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Court of Appeals

of the

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. and COUNTRYWIDE FINANCIAL CORP.,

Defendants.

-and-

BANK OF AMERICA CORP.,

Defendant-Respondent.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ASSOCIATION OF CORPORATE COUNSEL AS AMICI CURIAE IN SUPPORT OF DEFENDANT-RESPONDENT

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**Pro hac vice* motion pending

March 17, 2016

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the Chamber) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company, and no publicly held company has ten percent or greater ownership interest in the Chamber.

The Association of Corporate Counsel (ACC) is a non-profit, tax-exempt organization incorporated in the District of Columbia. ACC has no parent company, and no publicly held company has ten percent or greater ownership interest in ACC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the Chamber) is the nation's largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community.

The Association of Corporate Counsel (ACC) is a global bar association that promotes the common professional and business interests of in-house counsel. ACC has over 40,000 members who are in-house lawyers employed by over 10,000 organizations in more than 85 countries. For over 30 years, ACC has advocated across the country to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role and concerns of in-house counsel and the legal departments in which they work.

Resolution of the issue presented in this case—whether the common-interest privilege applies to communications shared by parties to a transaction that share legal interests even though they do not anticipate litigation arising from the transaction—will influence how many companies, including many Chamber

members and companies where ACC members work, structure deals both within and outside New York. The Chamber and ACC therefore offer this brief to aid the Court in understanding how the First Department's sensible interpretation of the common-interest privilege both accords with precedent and allows businesses to seek and share candid legal advice that is critical to many of their activities.

PRELIMINARY STATEMENT

Businesses that operate in New York (and around the country) undertake transactions every day that require them to get legal advice in collaboration with other companies. That collaboration is often necessary not only to ensure the success of the transactions but also to enable the participating companies to comply with the complex regulatory requirements they typically face. Ambac argues that parties to a deal only share a legal interest worth protecting when they anticipate that litigation may result from their interaction. The First Department's decision correctly recognizes, on the contrary, that sophisticated companies familiar with privilege rules are less likely to seek counsel if they fear a privilege waiver, regardless of whether they foresee litigation, and that they will then lack the information they need to obey regulations and satisfy their duties to shareholders. The experience of Chamber and ACC members provides practical confirmation of the wisdom of the First Department's approach. The Chamber and ACC thus urge

the Court to affirm the First Department's decision and decline to restrict the common-interest privilege to situations in which parties expect litigation.

ARGUMENT

I. LIMITING THE COMMON-INTEREST PRIVILEGE TO SITUATIONS OF ANTICIPATED LITIGATION WILL DISCOURAGE BUSINESSES FROM OBTAINING AND SHARING LEGAL ADVICE THAT ENABLES THEM TO COMPLY WITH THE LAW

The First Department applied the common-interest privilege to shield legal advice that Appellees Bank of America Corp. (BAC) and Countrywide Financial Corp. (CFC) shared pursuant to a merger agreement because the two companies shared a common legal interest even absent a specific expectation of litigation. In doing so, the court wisely recognized that "business entities often have important legal interests to protect even without the looming specter of litigation." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129, 130-131 (2014). The First Department's well-reasoned decision is supported by the experience of companies that operate in New York and seek legal advice on a daily basis to navigate complex regulatory requirements and satisfy their duties to shareholders.

A. The Common-Interest Privilege Enables Parties With Shared Legal Interests To Conform Their Conduct To The Law

Contrary to Ambac's attempt to divorce the common-interest doctrine from its origins, Ambac Br. 42-45, Ambac Reply Br. 24-26, it is an "'extension of the attorney client privilege.'" *United States v. Schwimmer*, 892 F.2d 237, 243 (2d

Cir. 1989) (quoting *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987)). The common-interest doctrine serves as an exception to the rule that the attorney-client privilege is waived when privileged material is disclosed to a third party. *See, e.g., In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 66 F. Supp. 3d 406, 410 (S.D.N.Y. 2014). As such, it "affords two parties with a common legal interest a safe harbor in which they can openly share privileged information without risking the wider dissemination of that information." *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-2192, 2006 WL 3715927, at *1 (D. Kan. Dec. 12, 2006) (unpublished).

