No. 13-465C
(Judge Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

DEFENDANT'S RESPONSE IN OPPOSITION TO THE NEW YORK TIMES COMPANY'S MOTION TO INTERVENE AND FOR AN ORDER DE-DESIGNATING DISCOVERY MATERIALS

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DEFENDANT'S RESPONSE IN OPPOSITION TO THE NEW YORK TIMES COMPANY'S MOTION TO INTERVENE AND FOR AN ORDER DE-DESIGNATING DISCOVERY MATERIALS

Defendant, the United States, respectfully submits this response in opposition to the motion to intervene and for an order de-designating discovery materials filed by The New York Times Company (the Times) on June 30, 2015 (ECF No. 177) (Times Mot.).

The Times seeks permission to intervene in this action for the purpose of asserting that the United States has inappropriately designated the deposition transcripts of Edward DeMarco and Mario Ugoletti as "Protected Information," for which access and use is restricted pursuant to the Court's protective order. The Times first argues that news organizations are "routinely" permitted to intervene "permissively or, at times, as a matter of right" for the purpose of challenging discovery protective orders, and that the Court should here allow permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.[1] Times Mot. at 2-3. Next, the Times challenges the validity of the Court's protective order, arguing that the

[1] The relevant portions of Rule 24(b) of the Federal Rules of Civil Procedure and Rule 24(b) of the Rules of the United States Court of Federal Claims (RCFC) are identical, so the Court may rely on cases interpreting the scope of either. *See, e.g., Am. Mar. Tranps., Inc. v. United States*, 870 F.2d 1559, 1560 & n.4 (Fed. Cir. 1989) (relying on cases citing to Rule 24 of the Federal Rule of Civil Procedure).

"provisions of the Protective Order itself fall short of the good cause standard [set forth in Rule 26(c) of the Federal Rules of Civil Procedure]," and, alternatively, that the deposition transcripts at issue are not covered by the protective order's definition of "Protected Information." *Id.* at 8. The Court should deny the Times's motion for two reasons. First, because the requirements of RCFC 24(b) are not here satisfied, the Court lacks the discretion to permit the Times to intervene. Second, as we establish here and in our separate brief in response to the motions filed by plaintiffs, Fairholme Funds, Inc., *et al.*, which seek similar relief, the United States has properly designated the deposition transcripts as protected information.

In seeking permission to intervene, the Times ignores the plain language of RCFC 24(b). The Times has not demonstrated that it possesses "a conditional right to intervene provided by federal statute" or "a claim or defense" that shares a common question with this action. Indeed, the Times does not even mention these requirements in its motion. Moreover, the Times lacks Article III standing, as it can demonstrate no discrete and particularized harm that is not held by the public at large. For these reasons, the Court does not possess the discretion to grant the pending motion. *See, e.g.*, Wright & Miller, Federal Practice and Procedure § 1911 (West 2015) ("If the would-be intervenor's claim or defense contains no question of law or fact that is raised also by the main action, intervention under this branch of the rule must be denied.") (referring to Fed. R. Civ. P. 24(b)). Rather than seek to intervene, the Times should have instead sought the Court's permission to file an *amicus* brief in support of Fairholme's motion to de-designate the transcripts.

The Times's argument that the depositions should be released to the public also lacks merit. Crucially, the subject of the Times's motion is discovery that has not been filed in the Court. Although the Times insists that the "public's interest" in the transcripts is "undeniable,"

Times Mot. 7, it concedes that "there is neither a common law nor First Amendment heightened presumption of public access to unfiled discovery materials[.]" *Id.* at 4. Indeed, the Times cites cases that support the proposition that the public does *not* possess a right to obtain such materials.

In any event, the deposition transcripts of Messrs. DeMarco and Ugoletti are properly designated as Protected Information under the protective order. *See* Protective Order ¶ 2 (July 16, 2014), ECF No. 73 (Prot. Order). The protective order's history refutes the Times's argument that the Court did not determine that "good cause" existed before entering the protective order. The transcripts at issue, moreover, include confidential information and market sensitive information covered by the protective order's plain terms. The United States has relied, and continues to rely, upon the protective order to safeguard the highly sensitive material produced in this action; the Court has consistently recognized that tangible harm could occur if protected information were released. *See* Opinion and Order at 5 (Oct. 15, 2014), ECF No. 101 (Howard Order) ("Defendant has clearly defined a serious injury that could occur if protected information is disclosed—not merely to one discrete business, which would, in itself, justify denial of the motion, but rather, to the United States financial markets."); *id.* at 6 ("[D]isclosure of the protected information could place this nation's financial markets in jeopardy, a risk that the court is not willing to take[.]"); Transcript of Proceedings at 18:20-25 (July 16, 2014), ECF No. 75 (July 16, 2014 Tr.) ("[Y]es, 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."). Given the very real harm that could

occur should confidential and market sensitive information be released publicly, the Court should not de-designate the deposition transcripts.

