*To Be Argued By*:
HARRY SANDICK
*Time Requested: 30 Minutes*

APL-2015-00061
New York County Clerk's Index No. 651612/10

# Court of Appeals

**STATE OF NEW YORK**

AMBAC ASSURANCE CORPORATION and THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION,

*Plaintiffs-Appellants,*

—against—

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP.,

*Defendants-Respondents,*

—and—

BANK OF AMERICA CORP.,

*Defendant.*

## BRIEF FOR PLAINTIFFS-APPELLANTS

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May 5, 2015

**CORPORATE DISCLOSURE STATEMENT**
**PURSUANT TO RULE 500.1(f)**

Plaintiff-Appellant Ambac Assurance Corporation is wholly owned by Ambac Financial Group, Inc. which is a public corporation whose stock is publicly traded. Plaintiff-Appellant the Segregated Account of Ambac Assurance Corporation is a segregated account established pursuant to Wis. Stat. § 611.24 with the approval of the Office of the Commissioner of Insurance of the State of Wisconsin. Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation are referred to collectively as "Ambac."

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## PRELIMINARY STATEMENT[1]

This case concerns the "common interest" doctrine, which is an exception to the rule that there is no attorney-client privilege for communications that are disclosed to third parties. It has long been established New York law that the common interest doctrine only applies if litigation was *pending or reasonably anticipated* at the time of the disclosure. The issue on this appeal is whether that "litigation requirement" should be abolished. This issue is a critical one that has wide-ranging implications – both in future cases and in this case – as it has the potential to *cover up wrongdoing* and thereby prevent justice from being done.

In the present case, Respondent Bank of America Corporation ("BAC") is trying to sweep under the rug what it learned during a pre-merger period about Countrywide's pervasive mortgage fraud and the details of BAC's plan to insulate Countrywide's liabilities in that merger. These issues are central to Appellant Ambac's secondary liability claims in this case.

On appeal of a discovery ruling, the First Department jettisoned the decades-old litigation requirement. This rule had been maintained consistently by at least 20 courts applying New York law over approximately two decades.

[1] As used herein, "Countrywide" refers to Defendant Countrywide Financial Corp. and its subsidiaries, including Defendants Countrywide Home Loans, Inc. and Countrywide Securities Corp., at the relevant time.

As discussed below, the litigation requirement should be retained. To abolish it would needlessly deprive courts and litigants of important evidence. Moreover, discarding the litigation requirement would not significantly encourage free and open communications between clients and attorneys – which is the reason why the attorney-client privilege exists. The law as it stands protects what clients say to, and the advice they receive from, their own lawyers. It also protects what separately represented parties with the same interest in an actual or anticipated lawsuit say, and the legal advice they receive, in discussions with the lawyer of either party. Parties who anticipate litigation also anticipate the likelihood of discovery requests. In that setting, it is worthwhile protecting communications among parties with common interests given the shadow posed by impending litigation.

In contrast, where no litigation is pending or expected, communications by a client with someone else's lawyer are not subject to the chilling effect of a looming lawsuit. Such communications outside the litigation context are thus no more deserving of the cloak of privilege than the innumerable other communications to which the normal rule – *i.e.,* that justice is entitled to everyone's evidence – applies. Moreover, the litigation requirement acts as a necessary check against abuses of the common interest privilege by parties who could otherwise cover up secrets merely by asserting a common interest.

Continuing the litigation requirement would also give trial courts sound guidance as to how to apply the common interest doctrine. It would provide a bright-line rule for determining when parties who share privileged communications have a qualifying common legal interest. It would do so using a test that trial courts are accustomed to applying – *i.e.*, anticipation of litigation.

Significantly, there is no sound policy justification for throwing out the litigation requirement. For years, businesses have organized their affairs in joint settings and have negotiated a variety of business combinations under existing privilege law. Before the Appellate Division's new pronouncement, there is no evidence that communications designed to seek out appropriate legal advice were discouraged in New York. Given the serious consequences of discarding this well-established requirement – such as concealing frauds from regulators, keeping secret unlawful attempts to monopolize through business combinations and covering up actions that injure consumers, among other things – there is no good reason to abandon the litigation requirement.

Given these serious policy matters, if this rule were to be changed, it is up to the Legislature to do so. This Court should be reluctant to abolish this established requirement and should defer to the Legislature to balance the competing policy interests at stake.

Alternatively, this Court should rule that there is *no protectable common legal interest* in the pre-merger setting at issue here. Until a merger is closed, the parties are on opposite sides of the table trying to protect their own interests in the deal. Therefore, the counterparties to the prospective merger have many divergent interests, and the interests on which they do align – *i.e.*, completing a business transaction – are primarily commercial, not legal, in nature.

The Appellate Division erred in disturbing the longstanding and sensible balance struck by New York courts between the need for secrecy and the search for truth. Its order should be reversed.

## QUESTION PRESENTED

Under New York law, may a party invoke the common interest doctrine to shield from disclosure communications that it voluntarily shared with a third party, even if litigation was not pending or reasonably anticipated at the time when the communication was shared?

## STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this appeal because all of the requirements of CPLR 5602(b)(1) are satisfied. This appeal is taken from a non-final Decision and Order entered December 4, 2014 (the "Order") by the Appellate Division, First Department. (R. x-xxv). The First Department granted

Plaintiffs' motion for leave to appeal the Order to this Court on March 3, 2015. (R. ix).

## I. FACTUAL BACKGROUND

### A. The Parties

Plaintiff Ambac Assurance Corp. ("Ambac Assurance") is a financial guaranty, or "monoline," insurer that insured, *inter alia*, residential mortgage-backed securities ("RMBS"). (Compl. ¶¶ 8, 19).[2] Ambac Assurance's RMBS insurance policies have been allocated to plaintiff The Segregated Account of Ambac Assurance Corporation (the "Segregated Account"),[3] which was created under Wis. Stat. § 611.24(2) with the approval of the Wisconsin Commissioner of Insurance and is the subject of an ongoing insurer rehabilitation proceeding in Dane County, Wisconsin. (Compl. ¶¶ 16-17).

In the mid-2000s, defendant Countrywide Financial Corp. ("CFC"), through its subsidiaries, engaged in mortgage lending and other real estate finance-related businesses. (Compl. ¶¶ 22, 29). Most of CFC's residential mortgage origination was conducted through defendant Countrywide Home Loans, Inc. ("CHL"), CFC's wholly owned subsidiary. (Compl. ¶¶ 20, 29). CFC's RMBS

[2] Ambac amended its complaint in September 2011, and again in May 2013. All citations to the "Complaint" refer to the Second Amended Complaint filed on May 28, 2013, which is publicly available as Document No. 107 on the docket for Index No. 651612/2010 through the eCourts WebCivil Supreme database, https://iapps.courts.state.ny.us/webcivil/FCASMain.

[3] Ambac Assurance and the Segregated Account will be referred to collectively as "Ambac."

offerings were typically underwritten by CFC's subsidiary, defendant Countrywide Securities Corp. ("CSC"), which was then a registered broker-dealer. (Compl. ¶¶ 21, 100).

Defendant BAC is the parent company for the Bank of America family of companies. Since July 1, 2008, BAC has been the direct parent of CFC and the ultimate parent of CHL and CSC. (Compl. ¶ 23).

### B. Countrywide Defrauds Ambac

The action from which this appeal originates concerns Countrywide's historic mortgage fraud and who will pay for the massive harm that fraud has caused Ambac. The wrongdoing of Countrywide, once the nation's largest mortgage lender, is well-documented: In just the past year, Countrywide's concealment of its abandonment of loan-underwriting standards formed the basis of a $16.65 billion settlement with the U.S. Department of Justice.[4] Moreover, a federal jury found Countrywide liable for fraud for having "engaged in an intentional scheme to misrepresent the quality of the mortgage loans" it sold to Fannie Mae and Freddie Mac, which led to the imposition of a $1.27 billion civil penalty. *See United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 33 F. Supp. 3d 494, 497 (S.D.N.Y. 2014).

[4] United States Department of Justice, Office of Public Affairs: Press Release, *Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis*, Aug. 21, 2014, http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

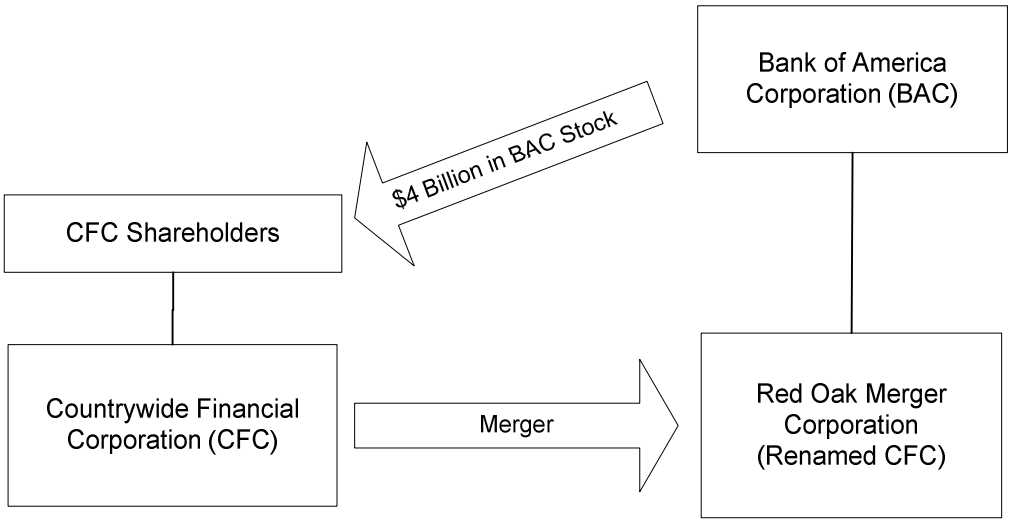
Ambac is one of the many victims of Countrywide's pervasive misconduct. From 2004 to 2006, Countrywide made numerous fraudulent misrepresentations to Ambac Assurance regarding its mortgage origination and lending practices. (Compl. ¶¶ 8-11). These misrepresentations induced Ambac Assurance to issue insurance policies guarantying payments to certificateholders in seventeen RMBS transactions that were secured by packages of Countrywide mortgage loans. (Compl. ¶¶ 7-8). When Ambac Assurance began to investigate why loans underlying these transactions were defaulting at an alarming rate, it discovered that Countrywide had repeatedly misled Ambac Assurance about the quality of the loans and Countrywide's processes for generating and securitizing them. (Compl. ¶ 12).

