Redacted Version

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., et al.,	)	
	)	
Plaintiffs,	)	Case No. 13-465
	)	Judge Sweeney
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

NON-PARTIES FEDERAL NATIONAL MORTGAGE ASSOCIATION AND DELOITTE & TOUCHE LLP'S PUBLIC, REDACTED OPPOSITION TO PLAINTIFFS' MOTION TO REMOVE THE "PROTECTED INFORMATION" DESIGNATION FROM CERTAIN DOCUMENTS IN NON-PARTIES' PRODUCTIONS

ADAM M. STUDNER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006
Telephone: 202-223-7300
Facsimile: 202-223-7420

Counsel for Deloitte & Touche LLP

D. ZACHARY HUDSON
Counsel of Record
BANCROFT PLLC
500 New Jersey Avenue
Seventh Floor
Washington, DC 20001
Telephone: 202-234-0090
Facsimile: 202-234-2806
zhudson@bancroftpllc.com

Counsel for Federal National Mortgage Association

August 10, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION

Non-parties Federal National Mortgage Association ("Fannie Mae") and Deloitte & Touche LLP ("Deloitte")—Fannie Mae's auditor—respectfully oppose plaintiffs' June 26, 2015, motions (Doc. 169 ("Deloitte Motion"); Doc. 170 ("Fannie Mae Motion")) seeking to remove the "protected information" designation from certain documents produced by Fannie Mae and Deloitte in this litigation. Under the protective order, plaintiffs bear the burden of establishing that the documents at issue are improperly designated "protected information." Plaintiffs have come nowhere close to carrying that burden. The protective order expressly applies to "confidential" information and each and every document at issue contains such information. Indeed, the vast majority of the documents plaintiffs seek to de-designate were marked "confidential" when created and thus are subject to Fannie Mae's well-established confidentiality policy. *See* Exhibit A (Fannie Mae Confidential Information – Quick Reference Guide); Exhibit B (Fannie Mae Confidential Information Policy). Moreover, while the fact that the information at issue is quite clearly "confidential" should end the matter, the necessity of continuing to treat the identified documents as "protected information" is underscored by the potential harm that will flow from public disclosure and the comparative absence of prejudice to plaintiffs (or anyone else) from allowing the documents to remain protected. The motions should be denied.

BACKGROUND

On February 26, 2015 (Doc. 32), this Court authorized plaintiffs to engage in limited jurisdictional discovery to assist in their efforts to oppose the government's motion to dismiss. After propounding discovery requests on the government, plaintiffs turned their attention to non-parties and served subpoenas on Fannie Mae, Freddie Mac, Fannie Mae's auditor, Freddie Mac's auditor, and other third parties. With respect to Fannie Mae, plaintiffs served their document production subpoena on May 5, 2014, and Fannie Mae served its objections on May 23, 2014. After numerous meet and confers, Fannie Mae agreed to make a substantial document production to plaintiffs. That production is now complete; Fannie Mae produced thousands of pages of documents to plaintiffs supplementing the hundreds of thousands of pages of documents that plaintiffs have received from the government. Plaintiffs have also deposed non-party witnesses, including Fannie Mae's former CFO, Susan McFarland.

With respect to Deloitte, plaintiffs served their document production subpoena on May 29, 2014, and Deloitte served its objections on June 10, 2014. After several meet and confers, Deloitte also agreed to make—and did make—a substantial document production.

Pursuant to the protective order issued by this Court on July 16, 2014 (Doc. 73), both Fannie Mae and Deloitte designated the documents produced to plaintiffs

"protected information."[1] In March 2015, plaintiffs' counsel contacted Fannie Mae to request that some of the documents produced be de-designated. Fannie Mae agreed to much of this first request, *see* Fannie Mae Motion Exhibit 7 (A037), and it reproduced agreed upon documents without the "protected information" designation.