BACKGROUND

After the United States filed its motion to dismiss Fairholme's complaint pursuant to RCFC 12(b)(1) and 12(b)(6), Fairholme requested limited, jurisdictional discovery to respond to the Government's motion. The Court granted Fairholme's request. To date, the United States has produced approximately 550,000 pages of documents and defended seven depositions.

Following the Court's order granting discovery, the parties undertook lengthy negotiations to facilitate and expedite discovery, which encompassed a massive and complicated document review and production process. After plaintiffs served their initial discovery requests, the United States sought an order limiting the scope of discovery and relieving it of its obligation to produce documents in response to some of plaintiff's requests. Def. Mot. for Protective Order (May 30, 2014), ECF No. 49. Following briefing on the Government's motion, the Court held a status conference to address the Government's arguments and plaintiffs' response. Transcript of Proceedings Regarding Def. Mot. for Protective Order (June 19, 2014), ECF No. 64 (June 19, 2014 Tr.). The Court noted its belief that many of the Government's concerns about the disclosure of sensitive information could be addressed through a protective order keeping documents under seal. *Id.* at 5:7-10 ("[I]f there's a protective order in place which provides for the sealing of all such documents [about, *e.g.*, the future of the conservatorships], how is the conservator harmed? There will be no release of documents."). The Court also stated its concerns that sensitive documents in similar litigation before this Court had recently leaked and similar leaks in this action could cause "grave and dire consequences" on the market and the economy. *Id.* at 7:6-19 ("[N]o judge wants a leak. But I think I've been able to come up with

some judicial caulk that I would put in place in the case and it would be this. We'd have a protective order.").

On July 11, 2014, the parties filed a joint status report presenting detailed arguments concerning disagreements over the proposed protective order governing jurisdictional discovery in this matter. Joint Status Report Regarding Proposed Protective Order (July 11, 2014), ECF No. 69 (JSR). On July 16, 2014, the Court held a status conference during which the parties presented their arguments concerning (1) the definition of "Protected Information," and (2) the burden of challenging designations of Protected Information. *See generally* July 16, 2014 Tr. The final protective order, issued that same day, facilitates and governs discovery. Prot. Order. The Court concluded that a protective order was necessary in order "to safeguard the confidentiality of" information likely to be disclosed by the United States which "may be sensitive or otherwise confidential and protectable." *Id*. at 1. The protective order defines "Protected Information" to include any "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 Court did not adopt either party's definition of Protected Information, but articulated its own definition. *Compare id.* ¶ 2 *with* JSR at 2. The protective order also incorporates a process for a receiving party to challenge the designation of materials as Protected Information, adopting the Government's position that the receiving party bears the burden of showing that the designation was improper. Prot. Order ¶ 17.

ARGUMENT

I. The Court Should Deny The Times's Request To Intervene

The Court should not allow the Times to intervene because the Times cannot establish the requirements for permissive intervention. RCFC 24(b)(1) reads: "On timely motion, the court

may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." The Times does not even attempt to show that these requirements are satisfied. Moreover, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties rights." RCFC 24(b)(3). Allowing the Times to intervene would prejudice the United States by delaying the completion of jurisdictional discovery and the adjudication of our outstanding motion to dismiss.

A. The Times Does Not Possess A "Claim Or Defense" That Shares A Common Question Of Law Or Fact With This Action

The Court should deny the Times's motion because the Times does not assert a claim or defense that shares a "common question of law or fact" with this action.[2] RCFC 24(b)(1); *see, e.g.*, *Standard Space Platforms Corp. v. United States*, 35 Fed. Cl. 463, 466 n.1 (1996) ("Permissive intervention, RCFC 24(b), is inapplicable because [proposed intervenor attempting to challenge a protective order] does not press before the court any 'claim or defense' having 'a question of law or fact in common' with the main action."). Although many of the cases identified by the Times focus on whether an applicant has identified a "common question" with the main action, the Court cannot make a commonality determination here because the Times has not identified a single "claim or defense" it possesses. RCFC 24(b)(1)(B).

