Redacted Version

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

FEDERAL HOME LOAN MORTGAGE CORPORATION'S PUBLIC, REDACTED RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM CERTAIN DOCUMENTS PRODUCED BY FREDDIE MAC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Non-party Federal Home Loan Mortgage Corporation ("Freddie Mac") respectfully files this Response in Opposition to Plaintiffs' Motion to Remove the "Protected Information" Designation from Certain Documents Produced by Freddie Mac, Doc. 171 (the "De-Designation Motion" or "Motion").[1] Only one document is subject to the De-Designation Motion: a confidential email [redacted] Plaintiffs fail to meet their burden to de-designate this document and their arguments in support of de-designation are disingenuous at best. This document does not require, as they claim, "a sophisticated understanding of financial markets, government housing policy, the tax code, congressional action" or any "other specialized areas of policy," and it does not need to be shared "with scholars, professionals, and client representatives who could lend their expertise to Plaintiffs' case." De-Designation Motion at 7. It is far from crucial to Plaintiffs' claim; the record is clear that Freddie Mac did not play any role in negotiating the Third Amendment and was not even made aware of it until shortly before it was signed and publicly announced. Rather, Plaintiffs want to use the document as a media sound bite even though using that sound bite could harm Freddie Mac. The Court should reject Plaintiffs' efforts and deny their Motion.

BACKGROUND

A. Protective Order

Freddie Mac is not a party to this case. Plaintiffs nevertheless sought limited discovery from Freddie Mac, and Freddie Mac produced documents that are subject to the Protective Order

[1] Plaintiffs also filed a Motion to Remove the "Protected Information" Designation from Certain Documents Produced by PricewaterhouseCoopers ("PwC"), Doc. 172. PwC is Freddie Mac's independent auditor, and PwC produced certain Freddie Mac documents to Plaintiffs. The dispute with regard to the three Freddie Mac documents that were the subject of the PwC motion has been resolved, and that motion is now moot.

in this case. July 16, 2014 Protective Order, Doc. 73.[2] As this Court knows, the Protective Order 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." Doc. 73 ¶ 2. "Confidential" is not separately defined in the Protective Order. As defined in Black's Law Dictionary, something is "confidential" if it is "meant to be kept secret" or "imparted in confidence," and "confidential information" is "[k]nowledge or facts not in the public domain but known to some. . . ." Black's Law Dictionary (10th ed. 2014). *See also* Webster's Unabridged Dictionary 429 (2d ed. 2001) ("limited to persons authorized to use information").

The Protective Order provides that if a receiving party "desires to disclose Protected Information to a person not otherwise authorized under th[e] Protective Order to receive such information, or if it disagrees with the protected designation" then the receiving party should notify counsel for the producing party in writing to try and resolve the dispute pursuant to a set of procedures specified in the order. Doc. 73 ¶ 17. The only mechanism for redacting documents is included in Paragraph 11 of the Protective Order, and that relates only to "[d]ocuments [f]or the [p]ublic [r]ecord." *Id.* ¶ 11. If the parties cannot resolve their disputes regarding de-designation, the receiving party may apply to the Court for relief. *Id.* ¶ 17.

The Protective Order is clear that "the burden of persuasion shall rest with the moving party," in this case Plaintiffs. *Id*. Plaintiffs do not dispute that they bear the burden of persuasion in their De-Designation Motion. Motion at 2.

[2] The Court entered an amended version of the protective order on July 29, 2015. The amendments have no bearing on the instant dispute.

B. The Email Exchange at Issue

The only document at issue with regard to this Motion is an August 17, 2012 email exchange between [redacted] FHLMC_00002429 (attached as Ex. 1 to Plaintiffs' Motion). Plaintiffs want to de-designate the portion [redacted] This email exchange between two Freddie Mac senior officers was confidential, and Plaintiffs have provided no evidence that the exchange was shared with anyone outside Freddie Mac.

