

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: HON. EILEEN BRANSTEN, JUSTICE PART 3

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MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

Index No.: 602825/08
Motion Date: 12/6/12
Motion Seq. No.: 067

COUNTRYWIDE HOME LOANS, INC.,
COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP.,
COUNTRYWIDE HOME LOANS
SERVICING, LP AND BANK OF AMERICA
CORP.,

Defendants.
-----X

The following papers, numbered 1 to 5, were read on this motion to seal.

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits	<u>3</u>
Supplemental Motion – Affidavits – Exhibits	<u>4, 5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the accompanying memorandum decision.

Dated: January 3, 2013


Hon. Eileen Bransten

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMITORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE
FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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-----X
PRESENT: HON. EILEEN BRANSTEN

This matter comes before the Court on the motion to seal filed by defendant Bank of America Corporation (“BAC”) (motion sequence no. 67). BAC seeks to seal certain documents and portions of documents included as exhibits to the summary judgment motions recently filed by MBIA Insurance Corporation (“MBIA”) and BAC in this litigation (motion sequence no. 60, 61). BAC’s motion is opposed by MBIA, as well as by Intervenor Bloomberg LP (“Bloomberg”).

BACKGROUND

The facts of this matter have been discussed extensively in previous decisions of this Court, including the December 9, 2012 decision on the sealing motions submitted by MBIA and defendants Countrywide Home Loans, Inc. (“CHL”); collectively with Countrywide

Securities Corporation (“CSC”), Countrywide Financial Corporation (“CFC”) and Countrywide Home Loans Servicing, LP (“CHLS”) “Countrywide”; and Countrywide, together with BAC, “Defendants”).¹ Thus, only details necessary to this motion are referenced herein.

This action stems from fifteen residential mortgage-backed securitizations (the “securitizations”). The securitizations were collateralized by residential mortgages that were originated and purchased by Countrywide. MBIA insured the securitizations, guaranteeing payments to the securitizations’ investors.

On August 24, 2009, MBIA filed an amended complaint (the “Amended Complaint”). The Amended Complaint added, among other things, a cause of action alleging successor and vicarious liability against BAC. The parties then entered into a protective order, governing the production, exchange, and discovery of documents, which was entered by the Court on March 3, 2010. Following several years of discovery, the Note of Issue was filed on September 17, 2012. Shortly thereafter, both MBIA and BAC filed motions for summary judgment pursuant to CPLR 3212. These summary judgment motions introduce as court records documents produced by the parties pursuant to the protective order.

¹ *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, Index No. 602825/2008 (Sup. Ct. N.Y. Cty. Dec. 6, 2012) (“Dec. 6, 2012 decision”).

In connection with these summary judgment motions, BAC seeks to have certain of these previously-designated confidential documents, or excerpts of such documents, filed under seal, since these documents otherwise would become part of the public court record. Following the Court's December 6, 2012 ruling on the motions to seal submitted by MBIA and Countrywide, BAC tailored its sealing request to cover the following categories of information:²

- personal identifying and private financial information of third-party borrowers, including home addresses, loan numbers and other financial account information;
- witnesses' home addresses;
- confidential bank account numbers of third-party borrowers and BAC subsidiaries;
- supplier information;
- information concerning BAC subsidiaries not at issue in this litigation;
- Bank of America and Countrywide's repurchase reserves, the formula for calculating such reserves, and information disclosing aspects of that formula;
- Countrywide's current financial information;
- minimum capital ratios for BAC subsidiaries;
- capital contribution amounts from BAC to Countrywide;

² December 11, 2012 Letter from Daniel Cantor to Court at 1. ("Cantor Letter") (Docket No. 3977.)

- settlement agreements and allocations of settlement payments under cost sharing agreements; and,
- non-public information concerning the amount of Countrywide's litigation reserves, settlement expenses, legal fees, and litigation costs.

BAC's tailored request identified the specific documents in each category that are now the subject of its motion. (Cantor Letter at 2-5.) The Court will address the proposed redactions in the documents identified by BAC in the Cantor Letter³ after discussing the broader categories identified by BAC.