The Times seems to assert that it has a generalized public right to access documents produced as part of judicial proceedings involving public officials, but it simultaneously

[2] The Times has likewise failed to identify any federal statute giving it a conditional right to intervene. RCFC 24(b)(1)(A). The United States is not aware of any statute that might permit the Times to intervene.

concedes that it has no right to access discovery documents under common law or the First Amendment. Times Mot. at 2, 4, 7. The Times cannot ignore the unambiguous requirement that it must possess some "claim or defense" in common with this action. RCFC 24(b)(1)(B). The Times cites numerous cases for the unremarkable assertion that newspapers or other third parties should seek the court's permission to intervene before challenging a protective order, Times Mot. at 3; these cases do not establish that a newspaper can intervene without showing a common claim or defense.[3]

An unspecified, general assertion of some remote interest in challenging a protective order is not sufficient grounds for intervention under RCFC 24. *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005) ("Drizin's sole argument seems to be that the district court should have allowed him to intervene in this case because he is entitled to a modification of the

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[3] *See San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999) (vacating order denying intervention when there was no dispute concerning newspaper's claim or defense in common with the main action); *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (intervenor filed an action in D.C. Superior Court that "plainly shares common questions with the main action"); *Pub. Citizenv. Liggett Grp., Inc.*, 858 F.2d 775, 784 (1st Cir. 1998) (acknowledging it was "clear from the proceedings below that the district court considered [the group] to have a legitimate interest in seeking modification of the protective order"); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1426 (10th Cir. 1990) (affirming permissive intervention by "litigants in suits in other state and federal courts" against the same defendants); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 784 (3d Cir. 1994) (newspaper intervenors had "already commenced a suit in [Pennsylvania] court"); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994) (newspaper attempting intervention did not have standing to challenge protective order in order to obtain discovery materials); *Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 164 (6th Cir. 1987) (intervenor had filed suit "involving the same defendants"); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979) ("The Government [intervenor], therefore, would have standing in the constitutional sense[.]"); *In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 789-91 (5th Cir. 1979) (congressional sub-committee seeking to obtain material sought through congressional subpoena met requirements of Rule 24(b)).

Protective Order. He is wrong."). The Times identifies no right that would be infringed by a denial of its motion to intervene. In fact, the Times offers only four, conclusory sentences to explain why it should be permitted to intervene, none of which meet the requirements of this Court's rules. The Court should not allow movants to disregard the requirements of those rules on the basis of so thin a reed. *See, e.g., id.* at 561 (rejecting appeal of party seeking intervention to modify protective order who "largely ignored" the Rule 24(b) requirements).[4]

Because the Times does not possess a "claim or defense" in common with this action, this Court does not have the discretion to permit intervention. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 840 (8th Cir. 2009) ("Judicial efficiency is not promoted by allowing intervention by a party with no interest upon which it could seek judicial relief in a separate lawsuit."); *Newby v. Enron Corp.*, 443 F.3d 416, 421 (5th Cir. 2006) (threshold requirement that an applicant possess a claim or defense sharing a common question of law or fact with the main action "is not discretionary; it is a question of law") (internal citations and quotation marks omitted). The Court should deny the Times's motion to intervene.

B. <u>The Times Does Not Possess Article III Standing To Permissively Intervene</u>

In addition to its failure to demonstrate that it satisfies the requirements expressly prescribed by RCFC 24, the Times has not shown that it has Article III standing and the Court should hold that Article III standing is necessary to permissively intervene. *See, e.g., Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring in part and concurring in the

[4] The Times has also failed to comply with the RCFC 24(c) procedural requirement to attach a pleading setting forth the asserted claim or defense in common with this action. *See, e.g., Rogers v. United States*, 104 Fed. Cl. 142, 147 n.4 (2012) ("Two courts of appeal have noted that total failure to submit a formal pleading stating grounds for intervention may constitute sufficient reason for a court to deny the motion.").

judgment) ("The words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement'" to "serve a motion stating 'the grounds therefor' and 'accompanied by a pleading setting forth the claim or defense for which intervention is sought.'").[5]