C. Plaintiffs' De-Designation Motion

Although Plaintiffs acknowledge that they have the burden of persuasion under the Protective Order, their arguments seek to re-write the Protective Order and implicitly shift that burden to Freddie Mac. They argue that Freddie Mac must show that it will be harmed by the disclosure of the email exchange in order for it to remain Protected Information. Motion at 5. Cutting and pasting arguments made in briefs filed against the Government, and without relating those arguments to the email exchange at issue here, Plaintiffs argue that they will be harmed if they cannot show this email to their clients, who are "sophisticated investors who could shed additional light on the information," as well as to "scholars" and "professionals" who "could lend their expertise to Plaintiffs' case." *Id.* at 7. They argue that the email exchange is relevant to their claims in their District Court litigation, which is of no moment given that, by order of this Court, they are free to use the document in that proceeding (filed under seal). They also argue that keeping this document confidential has First Amendment implications and will somehow lead to the "impoverishment of the debate over . . . crucial questions of public policy."

Id. at 9. Finally, they argue that the Protective Order permits the partial de-designation of materials even in the absence of the document at issue being part of a court filing. These arguments fail, as addressed below.

ARGUMENT

A. Plaintiffs Fail to Meet their Burden of Demonstrating that Disclosure Should be Allowed or that the Email Exchange was Improperly Designated

In issuing the Protective Order, the Court already determined that there is good cause for Freddie Mac to designate materials as Protected Information. Accordingly, the Court placed the burden on Plaintiffs to demonstrate that a document designated as Protected Information is "improperly designated or that disclosure [should be] allowed." Doc. 73 ¶ 17. Plaintiffs fail to make either showing.

Plaintiffs argue that disclosure should be allowed because they are harmed in pursuing their claim by their inability to share the snippet from the email exchange with "scholars, professionals, and client representatives who could lend their expertise to Plaintiffs' case." Motion at 7. It is simply ludicrous to argue, as Plaintiffs do, that this email "requir[es] a sophisticated understanding of financial markets, government housing policy, the tax code, congressional action, and other specialized areas of policy" (*id.*) such that Plaintiffs are prejudiced if they cannot seek guidance on this email from those outside the bounds of the Protective Order. As Plaintiffs recognize, they are free to share the email exchange with their retained experts. *Id.*

Moreover, keeping the email exchange as Protected Information does not hamper Plaintiffs' ability to use the document with this Court or in their D.C. Circuit appeal. By Order dated July 9, 2015, Doc. 194, the Court permitted Plaintiffs to file un-redacted documents

discovered in this case under seal in *Fairholme Funds, Inc. v. Federal Housing Finance Agency*, No. 14-5254 (D.C. Cir.), and Plaintiffs have already done so.

It is clear, therefore, that none of Plaintiffs' stated harms actually relate to ***this*** email exchange. Plaintiffs' remaining argument regarding the importance of "public access" to the document best illustrates Plaintiffs' real desire here: to create misleading sound bites as part of their on-going public relations campaign. Plaintiffs want to use [redacted] There is no evidence, however, that [redacted] To the contrary, [redacted] None of the Treasury or FHFA witnesses have testified that they shared their strategies and motives with anyone at Freddie Mac. That Plaintiffs know that any such interpretation of the email is flawed is evidenced by the fact that they did *not* include this email exchange in their recent Motion for Judicial Notice and Supplementation of the Record in the D.C. Circuit, wherein they sought to detail the evidence that they claim contradicts the Government's position regarding the purpose of the Third Amendment.

Moreover, even if the email exchange somehow was relevant to the litigation (which it is not), there is no presumptive right of public access to the document where, as here, the document has not been filed with the Court. *Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) ("Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to unfiled discovery."); *In re Terrorist Attacks on Sept. 11, 2001*, 454 F. Supp. 2d

220, 222 (S.D.N.Y. 2006) ("[P]ublic interest in particular litigation does not generate a public right of access to all discovery materials. Indeed, no public right of access exists with respect to materials produced during the initial stages of discovery."); *Armour of Am. v. United States*, 73 Fed. Cl. 597, 600 (2006) ("Pretrial discovery is not a public component of a civil trial."); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). Other than as part of this De-Designation Motion, the email exchange has not been used in any other court filing.