The effect on Ambac has been disastrous. To date, Ambac has already incurred almost $2 billion in insurance claims, with more claims expected in the future, under the insurance policies that it issued as a result of Countrywide's fraud. (Compl. ¶ 14).

### C. Countrywide Merges with BAC

In late 2007, as Countrywide faced increasing credit losses and negative expectations about its future performance, Countrywide management began discussing with BAC management the prospect of combining their businesses. (R. 69). Those discussions culminated in BAC and Countrywide

entering into an Agreement and Plan of Merger ("Merger Plan"), which they announced publicly on January 11, 2008. (R. 39, 69). If the Merger Plan was to close, Countrywide Financial Corporation ("CFC") would merge into a wholly owned subsidiary of BAC named Red Oak Merger Corporation (the "Red Oak Merger"), and as a consequence, CFC and its subsidiaries would become subsidiaries of BAC. (R. 69, 83). The below chart depicts the Merger Plan:




In the six months between the time when the Merger Plan was announced and when the Red Oak Merger closed, BAC and Countrywide discussed and formulated blueprints for the merger, and how to address Countrywide's liabilities, including its exposure to monoline insurers such as Ambac Assurance. During that pre-merger period, however, BAC and Countrywide remained unaffiliated, separate companies – with each entitled to call off the planned merger if, for example, Countrywide shareholder approval was not

obtained or if previously undisclosed liabilities were uncovered. (R. 69, 91; BAC Form S-4/A filed May 28, 2008,[5] at A-11, A-38, A-49, A-50).

After months of negotiation and planning among BAC and Countrywide, the Red Oak Merger closed on July 1, 2008. (R. 38-39, 101). The closing was followed soon thereafter by a series of asset transfers effected in July and November 2008 in which Countrywide sold substantially all of its assets to BAC and non-Countrywide subsidiaries of BAC. (R. 52-53, 110-13). Ambac believes that these asset transfers were intended to move as much of Countrywide's pre-merger mortgage business as possible to other parts of BAC's corporate family.

## II. PROCEDURAL HISTORY

### A. Ambac Sues BAC as Countrywide's Successor and Alter Ego

In its complaint filed against Countrywide in Supreme Court, New York County, Ambac asserts various claims including: fraudulent misrepresentation and breach of contractual representations arising from Countrywide's misrepresentations in connection with the RMBS transactions. (Compl. ¶¶ 269-81). Ambac also named BAC as a defendant, alleging that BAC is

[5] BAC publicly filed the Merger Plan as Appendix A to its Form S-4/A filing with the U.S. Securities and Exchange Commission on May 28, 2008, which is available at http://www.sec.gov/Archives/edgar/data/70858/000095014408004454/g11537a4sv4za.htm.

Countrywide's successor-in-interest and alter ego, and is therefore responsible for Countrywide's liabilities to Ambac. (Compl. ¶¶ 170-75, 289-94). These allegations are based in substantial part on the Red Oak Merger and subsequent asset transfers, through which Ambac alleges that BAC assumed Countrywide's debts as a matter of law. (Compl. ¶¶ 185-233). BAC has disputed these claims, contending that its transactions with Countrywide did not give rise to successor or alter ego liability.

### B. Ambac Challenges BAC's Attempt to Withhold Its Pre-Merger Discussions with Countrywide

In November 2012, Ambac challenged BAC's withholding from discovery of communications that, according to BAC's privilege log, took place prior to the closing of the merger and involved personnel from both BAC and Countrywide. (R. 564). In Ambac's view, each company's voluntary sharing of material before the merger closed waived any privilege that may otherwise have attached to the documents. (R. 736-37). Despite contesting its liability as Countrywide's successor and alter ego, BAC has refused to turn over hundreds of its pre-merger communications with Countrywide.

Specifically at issue on this appeal is the claimed privilege status of more than 300 communications between BAC and Countrywide during the six-month period between the January 11, 2008 signing of the Merger Agreement and the July 1, 2008 closing of the Red Oak Merger (the "Challenged

Communications"). (R. xiii-xiv, Order at 4-5; R. 193-359). These Challenged Communications were made at a time when the companies supposedly remained at arm's length and on opposite sides of an unconsummated commercial transaction. (R. 26-27). Ambac maintains that these pre-merger communications are relevant to Ambac's successor-liability and alter-ego claims against BAC arising from the Countrywide merger and the associated transfers of Countrywide's assets, personnel, and operations to BAC and BAC's non-Countrywide subsidiaries. At no point has BAC asserted that during the pre-merger period, it anticipated litigation in which it shared a common interest with Countrywide. Nor has BAC ever disputed the relevance of the Challenged Communications to Ambac's claims.

Among other things, discussions between BAC and Countrywide about how to structure those transactions and combine the companies are probative of Ambac's claim that Countrywide and BAC *de facto* merged, thus reflecting that Countrywide's liabilities passed to BAC as a matter of law. Additionally, the pre-merger communications addressing Countrywide's obligations to various counterparties are relevant to Ambac's alter-ego theory that BAC used its domination and control over Countrywide to compel Countrywide to divest its assets. These asset transfers were effected in a manner that primarily benefited the Bank of America family of companies to the detriment of Ambac and Countrywide's other contingent creditors who, subject to resolution of the

successor and alter ego claims, were left without an adequate source of recovery to redress Countrywide's wrongs.

Documents that BAC has produced – after withdrawing privilege claims for certain BAC-Countrywide communications that pre-dated the July 1, 2008 merger closing – reflect that BAC may have been put on notice of the prevalence of unreported fraud at Countrywide well before the Red Oak Merger. (R. 806-07). This raises serious questions whether BAC took action to structure the Countrywide integration so as to leave victims of Countrywide's fraud, such as Ambac, unable to recover in full for their damages. Discovery of the Challenged Communications at issue on this appeal is likely to yield similarly relevant support for Ambac's assertion that BAC fashioned a deliberate plan for how the Countrywide integration should and would unfold, with extensive knowledge of Countrywide's liabilities.

As one illustration of the import of the pre-merger communications at issue on this appeal, in a parallel RMBS action before the same Commercial Division Justice presiding over this matter, BAC argued that there was no "'integration plan' for BAC and the Countrywide Defendants' assets." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 40 Misc. 3d 643, 670 (Sup. Ct. N.Y. County 2013). Based on that argument, the IAS Court concluded in the *MBIA* litigation that there was a material fact issue "regarding BAC's role in the

transactions and its intent with regard to 'integrating' the Countrywide Defendants through the July and November 2008 transactions." *Id.*; *see also id.* at 669-70 (describing evidence of an "integration" plan in which Countrywide resources were "blend[ed]" with BAC "to get to a target state").

BAC's descriptions of the types of documents that it has attempted to cloak from discovery under the common interest doctrine (R. 34-35, 57-58) evince the extensive and detailed pre-merger planning involved in preparing for the integration of Countrywide into BAC. Although Ambac believes there remains no genuine issue of fact as to the existence of an integration plan, BAC has not conceded the point; thus, Ambac expects that such documentation of these efforts will support its position and contradict BAC's denial of any integration plan.

In May 2013, Ambac sought the Special Referee's intervention to compel BAC to produce the Challenged Communications.[6] (R. 736). Ambac argued that the common interest doctrine did not apply here because BAC had failed to show: (1) that it shared a common legal, as opposed to commercial, interest with Countrywide prior to the Red Oak Merger; and (2) that any of the Challenged Communications involved legal advice in connection with pending or

[6] By order dated January 18, 2013, the IAS Court appointed retired Supreme Court Justice John A. K. Bradley as Special Referee pursuant to CPLR 3104(b) to resolve privilege disputes in this action.

reasonably anticipated litigation. (R. 738-40). BAC, in turn, disputed that "the common-interest doctrine is confined to communications involving litigation," arguing that BAC and Countrywide's "common legal interest in closing the merger and the many necessary intermediate steps for two heavily regulated entities" was enough to justify shielding the Challenged Communications from disclosure. (R. 34-35).

### C. The Decisions Below

In a Decision and Order dated June 24, 2013, the Special Referee granted Ambac's motion to compel. (R. 26-32). Based on his review of New York case law and the policies underlying the attorney-client privilege, he concluded that the common interest doctrine "applies only when there is pending or reasonably anticipated litigation," and "may not be used to protect communications that are business oriented or of a personal nature." (R. 29-31). As a result, because the topics that BAC asserted the Challenged Communications addressed "would seem not to involve pending or reasonably anticipated litigation," the Special Referee instructed the parties to re-review the withheld documents in light of his ruling and to submit any documents that remained in dispute for in camera review. (R. 31-32).