"Although this Court is not an Article III court, it applies the same constitutional standing requirements as its Article III sisters." *KC Res., Inc. v. United States*, 115 Fed. Cl. 602, 605 (2014) (citing *Glass v. United States*, 258 F.3d 1349, 1355–56 (Fed. Cir. 2001)). Article III standing consists of three elements: (1) injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Times cannot establish these elements. Importantly, the Supreme Court has held that to satisfy Article III the injury must be "concrete and particularized," *id.*, and it has "repeatedly has rejected claims of standing predicated on "'the right, possessed by every citizen, to require that the Government be administered according to law . . . .' *Fairchild v. Hughes*, 258 U.S. 126, 129 [42 S.Ct. 274, 275, 66 L.Ed. 499] [1922]." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982) (quoting *Baker v. Carr*, 369 U.S. 186, 208 (1962)). Although the Times states its desire to "be heard on the question of the public's access to documents arising from discovery in this action," Times Mot. at 2, the press is not afforded any special rights to access information not available to the public at large. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974). And, even if the *public* had a right to access discovery materials, the

[5] The United States Court of Appeals for the Federal Circuit has not addressed the issue of whether Article III standing—in addition to the requirements of RCFC 24(b)—is necessary to permissively intervene in an ongoing case.

Government's designations would still not constitute a "concrete and particularized" injury *to the Times*, which is necessary to establish standing pursuant to Article III.

C. The Times Cannot Demonstrate That The Court Would Possess Independent Jurisdiction To Decide Any Claim Or Defense That It Could Assert

The Court should reject the Times's motion for the additional reason that there is no statutory basis for this Court to exercise jurisdiction here.

Because the "power to permit intervention is ultimately a function of [the court's] jurisdiction," which "may not be extended by court rule," *Anderson Columbia Envtl., Inc. v. United States*, 42 Fed. Cl. 880, 885 (1999) (internal citation and quotation marks omitted), this Court has frequently denied permissive intervention where a would-be intervenor failed to establish an independent basis for the Court's jurisdiction. *See id.* at 882-83 (denying motion for permissive intervention when movant identified neither a statute providing a conditional right to intervene nor a claim or defense in common with the main action); *Aeroplate Corp. v. United States*, 111 Fed. Cl. 298, 300 (2013) (Sweeney, J.) ("[Putative intervenor bank] acknowledges that it has no claim against the United States. Because the bank has not identified an independent claim over which the court possesses jurisdiction, its motion to intervene under RCFC 24(b) must also fail."); *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645, 658 (2004), *aff'd on other grounds, John R. Sand & Gravel Co. v. Brunswick Corp.*, 143 F. App'x 317 (Fed. Cir. 2005); *Karuk Tribe of Cal. v. United States*, 27 Fed. Cl. 429, 432 (1993). The Times has no "claim or defense" to begin with, and cannot establish the Court's independent jurisdiction to consider its non-existent claim or defense, so the Court should deny permissive intervention.

Importantly, the Court has not even decided whether it possesses jurisdiction to entertain *plaintiffs'* claims. Even if the Court ultimately concludes that it does possesses jurisdiction to

decide plaintiffs' claims, that fact would not necessarily establish jurisdiction to consider any claim or defense asserted by the Times. The Times may not rely on the fact that the deposition transcripts it now seeks may become part of some judicial record at an unidentified time in the future. *See, e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("[T]he Court of Federal Claims follow[s] the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought.") (quotation marks and citation omitted).

The Times cites non-binding precedent of other circuits that suggests that a *district court* does not need independent jurisdiction over a would-be intervenor that seeks solely to modify a protective order. *See, e.g.*, *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1047. Federal district courts may exercise supplemental jurisdiction over "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution," including over claims involving the intervention of parties. 28 U.S.C. § 1367(a). Thus, although certain district courts have acknowledged an exception to the rule requiring an independent jurisdictional basis when third parties challenge a protective order, this is explicitly permitted pursuant to § 1367. The Court of Federal Claims, however, may not exercise supplemental jurisdiction. *See, e.g.*, *Hall v. United States*, 69 Fed. Cl. 51, 57 (2005). It follows that an applicant for permissive intervention under RCFC 24(b) must show the Court possesses independent jurisdiction over an asserted claim. The Court should deny permissive intervention, rather than impermissibly extend its jurisdiction as the Times proposes through its motion.

D. The United States Would Be Prejudiced And Adjudication Of Its Rights Would Be Unduly Delayed If The Times Were Allowed To Intervene

Allowing the requested intervention would prejudice the United States in this and other cases.

