UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO COMPEL AND DEFINE SCOPE OF DISCOVERY AND IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR A PROTECTIVE ORDER

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Plaintiffs submit this memorandum in opposition to Defendants' motion for a protective order and in further support of their motion (a) to compel Defendants to produce documents; and (b) to define the scope of discovery in this case.

PRELIMINARY STATEMENT

Although Plaintiffs have produced more than 100,000 pages of documents, Defendants have not produced a single one. Having accepted and made use of Plaintiffs' production, Defendants now contend their default is due to their "reasonable and justified" request for a protective order. That request was raised by Defendants for the first time a month ago. They do this despite the fact that Plaintiffs served their document demand on the Defendants on January 27, 2016 and despite the fact that Defendants have eagerly accepted Plaintiffs' productions. That argument should be rejected out of hand.

Sweeping rhetoric aside, Defendants' cross-motion is limited to seeking a: "protective order regarding discovery that is relevant at most to Plaintiffs' RICO claim." (Def. Mem. at 12, heading II). Defendants have not referred to a protective order of the type they discuss to explain their default—a confidentiality order—except in their preliminary statement at 7-8 of their Memorandum. With regard to the confidentiality order, however, this is a case of great public interest, and Defendants should not be permitted to conceal documents that relate directly to Plaintiffs' claims.

Defendants' central argument is that certain categories of documents are only related to the *qui tam* Case and should therefore not be produced here. Defendants make this argument even though this Court has expressly asked the parties to make efforts to coordinate discovery in the two cases and even though **Defendants have asked for similar categories of documents themselves** and Plaintiffs have fully complied with Defendants' requests. Moreover, most of the documents Defendants complain about are relevant both to the claims in the *qui tam* Case and to the claims in this case. Defendants simply do not wish to produce documents that are relevant to the *qui tam* Case at all, whether or not they are relevant to this one, whether or not they have asked Plaintiffs to provide them with documents on the same issues, and whether or not this Court has told the parties to coordinate discovery.

Defendants also seek what they disingenuously call a "limited" stay of discovery related "solely to Plaintiffs' RICO allegations" This request, too, is raised for the first time, more than six months after Defendants made the motion to dismiss with which it is associated, and more than three months after they served the associated response to Plaintiffs' document requests. The argument that there are documents related solely to the RICO claims is specious because Plaintiffs have asserted a fraud claim in this action, and it was Defendants' fraud over the course of many years that has resulted in the claims in the instant suit and the *qui tam* action. Moreover, the vast majority of the documents requested relate to the contractual and commercial tort claims Plaintiffs advance in this case. If the motion for a stay is granted, it would give Defendants the almost unfettered discretion to hold back virtually any documents they choose to based on their unilateral determination that such documents are solely related to the RICO allegations. This would engender perpetual motion practice. as witness the fact that – months into discovery, Defendants still have not produced a single document.

Further, Defendants' focus on one single contract under which Plaintiffs paid $200,000 for loans (which Plaintiffs were fraudulently induced to enter into) as a justification to withhold discovery is meritless. Not only does that $200,000 not represent Plaintiffs' damages, but there are more than a thousand individual note sale agreements between the parties which have a face value in the hundreds of millions of dollars. This course of dealing began over ten years ago and the parties still have ongoing conflicts and disputes.

Defendants have acted in bad faith throughout and have not come close to meeting the heavy burden required to justify the extreme relief they are actually seeking. Their cross-motion should be denied and Plaintiffs' motion to compel should be granted.

ARGUMENT

POINT I

DISCOVERY SHOULD INCLUDE DOCUMENTS AND INFORMATION RELEVANT TO THE *QUI TAM* CLAIMS

A. The Requests Do Not Improperly "Expand" the Scope of Discovery

Defendants argue that they are entitled to disregard this Court's request that the parties coordinate discovery to avoid waste because this would be an impermissible expansion of the scope of discovery.[1] (Def. Mem. at 9). As discussed in Plaintiffs' moving papers, the majority of the documents Defendants have refused to produce are relevant to both cases. Requiring these documents to be produced once, in this case, is not an improper "expansion" of the scope of discovery. It is a sound exercise of discretion and will avoid giving Defendants a license to conceal evidence based on their unilateral determination of what is relevant to each case.

