SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 603751/2009
MBIA INSURANCE CORPORATION
vs
CREDIT SUISSE SECURITIES
Sequence Number : 024
COMPEL

INDEX NO. _____
MOTION DATE 7/17/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 490-518
Answering Affidavits — Exhibits _____ | No(s). 519-520
Replying Affidavits _____ | No(s). 521

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 10/[illegible]/13

SHIRLEY WERNER KORNREICH J.S.C.
_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MBIA INSURANCE CORPORATION,

Index No.: 603751/2009

Plaintiff,

DECISION & ORDER

-against-

CREDIT SUISSE SECURITIES (USA) LLC,
DLJ MORTGAGE CAPITAL, INC., and
SELECT PORTFOLIO SERVICING, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc., and Select Portfolio Servicing, Inc. move to compel plaintiff, MBIA Insurance Corporation (MBIA), to produce documents pertaining to MBIA's interactions with confidential witnesses whose statements were quoted in the Amended Complaint (the AC). Certain portions of the motion were resolved prior to oral argument (e.g. disclosure of the names of the confidential witnesses). The balance of defendants' motion is granted for the reasons that follow.

I. Factual Background & Procedural History

As this is motion sequence number 24, the court assumes familiarity with the underlying facts and, therefore, will not set forth a written recitation of the long and complex procedural and factual background of this case. In short, MBIA, a monoline insurer, originally sued defendants in 2009 for (1) breaching their contractual RMBS put-back obligations; and (2) for fraudulently inducing MBIA to issue financial guarantee insurance by misrepresenting defendants' business practices. After extensive discovery, motion practice, and appeals, MBIA filed the AC on January 30, 2013. The AC fundamentally changed the nature of MBIA's fraud allegations,

relying, for the first time, extensively on confidential witnesses to bolster its fraud claims. Some of these witnesses have been deposed, some have not, and some documentation has been provided to defendants regarding the interaction between MBIA and the witnesses.

On this motion, defendants seek the complete universe of documents which explain how these witnesses came to say the things they did, years into this litigation. Defendants are not satisfied with what they describe as piecemeal disclosure, where MBIA has selectively produced favorable documentation and withheld evidence that would impeach the witnesses' claims and credibility. Specifically, defendants want all communications between these important witnesses and MBIA's counsel, and all versions, drafts, or iterations of the affidavits that formed the basis for the AC and the witnesses' deposition testimony.

So far, what has come to light is that MBIA paid substantial sums of money (in certain cases, more than $10,000)[1] to the witnesses and flew the witnesses from across the country to New York so that they could recount their knowledge of (and possible participation in) defendants' fraudulent business practices. The witnesses are former employees of defendants' vendors who claim to have first-hand knowledge of the fraud alleged in the AC. MBIA's counsel worked with these witnesses to draft affidavits detailing their knowledge of the fraud. MBIA's counsel also extensively prepped them prior to deposition and defended their testimony against cross-examination by defendants.

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[1] For example, one witness, Ibrahim Shittu, was paid approximately $12,000 "[i]n exchange for six hours of initial meetings and deposition preparation plus four hours of deposition testimony (i.e., a total of 10 hours of 'work')." Def. Mem. at 5. Shittu testified that "he met with MBIA's counsel in New York rather than have them travel to his home in Arizona" because "he wanted to 'just come out to take a break' in New York." *Id.*, citing Shittu Dep. at 86. Without belaboring this point, MBIA's arrangement with the other witnesses was more of the same.

Defendants argue that they are entitled to the witnesses' communications with MBIA's counsel so that defendants' can properly cross-examine the witnesses about the veracity of their whistle blowing, which, as mentioned earlier, forms the backbone of the AC. Without such information, defendants aver, they are left to defend testimony of fraud written by MBIA's counsel[2] and parroted in affidavits by the witnesses, who solemnly nodded their heads and adhered to their affidavits at deposition.

