To be Argued by:
JONATHAN ROSENBERG
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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.

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RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Bank of America Corporation is a publicly held corporation whose shares are traded on the New York Stock Exchange. Bank of America Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Bank of America Corporation's direct and indirect subsidiaries as of December 31, 2014, are listed in Exhibit 21 of its 2014 Form 10-K, filed on February 25, 2015, with the Securities and Exchange Commission, and attached as Addendum A to this brief.

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PRELIMINARY STATEMENT[1]

The common-interest doctrine applies the attorney-client privilege to communications that parties share to further their common legal interests. There is no substantial dispute that BAC and CFC shared common legal interests in resolving the legal issues required to complete their 2008 merger transaction—in fact, the special referee in this case has already concluded that these merger parties confidentially shared all the substantive communications at issue to further their common legal interests. But Ambac maintains that the common-interest doctrine's protection should nevertheless fall away, simply because the many significant shared legal interests about which the parties communicated did not relate to pending or anticipated litigation. The Appellate Division correctly rejected that approach, consistent with the overwhelming majority of federal precedent and reasoned state-court decisions, as unnecessarily stifling legal advice to joint-venture parties with common legal interests.

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[1] This brief defines (i) Defendant-Respondent Bank of America Corporation as "BAC" (together with its subsidiaries, "Bank of America"), (ii) Defendant Countrywide Financial Corporation as "CFC," (iii) Defendant Countrywide Home Loans, Inc. as "CHL," (iv) Defendant Countrywide Securities Corporation as "CSC" (together with CFC and CHL, "Countrywide"), (v) Plaintiffs-Appellants Ambac Assurance Corp. and the Segregated Account of Ambac Assurance Corp. as "Ambac," (vi) the January 11, 2008 Agreement and Plan of Merger by and among CFC, BAC, and Red Oak Merger Corporation as the "Merger Agreement," and (vii) the merger transaction described in the Merger Agreement as the "Merger."

The purpose of the common-interest doctrine, like that of the attorney-client privilege from which it derives, is to encourage decisions based on full and frank legal advice. By allowing parties with common legal interests to share legal advice furthering those interests, the common-interest doctrine serves the public interest in facilitating compliance with the law and averting unnecessary litigation. In contrast, confining the common-interest doctrine to communications only about pending or anticipated litigation would *narrow* the attorney-client privilege and *discourage* parties with common legal interests from sharing among themselves the benefits of candid legal advice concerning those common interests, thereby frustrating legal compliance rather than facilitating it. Not surprisingly, Ambac is unable to provide a single persuasive reason for limiting the common-interest doctrine to the litigation context, and its arguments for imposing that artificial limitation are based on three key false premises.

First, Ambac postulates that the Appellate Division's decision *eliminated* an established New York law litigation limitation on the common-interest doctrine. There has never been, however, any such New York limitation. To the contrary, this Court long ago decided that no litigation requirement exists for shared communications between multiple clients represented by a single attorney, and Ambac offers no persuasive reason why the same rule should not apply where (as here) similarly situated clients are represented by multiple attorneys.

Second, Ambac contends that the common-interest doctrine should have the same litigation requirement as the work-product doctrine. The common-interest doctrine, however, does not derive from the work-product doctrine, but rather from the attorney-client privilege, which is not limited to litigation. And the work-product doctrine is by definition limited to litigation because it serves a litigation-specific purpose—protecting litigators' confidential strategy and papers from their adversaries—distinct from the broader purpose of the attorney-client privilege (and, thus, the common-interest doctrine). Ambac similarly asserts that a litigation requirement is the only way to prevent parties from shielding from disclosure communications made for a business, rather than legal, purpose; but the doctrine is already by its terms limited to *legal* communications shared to further a common *legal* interest, including (but not limited to) litigation strategy. Certainly, the majority of courts to have rejected Ambac's litigation requirement have had no trouble limiting the common-interest doctrine to its appropriate bounds, as the very authorities Ambac cites demonstrate.

Third, Ambac argues that a litigation limitation stems from the need to construe the common-interest doctrine narrowly, to blunt the doctrine's interference with litigation's truth-seeking function. That argument proves far too much: all privileges are construed narrowly, yet are nevertheless enforced because their benefits outweigh their costs. Moreover, the narrow construction courts

afford the attorney-client privilege necessarily translates to the derivative common-interest doctrine, thus winnowing down the communications potentially eligible for protection under that doctrine. And in any event, an arbitrary litigation limitation does not logically follow from a narrow-construction objective. Rather, the appropriate way to advance that objective is to limit the common-interest doctrine to documented situations where joint venturers confidentially communicate to obtain legal advice that furthers their genuine common legal—as opposed to business or personal—interests.

As the Appellate Division recognized, this case presents the quintessential example of two parties with common legal interests benefitting from shared legal advice addressing those interests. The relevant communications occurred after BAC and CFC had signed a merger agreement, and needed legal advice to navigate the many legal issues that arise in closing a merger involving heavily regulated public and banking-industry companies. Their merger agreement contractually bound the companies to work together to resolve those issues—including obtaining regulatory approval, filing required disclosures, reviewing the merger's ramifications on contractual obligations to third parties, analyzing tax-law consequences, and others—and the companies expressly agreed to share confidential information to facilitate those efforts. Every court to have considered the common-interest doctrine in a merger context such as this has held the doctrine

to apply. Whatever the outer bounds of the common-interest doctrine, this case does not remotely approach them.

There is thus no basis in law or policy for imposing on parties to a signed merger agreement a litigation limitation on their joint communications seeking and obtaining legal advice regarding merger-related legal issues. The Court should affirm the Appellate Division's well-reasoned opinion, and hold that the common-interest doctrine applies whenever parties share otherwise privileged attorney-client communications to further a common legal interest, within or outside the litigation context.

QUESTIONS PRESENTED

This is an appeal from a non-final order of the Appellate Division, before this Court on leave of the First Department. The questions presented are:

1. Did the Appellate Division correctly hold, consistent with the weight of reasoned precedent, that the common-interest doctrine preserves the privilege in attorney-client communications shared by parties to further their common legal interest even in the absence of pending or anticipated litigation?

2. Does this Court have jurisdiction to determine whether the merger parties in this particular case shared common legal interests, a question the Appellate Division did not consider or certify?

3. If so, do parties to a merger agreement, under which they are obliged to share legal advice confidentially to facilitate resolving the many legal issues involved in completing the agreed-upon transaction, have common legal interests sufficient to protect from disclosure their shared communications that further those interests?

STATEMENT OF THE CASE

This dispute arises from a lawsuit brought by Plaintiff-Appellant Ambac, a monoline bond insurer that guaranteed payments on various mortgage-backed securities issued by Countrywide. Ambac has asserted claims against Countrywide for, among other things, breach of contract and fraud arising from 2004–2006 Countrywide securitizations that Ambac insured. It has also asserted secondary, contingent claims against BAC, alleging that BAC would be liable as Countrywide's successor-in-interest if Countrywide were unable to pay any judgment against it. Those successor-liability claims rest on allegations that BAC has de facto merged with its subsidiary, CFC, based on, among other things, (i) CFC's July 1, 2008 forward triangular merger into Red Oak Merger Corporation, a wholly owned BAC subsidiary, (ii) subsequent asset sales from CFC and its subsidiaries to BAC and legacy BAC subsidiaries, and (iii) various Bank of America and Countrywide transition-related activities.

The facts relevant to this appeal are as follows:

A. Relevant Events Leading To The January 11, 2008 Red Oak Merger Agreement

BAC first acquired an equity interest in CFC in August 2007, when tightening capital markets forced Countrywide to look outside its traditional financing sources (i.e., mortgage securitizations) to fund residential mortgage loans.[2] After drawing down the entire available balance on CHL's $11.5 billion revolving line of credit with its bank lenders, CFC (among other things) sought and received a $2 billion preferred-stock investment from BAC in August 2007.[3] As the capital markets—and thus Countrywide's capital position—continued to deteriorate in late 2007, CFC began to look for an acquirer, turning naturally to one of its newest investors, BAC. Following a period of due diligence and negotiations, CFC and BAC signed the Merger Agreement on January 11, 2008, under which CFC would merge into a wholly owned BAC subsidiary, Red Oak Merger Corporation. That transaction closed on July 1, 2008.

B. The Merger Parties' Common Legal Interests In Meeting The Legal Requirements To Close The Merger

There is no legitimate dispute (and no court below has questioned) that the merger parties shared common legal interests in resolving the numerous legal

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[2] *See* Record on Appeal ("R") 69–79 (excerpts from CFC's Annual Report filed on SEC Form 10-K for the year ending December 31, 2007, filed with the SEC on February 29, 2008); R-80–81 (Jonathan Stempel, "Countrywide taps $11.5 bln credit, shares fall 11 pct" (Aug. 16, 2007)); R-61 (CFC's Current Report on SEC Form 8-K dated August 28, 2007).

[3] R-61, R-78, R-80.

issues involved in consummating the Merger. Those common legal interests are reflected in the Merger Agreement, in which BAC and CFC bound themselves to work together through pre-closing legal issues, from filing required disclosures[4] to consulting on state and federal tax consequences.[5] More broadly, the two companies agreed to cooperate in securing the appropriate merger approvals and consents of all relevant third parties and regulators:

> The parties shall cooperate with each other and use their respective reasonable best efforts to promptly prepare and file all necessary documentation, to effect all applications, notices, petitions and filings, to obtain as promptly as practicable all permits, consents, approvals and authorizations of all third parties . . . and Governmental Entities that are necessary or advisable to consummate the transactions contemplated by this Agreement . . . .[6]

To facilitate that cooperation, the parties recognized the importance of sharing all information to resolve their common issues (subject to two existing confidentiality agreements):

> [E]ach of Company and Parent shall, and shall cause each of its Subsidiaries to, afford to . . . the other party, reasonable access . . . to all its properties, books, contracts, commitments and records, and, during such period, such party shall . . . make available to the other party . . . all other information concerning its business,

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4 R-84 (Merger Agreement § 6.1(a)).

5 R-91 (Merger Agreement § 6.14).

6 R-84 (Merger Agreement § 6.1(b)).

> properties and personnel as the other party may reasonably request . . . .[7]

The parties made these agreements because of the legal challenges they knew they would face in closing the Merger. While large mergers and acquisitions generally present significant legal issues and thus require substantial attorney involvement, the legal issues BAC and CFC faced were particularly complex and extensive.

First and foremost, the parties required legal advice both to obtain the Merger's approval by the relevant regulators and to ensure that the post-Merger enterprise was well-positioned to continue complying with all regulatory requirements.[8] BAC and CFC and their respective subsidiaries are heavily regulated entities. BAC is a public bank holding company governed by the federal Bank Holding Company Act.[9] It offers products and services to customers through

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[7] R-85 (Merger Agreement § 6.2).

[8] R-41–43 (Affidavit of Edward J. Ofcharsky ¶¶ 6–10 (May 31, 2013) ("Ofcharsky Aff.") (submitted with BAC's June 3, 2013 letter to the special referee)); R-57, R-193–240 (listing privilege-log entries that correspond to documents containing privileged attorney-client communications relating to the Merger's regulatory approval and post-merger regulatory requirements, such as mortgage lending and servicing regulations (including fair-lending laws), consumer-protection laws, foreign registration requirements, and contractual or court-ordered mortgage-modification obligations).

