REDACTED VERSION

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,	)	
Plaintiffs,	)	
v.	)	No. 13-465C
	)	(Judge Sweeney)
THE UNITED STATES,	)	
Defendant.	)	

PLAINTIFFS' PUBLIC REDACTED MOTION AND BRIEF IN SUPPORT OF MOTION TO REMOVE THE "PROTECTED INFORMATION" DESIGNATIONS FROM THE DEPOSITIONS OF EDWARD DEMARCO AND MARIO UGOLETTI

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June 12, 2015

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REDACTED VERSION

Plaintiffs Fairholme Funds, Inc., et al. ("Plaintiffs" or "Fairholme") respectfully move, pursuant to Paragraphs 17 and 19 of the Protective Order ("P.O.") entered in this action (ECF Doc. 73), for entry of an order requiring the Government to remove the "Protected Information" designations that it has affixed to the transcript of the May 7, 2015 deposition of Edward DeMarco ("DeMarco Deposition") and to the May 15, 2015 deposition of Mario Ugoletti ("Ugoletti Deposition") (collectively, "the Depositions"). The information that is contained in these Depositions does not satisfy the definition of "Protected Information" under the Protective Order. Keeping this information secret, moreover, would prejudice both Plaintiffs and any other courts that are now resolving legal challenges to which this information is relevant. At the very least, the Court should order that the redacted version of the Depositions that Plaintiffs have prepared (the "Redacted Depositions") be de-designated. Finally, in the alternative, Plaintiffs respectfully move, pursuant to Paragraph 18 of the Protective Order, for entry of an order authorizing Plaintiffs to file the Depositions under seal in *Fairholme Funds, Inc. v. The Federal Housing Finance Agency*, No. 14-5254 (D.C. Cir.),[1] as well as in any other action challenging the Net Worth Sweep at issue in this case in which Plaintiffs participate either as parties or amici, to ensure that the courts are not presented with a misleading and incomplete factual record.

[1] The D.C. Circuit has consolidated the *Fairholme* appeal with the appeals of other cases challenging the Net Worth Sweep also pending before that court. *See* Order, *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. Oct. 27, 2014), ECF No. 1519092. The *Fairholme* plaintiffs (consisting of Plaintiffs in this action, minus Continental Western Insurance Company) have been directed to file a consolidated brief with certain plaintiffs from the other appeals, and that brief is due on June 30, 2015. *See* Order, *Perry Capital LLC v. Lew*, No. 14-5243 (D.C. Cir. May 6, 2015), ECF No. 1551023.

QUESTIONS PRESENTED

1. Does the information contained in the Depositions meet the definition of "Protected Information" under Paragraph 2 of the Protective Order?
2. Do the Redacted Depositions prepared by Plaintiffs meet the definition of "Protected Information" under Paragraph 2 of the Protective Order?
3. Should this Court authorize Plaintiffs to file the Depositions under seal in in *Fairholme Funds, Inc. v. The Federal Housing Finance Agency*, No. 14-5254 (D.C. Cir.), and in any other action challenging the Net Worth Sweep in which Plaintiffs participate either as parties or amici, to ensure that the courts are not presented with a misleading and incomplete factual record?

STATEMENT OF THE CASE

The ongoing discovery in this case is being conducted pursuant to a standard protective order that permits a producing party to "designate as Protected Information any information, document, or material that meets the definition of Protected Information set forth in this Protective Order." P.O. at 1. Protected Information is defined as "proprietary, confidential, trade secret, or market-sensitive information, as well as information that is otherwise protected from public disclosure under applicable law." *Id.* ¶ 2. The Protective Order permits a producing party to initially designate all information as protected solely in order to expedite production. *Id.*

This right to designate all information as protected initially, however, is subject to the receiving party's subsequent right to challenge that designation using the procedures established by Paragraph 17 of the Order. *Id.* ¶ 17; *see also id*. ¶ 19 ("This Protective Order shall be without prejudice to the right of any party to bring before the court at any time the question whether any particular document or information is Protected Information or whether its use otherwise should

be restricted."). Paragraph 17 provides that the party intending to challenge a designation must first notify the producing party of its disagreement with its designation. *Id.* ¶ 17. The parties must seek to resolve the dispute within five business days of the producing party's receipt of such notice. *Id.* After those five days,

> [i]f the dispute is not resolved, the party challenging the protected designation, upon no fewer than three (3) business days' written notice to the producing party may, by specifying the basis on which it claims that such designation is not appropriate or that such disclosure is proper, seek a ruling from the court that the information is improperly designated or that disclosure is allowed.

Id. The burden of persuasion rests with the moving party. *Id.*

On Thursday, May 7, 2015, Plaintiffs took the deposition of Edward DeMarco, the government official who served from 2009 through 2014 as the acting director of the Federal Housing Finance Agency ("FHFA"). On Friday, May 15, 2015, Plaintiffs took the deposition of Mario Ugoletti. Mr. Ugoletti was a Treasury official at the time that Fannie and Freddie were placed into conservatorship and was a FHFA official at the time of the Net Worth Sweep; he worked on matters related to the Preferred Stock Purchase Agreements ("PSPAs") in both positions. Transcripts of the depositions are attached hereto as Exhibits A and B. The Government designated the entire transcripts of both depositions as Protected Information.

In accordance with the procedures set forth in Paragraph 17 of the Protective Order, Plaintiffs' counsel notified counsel for the Government that Plaintiffs believed that the Ugoletti and DeMarco Depositions contained no protected information and should therefore be de-designated in their entirety. The notifications were sent on May 22 and May 26, respectively. *See* E-mails between Vincent Colatriano, Counsel for Plaintiffs, and Gregg Schwind, Counsel for the Government (Exhibits C and D). Plaintiffs also expressed their willingness, as a compromise, to agree to the de-designation of only certain identified portions of the deposition transcripts in the

hope that the Government would reconsider its previously expressed opinion that the Protective Order does not contemplate partial de-designation.

Counsel for the Government first responded to Fairholme's requests for de-designation on June 2, 2015—after the five-day period applicable under Paragraph 17 to Fairholme's request for de-designation of the Ugoletti Deposition had expired, and on the final day of the period applicable to Fairholme's request for de-designation of the DeMarco Deposition. But rather than respond to Fairholme's requests on their merits or otherwise seek to "try to resolve" this issue, P.O. ¶ 17, the Government acknowledged that it had not even reviewed those requests, and it told Fairholme that because it was busy, it would not review the requests until it had completed its final privilege logs—a task the Government does not expect to finish until at least the end of this month. Fairholme immediately objected to the Government's attempt to essentially grant itself a one-month extension of the Protective Order's five-day deadline for the Government to review the de-designation requests, and asked the Government to reconsider its position. *See* E-mail from Vincent Colatriano to Gregg Schwind (June 3, 2015) (Exhibit E). In light of the expiration of the five-day period contemplated by the Protective Order, and given an approaching June 30, 2015 deadline for filing opening briefs in the Court of Appeals for the D.C. Circuit, Plaintiffs' counsel also notified the Government at that time that Plaintiffs intended to seek the Court's resolution of this issue.

ARGUMENT

I. THE GOVERNMENT HAS IMPROPERLY DESIGNATED THE DEPOSITIONS AS "PROTECTED INFORMATION" AND THE COURT SHOULD ORDER THE REMOVAL OF THESE DESIGNATIONS.

Because they contain no information that meets the Protective Order's definition of Protected Information, the Court should order the de-designation of the Depositions in their entirety.

1. The Federal Circuit has cautioned that "[p]arties frequently abuse Rule 26(c) by seeking protective orders for material not covered by the rule." *In re Violation of Rule 28(D),* 635 F.3d 1352, 1358 (Fed. Cir. 2011). To avoid such abuse, there must be some "demonstrati[on] that there is good cause for restricting the disclosure of the information at issue." *Id.* at 1357. Requiring that there be a demonstration of good cause before disclosure may be restricted ensures not only that Rule 26(c) is respected, but also that the public's First Amendment "right of access . . . to civil trials and to their related proceedings *and records*" is not infringed. *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2011) (emphasis added); *see also Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) (noting that parties "are not the only people who have a legitimate interest in the record compiled in a legal proceeding"); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986) ("[F]irst [A]mendment considerations cannot be ignored in reviewing discovery protective orders.").

