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UNITED STATES COURT OF FEDERAL CLAIMS



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

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

BEFORE: THE HONORABLE MARGARET M. SWEENEY

Elizabeth M. Farrell, CERT, Digital Transcriber

1 APPEARANCES:

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1 P R O C E E D I N G S

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3 (Proceedings called to order at 2:03 p.m.)

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

8 THE COURT: Good afternoon. Please be seated.

9 (Chorus of good afternoons.)

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

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

15 MR. COLATRIANO: Good afternoon, Your Honor.

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

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

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

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

1 to begin.

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

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

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

20 THE COURT: Please. Thank you.

21 MR. COLATRIANO: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

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

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

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

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

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

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

18 THE COURT: Yes.

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

21 THE COURT: Nineteen, yes.

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

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

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

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

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

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

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

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

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

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

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

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

15 (Pause in the proceedings.)

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

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

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

24 THE COURT: Sorry for the interruption. Please
25 proceed.

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

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

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

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

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

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

25 MR. COLATRIANO: The word "confidential" was added

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

10 THE COURT: Yes.

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

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

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

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

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

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

6 But the Government's proposal goes well beyond just
7 adding the word "confidential," and it goes well beyond Rule
8 26C in the case law. The Government's proposed definition
9 just lists categories of materials that when you add them all
10 together, I think it's pretty apparent that they want to
11 designate everything as confidential and keep it confidential
12 throughout the course of this litigation, regardless of
13 whether that information is truly sensitive or whether the
14 disclosure of that information would cause any cognizable
15 harm to anyone.

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

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

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

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

5 MR. COLATRIANO: Then we can --

6 THE COURT: By market sensitive.

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

17 THE COURT: I agree with you.

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

1 on material that has already been publicly released, then
2 this provision would -- this catchall provision would ensure
3 that everything is maintained as confidential no matter how
4 old it is, how stale it is, whether it's disclosure would
5 cause any harm. We think that that proposal can't be squared
6 with the law, it can't be squared with the language of Rule
7 26C, it can't be squared with the case law that we discussed
8 in our filing, including case law that makes clear that the
9 Federal Circuit has been concerned about parties over-
10 designating material.

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

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

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

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

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

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

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

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

14 And, so, those are the subset of materials that it
15 says it's -- the public release of those materials would
16 cause harm. As I've mentioned, I think our proposal fully
17 protects it against that harm. But what the pertinent point
18 here is that the discovery in this case will range far beyond
19 that. The Government is going to be producing, it's my
20 understanding, materials going back as far as 2008. It had
21 nothing to do with the termination of the conservatorships.
22 It's going to produce material that predates August 17th,
23 2012, that has nothing to do with the current projections of
24 future profitability. And it has not claimed at all how
25 release of those materials will cause it any harm and, so, we

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

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

10 THE COURT: Yes.

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

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

17 MR. COLATRIANO: Yes.

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

24 MR. COLATRIANO: Well, I think --

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

1 of protecting material?

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

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

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

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

3 THE COURT: Causing doomsday?

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

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

22 THE COURT: What does the case law say?

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

1 protective orders that have done this both ways.

2 THE COURT: Yes.

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

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

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

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

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

5 THE COURT: No, thank you.

6 MR. COLATRIANO: Thank you.

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

9 THE COURT: Thank you very much.

10 MR. SCHWIND: Good afternoon, Your Honor.

11 THE COURT: Good afternoon, Mr. Schwind.

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

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

1 order here.

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

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

8 THE COURT: Okay.

9 MR. SCHWIND: -- process.

10 THE COURT: And then?

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

15 THE COURT: Okay.

16 MR. SCHWIND: So...

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

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

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

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

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

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

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

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

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

15 So --

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

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

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

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

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

17 MR. SCHWIND: Yes, correct, Your Honor.

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

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

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

5 THE COURT: But you want it that way?

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

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

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

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

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

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

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

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

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

5 THE COURT: Yes.

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

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

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

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

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

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

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

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

25 MR. SCHWIND: We're --

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

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

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

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

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

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

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

1 the protected designation.

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

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

8 MR. SCHWIND: Thank you, Your Honor.

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

11 MR. COLATRIANO: Very briefly.

12 THE COURT: Certainly.

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

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

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

4 There is a provision allowing us to hire financial
5 consultants.

6 THE COURT: Exactly.

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

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

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

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

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

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

25 THE COURT: No. It would be silly to have

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

10 MR. SCHWIND: Well, Your Honor --

11 THE COURT: I didn't know whether --

12 MR. COLATRIANO: No, I'm done.

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

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

17 THE COURT: Thank you very much.

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

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

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

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

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

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

15 THE COURT: Right.

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

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

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

25 Plaintiffs have the ability to hire financial

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

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

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

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

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

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

1 THE COURT: No, no, that's okay. Go ahead.

2 MR. SCHWIND: We did not just come up with that
3 with no basis. And, again, just pointing out that this is --
4 this case is at a very different posture from the ordinary
5 case where we have a motion for protective order or -- I'm
6 sorry, where we have a confidentiality order or a protective
7 order. And we're talking about whether or not as far as the
8 merits and going forward with the trial what should happen.
9 We do, again, think that's important.