ANALYSIS

I. Standard of Law

There is a broad presumption under New York law favoring public access to judicial proceedings and court records. *Mosallem v. Berenson*, 76 A.D.3d 345, 348 (1st Dep't 2010). This presumption stems from the State's long recognition that "civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly and fairly." *Id.* The media's right of access and the public's right are considered to be "on

³ While the hard copy documents submitted to the Court with the Cantor Letter included copies of the parties' briefing with proposed redactions, BAC's narrowed sealing request, as itemized in the Cantor Letter, made no reference to these papers. To the extent that BAC still seeks redaction of the parties' briefing, it may redact in accordance with the Court's direction herein.

the same footing.” *Danco Labs. v. Chemical Works of Gedeon Richter*, 274 A.D.2d 1, 6 (1st Dep’t 2000).

While the public’s right of access is broad, it is not absolute. *Mosallem*, 76 A.D.3d at 349. Under Section 216.1(a) of the Uniform Rules for Trial Courts, a court may seal court records: “upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.” 22 N.Y.C.R.R. 216.1(a).

Although “good cause” is not defined in Section 216.1(a), “[a] finding of ‘good cause’ presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant.” *Mancheski v. Gabelli Group Capital Partners*, 39 A.D.3d 499, 502 (2d Dep’t 2007). “Confidentiality is clearly the exception, not the rule, and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.” *Monallem*, 76 A.D.3d at 349. To satisfy this burden, the proponent of the sealing motion must demonstrate a “sound basis or legitimate need to take judicial action.” *Danco Labs.*, 247 A.D.2d at 8 (internal quotation omitted).

“[N]either the potential for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records.” *Monsallem*, 76 A.D.3d at

351. However, sealing has been deemed appropriate to shield trade secrets or where the release of documents could “threaten a business’s competitive advantage.” *Id.* at 350.

In determining whether information qualifies as a trade secret, the court may consider:

(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 124 (1st Dep’t 1998). As the Court of Appeals explained, “[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *New York Tel. Co. v. Pub. Serv. Comm’n of the State of New York*, 56 N.Y.2d 213, 219 n.3 (1982).

Determination of whether the release of documents threatens a harm to a business’s competitive business advantage hinges on a finding that such information: is proprietary; involves current or future business strategies; is closely guarded; and, if disclosed, would given a competitor an unearned advantage. *Mancheski*, 39 A.D.3d at 503. Such information has been described as “akin to a trade secret.” *Id.*

Where sealing is authorized, a document need not be withheld from the public in its entirety, as “[r]edaction is a viable option, predicated upon the required level of need.” *Danco Labs*, 274 A.D.2d at 8.

II. Document Categories For Which BAC Requests Sealing

As noted above, BAC seeks to seal documents falling under eleven different categories. While MBIA notes that certain of BAC’s requests are uncontested, *see* December 17, 2012 Letter from Manisha M. Sheth to Court at 2 (“Sheth Letter”), the Court nonetheless must make its own findings to the existence of “good cause” for each category of information. *See Mancheski*, 39 A.D.3d at 501 (explaining that Section 216.1 was promulgated to ensure judicial review of documents even where parties agree to sealing).

A. Personal Identifying and Private Financial Information of Third-Party Borrowers

BAC seeks to redact certain information identifying the borrowers of those loans eventually securitized into the fifteen transactions at issue in this litigation. The parties agree that this personal and financial information – including borrowers’ names, home addresses, social security numbers, and dates of birth – should be sealed.

The Court agrees with BAC and MBIA and finds that good cause has been shown for redaction. For the same reasons discussed in the Court's December 6, 2012 decision, there is no compelling public interest in disclosure of borrowers' personal and financial information. *See* Dec. 6, 2012 decision at 8-9. In fact, there is a compelling interest in shielding third-party borrowers' personal and financial information since "disclosure could impinge on the privacy rights of third parties who clearly are not litigants herein." *Mancheski*, 39 A.D.3d at 502.

Accordingly, BAC's request to redact the personal identifying and private financial information in the following documents is granted: Oblak Affirm.⁴ Ex. 44 and Rosenberg Affirm.⁵ Exs. 53, 64, 66, 72-74 and 148-151. However, BAC's request to redact Oblak Ex. 77 on this basis is denied, since Oblak Ex. 77, as submitted to the Court, does not appear to contain any personal identifying or private financial information.

⁴ Affirmation of Jonathan B. Oblak in Support of MBIA's Motion for Summary Judgment (motion sequence no. 61).

⁵ Affirmation of Jonathan Rosenberg in Support of BAC's Motion for Summary Judgment (motion sequence no. 60) and the Affirmation of Jonathan Rosenberg in Opposition to MBIA's Motion for Summary Judgment (motion sequence no. 61) (collectively "Rosenberg Affirm.").