This Court crafted a Protective Order with a clear and precise definition of "Protected Information" that ensures that the mandate of the Federal Circuit is obeyed and respected. Specifically, it defines "Protected Information" as "proprietary, confidential, trade secret, or market-sensitive information, as well as information that is otherwise protected from public disclosure under applicable law." P.O. ¶ 2. "Protected Information does not include discovery material that has been provided to or prepared by any Government agency (which shall include, for these purposes, FHFA) and that is available under applicable law." *Id.* The Order also recognizes that protected information "may be contained in . . . any deposition, sealed testimony or argument, declaration, or affidavit taken or provided during this litigation." P.O. ¶ 2(b).

The Order does not permit a party to designate as protected any and all information that it

might wish to shield from public scrutiny. While the Order does permit a party to "*initially* designate all information" produced as protected, P.O. ¶ 2 (emphasis added), any information designated as protected ultimately must meet the Protective Order's definition of protected information in order to qualify for protection from public disclosure. The information that is contained in the Depositions does not meet this definition and does not qualify for protection from disclosure.

Although the Government has yet to explain why the attorneys who reviewed the Depositions concluded that both must be shielded from public disclosure in their entirety, it is nonetheless clear that none of the categories set forth in Paragraph 2 in fact applies. None of the information contained in either Deposition constitutes a trade secret or could be considered proprietary information. Nor is the information arguably market-sensitive. Indeed, the Government took the position that the "date ranges" this Court established for document discovery also applied to deposition testimony, and Government counsel instructed the witnesses not to answer questions counsel deemed to fall outside those date ranges. *See, e.g.*, Ugoletti Deposition 145:9–146:1; DeMarco Deposition 134:4–7, 293:22–294:6, 297:3–6. The most recent of those date ranges closed on September 30, 2012. Opinion and Order at 4 (July 16, 2014), Doc. 72. It is simply implausible to assert that the public disclosure of nearly three-year-old information concerning Fannie's and Freddie's finances would have any significant impact on the market today. There is no other law, finally, that protects these Depositions from disclosure.

Nor does the information in these Depositions fall within any legitimate conception of "confidential" information. In previous briefing on related issues, the Government has argued that all that is required for information to be considered "confidential" within the meaning of the

Protective Order is that it not already be in the public domain. *See* Defendant's Resp. to Plaintiffs' Motion to Remove the "Protected Information" Designation from Defendant's Provisional Privilege Logs at 4 (May 18, 2015), Doc. 154. That position is untenable, as it would mean that *all* meaningful discovery in this action would qualify as Protected Information; after all, there would be no need for Fairholme to "discover" information that was already public. But in addition to hiding all meaningful discovery behind a shroud of secrecy, the Government's position also fails because it relies on an interpretation of "confidential" that this Court specifically rejected. When this Court heard argument on the parties' competing proposals regarding the definition of Protected Information, it made clear that the mere fact that a document had not been previously released to the public did *not* suffice to render that document "confidential." *See, e.g.*, Transcript of July 16, 2014 Status Conference at 10:23–11:23, Doc. 75 (Exhibit F). The Court should now reject any attempt, therefore, to interpret the Protective Order in a way that converts the process of discovery into an exercise in concealment.

Rather, for information to be considered "confidential" within the meaning of the order, the public release of that information must be likely to cause some type of legally cognizable harm to the producing party or to third parties. *Id.*; *see also In re Violation of Rule 28(D)*, 635 F.3d at 1357–58 ("[T]he party seeking to limit the disclosure of discovery materials must show that specific prejudice or harm will result if no protective order is granted." (quotation marks omitted)); *Lakeland Partners, LLC v. United States*, 88 Fed. Cl. 124, 133 (2009) (party seeking to limit discovery or seeking other protections under Rule 26(c) "must make a particularized factual showing of the harm that would be sustained if the court did not grant a protective order").[2]

[2] *Cf. Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1094 (N.D. Cal. 2004) (courts have classified as "confidential" information that is "of either particular significance or [that] which can be readily identified as either attorney work product or within the scope of the

Plaintiffs have been unable to identify any legitimate reason why the information contained in the Depositions meets this standard for protection, and the Government has offered none.[3]

2. The fact that the Depositions contain no Protected Information conclusively ends the relevant analysis under the Protective Order. Because the Depositions contain no Protected Information, the Government cannot continue to insist that they be treated as though they do. The Court should be aware nonetheless that the Government's refusal to remove the "Protected Information" designation from these Depositions would also prejudice Plaintiffs and the public, and potentially restrict the access of the courts to relevant evidence.

As an initial matter, disclosure of the Depositions would promote Plaintiffs' interest in being able to develop and present their case in a way that is informed and supported by the views and judgments of their clients as well as scholars, experts, and the public debate about the Government's treatment of Fannie and Freddie. *See* Plaintiffs' Public, Redacted Motion to Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log at 11–13 (May 12, 2015), Doc. 152; Plaintiffs' Reply in Support of their Motion to Remove the "Protected Information" Designation from Defendant's March 20 Privilege Log at 12–14 (May 27, 2015), Doc. 155. This is particularly important in a case involving issues related to corporate finance and other complex and specialized subjects.

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attorney-client privilege." (alteration in original)). *See also Return Mail, Inc. v. United States*, 107 Fed. Cl. 459, 466 (2012) (reviewing cases in which technical knowledge learned by a previous employee is considered confidential information).

[3] That the Government may be concerned that public disclosure of the Depositions may cause the public to question the way in which Government officials have conducted the public's business does not suffice to render the deposition a "confidential" document. The debate over how the Government responded to the 2008 financial crisis remains ongoing. The impoverishment of the debate that would result from shielding the deposition from disclosure "cannot be ignored," *Anderson*, 805 F.2d at 7, and counsels strongly in favor of de-designation.

Furthermore, Plaintiffs are prejudiced by the fact that, as things currently stand, they cannot use the information in the Depositions in their case challenging the Net Worth Sweep in the D.C. Circuit (or in any other case in which they may participate in the future, for that matter). As explained below, this prejudice is particularly acute because Mr. Ugoletti's testimony calls into question evidence submitted by FHFA in the district court.

II. THE REDACTED DEPOSITIONS PREPARED BY PLAINTIFFS CONTAIN NO PROTECTED INFORMATION AND SHOULD BE DE-DESIGNATED.

Although the Depositions should be de-designated in their entirety, Plaintiffs nevertheless offered to agree to the release of redacted versions of these transcripts that would reveal only those portions of the Depositions that they believe both are most relevant to certain issues relating to their challenge to the Net Worth Sweep, and do not raise any even arguable questions regarding confidentiality. Plaintiffs seek to remove the protected information designation from a total of 1,264 of 16,123 lines of transcription, an alternative that would result in less than 8% of these depositions being disclosed. Plaintiffs offered this proposal to keep over 90% of the depositions confidential in the spirit of compromise, seeking to minimize whatever harm (and we are not aware of any) that the Government could claim would result from the public release of the information.

Plaintiffs have provided the Government with a version of the Deposition transcripts, copies of which are attached hereto as Exhibits G and H, in which they highlighted a selection of passages for de-designation. The passages in the Ugoletti Deposition address, among other things, the need for HERA to restore confidence in the GSEs, Ugoletti Deposition 40:18–41:2; the process of drafting the PSPA in August and September of 2008, *id.* at 46:4–12; Mr. Ugoletti's involvement in that process on behalf of Treasury, *id.* at 47:22–49:18; the payment-in-kind provisions under the PSPA, *id.* at 52:1–14, 54:14–55:3, 58:2–14; the projections upon which

FHFA relied when considering the Net Worth Sweep, *id.* at 93:22–94:4; alternatives considered to the Net Worth Sweep, *id.* at 129:9–21, 149:8–17; the negotiation of the Net Worth Sweep, *id.* at 150:15–151:3, 154–158; and capital requirements and GSE safety and soundness, *id.* at 161:12-20, 164:8–166:5. Those passages that Plaintiffs have highlighted in the DeMarco Deposition concern primarily the financial data and income projections upon which FHFA and Treasury relied when they enacted the Third Amendment to the PSPAs, *see, e.g.*, DeMarco Deposition 163, 269–270, 308, and the government's long-term plans for the conservatorship, *see, e.g.*, *id.* at 193–95.

These specific passages, like the Deposition as a whole, contain no "Protected Information." And as discussed in greater detail in the next section of this brief, these passages are not only of unquestionable relevance to the resolution of the issues raised by the Government's publicly-filed motion to dismiss in this case, they also raise serious concerns regarding justifications for the Net Worth Sweep made by the Government in its public filings in the *Fairholme* litigation now pending in the D.C. Circuit.