Thereafter, BAC moved the Commercial Division Justice (Bransten, J.) to vacate the Special Referee's Decision and Order. (R. 20-21). The IAS Court

denied the motion, holding that New York law "requires that there be a reasonable anticipation of litigation" in order for the common interest doctrine to apply, and that BAC sought not an application of existing law but an "extension" of it. (R. 13-15). The Commercial Division Justice noted that BAC had failed "to cite any New York case that applied the common interest doctrine in the context of a signed, but not completed, merger agreement" or, "[m]ore significantly, . . . any New York case that applied the common-interest doctrine outside of either joint-representation of two parties by one attorney, or where parties reasonably anticipated litigation." (R. 16). Therefore, the IAS Court affirmed the Special Referee's holding that "New York law does not allow a privilege claim under the common-interest doctrine unless there is pending or reasonably anticipated litigation." (R. 18).

On BAC's appeal, however, the First Department (Moskowitz, J.) reversed. The court concluded that "today's business environment" called for a new rule of privilege. (R. xi, Order at 2). In the opening paragraph of its decision, the panel acknowledged that "New York courts have taken a narrow view of the common-interest privilege, holding that it applies only with respect to legal advice in pending or reasonably anticipated litigation." (*Id.*). But the court nonetheless rejected this longstanding "New York approach," explaining that "in today's

business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege." (*Id.*).

Noting that neither the First Department nor this Court "has yet considered the propriety of a litigation requirement for the common-interest privilege," the panel first examined the requirements of the attorney-client privilege, "from which the common-interest privilege derives." (R. xvii-xviii, Order at 8-9). It ruled that enlarging the common interest doctrine to apply to "a 'litigated or nonlitigated matter,'" as the attorney-client privilege does, would serve the "same basic purpose" of the attorney-client privilege. (R. xvii, Order at 8).

Rather than begin its analysis with New York law, the First Department first considered whether federal courts have adopted the litigation requirement for the common interest doctrine. (R. xviii, Order at 9). It focused on the Second Circuit's decision in *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989), which held that it was "unnecessary that there be actual litigation in progress" for the common interest doctrine to apply. (R. xviii, Order at 9 (citing *Schwimmer*, 892 F.2d at 244)). According to the panel, "a fair reading of the case makes clear" that the Second Circuit also rejected a requirement that litigation must be at least reasonably anticipated. (R. xix, Order at 10). This led the court to "adopt" the approach of some federal courts that had extended the common interest

doctrine "to joint legal strategies in non-litigation settings." (*Id.* (citing *Fox News Network , LLC v. U.S. Dep't of Treasury*, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010)).

Turning then to New York law, the First Department "acknowledge[d] that a line of New York cases requires pending or reasonably anticipated litigation for the common-interest doctrine to apply." (R. xx, Order at 11 (collecting New York cases)). But this case law, the panel believed, was inconsistent with policy: "[T]he better policy requires that we diverge from this approach." (R. xx-xxi, Order at 11-12). According to the court, the New York cases, including two decisions from the Second Department, which had consistently reaffirmed the litigation requirement, did "not adequately address the specific situation presented here," where "two business entities, having signed a merger agreement without contemplating litigation, and having signed a confidentiality requirement," disclosed legal advice to each other in the process of completing the transaction. (R. xxii-xxiii, Order at 13-14). To adhere to the established New York rule in these circumstances, the panel reasoned, would "discourage[] parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice" and thereby "inevitably result in" exposing them to "the onset of regulatory or private litigation." (R. xxiii, Order at 14).

In closing, the First Department noted that its decision is "further guided by Delaware's approach to the common-interest privilege." (*Id.*). The Delaware Legislature has codified its rule to expand the attorney-client privilege to cover communications with a lawyer "representing another in a matter of common interest"; this rule extends to parties "acting as joint venturers," without limitation to litigation. (*Id.* (citations omitted)). The First Department concluded that "Delaware presents the better approach." (R. xxiv, Order at 15).

The court below left open whether there are any grounds for turning over the documents in question or if any particular document falls within the common interest doctrine. (*Id.*). Accordingly, the First Department reversed the Commercial Division's discovery order and remanded to the IAS Court or the Special Referee for an in camera review consistent with its decision. (R. xxiv-xxv, Order at 15-16).

### D. The First Department Grants Leave to Appeal

By motion dated December 24, 2014, Ambac asked the First Department for leave to appeal to this Court. On March 3, 2015, the First Department granted Ambac's motion and certified the following question for this appeal: "Was the [Order] of this Court … properly made." (R. ix).

## ARGUMENT

## POINT I

### THIS COURT SHOULD RETAIN THE LONGSTANDING LITIGATION REQUIREMENT FOR NEW YORK'S COMMON INTEREST DOCTRINE

#### A. The Attorney-Client Privilege Is Construed Narrowly to Limit Its Obstruction of the Search for Truth

"[P]rivileges contravene the fundamental principle that the 'public . . . has a right to every man's evidence.' As such, they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citations omitted).

"The attorney-client privilege is, in this State, a creature of statute." *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 67 (1980) (citing CPLR 4503(a)). Its grant of immunity from disclosure is rooted in the belief that "persons in need of professional advice should not approach an attorney and disclose their problems in a manner tailored by a 'fear that such facts will be made public to their disgrace or detriment by the attorney.'" *Matter of Jacqueline F.*, 47 N.Y.2d 215, 218 (1979).

Only because of that salutary objective, the attorney-client privilege is a recognized exception to the judicial process's quest for truth. *Id.* at 218 (observing that the privilege is "an obstacle to the truth-finding process"). It is

antithetical to the rule that litigants are entitled to full and fair disclosure of "any facts bearing on the controversy which will assist preparation for trial." *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968); *see also Jacqueline F.*, 47 N.Y.2d at 218-19 ("[T]he attorney client privilege (CPLR 4503), like all privileges, operates as an exception to the general requirement that all persons give testimony upon facts within their personal knowledge inquired of in a court of law."). For this reason, this Court has repeatedly cautioned that the attorney-client privilege should be "narrowly construed" and scrutinized carefully "to ensure that its application is consistent with its purpose." *Jacqueline F.*, 47 N.Y.2d at 219; *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991); *accord Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989); *see also* 9 Weinstein-Korn-Miller, N.Y. Civil Practice § 4503.02 (2014).

### B. The Common Interest Doctrine Both Extends and Transforms the Attorney-Client Privilege

It is black-letter law that voluntary disclosure of an attorney-client communication to a third party destroys any claim of privilege. *People v. Patrick*, 182 N.Y. 131, 175 (1905) (voluntary disclosure of attorney-client communication waives privilege); *see New York Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172 (1st Dep't 2002); CPLR 4503(a)(1). The common interest doctrine is as an exception to this rule. *Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 205 (2d Dep't 2013). In other

words, the common-interest doctrine is an exception to an exception: it excuses compliance with the strict bounds of the attorney-client privilege, which itself is a limited carve-out to the rule that the public has a "'right to every man's evidence.'" *People v. O'Connor*, 85 A.D.2d 92, 94 (4th Dep't 1982) (quoting 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961)).

In particular, the common interest doctrine relaxes the core statutory element of the attorney-client privilege: *i.e.*, that the communication be and remain "confidential . . . between the attorney or his or her employee and the client." CPLR 4503(a); *Aetna Cas. & Sur. v. Certain Underwriters at Lloyd's, London*, 176 Misc. 2d 605, 611 (Sup. Ct. N.Y. County 1998), *aff'd*, 263 A.D.2d 367 (1st Dep't 1999) (observing that the common interest doctrine is "an exception to the traditional rule that the presence of a third party, not an agent or employee of counsel, at a communication between counsel and a client is sufficient to deprive the communication of the confidentiality which is one of the pillars of the privilege"). The confidence needed to invoke the attorney-client privilege arises from "the attorney-client relationship and the privacy of the conversation or communication to the attorney." *Matter of Vanderbilt (Rosner-Hickey)*, 57 N.Y.2d 66, 76 (1982). But that privacy expectation is destroyed if the client shares the contents of those communications with a third party who is not involved in rendering legal advice from attorney to client. *See* CPLR 4503(a); *People v.*

*Osorio*, 75 N.Y.2d 80, 84 (1989). Put another way, only by relinquishing the secrecy inherent in the attorney-client relationship does the common interest doctrine accomplish its policy objective – *i.e.*, "encourag[ing] the lawyer to disseminate information within certain confined limits, not maintain [the information's] privacy." Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 Fordham L. Rev. 871, 916 (1996).

### C. New York's Common Interest Doctrine Evolved From This Court's Recognition of the Need For Coordination in Litigation

*Osorio*, decided more than twenty-five years ago, is the only case in which this Court has suggested that it would recognize the attorney-client privilege's application even where a relevant communication is shared outside the confidential circle of the client, their counsel, and an agent of either.[7] 75 N.Y. 2d

[7] This is distinguished from the situation in which two clients are represented by the same attorney. The joint-client privilege and common interest doctrine are conceptually and analytically distinct bases for a privilege assertion. *Jordan (Berm.) Inv. Co., Ltd. v. Hunter Green Invs. Ltd.*, 2005 U.S. Dist. LEXIS 3424, at *3 (S.D.N.Y. Mar. 2, 2005) (applying New York law and concluding that the common interest doctrine "is not relevant" where "the communications at issue involve joint clients of the same counsel and are subject to the attorney-client privilege itself" (citing, *inter alia*, *Wallace v. Wallace*, 216 N.Y. 28 (1915), and *Hurlburt v. Hurlburt*, 128 N.Y. 420 (1891)). Specifically, an identical or near-identical alignment of client interests inheres in any joint representation; "otherwise the attorney cannot ethically handle a joint representation." Grace M. Giesel, *End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting*, 95 Marq. L. Rev. 475, 535 (2011-2012). Therefore, "[t]here need be no independent analysis of common interest other than a determination that the communication is in furtherance of the joint representation." *Id.* at 525. The same cannot be said where parties are separately represented, thus necessitating inquiry into whether they have common legal interests that align sufficiently to justify an extension of the attorney-client privilege and avoid a waiver of the privilege. *Id.* at 535-36, 538-40. Whereas the joint-client privilege "encourages full disclosure by the client group to the

at 85.