In deciding whether to grant intervention, the Court must consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." RCFC 24(b)(3). Allowing the Times to intervene would unduly delay the adjudication of the United States' pending motion to dismiss. The interest of the Times to gather newsworthy material—from ongoing litigation involving United States agencies or otherwise—is no greater than the interest of any member of the general public. *Pell*, 417 U.S. at 834 ("The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."). The Times has conceded that it has no presumptive *right* to access these discovery documents. Permitting intervention by the Times would invite any Twitter commentator, blogger, or other member of the general public to challenge any protective order in any ongoing litigation concerning any Government entity, even before threshold matters such as a court's jurisdiction or a plaintiff's standing have been determined. The Times and any other intervenor would then be free to challenge every aspect of every Court-provided protective order, increasing the burden on the parties that must respond and wasting finite judicial resources. *See, e.g.*, *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party.").

Even if the Court restricted the Times's ability to participate to matters directly related to the protective order, there is no dearth of objections it could raise. *See Schiller v. City of New York*, No. 04-cv-7922, 2007 WL 136149, at *1 (S.D.N.Y. Jan. 19, 2007) ("The New York Times

(the 'Times'), which was previously granted permission to intervene, has also moved to remove those designations. In addition, the Times has moved to modify the Protective Order[.]") (cited in Times Mot. at 5, 6, & 7). The United States has already invested significant resources to respond to the Times's current motion, notwithstanding the Times's complete disregard of the requirements of RCFC 24(b). This effort necessarily detracts from the Government's efforts to prepare its witnesses for depositions and resolve any remaining discovery disputes with plaintiffs. Should the Times be permitted to intervene, it is likely that the United States would be required to respond to serial motions (filed by the Times and/or subsequent intervenors) that would prejudice the Government and unduly delay the Court's resolution of the pending motion to dismiss.[6]

To allow the Times to intervene when the Times lacks any standing under Article III, does not assert a claim or defense over which the Court possesses independent jurisdiction, and where the only stated interest in this action is the Times's vague allusion to "the public's access to documents arising from discovery," Times Mot. at 2—the "right" to which the Times admits it does not possess, Times Mot. at 4—would render any prerequisites for permissive intervention identified in RCFC 24(b) entirely meaningless.

[6] To the extent there exists any *de minimis* public interest in obtaining the discovery documents in this action, that interest is better represented through alternative means. Plaintiffs have adequately represented the Times's purported interest, by arguing that the public is prejudiced by the continued protection of these transcripts under the Court's order. *See, e g.*, ECF No. 162 at 5. Instead of seeking intervenor status, the Times could have sought leave to file an *amicus curiae* brief in support of plaintiffs' numerous motions challenging the Government's designation of Protected Information.

II. The Transcripts Are Properly Designated As Protected Information

The Court should conclude that the United States properly designated the deposition transcripts as Protected Information under the protective order.

A. The Burden Of Proof Rests With The Party Seeking De-Designation

As a preliminary matter, the Times incorrectly asserts that the United States bears the burden of enforcing the Court's protective order. *See* Times Mot. at 4 ("[A] party seeking to keep such discovery materials confidential must still show that it has met the 'good cause' standards set forth in Fed. R. Civ. P. 26(c) before a protective order is . . . enforced."). The protective order's burden regime was a subject of dispute between the parties. During the status conference discussing the order, the parties identified two burdens: the burden of showing of "good cause" required under RCFC 26 prior to obtaining the order and the burden of challenging a designation made under a previously-entered protective order. *See* July 16, 2014 Tr. at 17:11-18:25, 26:15-29:10. Plaintiffs argued that the producing party (which, in this case, is only the United States), should bear both burdens. *Id.* at 17:11-18:25. We acknowledged that we had the initial burden of showing good cause to issue a protective order under RCFC 26, but explained that the challenging party should bear the burden of de-designating material protected under the order. *Id.* at 26:15-29:10. In its final order, the Court adopted our position. Prot. Order ¶ 17.

The Times's assertion that the protective order's provisions "fall short of the good cause standard," Times Mot. at 8, fails for multiple reasons. First, the Times ignores the statement in the protective order that "*[t]he court finds* that certain information likely to be disclosed orally or in writing during the course of this litigation may be sensitive or otherwise confidential and protectable, and *that entry of a Protective Order is necessary* to safeguard the confidentiality of that information." Prot. Order at 1 (emphasis added). Although the Court did not specifically

use the term "good cause," it clearly found that the threshold burden under RCFC 26(c) had been met. Second, the Times ignores the procedural history leading to the adoption of the Court's order. The parties offered competing definitions of "Protected Information." Joint Status Report at 2. The issue was argued at length before the Court. *See, e.g.*, July 16, 2014 Tr. at 7:24-17:3, 22:17-26:14. Ultimately, the Court did not adopt either party's definition, but crafted its own in the final order. Prot. Order ¶ 2. The Times offers nothing to support its assertion that the Court's standard fails to comply with RCFC 26.

