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By Fax

The Honorable Paul A. Crotty
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

By Fax and Electronic Filing

The Honorable Charles E. Ramos
New York State Supreme Court, Commercial Division
60 Centre Street
New York, NY 10007

Re: ***Syncora Guarantee Inc. v. EMC Mortgage Corp.*, No. 09-CV-3106 (PAC) (S.D.N.Y.)**

***Ambac Assurance Corp. v. EMC Mortgage Corp.*, Index No. 650421/2011 (N.Y. Sup. Ct.)**

Dear Judge Crotty and Justice Ramos:

We represent Syncora Guarantee Inc. ("Syncora") and Ambac Assurance Corporation ("Ambac") (together, "Plaintiffs") in the above-referenced actions. We write in response to defendants' letter dated January 18, 2012, seeking disclosure of an affidavit from a non-party witness who will be deposed in the *Syncora* and *Ambac* matters on January 20, 2012. The affidavit is protected from disclosure under the trial preparation and work product privileges, and the very cases defendants cite demonstrate they have not made the requisite showing to overcome such protections.

The deponent is a former contractor of Watterson Prime, LLC ("Watterson"). Defendants represented to Ambac and Syncora (and investors) that defendants had retained Watterson to conduct a thorough "due diligence" re-underwriting of the loans defendants "securitized" in the transactions at issue in the *Syncora* and *Ambac* matters. With detailed citations to the admissions and testimony of former employees of defendants and Watterson, Syncora and Ambac alleged that defendants' pre-closing representations regarding the quality and scope of the due diligence review were knowingly false and misleading. *See, e.g.*, Ambac First Amended Complaint ¶¶ 121-38; Syncora Complaint ¶¶ 8, 39-45. Defendants knew, but

failed to disclose, that their due diligence providers (e.g., Watterson) were not conducting an adequate review of the loans. *Id.*

Of particular significance here, the pleadings referenced the testimony of another former Watterson contractor who reviewed loans for defendants, and who was deposed in the *Syncora* matter on August 25, 2010. This contractor testified that Watterson's review was nothing more than a rubber stamp approval to satisfy defendants' objective of purchasing a large volume of loans for securitization. As the former contractor stated, the "vast majority of the time the loans that were rejected [by Watterson] were still put in the pool and sold." *See* Ambac First Amended Complaint ¶ 127. That testimony mirrored representations made in the press and before the Financial Crisis Inquiry Commission, which the record shows defendants were well-aware of when made.[1] Defendants also know – from communications with Watterson's counsel concerning an analogous application made before Justice Bransten[2] – that in the last three weeks an additional two Watterson contractors have been deposed concerning these same issues.

Thus, contrary to their claimed ignorance as to the subject of the scheduled deposition, defendants know full well the relevance and nature of the contemplated testimony. Like the other witnesses, the deponent is a whistleblower who will testify concerning the actual re-underwriting practices undertaken on behalf of the defendants, which were in stark contrast to the practices defendants represented to Syncora and Ambac (and investors). The deponent came forward and met with counsel for Syncora and Ambac in connection with the pending actions to set the record straight. As appropriate and common in preparing for trial,[3] counsel for Syncora and Ambac secured an affidavit from the deponent. This statement is protected under the work product and trial preparation privileges recognized by state and federal law.

Specifically, state and federal case law have repeatedly affirmed that witness statements prepared in anticipation of and in preparation for trial are protected from disclosure

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[1] *See, e.g.*, Chris Arnold, *[Watterson Prime] Auditor: Supervisors Covered Up Risky Loans*, National Public Radio, May 27, 2008, available at http://www.npr.org/templates/story/story.php?storyId=90840958; The Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 165-69 (2011), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf; Amended Complaint ¶¶ 1, 5, 8, 164-95, *Assured Guaranty Corp. v. EMC Mortgage LLC*, No. 10-CV-5367 (NRB) (S.D.N.Y. Nov. 18, 2011).