Plaintiffs then returned with a second de-designation request. This time, plaintiffs asked Fannie Mae and Deloitte to agree to remove the "protected information" designation from sensitive financial materials and memoranda prepared by Fannie Mae, Fannie Mae Motion Exhibits 1, 5, Deloitte Motion Exhibits 1, 5; related materials prepared by Fannie Mae's auditor based on sensitive information provided by Fannie Mae, Deloitte Motion Exhibits 4, 6;[2] materials provided to Fannie Mae's Board of Directors in anticipation of Board meetings, Fannie Mae Motion Exhibits 2, 4, 6; and actual Board meeting minutes, Fannie Mae Motion Exhibit 3.[3] After multiple e-mails and phone calls, plaintiffs' counsel and

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

[2] Plaintiffs have agreed to redact Deloitte proprietary and confidential information from Deloitte Motion Exhibits 4 and 6. The unredacted portions of Deloitte Exhibits 4 and 6, however, reveal confidential information of Deloitte's audit client, Fannie Mae, which Fannie Mae provided to Deloitte in Deloitte's capacity as Fannie Mae's auditor. For the reasons set forth below, that Fannie Mae–provided information is properly designated protected information.

[3] Fannie Mae and Deloitte are not contesting plaintiffs' motions with respect to Deloitte Motion Exhibit 3 or page A010 of Fannie Mae Motion Exhibit 2. Deloitte

non-party counsel were unable to reach agreement.[4] Contrary to plaintiffs' misstatement of the facts, *see* Fannie Mae Motion at 4, Fannie Mae's counsel explained that the Fannie Mae and Deloitte documents at issue all contained confidential information, that all but a handful were marked confidential at the time they were created, and that Fannie Mae continued to treat the documents as confidential. Fannie Mae's counsel also expressed concern that plaintiffs' request was not motivated by any legitimate litigation-related need, but rather by an interest in having certain information reported in the press. Plaintiffs' motions followed.

ARGUMENT

I. The Documents Identified By Plaintiffs Are Properly Designated "Protected Information."

Plaintiffs concede, as they must, that they bear the "burden of persuasion" under the protective order and thus must establish that the documents at issue are not "protected information." *See* Fannie Mae Motion at 2. Plaintiffs fall well short of doing so. The protective order expressly treats "confidential" information as "protected information," Protective Order ¶ 2, and all of the documents at issue are

---

Motion Exhibit 2 is an FHFA document that Fannie Mae provided to Deloitte in Deloitte's capacity as Fannie Mae's auditor. For the reasons stated in the government's opposition, that document is properly designated protected information.

[4] Accordingly, and as required by this Court's rules, counsel certify that they conferred with plaintiffs in good faith in an effort to resolve this dispute without court action.

"confidential." Moreover, while the fact that the information at issue is quite clearly "confidential" should end the matter, the necessity of continuing to treat the identified documents as "protected information" is underscored by the potential harm that will flow from public disclosure. Plaintiffs' attempts to shift the burden to Fannie Mae and Deloitte, invoke First Amendment principles, and manufacture prejudice where there is none are unavailing.

A. Both the Documents at Issue and the Information They Contain Fall Comfortably Within the Definition of "Protected Information" Adopted by This Court.

This Court's 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." Protective Order ¶ 2. The protective order does not explicitly define what is meant by "confidential," but that only reflects the fact that the definition of "confidential" should be beyond dispute. According to Black's Law Dictionary, "confidential" means "intended to be held in confidence or kept secret." Black's Law Dictionary 269 (5th ed. 1981). Definitions from non-legal dictionaries are in accord. Webster's, for example, defines "confidential" in the sense of "confidential documents" as "bearing the classification *confidential*" or "limited to persons authorized to the information, documents, etc., so classified." Webster's Unabridged Dictionary 429 (2d ed. 2001). And decisions from this Court and others are consistent with those

definitions. *See, e.g.*, *Castagna v. Sec'y of Health & Human Servs.*, No. 99-411V, 2011 WL 4348135, at *12 n.19 (Fed. Cl. Aug. 25, 2011) ("'Confidential' is defined as 'done or communicated in confidence; secret'" (quoting American Heritage Dictionary 386 (4th ed. 2006))); *BLT Rest. Grp. LLC v. Tourondel*, 855 F. Supp. 2d 4, 26 (S.D.N.Y. 2012) ("'Confidential' is a word denoting secrecy, the very antithesis of public disclosure"; the term "Confidential information" "embod[ies]" "documents or information that are typically held close in a business and not normally disclosed to outsiders." (citing dictionaries)).[5]

As a result, the definition of "confidential" and "confidential information" is abundantly clear: "confidential information" is information that is "intended to be held in confidence" when created, Black's Law Dictionary 269, "bear[s] the classification 'confidential,'" Webster's Unabridged Dictionary 429, or was intended to be "limited to persons authorized to" view the information when it was created.[6] The Fannie Mae and Deloitte documents at issue fall squarely within this