The Court should reject the Times's argument that the Court's "permissive wording" undermines any presumption of good cause because it "balloons into ambiguity." Times Mot. at 8. The protective order adequately identifies the protectable information. As explained further below, the deposition transcripts meet the definition of Protected Information in this Court's order, which was issued pursuant to RCFC 26 following a finding of good cause. Continued protection of the transcripts is, thus, appropriate.

B. The Deposition Transcripts Contain Confidential Information

The deposition transcripts contain Protected Information as defined pursuant to ¶ 2 of this Court's order. The protective order defines "Protected Information" to include "proprietary, confidential, trade secret, or market-sensitive information, as well as information that is otherwise protected from public disclosure under applicable law." Prot. Order ¶ 2. The protective order explicitly states that "Protected Information may be contained in . . . any deposition . . . taken or provided during this litigation." *Id.*

The transcripts contain market-sensitive and confidential information regarding the future of the conservatorships and the wind down of Fannie Mae and Freddie Mac and confidential testimony regarding the projections of profitability for these entities. This Court has limited

jurisdictional discovery to a time period prior to September 30, 2012, but the policy debates regarding the future of the companies are ongoing and financial projections made during the discovery time period cover years far into the future. *See, e.g.*, Notice of Filing of Administrative Record of the Department of Treasury at Treasury-3775–3802, *Perry Capital LLC v. Lew*, No. 13-cv-1025 (D.D.C. Dec. 17, 2013), ECF No. 26-11 (showing certain financial projections for Fannie Mae and Freddie Mac prepared by Department of Treasury during the discovery period in this action and covering the years 2012-2023).

The Court has recognized the ongoing potential for harm should sensitive material be released publicly. For example, the Court relied on the declarations of Melvin L. Watt, Director of the FHFA, and Michael A. Stegman, former Counselor to the Treasury Secretary for Housing Finance Policy at the Department of Treasury, in deciding to issue the protective order. Howard Order at 3 ("Based upon the information provided in these two declarations and defendant's arguments, the court granted defendant's motion for a protective order[.]"). In his declaration, Director Watt explained that "disclosure of projections that suggested (*or that market participants interpreted as suggesting*) that the Enterprises' financial conditions were worse than previously assumed, could . . . increase current prices in the primary and secondary markets." Def. Mot. for Protective Order, Watt Decl. ¶ 9 (A4) (May 30, 2014), ECF No. 49 (Watt Decl.) (emphasis added). Furthermore,"[m]aking available . . . the type of non-public and confidential information relating to the Conservator's conduct of the ongoing and future operations . . . could also adversely affect the Conservator's ability to operate the conservatorships because it would enable the Enterprises to gain access to . . . documents that were not intended to be shared or reviewed[.]" *Id.* ¶ 11 (A5); *see also* Howard Order at 6. The Court has acknowledged that risk of these serious harms to FHFA and to the markets more generally should sensitive material be

released publicly. *Id.* ("[D]ire harm would flow from the disclosure of the sensitive material that is the subject of the protective order.").

The cases cited by the Times to suggest the Court should not defer to the protective order are inapposite. This Court's order is not a stipulated blanket order approved without consideration of good cause. Times Mot. at 6 ("Where a stipulated protective order does not incorporate the 'good cause' standard, the courts need not defer to the order in considering whether materials have been improperly classified as confidential."); *see also In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 322 (D. Conn. 2009) ("Here the parties similarly did not make a good cause showing before the court signed the Protective Order in December 2003."); *Schiller*, 2007 WL 136149, at *1 ("On October 4, 2005, the Court approved the parties' stipulation concerning confidentiality."); *cf. Daniels v. City of N.Y.*, 200 F.R.D. 205, 210 (S.D.N.Y. 2001) (denying motion to intervene in order to modify a protective order that was "carefully crafted" to protect materials after a showing of good cause). The history of this protective order is comparable to the order at issue in *Daniels*. This Court's order was subject to a dispute between the parties. This dispute was adjudicated by the Court after briefing and argument by the parties. There is a presumption of good cause to protect designated information pursuant to the protective order, as articulated by the United States and accepted by the Court prior to its order.