Like the attorney-client privilege generally, the common-interest privilege promotes compliance with legal requirements in both the adversarial and transactional realms. "[T]he attorney-client privilege is not tied to the contemplation of litigation," because "[l]egal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct." *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 380 (1991). Were that advice subject to disclosure, clients would be less likely to consult with counsel and more likely to inadvertently break the law. *See, e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 361 (3d Cir. 2007), *as amended* (Oct. 12, 2007) ("*Upjohn* counsels a more nuanced inquiry into whether according a type of communication protection is likely to encourage

compliance-enhancing communication[.]"); *see also Liberman v. Gelstein*, 80 N.Y.2d 429, 437 (1992).

As an outgrowth of the attorney-client privilege, the common-interest privilege serves the same core goals: "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Candid legal advice serves not only the client's interests, but those of the public generally, by ensuring that clients are advised how "'to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities.'" *Sandra T.E. v. South Berwyn Sch. Dist. 100*, 600 F.3d 612, 621 (7th Cir. 2010) (quoting *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007)).

B. Engrafting A Litigation Requirement Onto The Common-Interest Privilege Would Chill Valuable Legal Advice In A Wide Range Of Transactions

Companies seek legal advice in a range of situations—not just when they think they might be sued—and a litigation requirement for application of the common-interest privilege would ignore the vast range of other situations in which business clients seek legal counsel. As the U.S. Supreme Court has recognized, "[i]n light of the vast and complicated array of regulatory legislation confronting

the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Upjohn*, 449 U.S. at 392 (internal quotation marks omitted). Companies need legal advice not just about actual or anticipated litigation, but "concerning compliance with securities and tax laws, foreign laws, currency regulations, [and] duties to shareholders." *Id.* at 394. Yet companies' willingness to obtain and share this advice would be gravely chilled if they lost the privilege for that advice simply because they obtained it for compliance reasons, rather than only after litigation was afoot.

1. Imposing a litigation requirement would chill important post-negotiation discussions between parties to a merger agreement

The communications Ambac seeks were exchanged after BAC and CFC negotiated a merger agreement and completed due diligence on the deal. Their extensive merger agreement evidences the common legal interests the parties shared in confronting the tax, securities, employment, and other legal implications of the merger. In addition to SEC reporting requirements BAC details in its brief, BAC Br. 10-11, the board of directors of a Delaware corporation must adopt a detailed resolution approving the merger agreement to be put to a shareholder vote, *see* Del. Code Ann. tit. 8, § 251, and must attend to their duties of care and loyalty in supervising all aspects of the merger.

As the First Department recognized, foisting a litigation requirement on parties to a merger agreement would discourage them "from seeking and sharing that advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel." *Ambac Assur. Corp.*, 124 A.D.3d at 137. That, in turn, "would make poor legal as well as poor business policy." *Id.*

The goal of encouraging companies to conform their behavior to the law is best served by a rule that protects legal advice given in the transactional context, especially when the transaction has ramifications for the parties' regulatory duties and for corporate officers' duty of care to shareholders. Where parties demonstrate their commitment to these joint legal interests by undertaking the expense of negotiating a merger agreement and conducting due diligence, it is appropriate for the common-interest privilege to shield their communications. *See* King, Comment, *The Common Interest Doctrine and Disclosures During Negotiations for Substantial Transactions*, 74 U. Chi. L. Rev. 1411, 1412, 1435-1439 (2007) (common-interest privilege should presumptively apply to "substantial transactions" such as mergers, sales of assets, or subsidiary divestitures that cause an automatic transfer of liabilities and in which parties incur significant expenses and exchange confidential information during due diligence).

2. Imposing a litigation requirement would chill legal advice in many other types of corporate transactions

Mergers are by no means the only kind of business transaction in which the common-interest privilege may appropriately be applied to promote the seeking of candid legal advice and thus compliance with the law. In a number of contexts, the common-interest privilege enables businesses to "benefit from planning their activities based on sound legal advice predicated upon open communication." *BDO Seidman, LLP*, 492 F.3d at 816.

