

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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

**GRANT THORNTON LLP’S PUBLIC, REDACTED RESPONSE TO PLAINTIFFS’ MOTION TO REMOVE THE “PROTECTED INFORMATION” DESIGNATION FROM CERTAIN GRANT THORNTON DOCUMENTS**

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**PRELIMINARY STATEMENT**

Plaintiffs' motion to remove the protected designation from certain documents produced by Grant Thornton LLP ("Grant Thornton") suffers from the same fatal flaws as Plaintiffs' other de-designation motions. First, Plaintiffs cannot satisfy their burden of establishing that the Grant Thornton documents were improperly designated as confidential pursuant to the operative Protective Order. Second, Plaintiffs' proposal to publicly file redacted versions of the documents is untenable. Not only are redactions not contemplated by the Protective Order, but redacting portions of the documents would mislead the public by presenting an incomplete picture of the contents of these documents.

The Grant Thornton documents, however, specifically merit "Protected Information" status under the Protective Order because they go to the core work product that Grant Thornton provides to the United States Department of the Treasury ("Treasury") as part of its valuation services -- services that continue to be provided today. Grant Thornton's work product takes many forms, ranging from handwritten notes to formal reports, all of which are properly designated as Protected Information. Notably, in performing valuation services for Treasury, Grant Thornton continues to work off of its original valuation reports from 2008, which have served as templates for later reports. Because Plaintiffs seek to de-designate documents containing Grant Thornton's proprietary and confidential work product that was created as part of its continuing work for Treasury, the Court should reject Plaintiffs' motion with respect to Exhibits A-F, and partially as to Exhibit O.

**FACTUAL AND PROCEDURAL BACKGROUND**

**I. Factual Background**

In 2008, Grant Thornton was engaged by Treasury as an independent, third-party consultant to perform valuation services, and since that time, Grant Thornton has continued to perform valuation work for Treasury. Specifically, Grant Thornton has been tasked annually with (1) valuing Treasury’s holdings of senior preferred stock in the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac,” and with Fannie Mae, the “government-sponsored enterprises” or “GSEs”); (2) valuing Treasury’s warrants to purchase 79.9 percent of the common stock of each GSE; and (3) calculating Treasury’s financing commitment to the GSEs.

As part of the valuation services provided to Treasury, Grant Thornton issues annual reports replete with [REDACTED]

[REDACTED] *See* Plaintiffs’ Sealed Motion to Remove the “Protected Information” Designation from Certain Grant Thornton Documents (“Pls.’ Br.”), ECF No. 165-1, Ex. E at A029. For example, with respect to the valuation of Fannie Mae senior preferred stock, Grant Thornton makes multiple judgment calls and decisions:

[REDACTED]

Pls.’ Br., ECF No. 165-1, Ex. E at A020, A022-23. Additionally:



Pls.' Br., ECF No. 165-1, Ex. E at A023.

Of course, in providing these valuation services, Grant Thornton's work product took many forms, including handwritten notes and analysis. In a typical example, Anne Eberhardt, who served on Grant Thornton's valuation team for Treasury, considered [REDACTED]

[REDACTED] Pls.' Br., ECF No. 165-1, Ex. D.

Documents containing Grant Thornton's notes and analyses often include other information as well, such as [REDACTED]

[REDACTED] *Id.*

## II. Procedural Background

In compliance with a non-party subpoena dated February 3, 2015 (the "Subpoena"), Grant Thornton produced more than 9,000 pages of documents,<sup>1</sup> as well as a witness for deposition. With respect to documents involving the core services provided by Grant Thornton as part of the Treasury engagement, Grant Thornton designated such documents as Protected Information under the terms of the operative Protective Order in this litigation. *See* Amended Protective Order, ECF No. 217 at ¶ 2; *see, e.g.*, Pls.' Br., ECF No. 165-1, Ex. D. The protected designation of some of these documents -- all of which contain confidential and/or proprietary

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<sup>1</sup> In a letter dated February 23, 2015, Grant Thornton advised Plaintiffs' counsel of its numerous objections to the Subpoena, but agreed to produce "reasonably responsive documents" to the extent such production was "not unduly burdensome."

information regarding the engagement -- are challenged by Plaintiffs in their motion (the “De-Designation Motion”).<sup>2</sup>

While Plaintiffs attach 21 exhibits to their De-Designation Motion,<sup>3</sup> there are only six Grant Thornton produced documents as to which the parties -- as well as Grant Thornton -- have been unable to reach a consensus (the “Grant Thornton Documents”). These documents fall into three categories: (1) Grant Thornton’s valuation of various components of the Senior Preferred Stock Purchase Agreements (the “Valuation Documents”) (Exhibits C, E, F); (2) the handwritten notes of a former Grant Thornton employee regarding [REDACTED] and [REDACTED] information (the “Grant Thornton Handwritten Notes and GSE Financial Information”) (Exhibit D); and (3) the cover pages of certain Grant Thornton valuation reports (the “Cover Pages”) (Exhibits A and B). The **Valuation Documents** include:

- Exhibit C: A chart containing [REDACTED] (the “Valuation Chart”) (Pl.s’ Br., ECF No. 165-1, Ex. C);
- Exhibit E: Grant Thornton’s valuation report concerning [REDACTED] (the “Fannie Mae Valuation Report”) (Pl.s’ Br., ECF No. 165-1, Ex. E); and
- Exhibit F: Grant Thornton’s valuation report concerning [REDACTED] (the “Freddie Mac Valuation

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<sup>2</sup> In addition to the De-Designation Motion involving Grant Thornton documents, Plaintiffs have filed a number of other, similar motions seeking removal of the Protected Information designation from various discovery materials. *See, e.g.*, Sealed Motion to Remove the “Protected Information” Designation from Certain Treasury and FHFA Documents, ECF No. 166.

<sup>3</sup> Aside from Exhibit O, which is discussed further in note 4, *infra*, Exhibits M through U to the De-Designation Motion were publicly filed, in their entirety, as part of Plaintiffs’ Public, Redacted Motion to Remove the “Protected Information” Designation from Certain Grant Thornton Documents (the “Public De-Designation Motion”), ECF No. 206.

Report,” and with the Fannie Mae Valuation Report, the “Valuation Reports”) (Pl.s’ Br., ECF No. 165-2, Ex. F).<sup>4</sup>

The **Grant Thornton Handwritten Notes and GSE Financial Information** (Exhibit D) consist of a document comprising a table with information pertaining to [REDACTED], as well as the handwritten notes of Anne Eberhardt, a former Grant Thornton employee. Pl.s’ Br., ECF No. 165-1, Ex. D.

The **Cover Pages** (Exhibits A and B) are the cover pages of Grant Thornton’s valuation reports regarding Treasury’s warrant rights to acquire GSE common shares. *See* Pl.s’ Br., ECF No. 165-1, Exs. A & B.

## LEGAL ARGUMENT

### **I. The Grant Thornton Documents Should Maintain Their Confidentiality Status**

Because the Grant Thornton Documents contain information that is confidential to Grant Thornton’s business operations, they were properly designated as Protected Information under the terms of the Protective Order. Indeed, the Federal Rules of Civil Procedure provide protection for “trade secret[s] or other confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G);<sup>5</sup> *see also* Charles Alan Wright & Arthur R. Miller, 8 Federal Practice & Procedure § 2043 (3d ed. 2015). Interpreting Rule 26(c), federal courts have repeatedly concluded that “potentially valuable commercial information which . . . could alter

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<sup>4</sup> Exhibit O, a set of emails between Vincent Colatriano and Ellen Randel dated May 8-13, 2015, discusses the contents of the Freddie Mac Valuation Report [REDACTED]

[REDACTED] *See* Pl.s’ Br., ECF No. 165-3, Ex. O. This language was redacted from the Public De-Designation Motion, and should maintain its confidentiality status.

<sup>5</sup> Similar language appears in Federal Rule of Civil Procedure 45, which permits courts “[t]o protect a person subject to or affected by a subpoena” where the subpoena would require “disclosing a trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 45(d)(3)(B)(i).



[an entity's] competitive position" warrants confidentiality. *Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993) (granting defendants' motion to seal internal corporate documents).<sup>6</sup>

Tracking the language of Federal Rule of Civil Procedure 26(c), the Protective Order defines Protected Information broadly in this case to include "proprietary, confidential, trade secret, or market-sensitive information, as well as information that is otherwise protected from public disclosure under applicable law." ECF No. 217 at ¶ 2. Notably, the definition is disjunctive -- meaning that a document may fall into any one of the listed categories to warrant protected status.

Plaintiffs contend that the information in the Grant Thornton Documents "does not come within the terms of the Protective Order's definition of 'Protected Information.'" Pls.' Br., ECF No. 165 at 5.<sup>7</sup> However, each of the Grant Thornton Documents is either confidential, proprietary, or both, based on the common and ordinary meanings of those terms. *See Webster's Third New International Dictionary*, <http://unabridged.merriam-webster.com> (defining "confidential" as "communicated, conveyed, acted on, or practiced in confidence; known only to a limited few; not publicly disseminated," and "proprietary" as "held as the property of a private

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<sup>6</sup> Unless otherwise noted, internal citations and quotations are omitted.