The Times cites to *Daniels* for the proposition that the burden of showing good cause for continued confidentiality should be with the United States because the Times is a "private party assert[ing] a public interest in order to gain access to information." Times Mot. at 6; *Daniels*, 200 F.R.D. at 207 (relying on *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559, 567–68 (E.D.N.Y. 1985), *aff'd on other grounds*, 821 F.2d 139 (2d Cir. 1987)). But the Times

acknowledges that there is *no public interest* in discovery documents not filed as part of the judicial record, Times Mot. at 4, so the burden-shifting regime in *Daniels* is not relevant to the Times's motion. This should be especially true under the unusual circumstances here when the Court has yet to determine whether it has jurisdiction to adjudicate the alleged claims, whether the plaintiffs have standing to pursue any alleged claims, or whether the plaintiffs have failed to state a claim.

The Times supports its argument with cases in which the third party was seeking access to *filed* court documents. *See In re Violation of Rule 28(d)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 134–35 (2d Cir. 2004); *Ottati v. City of Amsterdam*, No. 06-cv-1370, 2010 U.S. Dist. LEXIS 145010, at *21 (N.D.N.Y. Jan. 25, 2010); *Flaherty v. Seroussi*, 209 F.R.D. 295, 300 (N.D.N.Y. 2001). The Times, however, acknowledges these cases have no bearing by conceding there is neither a common law or First Amendment heightened presumption of public access to *unfiled* discovery materials. Times Mot. at 4.

The Times also errs in citing cases discussing a public right to discovery materials obtained *before* the amendments to Rule 5(d) of the Federal Rules of Civil Procedure. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 146 (2d Cir. 1987) ("Unless the public has a presumptive right of access to discovery materials [provided by Rule 5(d)], the party seeking to protect the materials would have no need for a judicial order [under Rule 26(c)] since the public would not be allowed to examine the materials in any event."); *see also San Jose*, 187 F.3d at 1103 (relying, *inter alia*, on *Agent Orange*); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (same); *Havens v. Met. Life Ins. Co.*, No. 94-cv-1402, 1995 U.S. Dist. LEXIS 5183, at *13 (S.D.N.Y. Apr. 20, 1995) ("Citing Fed. R. Civ. P. 26(c) and 5(d), the Journal asserts a right of access to the 'Havens litigation' discovery documents absent a valid

protective order."). As the Times briefly notes, Times Mot. at 5-6 n.1, Rule 5(d) was amended in 2000 to eliminate the previous requirement that, absent a court order or local rule, discovery materials must be filed with the court.[7] This change constituted a significant departure from the previous rule that created a presumption that discovery material would be incorporated into the judicial record. *See* Fed. R. Civ. P. 5(d), Advisory Committee Notes on 2000 Amendment ("The [new] rule supersedes and invalidates local rules that forbid, permit, or require filing of these materials before they are used in the action."); *see also Bond v. Utreras*, 585 F.3d 1061, 1076 (7th Cir. 2009) ("Whatever force these decisions [suggesting a substantive right of public access to discovery] had was destroyed by the 2000 amendment to Rule 5(d), which reversed the longstanding rule generally requiring discovery to be filed with the court"). Indeed, the Times "[c]oncede[s]" this, Times Mot. at 4, and case law relied upon by the Times reaffirms that there is no right to access discovery materials, *see, e.g.*, *Schiller*, 2007 WL 136149, at *2, n.2 ("While materials produced in discovery may be disclosed by the receiving party in the absence of a protective order, the public does not have a *right* of access to those materials.") (emphasis in original) (cited in Times Mot. at 5, 6, & 7).

The Times relies on *Agent Orange*, as quoted in *Gambale*, 377 F.3d at 142, to support the assertion that "if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection." Times Mot. at 4. The Times's assertion about the judicial protection of these materials is again incorrect and misleading. In *Agent Orange*, the United States Court of Appeals for the Second Circuit relied

[7] RCFC 5 was amended in the year 2002 to bring the rule "in closer conformity" with Rule 5 of the Federal Rules of Civil Procedure. RCFC 5, Rules Committee Notes on 2002 Revision.

jointly on Rules 5(d) and 26(c) of the Federal Rules of Civil Procedure to conclude there was a statutory right of access to certain discovery material sought by a third party. *Agent Orange*, 821 F.2d at 146. However, the appeals court subsequently acknowledged, that this holding in *Agent Orange* is no longer valid following the modification of Rule 5(d). *Sec. & Exch. Comm'n v. TheStreet.com*, 273 F.3d 222, 233 n.11 (2d Cir. 2001) ("However, to the extent that *Agent Orange* relied upon Federal Rule of Civil Procedure 5(d) to find a statutory right of access to discovery materials, we observe that the recent amendment to this rule provides no presumption of filing all discovery materials, let alone public access to them.") (cited in Times Mot. at 2).