III. IN THE ALTERNATIVE, THE COURT SHOULD PERMIT PLAINTIFFS TO FILE THE DEPOSITIONS UNDER SEAL IN *FAIRHOLME FUNDS, INC. V. THE FEDERAL HOUSING AGENCY.*

Finally, should the Court conclude—in error, Plaintiffs respectfully submit—that both the Depositions and the Redacted Depositions prepared by Plaintiffs contain Protected Information, Plaintiffs respectfully request that the Court permit the filing of the Depositions under seal in the *Fairholme* litigation in the D.C. Circuit. The Protective Order permits the Court to authorize a party "to file Protected Information in litigation other than the subject action identified in Paragraph 3." P.O. ¶ 18. This information would be filed under seal. *Id.* ("Unless the parties otherwise agree or this court otherwise orders, any such Protected Information that is filed in

other litigation must be filed under seal."). The opening briefs in the D.C. Circuit are due on June 30, 2015. *See supra* note 1.

The DeMarco and Ugoletti Depositions contain information that is relevant to Plaintiffs' pending appeal in the D.C. Circuit. For example, what the Government knew about Fannie's and Freddie's future profitability at the time of the Net Worth Sweep is at issue in both this case and in the D.C. Circuit, for the Government's "death spiral" rationale for the Net Worth Sweep is undermined if the Government knew that Fannie and Freddie would soon generate earnings exceeding Treasury's 10% dividend by tens of billions of dollars.

A significant portion of these tens of billions of dollars in earnings were generated by the reversals of the Companies' deferred tax assets valuation allowances in 2013. FHFA submitted a declaration signed by Mr. Ugoletti in the district court asserting that

> [N]either the Conservator nor Treasury envisioned at the time of the Third Amendment that Fannie Mae's valuation allowance on its deferred tax assets would be reversed in early 2013, resulting in a sudden and substantial increase in Fannie Mae's net worth, which was paid to Treasury in mid-2013 by virtue of the net worth dividend.

Declaration of Mario Ugoletti ¶ 20, *Perry Capital LLC v. Lew*, No. 13-1025 (D.D.C. Dec. 17, 2013), ECF No. 24-2. This assertion followed and supported Mr. Ugoletti's claim that "the intention of the Third Amendment was not to increase compensation to Treasury," *id*. ¶ 19—a point FHFA emphasized in its briefing. *See, e.g.*, FHFA Motion to Dismiss All Claims at 18, *Perry Capital LLC v. Lew*, No. 13-1025 (D.D.C. Jan. 17, 2014), ECF No. 28; FHFA Reply in Support of Motion to Dismiss at 53, *Perry Capital LLC v. Lew*, No. 13-1025 (D.D.C. May 2, 2014), ECF No. 45.

[redacted]

[redacted] That Declaration was not filed under seal, nor is it subject to a Protective Order. To permit the Government to withhold from the D.C. Circuit the information that it has provided in this action would be to permit the Government to provide different facts to different courts, violating the principle that courts must "protect the integrity of the judicial process" and "prevent improper use of judicial machinery." *New Hampshire v. Maine*, 532 U.S. 742, 749, 750 (2001) (quotation marks omitted).

A Protective Order should shield sensitive information from the public, not conceal facts from the courts. Paragraph 18 of the Protective Order accordingly permits this Court to authorize a party to file information with another court under seal. Should the Court conclude that any of the information contained in the Depositions should be protected from disclosure, therefore, the proper course under the Protective Order would be to permit its use in other judicial proceedings, but require that it be filed in those proceedings under seal.[4]

[4] As the Tenth Circuit noted in a similar context, "[A]ny legitimate interest the defendants have in continued secrecy as against the public at large can be accommodated by placing [third-party litigants] under the restrictions on use and disclosure contained in the original protective order." *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *cf. Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264–66 (9th Cir. 1964) (permitting the modification of protective orders to allow third-party litigants to take advantage of discovered information).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order requiring that the Government remove the "Protected Information" designation from the Ugoletti and DeMarco Depositions. If the Court does not believe such relief is appropriate, then Plaintiffs respectfully request that the Court order the "Protected Information" designation removed from those specific portions of the Depositions that Plaintiffs have identified in Exhibits G and H. Finally, in the alternative, Plaintiffs respectfully request that this Court exercise its power under Paragraph 18 of the Protective Order and authorize the filing of the Depositions under seal in the *Fairholme Funds, Inc. v. The Federal Housing Finance Agency* D.C. Circuit litigation, and in any other action challenging the Net Worth Sweep in which Plaintiffs are participating either as parties or amici, to ensure that the courts are not presented with a misleading and incomplete factual record.

Date: June 12, 2015

Respectfully submitted,

s/ Charles J. Cooper
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APPENDIX

INDEX TO APPENDIX

Exhibit A

REDACTED

Exhibit B

REDACTED

Exhibit C

From: Vince Colatriano
Sent: Friday, May 22, 2015 3:34 PM
To: Schwind, Gregg (CIV) (Gregg.Schwind@usdoj.gov)
Cc: David Thompson; Hosford, Elizabeth (CIV); Brian Barnes; Pete Patterson
Subject: Fairholme -- De-Designation of Ugoletti transcript

Gregg --

I'm writing, pursuant to Paragraph 17 of the Protective Order, to request that the Government agree to remove the Protected Information designation from the transcript of the Ugoletti deposition. While we believe the transcript should be "de-designated" in its entirety, we are willing, as a compromise, to agree to the de-designation of the highlighted portions appearing in the attached password-protected document. (I will send the password by separate email).

I would appreciate it if you could let me know the Government's position on this request as promptly as possible.

Thanks very much

Vince

Vincent J. Colatriano
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Washington, D.C. 20036
202-220-9656
www.cooperkirk.com

Ugoletti Depo Highlighted.pdf

Exhibit D

From: Vince Colatriano
Sent: Tuesday, May 26, 2015 10:45 AM
To: Schwind, Gregg (CIV) (Gregg.Schwind@usdoj.gov)
Cc: David Thompson; Howard Slugh; Pete Patterson; Hosford, Elizabeth (CIV)
Subject: FW: Highlighted DeMarco transcript

Gregg --

I'm writing, pursuant to Paragraph 17 of the Protective Order, to request that the Government agree to remove the Protected Information designation from the transcript of the DeMarco deposition. While we believe the transcript should be "de-designated" in its entirety, we are willing, as a compromise, to agree to the de-designation of the highlighted portions appearing in the attached password-protected document. (I will send the password by separate email).

Along similar lines, we have identified a small number of additional documents produced by the Government that we believe should be "de-designated." The list of documents is below. Although we believe that the documents should be de-designated in their entirety, we are willing, as a potential compromise, to agree to the de-designation of redacted versions of the documents. (We understand from our prior correspondence that you do not believe that the Protective Order contemplates such partial de-designations. We nevertheless provide such redacted versions in the hope that you will reconsider your position, which we believe is incorrect). We will be messengering to your attention a password-protected disc with the documents.

FHFA00028644- FHFA00028648
FHFA00047889- FHFA00047891
FHFA00083259- FHFA00083261
FHFA00102167
FHFA00103596
UST00207900- UST00207926
UST00382458
UST00500869

I would appreciate it if you could let me know the Government's position on these requests as promptly as possible.

Thanks very much

Vince

Vincent J. Colatriano
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Washington, D.C. 20036
202-220-9656
www.cooperkirk.com

Exhibit E

From: Vince Colatriano
Sent: Wednesday, June 03, 2015 11:07 AM
To: 'Schwind, Gregg (CIV)'
Cc: David Thompson; Howard Slugh; Pete Patterson; Hosford, Elizabeth (CIV)
Subject: RE: Highlighted DeMarco transcript

Gregg –

Since the Government doesn't expect to complete its final privilege logs until the end of this month, your email essentially reduces to the Government's decision to grant itself, at the very end of (and for at least one of our requests, after the expiration of) the five business day period specified in the Protective Order, a one-month extension of the deadline to respond to our requests. We understand that you are busy (as are we), and we would have no problem with a reasonable request for an extra day or two to consider our requests, but in light of the relatively small number of documents at issue, we believe that your declaration that you won't even review our requests for a month is not reasonable, and we urge you to reconsider. In the meantime, please consider this email our notice, pursuant to Paragraph 17 of the Protective Order, of our intent to seek a court ruling on this issue.