In short, Plaintiffs have not identified, and cannot identify, any legitimate reason for which they need to de-designate the document for use in their substantive case -- they just want to use it as a catchy sound bite in their public relations campaign. And that is not enough to meet Plaintiffs' burden of persuasion.

Plaintiffs also fail to demonstrate that the email exchange was improperly designated as Protected Information. Their De-Designation Motion relies on the conclusory statement that "[t]here is no plausible argument that the [email exchange] is Protected Information" and cites to inapposite cases in an effort to shift the burden back to Freddie Mac. De-Designation Motion at 3-4. Plaintiffs rely on *In re Violation of Rule 28(d)*, 635 F.3d 1352 (Fed. Cir. 2011) to assert that Freddie Mac "must show that specific prejudice or harm will result," De-Designation Motion at 4, from the disclosure of the email exchange. *In re Violation*, however, is inapposite because that case dealt with "improper confidentiality markings in the [parties' appellate] briefs," and held that the markings involving "parts of [the] briefs that set forth [a party's] legal argument" were improper as the legal arguments were not confidential. 635 F.3d at 1354, 1355-56. Plaintiffs' reliance on *Lakeland Partners, L.L.C. v. United States*, 88 Fed. Cl. 124 (2009) for the same proposition is equally misplaced. *Lakeland* involves a motion for a protective order relieving the defendant of the obligation to produce discovery to the plaintiff, and importantly,

did not address a situation where a protective order was already in place, as is the case in this action.[3]

Plaintiffs' efforts to avoid having to satisfy their burden in this matter should be rejected and the Court should deny Plaintiffs' De-Designation Motion.

B. The Email Exchange is Protected Information

Even if Plaintiffs could demonstrate prejudice to their case (which they cannot) the email exchange is "confidential" and thus qualifies as Protected Information.[4] And this conclusion holds even if Freddie Mac was required make a specific showing of harm (and it is not). As noted above, Plaintiffs point to no evidence that the exchange was shared with others outside Freddie Mac. [redacted] *See, generally*, *Arigbon v. Multnomah Cty.*, No. CV. 09-311-PK, 2009 WL 3335064, at *2 (D. Or. Oct. 15, 2009) (citing *In re Hawaii Corp.*, 88 F.R.D. 518, 524 (D. Haw. 1980) (recognizing employee morale as a cognizable interest justifying confidentiality); *Marten v. Yellow Freight Sys., Inc.*, No. CIV. A. 96-2013-GTV, 1998 WL 13244, at *1 (D. Kan. Jan. 6, 1998) (same).

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[3] Plaintiffs also cite *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087 (N.D. Cal. 2004) and *Return Mail, Inc. v. United States*, 107 Fed. Cl. 459 (2012), but those are expert disqualification cases that are inapplicable.

[4] The De-Designation Motion incorrectly asserts that, during efforts to resolve this dispute, counsel for Freddie Mac did not previously explain that the email exchange contains Protected Information. Similarly, Plaintiffs' allegation that Freddie Mac is maintaining the confidentiality of the email exchange to somehow defend claims made by the Government is completely baseless and non-sensical.

After execution of the Third Amendment, Treasury issued a press release describing it.

The discussion was intended to remain private, and falls within the definition of "confidential" in Black's Law Dictionary and other authorities. *See, e.g.*, *Castagna v. Sec'y of Health & Human Servs.*, No. 99-411V, 2011 WL 4348135, at *12 (Fed. Cl. Aug. 25, 2011); *BLT Rest. Grp. LLC v. Tourondel*, 855 F. Supp. 2d 4, 26 (S.D.N.Y. 2012). Moreover, as demonstrated by Plaintiffs' filing, the snippet from given the continued uncertainty about the future existence of the company, and the fact that Freddie Mac has no decision-making authority over its own future.