B. *Witnesses' Home Addresses*

BAC seeks to seal documents that reference witnesses' home addresses. These documents are primarily deposition testimony. For the reasons noted above with regard to third-party borrowers, good cause has been shown to redact this witness-specific information. Accordingly, BAC's motion to seal addresses in the following documents is granted: Oblak Affirm. Exs. 20, 26, 56, 68, 72, 114, 163, 289, and 322; Rosenberg Affirm. Exs. 127, 212, and 216; and Bea Affirm.⁶ Exs. 7, 13, 17, 18, 19, 22, and 111.

C. *Confidential Bank Account Numbers*

BAC proposes to redact various Bank of America financial account numbers contained in spreadsheets and attachments filed as exhibits by BAC and MBIA to their summary judgment papers. The Court agrees. There is good cause to redact BAC account numbers to prevent the same fraud and misappropriation noted above with regard to the third-party borrowers. Moreover, as with the third-party financial information discussed above, the Court finds no compelling public interest in exposure of this information. Thus, BAC's motion to redact bank account information contained in the following documents is

⁶ Affirmation of Renee B. Bea in Opposition to BAC's Motion for Summary Judgment (motion sequence no. 60).

granted: Rosenberg Affirm. Exs. 49, 50, 53, 66 and 312; Oblak Affirm. Ex. 349; and, Bea Affirm. Ex. 69.

D. *Supplier Information*

BAC seeks to redact a multi-column spreadsheet, listing the names of 930 suppliers used by Countrywide and BAC, as well as the amounts spent with each supplier. BAC argues that revelation of this supplier information could cause it competitive harm in its ongoing procurement-related dealings. The Court agrees. BAC has shown good cause under Section 216.1 for the redaction of this information, as revelation of the specific amounts spent by BAC could harm its negotiations with other vendors. Further, redaction of only the amounts spent will enable public access to the remainder of the information in Oblak Affirmation Ex. 165 without exposing the competitive information identified by BAC. *Mancheski*, 39 A.D.3d at 502 (noting that “good cause” determination “involves weighing the interests of the public against the interests of the parties.”). Accordingly, the redactions proposed by BAC to Exhibit 165 to the Oblak Affirm. are granted.

E. *Information Concerning BAC Subsidiaries Not At Issue in This Litigation*

BAC requests that information concerning Bank of America subsidiaries not involved in this litigation be redacted. Specifically, BAC maintains that the exhibits it seeks to seal

contain information that could pose competitive harm to these entities and interfere with their ongoing business negotiations. Moreover, none of the entities in question are involved in the successor liability claims asserted against BAC. After review of the documents at issue, the Court finds that BAC has shown good cause under Section 216.1 as to Oblak Affirm. Ex. 256 and Bea Affirm. Exs. 56, 74, 83, 84 and 88. While there may be a public interest in the disclosure of these documents, this interest is more in the nature of curiosity, since these documents do not concern entities at issue in this case. *See Matter of Crain Comm. v. Hughes*, 135 A.D.2d 351, 352 (1st Dep't 1987) (denying motion to seal where no showing made of any legitimate public interest "as opposed to mere curiosity").

However, one of the documents that BAC seeks to seal on this basis – Bea Affirm. Ex. 50 – does not appear to contain information about other BAC subsidiaries. Thus, BAC's request to redact this document on this basis is denied.

F. *Bank of America and Countrywide's Repurchase Reserves, the Formula For Calculating Such Reserves, and Information Disclosing Aspects of That Formula*

BAC next seeks to redact documents discussing both the repurchase reserves held by Bank of America and Countrywide, as well as the formulas and assumptions underlying those reserves. As addressed in the December 6, 2012 decision, the Court finds that specific discussions as to how reserves are set, including the formulas used to calculate reserves, are

to be sealed. *See* Dec. 6, 2012 decision at 20-21. Revelation of the formulas themselves, assumptions underlying the formulas, or other bases used to set reserves could cause competitive harm to Countrywide, as this information could reveal BAC's financial ability to resolve certain claims. Such information would give counterparties a window into the amount available to resolve their disputes, posing a competitive business disadvantage to BAC. *See Mancheski*, 39 A.D.3d at 503 (finding good cause to seal documents where "disclosure could harm the private corporation's competitive standing").

Accordingly, BAC's request to redact the formulas used to calculate reserves, as well as specific reserve numbers, from the following documents is granted: Oblak Affirm. Exs. 26, 69, 80, 81, 85, 101, 117, 119, 159, 160, 166-71, 176, 190, 307, 337, 338 and 339; Rosenberg Affirm. Ex. 121, 128, 133, 212, and 245; Bea Affirm. Ex. 27, 49, 56 and 108.