Thanks

Vince

Vincent J. Colatriano
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202-220-9656
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From: Schwind, Gregg (CIV) [mailto:Gregg.Schwind@usdoj.gov]
Sent: Tuesday, June 02, 2015 5:20 PM
To: Vince Colatriano
Cc: David Thompson; Howard Slugh; Pete Patterson; Hosford, Elizabeth (CIV)
Subject: RE: Highlighted DeMarco transcript

Vince:

There are several pending requests from plaintiffs for us to review transcripts and documents for possible removal of the "Protected Information" designation. As you know, we are in the midst of completing our final Treasury privilege log and preparing for depositions. In light of these high-priority tasks and our limited resources, we will review the pending requests to de-designate transcripts and documents when we have completed our privilege logs.

Let us know if you have any questions. Thanks.

Gregg

From: Vince Colatriano [mailto:vcolatriano@cooperkirk.com]
Sent: Tuesday, May 26, 2015 10:45 AM
To: Schwind, Gregg (CIV)
Cc: David Thompson; Howard Slugh; Pete Patterson; Hosford, Elizabeth (CIV)
Subject: [Not Virus Scanned] [Not Virus Scanned] FW: Highlighted DeMarco transcript

Gregg --

I'm writing, pursuant to Paragraph 17 of the Protective Order, to request that the Government agree to remove the Protected Information designation from the transcript of the DeMarco deposition. While we believe the transcript should be "de-designated" in its entirety, we are willing, as a compromise, to agree to the de-designation of the highlighted portions appearing in the attached password-protected document. (I will send the password by separate email).

Along similar lines, we have identified a small number of additional documents produced by the Government that we believe should be "de-designated." The list of documents is below. Although we believe that the documents should be de-designated in their entirety, we are willing, as a potential compromise, to agree to the de-designation of redacted versions of the documents. (We understand from our prior correspondence that you do not believe that the Protective Order contemplates such partial de-designations. We nevertheless provide such redacted versions in the hope that you will reconsider your position, which we believe is incorrect). We will be messengering to your attention a password-protected disc with the documents.

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FHFA00103596
UST00207900- UST00207926
UST00382458
UST00500869

I would appreciate it if you could let me know the Government's position on these requests as promptly as possible.

Thanks very much

Vince

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Exhibit F

In the Matter of:

Fairholme Funds, Inc., et al. v. USA

July 16, 2014

Condensed Transcript with Word Index

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., ET AL.,)
Plaintiffs,) Case No.
vs.) 13-465C
THE UNITED STATES OF AMERICA,)
Defendant.)

Courtroom 4
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Wednesday, July 16, 2014
2:00 p.m.
Status Conference

BEFORE: THE HONORABLE MARGARET M. SWEENEY

Elizabeth M. Farrell, CERT, Digital Transcriber

APPEARANCES:
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P R O C E E D I N G S
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(Proceedings called to order at 2:03 p.m.)

LAW CLERK: The United States Court of Federal Claims is now in session. Fairholme Funds, Incorporated vs. the United States, Case Number 13-465, the Honorable Margaret M. Sweeney presiding.

THE COURT: Good afternoon. Please be seated.

(Chorus of good afternoons.)

THE COURT: Would counsel in the courtroom please identify themselves for the record.

MR. COOPER: Of course, Your Honor, thank you. Charles Cooper for the Plaintiffs, Your Honor. And with me today are my partners, Vince Colatriano.

MR. COLATRIANO: Good afternoon, Your Honor.

MR. COOPER: And David Thompson. Also joining us for the Plaintiffs on the phone, Your Honor, are Brian Barnes and Nicole Moss.

THE COURT: Very good, thank you. Good afternoon. And for the United States?

MR. DINTZER: Good afternoon, Your Honor, Kenneth Dintzer for the United States Department of Justice. And with me here is Elizabeth Hosford and Gregg Schwind from our office.

THE COURT: Thank you very much. Well, we're ready

to begin.

MR. COOPER: Thank you very much, Your Honor. Charles Cooper again for the Plaintiffs. Since we were with you last, Your Honor, the parties have been hard at work on negotiating, in a very professional, mutually cooperative way and, I think, fruitful way, the confidentiality order that we're trying to get squared away, both in -- in compromise on each side. But there are a couple of points, Your Honor, that are sticking for each side. And, so, we brought them to you with apologies for, once again, crowding your docket and your patience.

THE COURT: Never needed. Both sides are excellent advocates for your clients and that's just what I would expect.

MR. COOPER: Thank you very much, Your Honor. And with the Court's permission, I'd like to ask Mr. Colatriano who has been handling the discussions with our friends from the Department of Justice to address the Court on the specifics of those issues.

THE COURT: Please. Thank you.

MR. COLATRIANO: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. COLATRIANO: May it please the Court. As Mr. Cooper mentioned, there are two issues that, in our view, are quite closely related to each other on which the parties have

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been unable to reach agreement. These issues, in our view, basically go to whether the producing party in discovery should be allowed to designate virtually everything it produces as protected and to maintain that designation throughout this litigation and even beyond, regardless of whether that information is truly deserving of such protection.

THE COURT: Does this mean you're going to be focusing exclusively on paragraph 17, I think it was, of your order or are you going -- is this a more global approach?

MR. COLATRIANO: There are two paragraphs where we have a disagreement. The first, I think, is paragraph 4.

THE COURT: I thought there was more than that -- more than two, but, okay, thank you.

MR. COLATRIANO: I think it's two paragraphs. One is -- the first is in paragraph two, which is the definition of protected information.

THE COURT: Yes.

MR. COLATRIANO: The second issue is in paragraph, I believe it's 19.

THE COURT: Nineteen, yes.

MR. COLATRIANO: Which deals with what happens when a party challenges designation of material as protected. I believe those are the two issues that are really (inaudible) the parties.

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THE COURT: Yeah, I should -- I was just giving you a peek behind the curtain. I had found some -- I can't say areas of great concern, but some additional language that I intended to include. So, that's fine.

MR. COLATRIANO: That's obviously fine with us as well, but --

THE COURT: And I'm sure you all will let me know if what I have inserted into the protective order is problematic.

MR. COLATRIANO: The two issues on which we do disagree I think are pretty related in that it deals with the definition of protected information and what happens if somebody challenges the designation of materials as protected. And we believe that the Government's position on both issues finds no support in the language of the rule or the relevant case law and would cause the parties, in some respects, the Court (inaudible) significant prejudice.

We believe that both issues need to be assessed by the Court against the backdrop of some of (inaudible) principles. The most important one being that there is a presumption that information produced in discovery should not be automatically subject to cumbersome and inefficient descriptions on use and disclosure. Those restrictions impose real burdens on the parties and the Court and they should, therefore, be the exception rather than the rule.

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And it's not just the litigants in the Court that have an interest in that; the public has an interest in what happens in judicial proceedings in Federal Courts. And if anything, the public's interest is even stronger in the case involving the actions of public officials and agencies on matters of public concern, as this case unquestionably is. And, so, in our view, federal agencies should not be allowed to presumptively shield all of the information produced in discovery from such public scrutiny.

This presumption, we would submit, is reflected in the discovery rules and, in particular, Rule 26C, the rule authorizing the issuance of protective orders. With these reasons under the rule, there needs to be a good reason for the imposition of restrictions on the availability of materials produced in discovery and it is the party who is seeking to impose those restrictions who must bear the burden of demonstrating the existence of that good reason. These principles are embodied in the requirement that a protective order can only issue upon a showing of good cause.

We believe that our proposed order is consistent with those principles, while the Government's not only runs afoul of those principles, it, in some respects, stands those principles on their head.

With respect to the first issue, the definition of protected information, I -- in keeping with the presumption

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in favor -- or the presumption against the restriction on these materials and the plain language of Rule 26C, the law is clear, as discussed in our filing, that materials produced in discovery should not be indiscriminately designated as protected with all the restrictions that that status carries with it.

Rather, the law requires that materials be considered truly sensitive in some legally cognizable way before they should be afforded protective status. That means both that the materials must be treated as confidential and that the public release of those materials would cause some real specified, or would at least be likely to cause, some real specified harm. Blanket and general allegations of confidentiality are not sufficient in this regard.

(Pause in the proceedings.)

LAW CLERK: I would ask again for the parties (inaudible) to please mute their lines. We're getting some feedback from some conversations.

THE COURT: You can also let them know that it's disruptive to court proceedings.

LAW CLERK: The Judge has actually expressed that it is disruptive to court proceedings, so please do mute your lines and give a check that they are muted. Thank you.

THE COURT: Sorry for the interruption. Please proceed.

