UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S & A CAPITAL PARTNERS, INC., MORTGAGE RESOLUTION SERVICING, LLC, and 1ST FIDELITY LOAN SERVICING, LLC, *Plaintiffs,*	:	No. 15-cv-00293-LTS-JCF
- v. -	:	
JPMORGAN CHASE BANK, N.A., JPMORGAN CHASE & CO., and CHASE HOME FINANCE LLC, *Defendants.*	:	

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Defendant JPMorgan Chase Bank, N.A., individually and as successor by merger to Chase Home Finance LLC, and Defendant JPMorgan Chase & Co. (collectively, "Defendants" or "Chase"), submit this Reply Memorandum of Law in further support of their motion for a protective order governing the disclosure and use of confidential information and documents produced in this action.

INTRODUCTION

Chase filed this motion for entry of a routine protective order to protect three narrow categories of confidential documents: (1) documents containing personally identifying information, (2) documents containing confidential business information, and (3) documents reflecting confidential communications with federal banking regulators. In response, Plaintiffs admit that documents in the first of these categories—those reflecting personally identifying information—are appropriately subject to a protective order. Opp. 2 (ECF Doc. No. 117). Plaintiffs object, however, to Chase's request to protect from disclosure a very small number of documents falling into the latter two categories. Their objections do not withstand scrutiny. First, there is good cause to protect those two narrow categories of documents—which fall within the express protection of Federal Rule of Civil Procedure 26—from disclosure. Second, Chase's proposed protective order places no inappropriate burden on Plaintiffs: it imposes only limited and appropriate limitations on their use of discovery materials and permits them to challenge Chase's confidentiality designations in the typical manner. Indeed, Chase's proposed order (ECF Doc. No. 113-1) is similar to others entered without objection in virtually every case in which undersigned counsel has previously been involved.

ARGUMENT

I. CHASE'S PROPOSED PROTECTIVE ORDER IS NARROWLY TAILORED.

Chase showed in its opening brief that its proposed protective order is narrowly tailored to protect only a limited set of confidential materials. *See* Chase Mem. 5-7 (ECF Doc. No. 113). Plaintiffs nonetheless contend that Chase's proposed protective order is "overbroad." Opp. 2-4. But Plaintiffs' assertion that Chase has proposed a "blanket" order is simply incorrect; the order permits parties to designate as confidential only documents fitting within a small number of narrowly prescribed categories. Proposed Order ¶ 3. Plaintiffs have conceded that good cause exists to protect documents containing personally identifying information, and their objections regarding other categories of documents subject to protection are without merit.

Plaintiffs complain principally that the proposed protective order encompasses "confidential or proprietary business information or communications, or other confidential research, development, or commercial information or communications." Opp. 3; Proposed Order ¶ 3(c). But Rule 26 contemplates the protection of precisely that information, using nearly identical language. Fed. R. Civ. P. 26(c)(1) (court may issue order requiring that "confidential research, development, or commercial information not be revealed or be revealed only in a specified way"); *see Gill v. Arab Bank, PLC*, No. CV-12-3706 JBW VVP, 2012 WL 8169888, at *1 (E.D.N.Y. Aug. 23, 2012) ("The Federal Rules specifically recognize the need to protect . . . proprietary information, given the possibility that disclosure can result in unnecessary financial detriment to the parties."); *see also* Chase Mem. 6 (citing additional cases).

The small number of documents that Chase intends to designate as "confidential" pursuant to that provision further belies Plaintiffs' suggestion that Chase's proposed protective

order is overbroad. In response to Plaintiffs' document requests, Chase initially identified more than 6300 documents for production.[1] Of that universe, Chase seeks to designate only 35 documents as confidential on the ground that they contain "confidential or proprietary business information or communications." These documents are largely presentations and a spreadsheet containing sensitive strategic and financial information that could be detrimental to Chase's business if released to the public or a competitor.

Plaintiffs also complain that Chase's proposed order permits protection of confidential communications with bank regulators. Opp. 4. But Plaintiffs do not dispute the case law Chase cited in its opening brief, holding that "'[i]t is perfectly evident that'" such documents should be "'subject to a protective order in order to maintain strict confidentiality.'" Chase Mem. 6-7 (quoting *In re Verrazano Towers, Inc.*, 7 B.R. 648, 652 (Bankr. E.D.N.Y. 1980)). Chase also notes that, of the more than 6300 documents that it has identified for production to date, it does not propose to designate any of them as confidential pursuant to this provision. Accordingly, Chase's proposed protective order is narrowly tailored and seeks to protect only materials that fall within the core of Rule 26.