However, BAC's request to seal Oblak Affirm. Ex. 79 is denied, as this document does not contain formulas used to calculate repurchase reserves, nor does it reference the setting of a reserve. Thus, the Court sees no reserve-related information to redact from this document. Moreover, the information in this document appears to relate to MBIA's repurchase requests, and thus fall within the category of repurchase documents that the Court ruled against sealing. *See* Dec. 6, 2012 decision at p. 16.

G. *Countrywide's Current, Non-Public Financial Information and Minimum Capital Ratios for BAC Subsidiaries*

BAC requests redaction of documents disclosing Countrywide's non-public financial information. These documents discuss Countrywide's "current profitability, shareholder equity, aggregate litigation amounts, legal fees and reserves", with "current" defined as of December 31, 2011 or later. (Affidavit of Michael W. Schloessmann in Support of BAC's Motion to Seal ("Schloessmann Aff.") ¶ 19.) BAC explains that exposure of this non-public information would harm BAC's competitive business advantage, particularly as it pertains to settlement negotiations. After reviewing the documents, the Court finds that good cause has been shown under Section 216.1 to redact the numbers in the documents at issue; however, the headings of the tables containing those numbers and any other contextual information in the documents shall not be redacted. Thus, BAC's request to seal is granted as to the figures – including specific dollar amounts and denominations – contained in the following documents: Rosenberg Affirm. Exs. 152, 238, and 241; Oblak Affirm. Exs. 69, 161, 162, 172, 173, 204, 316 and 317; Bea Affirm. Exs. 25, 27 and 106.

Further, for those documents revealing minimum capital ratios for BAC subsidiaries, the same reasoning applies, regardless of whether this information pre-dates December 31, 2011. Accordingly, BAC's request to seal is granted as to those numbers in the following documents that reveal minimum capital ratios: Rosenberg Affirm. Exs. 121, 128, and 133;

Oblak Affirm. Exs. 25, 26, 69, 82, 85, 117, 119, 159, 160, 166, 167, 169-171, 177, 204, 348, and 350; and Bea Affirm. Exs. 27, 47, 88 and 108.

H. *Non-Public Information Concerning the Amount of Countrywide's Litigation Reserves, Settlement Expenses, Legal Fees and Litigation Costs*

BAC requests that information concerning its litigation reserves, as well as expenses incurred due to legal fees and settlements, be redacted. The Court finds that the analysis above as to current non-public financial information is appropriate here. Specifically, BAC has shown good cause as to why disclosure of the specific amounts spent on or reserved for litigation could threaten its ability to contest and resolve the actions asserted against it. Further, no compelling public interest has been shown in the revelation of the specific amounts set aside for this purpose, as opposed to the fact that such funds were reserved. Accordingly, BAC's request to redact dollar figures, including denominations, from the following documents is granted: Rosenberg Affirm. Exs. 121, 128, 133, 212, and 240; Oblak Affirm. Exs. 69, 84, 85, 117, 119, 159, 160, 166-171, 176, 202, 307, 313-315, and 318-320; and, Bea Affirm. Exs. 20, 27, 56, and 108. Consistent with the Court's statement above, however, the other non-numerical information in these documents shall not be redacted.

I. *Amount of Capital Contributions Made by BAC to Countrywide*

In its motion, BAC also seeks to redact information concerning capital contributions made by BAC to Countrywide. While BAC asserts that revelation of the contribution amounts could impede its ongoing settlement negotiations with other counterparties, MBIA counters that BAC already disclosed the aggregate amounts of these payments. Further, MBIA asserts that aggregate numbers are sufficiently non-specific as to prevent BAC's counterparties from determining the contribution allocated for any particular settlement. Neither argument advanced by MBIA demonstrates that BAC lacks good cause to redact the specific contribution amounts at issue.

First, MBIA contends that BAC revealed the aggregate amount of its contributions in an expert report filed in separate litigation. *See* Dec. 17, 2012 Sheth Letter at 3. However, the capital contribution amount discussed in the expert report, appended to the Sheth letter, is different from the figures cited in many of the documents which BAC seeks to seal. Thus, to the extent that MBIA argues that BAC seeks to seal a specific figure that already has been disclosed, review of the expert report and the documents at issue in this litigation demonstrate otherwise. Moreover, MBIA points to no case law holding that discussion of a certain subject matter in a publicly-filed document waives or somehow estops a party from demonstrating good cause for redaction of information pertaining to the same subject matter in a separate litigation. Put another way, MBIA has not shown how discussions of aggregate

capital contributions in an expert report submitted by BAC in a different case requires revelation of specific capital contribution-related information – or even different aggregate numbers – in this litigation.

