UNITED STATES COURT
OF FEDERAL CLAIMS

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

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

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MOTION TO INTERVENE AND FOR AN ORDER DE-DESIGNATING DISCOVERY MATERIALS

Proposed Intervenor The New York Times Company ("The Times") hereby moves this Court for an order permitting The Times to intervene and for the removal of "protected information" designations from the transcripts of depositions of Edward DeMarco and Mario Ugoletti. In support of this motion, we rely upon the following brief.

PROCEDURAL BACKGROUND

Edward DeMarco and Mario Ugoletti, both witnesses for Defendant, gave depositions in this action on May 7, 2015 and May 15, 2015, respectively. (*See* Plaintiffs' Public Redacted Motion and Brief in Support of Motion to Remove the "Protected Information" Designations from the Depositions of Edward DeMarco and Mario Ugoletti ("Plaintiffs' Motion"), Docket No. 168, at 1.) Mr. DeMarco served as the acting director of the Federal Housing Finance Agency ("FHFA") from 2009 to 2014. Mr. Ugoletti was a senior official with the Department of the Treasury when the Government bailed out Fannie Mae and Freddie Mac in 2008. As a result of their positions, both played a critical role in the Government's efforts to stabilize the economy by placing Fannie Mae and Freddie Mac into conservatorship during the mortgage market crisis.

Defendant has designated the transcripts (the "Transcripts") of these depositions "Protected Information" (the "Confidentiality Designations") under the Protective Order entered in this action (Docket No. 73). *Id.* On June 25, 2015, Plaintiffs moved to have the Confidentiality Designations removed or to have the redacted versions of the

Transcripts de-designated. *Id.* Alternatively, Plaintiffs ask that they be permitted to file the Transcripts under seal in a related action. *Id.*

ARGUMENT

I.

THE TIMES HAS A RIGHT TO INTERVENE AS A NEWS ORGANIZATION

Through this motion, The Times seeks to intervene and be heard on the question of the public's access to documents arising from discovery in this action. News organizations are routinely permitted to intervene and be heard on issues involving public access to judicial proceedings and documents, including challenges to discovery protective orders, pursuant to Rule 24 of the Federal Rules of Civil Procedure, either permissively or, at times, as a matter of right. *See, e.g., Baystate Techs., Inc. v. Bowers*, 283 Fed. Appx. 808, 810 (Fed. Cir. 2008) ("Intervention is the proper means for a non-party to challenge a protective order") (Unpublished Opn.); *Sec. and Exch. Comm'n v. TheStreet.Com*, 273 F.3d 222, 227 n.4 (2d Cir. 2001); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987) (citing *In re Upjohn Co. Antibiotic Cleocin Products Liability Lit.*, 664 F.2d 114, 118 (6th Cir. 1981)); *Beckett v. Serpas*, No. 12-910, 2013 U.S. Dist. LEXIS 173407, at *10 (E.D. La. Dec. 11, 2013); *In re New Motor Vehicles Canadian Exp. Antitrust Lit.*, MDL No. 03-md-1532, 2009 U.S. Dist. LEXIS 130579, at *23-24 (D.Me. March 26, 2009); *Schiller v. City of New York ("Schiller I")*, No. 04 Civ. 7922 (KMK) (JCF), 2006 U.S. Dist. Lexis 70479, at *5-*6 (S.D.N.Y. Sept. 27, 2006); *Havens v. Metro. Life Ins. Co.*, No. 94 Civ. 1402 (CSH), 1995 U.S. Dist. LEXIS 5183, at *6-*22 (S.D.N.Y. April 20, 1995); *see also Savitt v. Vacco*,

No. 95 Civ. 1842 (RSP/DRH), 1996 U.S. Dist. LEXIS 16875, at *25 (N.D.N.Y. Nov. 8, 1996) (the courts "consistently have held that news agencies have standing to challenge protective orders in cases of public interest.").

While on "its face, Rule 24(b) would appear to be a questionable procedural basis for a third-party challenge to a confidentiality order . . . every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.,* 146 F.3d 1042, 1045 (D.C. Cir. 1998) (*collecting cases*); *see Public Citizen v. Liggett Group, Inc.,* 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. International Telephone and Telegraph Corp.,* 594 F.2d. 291, 294 (2d Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg*, 823 F.2d at 162; *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.,* 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 470, 473 (10th Cir. 1992); *See also San Jose Mercury News v. U.S. District Court – N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999) ("Nonparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under Rule 24(b)(2)").