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MR. COLATRIANO: Oh, no problem. Thank you, Your Honor. Blanket and general allegations of confidentiality are not sufficient under the rule. As this Court has observed on multiple occasions, there must be some particularized factual showing of the harm that would be sustained if the protective order is not entered. For that reason, protection is typically limited to materials that are proprietary in nature, trade secrets or information that would cause competitive harm if they were released or that would cause some type of breach of personal privacy.

It is improper under the rules, we would submit, for a party to just make wholesale and discriminative designations of all the materials it produces in discovery as protected. Having said that, as the Court is aware from its review of the orders that have been provided, we have agreed, in an effort to expedite discovery, that at least as an initial matter, the Government can designate everything it produces because that -- they told us that that's what they intended to do in order to expedite discovery. We're not thrilled with that, but that's something we were willing to agree to in order to expedite that.

But that still begs the question of what -- of how you should define protected information in the case of any type of dispute between the parties as to whether the Government over-designated.

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Our proposed definition in our proposed paragraph 2 fully satisfies the relevant principles underlying Rule 26C and fully protects any interest a producing party may have in protecting against the disclosure of information that is legitimately viewed as sensitive. We have defined protected information to include proprietary, trade secret or market-sensitive information, as well as other information that is otherwise protected from disclosure under applicable law. That standard, we would submit, is consistent with the language of the rules and the case law.

And by including the term "market-sensitive information," the proposal will protect any information whose disclosure would have the types of market distorting or economic effects that the Government has warned about in its separate pending motion for protective order regarding materials related to the conservatorships. And, in fact, we took the term "market-sensitive information" from the Government's own proposal. We had originally proposed something like competitively-sensitive information. The Government responded by proposing "market-sensitive" and we've adopted that. We think that makes sense in the context of this case.

THE COURT: But you did not agree with the word "confidential."

MR. COLATRIANO: The word "confidential" was added

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very late in the game. It was back on Friday afternoon, by the Government. They had not proposed that before. I don't think we would have a problem with that word as long as it weren't meant to describe anything that's not publicly -- that hasn't publicly been released is, therefore, protected. We don't think that's the standard. In the case law, confidential, in this context, usually means something whose disclosure could cause some harm. So, the mere fact that it hasn't already been publicly released is not sufficient.

THE COURT: Yes.

MR. COLATRIANO: And, so, it's not --

THE COURT: No, I agree with you. I did -- I was having difficulty understanding, though, why Plaintiff opposed "confidential." So, that's --

MR. COLATRIANO: That was added literally at the -- by the Government at the last minute on Friday and they added it as a stand-alone category. And if what they meant was it hasn't been publicly -- if it hasn't already been publicly released, it should never be publicly released or it should have these restrictions, then we don't agree with that. But --

THE COURT: Well, I don't think that's the understood definition of confidential.

MR. COLATRIANO: And with that understanding, if it's something that (inaudible) disclosure would cause these

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types of legally recognizable harm, I don't think Plaintiffs would have a problem with that. It was a last-minute addition and, so, we just didn't sweep it up in our proposal. But with that understanding, I don't think we would have a problem with that type of amendment to our proposal.

But the Government's proposal goes well beyond just adding the word "confidential," and it goes well beyond Rule 26C in the case law. The Government's proposed definition just lists categories of materials that when you add them all together, I think it's pretty apparent that they want to designate everything as confidential and keep it confidential throughout the course of this litigation, regardless of whether that information is truly sensitive or whether the disclosure of that information would cause any cognizable harm to anyone.

THE COURT: But would you agree that the other two words were "financial" and "operational," but there may very well be documents that would fall into the financial realm or operational categories that may, in fact, be properly -- find themselves on a privilege log on or at least they should be the subject of a protective order?

MR. COLATRIANO: Certainly, if there's anything that's privileged, obviously, the Government's going to assert privileges. If financial information is market sensitive, in other words, this disclosure would cause a type

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of market-distorting effects that the Government has complained about in its other motion --

THE COURT: And that's already covered. They've already --

MR. COLATRIANO: Then we can --

THE COURT: By market sensitive.

MR. COLATRIANO: Exactly. That would be covered by our proposal. If what -- though what the Government means is that any information that discusses financial matters or that discusses operational matters, whatever that means, it's not a very defined term. If what they mean is that as long as it discusses financial or operational matters in any way, then it falls under this definition, then no, we would not agree with that because I think that would -- A, it's very vague, but, B, it would sweep within it all information produced in a case of this nature.

THE COURT: I agree with you.

MR. COLATRIANO: And then when you add up all these definitions, these terms, I think it's pretty clear that the Government wants to keep everything it produces as confidential. We're just speculating that that's what the Government wants to do because the Government goes on to further say that any information that has not been publicly released should be treated as confidential, since it's unlikely that the parties will focus their discovery efforts

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on material that has already been publicly released, then this provision would -- this catchall provision would ensure that everything is maintained as confidential no matter how old it is, how stale it is, whether it's disclosure would cause any harm. We think that that proposal can't be squared with the law, it can't be squared with the language of Rule 26C, it can't be squared with the case law that we discussed in our filing, including case law that makes clear that the Federal Circuit has been concerned about parties over-designating material.

And one of the reasons we think the Government's proposal is unnecessary to protect any legitimate interest it may have is that the Government's own actions have confirmed that it doesn't need that type of protection. As we discussed in our filing in the companion litigation in the District Court before Judge Lambert, the Treasury produced and publicly filed what it called an administrative record and the Federal Housing Finance Agency produced and publicly filed what it called a document compilation relating to the net worth sweep.

We think those submissions were woefully inadequate for many reasons, but the pertinent point here is that those submissions contained within them discussions of financial projections within the two companies and discussions that I think would fall under the definition of materials discussing

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the operation of the conservatorships. And, so -- and it contained information that was not already publicly released, at least some of the information meets those categories.

This was, in short, information that falls squarely within the Government's proposed definition of protected information. But it was publicly filed in that case. And not only did the world not end when that happened, the Government hasn't suggested that any harm was caused to anyone when it released that information publicly. So, I think its own actions confirm that it doesn't need the types of protections that it's asking for in its submissions.

The Government, I think it's -- in its submission in defense of its own proposal, doesn't cite to any legal authority that supports its proposed definition of protected information. It does take issue with our definition's reliance on trade secret and proprietary information and says that that won't protect it against the types of market-distorting effects that it's worried about from the public release of some of this information. But it ignores that our definition includes the term "market-sensitive," which is designed to take into account these concerns.

And I do think it's useful to keep in mind that the Government's only recitation of harm in its submission in support of its proposal is its discussion of these types of market-distorting effects that were discussed in its motion

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for protective order and the types of internal deliberative documents that it discussed in its pending motion for protective order. That's the only types of harm it discusses.

But this proposal would govern discovery that ranges well beyond those items. The Government's motion for protective order is limited to material -- at least that aspect of that motion for protective order, is limited to materials relating to the termination of the conservatorships and on -- and current projections of future profitability, and it is limited, by its terms, to the materials that were produced after August 17th of 2012, the date of the net worth sweep.

And, so, those are the subset of materials that it says it's -- the public release of those materials would cause harm. As I've mentioned, I think our proposal fully protects it against that harm. But what the pertinent point here is that the discovery in this case will range far beyond that. The Government is going to be producing, it's my understanding, materials going back as far as 2008. It had nothing to do with the termination of the conservatorships. It's going to produce material that predates August 17th, 2012, that has nothing to do with the current projections of future profitability. And it has not claimed at all how release of those materials will cause it any harm and, so, we

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think that that, in and of itself, defeats any type of argument that they have shown good cause for their definition.

If I may very briefly touch on the second issue because I think a lot of what I just said relates to that, which is -- has to do with, as you know, the Government's going to -- or at least has told us, it's going to designate everything it produces as confidential. But there is a procedure for the receiving party to challenge that.

THE COURT: Yes.

MR. COLATRIANO: Under our proposal, in the event of such a challenge, the burden should be on the party who is asserting the confidentiality of the information to sustain that assertion.

THE COURT: Well, you have to have discussions, right?

MR. COLATRIANO: Yes.

THE COURT: I mean, you're required to have the discussions. So, the Government has to lay out all its reasons as to why the material is properly designated under the protective order. There should be restricted access. Why -- shouldn't it be your burden because you're the one who wants to take away the protection?

MR. COLATRIANO: Well, I think --

THE COURT: Shouldn't we always defer on the side

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of protecting material?