[9] R-175–76 (Affidavit of William Stokes ¶ 3, *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825/2008 (Sup. Ct. Sept. 28, 2012) ("Stokes Aff.")).

subsidiaries like Bank of America, N.A. ("BANA"), a federally chartered bank.[10] BANA is governed by the National Bank Act and regulated by the Office of the Comptroller of the Currency and Federal Reserve Board.[11] For its part, CFC was a public savings-and-loan holding company that also owned operating subsidiaries.[12] Its bank subsidiary, Countrywide Bank FSB, was regulated by the Office of Thrift Supervision.[13] Another CFC subsidiary, CHL, originated most of Countrywide's mortgage loans until mid-to-late 2007, when Countrywide Bank assumed that role.[14] And still another subsidiary, CHLS, was responsible for servicing mortgages that CHL and Countrywide Bank originated.[15] Both CHL and CHLS were subject to regulation by every state in which they did business.[16]

Another set of regulations and regulators were involved because both BAC and CFC were also public reporting companies. Thus, the companies also needed to satisfy the U.S. Securities and Exchange Commission ("SEC") disclosure

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10 R-176 (Stokes Aff. ¶¶ 4 & 8).

11 R-176 (Stokes Aff. ¶ 4).

12 R-69.

13 R-110 (Affidavit of Edward J. Ofcharsky ¶ 4, *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825/2008 (Sup. Ct. Sept. 28, 2012)).

14 R-80 (observing that Countrywide "plans to originate nearly all home loans in its Countrywide Bank unit by September 30," 2007); R-70 (stating that Countrywide "[a]ccelerated the integration of our mortgage banking activities into Countrywide Bank" in 2007).

15 R-110.

16 R-111.

requirements associated with merging one public company into a subsidiary of another. CFC needed to file a proxy statement to solicit its shareholders' approval of the Merger, which would eliminate all CFC shares.[17] And because the Merger Agreement provided that those shares would be converted into new BAC shares, BAC needed to register those new shares by filing a registration statement with the SEC.[18] The parties intended to meet these securities and Delaware law requirements by preparing and filing a joint proxy and registration statement that the SEC would have to approve before it could become effective.[19]

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[17] *See* R-83–85 (Merger Agreement § 6.3 (requiring CFC to "call a meeting of its stockholders . . . for the purpose of obtaining the requisite stockholder approval required in connection with the Merger"); *id.* § 1.1(a) (stating that CFC's "separate corporate existence" will end after the Merger); *id.* § 6.1(a) (requiring CFC to "mail or deliver the Proxy Statement to its stockholders")); R-105 (CFC's Current Report on SEC Form 8-K (filed with the SEC on July 8, 2008) (stating that all of CFC's "outstanding shares of common stock . . . would be cancelled" in the Merger)).

[18] R-105 (CFC's Current Report on SEC Form 8-K (filed with the SEC on July 8, 2008) (stating that all of CFC's "outstanding shares of common stock . . . would be cancelled and converted into the right to receive 0.1822 of a share of Bank of America common stock" in the Merger and that "Bank of America issued an aggregate of 106,269,417 shares of Bank of America common stock in the Merger")); R-84 (Merger Agreement § 6.1(a) (requiring BAC to "file with the SEC the Form S-4" registration statement and to "use its reasonable best efforts to have the Form S-4 declared effective under the Securities Act")).

[19] *See* R-84 (Merger Agreement § 6.1(a) (requiring BAC and CFC to "promptly prepare and file with the SEC the Form S-4, in which the Proxy Statement will be included" and to use their "reasonable best efforts to have the Form S-4 declared effective")).

The merger parties likewise needed shared legal advice because Countrywide was party to many contracts that contained change-in-control provisions that the Merger would trigger.[20] Among the contracts with such provisions were those governing CHL's $11.5 billion in bank debt,[21] under which the entire balance that CHL owed became immediately due and payable upon the Merger's consummation.[22] Thus, lawyers from Bank of America and Countrywide had to work together to structure and document asset-sale transactions to ensure that CHL had adequate liquidity to pay its bank debt when the acquisition closed.[23]

The merger parties also needed to share legal advice on tax issues. Both the Merger and the Countrywide–Bank of America asset sales that occurred shortly

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[20] *See* R-180–91 (Defendant Bank of America Corporation's Statement of Undisputed Material Facts Under Rule 19-a ¶¶ 41–79, *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825/2008 (Sup. Ct. Sept. 28, 2012) (identifying and quoting contractual change-in-control provisions)); R-43–44 (Ofcharsky Aff. ¶¶ 11–16); R-241–66 (listing privilege-log entries that correspond to documents containing privileged attorney-client communications relating to Countrywide contracts with (among others) bank lenders, Fannie Mae, and Freddie Mac containing change-in-control provisions).

[21] R-180–82 (¶¶ 41–49).

[22] R-180–82 (¶¶ 43–48).

[23] R-43–44 & 47 (Ofcharsky Aff. ¶¶ 13 & 25); R-332–59 (listing privilege-log entries that correspond to documents containing privileged attorney-client communications relating to July 2008 asset sales, such as communications regarding contracts governing the transfer of mortgage-servicing rights); *see also* R-192 (Countrywide Financial Corporation and Subsidiaries Consolidating Balance Sheet (as of June 30, 2008) at F:276 (listing approximately $6.65 billion of cash on consolidated basis)).

after the Merger's closing required significant involvement from Countrywide and Bank of America lawyers to address the potential tax consequences in structuring the transactions.[24] For example, decisions to sell certain CFC subsidiaries or Countrywide joint ventures had potential tax ramifications.[25]

And as in any significant acquisition, lawyers also had to help with many other legal issues that arose from the transaction, such as advising on labor and employment issues, filing the necessary SEC disclosures, counseling employees on appropriate coordination under the antitrust laws during the pre-closing period, and preparing to deal with pending and anticipated litigation against Countrywide.[26]

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[24] R-45 (Ofcharsky Aff. ¶¶ 17–19); R-267–86 (listing privilege-log entries that correspond to documents containing privileged attorney-client communications relating to state and federal tax-law consequences of Merger, July and November 2008 asset sales, and ancillary transactions, such as merging Countrywide Bank into BANA and making CHLS a BANA subsidiary).

[25] R-267–86 (listing privilege-log entries that correspond to documents containing privileged attorney-client communications relating to state and federal tax-law consequences of potential ancillary transactions).

[26] R-41–43, R-45–47 (Ofcharsky Aff. ¶¶ 6–10, 20–24); R-193–240, R-287–331 (listing privilege-log entries that correspond to documents containing privileged attorney-client communications relating to (i) required SEC and other disclosures, such as those relating to CFC shareholder approval of the Merger and to potential changes in Countrywide Bank customers' accounts (Appendix A, Entries 1–111); (ii) labor and employment law compliance and contractual terms of retirement, compensation, and severance packages (Appendix D, Entries 248–253); (iii) antitrust-law limitations on pre-closing sharing of pricing, customer, and other competitively sensitive information (Appendix E, Entries 254–259); (iv) post-closing litigation management, such as accepting service of subpoenas directed at Countrywide (Appendix F, Entries 260–286); and (v) shareholder agreements

C. The Privileged Communications Concerning Legal Issues Involved In Closing The Merger

Ambac submitted to the special referee on May 1, 2013, a categorical challenge to hundreds of BAC privilege-log entries between January 11, 2008, when the Merger Agreement was signed, to July 1, 2008, when the Merger closed. All communications at issue involved both Bank of America and Countrywide personnel and attorneys. As Edward Ofcharsky, who managed Bank of America's planning and preparation to close the Merger,[27] explained in an unrebutted affidavit, the relevant communications were made to further the parties' common legal interests on topics including:

i. filing the proper disclosures with the SEC[28];

ii. securing regulatory approvals and ensuring regulatory compliance[29];

iii. reviewing contractual obligations to third parties (including obligations to secure third-party consents to the Merger)[30];

iv. negotiating and advising on employee retentions, benefits, and terminations[31];

v. opining on the Merger's tax-law consequences[32];

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related to obtaining CFC shareholder approval of the Merger and other legal issues related to the Merger's closing (Appendix G, Entries 287–382)).

[27] R-38 (Ofcharsky Aff. ¶ 1).

[28] R-193–240; *see supra* note 26.

[29] R-193–240; *see supra* note 26.

[30] R-241–66; *see supra* note 20.

[31] R-287–89; *see supra* note 26.

vi. structuring and advising on the contracts for the additional transactions necessary or ancillary to the Merger (such as asset sales between Bank of America and Countrywide entities)[33];

vii. planning for additional litigation by establishing in-house legal department policies and procedures[34]; and

viii. counseling employees on appropriate information-sharing during the pre-closing period under the antitrust laws.[35]

Ambac disputed none of this; rather, it argued that the common-interest doctrine did not apply because BAC and CFC were "unaffiliated, separate entities" at the time of the challenged communications and none of those communications involved "legal advice in pending or reasonably anticipated litigation."[36]

D. The Special Referee And The Trial Court Hold That The Common-Interest Doctrine Applies Only When Parties Share A Legal Interest In Litigation

On June 24, 2013, the special referee ruled on Ambac's legal challenge. He did not question that Bank of America and Countrywide shared common legal interests on issues such as filing "joint SEC disclosures" and "negotiating and advising on employee retention, benefits, and termination." R-31. And he agreed

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[32] R-267–86; *see supra* note 24.

[33] R-332–59; *see supra* note 23.

[34] R-293–99; *see supra* note 26.

[35] R-290–92; *see supra* note 26.

[36] R-360–61, 363 (May 1, 2013 Letter from Harry Sandick, Esq. to Hon. John A.K. Bradley).

that communications on these subjects must first satisfy “the requirements for the attorney-client privilege to apply.” R-29.

But the special referee then limited the scope of the attorney-client privilege over the challenged communications to only those concerning litigation: “[A]ny ‘common interest’ privilege must be 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.” R-30 (emphasis added). He therefore concluded that the common-interest doctrine did not protect Bank of America and Countrywide’s pre-closing communications concerning legal issues related to closing the Merger, because those communications “would seem not to involve pending or reasonably anticipated litigation.” R-31.

BAC timely moved to vacate the special referee’s ruling on July 9, 2013. As with the special referee, the trial court did not question BAC and CFC’s common interests in resolving legal issues related to closing the Merger. And it correctly recognized the hand-in-glove relationship between the common-interest doctrine and the attorney-client privilege: a “third party may be privy to the communication between an attorney and a client, without destroying the privilege, if the communication is made for the purpose of furthering a nearly identical legal interest shared by the client and the third party.” R-14–15.

But the trial court then concluded that even though BAC and CFC may have had common legal interests, their communications fall outside the attorney-client privilege because, on its view of New York law, "there [must] be a reasonable anticipation of litigation in order for the common-interest doctrine to apply." R-15.

E. The Appellate Division Reverses, Holding That The Common-Interest Doctrine Includes No Litigation Requirement

The Appellate Division reversed. It held—consistent with the weight of federal authority, the Restatement of the Law Governing Lawyers, and the position of the Delaware Chancery Court—that "[s]o long as the primary or predominant purpose for the communication with counsel is for the parties to obtain legal advice or to further a legal interest common to the parties, and not to obtain advice of a predominately business nature, the communication will remain privileged." R-xx. The court's holding was based in part on business realities in general: "in today's business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege." R-xi. And the particular "circumstances presented in this case," the court explained, "illustrate precisely the reason that the common-interest privilege should apply—namely, that business entities often have important legal interests to protect even without the looming specter of litigation." R-xi–xii.