In *Osorio*, this Court considered whether a defendant who communicated with counsel in the presence of a separately represented co-defendant in a pending criminal lawsuit could assert privilege over those communications. Relying on federal decisions arising in the joint defense context, this Court held that the benchmark for determining whether privilege is preserved is whether the parties "are mounting a common defense": "If the codefendants are mounting a common defense their statements are privileged *but unless the exchange is for that purpose* the presence of a codefendant or his counsel will destroy any expectation of confidentiality between a defendant and his attorney."[8] *Osorio*, 75 N.Y.2d at 85 (emphasis added). Because the defendant was "not planning a common defense" with his co-defendant, this Court held that the statements made to counsel in the presence of the co-defendant were not privileged. *Id.*

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attorney," and thus furthers the goal of the attorney-client privilege "to encourage clients to make complete disclosure to their attorneys," "[a]pplying the privilege in the allied lawyer [or common interest] context does not encourage frank attorney-client communications that can improve legal representation, which is the heart of the [attorney-client] privilege's purpose." *Id.* at 481-82.

[8] For this proposition, *Osorio* cited: *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979), which held that joint defense communications were privileged because they "were made in confidence to an attorney for a co-defendant for a common purpose related to both defenses" and "serve[d] to expedite the trial or . . . the trial preparation"; and *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965), which affirmed privilege claims over communications between attorneys of "two or more persons who are subject to possible indictment . . . to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings."

*Osorio* was decided in the context of co-defendants exposed to criminal charges – clients whose right to counsel was protected by the State and Federal Constitutions. *See People v. Waterman*, 9 N.Y.2d 561, 565 (1961). Nonetheless, New York courts have applied *Osorio*'s "joint defense" privilege in civil matters and when any parties – not just co-defendants – share a common interest in litigation. *See, e.g.*, *Yemini v. Goldberg*, 12 Misc. 3d 1141, 1143-44 (Sup. Ct. Nassau County 2006); *Aetna*, 176 Misc. 2d at 611; *Parisi v. Leppard*, 172 Misc. 2d 951, 956 (Sup. Ct. Nassau County 1997). These courts have done so on the theory that "[t]he principles which warrant an extension of the privilege to codefendants facing criminal charges apply with equal force to those parties facing common problems in pending or threated civil litigation." *Aetna*, 176 Misc. 2d at 611; *see also Parisi*, 172 Misc. 2d at 956; *In re Megan-Racine Assocs.*, 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995) (applying New York law). Through this broader application of the joint defense privilege, the rule came to be known as the "common interest" doctrine. *Schwimmer*, 892 F.2d at 243. Thus, the roots of the common interest doctrine were in the joint defense privilege which assumed the presence of litigation involving parties who "are mounting a common defense." *Osorio*, 75 N.Y.2d at 85.

### D. New York Courts Have Consistently Recognized the Litigation Requirement of the Common Interest Doctrine

Even as New York courts expanded the legal contexts in which the "joint defense" privilege may apply so as to create a broader common interest doctrine, they preserved the rule's fundamental requirements – namely, that: (1) there exists a valid underlying privilege, (2) the parties share a common legal interest, and (3) most relevant to the present appeal, litigation is pending or reasonably anticipated at the time the disclosure to the third party is made. *E.g.*, *Hyatt*, 105 A.D.2d at 205; *Yemini*, 12 Misc. 3d at 1144; *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 108 (Sup. Ct. N.Y. County 2003); *Aetna*, 176 Misc. 2d at 612; *see also Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 194 Misc. 2d 331, 334 (Sup. Ct. Kings County 2002) ("[T]he joint defense privilege arises only where the common interest of the parties relates to the joint defense of existing or impending litigation."); 4-160 Bender's New York Evidence § 160.02(6)(e) (2015) ("The joint defense privilege . . . is limited to communication between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest.").

Until the First Department's order below, at least twenty New York courts or federal courts applying New York law for nearly twenty years – including two panels of the Second Department – had consistently recognized that a

communication must be shared in the face of pending or anticipated litigation in order for the common interest doctrine to apply.[9] Even the First Department below recognized that such was the rule in New York before the court's decision to abandon it.[10] (R. xi, xx-xxi, Order at 2, 11-12). Our research has failed to uncover

[9] *Hyatt*, 105 A.D.2d at 205 ("reasonable anticipation of litigation"); *Hudson Valley Marine, Inc. v. Town of Cortlandt*, 30 A.D.3d 377, 378 (2d Dep't 2006) (same); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Transcanada Energy USA, Inc.*, No. 650515/2010, 2013 N.Y. Misc. LEXIS 3735, at *10 (Sup. Ct. N.Y. County Aug. 15, 2013) ("parties reasonably anticipate, or are currently engaged, in litigation"), *aff'd on other grounds*, 119 A.D.3d 492 (1st Dep't 2014); *Gipe v. Monaco Reps, LLC*, No. 156707/2012, 2013 N.Y. Misc. LEXIS 2828, at *16 (Sup. Ct. N.Y. County July 2, 2013) ("pending or reasonably anticipated litigation"); *Omni Health & Fitness Complex of Pelham, Inc. v. P/A-Acadia Pelham Manor, LLC*, No. 24678/08, 2011 N.Y. Misc. LEXIS 4916, at *6 (Sup. Ct. Westchester County Sept. 28, 2011) (same); *Finkelman v. Klaus*, No. 5257/05, 2007 N.Y. Misc. LEXIS 8076, at *10 (Sup. Ct. N.Y. County Nov. 28, 2007) ("substantial showing . . . of the need for a common defense as opposed to the mere existence of a common problem" (editing marks omitted)); *EOS Partners SBIC, LP v. Levine*, No. 601530/2005, slip op. at 4 (Sup. Ct. N.Y. County June 21, 2007) (R. 698) ("a pending litigation in which the parties have a 'common legal interest'"); *Yemini v. Goldberg*, 12 Misc. 3d 1141, 1144 (Sup. Ct. Nassau County 2006) ("pending or reasonably anticipated litigation"); *Grande Prairie Energy LLC v. Alstom Power, Inc.*, No. 600926/03, 2004 N.Y. Misc. LEXIS 1684, at *4 (Sup. Ct. N.Y. County Oct. 4, 2004) ("pending or anticipated litigation"); *Stenovich*, 195 Misc. 2d at 108 ("pending or reasonably anticipated litigation"); *Brooklyn Navy Yard Cogeneration Partners*, 194 Misc. 2d at 334 ("existing or impending litigation"); *Aetna*, 176 Misc. 2d at 612 ("pending or reasonably anticipated litigation"); *Parisi*, 172 Misc. at 956 ("in or in anticipation of litigation"); *see also Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 434 (S.D.N.Y. 2013) ("a substantial showing . . . of the need for a common defense as opposed to the mere existence of a common problem"); *Velo Holdings, Inc. v. Paymentech, LLC*, 473 B.R. 509, 517 (Bankr. S.D.N.Y. 2012) ("pending or reasonably anticipated litigation"); *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 71 n.9 (S.D.N.Y. 2009) (same); *Allied Irish Banks, p.l.c. v. Bank of Am., N.A.*, 252 F.R.D. 163, 171 (S.D.N.Y. 2008) (same); *Gulf Islands Leasing v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 471 (S.D.N.Y. 2003) (same); *Bank of Am., N.A. v. Terra Nova Ins. Co.*, 211 F. Supp. 2d 493, 498 (S.D.N.Y. 2002) (same); *In re Megan-Racine Assocs., Inc.*, 189 B.R. at 573 ("co-parties to litigation or reasonably believed that they could be made a party to litigation").

[10] Indeed, even after this appeal was fully briefed below, the First Department issued a decision recognizing that same rule. *Nat'l Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy USA, Inc.*, 114 A.D.3d 595 (1st Dep't Feb. 25, 2014) ("The common interest exception to waiver of the attorney-client privilege by disclosure is not applicable, since there was no pending or reasonably anticipated litigation in which the insurance companies had a common legal interest"). However, once Ambac brought that decision to the panel's attention,

a single New York decision – other than the one on appeal – that has extended the protection of the common interest doctrine to parties who were not involved in or did not anticipate litigation. Neither the First Department below nor BAC at any stage of these proceedings has identified any New York case law to the contrary.

### E. There Are Sound Policy Reasons for Continuing the Litigation Requirement

This appeal turns on whether New York imposes a litigation requirement for the common interest doctrine. BAC has never asserted that in the six months prior to the Red Oak Merger, it reasonably anticipated any litigation in which it shared a common interest with Countrywide. (R. xxii-xxiii, Order at 13-14 (noting that "the specific situation presented here" involves "two business entities[] having signed a merger agreement without contemplating litigation")). Therefore, unless the litigation requirement is abolished, none of the Challenged Communications qualify for protection under the common interest doctrine.

There are strong policy reasons why the litigation requirement, as recognized and developed by New York courts over the past two decades, strikes the proper balance between protecting the pooling of legal advice and restricting its incursion upon litigation truth-finding. As shown in Point I(C) above, the common interest doctrine has been recognized by this Court only as to communications

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the First Department vacated the *National Union* opinion and issued a new one, which concluded that the court did not need to reach whether the common interest doctrine applied in that case. 119 A.D.3d 492 (1st Dep't July 31, 2014).

involving separately represented defendants who are mounting a common defense in a criminal case. Lower courts, and federal courts applying New York law, have extended the doctrine to parties in actual or anticipated civil or criminal litigation. However, until the present Appellate Division ruling, the expansion had stopped there.