Intellectual Property. In the acquisition of intellectual property, patentee and acquirer have a shared interest in assuring the validity and enforceability of patents. *Morvil Tech., LLC v. Ablation Frontiers, Inc.*, No. 10-CV-2088, 2012 WL 760603, at *2-3 (S.D. Cal. Mar. 8, 2012) (unpublished) (affording protection to legal advice identifying products covered by specific patents despite no indication parties would face joint litigation); *see also BriteSmile, Inc. v. Discus Dental Inc.*, No. C 02-3220, 2004 WL 2271589, at *2 (N.D. Cal. Aug. 10, 2004) (unpublished) (shielding documents defendant revealed to third party from whom it acquired patent because of their "common legal interest in the issue of whether the technology ... was patentable and whether it infringed any patent"), *aff'd*, No. C 02-3220, 2004 WL 3331770 (N.D. Cal. Oct. 26, 2004) (unpublished). The Federal Circuit has accordingly applied the common-interest privilege to communications between a patentee and licensee, explaining that protecting

communications made to ensure compliance with patent law "may avert litigation." *In re Regents of Univ. of California*, 101 F.3d 1386, 1390-1391 (Fed. Cir. 1996); *see also Edward Lowe Indus., Inc. v. Oil-Dri Corp. of Am.*, No. 94 C 7568, 1995 WL 410979, at *3 (N.D. Ill. July 11, 1995) (unpublished) ("[T]he court applies the common interest doctrine insofar as the documents defendants withheld clearly address either anticipated litigation or a joint effort to avoid litigation."). Copyright licensees often have a similar need to share legal information and thus have also been accorded the protection of the common-interest privilege. *See United States v. American Soc'y of Composers, Authors & Publishers*, No. CIV. 13-95, 1996 WL 633220, at *2 (S.D.N.Y. Nov. 1, 1996) (unpublished) (cable providers likely entitled to protection for discussions related to legal issues arising from music performance rights fees).

Tax and Corporate Restructuring. The Second Circuit's recent application of the common-interest privilege in *Schaeffler v. United States*, 806 F.3d 34 (2015), reveals another situation in which parties must share legal opinions. There, a consortium of banks sought tax advice on the implications of extending additional credit to a borrower for its corporate restructuring. Without the additional line of credit, the company could have faced insolvency and defaulted on the consortium's initial multi-billion dollar loan. The banks thus needed to ensure the restructuring would obtain certain tax treatment. *Id.* at 37.

Absent the certainty that their legal communications in aid of that goal would be shielded from disclosure, the parties would have been unlikely to have exchanged legal advice, and the deal might not have gone through. *See also United States v. United Techs. Corp.*, 979 F. Supp. 108, 112 (D. Conn. 1997) (shielding from discovery shared documents that "pertain to the development of a common legal strategy regarding the tax structure" of a consortium to be formed by several companies).

Joint Ventures. Joint venturers often have a similar need to share legal advice when they contemplate a relationship that implicates antitrust law. In *In re Sulfuric Acid Antitrust Litigation*, 235 F.R.D. 407, 416 (N.D. Ill. 2006), for example, the court applied the doctrine to a firm's internal legal memorandum—shared with another company in which it owned a controlling stake and with which it eventually integrated much of its operations—about the firm's compliance with antitrust law in marketing chemicals.

Public Regulatory Programs. Two state appellate cases that rejected a litigation requirement for the common-interest privilege illustrate its value in promoting compliance with regulatory obligations. In *Santa Fe Pacific Gold Corp. v. United Nuclear Corp.*, 175 P.3d 309 (N.M. Ct. App. 2007), the New Mexico Court of Appeals held that one company's "joining forces with [a second firm] to address the legal ramifications of existing environmental conditions" sufficed to

invoke the common-interest privilege without a contemplated judicial action. *Id.* at 316. Likewise, firms that cooperatively operate public utilities projects need to share legal advice concerning environmental regulations and legislation. In *Black v. Southwestern Water Conservation District*, 74 P.3d 462 (Colo. App. 2003), the Colorado Court of Appeals recognized that litigation is not required for the common-interest privilege to apply. The court treated as privileged legal memoranda that were "intended and reasonably believed to be part of an on-going and joint effort to set up a common legal strategy" to analyze proposed legislation that would affect a joint water project. *Id.* at 469.

In situations where parties' sharing of legal advice is critical to complying with the law and fulfilling legal duties to shareholders, a rule limiting the common-interest privilege to litigation would only stifle attempts to comply with these fundamental responsibilities.