The Appellate Division explained that "[t]o properly understand the common-interest doctrine, it is necessary to examine the purpose of the privilege from which it descends—namely, the attorney-client privilege." R-xv. That privilege, which is meant to encourage full and frank communication between attorney and client, "is not tied to the contemplation of litigation, because advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with law, or simply to guide a client's course of conduct." R-xvi–xvii (quotation omitted). The court held that the same rule should apply to the common-interest doctrine, because that doctrine furthers the "same basic purpose—namely, it encourages parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly, and therefore serves the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation." R-xvii (quotation omitted).

The court emphasized that applying the common-interest doctrine is particularly appropriate in the context of this case. The court explained that there is no basis to exclude from the scope of that doctrine confidential legal advice shared by "two business entities, having signed a merger agreement without contemplating litigation, and having signed a confidentiality agreement, [that] required the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction." R-xxii–xxiii.

Indeed, "imposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, 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." R-xxiii. The court thus concluded that the common-interest doctrine does not include a litigation requirement, and remanded the matter to allow the lower court to review the challenged documents and determine whether they were (i) privileged and (ii) shared to further a common legal interest. R-xxiv.

The Appellate Division subsequently granted Ambac leave to appeal, certifying the question whether its decision rejecting a litigation requirement was "properly made." R-ix.

F. On Remand, The Special Referee Concluded That Each Of The Substantive Communications Challenged Here Are Protected By The Common Interest Privilege

While Ambac's motion for leave to appeal was still pending in the Appellate Division, Ambac moved the special referee to review the challenged documents in camera based on the standard the Appellate Division announced. The special referee granted that motion and concluded on March 25, 2015, that each of the substantive communications challenged here—i.e., all the challenged documents other than several non-substantive cover or logistical emails—were protected from disclosure because they "qualify for protection under the attorney-client privilege"

and were "made for the purpose of furthering a legal interest or strategy common to the parties."[37] Ambac did not move to vacate the special referee's ruling.

ARGUMENT

This Court has held for more than a century that attorney-client and other privileged communications may be shared between parties to further a common legal interest without waiving the privilege. *See, e.g.*, *Wallace v. Wallace*, 216 N.Y. 28, 36 (1915) (confidential communications between "two parties having a common interest" are "clearly privileged from disclosure at the instance of a third person"); *Hurlburt v. Hurlburt*, 128 N.Y. 420, 424 (1891) (when two parties are "both interested in the [legal] advice which they sought," attorney-client privilege "cannot be invoked in any litigation which may thereafter arise between such persons, but can be in a litigation between them and strangers"). Ambac does not dispute either the existence of a "common-interest doctrine," or that the doctrine is an extension of the attorney-client privilege. But it contends that the common-interest doctrine should be limited to shared communications involving pending or anticipated litigation, even though the attorney-client privilege from which the doctrine derives is not so limited.

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[37] The special referee's opinion is publicly available as Document No. 455 on the docket for Index No. 651612/2010 through the eCourts WebCivil Supreme database, https://iapps.courts.state.ny.us/webcivil/FCASMain.

This Court should reject that artificial limitation, as the overwhelming majority of reasoned federal and state-court decisions to have considered the question—including the court below—have held. The attorney-client privilege itself is not so limited: its purpose is to ensure that clients obtain full and frank legal advice without fear of later public disclosure—a concern that exists even absent the prospect of litigation. The same is true for the common-interest doctrine: its purpose is to ensure that clients with a common legal interest can share full and frank legal advice to further their common legal interest without fear of public disclosure, so as to further legal compliance and *prevent* litigation.

Contrary to Ambac's contention, rejecting a litigation limitation would not significantly expand the common-interest doctrine. The doctrine is by its terms limited both by (i) the strict requirements of the attorney-client privilege, and (ii) the additional requirement that the parties share a *legal* (as opposed to business or personal) interest that the relevant communications further. This case presents a perfect example of non-litigating parties working together to further their common legal interests—these merger parties agreed by written contract to work together, including by sharing confidential information, to effectuate a corporate acquisition involving heavily regulated entities. There is every reason to encourage parties in that documented joint-venture context to share legal advice. And yet Ambac's rule

would render those salutary confidential attorney-client communications an open book for all to see, thus assuring that they would not be shared in the first place.

This Court should join the vast majority of reasoned precedent rejecting that rule, and affirm the decision below.

I. THE COMMON-INTEREST DOCTRINE PROTECTS PRIVILEGED COMMUNICATIONS BETWEEN PARTIES THAT SHARE COMMON LEGAL INTERESTS, REGARDLESS WHETHER LITIGATION IS PENDING OR ANTICIPATED

This Court has never directly considered whether the common-interest doctrine is limited to the litigation context. But it has long recognized the principles and policies that require rejecting that limitation, because they are the same principles and policies that have led the Court to reject a parallel litigation requirement under the attorney-client privilege more generally. The decision below—the first and only reasoned New York decision on the issue—should be affirmed.

A. The Attorney-Client Privilege, From Which The Common-Interest Doctrine Derives, Is Not Limited To Pending Or Anticipated Litigation

The common-interest doctrine "does not create new kinds of privileged communications aside from client-lawyer." Restatement (Third) of the Law Governing Lawyers § 76 Reporter's Note cmt. d (2000) (the "Restatement"). Rather, that doctrine is "an extension of the attorney-client privilege." *United*

States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).[38] Thus, determining the common-interest doctrine's application requires understanding the principles underlying the attorney-client privilege.

This Court has explained that the attorney-client privilege is the "oldest among common-law evidentiary privileges." *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991). It protects from disclosure confidential communications between attorney and client for the purpose of obtaining or facilitating legal advice in the course of a professional relationship. *See* C.P.L.R. § 4503(a); *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989). Its purpose is to "foster[] uninhibited dialogue between lawyers and clients," *Rossi*, 73 N.Y.2d at 592, which is "essential to effective representation," *Spectrum Sys.*, 78 N.Y.2d at 377. As the U.S. Supreme Court has held, "encourag[ing] full and frank communication between attorneys and their clients . . . promote[s] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also Rossi*, 73 N.Y.2d at 592 (observing that attorney-client privilege "promot[es] the administration of justice"). Sound legal advice "depends upon the lawyer's being fully informed by the client," *Upjohn*, 449 U.S. at 389—"[w]ithout

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[38] *See U.S. Bank Nat'l Ass'n v. APP Int'l Fin. Co.*, 33 A.D.3d 430, 431 (2006) (federal decisions in general, and *Schwimmer* in particular, are "instructive" as to the scope of the common-interest doctrine).

that frankness, sound legal advice is impossible, and without informed advice, the ultimate goal of the attorney-client privilege is unattainable," *In re Sulfuric Acid Antitrust Litig*., 235 F.R.D 407, 414 (N.D. Ill. 2006) (citing *Upjohn*, 449 U.S. at 389).

Because the attorney-client privilege advances legal compliance generally, its application is in no way, shape, or form limited to pending or anticipated litigation. As this Court has explained, "the 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.*, 78 N.Y.2d at 380. For this reason, "American courts *rejected*" a litigation limitation as early as 1814. *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 360 (3d Cir. 2007) (citing Paul R. Rice, *Attorney-Client Privilege in the United States* § 1.12 (2d ed. 1999)). As those early decisions recognized, "confining the privilege would discourage clients from seeking the advice of counsel before problems arise." *Id.* (citing *Parker v. Carter*, 18 Va. 273, 1814 WL 667, at *9 (1814)). A litigation limitation would, in fact, subvert the daily legal counseling by tens of thousands of attorneys in this State, who advise their business clients regarding the (sometimes arcane) legal wrinkles, requirements, and pitfalls that commercial transactions almost always involve, but that have nothing to do with litigation.

Courts have recognized that corporations especially need advance counsel in "today's business environment." R-xi. "In 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, particularly since compliance with the law in this area is hardly an instinctive matter." *Upjohn*, 449 U.S. at 392 (citation and quotation omitted). Simply put, limiting the attorney-client privilege to circumstances in which litigation was already pending or on the horizon would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law," *id.*, and thus to avoid litigation in the first place.

B. As With The Attorney-Client Privilege, The Principles Underlying The Common-Interest Doctrine Preclude Limiting That Doctrine To Communications Made In The Context Of Pending Or Anticipated Litigation

1. *A Litigation Limitation Would Undermine The Common-Interest Doctrine's Purpose Of Promoting Compliance With The Law And Averting Litigation*

The common-interest doctrine "permits persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers." Restatement § 76 cmt. b. The doctrine "afford[s] a conditional, or qualified, privilege to a communication made by one person to another upon a subject in which both have an interest." *U.S. Bank*, 33 A.D.3d at 431. Two requirements must be satisfied. *First*, "the communication

must satisfy the requirements of the attorney-client privilege." *Id.*; *see Schwimmer*, 892 F.2d at 244 (holding that "claim resting on the common interest rule requires" same showing as "all claims of privilege arising out of the attorney-client relationship"). *Second*, the communication must "further[] a common legal interest" of the relevant parties. *Mt. McKinley Ins. Co.*, 81 A.D.3d 498, 499 (1st Dep't 2011); *see 330 Acquisition Co., LLC v. Regency Sav. Bank, F.S.B.*, 12 A.D.3d 214, 214 (1st Dep't 2004) (affirming "attorney-client common interest privilege" finding based on parties' "common legal interest").

Thus, the common-interest doctrine simply extends to the shared-legal-interest context the recognized principle underlying the attorney-client privilege, i.e., that "the public interest is served by shielding certain communications" from disclosure, "rather than risk stifling them altogether." *U.S. Bank*, 33 A.D.3d at 431. The common-interest doctrine, like the attorney-client privilege from which it derives, "encourages parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly," and thus "serves the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007) (quotation omitted).

Recognizing this fundamental principle underlying the common-interest doctrine all but answers the question presented in this case. Just as the attorney-

client privilege extends beyond the litigation context to further its purpose of encouraging full and frank communication between attorney and client in *all* legal contexts, so too must the common-interest doctrine necessarily apply beyond the litigation context, thus generally allowing parties with a shared legal interest "to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly." *Id.* (quotation omitted). The "salient purposes" of the doctrine "are to promote the broader public interests in the observation of law and administration of justice," and achieving those goals "manifestly does not require that there be actual or contemplated litigation." *In re Sulfuric Acid*, 235 F.R.D. at 416 (quotation omitted).

Adopting the litigation limitation Ambac presses would self-evidently undermine the purpose of the common-interest doctrine by *discouraging* parties outside the litigation context from sharing legal advice in furtherance of a common legal interest, inevitably inviting rather than preventing future litigation. "[I]n response to the explosion of regulations from federal and state agencies, business entities routinely seek the advice of lawyers precisely so that they may avoid litigation by planning for the future." *In re Sulfuric Acid*, 235 F.R.D. at 416. No one could disagree that "[c]orporations should be encouraged to seek legal advice in planning their affairs to avoid litigation as well as in pursuing it." *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976). And "[r]eason and experience

demonstrate that joint venturers . . . benefit from planning their activities based on sound legal advice predicated upon open communication." *BDO Seidman*, 492 F.3d at 816. Thus, as the Massachusetts Supreme Judicial Court explained in rejecting a litigation limitation on the common-interest doctrine, the "[c]onfidentiality of consultations between parties to business transactions with their respective attorneys is no less essential or less common than in the litigation context." *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 449 Mass. 609, 616 (2007).

Certainly, there is no reason whatever to discourage parties to a merger agreement from sharing legal advice in furtherance of their common legal interests to overcome the many legal hurdles required to consummate a merger involving heavily regulated entities. As the Appellate Division correctly observed, "imposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, 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." R-xxiii. "This outcome would make poor legal as well as poor business policy." *Id.* The question is not whether the merger would have closed anyway, as Ambac argues (Ambac Br. 46), but whether the law should encourage parties with a common legal interest to share such privileged communications among themselves

to assure legal compliance and prevent future litigation, even when litigation is not imminent.