[2] Defendants concede that a due diligence firm made an application to Justice Bransten for the production of affidavits obtained by plaintiffs in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, Index No. 08-602825 (N.Y. Sup. Ct.). But defendants fail to point out that, on January 17, 2012, the court denied the due diligence firm's request absent further briefing on the issue. Further, in light of a whistleblower's testimony that the due diligence firm was attempting to stifle truthful testimony by its former employees by invoking confidentiality agreements that the former employees may have signed (and other means), the court noted that it "is troubled by the allegations of impropriety in requesting or pressuring Clayton [the due diligence firm] witnesses not to speak to third parties [i.e., monoline insurers] regarding their employment at Clayton. The court has full confidence in the attorneys that come before it, and trusts that impropriety is not, and will not be, occurring."

[3] Any insinuation by the defendants that it is improper to reach out to such employees is belied by their own actions. Defendants have retained a former employee of Ambac as an expert witness in these litigations and are asserting work product protection over their communications.

under the New York Civil Practice Law and Rules ("CPLR") and the Federal Rules of Civil Procedure. *See, e.g.*, *People v. Kozlowski*, 11 N.Y.3d 223, 245 (N.Y. 2008) (witness statements protected as trial preparation material); *Valencia v. Obayashi Corp.*, 84 A.D.3d 786, 787 (N.Y. App. Div. 2d Dep't 2011) ("Witness statements taken by a party's counsel are subject to the qualified privilege for materials prepared in anticipation of litigation or for trial"); *Warren v. New York City Transit Authority*, 34 A.D.2d 749, 749 (N.Y. App. Div. 1st Dep't 1970) ("It is quite clear that statements taken from witnesses to prepare for litigation are attorney's work product and protected."); *DeGourney v. Mulzac*, 287 A.D.2d 680, 680 (N.Y. App. Div. 2d Dep't 2001) ("written statement by a nonparty eyewitness answering questions posed by the plaintiff's attorney . . . immune from disclosure pursuant to CPLR 3101(d)(2) since it constitutes material prepared for litigation"); *Sullivan v. Smith*, 198 A.D.2d 749 (N.Y. App. Div. 3d Dep't 1993) (written statements of witnesses given to insurance adjuster protected); *In re James, Hoyer, Newcomer, Smiljanich and Yanchunis*, 2010 N.Y. Slip. Op. 50863U, at *15 (N.Y. Sup. Ct. N.Y. County 2010) ("statements taken from witnesses if taken to prepare for litigation have been deemed attorney work product"); *Lopez v. New York City Housing Auth.*, 2005 N.Y. Slip. Op. 50468U, at *11 (N.Y. Sup. Ct. Bronx County 2005) ("Statements taken from witnesses if taken to prepare for litigation have been deemed attorney work product."); *Frawley v. Albrecht*, 163 Misc. 2d 630, 634 (N.Y. Sup. Ct. Nassau County 1994) (written and recorded statements given by non-party witness protected); *Securities and Exchange Commission v. Treadway*, 229 F.R.D. 454, 455-46 (S.D.N.Y. 2005) (witness statement protected under Rule 26(b)(3)(A)); *Costabile v. Westchester*, 254 F.R.D. 160, 167 (S.D.N.Y. 2008) (same).[4]

Indeed, defendants' own citations affirm that the deponent's statement is protected from disclosure. Defendants cite first the *Miller* decision from the Northern District of New York for the proposition that a witness statement is discoverable "absent a claim that the information contained in the statement is privileged or subject to protection as trial preparation material." *See* Defendants' Letter at p. 2 (citing *Miller v. Elexo Land Servs., Inc.*, No. 09-CV-0038 (GTS/DEP), 2011 WL 4499281, *15 (N.D.N.Y. Sept. 27, 2011)). As defendants concede, Syncora and Ambac have asserted such a claim. Defendants next cite the *Sequa* decision for the proposition that affidavits are discoverable "where [there was] no indication that affidavits were prepared with the intention that they remain confidential." *Id.* (citing *Sequa Corp. v. Gelmin*, No. 91-CV-8675 (CSH), 1993 WL 276081, *4 (S.D.N.Y. July 16, 1993)). As defendants also concede, Plaintiffs have consistently communicated the "intention that they remain confidential."[5]

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[4] *See also* David D. Siegel, New York Practice § 348 (5th ed. 2011) ("[m]ost common example of an item sought by one side but claimed by the other to be litigation material is a statement given by a witness. . . . These statements ordinarily do qualify for the . . . [CPLR 3101](d)(2) immunity, and are hence undisclosable unless the stated conditions are satisfied.").