MR. COLATRIANO: Well, I'm not sure that that's the relevant standard when the standard is there needs to be good cause to restrict --

THE COURT: Well, no. Yes, of course. But, I mean, presumably, from what the Government has said so far -- I mean, I've only received certain information, but the harm that could result in markets crashing is quite dramatic. I mean, I really don't want something cataclysmic to happen because I was too generous in allowing certain discovery and that certain documents would either be -- either, A, I would not allow any privilege to attach and it would be disclosed and it could be relied upon in summary judgment briefings or it could be released to the public. And, yes, the public has an interest in knowing, but just as the FBI does not really disclose sources and methods in the manner in which it surveils spies and terrorists -- I mean, yes, people would really like to know, but we really don't want to disclose how the FBI is able to be effective and keep us safe.

So, sort of the same reasoning, yes, the public has a right to know what officials are doing, but if the release of certain market information or financial information at this point in time could result in a market crash, as far as I'm concerned, it would be irresponsible to allow that information to go out and harm the public as a whole. So --

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MR. COLATRIANO: Your Honor, we certainly have no interest in being party to something that --

THE COURT: Causing doomsday?

MR. COLATRIANO: Exactly. So, we take very seriously our obligations as well. And, so, we don't -- we wouldn't be indiscriminately saying, you know, just release it all. But there is still an underlying good cause standard. But I do think there are a couple of different issues here. One is, who should bear the burden of sort of initiating a court proceeding if there is a challenge? We had proposed that it should be the producing party; the Government's proposed that it should be the receiving party.

In some respects, that's not an incredibly important issue. The more important issue is, in any such proceedings, who should bear the burden of persuasion as to whether the material is confidential or not? We're prepared to yield on whether the receiving party or the producing party should initiate the court proceeding. But I think on the ultimate burden of persuasion, the burden should be on the party who is asserting confidentiality to show some type of harm.

THE COURT: What does the case law say?

MR. COLATRIANO: The case law that I have seen has said -- and I think this is the party who is asserting confidentiality who bears that burden. Now, I have seen

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protective orders that have done this both ways.

THE COURT: Yes.

MR. COLATRIANO: In the Starr protective order, which we based a lot of our initial proposals on, it was the party resisting -- it was the party asserting confidentiality who bore that burden. But I have, I will admit, some protective orders where it's the party who is seeking to challenge the assertion of confidentiality who has the burden of at least initiating those proceedings. So, I've seen that both ways. I think the law is much more on the side of if somebody seeks to assert confidentiality, the burden of persuasion at least should be on that person.

Overarching all of this is what should the standard be no matter who bears the burden on whether the information should be treated as confidential. And that's issue number one, sort of the definition of protected information. In many respects, it doesn't really matter who bears the burden if the standard is so broad that anything could meet it. And, so, we really do think that that is, in some respects, the paramount issue, the burden issue is important, but it secondary -- of secondary importance to the -- to what the standard should be.

But we do think it makes sense, even if we have to -- or the receiving party has to initiate the proceedings, I think it makes the most sense for the party who is asserting

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confidentiality to at least bear the burden of ultimate persuasion on that.

And, so, unless the Court has any further questions about our proposal...

THE COURT: No, thank you.

MR. COLATRIANO: Thank you.

MR. DINTZER: Your Honor, Mr. Schwind will be delivering the analysis from the United States.

THE COURT: Thank you very much.

MR. SCHWIND: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Schwind.

MR. SCHWIND: We do have a number of responses to Plaintiffs' arguments presented in the joint status report and this afternoon to the Court. But, first, just some brief overarching observations about where we are in this case and the context of the protective order. With respect to the disputed terms, the Government is not seeking to limit discovery to Plaintiff. That's not what this is about. We're not seeking to deny Plaintiffs access to documents. It's a very different situation and it's a situation that comes up in many published decisions where one side or the other seeks to just limit discovery.

We're just talking about whether or not and under what circumstances we can designate certain documents protective. Both sides agree there's a need for a protective

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order here.

THE COURT: Let me ask you something. As I understand Plaintiffs' counsel's argument, the Government has indicated it intends to designate all material it produces as protected. Is that correct?

MR. SCHWIND: Initially, Your Honor, yes. And Plaintiffs have agreed with that --

THE COURT: Okay.

MR. SCHWIND: -- process.

THE COURT: And then?

MR. SCHWIND: And then there would be a process where we would go back and look at the documents and undesignate documents that do not meet the definition that the Court puts in the order.

THE COURT: Okay.

MR. SCHWIND: So...

THE COURT: Well, you would realize even -- let's say I do not accept "financial" or "operation" as one of the definitions. It doesn't mean that certain financial documents or certain operational documents could not be the subject of a protective order.

MR. SCHWIND: Yes, Your Honor. There is --

THE COURT: I'm just concerned that the "financial" and "operational" might be too broad, that almost anything coming out of the agency could be designated or fall under

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one of those two terms, and it gives me pause.

MR. SCHWIND: And we understand that, Your Honor, and we concede there is quite a bit of redundancy and overlap in the terms that the United States has proposed to the Court. And one way that we look at this is the Court can essentially choose what it thinks is most appropriate for this case. And that's another one of the overarching points. This Court -- this is a -- as we've said all along, this is a very unique case, and this Court certainly has the authority to craft a protective order that meets the particular needs in a particular case. The Court is not limited, as Plaintiffs seem to imply, to trade secrets and whatnot under -- I guess it's Rule 26C(1)(g).

There are other bases there as well, including an overarching basis that -- or overarching authority that the Court has to specify the terms for disclosure or discovery as part of this Court's inherent authority and this Court has recognized that in the past. And that's why we think it's important to look at this particular case and also -- and the concerns that we raised in our motion for protective order previously, and also the posture of this case.

Many of the public interest concerns that the Court has cited and Plaintiffs have cited, those arise not in the context of pre-motion to dismiss exchanges of documents between parties. They arise in the context of judicial

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records and court filings and the public interest in having access. The presumption, essentially, is that the public has access to the judicial system to see what is happening in that system. And that's when the -- when these decisions that come out about the burden on the Government or the burden on whatever party is seeking to keep those matters confidential, we readily recognize that and that burden -- if we were there -- we are not there.

What we are trying to do right now is to facilitate disclosure to Plaintiffs in order to respond to a motion to dismiss in a case where this Court has not yet even found that it has jurisdiction over Plaintiffs' claim, in a case in which this Court has yet to find that Plaintiffs have even stated a claim.

So --

THE COURT: Well, that doesn't mean that I will, but that doesn't mean that I won't.

MR. SCHWIND: Correct, Your Honor. And when we get to that point -- and Plaintiffs, for example, bring up Starr and the protective order there and whatnot. That is a case that is fundamentally different on its facts, but it's also fundamentally different in its posture, that is post-motion to dismiss, the parties are ready for trial, their documents are being exchanged, have been exchanged. It's entirely different than where we are here and we think that's

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important. And the public interest is not the same as if we were talking about the context of judicial records, court filings. We're talking now about just simply facilitating disclosure to Plaintiffs to allow them to respond to a motion to dismiss. It's a very different posture.

And, again, there is no question of prejudice to the Plaintiffs. The Plaintiffs' counsel will have access to these documents. They're going to be able to make whatever use they can make of them in responding to our motion to dismiss. The only question is whether or not we get to designate or what the terms are of our ability -- as the one party that's going to be producing documents, to designate these documents are protected. That's the only issue.

THE COURT: Well, remember, even if I don't accept the terms "financial" and "operational," you don't lose the ability to designate such documents.

MR. SCHWIND: Yes, correct, Your Honor.

THE COURT: So, you haven't lost -- I think "financial" and "operational" in paragraph 2, the way it's drafted is too broad. But, again, you haven't lost anything. It may be that when certain financial or operational documents that would be otherwise be disclosed perhaps, if you believe they are sensitive and are properly the subject of the protective order, you're not going to be shy about letting the Plaintiffs know. And then, ultimately, I may

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have to make a determination as to whether or not you were correct.

MR. SCHWIND: Thank you. We appreciate that. We haven't seen --

THE COURT: But you want it that way?

MR. SCHWIND: Well, again, one way we look at this is as choices for the Court. And, again, we understand -- we can see there's redundancy in that, and I think the Court is absolutely correct. It's --

THE COURT: It kind of looks like hands tied behind back to me. But I thought it was much too restrictive. The -- using the words -- to include the words "financial" and "operational," I thought that was really -- I didn't think it should be in the protective order.

MR. SCHWIND: Oh, I understand -- understood, Your Honor. Well, we appreciate that.