Ambac's rule would *by design* discourage such productive communication, and would instead relegate joint-venture parties seeking to assure the confidentiality of their legal advice to two self-evidently counter-productive alternatives. *First*, each party could confer separately and confidentially on parallel tracks with their own counsel and never coordinate legal advice and strategy, thus potentially working at cross-purposes, needlessly frustrating their common legal interests. *Second*, the parties could hire the same attorney. *See infra* at 40–41 (explaining that litigation requirement does not apply when advice is shared between parties represented by a single attorney). But that would create obvious conflict-of-interest problems, since even parties who share many legal interests may simultaneously have divergent interests in some circumstances—criminal co-defendants framing a common defense strategy while negotiating plea deals is a classic example, *see infra* at 53. Any reasonable legal regime should encourage such parties to obtain separate legal representation, rather than penalizing them for doing so. And confining joint ventures to joint representation would be especially unwarranted in the corporate context, effectively barring from the advice-sharing process each party's in-house counsel and legacy law firms, and their deep institutional knowledge of the parties' legal issues.

In short, Ambac's rule would lead to worse, less-informed legal advice, and more litigation. This Court should reject that result.

2. *Ambac's Principal Policy Defense Of A Litigation Requirement Fails To Recognize That The Principles Underlying The Common-Interest Doctrine Apply Beyond Litigation*

Ambac's defense of a litigation requirement is unmoored to any policy or principle behind the common-interest doctrine. Ambac asserts—citing only a law review article—that applying the common-interest doctrine when there is no imminent litigation is "unnecessary" because in these circumstances, "privilege concerns are not uppermost in mind." Ambac Br. 29 (quotation omitted). Exactly the same point could be made about the attorney-client privilege more generally—i.e., it is an "unnecessary" protection outside the litigation context because there is little fear of discovery to chill attorney-client communication. Yet this Court has decidedly rejected a litigation limitation on the attorney-client privilege precisely because open and honest attorney-client communications should *always* be encouraged, regardless whether the client perceives an imminent fear of discovery. The same is true of parties seeking to share legal advice when doing so would further their common legal interest.

Ambac's argument that parties outside the litigation context do not have "privilege concerns . . . uppermost in mind" is wrong even on its own terms. Only attorney-client communications that are *already privileged* are even eligible for

protection under the common-interest doctrine. Thus, "privilege concerns" are a prerequisite to the common-interest doctrine's application. Ambac makes the same mistake in asserting that rejecting a litigation requirement would merely "immuniz[e] communications that would have taken place in any event." Ambac Br. 44. Ambac's logic is backwards: parties that cannot rely on the common-interest doctrine would be less willing to share legal advice in the first place, whereas parties that can rely on the common-interest doctrine would be more likely to do so—a self-evident point that one law professor apparently resists, *id.*, but that every appellate court to have considered the question has accepted, *see supra* at 26-28; *infra* Part I.C.

Indeed, the entire premise of Ambac's argument bears no relation to how companies actually act in today's business and regulatory environment. Modern corporations like the merger parties, confronted with a "vast and complicated array of regulatory legislation," *Upjohn*, 449 U.S. at 392, are in some ways *always* under the potential specter of litigation, either by private parties like Ambac, or by the myriad federal and state regulators with pervasive and overlapping enforcement authority, *see supra* at 9–11. That is why corporations "constantly go to lawyers to find out how to obey the law," *Upjohn*, 449 U.S. at 392, independent of any specific litigation, pending or anticipated. *See supra* at 24–25, 27–28. To the extent Ambac believes the threat of litigation must be "uppermost in mind" for the

purposes of the common-interest doctrine to apply, Ambac Br. 29, then that condition is readily satisfied, for better or worse, in today's regulatory environment, regardless whether the parties can point to any specific pending or anticipated litigation.

The record belies Ambac's speculation that the merger parties would have shared the relevant communications even without privilege protection. Ambac Br. 46. By agreeing in the Merger Agreement to share legal advice confidentially and in furtherance of their common legal interests, the parties did all they could to assure that the relevant communications would remain confidential. The parties had every reason to believe that the law would recognize the confidentiality of those communications, since the majority of jurisdictions—including Delaware courts and most federal courts—reject a litigation limitation on the common-interest doctrine. *See infra* Part I.C.

Ambac demonstrates its own error when it likens the common-interest doctrine not to the attorney-client privilege, but to the *work product* doctrine, which does apply only in the litigation context. Ambac Br. 31. Ambac fails to recognize that the "purpose of the work-product doctrine differs from that of the attorney-client privilege," *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991), and thus the common-interest doctrine that derives from the attorney-client privilege. The work-product doctrine is limited to

the litigation context because unlike the attorney-client privilege, it serves a purpose *specific to litigation*: "the work-product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. Protecting attorneys' work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." *Id.* at 1428; *see also United States v. Am. Tel. & Tel. Corp.*, 642 F.2d 1285, 1298–99 (D.C. Cir. 1980).

The attorney-client privilege, by contrast, is not limited to the litigation context because its purpose extends beyond litigation more broadly to "promote[] the attorney-client relationship, and, indirectly, the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys." *Westinghouse*, 951 F.2d at 1428; *see Spectrum Sys.*, 78 N.Y.2d at 380. Thus, whereas a litigation limitation on the work-product doctrine comports entirely with that doctrine's purpose, such a limitation has no relationship to—and is inconsistent with—the common-interest doctrine's purpose of assuring that parties with shared legal interests can also share legal advice without waiving the attorney-client privilege. *See supra* Part I.B. Rejecting a litigation limitation would thus further the common-interest doctrine's purpose, whereas imposing such a requirement would undermine it.

C. The Overwhelming Weight Of Reasoned Precedent Rejects A Litigation Requirement

Because a litigation limitation on the common-interest doctrine is flatly inconsistent with that doctrine's recognized purposes, it is not surprising that the "weight of authority holds that litigation need not be actual or imminent for communications to be within the common interest doctrine." *Dura Global Tech., Inc. v. Magna Donnelly Corp.*, 2008 WL 2217682, at *3 (E.D. Mich. 2008). The First Department is the only New York appellate court squarely to have considered the question, and correctly rejected an artificial litigation limitation.

1. *The Decision Below Is The Only New York Decision To Have Squarely Confronted Whether The Common-Interest Doctrine Is Limited To The Litigation Context*

Ambac principally relies on *dicta* in two Second Department decisions. Ambac Br. 26 n.9. But that court recently declined to consider whether the "common-interest privilege . . . include[s] non-litigation-related communications," because the relevant communications were "not legal in nature, but commercial . . . and are not protected by the attorney-client privilege." *Hyatt v. State of California Franchise Tax Board*, 105 A.D.3d 186, 205–06 (2d Dep't 2013). Thus, the Second Department obviously considered the question open (and chose not to address it) in 2013. The other Second Department case Ambac cites, *Hudson Valley Marine, Inc. v. Town of Cortlandt*, 30 A.D.3d 377 (2d Dep't 2006), was decided seven years before *Hyatt*, and mentioned a litigation requirement only in passing while

holding that the proponent of the privilege "failed to demonstrate that an attorney-client privilege existed" in the first place. *Id.* at 378. Certainly, neither of these Second Department decisions engaged in even a superficial analysis to explain why the common-interest doctrine would be limited to the litigation context, or how such a limitation could be consistent with the principles underlying that doctrine.

Ambac also cites numerous trial court decisions mentioning a litigation requirement, Ambac Br. 26 n.9, but all but one of those decisions similarly did not actually hold that such a requirement exists. Rather, they either (i) upheld common-interest protection while expressly declining to address whether litigation was a required element[39]; (ii) found that there *was* pending or anticipated litigation, meaning a litigation requirement did not matter[40]; (iii) found that the challenged

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[39] *See HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 71–73 (S.D.N.Y. 2009) (upholding common-interest protection and declaring litigation requirement issue "irrelevant because the communications at issue pertain to the timing and conduct of this litigation"); *In re Velo Holdings, Inc.*, 473 B.R. 509, 517 (Bankr. S.D.N.Y. 2012) (upholding common-interest protection and declaring litigation requirement issue "irrelevant here because the communications between the parties were made in anticipation of litigation").

[40] *See The OMNI Health & Fitness Complex Of Pelham, Inc. v. P/A Acadia Pelham Manor, LLC*, 33 Misc. 3d 1211(A) (Sup. Ct. Westchester Cty. 2011) ("[L]itigation was anticipated and defendants Acadia Realty Trust, P/A Associates, LLC, Slayton and Malinsky shared a common legal interest"); *In re Megan-Racine Associates, Inc.*, 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995) ("[T]he Committee reasonably believed that it could be, and it in fact became, a party to the litigation."); *Parisi v. Leppard*, 172 Misc. 2d 951, 956 (Sup. Ct. Nassau Cty. 1997)

communications were not privileged in the first place[41]; (iv) involved a circumstance where the only asserted common legal interest was defense of potential claims in anticipated litigation[42]; or (v) found only common commercial or financial (as opposed to legal) interests, or no common interests at all.[43] The

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("[T]he court holds that provided the exchanges sought to be shielded were made in contemplation of legal action by or against Dr. Parisi and/or POSA, they are privileged.").

[41] *See Nat'l Union Fire Ins. Co. v. TransCanada Energy USA, Inc.*, 2013 N.Y. Misc. LEXIS 3735, at *12 (Sup. Ct. N.Y. Cty. Aug. 19, 2013) (holding that documents at issue "are not attorney-client communications, and those that involve the investigation of claims do not constitute legal advice" because insurers' "attorneys were primarily working to determine whether to deny coverage, an ordinary business activity for an insurance company"); *Gipe v. Monaco Reps, LLC*, 2013 N.Y. Misc. LEXIS 2828, at *19 (Sup. Ct. N.Y. Cty. July 2, 2013) (finding waiver because "plaintiffs failed to establish that" third-party with whom they shared privileged communications "had an attorney-client relationship"); *Finkelman v. Klaus*, 17 Misc. 3d 1138(A), at *12 (Sup. Ct. Nassau Cty. 2007) (ordering an in camera review to confirm court's finding that "no privilege applies"); *see also Aetna Cas. & Sur. v. Certain Underwriters at Lloyd's, London*, 263 A.D.2d 367, 368 (1st Dep't 1999) (affirming trial court common-interest decision on ground that underlying communications are not privileged).

[42] *See Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, 252 F.R.D. 163, 172 (S.D.N.Y. 2008) ("[T]he only interest that is alleged to be common among PwCIL and the member firms is their defense of potential claims against them relating to the Allfirst fraud.").