[5] Fannie Mae itself defines "Confidential – Restricted," which is how the majority of documents at issue are classified, as pertaining to information where release [redacted] Exhibit A at 1. "Confidential – Internal Distribution" means that release [redacted]

[6] This commonsense definition of "confidential" is entirely consistent with plaintiffs' view that "the mere fact that a document ha[s] not been previously released to the public" is insufficient "to render the document 'confidential.'" Fannie Mae Motion at 4 (citing Transcript of July 16, 2014 Status Conference at 10-11 (Fannie Mae Motion Exhibit 8, A042-43)). There are many documents that are

definition. All of the documents at issue were "intended to be held in confidence" and "limited to persons authorized to" view them. The lion's share of the documents were marked "confidential" when created, reflecting a decision by the author that the material was sensitive and confidential. *See* Fannie Mae Motion Exhibits 1-6; Deloitte Motion Exhibits 1, 5. And the few documents at issue not marked "confidential" quite clearly are based on documents that are and are thus entitled to the same treatment. *Compare* Deloitte Motion Exhibits 4, 6 with Deloitte Motion Exhibit 5.

Moreover, in accordance with Generally Accepted Auditing Standards and AICPA rules, Deloitte treats its audit working papers (from which the Deloitte documents at issue in this motion were produced)—and the confidential client information contained in them—as confidential, and does not share those working papers absent the circumstances described in AICPA's rules (*e.g.*, where the client has consented, or when required by law or judicial process). *See* AU § 339.33, Audit Documentation (Am. Inst. of Certified Pub. Accountants 2006); AICPA Code of Professional Conduct (2014) §§ 0.400.09 (formerly ET § 92.05), 1.700.001 (formerly ET § 301.01).

---

not yet public that are intended to be and ultimately will be public. Such documents typically are not marked "confidential" when created and then subsequently and continuously treated as such.

Plaintiffs' cases provide no support for adopting a definition of "confidential" that would exclude non-parties' confidential materials from its meaning. The court in *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087 (N.D. Cal. 2004), for instance, defined "confidential" to include, among other things, information of "particular significance." *Id.* at 1094; *see* Fannie Mae Motion at 5 n.3 (citing and quoting *Hewlett-Packard*). This Court can safely conclude that the confidential information at issue here—sensitive financial materials and memoranda prepared by Fannie Mae (and, in some cases, provided by Fannie Mae to its auditor, Deloitte), materials provided to Fannie Mae's Board of Directors in anticipation of Board meetings, and actual Board meeting minutes—are of "particular significance."

B. This Court Should not Endorse Plaintiffs' Efforts to Avoid Their Burden Under the Protective Order.

In likely recognition of the fact that they cannot carry their burden under the protective order, plaintiffs attempt to shift it to Fannie Mae and Deloitte. They are wrong to do so. The protective order clearly places the burden of establishing that the materials at issue are not "protected information" on plaintiffs. Even assuming that plaintiffs could amend the protective order through citation to case law—they, of course, cannot—none of the authorities cited by plaintiffs supports the contention that Fannie Mae, Deloitte, and other non-parties to this litigation must establish that public release of their confidential information is "likely to cause some type of

legally cognizable harm to the producing party or to third parties" in order to benefit from the protective order. Fannie Mae Motion at 4.

Plaintiffs overstate the extent to which the primary authority on which they rely—*In re Violation of Rule 28(D)*, 635 F.3d 1352 (Fed. Cir. 2011)—supports their burden-shifting theory. *See* Fannie Mae Motion at 3, 4, 5, 8, 10 (citing and quoting *In re Violation of Rule 28(D)*). As the case name itself readily suggests, that case addresses a party's failure to comply with Federal Circuit Rule 28(d) concerning the submission of appellate briefs containing material subject to a protective order. The offending party in that case had "mark[ed] confidential those parts of its briefs that set forth [its] legal argument[s]." 635 F.3d at 1355. As a result, all of the statements that plaintiffs have plucked from that case—such as there must be "'good cause for restricting the disclosure of the information at issue,'" the "'party seeking to limit the disclosure of discovery materials must show specific … prejudice,'" and "'[t]here is a strong presumption in favor of a common law right of public access to court proceedings,'" Fannie Mae Motion at 3-4, 10 (all quoting *In re Violation of Rule 28(D)*, 635 F.3d at 1356-58)—were all made in the context of critiquing the redaction of legal arguments in an appellate brief. That case is thus not a sound basis for shifting the protective order's burden to non-parties in jurisdictional discovery.

