues to track and cover such cases. Oster Aff. at \P 9. Bloomberg's coverage of such issues, and presentation to the public, could be informed by the documentation and evidence provided in the *MBIA v. Countrywide* litigation. Oster Aff. at \P 10. Accordingly, Bloomberg respectfully requests that this Court grant its motion to intervene and support Plaintiff's motion to remove certain confidentiality restrictions.

Statement of Facts

Bloomberg has not been involved in this litigation as a party, and therefore, for purposes of this motion, it adopts the statement of facts as set forth by the parties in their papers.

Legal Argument

I. Bloomberg has the Right to Intervene in these Proceedings.

The courts of this State have held that "[p]rior to issuance of an order to seal judicial documents, the court is obligated, where possible, to afford news media an opportunity to be heard[.]" Mancheski v. Gabelli Group Capital Partners, 835 N.Y.S.2d 595, 597 (2d Dep't 2007) (citing *Coopersmith v. Gold*, 156 Misc. 2d 594, 599-600 (Sup. Ct. 1992) (quoting same) and *In re Herald Co v. Weisenberg*, 59 N.Y.2d 378, 383 (1983) (noting "no hearing should be closed before affected members of the news media are given an opportunity to be heard 'in a preliminary proceeding adequate to determine the magnitude of any genuine public interest' in the matter[.]"). Bloomberg, as a member of the news media, need not meet the requirements for intervention pursuant to CPLR § 1012 or § 1013, but may be accorded standing in this matter by request. Coopersmith, supra, 156 Misc. 2d at 600 ("it appears that intervention is not the mechanism whereby such opportunity is given. Rather, the news media are accorded standing to be heard, on request, prior to a ruling on closure or sealing, without the necessity of formal intervention."); see also Mancheski, supra, 835 N.Y.S.2d at 597 (it was a "provident exercise of discretion" for lower court to permit media entity Bloomberg to intervene; Bloomberg was not "required to meet the formal requirements for intervention under CPLR § 1012 or § 1013[.]").

Accordingly, Bloomberg respectfully requests that it be allowed to intervene for the limited purpose of supporting Plaintiff's motion regarding the removal of confidentiality restrictions.

II. Defendants may not Abuse the Concept of Confidentiality in Discovery in Order to Circumvent the Presumption of Access to Court Records.

There is a "broad constitutional proposition, arising from the First and Sixth Amendments, as applied to the States by the Fourteenth Amendment, that the public, as well as the press, is generally entitled to have access to court proceeding." *Danco Labs., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 711 N.Y.S. 2d 419, 423 (1st Dep't 2000); *see also In re Marshall*, 824 N.Y.S.2d 755 (Sup. Ct. 2006) ("noting that the "First Amendment, as applied to the states by the Fourteenth Amendment, grants to the public and the press a qualified right of access to civil court proceedings."). Consistent with this principle, any court order that prevents access "must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access." *Danco, supra*, 711 N.Y.S2d at 423. The public's, and media's, right to access is not absolute, but when access is restricted, it must be done so in accordance with constitutional requirements and a broad sealing, without detailed explanation, will not be condoned. *See id.*

The policy reasons for allowing public access to court proceedings are manifold. Among them, "[t]here is a presumption that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system, as the 'bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud." *Mancheski*, *supra*, 835 N.Y.S.2d at 597 (quoting *Republic of Phillipines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660 (3d Cir. 1991)). New York has recognized such policy concerns and has an established "broad presumption that the public is entitled to access to judicial proceedings and court records." *Mosallem v. Berenson*, 905 N.Y.S.2d 575, 578 (1st Dep't 2010); *see also In re*

Herald, supra, 59 N.Y.2d at 381 (New York has a "strong public policy . . . of public access to judicial and administrative proceedings."). This policy is evident in this State's Judiciary Law, N.Y. CLS Jud. § 4, as well as in the court rule regarding the sealing of court records, 22 NYCRR 216.1, which reads in its entirety as follows:

§ 216.1 Sealing of court records.

- (a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.
- (b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

In order to overcome the presumption of openness established by this rule, a plaintiff has the burden of showing that there is "good cause" to seal the court records at issue. Doe v. New York Univ., 786 N.Y.S.2d 892, 874 (Sup. Ct. 2004) (citing Danco, supra, 711 N.Y.S.2d 419 and Coopersmith, supra, 156 Misc. 2d at 606). "To demonstrate 'good cause,' plaintiffs must establish that 'compelling circumstances' exist to justify secrecy[.]" Doe, supra, 786 N.Y.S.2d at 875; see also Coopersmith, supra, 156 Misc. 2d at 606 ("Good cause' as used in section 216.1 presupposes that compelling circumstances must be shown by the party seeking to have the records sealed."); Mancheski, supra, 835 N.Y.S.2d at 598 ("A finding of 'good cause' presupposes that

As noted by the court in *Coopersmith*, the burden to show "good cause" must necessarily be on the party moving to seal in part because "the news media usually are unaware of the reasons expressed by the parties[.]" 156 Misc. 2d at 606. Here, Bloomberg is not privy to the underlying documents, and must rely in part on the movant's arguments regarding their substance. It cannot be doubted, however, that the substance of these documents fall squarely within the public interest.

public access to the documents at issue will likely result in harm to a compelling interest of the movant. . . and that no alternative to sealing can adequately protect the threatened interest."). As noted by the *Mancheski* court, "since there is no absolute definition, good cause, in essence, 'boils down to . . . the prudent exercise of the court's discretion. . . and thus a case-by-case analysis is warranted." *Id*.

Because Plaintiffs have not yet filed their summary judgment motion, at first glance it may appear that this motion is not ripe or is premature. However, Bloomberg believes that Defendants' over-broad Confidential and Highly Confidential designation have effectively created a huge burden on Plaintiff's filing of a summary judgment motion that will undoubtedly make it more difficult for the public to review the documents in a timely fashion that Plaintiff relies on to make their case and that Defendants will use to oppose Plaintiff's motion. This Court has the inherent power to streamline this process so that those documents determined to be necessary and relevant to summary judgment can be filed unsealed by both parties. *See, e.g., Swanton v. Swanton*, 893 N.Y.S.2d 876, 877 (2d Dep't 2010) (noting that a nonfrivolous issue existed as to whether the lower court should have denied a motion to modify a "so ordered" stipulation regarding custody, and granting assignment of new counsel for appeal); Bloomberg believes that this motion is the proper vehicle for such an action

Conclusion

For the reasons set forth above, Bloomberg respectfully requests that the Court grant Plaintiff's motion so that it can file appropriate discovery documents as part of the judicial records without a protracted and burdensome process that will likely delay or withhold documents from public view.

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By:

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Dated: New York, New York August 24, 2012

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-against-

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MEMORANDUM OF LAW IN SUPPORT OF BLOOMBERG LP'S MOTION TO INTERVENE

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Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: August 24, 2012

BRUCE'S. ROSEN

Attorneys for Bloomberg LP