[43] *See EOS Partners SBIC, L.P. v. Levine*, 2007 WL 2175590, at *5 (Sup. Ct. N.Y. Cty. June 21, 2007) (compelling production because "[a]lthough the parties' commercial interests may to some extent coincide," they "do not share an identical legal interest because they are opposing parties to the litigation"); *Yemini v. Goldberg*, 12 Misc. 3d 1141, 1144 (Sup. Ct. Nassau Cty. 2006) (finding that witness's "interest in the outcome of this aspect of the litigation can only be viewed as personal or business oriented"); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 109 (Sup. Ct. N.Y. Cty. 2003) ("Here, the common interest . . . was exclusively of a commercial nature and did not concern the rendering of

only other trial court decision Ambac cites adopted a litigation requirement without any analysis whatever.[44]

In any event, this Court would obviously not be bound even by holdings—let alone the dicta—of lower New York courts. And while Ambac cites this Court's decision in *People v. Osorio*, 75 N.Y.2d 80 (1989), Ambac Br. 22–23, Ambac wisely does not contend that *Osario* resolves the question here. *Osorio* was a criminal case. In that context, this Court stated that "[i]f 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." 75 N.Y.2d at 85 (emphasis added). That statement reflects the factual premise that the parties' common legal interest in that case was "mounting a common defense" in a criminal case. If their statements furthered that legal interest, they would be

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legal advice."); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 473 (S.D.N.Y. 2003) (citing witness testimony that relevant entities "held different interests"); *Bank of Am., N.A. v. Terra Nova Ins. Co.*, 211 F. Supp. 2d 493, 497 (S.D.N.Y. 2002) ("[T]he Bank has supplied no evidence that the letter of credit agreements constituted anything more than a business transaction—that is, a commercial endeavor."); *Grande Prairie Energy LLC v. Alstom Power, Inc.*, 2004 N.Y. Misc. LEXIS 1684, at *3–4 (Sup. Ct. N.Y. Cty. Oct. 4, 2004) (deeming challenged communications "business advice"); *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 435 (S.D.N.Y. 2013) (finding that because none of the communications were "made in the course of formulating a common legal strategy . . . the common interest exception is inapplicable").

[44] *See Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 194 Misc. 2d 331, 334 (Sup. Ct. 2002).

privileged; if not, the privilege would be lost. As the Appellate Division recognized, *Osorio* says nothing about whether the common-interest doctrine should apply in *other* circumstances, such as between parties to a merger agreement sharing legal advice under a confidentiality agreement to resolve legal issues necessary to consummate the merger. R-xxii–xxiii. If *Osorio* were read as defining the ultimate scope of the common-interest doctrine, then the common-interest doctrine would apply only to criminal defendants in pending litigation (and not to civil parties or imminent or anticipated litigation), which not even Ambac suggests is the New York rule.

Ambac nevertheless relies on *Osorio* in arguing that the common-interest doctrine has its "roots" in the joint-defense privilege. Ambac Br. 24; *see also* Ambac Br. 40–42. But a joint defense was merely an early—and as commentators have noted, frequent—illustration of the common-interest doctrine, not a limitation on it. According to the Restatement of the Law Governing Lawyers, which this Court routinely follows,[45] the doctrine's rationale applies equally to legal advice outside of litigation:

> Terms such as "joint defense" . . . can be misleading,

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[45] *See, e.g.*, *In re Lawrence*, 24 N.Y.3d 320, 341 (2014); *Wyly v. Milberg Weiss Bershad & Schulman*, LLP, 12 N.Y.3d 400, 410–11 (2009); *People v. DePallo*, 96 N.Y.2d 437, 442 n.1 (2001); *Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611, 616 (1999); *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30, 36 (1997).

> perhaps connoting that disclosure can occur only between co-defendants, and perhaps then only if they are actually involved in pending litigation. Although joint defense of a pending lawsuit is a common situation in which courts have applied the doctrine, its rationale and the Section apply equally to two or more separately represented persons whatever their denomination in pleadings *and whether or not involved in litigation* . . . . A preferable term is "common interest" because it includes, as do the decisions, both claiming as well as defending parties and nonlitigating as well as litigating persons.

Restatement § 76 Reporter's Note cmt. b (emphasis added); *see also Lugosch v. Congel*, 219 F.R.D. 220, 236 n.10 (N.D.N.Y. 2003) ("[T]he common interest arrangement doctrine, gaining acceptance in the legal community and the courts, includes both litigation and non-litigation matters. In essence, the common interest arrangement extends the joint litigant premise further . . . .").

Thus, while the "shared interest necessary to justify extending the privilege to encompass intercorporate communications appears most clearly in cases of co-defendants and impending litigations," it "is not necessarily limited to those situations," *SCM Corp.*, 70 F.R.D. at 513, particularly for corporations that daily confront myriad legal questions having nothing to do with litigation, *see supra* at 24–25, 27–28. As the Appellate Division properly concluded, the circumstances of this case—two heavily regulated parties to a merger agreement who have signed a confidentiality agreement and agreed to work together to resolve legal issues necessary to consummating the merger—"illustrate precisely the reason that the

common-interest privilege should apply[,] namely, that business entities often have important legal interests to protect even without the looming specter of litigation." R-xi–xii.

A more apt source of the common-interest doctrine's "roots" is the rule that multiple clients represented by a single attorney may share information with each other in furtherance of a common legal interest: the "common interest doctrine has its origins in situations where one attorney acts for two clients." Edna Selan Epstein, *Attorney-Client Privilege & Work-Product Doctrine* 196 (4th ed. 2001). Those one-attorney-two-clients roots are reflected in this Court's two turn-of-the-century holdings that no litigation requirement exists when two parties sharing a common legal interest consult a single attorney. *See Wallace v. Wallace*, 216 N.Y. 28 (1915); *Hurlburt v. Hurlburt*, 128 N.Y. 420 (1895). The only distinction between those cases and this one is the number of lawyers. Ambac tries to distinguish the joint-representation context by arguing that it involves an "identical alignment of client interests." Ambac Br. 22 n.7. But that argument only proves the First Department's point, because a common legal interest is a precondition to applying the common-interest doctrine. *See, e.g.*, *Mt. McKinley Ins. Co.*, 81 A.D.3d at 499 (proponent of common-interest doctrine must "establish that the relevant communications . . . were in furtherance of a common legal interest and that with respect to these communications, [the parties] had a reasonable

expectation of confidentiality"); *330 Acquisition Co., LLC*, 12 A.D.3d at 214 (affirming "attorney-client common interest privilege" finding based on parties' "common legal interest").

2. *The Majority of Federal-Court and Reasoned State-Court Authority Rejects a Litigation Limitation on the Common-Interest Doctrine*

The overwhelming majority of courts to have considered the question—and every relevant reasoned appellate decision—holds that the common-interest doctrine is not limited to pending or anticipated litigation. That majority view is reflected in the Restatement's explanation that "the common-interest attorney-client privilege" applies *either* to "a litigated or nonlitigated matter." Restatement § 76. And the leading federal evidence treatise explains that the common-interest doctrine applies "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 in the conference." 3-503 Weinstein's Federal Evidence § 503.21 (emphasis added).

As the First Department correctly recognized, "the federal courts that have addressed the issue have overwhelmingly rejected" a litigation requirement. R-xviii. Consistent with the First Department, the Restatement, and Weinstein's Federal Evidence, the Third, Seventh, Ninth, and Federal Circuits have squarely held that the common-interest doctrine "is not limited to actions taken and advice obtained in the shadow of litigation." *In re Regents of the Univ. of Calif.*, 101 F.3d

1386, 1390–91 (Fed. Cir. 1996); *see In re Teleglobe*, 493 F.3d at 364 (doctrine "applies in civil and criminal litigation, and even in purely transactional contexts"); *BDO Seidman*, 492 F.3d at 816 ("[C]ommunications need not be made in anticipation of litigation to fall within the common interest doctrine."); *United States v. Zolin,* 809 F.2d 1411, 1417 (9th Cir. 1987) ("Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications."), *aff'd in part and vacated in part on other grounds,* 491 U.S. 554 (1989). New York courts routinely find federal decisions instructive on privilege issues. *See supra* at note 38.

Moreover, as the First Department also recognized, R-xviii–xviv, the Second Circuit in *Schwimmer*—which, as the trial court recognized, is "often relied on by New York courts," R-15—rejected an actual-litigation limitation on the common-interest doctrine 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 244. The same principle requires rejecting any litigation requirement, whether actual or anticipated, which

is why federal district courts within the Second Circuit generally reject any such requirement.[46]

Thus, Ambac is dead wrong in asserting that "a majority of federal courts of appeals have either expressly or implicitly" recognized a litigation limitation, Ambac Br. 50, as the rejection of that limitation by Judge Weinstein's federal evidence treatise confirms. Only one federal appellate court has even suggested that such a limitation exists, *see In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001), and it did so without explaining how imposing that limitation would serve the common-interest doctrine's purposes. Most of the cases Ambac cites either explain the scope of the joint-defense privilege (which even Ambac admits is narrower than the common-interest doctrine, *see supra* at 38) or consider

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[46] *See, e.g.*, *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010) ("Although the [common-interest] doctrine is most frequently applied in the context of litigation, it also has been successfully invoked with respect to joint legal strategies in non-litigation settings."); *Doctor's Assocs., Inc. v. QIP Holder LLC & IFILM*, 2009 U.S. Dist. LEXIS 55270, at *5–6 (D. Conn. Feb. 26, 2009) ("The common interest rule, or privilege, is an exception to waiver based on the theory that when two or more parties, with the same legal interest, in a litigated or non-litigated matter . . . ."); *In re Rivastigmine Patent Litig.*, 2005 U.S. Dist. LEXIS 20851, at *10 (S.D.N.Y. Sept. 22, 2005) ("A community of interest may arise, as in this case, among parties engaged in a joint program of developing technology and obtaining patents for it."); *Lugosch v. Congel*, 219 F.R.D. 220, 236 n.10 (N.D.N.Y. 2003) ("[T]he common interest arrangement doctrine, gaining acceptance in the legal community and the courts, includes both litigation and non-litigation matters. In essence, the common interest arrangement extends the joint litigant premise further and permits parties to share information outside of its normal legal advice infrastructure even though it may not involve a lawsuit.").

whether that privilege applied in the particular circumstance of the case.[47] Ambac also cites cases that (i) did not adopt a litigation requirement because the parties did not share a common legal interest in the first place[48]; and (ii) concerned sharing *work product*, which, unlike attorney-client communications, itself includes a litigation requirement.[49]

As with the great weight of federal precedent, the only reasoned state-court decisions on the issue recognize (as did the Appellate Division) that a litigation limitation is inconsistent with the principles underlying the common-interest doctrine. The Massachusetts Supreme Judicial Court rejected a litigation

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[47] *See In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001) ("Common sense suggests that there can be no joint defense agreement when there is no joint defense to pursue. We so hold."); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) ("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"); *United States v. Moss*, 9 F.3d 543, 550 (6th Cir. 1993) (explaining in dicta that joint-defense 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'"); *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (remanding for determination whether relevant communications were made within or without purview of joint-defense agreement); *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003) (explaining that joint defense privilege is "appropriate" in order "that codefendants 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").

[48] *See In re Qwest Commc'ns. Int'l Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006).

[49] *See United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

requirement in *Hanover*, after analyzing in detail the principles underlying the common-interest doctrine and precedent from other jurisdictions. The court explained that the "common interest doctrine does not create a new or separate privilege, but prevents waiver of the attorney-client privilege when otherwise privileged communications are disclosed to and shared, in confidence, with an attorney for a third person having a common legal interest for the purpose of rendering legal advice to the client." 449 Mass. at 614. Thus, in determining whether the common-interest doctrine should be confined to the actual or pending litigation context, the court "beg[a]n by reviewing the purpose of the attorney-client privilege." *Id.*

The Supreme Judicial Court accordingly explained that the "attorney-client privilege not only protects statements made by the client to the attorney in confidence for the purpose of obtaining legal advice in a particular matter, but also protects such statements made to or shared with necessary agents of the attorney or the client, including experts consulted for the purpose of facilitating the rendition of such advice." *Id.* at 616. Thus, "[t]here is no reason to treat confidential client communications differently when shared with an attorney representing a client having a common interest where the purpose for sharing is to provide a free flow of information essential to providing the best available legal services to the client." *Id.* The New Mexico Court of Appeals has likewise rejected a litigation

requirement as inconsistent with the common-interest doctrine's purposes. *See S.F. Pac. Gold Corp. v. United Nuclear Corp.*, 143 N.M. 215, 222 (2007) (explaining that "the common interest doctrine serves the purpose of the [attorney-client] privilege, which is to encourage the free flow of information between attorney and client," and that in light of this purpose, a "third party to whom privileged disclosures are made under the common interest doctrine may be a nonparty to any anticipated litigation and may be a legal entity distinct from the client who receives the legal advice" (quotation omitted)).