Except when they did not. Several of the witnesses began to recant their testimony or indicated that what was written in their affidavits was the work of MBIA's counsel and was not entirely an accurate description of their knowledge. *See* Def. Mem. at 11, citing Torrance Dep. at 142 (recanting her sworn statement that certain fraudulent practices occurred "without fail" because, after being questioned at her deposition, she conceded that it was not "the proper thing to say"); Johnson Dep. at 271 ("For the purpose of the affidavit, I agreed to those words."). Fundamental fairness dictates, defendants contend, that this evidence establishes a need to inspect the degree to which the AC's fraud allegations came from the honest recollection of the witnesses or from the minds of MBIA's counsel.

MBIA's counsel protests vigorously. They claim that their payment of the witnesses was completely appropriate, legal, and in accord with their ethical obligations. They also argue that defendants seek disclosure of trial preparation materials shielded under CPLR 3101(d)(2). However, the disproportionate payments to the witnesses implicate the serious concerns recently expressed by the Court of Appeals:

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[2] Indeed, many of the witnesses' affidavit testimony was virtually, word-for-word, the same, meaning that they either worked together, or more likely, such language was drafted by MBIA's counsel. *See* Def. Mem. at 9-10 (quoting the affidavits of four of the witnesses to demonstrate this point).

> [T]he payment of such a disproportionate fee for a short amount of time at trial is troubling, and the distinction between paying a fact witness for testimony and paying a fact witness for time and reasonable expenses can easily become blurred. A line must therefore be drawn "between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to 'influence' witnesses to 'remember' things in a way favorable to the side paying them."

Caldwell v Cablevision Sys. Corp., 20 NY3d 365, 371 (2013), quoting N.Y. St. Bar. Assn. Comm. on Prof. Ethics Op. 668. With this in mind, the court finds that, for the reasons discussed below, the requested information is not shielded by CPLR 3101(d)(2).

II. Discussion

Pursuant to CPLR 3101(d)(2), "[d]ocuments generated for litigation are generally classified as trial preparation materials [] unless they contain otherwise privileged communications, such as memoranda of private consultations between attorney and client." *In re NYC Asbestos Lit.*, 109 AD3d 7, 12 (1st Dept 2013), citing *People v Kozlowski,* 11 NY3d 223, 244 (2008). "Trial preparation materials are subject to a conditional privilege and may be disclosed 'only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'" *Id.* at 12-13, citing *Giordano v New Rochelle Mun. Housing Auth.*, 84 AD3d 729, 732 (2d Dept 2011). Moreover, "'it is unfair for the opposing party in a litigated controversy to ... use this privilege both as a sword and a shield, to waive when it enures to her advantage, and wield when it does not.'" *Id.* at 13, quoting *Farrow v Allen*, 194 AD2d 40, 45 (1st Dept 1993) (internal quotation marks omitted).

The question before the court is *not* whether the use of confidential witness testimony in a complaint automatically entitles a defendant to obtain all documents and communications

between the witnesses and plaintiff's counsel. Rather, the issue is whether, once defendants have laid a foundation giving rise to a reasonable suspicion of a witness dissembling, fairness militates in favor of disclosure. Specifically, where, as here, material witnesses admit to swearing to facts that do not entirely comport with the truth while being handsomely compensated for doing so, is the opposing party entitled to trial preparation materials which reveal the witnesses' true beliefs. The situation is one where defendants have a substantial need of the materials to properly defend and there are few if any avenues other than disclosure to obtain substantially equivalent material. Defendants cannot question plaintiff's counsel regarding the preparation of the affidavits nor is it likely counsel would admit to coaching these witnesses. Also, there is a clear limit to what witnesses will disclose about averring to untruths given the fear of negative consequences. Thus, the only means for defendants to ascertain what the witnesses really know is to look at contemporaneous documentary evidence. That is, multiple drafts of a whistle blowing affidavit, where the severity of the allegations are heightened progressively to better state a fraud claim, will show what the witnesses really know to have occurred and to what extent there was lawyer-incentivized embellishment.