Freddie Mac would be prejudiced if the email exchange is publicly disclosed and catchy snippets used in a media campaign.[5]

Fundamentally, internal discussions between Company executives regarding sensitive and important company issues that are not meant to be shared are confidential. Courts recognize that allowing public disclosure of these types of internal deliberations can have a negative "chilling effect" on candid exchanges between executives on sensitive issues, and that this chilling effect should be avoided. *See e.g.*, *City of Roseville Emps' Ret. Sys. v. Crain*, No. 11-CV-2919 JLL JAD, 2013 WL 4509970, at *1 (D.N.J. Aug. 22, 2013) (holding that disclosure of internal company deliberations would unduly prejudice the company because, among other things, it would "have a chilling effect on internal company deliberations"); *New Castle Cty. v. Hartford Accident & Indem. Co.*, No. M8-85, 1987 WL 10736, at *1 (S.D.N.Y. May 1, 1987) (noting potential "chilling effect"); *Disney v. Walt Disney Co.*, No. CIV.A. 234-N, 2005 WL 1538336 (Del. Ch. June 20, 2005). Freddie Mac would be harmed if Plaintiffs are allowed to publicize confidential internal communications between its executives.

The email exchange is confidential and, thus, qualifies as Protected Information. Plaintiffs' have not met their burden of persuasion to show otherwise.

[5] *See also* Chris Arnold, *Morale Takes A Hit at Beleaguered Fannie, Freddie*, NPR (June 27, 2012), *available at* http://www.npr.org/2012/06/27/155761696/morale-takes-a-hit-at-beleaguered-fannie-freddie ("[E]ver since their government bailout four years ago, both companies have suffered from image problems, they're under the threat of being dismantled by Congress, and many key people are leaving. . . . [W]ith a lot of talent leaving, the worry is that Fannie and Freddie could make more mistakes, lose more money and bungle their mission: to responsibly foster homeownership by supporting the mortgage market.").

C. The Protective Order Does Not Specify a Process for the Partial De-Designation and Redaction of Documents Marked as Protected Information But Not Filed with the Court, and the First Amendment is Not Implicated Absent a Court Filing

In addition, the Court should deny the De-Designation Motion because the relief the Plaintiffs seek is not provided for in the Protective Order. The Protective Order does not set forth a procedure of partial de-designation of documents not filed with the Court in the manner Plaintiffs propose, and with good reason. First, as discussed above, if the document has not been filed with the Court, there is no presumptive right of public access to the document. *See* 5-6, *infra*. Second, while a presumably finite set of relevant materials may be filed with the Court, Plaintiffs will continue to seek to de-designate potentially misleading snippets from a much larger set of unfiled materials for their media campaign. This places an unreasonable burden on non-parties like Freddie Mac, as well as this Court. Third, absent the context of a court filing, portions of documents that contain Protected Information may be misleading when disclosed without any context. Again, this is particularly troubling when documents produced by non-parties are used solely to generate media attention.[6]

[6] Freddie Mac incorporates by reference as if fully stated herein the arguments presented in Defendant's Response to Plaintiffs' Sealed Motions to Remove the "Protected Information" Designation from Certain Discovery Materials and the arguments presented in the Non-Parties Federal National Mortgage Association and Deloitte & Touche LLP's Sealed Opposition to Plaintiffs' Motion to Remove the "Protected Information" Designation from Non-Party Production.

CONCLUSION

For the reasons set forth above, Plaintiffs have not met their burden of persuasion, and their motion to de-designate the internal Freddie Mac email exchange should be denied.

Respectfully submitted, this the 10th day of August 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2015, I electronically filed a copy of the foregoing with the clerk of the Court using ECF system, which will send notification of such filing to all ECF participants.

/s/ Michael J. Ciatti
Michael J. Ciatti

APPENDIX

APPENDIX TABLE OF CONTENTS

EXHIBIT 1

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EXHIBIT 2

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