And the Delaware Chancery Court—which, like the First Department, has extensive experience resolving legal issues in "today's business environment," R-xi[50]—has squarely rejected a litigation requirement. It has instead enforced the common-interest doctrine in the transactional context so long as the parties' common legal interest is "so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers." *3Com Corp. v Diamond II Holdings, Inc.*, 2010 WL 2280734, *7 (Del. Ch. 2010) (quotation omitted). Ambac misleadingly asserts that the litigation requirement was rejected by rule in Delaware, Ambac Br. 18, but the relevant rule of evidence

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[50] *See, e.g.*, Donald F. Parsons, Jr. & Joseph R. Slights III, The History of Delaware's Business Courts, Business Law Today (Mar./Apr. 2008), *available at* http://apps.americanbar.org/buslaw/blt/2008-03-04/slights.shtml (discussing Delaware Chancery Court's "worldwide reputation for fairness, experience, and expertise in presiding over corporate disputes")

does not mention a litigation requirement one way or the other—it simply states that attorney-client privileged material is protected from disclosure if it is shared with "a lawyer or a representative of a lawyer representing another in a matter of common interest." Del. R. Evid. 502(b). The Delaware Chancery Court has correctly interpreted the term "a matter of common interest" to extend beyond the litigation context. *See, e.g.*, *3Com Corp.*, 2010 WL 2280734, at *7.

These reasoned state-court opinions not only show that courts that actually grapple with the scope of the common-interest doctrine routinely reject a litigation requirement, but also defeat Ambac's assertion that there would be "no unlevel playing field for New York" if this Court were to impose a litigation requirement. Ambac Br. 46. Adopting Ambac's position would place New York business litigants in particular at an extreme disadvantage, because New York would then anomalously fail to protect from discovery otherwise privileged, transaction-related communications that the other principal business-law jurisdictions—most obviously, federal, Delaware, and Massachusetts courts—protect under the common-interest doctrine.

Ambac does not cite a single reasoned state-court decision rejecting a litigation requirement. It instead cites several state-court appellate decisions that have merely asserted the existence of a litigation requirement, Ambac Br. 51–52 & n.16, but without any analysis or consequence for the outcome of the privilege

challenge.[51] Thus, Ambac's centerpiece, the New Jersey Supreme Court's recent decision in *O'Boyle v. Borough of Longport*, 218 N.J. 168 (2014), was about whether the common-interest doctrine applies *at all* under New Jersey law. *Id.* at 197. And while the court stated in passing that the doctrine applies only in the context of actual or anticipated litigation, the court never explained why. Nor did it need to, because the relevant communications indisputably concerned litigation. *Id.* at 199–200. Ambac also cites several states that have by rule limited the common-interest doctrine to the litigation context. Ambac Br. 51 n.16. This State's Legislature has not so restricted the common-interest doctrine, as Ambac acknowledges. Ambac Br. 47. And while states are, of course, free to make whatever legislative choices they deem appropriate, the need those particular states felt to legislate a litigation limitation only proves that the common-interest doctrine is naturally not so limited.

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[51] *See Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, 2013-Ohio-3508, ¶¶ 14-15 (Ohio Ct. App. 2013) (court holds that underlying communications are not privileged in the first place); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 214-15 (Tenn. Ct. App. 2002) (communications indisputably concerned litigation); *Gallagher v. Attorney Gen.*, 787 A.2d 777, 784-85 (Md. Ct. Spec. App. 2001) (same); *Hicks v. Commonwealth of Virginia*, 439 S.E.2d 414, 416 (Va. Ct. App. 1994) (same); *Visual Scene, Inc. v. Pilkington Bros., Plc.*, 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987) (same).

D. Ambac's Remaining Policy Arguments In Support Of A Litigation Limitation Are Meritless

Without any reasoned caselaw on its side, and with its litigation limitation undermined by the principles underlying the common-interest doctrine, Ambac conjures a series of further policy arguments having nothing to do with the common-interest doctrine or the principles from which it derives. But most telling is the policy argument that Ambac does *not* make: why sound legal policy should discourage parties in the circumstances here—i.e., heavily regulated companies bound under a merger agreement to cooperate in resolving confidentially the myriad legal issues necessary to consummate the merger—from sharing legal advice in attempting to achieve those goals, thereby increasing the likelihood of legal compliance and decreasing the likelihood of future litigation. Ambac provides no such explanation because there is none. And the policy arguments on which Ambac does rely are entirely meritless.

1. *Construing The Common-Interest Doctrine Strictly, Like All Privileges, Does Not Require A Litigation Limitation*

Ambac's argument that privileges must be "strictly construed" actually shows why a litigation limitation is unnecessary. Ambac Br. 19 (quotation omitted). The attorney-client privilege on which the common-interest doctrine is based is already narrowly construed because, like *all* privileges, it is *designed to* prevent discovery of potentially relevant evidence. *See Spectrum*, 78 N.Y.2d at

377 (holding that "any right to protection . . . must be narrowly construed"). Thus, the common-interest doctrine is *already* narrow because it is merely derivative of the attorney-client privilege, which is also narrowly construed, thus necessarily limiting the communications potentially eligible for common-interest protection. But "narrowly construing" a doctrine's requirements is not a license to add *new* restrictions that are inconsistent with the doctrine's purposes. Rather, as Ambac's own authority makes clear, courts must "ensure" that a privilege's "application is consistent with its purpose." *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219 (1979) (cited at Ambac Br. 20).

2. *Courts Are Fully Able To Enforce The Common-Interest Doctrine's Boundaries Without A Litigation Requirement, As The Precedents Ambac Cites Have Repeatedly Demonstrated*

Ambac resorts to the slippery slope, arguing that without a litigation requirement, "there would be essentially no limit to the sorts of common interests that may be claimed," including "shared business or personal interests." Ambac Br. 32, 34. This shrill argument falls of its own weight. The common-interest doctrine is *already* limited to *legal* advice shared to further a common *legal* interest. The doctrine applies only to communications that are:

- already privileged, meaning that they are "primarily or predominantly of a legal character," *Spectrum*, 78 N.Y.2d at 379; and
- shared to further the parties' common *legal*—not business or personal—interest, *see Mt. McKinley Ins. Co.*, 81 A.D.3d at 499; *BDO Seidman*, 492 F.3d at 816 (applying common-interest doctrine only when the "parties

> undertake a joint effort with respect to a common legal interest," and "strictly to those communications made to further an ongoing enterprise").

Thus, not all shared communications that further a merger's closing remain privileged, as Ambac contends (Ambac Br. 52, 54–55)—only those that further the merger parties' common legal interest in resolving legal issues related to closing the merger. And the crime-fraud exception to the attorney-client privilege already safeguards against the nefarious things that Ambac believes the common-interest doctrine would shield, such as "concealing frauds from regulators" or covering up "unlawful attempts to monopolize." Ambac Br. 3. *See, e.g.*, *In re. N.Y. City Asbestos Litig.*, 109 A.D. 3d 7, 10–11 (1st Dep't 2013) (holding that attorney-client privilege excludes communications that further "a fraudulent scheme . . . or an accusation of some other wrongful conduct"). Tellingly, although Ambac theorizes some sort of fraudulent intent from BAC here, *e.g.*, Ambac Br. 11–12, it has never once argued below that the crime-fraud exception applies to any of its privilege challenges.

Undeterred, Ambac sets forth a parade of horribles that it says would result if its litigation limitation were not adopted. Ambac Br. 36. The parade does not seem so horrible—why, for example, would the law not protect "beneficiaries of a will jointly interested in the orderly disposition of an estate" from sharing legal advice in furtherance of their joint legal interests? *Id.* On Ambac's view, these

two hapless beneficiaries, each with his separate attorney, could only avoid later discovery of otherwise privileged communications by (i) attempting to navigate every arcane detail of probate law separately, or (ii) hiring the same attorney, and thereby potentially inviting a conflict of interest in circumstances when their interests do not align. *See supra* at 29. Ambac does not attempt to explain why any rational legal system would encourage either of those results.

In any event, Ambac cites nothing to suggest that courts applying the majority rule rejecting a litigation requirement have allowed the doctrine to expand beyond its purpose. Ambac instead cites several cases in which courts have refused to apply the common-interest doctrine in the transactional context because the communications at issue furthered a commercial, not legal, interest, Ambac Br. 34–35, thus demonstrating beyond any doubt that courts are fully capable of making that determination.[52] In contrast, every court to have considered the issue in the circumstances of *this* case—i.e., involving communications between contractually bound merger parties to address the complex legal issues involved in closing the merger—has held that such communications fall squarely within the heartland of the common-interest doctrine. *See infra* Part II.B. Thus, cases like

[52] *See also S.F. Pac. Gold Corp.*, 143 N.M. at 224 (rejecting a litigation requirement but holding that challenged communications were not shared to further a common legal interest); *Jebwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426, at * 2 (Del. Ch. 1986) (same).

this make judicial review easy, providing the court with documented and easily articulated multiple common legal interests.

Similarly meritless is Ambac's assertion that a litigation limitation is required to "give[] courts a concrete test to decide what qualifies as a protectable 'common interest.'" Ambac Br. 38. The doctrine itself already includes a "concrete test" without such a limitation—the communications must be privileged and shared to further a common legal interest. Ambac's argument that it can be difficult to define a "common legal interest" without a litigation requirement applies even in the litigation context, where parties can simultaneously have common and adverse interests (e.g., co-defendants preparing a defense while at the same time negotiating separate pleas or settlements). If anything, the common-interest doctrine's inherent limitation to communications shared for a common legal interest underscores the point that litigation is not a separate requirement, but a frequent example of the required "common legal interest" that trial courts are well-situated to evaluate, as Ambac's own authorities exemplify.

3. *The Common-Interest Doctrine Is Not A "New" Privilege And Does Not Require Legislative Approval*

Ambac's final argument—that the Legislature, not courts, should recognize "new" privileges—overlooks that the common-interest doctrine is *not* a "new" privilege. Ambac Br. 47. "While there is no New York statute that recognizes the common interest privilege as a distinct privilege, most commentators and courts

view it as an extension of the attorney-client privilege or work-product doctrine." *In re Megan-Racine Assocs., Inc.*, 189 B.R. 562, 570 (Bankr. N.D.N.Y. 1995); *see supra* at 22–23. Indeed, Ambac's argument fails even on its own terms, since Ambac agrees that the common-interest doctrine applies in the litigation context without specific statutory authorization. And Ambac misleads the Court in arguing that the Legislature specifically rejected a 1982 proposal to extend the common-interest doctrine beyond the litigation context. Ambac Br. 48. The Legislature in 1982 rejected the New York Law Revision Commission's proposal to codify *all* of New York's evidence rules, of which Proposed Code § 503(b)(3) was a very small part. Barbara C. Salken, *To Codify or Not to Codify-That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 Brook. L. Rev. 641, 661 (1992). There is no basis to conclude that the Legislature ever specifically considered and rejected adopting a common-interest doctrine provision of any sort.