Further, MBIA argues that revelation of an aggregate settlement number will not reveal the amount contributed for any particular settlement, rendering any of BAC's concerns about specific counterparty negotiations moot. Nonetheless, the Court considers disclosure of contribution amounts to be similar to disclosure of reserves. Revelation of the amounts allocated to either in this context would reveal the figures set aside or paid to resolve claims. Under these facts, BAC's argument that disclosure could hamper its ongoing settlement negotiations with counterparties demonstrates good cause for redaction and no compelling public interest has been shown for public disclosure of this information.

Accordingly, BAC's request to redact the dollar amounts of capital contributions – including the denominations that follow any specific figure – is granted. The following documents listed in the Cantor Letter shall be redacted: Rosenberg Affirm. Exs. 133-136; Oblak Affirm. Exs. 25, 26, 69, 82, 119, 166, 167, 169-171, 177, 204, 348, and 350; and, Bea Affirm. Exs. 20, 23, 25, and 27.

J. *Settlement Agreements and Allocation of Settlement Payments Under Cost Sharing Agreements*

BAC next requests redaction of a settlement agreement, as well as other documents discussing allocation of settlement payments. After review of the documents at issue *in camera*, it appears that these documents present different concerns.

First, the settlement agreement, by its nature, provides detailed descriptions of the terms accepted by BAC in resolving the claims brought in another litigation, which shall go unnamed for the purpose of this motion. If the entire settlement agreement is filed in unredacted form, BAC maintains that its ability to enter into future litigation settlements with counterparties in similar litigations will be compromised. *See* Schloessmann Aff. ¶¶ 17-18. MBIA notes, however, that the existence of settlement agreement at issue is a matter of public knowledge and that the “key terms” of the settlement have been disclosed. (11/29/12 Hearing Tr. 54: 8-10.) Intervenor Bloomberg’s submission corroborates MBIA’s statement. Bloomberg attaches a press release circulated after settlement that reveals certain specific information drawn from the settlement agreement that is consistent with the terms in Oblak Affirm. Ex. 349. *See* Bloomberg Dec. 17, 2012 Letter to Court at 4 (Docket No. 3989); Oblak Affirm. Ex. 349, ¶ 2(a). This press release was issued by CW and BAC’s settlement counterparty.

After review of the settlement agreement and the press release submitted by Bloomberg, the Court finds that BAC has demonstrated good cause for sealing the confidential portions of the settlement agreement filed as Oblak Affirm. Ex. 349. *See In re East 51st Street Crane Collapse Litig.*, 31 Misc. 3d 406, 416, 90 N.Y.S.2d 584, 592 (Sup. Ct. N.Y. Cty. 2011) (granting sealing of settlement agreement given “strong public policy favoring settlement of claims, coupled with the good cause shown in maintaining the confidentiality of the settlement terms so as to avoid creating an artificial monetary threshold in future settlement negotiations”). However, to the extent that information contained in Oblak Affirm. Ex. 349 already has been disclosed publicly in the press release provided by Bloomberg, such information is no longer confidential and shall remain unredacted.

Documents discussing the allocation of settlement payments require a different analysis. The documents at issue here are internal BAC documents that describe the processes by which the settlement payments were allocated within BAC and Countrywide. Good cause has not been shown to justify sealing these documents in their entirety, as the information contained therein has not been demonstrated to be a “trade secret” or to pose a competitive disadvantage. Therefore, the following documents shall not be sealed in their entirety, but to the extent that these documents reveal specific dollar amounts, these amounts and their denominations may be redacted: Rosenberg Affirm. Ex. 133; Oblak Affirm. Exs. 82, 85, 121, 166, 167, 169-171, and 177; and, Bea Affirm. Exs. 25, 27, 28, and 108.

ORDER

Accordingly, it is hereby

ORDERED that defendant Bank of America Corporation's motion to seal is granted in part and denied in part; and it is further

ORDERED that defendant Bank of America Corporation shall redact those exhibits discussed in the Court's Opinion in accordance with the Court's direction; and it is further

ORDERED that defendant Bank of America shall file the redacted documents by Tuesday, January 8, 2013 at 5 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York

January 3, 2013

ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.