The Times likewise asserts that this Court "has recognized that the public has an enforceable interest in access to discovery, which is to be balanced against the parties' interest in confidentiality." Times Mot. at 5 (citing *Ross-Hime Designs, Inc v. United States*, 109 Fed. Cl. 725, 731 (2013)). This assertion is incorrect. In *Ross-Hime*, plaintiff sought to modify a court-entered protective order to allow its corporate president and another employee access to proprietary information protected by the relevant order. 109 Fed. Cl. at 728–730. The court quoted what it found to be the relevant legal standard from an unpublished, non-precedential decision of the Federal Circuit, stating "the court must balance the privacy interests of the parties against the public interest in access to discovery information." *Id.* at 731 (quoting *Baystate Techs., Inc. v. Bowers*, 283 F. App'x 808, 810 (Fed. Cir. 2008) (per curiam)). However, absent context, this quotation from *Baystate* is misleading. Although the Federal Circuit, applying First Circuit law, mentioned a public interest in "discovery information," the proposed intervenor in that action sought access to trial exhibits and other documents actually filed in judicial proceedings in a case that had previously been dismissed. *See Baystate*, 283 F. App'x at 809 ("[Would-be intervenor] seeks access to trial exhibits and other documents."); *see also* Stipulated

Order Partially Resolving George W. Kuney's Motion to Interevene [sic] and Motion to Dissolve or Modify the Stipulated Protective Order at 2, *Bowers v. Baystate Techs., Inc.*, No. 91-cv-40079 (D. Mass. Apr. 2, 2007), ECF No. 557-2. Neither the *Baystate* court nor the *Ross-Hime* court recognized an "enforceable interest" of members of the general public to access unfiled, discovery materials. Thus, the Times cannot articulate a public interest in discovery materials, and so any proposed balancing test is irrelevant.

Even were the Court to engage in balancing interests, however, it is "presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied." *TheStreet.com*, 273 F.3d at 230. The protective order assures confidentiality of sensitive material and the United States has reasonably relied on this protection in producing the voluminous documents in this action and providing deposition testimony. This reliance applies specifically to the testimony the Times currently seeks to obtain. In his declaration, Director Watt asserted that:

> The release of documents that reflect prior thinking of Agency personnel concerning matters about which the Agency may follow a different course during my tenure as Director are likely to lead to the public and market participants second-guessing every decision, and will make any changes to Agency policy more difficult at both the deliberation and implementation stages. Thus, the disclosure of such documents and information would substantially impair my ability to direct the operations of the conservatorships in the manner I believe to be in the best interests of the conservatorships and the Agency. Accordingly, disclosure of deliberations of my immediate predecessor and during my tenure could have adverse impact to the Enterprises and market consequences.

Watt Decl. ¶ 13. The Times seeks public access to the deposition testimony of Director Watt's predecessor, Mr. DeMarco, concerning, among other things, the future of the conservatorships and the wind down of Fannie Mae and Freddie Mac. The conservatorships have not ended, nor have Fannie Mae and Freddie Mac been wound down. These are exactly the type of ongoing

policy issues in which Director Watt's approach could differ from Mr. DeMarco's and the risk of second-guessing by stakeholders impairing FHFA's ability to direct the conservatorships (and consequential harm to the markets) is very real. *See also* Howard Order at 6 (acknowledging "the grave harm to the nation's economy that would result from the disclosure of information subject to the protective order, inadvertent or otherwise"). The potential harm to FHFA in its ability to operate the conservatorships, and the grave market consequences should sensitive information be made public vastly outweighs the concededly non-existent "right" to access discovery material.

The Court should reject the Times's motion to intervene because the Times has failed to meet the requirements of RCFC 24, or any other threshold constitutional and jurisdictional requirements, and because intervention would be likely to cause prejudice and delay. Even if the Court allowed the Times to intervene, its motion to modify the protective order should be denied because, as the Times concedes, there is no public right to access discovery materials that have not become part of judicial proceedings. The information contained in the deposition transcripts is Protected Information, as defined in this Court's valid protective order, and public disclosure of this information is likely to cause tangible harm.

CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court deny the Times's motion.

Respectfully submitted,

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