The decision below is entirely correct, and should be affirmed.

II. TO THE EXTENT THIS COURT HAS JURISDICTION TO CONSIDER THE QUESTION, IT SHOULD HOLD THAT THE COMMON-INTEREST DOCTRINE SHIELDS FROM DISCLOSURE MERGER PARTIES' JOINT ATTORNEY-CLIENT COMMUNICATIONS CONCERNING LEGAL ISSUES INVOLVED IN PERFORMING THE PARTIES' EXECUTED MERGER AGREEMENT

A. The Only Question This Court Has Jurisdiction To Answer Is Whether The Common-Interest Doctrine Contains A Litigation Requirement, Not Whether There Is A Common Legal Interest In The Factual Circumstances Here

This Court has no jurisdiction to entertain Ambac's contention that even if the common-interest doctrine generally does not require litigation, the specific communications here were not shared in furtherance of a common legal interest. This Court's jurisdiction over appeals from non-final decisions based on leave to appeal from the Appellate Division is limited to the question of law certified by that Court. *See* CPLR §§ 5613, 5614. Here, the Appellate Division certified the question whether its decision was "properly made." R-ix. This Court's "usual practice" is to "interpret the question here certified—which asks whether the Appellate Division's order was 'properly made'—as posing the question of law decided by that court and which it evidently intended to certify." *Patrician Plastic Corp. v. Bernadel Realty Corp.*, 25 N.Y.2d 599, 604 (1970).

The Appellate Division's opinion spells out the question it was "asked to decide"—namely, whether the common-interest doctrine "applies only with respect to legal advice in pending or reasonably anticipated litigation." R-xi. The court

answered that question by holding that "pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege." *Id.* The court expressly did *not* decide "whether any particular document does or does not fall within the common-interest privilege," including because the communication reflected in the relevant document was made in furtherance of a common legal interest. R-xxiv. The court instead remanded that fact-specific question to the trial court. *Id.* And although Ambac does not mention it, the special referee, following an in camera review that Ambac pressed, upheld on remand BAC's claim of privilege as to every substantive communication of the several hundred at issue, and Ambac failed to move to vacate that decision. *See supra* at 19–20.

Presumably for this reason, the only question that Ambac asked the Appellate Division to certify was "[w]hether New York's common-interest doctrine applies only when the parties exchanging communication share a common legal interest in pending or reasonably anticipated litigation." Mem. of Law in Support of Pls' Mot. for Leave to Appeal at 3. That is an accurate statement of the "question of law decided by that court and which it evidently intended to certify." *Patrician Plastic Corp.*, 25 N.Y.2d at 604. This Court should thus limit itself to that question, and decline to consider whether there is a common legal interest on the specific facts of this case.

B. The Common-Interest Doctrine Protects Privileged Communications Shared By Parties To A Merger Agreement That Agree Confidentially To Share Legal Advice To Resolve The Legal Issues Required To Complete The Merger, As Every Court To Have Considered The Issue Has Held

To the extent the Court has jurisdiction to answer that question, however, the answer is quite obviously yes. If there is any context outside of litigation in which the parties' legal interests are sufficiently closely aligned to support the common-interest doctrine's application, it is the legal efforts of two parties to an executed merger agreement working cooperatively to close the agreed merger. Indeed, there is no real dispute that the parties here shared common legal interests in resolving the many legal issues necessary to consummate the Merger Agreement. That agreement bound the parties to work jointly to address those legal issues, including by sharing confidential information to achieve their common purpose. And the purposes underlying the common-interest doctrine apply fully here—heavily regulated entities working together to close a merger should be encouraged to share legal advice so they can assure legal compliance and avoid future litigation. There is no plausible basis to dispute that merger parties' legal interests generally—or these merger parties' legal interests in particular—are more than sufficiently aligned to warrant application of the common-interest doctrine, as the special referee has already held on remand.

Not a single court that has addressed the common-interest doctrine in the context of a signed merger agreement has declined to apply the doctrine. Rather, the "weight of case law" in the federal courts holds that "privileged information exchanged during a merger between two unaffiliated businesses would fall within the common-interest doctrine." *Munich Reins. Am., Inc. v. Am. Nat'l Ins. Co.*, 2011 WL 1466369, at *20 (D.N.J. April 18, 2011) (quotation omitted); *see also La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 310 (D.N.J. 2008) (same); *Cavallaro v. United States*, 153 F. Supp. 2d 52, 61 (D. Mass. 2001) (same). Those authorities are not limited to merger parties that end up in litigation. Rather, the relevant cases explain that buyers and sellers share a common legal interest in, for example, resolving the complex legal issues necessary to complete any merger or acquisition, especially one between two heavily regulated financial institutions.

Ambac acknowledges these cases, but argues that they are "inconsistent with New York's narrow construction of the attorney-client privilege." Ambac Br. 57. But just as in New York, the attorney-client privilege is construed narrowly in federal courts to apply "only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Ambac's position has routinely been rejected not because of a less than "narrow construction," but because it is wrong.

For example, in *In re J.P. Morgan Chase & Co. Securities Litig.*, 2007 U.S. Dist. LEXIS 60095 (N.D. Ill. Aug. 13, 2007), the court found that J.P. Morgan and Bank One "shared a common legal interest following the signing of the merger agreement" in "ensuring that the newly agreed merger met any regulatory conditions and achieved shareholder approval." *Id.* at *15–16. The court therefore found "significant benefit in allowing the Bank One and JP Morgan attorneys to communicate freely and openly and to exchange confidential documents." *Id.* Similarly, in *United States v. Gulf Oil Corp.*, 760 F.2d 292 (Temp. Emer. Ct. App. 1985), the court declared "apparent" that parties to a signed but unconsummated merger agreement "did not waive . . . privilege . . . by disclosing the documents to [each other] pursuant to the merger agreement" because the parties "were in the initial stages of becoming parent and subsidiary." *Id.* at 296. And the court in *Morvil Tech., LLC v. Ablation Frontiers, Inc.*, 2012 U.S. Dist. LEXIS 30815 (S.D. Cal. Mar. 8, 2012), found that because "Medtronic and AFI were contemplating the wholesale acquisition of AFI by Medtronic," the companies' "legal interests . . . in evaluating" their respective products' intellectual-property rights "were aligned as both parties were committed to the transaction and working toward its successful completion." *Id.* at *9; *see also Weber v. FujiFilm Med. Sys. U.S.A.*, 2011 U.S. Dist. LEXIS 6199, at *7 (D. Conn. Jan. 21, 2011) (applying common-

interest doctrine to documents "concern[ing] legal advice related to the . . . merger, a matter in which [the parties] have a common legal interest").

The same result is required here. The record is undisputed that BAC and CFC shared privileged information under the Merger Agreement—which "committed" them to the transaction's "successful completion," *Morvil*, 2012 U.S. Dist. LEXIS 30815, at *9—to assist them "in the initial stages of becoming parent and subsidiary," *Gulf Oil*, 760 F.2d at 296. The agreement expressly protected that information-sharing under existing confidentiality agreements,[53] thereby "strengthen[ing] the case against waiver" under the common-interest doctrine. *Id.* And the special referee concluded after reviewing the relevant documents in camera that all substantive communications at issue—on subjects such as filing proper SEC disclosures; seeking regulatory approvals[54]; advising employees on permitted pre-Merger information-sharing under the antitrust laws[55]; opining on

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[53] *See* R-85 (Merger Agreement § 6.2(b) ("All information and materials provided pursuant to this Agreement shall be subject to the provisions of the Confidentiality Agreements entered into between the parties . . . .")).

[54] *See, e.g.*, *In re J.P. Morgan*, 2007 U.S. Dist. LEXIS 60095, at *15–16 (finding "a common legal interest" between merger parties in "ensuring that the newly agreed merger met any regulatory conditions and achieved shareholder approval").

[55] *See, e.g.*, *In re Sulfuric Acid*, 235 F.R.D. at 417 (finding that affiliated corporations "shared a common legal interest regarding compliance with antitrust and other laws").

tax issues[56]; and structuring and advising on contracts documenting ancillary transactions necessary to complete the Merger,[57]—were made to further the parties' shared legal interests. *See supra* at 19–20.

Ambac thus errs in contending that BAC's and CFC's legal interests were not sufficiently common because there could theoretically have been circumstances in which the parties could have rejected the Merger Agreement before closing. Ambac Br. 53–54. To whatever extent that might have been true here, it would just mean that the parties could in some circumstances have diverging legal interests, no different from, say, parties to a joint representation or co-defendants in criminal and civil cases. *See supra* at 53. The relevant question, though, is whether each communication at issue was shared in furtherance of a legal interest that *was* common to the parties. The communications here were shared to resolve specific legal issues that the Merger Agreement had itself bound the parties to coordinate in resolving, including by sharing confidential information.

It is thus true but irrelevant that a generalized common interest in "closing a business deal in compliance with the law" is not by itself protected under the common-interest doctrine. Ambac Br. 34; *see* Ambac Br. 54. The common legal interest here is not legally completing the merger, but resolving the specific legal

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[56] R-45 (Ofcharsky Aff. ¶¶ 17–19).

[57] R-41–47 (Ofcharsky Aff. ¶¶ 6–25).

issues that had to be resolved before the signed merger could be completed, as the parties had agreed to do—a circumstance courts have repeatedly recognized as falling within the common-interest doctrine. *See supra* at 59–60. Ambac does not even try to explain how the parties' interests in resolving the specific categories of legal issues listed in Ofcharsky affidavit could not qualify under any plausible definition of "common legal interests."

Ambac does not cite a *single* case in which a court refused to apply the common-interest doctrine to communications shared during the post-merger-agreement, pre-closing period. Rather, most of Ambac's merger authorities (Ambac Br. at 35–36) involve parties that had either not yet signed a merger agreement or had already agreed to renegotiate such an agreement—and therefore did not share any legal interests either inside or outside of litigation.[58] And the case that Ambac tabs as "most relevant[]," *Integrated Global Concepts, Inc. v. j2*

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[58] *See, e.g.*, *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578–79 (N.D. Cal. 2007) (recognizing that the common-interest doctrine applies beyond the litigation context, but holding that the parties did not share a common legal interest because one "was simply considering buying a majority share of" the other); *Net2Phone, Inc. v. Ebay, Inc.*, 2008 WL 8183817, at *7–8 (D.N.J. June 26, 2008) (explaining that the common-interest doctrine applies to communications furthering not only "joint interest in pending or anticipated litigation," but also "a common legal strategy," but concluding that the communications at issue did not satisfy that standard because the parties "were negotiating the price that [one] would pay for [the other's] shares"); *Advanced Neuromodulation Sys., Inc. v. Advanced Bionics Corp.*, 2005 U.S. Dist. LEXIS 47692, at *5 (E.D. Tex. Oct. 26, 2005) (finding waiver when party "disclosed documents and communications to [counterparty] during merger negotiations prior to entering into a merger agreement").

Global, Inc., 2014 U.S. Dist. LEXIS 7294 (N.D. Cal. Jan. 21, 2014), does not help Ambac at all. To the contrary, *Integrated Global*

- *Rejected* a litigation requirement, holding that the doctrine applied when parties were "working together in prosecuting or defending a lawsuit *or in certain other legal transaction[s]*." *Id.* at *6 (emphasis added).

- Considered communications that involved *a third party* in addition to the two merger parties that did "not provide any form of legal service." *Id.* at *2, *5–6.

- Involved no "evidence of any written [common interest] agreement with [the post-merger company and the third party] whatsoever, giving the court no evidence on which to base a finding that the communications are covered by the privilege." *Id.* at *6.