In sum, defendants have a "substantial need" for the requested documents so that they can defend. To preclude defendants from obtaining this disclosure would be an "undue hardship" since there is no other contemporaneous, physical evidence of what happened that could allow defendants to cross-examine and impeach the witnesses.

In a case similar to this, Judge Sweet recognized that disclosure was necessary. *See MBIA Ins. Corp. v Patriarch Partners VIII, LLC*, 2012 WL 2568972 (SDNY 2012).[3] In that

[3] In both cases, the parties disputed whether selective disclosure waived attorney-client privilege. Here, there has been much selective disclosure, ranging from the voluminous quotations of the witnesses in the AC to partial disclosure of affidavits. MBIA has selected what to reveal, using

case, Judge Sweet considered whether defendants could overcome the burden of establishing wavier of attorney-client privilege (which is entitled to more protection under CPLR 3101(b) & (c) than trial preparation materials, the documents at issue here, receive under CPLR 3101(d)). He noted that "[i]t has long been recognized that the attorney-client privilege constitutes an obstacle to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose." *Id.* at *5, quoting *Priest v Hennessy,* 51 NY2d 62, 68 (1980) (internal quotation marks and citations omitted). He further noted that "the extent to which privilege has been waived turns on considerations of fairness." *Id.* at *8, citing *Kozlowski,* 11 NY3d at 246-47.

Fairness cuts both ways. The law in this state allows a plaintiff, such as MBIA, to maintain a fraud claim (normally subject to heightened pleading standards) on the basis of confidential witness testimony. At stake in this case is both a substantial amount of money and defendants' reputation in the financial industry. Indeed, the stakeholders in this case are not limited to the parties themselves, but the general public, who has a compelling interest in learning about the conduct that caused the recent global financial crisis. For this reason, this court denied defendants' request to redact or seal documents in this action. *See* 7/16/13 Tr. at 37-38. The courts are public fora and transparency, particularly in these mortgage-backed securities cases, is vital to maintain the public trust.

Finally, there is little concern that the requested trial preparation materials will prejudice MBIA by compromising its litigation strategy. If, as MBIA alleges, the witnesses affidavits are

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the material as a sword and shield. However, the basis for this decision is not selective disclosure, but the ground articulated by Judge Sweet: "Irrespective of whether MBIA has selectively disclosed privileged information, [defendant], as a matter of fairness, is entitled to obtain documents capable of rebutting MBIA's assertions." *MBIA*, 2012 WL 2568972, at *8.

truthful and a vetting of the witnesses' testimony supports this, MBIA's position will be bolstered. Accordingly, it is

ORDERED that the motion by defendants Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc., and Select Portfolio Servicing, Inc. is granted and plaintiff MBIA Insurance Corporation must produce all outstanding requested items in defendants' Notice of Motion dated March 8, 2013 (NYSCEF Doc. No. 490); and it is further

ORDERED that the parties must meet and confer about which items are outstanding within 7 days of the entry of this order on the NYSCEF system and such items must be produced within 10 days thereafter; and it is further

ORDERED that a status conference will be held on October 29, 2013 at 10:30 am, at which time the court will address all outstanding discovery disputes, including the dispute at issue in Motion Sequence Number 25, a firm discovery schedule will be set, and a determination will be made about the scope of discovery in this case so that each and every marginal discovery request will not require court intervention.

Dated: October 3, 2013

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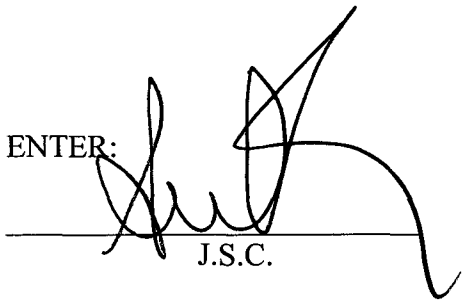

J.S.C.