And that is where it should stop. There is no sound justification for the Appellate Division's decision to expand the attorney-client privilege – and thereby limit the scope of evidence available to litigants and courts – to any parties who can claim a "common interest" of any kind in any matter as to which they seek advice from their own separate lawyers.

1. The Litigation Requirement Limits Common Interest Protection to those Communications Most Likely to Have Been Discouraged But for the Protection

The litigation requirement makes it significantly more likely that the common interest doctrine will be limited to those communications that would not have been made but for the protection it affords. It thus advances the policy concerns which drove the adoption of the common interest doctrine.

When two or more parties reasonably foresee or are involved in ongoing litigation in which they share a common legal interest, they know that their communications may be subject to discovery requests by their adversary. As a result, this knowledge may well prevent them and their lawyers from openly

coordinating legal strategy. The looming threat of mandatory disclosure to an adversary in litigation may chill the parties' exchanges of privileged information that is material to their common litigation objectives. In such circumstances, the common interest doctrine promotes candor that might otherwise have been inhibited. *See Parisi*, 172 Misc. 2d at 956 ("The [common interest] privilege serves its purpose when parties who are concerned with potential litigation, as well as those who are already involved in a lawsuit, may attend a strategy session with their respective attorneys without fear that the full contents of the meeting will later be available to a potential adversary.").

By contrast, when litigation is not at least on the horizon, guaranteeing protection against disclosure in some unforeseen lawsuit is an unnecessary incentive that comes at an inappropriate expense to the ability of future adversaries to gather evidence. "[W]hen parties share attorney-client communication for planning purposes outside of the specter of anticipated litigation, such as when parties cooperate to strengthen or obtain patent protection[,] . . . it is more likely that the parties would have shared information even absent the privilege." Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 Wis. L. Rev. 31, 68 (2000). In such cases, "the party that discloses attorney-client communications is removed from the threat of litigation, and privilege concerns are not uppermost in mind"; thus, "extending the

privilege to protect the communications that would have otherwise been discoverable *would* harm the client's adversary by broadening the scope of protected evidence." *Id.* at 71 (emphasis added); *see also Developments in the Law–Discovery*, 74 Harv. L Rev. 940, 1030 (1961) (in the context of the work product doctrine, noting that protection is unnecessary when litigation is not at least reasonably anticipated because when "a lawyer is asked to assist in planning future conduct, even though he might recognize the ever present possibility of litigation, he is prompted chiefly by his responsibility to avoid embroiling his client in controversy").

The common interest doctrine is not the only evidentiary privilege that is linked to the anticipation or pendency of litigation. Our Legislature has singled out for protection "materials . . . prepared in anticipation of litigation or for trial." CPLR 3101(d)(2).[11] Thus, "while the common interest doctrine is an extension of the attorney-client privilege, it follows the contours of the trial preparation materials and work product protections in that it requires litigation or its anticipation." *Nat'l Union Fire Ins. Co. of Pittsburgh v. TransCanada Energy USA, Inc.*, No. 650515/2010, 2013 N.Y. Misc. LEXIS 3735, at *10 (Sup. Ct. N.Y. County Aug. 15, 2013), *aff'd on other grounds*, 119 A.D.3d 492 (1st Dep't 2014).

[11] The same limitation exists for the federal work product doctrine. *See* Fed. R. Civ. P. 26(b)(3).

The litigation requirement of both the trial preparation protection and the work product doctrine serves the same purpose that it does for the common interest doctrine: it focuses the protection of each doctrine on information that is most likely to be stifled by fear of litigation-mandated disclosure. *See, e.g.*, *Corcoran v. Peat, Marwick, Mitchell & Co.*, 151 A.D.2d 443, 445 (1st Dep't 1989) (holding that the trial preparation protection and the work product doctrine protected attorney's interview notes because "[i]t is certainly highly likely that had [the attorney] expected that the information obtained from his discussions with the accountants was discoverable, he would not have conducted these interviews in the manner in which he did nor would he have taken any notes," and "the limitations upon [the attorney's] conversations . . . necessitated by the knowledge that they might be subject to disclosure would have had an extremely detrimental effect on the ability to prepare an effective and informed defense for his clients"); *Developments in the Law–Discovery*, *supra*, at 1030 (explaining that the work product doctrine's "anticipation of litigation" requirement is premised on fact that "a lawyer who does not envision litigation will not anticipate discovery requests," and thus "the fear of disclosure should not affect the way in which the material is prepared").

As a result, maintaining the litigation requirement would focus the common interest doctrine on those communications that are most worthy of protection.

2. The Litigation Requirement Is a Necessary Check Against Abuse of the Common Interest Protection

As a policy matter, the litigation requirement protects against abuse of the common interest doctrine. *See* Edna S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 277 (5th ed. 2005) ("The greatest push to expand the common interest privilege comes from corporate attorneys representing multiple clients often in an antitrust context. It is precisely in such a context that the potential for abuse is greatest."). New York courts have long recognized that absent pending or impending litigation, parties with shared business or personal interests, no matter how closely aligned, should not be entitled to cloak their communications behind the common interest doctrine. *Aetna*, 176 Misc. 2d at 612; *Grande Prairie Energy LLC v. Alstom Power, Inc.*, No. 600926/03, 2004 N.Y. Misc. LEXIS 1684, at *4 (Sup. Ct. N.Y. County Oct. 4, 2004) (ruling that under the common interest doctrine, "[b]usiness and personal communications are not privileged," and "[t]he fact that attorneys may have been involved to structure [a business] deal does not result in common interest privilege"); *see also Terra Nova*, 211 F. Supp. 2d at 497 (holding that "developing a business deal that included as a component the desire to avoid litigation" does not give rise to a protectable

common interest). Therefore, the pendency or impendency of litigation – which is the quintessential legal setting – is an appropriate litmus test for ensuring that the common interest doctrine is not exploited by those who seek immunity from disclosure in situations that do not justify the costs placed on the judicial process. *Aetna*, 176 Misc. 2d at 612; *Parisi*, 172 Misc. 2d at 956.

Imposing a litigation limitation is essential to containing the potentially sweeping reach of the protection. The common interest doctrine, no less than the attorney-client privilege, is "subject to severe limitations and a 'narrow construction.'" *Aetna*, 176 Misc. 2d at 612; *accord GUS Consulting GmbH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 541 (Sup. Ct. N.Y. County 2008) ("Like all privileges, the common interest rule is narrowly construed.") (citation omitted); *see also United States v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999) ("Privileges should be narrowly construed and expansions cautiously extended."). The litigation requirement ensures that the scope of the common interest doctrine remains narrow, as it checks the expanse of a rule that would otherwise shroud in secrecy a wide range of communications between any two parties having some arguable common interest. *See Aetna*, 176 Misc. 2d at 612; Michael J. Hutter, *Attorney-Client Privilege: Ambac's New Exception to Waiver*, New York Law Journal, Feb. 5, 2015, 3, col. 1 ("[A]s the determination of whether a common issue is present is difficult to ascertain in the absence of litigation, the

exception could easily be used to bar disclosure of large classes of communications which involve non-legal matters, thereby abetting the frustration of th[e] [truth-finding] process. . . . [L]imiting a common interest exception to the situation where litigation is present or imminent promotes sufficiently important interests to offset the loss of probative evidence."). This Court's exhortation to construe privileges narrowly and only to the extent needed to serve their purpose does not "permit[] the carving out of a large class of communications between potential parties so as to immunize their communications between themselves and counsel for other parties." *Aetna*, 176 Misc. 2d at 612.

If this Court were to affirm the First Department's rule, there would be essentially no limit to the sorts of common interests that may be claimed to justify the withholding of evidence. The First Department's decision illustrates this point starkly: it concluded that "accurately navigating the complex legal and regulatory process involved in completing the transaction," in the interests of avoiding "the onset of regulatory or private litigation," was a sufficiently compelling common interest to merit protection from disclosure. (R. xxiii, Order at 14). That "common interest," however, is merely a permutation of the oft-rejected contention that commercial parties have a protectable common interest in closing a business deal in compliance with the law. *E.g.*, *Terra Nova*, 211 F. Supp. 2d at 497 (finding no common legal interest even though parties to letter-of-credit

agreement engaged in "a 'collaborative effort' to structure a deal . . . that was appropriately supported by reinsurance policies" and "may have been developing a business deal that included as a component the desire to avoid litigation") (citation omitted); *In re FTC*, 2001 U.S. Dist. LEXIS 5059, at *13 (S.D.N.Y. Apr. 19, 2001) (holding that shared "concern[] about the consequences of failing to comply with applicable law and regulations . . . is simply not enough to transform [the parties'] mutual commercial interest . . . into a coordinated legal strategy"); *Walsh v. Northrup Grumman Corp.*, 165 F.R.D. 16, 19 (E.D.N.Y. 1996) (holding that corporation's communications with financial adviser in "developing a business strategy one of whose components was to avoid litigation if possible . . . does not transform their common interest and enterprise into a legal, as opposed to commercial, matter"); *see also In re Fresh & Process Potatoes Antitrust Litig.*, 2014 U.S. Dist. LEXIS 74936, at *32, *37-38 (D. Idaho May 30, 2014) (holding that joint interest in "formation and structure of entities seeking to take advantage of [antitrust] immunity," as well as "to remain in compliance with [federal law granting such immunity] and avoid the potential of litigation," did not warrant protection under common interest doctrine).