None of the cases cited by Plaintiffs—which all involved substantially broader protective orders—is to the contrary. *E.g.*, *Pitsiladi v. Guerrero*, No. 07 Civ 6605(JGF)(JCF),

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[1] Contrary to Plaintiffs' unsupported assertions, that initial universe of documents is not limited to "emails that have been stripped of their attachments" from individuals "connected only to the loans that MRS purchased under the terms of the MLPA." Opp. 6 n.2. Rather, Chase has produced both emails and attachments from all of the custodians who had principal responsibility for Chase's relationship with any of the Plaintiffs. The universe, however, does not yet include the narrow categories of additional documents that the Court ordered Chase to produce in its Order dated July 14, 2016 (which Chase is still in the process of collecting for review). It also does not include all of the loan data that Chase has committed to produce, although Chase does not expect that any such loan data will be designated as confidential on the ground that it contains "confidential or proprietary business information or communication."

2008 WL 5454234, at *1 (S.D.N.Y. Dec. 30, 2008) (proposed protective order provided that "*all documents* produced in discovery in this action . . . be used only in connection with this litigation" (emphasis added)); *accord United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Williams v. Johnson & Johnson*, 50 F.R.D. 31, 32 (S.D.N.Y. 1970); *see United States v. Hooker Chems. & Plastics Corp.*, 90 F.R.D. 421, 423 n.2 (W.D.N.Y. 1981) (protective order imposed no limits on the categories of documents eligible for designation as confidential); *see also In re Parmalat Sec. Litig.*, 258 F.R.D. 236, 245 (S.D.N.Y. 2009) (protective order limited use of any material from the litigation outside the litigation, "whether designated confidential or not" (emphasis omitted)).[2]

Pitsiladi is instructive. Because the proposed protective order in that case—unlike here—would have imposed a blanket prohibition on the disclosure of every document produced in the litigation, the court rejected the proposed order as "undefined and, consequently, virtually limitless." *Id.* at *2. The court, however, entered a protective order covering certain, more narrowly tailored categories of materials, including personally identifying information and

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[2] *Parmalat*, like other cases cited by Plaintiffs, is also inapposite because it addressed judicial documents filed in court, which may be subject to a rebuttable presumption of public access. *See* 258 F.R.D. at 256; *see also Brown & Williamson v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (unsealing judicial documents based on "strong common law presumption in favor of public access to court proceedings and records"); *Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D. Conn. 1989) (denying motion to file complaint under seal for failure to "overcome the public's right of access to a document that has been filed with the Court"). It is settled law that the public-access presumption applicable to certain judicial documents is not applicable to documents merely produced in discovery. *See, e.g.*, *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995) ("Documents that play no role in the performance of Article III functions, such as those passed between the parties in discovery, lie entirely beyond the [public access] presumption's reach."); *United States v. Smith*, 985 F. Supp. 2d 506, 519 (S.D.N.Y. 2013) ("[E]xperience and logic show that there is no right of access to discovery materials."); *see also Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 621 F. Supp. 2d 55, 63 (S.D.N.Y. 2007) (no presumption of public access to discovery materials, irrespective of any "great and substantial interest" the public may have in the subject of the discovery).

tax returns. *Id.* at *2-3. Thus, *Pitsiladi* in fact supports Chase's request for entry of a narrowly tailored protective order in this case.

II. THE PROPOSED PROTECTIVE ORDER PLACES NO INAPPROPRIATE BURDEN ON PLAINTIFFS.

Plaintiffs also contend that Chase's proposed protective order places an unreasonable burden on them. Once again they are mistaken.

Use in Other Matters. Plaintiffs complain that Chase's proposed order would prevent them from using documents produced in this litigation in other, vaguely defined matters. But the proposed order places no restriction on Plaintiffs' ability to use non-confidential documents in other matters. Nor does it place any restriction on Plaintiffs' ability to use documents from this litigation in the *qui tam* action that Plaintiffs' principal, Larry Schneider, filed against Chase in the District of Columbia, even if those documents are designated as confidential. Proposed Order ¶ 2(b). Although the proposed order precludes Plaintiffs from otherwise publicly disclosing confidential Chase documents, that limitation is appropriate and necessary to protect the small number of sensitive documents that Chase intends to designate as confidential. *See* Chase Mem. 8-9 (citing cases).[3]

The authority cited by Plaintiffs for the generic proposition that discovery may be shared between litigants in different cases does not alter this result. Opp. 4-5. Those cases—all

[3] Plaintiffs strain to argue that they may want to rely on unspecified Chase confidential documents in the course of defending against claims asserted against them by debtors. Opp. 5. In the highly unlikely event that a particular Chase document regarding a loan or debtor proves relevant to a claim asserted against Plaintiffs in another matter and the document cannot be produced in that matter in the regular course, Chase would be willing to meet and confer with Plaintiffs to discuss the issue at the appropriate time. Plaintiffs, however, should not be given *carte blanche* to disclose any and all Chase confidential documents in connection with any other "claim" or "proceeding" to which one of them is a party, as contemplated by their proposed protective order (*see* ECF Doc. No. 118-17, ¶ 10-c).

