

January 18, 2012

By Fax

Honorable Paul A. Crotty
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, New York 10007-1312

By Fax and Electronic Filing

Honorable Charles E. Ramos
Supreme Court, New York County
60 Centre Street
New York, New York 10007

Re: **Syncora Guarantee, Inc. v. J.P. Morgan Securities LLC**
No. 09-cv-3106 (PAC) (S.D.N.Y.)

Ambac Assurance Corp. v. EMC Mortgage LLC, et al.
Index No. 650421/2011

Dear Judge Crotty and Justice Ramos:

We are counsel for Defendants in the above-referenced matters. We write with respect to the upcoming deposition of a non-party witness who was subpoenaed by the same counsel, Patterson Belknap Webb & Tyler (“Patterson Belknap”), on behalf of the Plaintiffs in both these actions. We received notice of the deposition on or about January 10 and the deposition is scheduled for January 20, 2012.

In the course of preparing for the deposition, we learned that attorneys at Patterson Belknap, in conjunction with attorneys representing different monoline insurers in other RMBS cases, have engaged in a pattern of conduct whereby they privately contact and meet with non-party witnesses and obtain signed affidavits from them, and then subpoena the witnesses for depositions. In the cases at issue here, the non-party witness is Ms. Chantelle Nickson-Clark, a former employee of Watterson Prime LLC, a contractor that provided limited due diligence services to EMC in connection with its acquisition of loans that back

residential mortgage backed securities issued by or on behalf of Defendants and insured by Plaintiffs. During a telephone call with Patterson Belknap's Erik Haas, Esq. on January 17, 2012, Mr. Haas acknowledged that Ms. Nickson-Clark previously signed an affidavit prepared by Patterson Belknap. Mr. Haas, however, denied our request for a copy of the affidavit. In light of the urgency of this situation given the upcoming deposition, we respectfully request that a telephone conference be scheduled in each of these cases prior to January 20 to address this issue. We note further that Patterson Belknap has also subpoenaed 3 other former Watterson Prime employees to appear for depositions, and we have reason to believe that Patterson Belknap procured affidavits from these witnesses as well.¹

We understand Syncora and Ambac seek to withhold the affidavit by asserting that it is attorney work product. However, an affidavit signed under oath by a third party witness is not attorney work product, even if Plaintiffs' attorneys drafted and procured that affidavit in the first instance. It is a prior statement of the witness under oath on which the witness may properly be examined, including for purposes of impeachment or bias to identify just a few. Its discoverability is not dependent upon whether Plaintiffs decide to question the witness about it. *See Miller v. Elexco Land Servs., Inc.*, 2011 WL 4499281, *15 (N.D.N.Y. Sept. 27, 2011) ("a transcribed, sworn-to statement from a non-party witness who possesses information relevant to the underlying dispute is discoverable absent a claim that the information contained in the statement is privileged or subject to protection as trial preparation material."); *Sequa Corp. v. Gelmin*, 1993 WL 276081, *4 (S.D.N.Y. July 16, 1993) (work product claim rejected where no indication that affidavits were prepared with the intention that they remain confidential; the fact that plaintiff chose to seek affidavits underscores its intention to have these documents available for filing or other public disclosure).

The burden of demonstrating that particular documents are exempt or immune from disclosure is on the party asserting such immunity. *See Brooklyn Union Gas Co. v. Am. Home Assurance Co.*, 803 N.Y.S.2d 532, 534 (1st Dep't 2005); *see also In re Grand Jury Subpoena Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003) ("The burden is a heavy one, because privileges are neither 'lightly created nor expansively construed.") (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)). The mere assertion that items constitute attorneys' work product or material prepared for litigation will not suffice. *See Doe v. Poe*, 664 N.Y.S.2d 120, 123 (2d Dep't 1997); *see also Agovino v. Taco Bell 5083*, 639 N.Y.S.2d 111, 112 (2d Dep't 1996).

With respect to the attorney work product exception, the case law makes clear that such exception is "narrowly construed, and "applies only to...materials uniquely the product

¹ It is our understanding that the issue of whether affidavits and related documents obtained from non-party witnesses should be disclosed to the witnesses' former employers has been raised before Justice Eileen Bransten in *MBIA Insurance Corp. v. Countrywide Home Loans, et al*, Index No. 08-602825. As we understand it, the former employers may have entered into confidentiality agreements with the witnesses in the course of their employment, and the witnesses' disclosures to insurers' counsel may violate those confidentiality agreements. Justice Bransten has invited the parties to that litigation to submit briefs on the issue. Neither undersigned counsel nor our clients are involved in that case.

of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *Brooklyn Union Gas Co.*, 803 N.Y.S.2d at 534; *see also In re Grand Jury Subpoena Dated March 19, 2002 and August 2, 2002*, 318 F.3d at 384. Materials or documents that could have been prepared by a layperson do not fall within the attorney work product exception. *See Bloss v. Ford Motor Co.*, 510 N.Y.S.2d 304, 305 (3d Dep't 1987).

Ms. Nickson-Clark's signed affidavit is her product (indeed it is her sworn statement) and not the product of counsel. As such it is entitled to no attorney work product protection whatsoever. Even if Ms. Nickson-Clark's affidavit were unsigned or in draft form, to the extent it contains her recollections and purported factual information regarding her work at Watterson Prime, and is devoid of any analysis or legal strategy by attorneys at Patterson Belknap, the affidavit could not constitute work product and would not be immune from disclosure. In short Patterson Belknap's refusal to produce the Nickson-Clark affidavit it procured is baseless and it should be ordered to produce it immediately. At a minimum, we request that the affidavit be made available for *in camera* inspection to determine whether it is subject to disclosure.

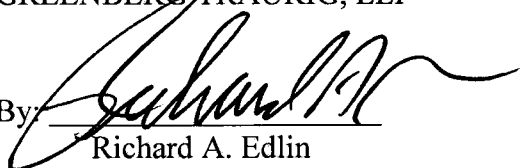
Even if Patterson Belknap were to argue that the affidavit was "prepared in anticipation of litigation," it does not exempt the affidavit from disclosure. Such documents may nonetheless be ordered disclosed upon a showing that the party seeking discovery has substantial need for the materials and is unable to obtain the substantial equivalent by other means without undue hardship. CPLR § 3101(d)(2); Fed. R. Civ. P. 26(b)(3)(A)(ii). Here, the affidavit is necessary to enable counsel to properly prepare for the deposition and to possibly cross-examine Ms. Nickson-Clark, who apparently resides in Missouri and cannot be compelled to appear at trial. Moreover, with only days before the scheduled deposition, we are unable to interview Ms. Nickson-Clark and there is no other means by which we can obtain a copy of the affidavit. Permitting Patterson Belknap to secure an affidavit and then conduct a deposition where it will know what to ask, and more importantly what not to ask, while not permitting Defendants access to the same affidavit, is prejudicial to the Defendants and smacks of ambush litigation tactics that should not be condoned.

Accordingly, Defendants respectfully seek an expedited telephone conference for the purpose of seeking an order that Patterson Belknap be ordered to produce a copy of the

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witness's affidavit and any other affidavits of non parties in its possession.

Respectfully submitted,
GREENBERG-TRAURIG, LLP

By: 
Richard A. Edlin

RAE/ng

cc: Erik Haas, Esq.
Robert A. Sacks, Esq.
Darrell S. Cafasso, Esq.
Frank Morreale, Esq. (Counsel for LPS Credit Risk Solutions, LLC, custodian of
certain records of Watterson Prime, LLC.)