The Appellate Division's new no-litigation rule is in no sense limited to the merger context and thus has extraordinarily broad implications. (R. xi-xii, Order at 2-3). It takes little imagination to envision how parties with any sort of

shared objective will seize upon the First Department's rule as *carte blanche* to dramatically expand the scope of the attorney-client privilege. Consider the vast array of settings in which parties could potentially claim a "common interest" that would entitle them to sweep their dirty laundry under the rug, as BAC has tried to do here:

- A patent holder and a licensee commonly interested in protecting patents from challenge;
- A seller of real estate and a buying developer jointly interested in obtaining a government approval;
- Co-fiduciaries of a trust commonly interested in developing a strategy for managing the trust's assets;
- An author and publisher with a shared goal of gaining copyright protection for a book;
- A mortgage lender and a borrower with a common interest in ensuring that title to the property is clear;
- A contractor and a sub-contractor with a shared interest in obtaining payment from the owner;
- Tenants in common investigating a nuisance affecting their property;
- Beneficiaries of a will jointly interested in the orderly disposition of an estate; or
- An employer and its investment managers with a common interest in ensuring that the employer's pension plan complies with law.

No doubt all these parties would welcome "common interest" protection. Parties to stock offerings, financial advisors assisting their clients in creating tax shelters, competitors discussing a business combination, manufacturers negotiating a sale of one's operating divisions – all of these would now be entitled to protection under the common interest doctrine as framed by the First Department, irrespective of whether the parties anticipated litigation. But the consequence of granting their wish would be suppression of evidence on an unjustifiable scale. The victims of this suppression may be the shareholder whose ownership interests were diluted by the stock issuance; or the Department of Taxation, suspecting that the shelter is a front for tax evasion; or the Attorney General's Antitrust Bureau, concerned that negotiating competitors may be colluding in violation of antitrust laws; or a class of injured consumers, searching for proof that the manufacturer was on notice of a design defect in a product. The First Department's rule would deny evidence needed by each of these parties in the name of extending a protection to commercial counterparties who exchange privileged information in the course of a business venture with only a secondary or peripheral legal dimension. *See* Epstein, *supra*, at 277 ("The 'common interest' privilege may be nothing but a cover for an antitrust conspiracy."). These potentially disastrous consequences counsel against adopting the First Department's approach.

### 3. The Litigation Requirement Provides Needed Certainty in Determining Whether a Common Interest Warrants Protection

Next, the litigation requirement gives courts a concrete test to decide what qualifies as a protectable "common interest." Commentators have lamented the amorphousness of a doctrine that gives little instruction to courts and litigants about how it is supposed to be applied. Giesel, *supra* at 485, 553 (noting that courts have struggled to "define the necessary common interest" in a manner applicable "to a vast myriad of possible fact settings" because "[d]efining and analyzing the existence of a common interest in such a variety of contexts is beyond the reach of most mortals"); George S. Mahaffey, Jr., *Taking Aim at the Hydra: Why the "Allied-Party Doctrine" Should Not Apply in* Qui Tam *Cases When the Government Declines to Intervene*, 23 Rev. Litig. 629, 676-77 (2004) ("Although the [common interest] loophole is easy to proffer, it is difficult to define. Specifically, a good deal of confusion exists over the protean term 'common interest' or 'community of interests.' And why shouldn't there be?"); *see also Aetna*, 176 Misc. 2d at 612 ("The parameters as to what constitutes an adequate 'common legal interest' so as to implicate the 'common interest' privilege are less than clear.").

For nearly two decades, New York courts have been able to rely on the pending or anticipated litigation test as a straightforward marker that is easily

applied and that provides the context necessary to readily determine whether two parties do indeed share a sufficient interest to qualify for protection. Through experience in applying the work product and trial preparation doctrines, and in overseeing litigation generally, courts are well equipped to discern when litigation is pending or anticipated, and when litigants – or expected litigants – share a common litigation interest. Epstein, *supra*, at 277 ("The concepts as to what constitutes 'actual or threatened' litigation have been developed already in the context of the work-product protection and thus are readily available for use by courts in this common interest context as well."). Courts are less well suited, however, to pin down the tipping point at which a "common interest" becomes a relation deserving of privilege.

In this respect, the litigation requirement lends desirable predictability to an otherwise unbounded doctrine like the one the First Department adopted. *See* Giesel, *supra*, at 485 (arguing that courts have failed to uniformly define and apply the common interest doctrine "in a way that allows parties to predict with a degree of certainty at the time of the communication that disclosure of the communication cannot be compelled at a later time"). As the U.S. Supreme Court has recognized, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all." *Upjohn v.*

*United States*, 449 U.S. 383, 393 (1981). The line-drawing function that the litigation requirement provides is a salutary one in this context.

Accordingly, the litigation requirement reduces the uncertainty surrounding the common interest doctrine by setting a coherent rule and allowing parties and their counsel to understand readily when assertions of the common interest doctrine are likely to be upheld.

4. The Litigation Requirement Harmonizes the Common Interest Doctrine with Its Doctrinal Origins in the Joint Defense Privilege

The litigation requirement also better conforms the common interest doctrine to the policies that justified adopting the joint defense privilege, from which the common interest doctrine evolved.

The joint defense privilege was recognized for the benefits that it conferred on both co-defendants and the court system, as it "not only provides criminal co-defendants with a fair opportunity to mount a proper defense, but also serves to expedite trial preparation and the trial itself." *People v. Pennachio*, 167 Misc. 2d 114, 117 (Sup. Ct. Kings County 1995) (citing *McPartlin*, 595 F.2d at 1336-37); *see also Aetna*, 176 Misc. 2d at 611 (observing that courts have accepted the joint defense privilege on the theory that it "is necessary to permit a joint defense to the common charges"); *see also* Bartel, *supra*, at 881-82 (explaining that "the joint defense arrangement provides balance to the adversary process,"

since "[e]ncouraging co-defendants to communicate about trial strategy is the only way to assure a contest of equals," and promotes the "efficient use of scarce judicial resources"). These are benefits that "are confined to the litigation process" and "do not advance social values extrinsic to the litigation." Bartel, *supra*, at 885. When the common interest doctrine is limited to pending or reasonably anticipated litigation, it confers the same benefits: it provides balance to the adversary system by allowing co-parties to align their litigation strategy, it streamlines trial preparation, and it can expedite and focus trial proceedings. *See, e.g.*, Anne King, Comment, *The Common Interest Doctrine and Disclosures During Negotiations for Substantial Transactions*, 74 U. Chi. L. Rev. 1411, 1425, 1433 (2007) (recognizing that "[t]he purpose of the common interest doctrine is to allow parties with a common interest to share information when litigation is imminent or anticipated" and that, like work product protection, its justification is to "conserve[] litigation resources and promote[] fairness").

In contrast, courts such as the First Department that apply the common interest doctrine outside the context of litigation or its shadow conceive of the doctrine as furthering social benefits that are untethered to the adversary process or trial efficiency – *i.e.*, "encouraging parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly." (R. xvii, Order at 8 (citation and quotation marks omitted)). In so

doing, these courts effectively create a new privilege that "exists to advance social policies beyond the litigation context," rather than "[a] judicially administered doctrine of confidentiality" that, like the joint defense privilege, "exists to serve policies related to the litigation." Bartel, *supra*, at 918-19.

By dispensing with the litigation requirement for the common interest doctrine, the First Department transformed a doctrine that was confined to effective litigation management into a privilege aimed at all manner of commercial and other activities. In essence, that would create a new privilege, which is a function of the Legislature, not the courts. *See, e.g.*, Ronald N. Jonakait et al., New York Evidentiary Foundations § 218, at 214 (2d ed. 1998) ("The Court of Appeals has indicated that privileges should be created not by the courts, but only by the legislature.") (citing *People ex rel. Mooney v. Sheriff of N.Y. County*, 269 N.Y. 291, 295 (1936)).

Accordingly, continuing the litigation requirement will ensure that the common interest doctrine remains consistent with its roots in the joint interest privilege.

5. The Litigation Requirement Properly Accounts for the Difference in Scope Between the Attorney-Client Privilege and the Common Interest Doctrine

The First Department believed that there was an incongruity between on the one hand, restricting the common interest doctrine to the litigation setting

and on the other, recognizing the attorney-client privilege (which the doctrine protects) in a variety of non-litigation contexts.[12] But when the grounds for the two protections are examined more closely, their similarities dissolve, and any incongruity disappears.

As critics of an expansive common interest doctrine have recognized, shielding attorney-client communications disclosed to a third party – as the common interest doctrine does – does nothing to advance the attorney-client privilege's goal of encouraging clients to be candid and thorough with their attorneys. Giesel, *supra*, at 545-51; Mahaffey, *supra*, at 683; Craig S. Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 Notre Dame L. Rev. 1449, 1514-31 (2002); Bartel, *supra*, at 915-16; Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney*

[12] This difference has been noted by courts that have recognized the litigation requirement for the common interest doctrine. *E.g.*, *Parisi*, 172 Misc. 2d at 956 (observing that "[o]n its face, this joint defense/common interest privilege appears to be considerably narrower than the original concept from which it springs" because "the attorney-client privilege applies to all communications between client and lawyer when legal advice is sought — whether or not litigation is ongoing or even contemplated," whereas the common interest doctrine applies "in or in anticipation of litigation"); *accord Megan-Racine*, 189 B.R. at 573 & n.8; *see also* 3-34 N.Y. Crim. Practice § 34.02 (2014) ("Since the attorney-client privilege may be applicable even in the absence of actual litigation, the question arises whether multiple clients mutually meeting with counsel can ever be said to be asserting a 'common defense'; if there is no litigation, it would seem to follow there is no 'defense.' Some courts have resolved this problem by concluding that the privilege would apply to multi-party meetings in anticipation of potential litigation . . . .").

*Ethics, and the Joint Defense Doctrine*, 58 Tex. L. Rev. 809, 839 (1980). Indeed, due to the fundamental differences between the attorney-client privilege and the common interest doctrine, many of these commentators have argued that the latter is an independent privilege all its own.