Plaintiffs' reliance on this Court's precedents fares no better. *See, e.g.*, Fannie Mae Motion at 4-5 & n.3. *Return Mail, Inc. v. United States*, 107 Fed. Cl. 459

(2012), is an expert disqualification case. And in *Lakeland Partners, LLC v. United States*, 88 Fed. Cl. 124 (2009), the Court simply explained that "'good cause'" must be shown to justify the "issuance of a protective order." *Id*. at 133. Here, a protective order has already issued. The only question before this Court is whether plaintiffs have carried their burden under that order of establishing that the "confidential" non-party documents at issue are inappropriately designated "protected information." They have not.

In all events, even if—contrary to the protective order—Fannie Mae and Deloitte are required to show "good cause" for continuing to treat their "confidential" documents as "protected information," that showing is easily made. As Fannie Mae's confidentiality policy makes plain, the fact that that a document is marked "confidential" means that its release may [redacted] Exhibit A at 1.

The case for Fannie Mae's Board meeting minutes is even more straightforward. If, as a general matter, the marked-confidential meeting minutes of boards of directors are treated as non-confidential in litigation as a matter of course, there will be a very real chilling effect on board deliberations and an incentive for corporate entities to keep barebones minutes in order to avoid the later release of sensitive information. *See, e.g.*, *Disney v. Walt Disney Co.*, No. CIV. A. 234-N, 2005 WL 1538336, at *4 (Del. Ch. June 20, 2005) ("mak[ing] public the preliminary

discussions, opinions, and assessments of board members and other high-ranking employees … would surely have a chilling effect on board deliberations"); *City of Roseville Employees' 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 County v. Hartford Accident & Indem. Co.*, No. M8-85, 1987 WL 10736, at *2 (S.D.N.Y. May 1, 1987) (noting potential "chilling effect"). The same is true of materials provided to corporate boards. If the default rule is that all such materials are released to the public following discovery (even jurisdictional discovery and when the producing entity is a non-party) then there will be an incentive to keep the preparation materials provided to a minimum. No one's interests are served by that outcome and good cause exists for continuing to treat Fannie Mae's confidential Board minutes and confidential Board materials as confidential protected information.

Good cause also exists for continuing to treat the confidential financial materials and memoranda at issue as protected information. Those documents were designed and used for a very specific purpose—to keep key players informed about financial issues and stimulate discussion on those issues. They were not intended for public scrutiny and public consumption, especially when redacted such that it is

impossible for anyone to understand the information contained in context. It is thus very likely—if not certain—that these materials (as wielded by plaintiffs) will be misleading and will cause those who come across them to form misguided conclusions.

II. "First Amendment Principles" Do Not Support Granting Plaintiffs' Request.

In addition to ignoring the protective order and attempting to shift their burden to Fannie Mae and Deloitte, plaintiffs contend that "First Amendment principles" require public disclosure of "confidential" materials produced by non-parties during jurisdictional discovery. Fannie Mae Motion at 8-9. Not so. Plaintiffs' mistaken reliance on First Amendment principles is even less availing than their misplaced dependence on *In re Violation of Rule 28(D)*. As the case law on which plaintiffs rely amply demonstrates, the "public's 'right of access … to civil trials and to their related proceedings and records'" is barely, if at all, implicated by protecting confidential material produced by non-parties during jurisdictional discovery. Fannie Mae Motion at 8 (quoting *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.* 684 F.3d 286, 298 (2d Cir. 2012)); *see 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."); *Armour of Am. v. United States*, 73 Fed. Cl. 597, 600 (2006) ("Pretrial discovery is not a public component of a civil trial.").

The vast majority of authorities cited by plaintiffs are inapposite. In *New York Civil Liberties Union*, for instance, the Second Circuit merely recognized that "the First Amendment guarantees a qualified right of access not only to criminal [proceedings] but also to civil trials and to their related proceedings and records" and then extended that presumptive right of access to administrative proceedings that New York had refused to open to the public. 684 F.3d at 298; *see id.* at 300-01. And in *Courthouse News Service v. Planet*, 750 F.3d 776 (9th Cir. 2014), the Ninth Circuit simply observed that the First Amendment guaranteed the right of news media—with some limitations—to access civil complaints. Accordingly, while *New York Civil Liberties Union* and *Courthouse News Service* might be helpful to plaintiffs if this Court were attempting to hold all proceedings in private or to deny the public access to court filings, neither case provides any support for plaintiffs' attempt to use the First Amendment as an end run around the protective order.[7]