This case, in contrast, involves no third-parties, BAC and CFC "required shared legal advice from counsel," and "[a]ll information and material exchanged between [them] under the merger agreement was subject to confidentiality provisions and a common interest agreement the parties entered into shortly before they signed the merger agreement," as the Appellate Division recognized. R-xii–xiii.

Ambac's error is further demonstrated by another case it cites, *Zirn v. VLI Corp.*, 16 Del. J. Corp. L. 1700 (Del. Ch. 1990). There, the Delaware Chancery Court held that communications shared before a signed merger agreement and while the parties were renegotiating the agreement were not protected because the "parties still had adverse interests in renegotiating and restructuring the original agreement." *Id.* at 1714. But the court also explained that these adverse interests

lasted only "until the revised merger agreement was executed." *Id.* at 1714.[59]

Thus, Ambac's authorities might conceivably apply if the communications at issue here had occurred *before* the Merger Agreement was signed, or if the parties had agreed to renegotiate that agreement. But there is no dispute that BAC and Countrywide "shared a common legal interest *following* the signing of the merger agreement" in "ensuring that the newly agreed merger met any regulatory conditions and achieved shareholder approval." *In re J.P. Morgan*, 2007 U.S. Dist. LEXIS 60095, at *15-16 (emphasis added).

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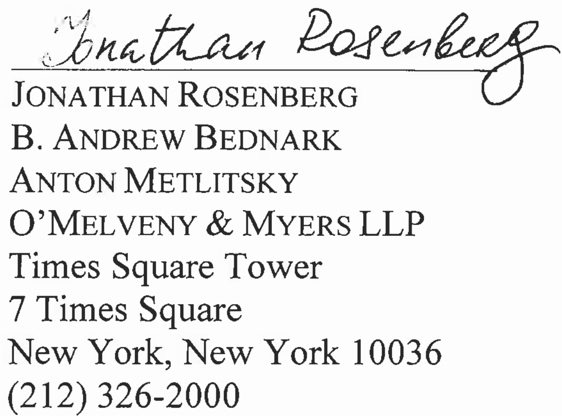
[59] Most puzzling is Ambac's citation (at 56–57) of *Infinite Energy, Inc. v. Econnergy Energy Co.*, 2008 WL 2856719 (N.D. Fla. July 23, 2008). That case does not involve communications shared by parties to a merger agreement. Rather, it involved one party to a merger agreement and one of its major shareholders, neither of whom could articulate any shared legal interest at all, but only an interest in "getting the deal done and selling the company." *Id.* at *3.

CONCLUSION

For the foregoing reasons, the certified question should be answered in the affirmative, and the judgment of the Appellate Division affirmed.

Dated: June 23, 2015

Respectfully submitted,



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Attorneys for Defendant-Respondent Bank of America Corporation

Addendum A

EX-21 4 bac-12312014x10kex21.htm EXHIBIT 21

Exhibit 21

Direct and Indirect Subsidiaries of Bank of America Corporation
As of December 31, 2014

Name	Location	Jurisdiction
Asian American Merchant Bank Ltd.	Singapore, Singapore	Singapore
B of A Issuance B.V.	Amsterdam, The Netherlands	Netherlands
BA Continuum Costa Rica, Limitada	San Jose, Costa Rica	Costa Rica
BA Continuum India Private Limited	Hyderabad, India	India
BA Continuum Singapore International Holdings Private Limited	Singapore, Singapore	Singapore
BA Credit Card Funding, LLC	Charlotte, NC	Delaware
BA Electronic Data Processing (Guangzhou) Ltd.	Guangzhou, PRC	People's Republic of China
BAC Canada Finance Company	Toronto, Ontario, Canada	Canada
BAC North America Holding Company	Charlotte, NC	Delaware
BANA Canada Funding Company Ltd.	Calgary, Alberta, Canada	Canada
BANA Holding Corporation	Charlotte, NC	Delaware
Banc of America Consumer Card Services, LLC	Charlotte, NC	North Carolina
Banc of America FSC Holdings, Inc.	San Francisco, CA	Delaware
Banc of America Leasing & Capital, LLC	San Francisco, CA	Delaware
Banc of America Merchant Services, LLC	Atlanta, GA	Delaware
Banc of America Preferred Funding Corporation	Charlotte, NC	Delaware
Banc of America Public Capital Corp	Charlotte, NC	Kansas
Banc of America Securities (India) Private Limited	Mumbai, India	India
Banc of America Securities Asia Limited	Hong Kong, PRC	Hong Kong, PRC
Bank of America California, National Association	San Francisco, CA	United States of America
Bank of America Malaysia Berhad	Kuala Lumpur, Malaysia	Malaysia
Bank of America Merrill Lynch Banco Multiplo S.A.	Sao Paulo, Brazil	Brazil
Bank of America Merrill Lynch International Limited	London, U.K.	United Kingdom
Bank of America Mexico, S.A., Institucion de Banca Multiple	Mexico City, Mexico	Mexico
Bank of America Overseas Corporation	Charlotte, NC	United States of America
Bank of America Singapore Limited	Singapore, Singapore	Singapore
Bank of America, National Association	Charlotte, NC	United States of America
BankAmerica International Financial Corporation	San Francisco, CA	United States of America
Blue Ridge Investments, L.L.C.	Charlotte, NC	Delaware
BofA Canada Bank	Toronto, Ontario, Canada	Canada
BofA Distributors, Inc.	Boston, MA	Massachusetts
BofAML Funding Limited	London, U.K.	United Kingdom
Boston Overseas Financial Corporation	New York, NY	United States of America
CM Investment Solutions Limited	London, U.K.	England
Countrywide Financial Corporation	Calabasas, CA	Delaware
Countrywide Home Loans, Inc.	Calabasas, CA	New York
DSP Merrill Lynch Limited	Mumbai, India	India
DSP Merrill Lynch Trust Services Limited	Mumbai, India	India
FIA Holdings S.a.r.l.	Luxembourg, Luxembourg	Luxembourg
Financial Data Services, Inc.	Jacksonville, FL	Florida
First Franklin Financial Corporation	San Jose, CA	Delaware
Marlborough Sounds LLC	Charlotte, NC	Delaware
MBNA Limited	Chester, England	England & Wales
Merrill Lynch (Asia Pacific) Limited	Hong Kong, PRC	Hong Kong, PRC
Merrill Lynch (Australia) Futures Limited	Sydney, Australia	Australia
Merrill Lynch (Singapore) Pte. Ltd.	Singapore, Singapore	Singapore
Merrill Lynch Argentina S.A.	Capital Federal, Argentina	Argentina
Merrill Lynch B.V.	Amsterdam, The Netherlands	Netherlands
Merrill Lynch Bank and Trust Company (Cayman) Limited	George Town, Grand Cayman, Cayman Is.	Cayman Islands
Merrill Lynch Canada Inc.	Toronto, Ontario, Canada	Canada
Merrill Lynch Capital Markets (France) SAS	Paris, France	France
Merrill Lynch Capital Markets AG	Zurich, Switzerland	Switzerland
Merrill Lynch Capital Markets Espana, S.A., S.V.	Madrid, Spain	Spain

Merrill Lynch Capital Services, Inc.	New York, NY	Delaware
Merrill Lynch Commodities (Europe) Limited	London, U.K.	England
Merrill Lynch Commodities Canada, ULC	Toronto, Ontario, Canada	Canada
Merrill Lynch Commodities, Inc.	Houston, TX	Delaware
Merrill Lynch Corredores de Bolsa SpA	Santiago, Chile	Chile
Merrill Lynch Credit Reinsurance Limited	Hamilton, Bermuda	Bermuda
Merrill Lynch Derivative Products AG	Zurich, Switzerland	Switzerland
Merrill Lynch Equities (Australia) Limited	Sydney, Australia	Australia
Merrill Lynch Equity S.a.r.l.	Luxembourg, Luxembourg	Luxembourg
Merrill Lynch Far East Limited	Hong Kong, PRC	Hong Kong, PRC
Merrill Lynch Financial Markets, Inc.	New York, NY	Delaware
Merrill Lynch Global Services Pte. Ltd.	Singapore, Singapore	Singapore
Merrill Lynch International	London, U.K.	England
Merrill Lynch International & Co. C.V.	Curacao, Netherlands Antilles	Curacao

Name	Location	Jurisdiction
Merrill Lynch International Bank Limited	Dublin, Ireland	Ireland
Merrill Lynch International Incorporated	New York, NY	Delaware
Merrill Lynch Israel Ltd.	Tel Aviv, Israel	Israel
Merrill Lynch Japan Finance GK	Tokyo, Japan	Japan
Merrill Lynch Japan Securities Co., Ltd.	Tokyo, Japan	Japan
Merrill Lynch Life Agency Inc. (Washington)	Pennington, NJ	Washington
Merrill Lynch Luxembourg Finance S.A.	Luxembourg, Luxembourg	Luxembourg
Merrill Lynch Malaysian Advisory Sdn. Bhd.	Kuala Lumpus, Malaysia	Malaysia
Merrill Lynch Markets (Australia) Pty. Limited	Sydney, Australia	Australia
Merrill Lynch Markets Singapore Pte. Ltd.	Singapore, Singapore	Singapore
Merrill Lynch Menkul Degerler A.S.	Istanbul, Turkey	Turkey
Merrill Lynch Mexico, S.A. de C.V., Casa de Bolsa	Mexico City, Mexico	Mexico
Merrill Lynch Mortgage Lending, Inc.	New York, NY	Delaware
Merrill Lynch Professional Clearing Corp.	New York, NY	Delaware
Merrill Lynch Reinsurance Solutions LTD	Hamilton, Bermuda	Bermuda
Merrill Lynch S.A. Corretora de Titulos e Valores Mobiliarios	Sao Paulo, Brazil	Brazil
Merrill Lynch Securities (Taiwan) Ltd.	Taipei, Taiwan	Taiwan
Merrill Lynch Securities (Thailand) Limited	Bangkok, Thailand	Thailand
Merrill Lynch South Africa (Proprietary) Limited	Gauteng, South Africa	South Africa
Merrill Lynch UK Holdings Limited	London, U.K.	United Kingdom
Merrill Lynch Yatirim Bank A.S.	Istanbul, Turkey	Turkey
Merrill Lynch, Kingdom of Saudi Arabia Company	Kingdom of Saudi Arabia	Saudi Arabia
Merrill Lynch, Pierce, Fenner & Smith Incorporated	New York, NY	Delaware
ML Equity Solutions Jersey Limited	St. Helier, Jersey	Jersey
Mortgages 1 Limited	London, U.K.	England
Mortgages plc	London, U.K.	England
NB Holdings Corporation	Charlotte, NC	Delaware
One Bryant Park LLC	New York, NY	Delaware
OOO Merrill Lynch Securities	Moscow, Russia	Russia
Prime Asset Custody Transfers Limited	London, U.K.	United Kingdom
PT Merrill Lynch Indonesia	Jakarta, Indonesia	Indonesia
ReconTrust Company, National Association	Simi Valley, CA	United States of America
Specialized Lending, LLC	Dallas, TX	Delaware
Spring Valley Management LLC	Charlotte, NC	Delaware
U.S. Trust Company of Delaware	Wilmington, DE	Delaware
Wave Lending Limited	London, U.K.	England

Pursuant to Item 601(b)(21)(ii) of Regulation S-K, the names of certain other subsidiaries of Bank of America Corporation are omitted. These subsidiaries, considered in the aggregate, would not constitute a "significant subsidiary" under SEC rules.