10 THE COURT: Well, I appreciate it. And, truly,
11 I -- if I've made a mistake, I expect you to straighten me
12 out and I would appreciate your straightening me out, but we
13 have -- there are some parts of the order that favor the
14 Plaintiff, I agree, and other parts, I disagree. So, I'll --
15 no one will be totally happy with what they say, but I
16 believe what I'm doing will be -- what you see will be fair
17 and appropriate and in the best interest of justice. And if
18 you all run into a problem, I'm sure you're going to let me
19 know.

20 MR. SCHWIND: Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Schwind.

22 MR. COOPER: Your Honor, at the risk of belaboring
23 one more --

24 THE COURT: No, no, no, I'm here for as long as you
25 want me to sit here.

1 MR. COOPER: Thank you very much. It deals with
2 the colloquy you've just had with my friend for the
3 Government on the issue of FOIA. And I just want to make
4 sure there's clarification here, or perhaps that I am
5 corrected. But the issue really isn't so much, it seems to
6 me, whether or not we would be entitled to a document if the
7 Government, after discovery's been produced to us, releases
8 that document to the public in a FOIA request. Then, of
9 course, it's no longer nonpublic and it would be -- that
10 would be the epitome of silliness for them to suggest that at
11 that point we can't use it.

12 The real question, though, is in the standard that
13 they apply and that this Court will ultimately apply if
14 there's any dispute over a particular document, whether it is
15 genuinely legitimately warranted protection, whether or not
16 we should be entitled to receive, without restrictions,
17 anything that any Tom, Dick or Harry in the United States
18 made an FOIA request for and would be entitled under that law
19 to receive. Surely, if any member of the public -- if we ask
20 for the same document as FOIA requesters, we'd be entitled
21 under that law to receive it and, surely, we should be
22 entitled to receive that in this process without the
23 restraints of the protective order. That's -- I just wanted
24 to make sure that --

25 THE COURT: No, we're on the same page.

1 MR. COOPER: Okay.

2 THE COURT: I think we're very clear. I think
3 what's clear is if Tom, Dick or Harry made the FOIA
4 application, Treasury would -- or, excuse me -- well, it
5 depends, I guess, to which agency they were making the
6 application. But FHFA would indicate what documents would be
7 available or the number of documents, how much it was going
8 to cost to have the documents reproduced and they wouldn't be
9 seeing any privileged document of any sort --

10 MR. COOPER: Of course not.

11 THE COURT: -- or any sensitive -- I mean, I don't
12 think that the Government or the agency is going to give to
13 anyone, who would file a FOIA request, sensitive material, I
14 think that's a guarantee.

15 MR. COOPER: I do, too, Your Honor. And, so,
16 obviously, if it would be something that under FOIA, because
17 of these considerations, they would be entitled not to
18 produce to the public, then I don't think that's in dispute.
19 That's something they can designate as protected here in this
20 proceeding, and we're not going to challenge. But if it --
21 or we may -- we probably aren't going to challenge. But my
22 point is that, surely, if it's something that under the FOIA
23 they would have no basis to withhold it, legitimate under
24 that law, then they ought not be able to stamp it as
25 protected here or -- they will stamp it as protected, but --

1 THE COURT: But they will withdraw it where
2 appropriate.

3 MR. COOPER: But once we get into, you know, a back
4 and forth on this -- and, certainly, if we bring the issue to
5 you, if we'd be entitled to it as FOIA requesters, we surely
6 are entitled to it as litigants in this Court.

7 THE COURT: That seems fairly straightforward.

8 MR. COOPER: Thank you, Your Honor.

9 MR. SCHWIND: Your Honor, I just want to make sure
10 -- because counsel brought up FOIA. We do not believe the
11 FOIA standard has any place in the protective order.
12 Plaintiffs have proposed that in paragraph 2.

13 THE COURT: Two, yes.

14 MR. SCHWIND: If the Court wants to modify
15 Plaintiffs' statement -- I mean, right now, Plaintiffs say
16 that protective information does not include material that is
17 available to the public under FOIA.

18 THE COURT: Or any other --

19 MR. SCHWIND: Or any other law.

20 THE COURT: Yes.

21 MR. SCHWIND: Well, we do not think it's
22 appropriate to essentially add the body of FOIA law, to
23 essentially import it into this protective order or require
24 the United States or whatever side is producing documents --
25 of course, FOIA only applies to the Government, right; so, it

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

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

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

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

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

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

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

17 MR. SCHWIND: Yes, Your Honor.

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

20 MR. SCHWIND: Thank you.

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

1 MR. SCHWIND: Thank you, Your Honor.

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

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

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

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

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

10 MR. COOPER: Thank you, Your Honor.

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

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CERTIFICATE OF TRANSCRIBER

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

DATE: 7/17/14

S/Elizabeth M. Farrell
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