[5] To further clarify defendants' misleading citation to these cases: In *Miller*, the statement at issue was a "transcribed interview" of the witness, and not an affidavit or written statement. *See Miller*, 2011 WL 4499281, at *15. Further, in *Miller*, the court held that the defendant could not use the attorney work product protection because it had failed to notify the plaintiffs of the transcribed interview on its privilege log, and as such, had waived protection. *Id.* No such waiver exists here. In *Sequa*, plaintiff had already disclosed another similar affidavit prepared by the same witness, and all drafts thereof, and as such, they could not "establish either that they harbored . . . expectations of confidentiality or that they in fact kept the documents confidential." *Sequa*, 1993 WL 276081, at *1, *4. Here, the affidavits were executed with

For good policy reasons, the protection afforded to deponent's statement by the trial preparation and work product privileges only may be pierced in very limited circumstances. Under CPLR 3101(d)(2), "materials . . . prepared in anticipation of litigation or for trial by . . . another party . . . may be obtained ***only upon showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain substantial equivalent of the materials by other means***." CPLR 3101(d)(2) (emphasis added). Rule 26(b)(3)(A) of the FRCP contains a similar provision. Defendants have not demonstrated, and cannot show, the "substantial need" or inability to obtain "without undue hardship" the "substantial equivalent" of the deponent's statement, as they must to overcome the privilege and protections afforded under state and federal law.

Rather, the cases hold that an opportunity to depose a non-party witness ***is*** the substantial equivalent of a prior statement or affidavit by that witness. *See, e.g.*, *Frawley*, 163 Misc. 2d at 634 (refusing to pierce the trial preparation privilege and order production of affidavit from non-party witness who was deposed; "[t]his court is not willing to chip away at the privilege in CPLR 3101(d) [and order production of affidavit] solely for the purposes of impeaching a nonparty witness"); *Treadway*, 229 F.R.D. at 457 ("Defendants are free to question each of the witnesses at their depositions, and at trial, concerning the witnesses' statements to the SEC at various proffer sessions. No case cited by Defendants concludes that parties cannot, by deposing witnesses, obtain 'the substantial equivalent' of earlier attorney interview notes of the same witnesses without 'undue hardship.'"); *Costabile*, 254 F.R.D. at 167 ("'Substantial need' cannot be shown where persons with equivalent information are available for interrogation and/or deposition."). Defendants cannot show a "substantial need" for the affidavit or any "undue hardship" in view of their opportunity to cross-examine the non-party witness tomorrow.

Simply put, defendants' cries of "ambush litigation tactics" for Plaintiffs' appropriate retention of protected affidavits are unfounded. Defendants have long known from publicly available material and previous depositions of former Watterson contractors the nature of the contemplated testimony. Defendants have had ample time and opportunity to contact the witness and seek affidavits of their own. And defendants were provided with proper notice of, and will have full opportunity to cross-examine the witness at, tomorrow's deposition.

Accordingly, Syncora and Ambac request that defendants' request be denied. Plaintiffs are prepared to submit the affidavit for an *in camera* review and are available for a telephone conference at the Courts' convenience if necessary.

Respectfully submitted,

Erik Haas

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expectation that they will be kept confidential, and Syncora and Ambac have not produced the affidavits, or drafts thereof, to the defendants.

cc: Counsel for Defendants
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Robert A. Sacks, Esq. and Darrell S. Cafasso, Esq. (Sullivan & Cromwell LLP)

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