<sup>7</sup> Plaintiffs cite extensively to *In re Violation of Rule 28(d)*, 635 F.3d 1352 (Fed. Cir. 2011), to support their argument that the Grant Thornton Documents fall outside the scope of Protected Information. *See* Pls.' Br., ECF No. 165 at 6, 7, 8. Plaintiffs rely on *In re Violation of Rule 28(d)* for the proposition that "there must be some demonstrati[on] that there is good cause for restricting the disclosure of the information at issue." Pls.' Br., ECF No. 165 at 6. However, Plaintiffs ignore the context of the quoted language -- i.e., the court's analysis of procedural and case law regarding the issuance of protective orders. The court explained that "protective orders restricting the disclosure of information may only *be issued* for good cause. The party seeking protection bears the burden of demonstrating that there is good cause for restricting the disclosure of the information at issue." 635 F.3d at 1357 (emphasis added). Here, there is already a protective order in place, and Plaintiffs' reliance on *In re Violation of Rule 28(d)* is merely an attempt to re-litigate the definition of "Protected Information."

owner”); Black’s Law Dictionary (10th ed. 2014) (defining “confidential” as “meant to be kept secret; imparted in confidence,” and “proprietary” as “[o]f, relating to, or holding as property”).<sup>8</sup>

The Valuation Documents: Valuation Chart (Exhibit C). The Valuation Chart reflects the work product of the Grant Thornton valuation team. Plaintiffs contend that the Valuation Chart “contain[s] outdated financial information . . . that cannot in any sense be considered proprietary,” Pls.’ Br., ECF No. 165 at 6 -- but courts frequently reject staleness arguments because “it is terribly difficult to establish, on any principled basis, temporal boundaries governing the protection to be accorded information.” *Tavoulaareas v. Washington Post Co.*, 111 F.R.D. 653, 661 (D.D.C. 1986) (concluding that there was good cause for the continued maintenance of the protective order, and rejecting argument that confidentiality was unnecessary because “[t]he vast majority of the materials are already in the public domain” and “deal with commercial events a decade old”). Additionally, the Valuation Chart was prepared as part of the valuation services that Grant Thornton continues to provide to Treasury -- services that are constantly evolving and building on past experience. Thus, Plaintiffs’ argument that the information contained in the Valuation Chart is stale because it is from 2008, *see* Pls.’ Br., ECF No. 165 at 8, contorts the reality of Grant Thornton’s engagement with Treasury, and fails to recognize that the services Grant Thornton provided in 2008 continue to be provided today. Moreover, if there was any doubt as to the Valuation Chart’s confidentiality status, the header of that document specifies that the chart is [REDACTED]

*See* Pl.s’ Br., ECF No. 165-1, Ex. C.

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<sup>8</sup> The Grant Thornton Documents may well also be “market sensitive.” However, as a practical matter, there is likely no information in the Grant Thornton Documents that will be “market sensitive,” but not also “confidential.” Grant Thornton would also defer to the GSEs as to the market impact of the disclosure of such information.

The Valuation Documents: Valuation Reports (Exhibits E and F). The Valuation Reports reflect the core work product that Grant Thornton was providing, and continues to provide, to Treasury. While Plaintiffs argue that “[m]ost of the information in the [Valuation Reports] consists of publicly available financial or other data . . . and similarly non-proprietary information,” Pls.’ Br., ECF No. 165 at 6, they gloss over the fact that (even if it were true) Grant Thornton compiled, organized, and analyzed certain publicly-available information, along with a significant amount of confidential information, to arrive at [REDACTED]

[REDACTED] in the Valuation Reports. *See, e.g.*, Pls.’ Br., ECF No. 165-1, Ex. E at A010.<sup>9</sup> For example, in the Fannie Mae Valuation Report, Grant Thornton explained that [REDACTED]

[REDACTED] Pls.’ Br., ECF No. 165-1, Ex. E at A022-23. Moreover, the Valuation Reports specified -- seemingly with Webster’s definition of “confidentiality” in mind -- that [REDACTED]

[REDACTED] Pls.’ Br., ECF No. 165-1, Ex. E at A031; Pls.’ Br., ECF No. 165-2, Ex. F at A085. Indeed, the Valuation Reports

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<sup>9</sup> In arguing that the Valuation Reports should not be protected because they include some information that is already in the public domain, Plaintiffs focus specifically on information that “had been replicated in documents that the Government filed as part of the public administrative record in the *Fairholme* case in the District Court for the District of Columbia.” *See* Pls.’ Br., ECF No. 165 at 4. However, Plaintiffs fail to recognize that, in performing its valuation work, Grant Thornton relies on multiple sources of information, including publicly-available information -- and then synthesizes and analyzes that information. Indeed, that some of the information in the documents is public only reinforces the point that the Valuation Documents embody Grant Thornton’s core work product and are deserving of protection.

contain precisely the types of information that typically fall within the bounds of a protective order. *See, e.g., StoneEagle Servs., Inc. v. Gillman*, No. 3:11-cv-2408-P, 2013 WL 6008209, at \*2 (N.D. Tex. Nov. 13, 2013) (noting that “courts generally agree that financial information constitutes confidential information that falls under the protection of a protective order”).