Accordingly, The Times should be permitted to intervene for the purpose of asserting that the Transcripts have been improperly designated as Protected Information and kept confidential, and requesting their de-designation.

II.

THE GOVERNMENT HAS FAILED TO SHOW GOOD CAUSE FOR SEALING

Concededly, there is neither a common law nor First Amendment heightened presumption of public access to unfiled discovery materials, as there is with judicial documents filed with a court. *See generally Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006) (First Amendment and common law right to judicial documents). However, a party seeking to keep such discovery materials confidential must still show that it has met the "good cause" standards set forth in Fed. R. Civ. P. 26(c) before a protective order is permissible or enforced: "'[T]he party seeking a protective order has the burden of showing that good cause exists for issuance of that order. However, it is equally apparent that the obverse also is true, *i.e.*, if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection.'" *Gambale v. Deutsche Bank*, 377 F.3d 133, 142 (2d Cir. 2004) (quoting *In re "Agent Orange" Products Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987)); *see also In re Violation of Rule 28(D)*, 635 F.3d 1352, 1357-58 (Fed. Cir. 2011); *San Jose Mercury News*, 187 F.3d at 1103 ("It is well-established that the fruits of pre-trial discovery are, in the absence of a court order to the contrary, presumptively public."); *Jepson, Inc. v. Makita Elec. Works, Ltd.,* 30 F.3d 854, 858 (7th Cir. 1994) (absent a protective order, "parties to a law suit may disseminate materials obtained during discovery as they see fit"); *Medical Protective Co. v. Am. Int'l Specialty Lines Ins. Co.*, No. 13-CV-357, 2014 U.S. Dist. LEXIS 166005, at *1-2 (N.D. Ind. Dec. 1, 2014) (only "legitimately confidential information" can be subject to a discovery protective order); *Arnold v. FitFlop USA, LLC*, 11cv973-W (KSC), 2013 U.S. Dist. LEXIS 46266,

at *3 (S.D. Cal. March 29, 2013) ("Generally, the public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows 'good cause' why a protective order is necessary") (quoting *Phillips ex. Rel. Estates of Byrd v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); *Mitchell v. Fishbein*, 227 F.R.D. 239, 254 (S.D.N.Y. 2005) (movant must demonstrate good cause for order barring public dissemination of discovery materials); *Condit v. Dunne*, 225 F.R.D. 113, 115 (S.D.N.Y. 2004) (same). In fact, this court has recognized that the public has an enforceable interest in access to discovery, which is to be balanced against the parties' interest in confidentiality. *See Ross-Hime Designs, Inc. v. United States*, 109 Fed. Cl. 725, 731 (2013).[1]

To show good cause under Rule 26(c), parties must demonstrate that disclosure will cause a clear and serious injury via a "particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Havens*, 1995 U.S. Dist. Lexis 5183, at *29 (quoting *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)); *see also Carlson v. Geneva City Sch. Dist.*, 277 F.R.D. 90, 94 (W.D.N.Y. 2011) (requiring "defined, specific, and serious injury" in case with public agency as a defendant (citation omitted)); *Schiller v. City of New York ("Schiller II")*, Nos. 04 Civ 7922 (KMK) (JCF), 04 Civ. 7921 (KMK) (JCF), 2007 U.S. Dist. LEXIS 4285, at *17-*18 (S.D.N.Y. Jan. 19, 2007) (noting that "the harm must be significant, not a mere trifle" (internal citation and quotation marks omitted)); *Allen v. City of New York*, 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006) (to establish good cause, a party must demonstrate

[1] Certain older cases supporting access to discovery also found a presumptive right of access under the prior version of the Federal Rules of Civil Procedure that required the filing of discovery under Rule 5 absent an order from the court. The rules were amended in 2000 to

that "a clearly defined and serious injury . . . would result from disclosure of the document." (internal citations and quotation marks omitted)).