And with respect to the burden issue, I think Plaintiffs appear to recognize today, we're talking really about two burdens, if you will. The person having the burden is just who has the responsibility to bring the motion challenging a protected designation. That's one burden.

And the second burden is, okay, once that motion is filed, who bears the burden of persuasion in that motion. And we think -- and I think, as the Court has hinted, that when a party seeks to challenge something like a designation

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of protected or a privilege designation, that the burden logically is on the party making the challenge to bring that motion, to identify the documents that -- after hearing what the Government -- or hearing the producing party's response to why it made the designation, to then really sitting down and deciding, okay, which ones do we really want to bring a challenge to, which ones really matter to us. And then limiting its motion to that.

If the burden is on the producing party, again, here the United States -- the only party that's going to be producing documents at this stage of litigation, Plaintiffs can essentially just tee them all up, tee up all the documents. Just say -- and tie us up essentially in a motion to justify the designation of most or all of what we've designated confidential. We don't think that serves anyone's interest.

As far as the burden, once that motion is filed, I think Plaintiffs, we'd agree, are correct. There's an authority problem on both sides of that issue as far as who bears the burden of persuasion to justify that. But I think the burden would be limited to showing that the designation falls within the doc -- within the definition in the protective order. I say that because many of the cases that Plaintiffs rely on when we're talking about who bears the burden are in a different context.

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Oftentimes, after a court issues a decision, it publishes the decision just to the parties and says, okay, within two weeks, proposed redactions. Sometimes there are disputes.

THE COURT: Yes.

MR. SCHWIND: Sometimes one side says no and we don't want that to be redacted, and it turns into a motion. That motion, the basis for that motion to challenge that redaction is not the protective order; it's essentially case law that says there is a presumption of the -- that things are going to -- again, the judicial record is going to be out there. It's in the public interest. And there's some factors and there are cases that go down and talk about that. It's a very different scenario.

Again, it gets back to my original -- one of my original points that at this stage of litigation, it does make sense to put that burden on Plaintiffs just for this limited purpose of allowing the United States to designate documents as protected. We're not talking about whether or not there's a public interest in what the parties ultimately attach to court filings, to what ultimately the parties quote in their filings where the public could very well have in seeing that.

So, we think our proposal best meets the needs of this case as far as facilitating disclosure of the documents

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that Plaintiffs say they need, documents they say they need to respond to our motion to dismiss, minimizing the contested motions practice and allowing the Court to get to the point that we would very much like the Court to get to of deciding our motion to dismiss.

THE COURT: Well, I can agree with that, my sentiments entirely. But Plaintiffs have to be able to have access to documents to establish this Court's jurisdiction. I mean, otherwise, they don't have their day in court if they don't have that opportunity.

And one thing that does concern me is that the Government is going to designate the entire universe of documents as protected. And as I understand it, the Government still haven't reviewed all of those documents yet. So -- but I also understand you to say that despite that initial blanket designation, you will go back then and look at each document and make a determination as to whether or not it should be protected.

MR. SCHWIND: Correct, Your Honor. And to the extent there's a disagreement, as Plaintiffs said, there is a process in the order that the parties can address those disagreements.

THE COURT: Has the Government -- are you beginning -- how far along in your review are you?

MR. SCHWIND: We're --

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THE COURT: I assume you have people tasked to do this and they've been --

MR. SCHWIND: One or two, Your Honor. Yes, we have people.

THE COURT: It's an army, I take it, from that smile on your face, maybe --

MR. SCHWIND: Well, we are substantially along. I don't want to -- I don't know how to phrase this, but we have started -- we started some time ago, weeks, at least, in reviewing documents for responses and privilege. We are not finished that process yet, but we do expect it to be concluded, I'd say, in the next -- within the next month.

Again, we're definitely -- for what we've -- see, the Court has yet to issue its final ruling as far as the date ranges --

THE COURT: You're going to see that very shortly.

MR. SCHWIND: Okay. We definitely appreciate that, Your Honor. So, how far along we are, as far as percentage, is going to depend on what the Court ultimately says we have to review for responses and privilege. But right now, based on our initial proposal, which was thought (inaudible) what Plaintiffs wanted, we're certainly more than halfway along. So, we do expect, for example, that when the Court issues the protective order, that within -- I'd say within a week, we will start being able to produce documents to Plaintiffs with

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the protected designation.

Will it be all the documents? No. But what we intend to do -- and I think this is not -- Plaintiffs won't object to this -- is to produce on a rolling basis so at least they start getting documents expeditiously.

THE COURT: That's certainly not unusual, even in far less complicated cases. So, that makes good sense.

MR. SCHWIND: Thank you, Your Honor.

THE COURT: Thank you. Is there anything else for Plaintiff? Any response?

MR. COLATRIANO: Very briefly.

THE COURT: Certainly.

MR. COLATRIANO: Thank you, Your Honor. We do agree, by the way, that it makes sense for the Government to produce these materials on a rolling basis. That was our understanding, that within a matter of days after the protective order is entered, that the Government would be in position to do that. So, we're happy to hear that.

Very briefly, the Government -- Mr. Schwind said that we would not be prejudiced at all under their proposal because we're still going to be getting the documents. That's not quite accurate. There are restrictions in this protective order that, for example, restrict our ability to share this information with our clients, that if we -- and, so, lawyers, we might not be in the best position to

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interpret financial information in these materials, but we can't discuss them with our clients if it's been designated as protected. That's prejudice.

There is a provision allowing us to hire financial consultants.

THE COURT: Exactly.

MR. COLATRIANO: But, you know, that's different from being able to talk about it with your clients. So, there are some -- there is some prejudice here associated with the designation of materials as prejudice. And it's also not quite accurate -- designation of materials as confidential.

It's also not quite accurate to say that this is only about how we're going to be getting the documents. This protective order then talks about how we -- if we decide that we need to use those documents in any court filing, how we'd go about doing that. So, they would need to be filed under seal and things like that. And, so, the protective order does implicate this Court's -- filings in this Court and proceedings in this Court. And, so, that's why it's very important that the definition of protected information be clear and be fully protective of the Government's legitimate interests while not leading to over-designation of materials.

In that regard, I do think it's worthwhile. The Court indicated that it has some problems with the

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definitions -- with the terms "financial" and "operational." We, obviously, share those concerns. But we also have the Government's catchall provision that says any information that has not been publicly released is, by definition, protected. We think that's way too broad.

THE COURT: Right. I can tell you, I did not -- that also jumped out at me immediately because it would seem cumbrous to have -- let's say a reporter files a Freedom of Information Act or by some other means obtains information during the pendency of this case, and because it hasn't been produced to you today, you couldn't have it. I mean, I just -- no, that just -- that's just -- this isn't a legal term, so forgive me, but it just seems silly. So, I mean -- and just terribly unfair. And I was very -- well, the Government attorneys are very good advocates and, so, I -- and I do respect that. But that one didn't slide by me and that's not going in the order.

MR. COLATRIANO: Your Honor, I think your comment puts into sharp belief sort of what's a concern here. Under the Government's proposal, if a member of the public submits a FOIA request and gets something without any restrictions, if we asked for the same documents, it would be subject to all of these restrictions in discovery, and there's no basis for that type of disparate treatment.

THE COURT: No. It would be silly to have

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something printed, the entire, say, document printed in a Washington Post or New York Times article, but you couldn't see it or you couldn't rely on it. You couldn't show it to anyone. I mean, it just -- if everyone on the subway is reading it, then Plaintiff should be able to use it without any sort of a protective order attachment. So, I understand your concern and that will not appear in the order. I am happy to let you make some other comments, but I'm just letting you know that that's coming.

MR. SCHWIND: Well, Your Honor --

THE COURT: I didn't know whether --

MR. COLATRIANO: No, I'm done.

THE COURT: I don't want to push you away. Are you finished?

MR. COLATRIANO: No, I'm done. Thank you very much, Your Honor.

THE COURT: Thank you very much.

MR. SCHWIND: I'm anxious to see -- to get into the firing line here.

THE COURT: You can try and convince me why I'm wrong. I --

MR. SCHWIND: Your Honor, if a document is released under FOIA, it becomes publicly available and we're not going to -- we would never maintain a protected designation on a document that's been released in FOIA. That's not our --

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THE COURT: The way this is written, it could be so interpreted.

MR. SCHWIND: Well, we think that would be unreasonable, Your Honor. I mean, we share Your Honor's concern. That was not our intent. But the intent was to give us the broad ability to do it. But if -- but, obviously, in that case, Plaintiffs could make -- bring a challenge if we, for whatever reason, refused to agree that even though the New York Times has a document, that ought to remain confidential. Again, that was never our intent.