The Grant Thornton Handwritten Notes and GSE Financial Information (Exhibit D).

Similarly, Grant Thornton’s notes, which were created in connection with the valuation services detailed above, are reflective of Grant Thornton’s work product and fit well within the Protective Order’s definition of Protected Information. For example, in handwritten notes, Anne Eberhardt commented that [REDACTED]

[REDACTED] and discussed [REDACTED]  
[REDACTED] *See* Pls.’ Br., ECF No. 165-1, Ex. D. These notes cannot be viewed in a vacuum, as Plaintiffs appear to suggest, but instead must be understood in their proper context -- i.e., in connection with the valuation services Grant Thornton provides to Treasury. Thus, to the extent the Valuation Reports are proprietary, so too are the notes. Moreover, the GSE financial information contained in the same document as Ms. Eberhardt’s notes should also maintain its protected status because [REDACTED]

The Cover Pages (Exhibits A and B). In the De-Designation Motion, Plaintiffs argue that two additional documents -- the cover pages of certain Grant Thornton valuation reports -- are also undeserving of protection. *See* Pls.’ Br., ECF No. 165-1, Exs. A&B; Pls.’ Br. ECF No. 165 at 6. As an initial matter, the entire valuation report, for the reasons stated above, is Protected Information, including the Cover Pages. But there is a more practical (and perhaps more important) problem for Plaintiffs -- their argument is a red herring because, as a practical matter,

there are other ways to give Plaintiffs what they seem to be seeking through de-designation of the Cover Pages, while maintaining those documents' confidentiality status. For example, the parties (or Grant Thornton, as a nonparty) could enter a stipulation as to the date of the subject valuation reports. With such a stipulation, what seems to be mostly a rhetorical play on Plaintiffs' part in their brief (to chide the various parties and nonparties regarding designation decisions) falls easily to the side.<sup>10</sup>

## **II. The Protective Order Does Not Permit Plaintiffs to File Redacted Versions of the Grant Thornton Documents**

Grant Thornton opposes Plaintiffs' redaction proposal<sup>11</sup> for the reasons set forth by the Government. As the Government explains in its brief (ECF No. 222), redactions are not contemplated by the Protective Order, would be extremely burdensome in light of additional redaction requests, and would put producing parties in a "Catch 22" position, where they either must waive the confidentiality of Protected Information, or run the risk that certain portions of the documents -- strategically selected by Plaintiffs -- will be presented to the public.<sup>12</sup>

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<sup>10</sup> Plaintiffs also argue that maintaining the confidentiality of the Grant Thornton Documents will somehow harm their ability to make their case. *See* Pls.' Br., ECF No. 165 at 12-13. Although Grant Thornton is a nonparty to this litigation, it is difficult to understand Plaintiffs' argument. The parties should be able to resolve issues as to how confidential documents can be shared with their experts.

<sup>11</sup> Plaintiffs' proposed redactions are attached as Exhibits G-L to the De-Designation Motion. *See* Pls.' Br., ECF No. 165-2, Exs. G, H; Pls.' Br., ECF No. 165-3, Exs. I-L. Exhibits G and H are identical to Exhibits A and B, respectively.

<sup>12</sup> In Section III of the De-Designation Motion, Plaintiffs argue that the Court should "at least permit the filing of the [Grant Thornton] Documents under seal in the *Fairholme* D.C. Circuit litigation, as well as in any other action challenging the Net Worth Sweep in which Plaintiffs participate either as parties or amici." Pls.' Br., ECF No. 165 at 18. As to the former, this Court has already granted the relief sought and, as such, the request is moot. *See* Order (July 21, 2015), ECF. No. 212. As to the latter, Plaintiffs have made no showing as to why they should get such blanket relief; moreover, the request is premature as Plaintiffs fail to point to any specific litigation in which they are looking to use the information, let alone why it makes sense to be allowed to file the Protected Information in that litigation.

**CONCLUSION**

For the reasons set forth above, Grant Thornton respectfully requests that the Court deny Plaintiffs' motion to remove the Protected Information designation from Exhibits A, B, C, D, E, F, and (partially) O, and further deny Plaintiffs' motion to the extent it requests permission to publicly file redacted versions of the Grant Thornton Documents.

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