of which involved blanket protective orders far broader than Chase's proposed order—recognize that good cause may justify a protective order limiting the use of confidential materials. *See Williams*, 50 F.R.D. at 32-33; *Hooker*, 90 F.R.D. at 423 n.2, 425; *see also United Nuclear*, 905 F.2d at 1427. The cases merely note that there is no "all-encompassing" rule against use of discovery from one case in another case and that no blanket protection is warranted when "it appears that there is nothing from which to legitimately protect." *Williams*, 50 F.R.D. at 32-33. Where, as here, a protective order is narrowly tailored to provide legitimate and necessary protections, the order plainly may limit use of confidential documents in other matters. *See, e.g.*, *Wolters Kluwer Fin. Servs. Inc. v. Scivantage*, No. 07 CV 2352 (HB), 2007 WL 1498114, at *7 (S.D.N.Y. May 23, 2007) (protective orders prohibiting use "in any other litigation proceeding" are "valid and enforceable" and courts "have indeed imposed sanctions for a party's use of protected documents in other litigation").

Challenges To Confidentiality Designations. Plaintiffs also contend that they would be burdened by the—entirely commonplace—procedure for challenging confidentiality designations set forth in Chase's proposed protective order. Opp. 6. As Chase explained in its opening brief, however, Plaintiffs' alternative proposal is highly disfavored because it has the potential to place a substantial and unnecessary burden on the Court. Chase Mem. 8.

Under Plaintiffs' proposal, they would be free to issue a blanket "challenge" to any or all of Chase's confidentiality designations, at which time Chase would be forced to "submit the challenged Confidential Information for Court intervention" on a document-by-document basis. ECF Doc. No. 118-17, ¶ 9. Numerous decisions recognize that such a procedure is disfavored because of the potential burden it imposes on the reviewing court. *See* Chase Mem. 8 (citing cases); *see also United Nuclear*, 905 F.2d at 1427 (protective order

"restrict[ing] use and disclosure unless a party challenge[s] the confidentiality of a particular item" avoids "expense and delay of protracted disputes over every item of sensitive information"); *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122-23 & n.18 (3d Cir. 1986) (noting that Chase's "approach has several advantages over the document-by-document method," including offering a less burdensome, time-consuming, and expensive process, and avoiding "extensive involvement by the court in the discovery process").

Plaintiffs' efforts to distinguish the cases cited by Chase are unavailing. Opp. 6-7. For example, Plaintiffs note that the documents at issue in *Brookdale University Hospital & Medical Center, Inc. v. Health Insurance Plan of Greater New York*, No. 07-CV-1471 (RRM)(LB), 2008 WL 4541014 (E.D.N.Y. Oct. 7, 2008), were reviewed *in camera*. But it was precisely that *in camera* review that underscored the court's conclusion that the producing party was in a better position than the court to make confidentiality determinations. *See id.* at *2 n.5 ("Although, in deciding the instant motion, the court conducted a document-by-document review of the Contested Documents, the court recognizes that in general, as well as in this instance, the 'producing party is in the best position to determine the sensitivity of the material produced.'" (quoting *Kamyr AB v. Kamyr, Inc.*, No. 91-CV-0453, 1992 WL 317529, at *5-6 (N.D.N.Y. Oct. 30. 1992))).

Moreover, Plaintiffs' own cases reject the assertion that Chase, as the party seeking a protective order, must demonstrate on "a document-by-document basis that each item should be protected." *Cipollone*, 785 F.2d at 1122 (cited by Opp. 3, 4). Rather, it is "consistent with the proper allocation of evidentiary burdens for the court to construct a broad 'umbrella' protective order upon a threshold showing" of good cause, permitting the non-producing party

subsequently to challenge a designation with which it disagrees. *Id.* That is precisely the common-sense approach taken by Chase in its proposed protective order here.[4]

Finally, the cases cited by Plaintiffs also underscore the commonplace nature of Chase's proposed approach. *See United Nuclear*, 905 F.2d at 1427 ("[O]rder[s] restrict[ing] use and disclosure unless a party challenge[s] the confidentiality of a particular item . . . are becoming standard practice in complex cases."); *Cipollone*, 785 F.2d at 1123 n.20 (citing cases and commentary demonstrating "[t]he tendency of courts to enter [such] orders, sometimes sua sponte"); *see also McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 90 (11th Cir. 1989) (protective order applying Chase's approach is "based on standards suggested in the *Manual for Complex Litigation, Second*, prepared by the Federal Judicial Center"). Indeed, the terms of Chase's proposed order are functionally identical to others entered without objection in virtually every case in which undersigned counsel has previously been involved. Accordingly, the Court should enter Chase's proposed order.

CONCLUSION

For the foregoing reasons and those stated in Defendants' original memorandum of law, Defendants' motion for entry of a protective order should be granted.

[4] Notably, Chase's proposed order does not leave Plaintiffs without recourse in the event that they disagree with Chase's designation of a particular document as confidential: the order provides a straightforward and efficient mechanism for Plaintiffs to challenge any such designation. Proposed Order ¶ 10.

Dated: August 24, 2016

Respectfully submitted,

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