As far as Plaintiffs' statement that, well, we won't have it. Well, there was never -- this isn't about whether Plaintiffs have it or not; this is about whether or not it has a protected designation.

THE COURT: Right.

MR. SCHWIND: That's all we're arguing.

THE COURT: Whether they can share it, whether it will appear in briefs.

MR. SCHWIND: Whether they can share it. And the Court correctly observed that while there are restrictions -- and there are restrictions in every protective order as far as who can see it -- in most protective orders, the clients do not get to see it. So, that's nothing out of the ordinary.

Plaintiffs have the ability to hire financial

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consultants to the ability they can't -- to the extent they can't understand or want a professional opinion on what a particular term means or a particular document means. They can solve that problem with consultants. And if, for some reason, the client just had to see, they had to show it to the client, there is a procedure under the order that would allow Plaintiffs to bring that matter to the Court's attention and request relief.

So, there's nothing in this order that would stop them from getting to the things that they wanted, at least as far as they've stated here today. And as far as the Court's comment, one part of our protected designation -- or definition --

THE COURT: The "financial" and "operational?"

MR. SCHWIND: Well, no, with any -- protected information also means any information disclosed in this litigation that has not been released to the public previously. Again, Starr and AIG is a very different case, but that sentence came from that protective order. So, we didn't -- we weren't just trying to come up with something that hadn't been -- we're not here to --

THE COURT: I'm just telling you how it struck me.

MR. SCHWIND: Yes, Your Honor. But -- and I'm not here to argue with the Court. I just want the Court to know we did not --

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THE COURT: No, no, that's okay. Go ahead.
MR. SCHWIND: We did not just come up with that with no basis. And, again, just pointing out that this is -- this case is at a very different posture from the ordinary case where we have a motion for protective order or -- I'm sorry, where we have a confidentiality order or a protective order. And we're talking about whether or not as far as the merits and going forward with the trial what should happen. We do, again, think that's important.
THE COURT: Well, I appreciate it. And, truly, I -- if I've made a mistake, I expect you to straighten me out and I would appreciate your straightening me out, but we have -- there are some parts of the order that favor the Plaintiff, I agree, and other parts, I disagree. So, I'll -- no one will be totally happy with what they say, but I believe what I'm doing will be -- what you see will be fair and appropriate and in the best interest of justice. And if you all run into a problem, I'm sure you're going to let me know.
MR. SCHWIND: Thank you, Your Honor.
THE COURT: Thank you, Mr. Schwind.
MR. COOPER: Your Honor, at the risk of belaboring one more --
THE COURT: No, no, no, I'm here for as long as you want me to sit here.

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MR. COOPER: Thank you very much. It deals with the colloquy you've just had with my friend for the Government on the issue of FOIA. And I just want to make sure there's clarification here, or perhaps that I am corrected. But the issue really isn't so much, it seems to me, whether or not we would be entitled to a document if the Government, after discovery's been produced to us, releases that document to the public in a FOIA request. Then, of course, it's no longer nonpublic and it would be -- that would be the epitome of silliness for them to suggest that at that point we can't use it.
The real question, though, is in the standard that they apply and that this Court will ultimately apply if there's any dispute over a particular document, whether it is genuinely legitimately warranted protection, whether or not we should be entitled to receive, without restrictions, anything that any Tom, Dick or Harry in the United States made an FOIA request for and would be entitled under that law to receive. Surely, if any member of the public -- if we ask for the same document as FOIA requesters, we'd be entitled under that law to receive it and, surely, we should be entitled to receive that in this process without the restraints of the protective order. That's -- I just wanted to make sure that --
THE COURT: No, we're on the same page.

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MR. COOPER: Okay.
THE COURT: I think we're very clear. I think what's clear is if Tom, Dick or Harry made the FOIA application, Treasury would -- or, excuse me -- well, it depends, I guess, to which agency they were making the application. But FHFA would indicate what documents would be available or the number of documents, how much it was going to cost to have the documents reproduced and they wouldn't be seeing any privileged document of any sort --
MR. COOPER: Of course not.
THE COURT: -- or any sensitive -- I mean, I don't think that the Government or the agency is going to give to anyone, who would file a FOIA request, sensitive material, I think that's a guarantee.
MR. COOPER: I do, too, Your Honor. And, so, obviously, if it would be something that under FOIA, because of these considerations, they would be entitled not to produce to the public, then I don't think that's in dispute. That's something they can designate as protected here in this proceeding, and we're not going to challenge. But if it -- or we may -- we probably aren't going to challenge. But my point is that, surely, if it's something that under the FOIA they would have no basis to withhold it, legitimate under that law, then they ought not be able to stamp it as protected here or -- they will stamp it as protected, but --

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THE COURT: But they will withdraw it where appropriate.
MR. COOPER: But once we get into, you know, a back and forth on this -- and, certainly, if we bring the issue to you, if we'd be entitled to it as FOIA requesters, we surely are entitled to it as litigants in this Court.
THE COURT: That seems fairly straightforward.
MR. COOPER: Thank you, Your Honor.
MR. SCHWIND: Your Honor, I just want to make sure -- because counsel brought up FOIA. We do not believe the FOIA standard has any place in the protective order. Plaintiffs have proposed that in paragraph 2.
THE COURT: Two, yes.
MR. SCHWIND: If the Court wants to modify Plaintiffs' statement -- I mean, right now, Plaintiffs say that protective information does not include material that is available to the public under FOIA.
THE COURT: Or any other --
MR. SCHWIND: Or any other law.
THE COURT: Yes.
MR. SCHWIND: Well, we do not think it's appropriate to essentially add the body of FOIA law, to essentially import it into this protective order or require the United States or whatever side is producing documents -- of course, FOIA only applies to the Government, right; so, it

would only apply to us at least with respect to FOIA -- to bring that into the order and essentially ask us to conduct a FOIA examination of every document.

THE COURT: No, we're not doing that. In fact, the applicable law appears in the protective order that you'll be seeing, but FOIA was not included. If they're entitled to receive documents under law, they're going to get it. I mean, that's just the way it goes. And then you can make a determination whether or not you're going to remove the -- whether the designation of protected document or protected information should be maintained.

And then you'll bring the -- and I want the -- when you have discussions, I'm assuming it's not a -- if it's possible, I'm assuming it will actually happen with the nature of this case and with the number -- I mean, it's obviously voluminous documents. So, I'm going to see at least one document in dispute, if not more.

Please make sure these discussions are meaningful and not just "I want it, you can't have it" or rather, it should -- you know, "this shouldn't be marked protected; well, tough, it's going to stay that way." You know, I want you to really explain your reasoning so that when I'm reading motions, I am -- we have a thorough give-and-take or -- and all the reasoning is set forth. In fact, we may eventually have -- you know, I shouldn't try to predict the future, but

it would not surprise me if we have to have a closed court session where we're actually going through some documents and having argument. I hope not. I hope not. It might be far more straightforward than that. But --

MR. SCHWIND: Right, Your Honor. And we don't have any dispute with that. But we do, again, dispute this idea that protected material does not include material that might be theoretically available under some other law. If it's been made available to the public under some other law, that's one thing. But to bring in the entire body of laws out there that could allow, if someone requested it, the disclosure of a certain document, we think that is not the purpose of this protective order.

THE COURT: We're talking about the applicable law of this Court. I mean, and, obviously, we're not talking about every statute on the books.

MR. SCHWIND: Yes, Your Honor.

THE COURT: So, it would be that would pertain to these proceedings.

MR. SCHWIND: Thank you.

THE COURT: And I would hope all counsel would understand that and I -- I hope the order that I prepare will be clear. And as I said, if it's not, I'm sure you won't be shy about letting me know and I'd welcome you letting me know.

MR. SCHWIND: Thank you, Your Honor.

THE COURT: Mr. Cooper, anything else from you or your colleagues?

MR. COOPER: No, Your Honor, thank you very much.

THE COURT: Last chance for the Government, Mr. Dintzer.

MR. DINTZER: No, thank you, Your Honor.

THE COURT: Very good. Counsel, thank you very much.

MR. COOPER: Thank you, Your Honor.

Whereupon, at 2:57 p.m., the hearing was adjourned.)

CERTIFICATE OF TRANSCRIBER

I, Elizabeth M. Farrell, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-titled matter.

DATE: 7/17/14 S/Elizabeth M. Farrell
ELIZABETH M. FARRELL, CERT

Exhibit G

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Exhibit H

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