Finally, *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986), on which plaintiffs repeatedly rely, actually undermines their position. *See* Fannie Mae Motion at 8-9. In *Anderson*, the First Circuit recognized that some courts had

[7] Plaintiffs' reliance on *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999), is likewise unhelpful to their cause. In that case, the Seventh Circuit stated that "pretrial discovery, unlike the trial itself, is usually conducted in private" and that "there is no tradition of public access to discovery materials." *Id.* at 944-45. It also recognized, however, that "[m]ost cases endorse a presumption of public access to discovery materials." *Id.* at 946.

"entirely eliminat[ed] the first amendment as a factor in the review of discovery protective orders" and, drawing on those decisions, refused to extend the First Amendment access right to "documents submitted to a court in connection with discovery proceedings." *Id.* at 6, 10; *see id.* at 11 ("there is no right of public access to documents considered in civil discovery motions"); *id.* at 12 ("discovery proceedings are fundamentally different from proceedings to which the courts have recognized a public right of access").

In short, the First Amendment provides no support for plaintiffs' request.

III. Neither Plaintiffs Nor Anyone Else Is Prejudiced By Treating The Documents At Issue As "Protected Information."

Plaintiff's averments of harm are not relevant to the question before the Court—whether plaintiffs have established that the confidential information at issue is improperly designated protected information. Even assuming, however, that plaintiffs' claimed prejudice were relevant, plaintiffs have not shown that they will be prejudiced if the documents remain confidential.

As to plaintiffs themselves, plaintiffs assert that "Fannie Mae's refusal to de-designate the unredacted information prevents Plaintiffs' counsel from consulting with outside experts … about this critical information." Fannie Mae Motion at 7. That manufactured concern rings hollow for at least two reasons. First, as plaintiffs concede, the protective order expressly permits them to hire (and they have, in fact, hired) experts who are permitted to access and evaluate information and documents

covered by the protective order. *See* Protective Order ¶ 7. Second, plaintiffs unequivocally state that "it is clear enough" to them "that the unredacted information undermines the Government's narrative in this and other litigation," but nonetheless claim that they are prejudiced by not being able to limitlessly share this "confidential" information with others who might have a different view. Fannie Mae Motion at 7. But plaintiffs' insecurity about their own conclusions does not amount to prejudice in any way contemplated by a court of law. Notably, plaintiffs do not cite a single case in making this argument—or any of their other prejudice arguments.

Nor is the public prejudiced by allowing these "confidential" documents to remain "confidential." Plaintiffs raise amorphous concerns about the public's interests in "well-informed democratic deliberation" and accessing "vital information about their Government." Fannie Mae Motion at 5, 7. Whatever relevance those arguments might have in seeking to de-designate documents produced by the government, they are of no moment when it comes to documents and information produced by Fannie Mae and Deloitte. At the risk of stating the obvious, neither Fannie Mae nor Deloitte is the government. And the fact that Fannie Mae is in conservatorship in no way transforms its private corporate documents into public government documents. *Cf. Judicial Watch, Inc. v. Federal Housing Finance Agency*, 646 F.3d 924 (D.C. Cir. 2011) (holding that Fannie Mae

documents generated while in conservatorship are not "agency records" under the Freedom of Information Act).

Finally, plaintiffs' claim that other courts will be prejudiced if the specified non-party confidential information provided during jurisdictional discovery is not removed from the protective order is meritless in light of this Court's recent rulings. Plaintiffs can submit these documents—and all others—under seal in all the D.C. Circuit litigation in which they are involved. Courts will thus have the opportunity to consider the "confidential" information produced by the government and non-parties to the extent that those courts conclude that doing so is appropriate.[8]

[8] Without reason or provocation, plaintiffs suggest that "the true reason" Fannie Mae and Deloitte "seek[] to keep" the information at issue "confidential" is that it "undercuts key claims made by the Government in this and related litigation." Fannie Mae Motion at 6. That unwarranted aspersion is completely without merit. As explained, both non-parties have produced a substantial number of documents to plaintiffs at significant expense. Fannie Mae did not oppose plaintiffs' efforts to depose its former CFO. And Fannie Mae has already agreed to de-designate some of the documents identified by plaintiffs. The reason Fannie Mae and Deloitte oppose de-designating the information at issue is simple: the material is "confidential" as that term is commonly understood and thus properly treated as protected information. Plaintiffs may disagree with that conclusion, but that is no reason for them to cast baseless aspersions, especially given the considerable effort by Fannie Mae and Deloitte to accommodate plaintiffs' requests.