The fact that a confidentiality order exists in an action does not alter the requirement that good cause be shown. Whether a party is seeking a protective order or seeking to maintain confidentiality under an existing order, the burden rests on the party advocating for confidentiality to show that the "good cause" standard is met and therefore the designated materials can properly be subject to confidentiality. *See, e.g.*, *Schiller II*, 2007 U.S. Dist. LEXIS 4285, at *10 (holding that the burden of showing good cause for issuance of a protective order or for stopping its modification falls on the party seeking nondisclosure); *Daniels v. City of New York*, 200 F.R.D. 205, 207 (S.D.N.Y. 2001) (where an intervenor asserts a public interest, "the burden is on the party seeking to maintain the confidentiality order to show that there is 'good cause' for continued confidentiality"); *Havens*, 1995 U.S. Dist. LEXIS 5183 at *28-*29 (requiring defendant to show good cause for keeping discovery confidential when newspaper intervenes for modification of protective order). Where a stipulated protective order does not incorporate the "good cause" standard, the courts need not defer to the order in considering whether materials have been improperly classified as confidential. *In re: Ethylene Propylene Diene Monomer ("EPDM") Antitrust Litig.*, 255 F.R.D. 308, 321 (D. Conn. 2009) (court review of confidentiality is appropriate where "stipulated protective orders that grant parties 'open-ended and unilateral deference' to protect whichever discovery materials they choose").

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eliminate filing, and, as set forth here, the proper standard is whether good cause is shown. *Bond v. Utreras*, 585 F.3d 1061, 1075-76 (7th Cir. 2009).

The courts have repeatedly recognized that disclosure of discovery is particularly appropriate when a lawsuit sheds light on the performance of governmental agencies and entities – which is precisely the case here. *See Padberg v. McGrath-McKechnie*, No. CV-00-3355 (RJD) (SMG), 2005 U.S. Dist. Lexis 44519, at *5-*7 (E.D.N.Y. April 27, 2005) (holding that even though the court had not relied on former Mayor Giuliani's deposition, public access was warranted because of the heightened public interest in monitoring elected officials); *cf. Ottati v. City of Amsterdam*, No. 06-CV-1370 (NPM / DEP), 2010 U.S. Dist. LEXIS 145010, *21-*24 (N.D.N.Y. Jan 25, 2010) (acknowledging the significant public interest in documents that would help "[hold] public agencies accountable" and provide insight into the performance of the chief of police); *Flaherty v. Seroussi*, 209 F.R.D. 295, 299-300 (N.D.N.Y. 2001) (declining to seal discovery because there is "a strong, legitimate public interest on the part of the citizenry to have unfettered access to court proceedings, particularly when they involve elected officials and the performance of their governmental responsibilities"); *see generally Schiller II*, 2007 U.S. Dist. LEXIS 4285 (unsealing various police documents in a case challenging the practices of the New York City Police Department).

The public's interest in the underlying facts of this case is undeniable. The litigation has deep roots in the Government's decision to provide an emergency bailout to Fannie Mae and Freddie Mac in the midst of a grave threat to the national economy. The case directly addresses how the Government is going about recouping public funds used in the bailout and whether other investors are being treated lawfully. The Government should not be able to hide from the public – voters and taxpayers – the facts that were central to the decisions that the Government made as part of the far-reaching effort to

safeguard the U.S. economy. To the contrary, access to the evidence will enable the public to understand more fully the decisions the Government has made in the public's name and to assess the wisdom and effect of those decisions.

Good cause for continued confidentiality has not been shown here as to the Transcripts. As an initial matter, there is no indication that the Government has even attempted to articulate good cause for the confidentiality, and it cannot avoid its obligations to do so, despite the fact that a protective order currently exists. *See In re: Ethylene Propylene Diene Monomer ("EPDM") Antitrust Litig.*, 255 F.R.D. at 321. The provisions of the Protective Order itself fall short of the good cause standard. While the order begins with specific categories of confidentiality ("proprietary, confidential, trade secret, or market-sensitive information"), it quickly balloons into ambiguity, stretching its terms to "information that is otherwise protected from public disclosure under applicable law." (Protective Order ¶ 2.) Is "applicable law" a reference to the high standard appropriate for court-filed documents or the much lower standard of, say, the Freedom of Information Act or something else?

Even under that permissive wording, it is inconceivable that the Transcripts fall wholly and without exception within the enumerated categories and the catchall provision. Nowhere is there any indication that the Government has shown that its claimed need for confidentiality rests on a showing of specific harm and not "stereotyped and conclusory" assertions, as required by the good cause standard. Among other things, there are legitimate questions about the continuing sensitivity of information that is now years old, the degree to which the information from the Transcripts deals with policy choices and political decision-making rather than commercial information, and whether

the actions and words of public entities and public officials are truly deserving of broad confidentiality, particularly where, as here, the public interest in understanding governmental activity is exceedingly strong.

CONCLUSION

For all of the foregoing reasons, the Court should grant The Times motion to intervene, order that the Designations be removed from the Transcripts, and grant such other relief as the Court deems just and proper.

Dated: New York, New York
June 30, 2015

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