Moreover, the common interest doctrine necessarily applies only when the confidentiality essential to the attorney-client privilege is breached. By excusing the requirement that attorney-client communications be kept confidential between the attorney and client, the common interest doctrine does away with a limitation that "is intended to restrict the scope of communications shielded by the attorney-client privilege to those that would not have occurred but for the existence of the privilege. If a client is willing to communicate in the presence of a third party who may be questioned in a legal proceeding, then he cannot be said to have relied upon the privilege in communicating with an attorney . . . ." Lerner, *supra*, at 1477. In other words, the confidentiality limitation operates to ensure that the privilege stimulates socially beneficial communications that would not otherwise have occurred, instead of immunizing communications that would have taken place in any event. *See* 6B Edward J. Imwinkelried, The New Wigmore: A Treatise on Evidence § 6.8, at 787 (2d ed. 2009) ("The requirement of confidentiality flows from the instrumental rationale from the privilege; if the client is willing to let others know what he has told the lawyer, there is no need to provide the incentive

of the privilege to encourage him to talk.") (citation omitted); Leslie, *supra*, at 33 ("[T]he confidentiality requirement exists to limit the exclusion of reliable evidence by ensuring that the privilege applies only to those statements that would not have been made absent the privilege.").

Because the common interest doctrine allows for departures from this confidentiality requirement, absent the litigation requirement, it could be stretched to permit far more secrecy than is needed to stimulate the attorney-client dialogue that it seeks to foster. The litigation requirement thus operates as a necessary limit on the scope of the common interest doctrine, ensuring that the doctrine's protections are targeted at communications that would not occur without that protection. *See* Point I(E)(1) *supra*.

6. Business Policy Does Not Justify Eliminating the Litigation Requirement

Central to the First Department's ruling was its determination that business and legal policy called for New York courts to recognize a new rule of privilege. (R. xxiii, Order at 14). But even without the benefit of this newly pronounced protection, business dealings and other joint endeavors were successfully consummated every single day. And without this additional protection in place for two decades, New York has managed to remain the nation's financial capital and commercial hub. Moreover, as discussed in Point I(F) below,

various other jurisdictions insist on the litigation prong of the common interest doctrine so there is no unlevel playing field for New York.

The First Department explained its holding by reasoning that the parties to the Merger Plan were entitled to protection because they "required the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction," and the failure to secure such advice "would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel." But there can be no serious dispute that even absent a common interest doctrine that negates a privilege waiver upon such sharing of legal advice, BAC and Countrywide would still have closed their merger here. Instead, they would have found a less intrusive way to minimize the risk of running afoul of the law.

Certainly, for years upon years before the First Department adopted this new rule, businesses were sufficiently incentivized to coordinate their transactions and other joint ventures so as to comply with legal and regulatory requirements. The very fact that the Challenged Communications took place in 2008, more than six years before the panel admittedly broke stride with existing New York law and discarded the longstanding litigation requirement (R. xi, xx, Order at 2, 11), confirms that BAC and Countrywide did not need judicial

immunity from discovery to induce them to exchange information helpful to completing their merger.

In short, the "business policy" reasons identified by the First Department do not justify abandoning established New York precedent, which recognizes the litigation requirement.

7. Continuing the Litigation Requirement Respects the Legislature's Role in Defining Evidentiary Privileges

The reasons to continue recognizing the litigation requirement are particularly strong in New York. Unlike in the federal system[13] and many states, our State's privilege rules are enacted by the Legislature – not created by the courts. As such, "[w]ith the rarest of exceptions, and then only where there has been a strong showing that the harm to the public interest from disclosure outweighs the interest of the litigant seeking disclosure or that disclosure would impair fundamental rights, New York courts have deferred to the Legislature as to the creation of any new evidentiary privilege." *Lamitie v. Emerson Elec. Co.*, 142 A.D.2d 293, 298-99 (3d Dep't 1988) (internal citations omitted); *see also Matter of A&M*, 61 A.D.2d 426, 434-35 (4th Dep't 1978) ("[T]he creation of a privilege devolves exclusively on the Legislature."). As a result, it is the Legislature's province to choose whether to create new impediments to the truth-seeking process in the form of privilege rules. Hutter, *supra*, at 3, col 1 ("Traditionally, the New

[13] *See* Fed. R. Evid. 501.

York courts have deferred to the Legislature as to the creation of any new evidentiary privilege and only in 'compelling circumstances' will they block the truth-seeking process in litigation by broadening the classes of privileged communications.").

The First Department's unprecedented expansion of the common interest doctrine represents precisely the sort of evidentiary privilege-making that our State's courts have been cautious to avoid. The panel's enlargement of the common interest protection is even more suspect given that the Legislature has already considered – and decided against adopting – a proposal to extend the attorney-client privilege to parties sharing a "common interest," without any limitation to litigation. *See* N.Y. Proposed Code Evid. § 503(b)(3) (1980). Specifically, the Legislature rejected a codification of the attorney client-privilege submitted in the 1982 Legislative Session that would have enlarged the privilege to cover "confidential communications . . . made for the purpose of facilitating the rendition of professional legal services to the client . . . by [the client] or his lawyer to a lawyer representing another in a matter of common interest." *Id.*; *see also* Bernard S. Meyer et al., *The History of the New York Court of Appeals: 1932-2003* 772 (1st ed. 2006) (noting that the proposed code of evidence that the Legislature rejected in 1982 "would have changed much of New York law by codifying the substance of the federal rules").

As this Court has recognized, it would undermine the legislative function to enact by judicial fiat an evidentiary privilege that the Legislature has specifically declined to adopt.[14] *People ex rel. Mooney v. Sheriff of N.Y. County*, 269 N.Y. 291, 295 (1936) (declining to recognize privilege for reporters when the Legislature had failed to pass prior proposals to create such a privilege by statute and observing that "[i]f that is to be done, it should be done by the Legislature which has thus far refused to enact such legislation"); *see also Univ. of Pa. v. Equal Emp't Opportunity Comm'n*, 493 U.S. 182, 189 (1990) ("We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.").

Accordingly, if the litigation requirement is to be abandoned, it should be done by the Legislature which is best positioned to balance all the competing policy issues.

[14] Nor can it be said that the First Department's rule merely enunciates a privilege rule long established in the law of other states; to the contrary, as one law journal article reported in 1972, "[n]o American case ha[d] allowed a privilege for a joint conference in a situation totally unrelated to litigation." *The Attorney-Client Privilege in Multiple Party Situations*, 8 Colum. J.L. & Soc. Probs. 179, 187 (1971-1972). Case law to that point had imposed an "apparent requirement that there be a nexus between the communication and litigation." *Id.* at 194.

### F. Myriad Other Jurisdictions Have Tied the Common Interest Doctrine to Litigation

If this Court continues the well-established boundaries of the common interest doctrine that the First Department upended, New York would remain one of a large number of federal courts and states that have imposed a litigation requirement for the common interest doctrine.

Notwithstanding the First Department's statement that applying the common interest doctrine outside the litigation context is "the federal approach" (R. xix, Order at 10), many federal courts have recognized the litigation requirement. Indeed, a majority of the federal courts of appeals have either expressly or implicitly conditioned the doctrine's invocation on a showing that litigation was at least reasonably anticipated at the time of the communication.[15]

[15] *In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001) ("The rationale for recognizing joint defense agreements is that they permit parties to share information pertinent to each others' defenses. . . . In an adversarial proceeding, a party's entitlement to this enhanced veil of confidentiality can be justified on policy grounds. But outside the context of actual or prospective litigation, there is more vice than virtue in such agreements.") (citation omitted); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (explaining that "the rationale for the joint defense rule" is that "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims"); *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 711 (5th Cir. 2001) ("[T]here must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might some day result in litigation, before communications between one possible future co-defendant and another . . . could qualify for protection."); *United States v. Moss*, 9 F.3d 543, 550 (6th Cir. 1993) ("A joint defense extension of the attorney-client privilege has been applied to confidential communications shared between co-defendants which are 'part of an on-going and joint effort to set up a common defense strategy.'") (citations omitted); *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (quoting *Grand Jury Subpoenas*, 902 F.2d at 249); *In re Qwest Commc'ns. Int'l Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006)( explaining that "the 'joint defense' or 'common interest' doctrine provides an exception to waiver because disclosure advances the

Moreover, at least 17 states, through statutory enactment or judicial opinion, have required litigation as a lodestar for determining whether a common legal interest warranting protection exists.[16]

Just last year, the New Jersey Supreme Court upheld a litigation requirement for the common interest doctrine. New Jersey's highest court observed that the purpose of the common interest doctrine is to "offer[] all parties

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representation of the party and the attorney's preparation of the case.") (citations omitted); *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003) (explaining that the joint defense privilege is "appropriate" in order "that co-defendants be given the opportunity to collaborate on defense tactics and exchange information in a confidential fashion without forcing the defendants to hire the same attorney"); *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (recognizing "common interests" where the parties "anticipate litigation against a common adversary on the same issue or issues" because "they have strong common interests in sharing the fruit of the trial preparation efforts."); *see* 6 Moore's Federal Practice § 26.49[5][b] (Matthew Bender 2015) ("Two types of communications are protected under the common legal interest privilege: (1) communications between codefendants in actual litigation and their counsel; and (2) communications between potential codefendants and their counsel."). The Seventh Circuit's sweeping statement in *United States v. BDO Seidman, LLP* – one of the few federal Courts of Appeals decisions to have rejected the litigation requirement – that "[a]t least five of our sister circuits have recognized that the threat of litigation is not a prerequisite to the common interest doctrine" is incorrect. 492 F.3d 806, 816 n.6 (7th Cir. 2007). Indeed, four of the five decisions cited by the Seventh Circuit in support of that assertion recognized only that litigation need not be pending for the doctrine to apply. *In re Grand Jury Subpoena*, 274 F.3d at 572; *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir.1996); *Schwimmer*, 892 F.2d at 244 (2d Cir.1989); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987), *aff'd in part and vacated in part on other grounds, United States v. Zolin*, 491 U.S. 554 (1989). None of those four decisions stated that the doctrine could even apply absent a "threat of litigation," and indeed, the party asserting the common interest doctrine in each case was facing the threat of litigation at the time of the communication.