C. The Weight Of Legal Authority Rejects Limiting The Common-Interest Privilege To Anticipated Litigation

The rule adopted by the First Department promotes a consistent legal environment across the jurisdictions in which parties to sophisticated business transactions typically litigate. The Delaware Court of Chancery, which, like the First Department, has deep experience with complex commercial cases, has similarly applied the common-interest privilege to documents exchanged outside of litigation. *See 3Com Corp. v. Diamond II Holdings, Inc.*, No. 3933, 2010 WL

2280734 (Del. Ch. May 31, 2010) (unpublished) (parties to a merger entitled to privilege protection because their common interest is "so parallel and non-adverse that, at least with respect to the transaction involved, the two parties may be regarded as acting as joint venturers" (internal citation and quotation mark omitted)).

The overwhelming weight of authority in the federal courts also holds that "litigation need not be actual or imminent for communications to be within the common interest doctrine." *BDO Seidman, LLP*, 492 F.3d at 816 n.6 (collecting decisions from the First, Fourth, Second, Ninth, and Federal Circuits). These courts have correctly concluded that a litigation requirement is illogical because "'[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter.'" *Schwimmer*, 892 F.2d at 243-244. The rationale behind this majority rule is simple:

> Applying the common interest doctrine to the full range of communications otherwise protected by the attorney-client privilege encourages parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly. ... Reason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication.

BDO Seidman, LLP, 492 F.3d at 815-816 (internal citations and quotation marks omitted).

Leading commentators have also endorsed the view that the common-interest privilege should not be restricted to situations of anticipated litigation. The most prominent authorities on the law of evidence agree that the common-interest privilege, properly applied, has no litigation requirement. *See, e.g.*, 1 Rice, *Attorney-Client Privilege in the United States* § 4.35 (2015) ("The 'community of interest' rule is distinguished from the 'joint defense' rule by the fact that the collaboration between the parties need not be related to a pending legal action."). Judge Weinstein, in analyzing Federal Rule of Evidence 503, explains that "[t]he [common-interest] privilege should apply not only if litigation is current or imminent but whenever the communication is made in order to facilitate the rendition of legal services to each of the clients involved." 3 *Weinstein's Federal Evidence* § 503.21[2] (Brodin ed., 2016). The Restatement of the Law Governing Lawyers agrees that the common-interest privilege should attach to any otherwise-privileged communication between parties on a matter of common interest, whether "litigated or nonlitigated." *Restatement (Third) of the Law Governing Lawyers* § 76 (Am. Law Inst. 2000); *see also id.* § 76, comment c (exchange of communications "may pertain to litigation or to other matters").[1]

[1] Ambac's alarmist claim that the litigation requirement is the only dike holding back a flood of privilege claims is unwarranted. As BAC notes, two clear limiting principles prevent the common-interest privilege from shielding large swaths of shared communications from discovery. First, communications must be attorney-client privileged, an already narrow category. Second, the parties must demonstrate an interest that is both *common and legal*. Courts are well-equipped to police this boundary and routinely do so. *See, e.g.*, *Nidec Corp. v.*

II. A RULE LIMITING THE COMMON-INTEREST PRIVILEGE TO LITIGATION WOULD DISCOURAGE CORPORATE TRANSACTIONS IN NEW YORK

When parties to a complex transaction do not share legal advice, it creates more litigation and less compliance with the law. Accordingly, narrowing the common-interest privilege by subjecting shared communications to discovery will only add to the cost of doing business in New York.

Ambac argues that parties to a transaction unlikely to result in litigation are unlikely to be dissuaded from sharing legal advice by the absence of the common-interest privilege, and that application of the privilege in such situations would tip the balance of evidence rules against discovery of relevant information without any concomitant benefit. Ambac Br. 28-30. On the contrary, the effectiveness of the attorney-client privilege guides corporate counsel's every decision, and counsel will be wary of advising clients to share materials with counterparties to a transaction if doing so might waive otherwise valid privilege. *See* Association of Corporate Counsel, Executive Summary, *Is the Attorney-Client Privilege Under*