CONCLUSION

For all these reasons, this Court should deny plaintiffs' motions seeking to remove the "protected information" designation from certain documents produced by Fannie Mae and Deloitte in this litigation.

Respectfully submitted,

s/D. Zachary Hudson
D. ZACHARY HUDSON
Counsel of Record
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
Telephone: 202-234-0090
Facsimile: 202-234-2806
zhudson@bancroftpllc.com

Counsel for Federal National Mortgage Association

ADAM M. STUDNER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006
Telephone: 202-223-7300
Facsimile: 202-223-7420

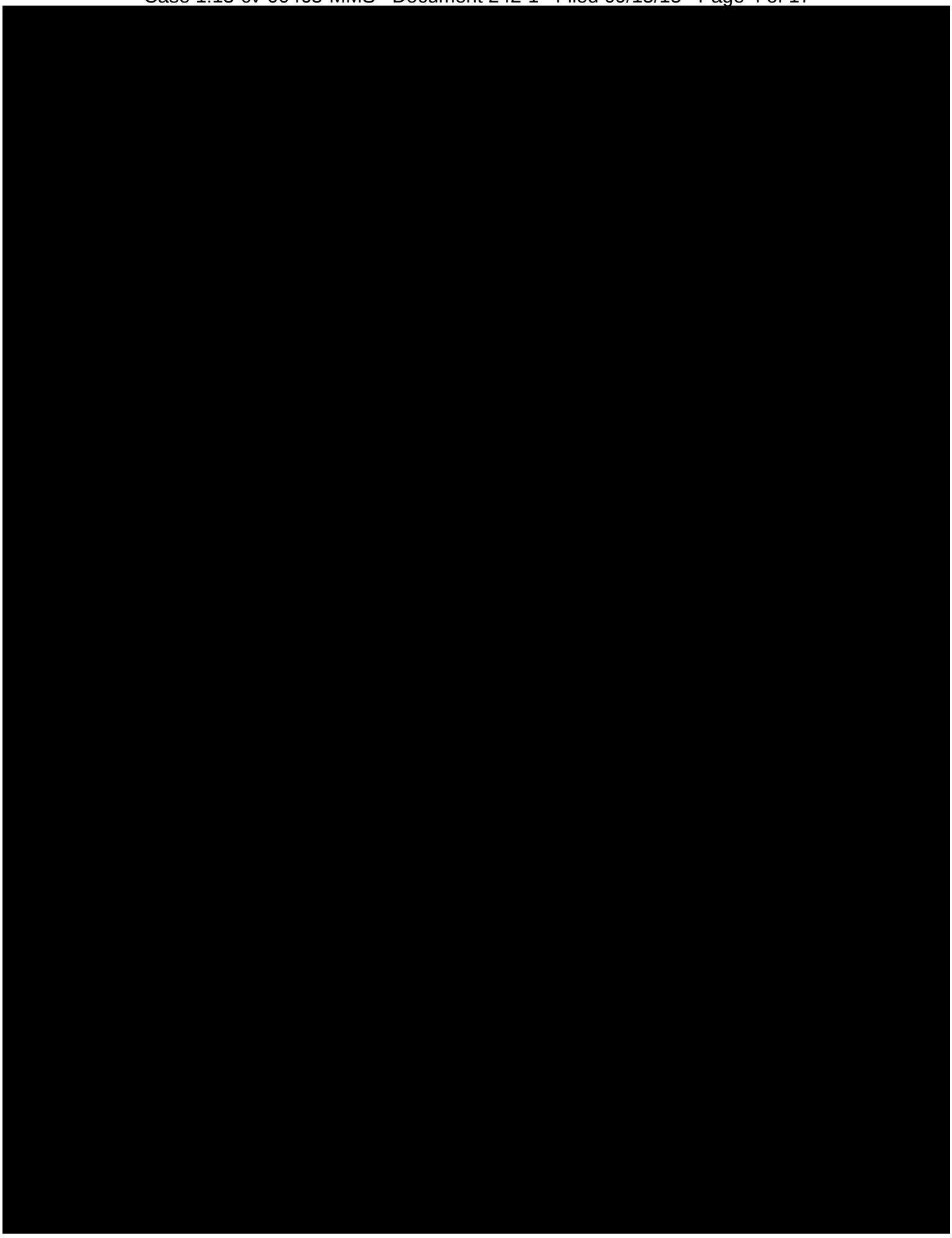
Counsel for Deloitte & Touche LLP

August 10, 2015

APPENDIX

APPENDIX TABLE OF CONTENTS

EXHIBIT A



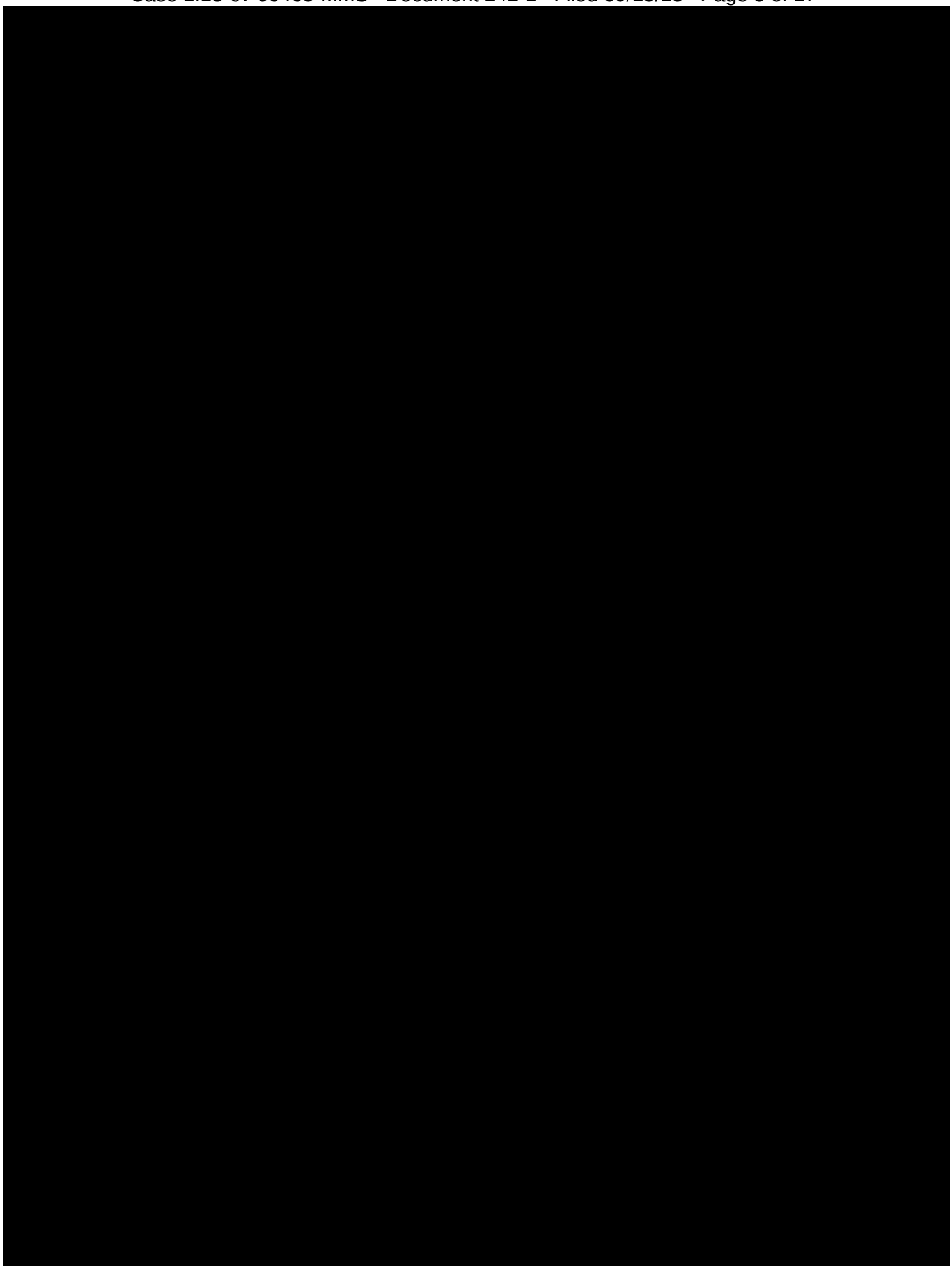


EXHIBIT B