[16] Ark. R. Evid. 502(b)(3); Haw. R. Evid. 503(b)(3); Ky. R. Evid. 503(b)(3); Me. R. Evid. 502(b)(3); Miss. R. Evid. 502(b)(3); N.D.R. Evid. 502(b)(3); N.H.R. Evid. 502(b)(3);12 Okla. Stat. § 2502(B)(3); S.D.C.L. § 19-13-3(3); Tex. R. Evid. 503(b)(1)(C); Vt. R. Evid. 502(b)(3); *O'Boyle v. Borough of Longport*, 94 A.3d 299, 316-17 (N.J. 2014); *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 2013-Ohio-3508, ¶¶ 14-15 (Ohio Ct. App. 2013); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 214-15 (Tenn. Ct. App. 2002); *Gallagher v. Attorney Gen.*, 787 A.2d 777, 784-85 (Md. Ct. Spec. App. 2001); *Hicks v. Commonwealth of Virginia*, 439 S.E.2d 414, 416 (Va. Ct. App. 1994); *Visual Scene, Inc. v. Pilkington Bros., Plc.*, 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987); *see also* Uniform R. Evid. 502(b).

to the exchange the real possibility for better representation by making more information available to craft a position and inform decision-making in anticipation of or in the course of litigation." *O'Boyle*, 94 A.3d at 316 (citation omitted). As a result, the New Jersey Supreme Court adopted the rule that the doctrine applies, *inter alia*, only "if the disclosure is made due to actual or anticipated litigation for the purpose of furthering a common interest." *Id.* at 317. This rule, the court concluded, "strikes an acceptable balance" between encouraging litigation-related communications between commonly interested parties and curbing the "intru[sion] on the fact-finding function of litigation." *Id.*

Reaffirming the litigation requirement would therefore retain New York's place among many other jurisdictions that have acknowledged the wisdom of this limitation on the common interest doctrine.

## POINT II

### BAC AND COUNTRYWIDE'S INTERESTS IN CLOSING THEIR MERGER DOES NOT AMOUNT TO A COMMON LEGAL INTEREST

In the alternative, even if this Court were to affirm the First Department's abandonment of the litigation requirement, it should conclude that these two business counterparties' shared desire to close a merger transaction, without more, is not a "common legal interest" that qualifies for protection.

Indeed, their interests are neither predominantly "common" (*i.e.*, overlapping) nor legal in nature.

First, it is incorrect to assume that merely because parties want to see a deal completed, they have objectives that are sufficiently interlocking to properly regard them as "common interests." Even after parties to a prospective merger or acquisition arrive at a preliminary agreement regarding the contours of the transaction, the deal's closing is far from a *fait accompli*. Each party has an interest adverse to its counterparty in investigating and determining whether the counterparty has concealed any potential sources of future liability. *See, e.g.*, Eleanor M. Fox and Byron E. Fox, Corporate Acquisitions and Mergers (May 2015), § 2B.03 (noting that "[a]s a matter of practice, both sides will want to conduct due diligence investigations and the scope and nature of the investigation by each side will depend on its power and leverage over the other" and that "[t]he usual practice, . . . at least in sizable transactions," is execution of a detailed agreement "that contemplate[s] extensive due diligence and provide[s] grounds for termination if adverse information is adduced"). Moreover, until the merger closes, the parties have diametrically opposing interests in trying to extract the best deal for themselves at the expense of the other.

BAC and Countrywide are no exception. Their Merger Plan provided, as a condition precedent to "the obligation of [BAC] . . . to effect the Merger," that

Countrywide had made true and correct representations that "any material liability or obligation of any nature whatsoever (whether absolute, accrued, contingent, determined, determinable or otherwise and whether due or to become due)" had been fully disclosed. (R. 91; BAC Form S-4/A filed May 28, 2008, at A-11, A-49). The parties also contemplated that the Merger Plan, including the provision setting forth the consideration to be exchanged, could be amended or terminated if either party breached a representation or warranty in the Plan. (BAC Form S-4/A filed May 28, 2008, at A-2, A-51). Confirming that the parties did not view closing of the merger as a certainty, they included a provision in the Merger Plan requiring Countrywide to pay BAC a termination fee of $160 million if the deal fell through under certain specified circumstances. (R. 69; BAC Form S-4/A filed May 28, 2008, at A-52). This shows that even though they were bound by agreement to the Merger Plan under certain conditions, BAC and Countrywide contemplated being pitted against one another in many respects unless and until the transaction closed.

Second, a common interest in completing a business deal is not a legal interest and therefore is not sufficient to warrant protection under the common interest doctrine. *See, e.g.*, *Hyatt*, 105 A.D.3d at 205-06; *Grande Prairie*, No. 600926/03, 2004 N.Y. Misc. LEXIS 1684, at *4; *see also Terra Nova*, 211 F. Supp. 2d at 496-98. Even the panel below recognized that to qualify for

protection, the common interest in question must be a "legal" one. (R. xv, Order at 6 (recognizing that one of the doctrine's requirements is that "the communication be made for the purpose of furthering a *legal* interest or strategy common to the parties") (emphasis added)).

When counterparties to a commercial transaction choose to share privileged information but do not anticipate litigation in which they share a joint interest – as the panel found was the case here – they are motivated primarily by their business interests in closing a financially advantageous deal. *See* cases cited at Point I(E)(2) *supra*. This is not a protectable legal interest. "Once a corporate decision is made to disclose [privileged documents] for commercial purposes, no matter what the economic imperatives, the privilege is lost." *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982).

Many courts have agreed that before the closing of a merger or acquisition, the shared objective of counterparties in completing the transaction does not rise to the level of a protectable common interest. *E.g.*, *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 579 (N.D. Cal. 2007) (following view that the common-interest doctrine does not "extend[] generally to disclosures made in connection with the prospective purchase of a business," and collecting cases); *accord Net2Phone, Inc. v. eBay, Inc.*, 2008 U.S. Dist. LEXIS 50451, at *28-30 (D.N.J. June 25, 2008) (holding that pre-acquisition communications were not

privileged because, *inter alia*, the parties "were adverse in the price per share" to be paid for the target and "there is no indication that the communications associated with the tender offer were disclosed to further a common legal strategy or joint interest in pending or anticipated litigation"; rather, "the information was shared to further a commercial transaction between legally separate entities"); *Advanced Neuromodulation Sys., Inc. v. Advanced Bionics Corp.*, 2005 U.S. Dist. LEXIS 47692, at *4-5 (E.D. Tex. Oct. 26, 2005) (holding that defendant waived privilege over documents and communications that it shared with a merger counterparty prior to merger because the counterparty "is not a co-defendant and was not a potential co-defendant in any future litigation at the time Bionics disclosed privileged information to it"); *Zirn v. VLI Corp.*, 1990 Del. Ch. LEXIS 135, at *21-23 (Del. Ch. Ct. Aug. 13, 1990), *rev'd on other grounds*, 621 A.2d 773 (Del. 1993) (holding that communications between counterparties to prospective merger during period between time when original merger agreement was signed and revised merger agreement was executed were not subject to common-interest doctrine because the parties "still had adverse interests in renegotiating and restructuring the initial agreement"); *see also Infinite Energy, Inc. v. Econnergy Energy Co.*, 2008 U.S. Dist. LEXIS 63493, at *7-8 (S.D. Fla. July 23, 2008) (holding that communications between counterparty to planned merger and one of

its large shareholders who was aligned in "getting the deal done and selling the company" were "business related" and not protected).[17]

Most relevantly, just last year, a federal court faced with a substantially similar fact pattern as the one presented here – *i.e.*, two parties to a merger agreement invoking the common interest doctrine over pre-merger communications – concluded that such communications could not be withheld from discovery. *Integrated Global Concepts, Inc. v. j2 Global, Inc.*, 2014 U.S. Dist. LEXIS 7294, at *5-6 (N.D. Cal. Jan. 21, 2014). The court reasoned that "the communications in question fall outside the scope of the common-interest privilege" because, among other things, the parties "faced no litigation" or "impending threat of litigation" at the time, and there was no "evidence of a common legal foe." *Id.* at *6. As a result, the Court found no common interest worthy of protection.

Unless the parties to a prospective merger or acquisition share a legitimately legal interest – *e.g.*, anticipating litigation in which they have a common legal objective in prosecuting or defending against a claim – they cannot dress up their commercial goals in the guise of purported legal concerns about conforming their deal to the law. If the rule were otherwise, the common-interest

[17] We recognize that some federal courts have reached the opposite conclusion. *See, e.g.*, *In re JP Morgan Chase & Co. Sec. Litig.*, 2007 U.S. Dist. LEXIS 60095, at *15-16 (N.D. Ill. Aug. 13, 2007). Those decisions, however, are inconsistent with New York's narrow construction of the attorney-client privilege. *See*, *e.g.*, *Jacqueline F.*, 47 N.Y.2d at 218.

doctrine would shield communications exchanged in every business deal, since every deal has counterparties who want to complete it consistent with legal requirements. New York should not countenance such a limitless expansion of the attorney-client privilege.

## CONCLUSION

For all the foregoing reasons, the First Department's order should be reversed, and the matter should be remanded to the IAS Court, or at its direction to the Special Referee, for further proceedings consistent with this Court's order.

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Respectfully submitted,

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