Victor Co. of Japan, 249 F.R.D. 575, 578-580 (N.D. Cal. 2007) (recognizing common-interest doctrine does not require litigation, but declining to shield litigation abstract a firm shared with the potential bidder for a majority stake in the company because the parties shared the abstract to "further a commercial transaction in which the parties, if anything, have opposing interests."); *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1099-1100 (Ariz. Ct. App. 2003) (quoting Restatement rule that the doctrine applies in either "a litigated or nonlitigated matter," but holding that documents related to Arizona redistricting process did not pertain to a common legal interest because only one party was charged by the state constitution with implementing redistricting); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 512-513 (D. Conn. 1976) (observing that "the [common-interest] privilege need not be limited to legal consultations between corporations in litigation situations," but declining to shield from discovery an analysis of antitrust liability one party shared with its co-venturer, since the parties' interests were adverse because the latter was negotiating an exit from the joint venture).

Attack? 2-3 (2005) (finding that 95 percent of surveyed corporate counsel believe lack of privilege protection would "chill" clients' candor with their attorneys, and that a sizeable majority stated that employees of their clients were aware of and relied on the privilege in consulting counsel).

Parties to complex transactions that do not communicate about common legal issues because they fear a privilege waiver will have less information about the liabilities they may assume and potential violations of their legal obligations if they proceed with a transaction. They may be less likely to go forward with certain deals altogether.

It is telling that Ambac does not explain what "less intrusive way" BAC and CFC might have found to complete their merger in lieu of exchanging confidential legal opinions. *See* Ambac Br. 46. Perhaps Ambac intends that parties to a merger obtain joint representation, but this could lead to a raft of complications if the deal does not go through. For example, counsel in such a situation could be open to disqualification for a conflict of interest in subsequent litigation, depriving both parties of the continued assistance of the attorneys who guided them through the transaction. Apart from joint representation, under Ambac's proposed rule, the parties' only options would apparently be to abandon the merger or to avoid any communication about common legal issues lest they waive privilege.

The latter route could also invite legal trouble. As one court has observed,

> Unless it serves some significant interest courts should not create procedural doctrine that restricts communication between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of the business or product they are considering buying. Legal doctrine that impedes frank communication between buyers and sellers also sets the stage for more lawsuits, as buyers are more likely to be unpleasantly surprised by what they receive. By refusing to find waiver in these settings courts create an environment in which businesses can share more freely information that is relevant to their transactions. This policy lubricates business deals and encourages more openness in transactions of this nature.

Hewlett-Packard Co. v. Bausch & Lomb, Inc., 115 F.R.D. 308, 311 (N.D. Cal. 1987).

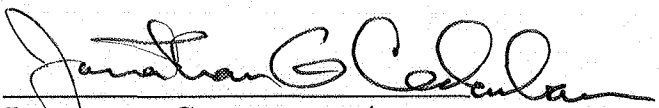
Any rule limiting the common-interest privilege to anticipated litigation would ignore the legal reality facing parties to complex transactions, and "threaten[] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392. Rather than fashion a rule that will lead to less regulatory compliance and more litigation, the Court should promote corporate compliance "'with the ever growing and increasingly complex body of public law,'" *In re Cty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036-1037 (2d Cir. 1984)), by endorsing the First Department's interpretation of the common-interest privilege.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the First Department.

Dated: March 17, 2016

Respectfully submitted,



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COURT OF APPEALS
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I, Leon T. Kenworthy, admitted to practice law in the state of New York, affirm under penalty of perjury that the following is true and correct.

1. I am over 18 years of age, and I am employed at Wilmer Cutler Pickering Hale and Dorr LLP. I am not a party to this action.

2. On March 17, 2016, a true and correct copy of the attached Brief of The Chamber Of Commerce of the United States and The Association of Corporate Counsel as Amici Curiae in Support of Defendant-Respondent was served by Federal Express upon:

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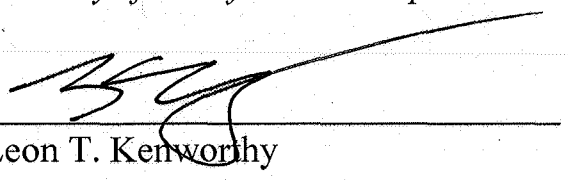

Leon T. Kenworthy

Executed on this
17th day of March, 2016