Defendants' inability to find authority even remotely supportive of their argument proves Plaintiffs' point. Defendants cite *Johnson Matthey, Inc. v. Research Corp.*, No. 01 CIV 8115 (MBM)(FM), 2002 WL 31235717 (S.D.N.Y. Oct. 3, 2002), which has no relevance to the issues before this Court. There, the plaintiff, who sued for royalties arising out of an agreement to exploit compounds it developed at a university, asked the court to reconsider its denial of a motion to compel production of documents related to a lawsuit filed seven years previously between the defendant and the university because the limited public record from that lawsuit indicated it concerned one of the compounds at issue The court had previously held the complaint was not even relevant to the "subject matter" of the case, let alone to the claims at issue. *Johnson Matthey,* 2002 WL 31235717 at *2. Accordingly, it denied the motion.

Defendants rely upon *R.E.D.M. Corp. v. Lo Secco*, 44 F.R.D. 356, 357 (S.D.N.Y. 1968), a case which has not been cited by a single court in the almost 50 years since it was decided, except in

[1] Defendants have moved to dismiss the *qui tam* Case and attach both their moving brief and reply brief. However, the motion has not been granted at this time. Moreover, Defendants neglect to include the opposition papers to that motion, which we attach to the accompanying Reply Declaration of Helen Davis Chaitman ("Reply Dec.") as **Exhibit A**.

administrative proceedings by the same parties. That is not surprising. There, a government contracting officer sought to quash deposition notices issued in a mandamus proceeding which sought to require the officer to make specific findings in denying the award of a contract. The court declined to allow the depositions because they only related to the merits of the denial of the contract, a matter that was only at issue in an administrative proceeding. The issue of what discovery a court will order on an application for an extraordnairy writ consistent with the strictures of administrative procedure might make for an interesting law school examination question, but it has no relevance to the standards for discovery in a plenary action subject to the normal rules of Fed. R. Civ. P. 26 *et seq*, and where the documents Plaintiffs seek are relevant both to the subject matter of this case and to Plaintiffs' claims in this Court . Accordingly, Plaintiffs' motion to compel should be granted in its entirety.

B. <u>Defendants Have Opened the Door to the Requests</u>

Defendants' contention that they did not open the door to discovery related to the *qui tam* Case is meritless. The argument is premised on Defendants' contention that, in all of the requests Plaintiffs reference, except one, Defendants also made mention of paragraphs in the TAC. However, that is exactly the point. As Plaintiffs have repeatedly pointed out, there is considerable overlap between the claims in this case and the *qui tam* claims. They cannot be surgically dissected to make them independent of, much less irrelevant to, the other. The impossibility of Defendants' position is confirmed by the fact that they themselves requested documents which, when reciprocally sought by Plaintiffs, Defendants refuse to produce. Their Request 18 seeks documents relating to Chase's

> violations of any agreements with federal and state governments, including the National Mortgage Settlement and the RMBS Settlement referenced in paragraphs 146-47 of the TAC, including but not limited to documents regarding how (if at all) Chase's alleged conduct harmed You.

Similarly, in their Request 19, they asked for documents

> relating to communications between You and any government regulators or authorities regarding Chase, including but not limited to . . . [those] related to the allegations in paragraph 145 of the TAC.

Just because Defendants added a reference to the TAC does not mean that the Requests are not centered on the *qui tam* Case. Rather, it demonstrates that the issues in both cases are inextricably intertwined. Plaintiffs certainly communicated with government regulators regarding the *qui tam* Case and by the terms of Defendants' request, those communications are included. Do Defendants now contend that this request excludes any communications that are not related to ¶ 145? Of course not.

Moreover, Defendants did indeed state that the claims in this case are largely encompassed by those in the *qui tam* Case. It is cold comfort that the Defendants argue that they did not state, "as a categorical matter," that a witness deposed in this case could not be redeposed in the *qui tam* Case, but that the parties could "address any such purported need at the appropriate time, in the appropriate case." (Def. Mem. n. 14) It makes no sense to have discovery proceeding in both cases that will be largely duplicative, and to allow Defendants to decide what is and what is not discoverable is highly prejudicial. When it suited their purposes, Defendants acknowledged that the cases "plainly present a large degree of factual and legal overlap." (Docket 43 at 5). They also contended that "Chase should not be required to present numerous witnesses for duplicative depositions on the very same factual questions, nor should this Court be forced to waste time and effort on questions of fact and discovery issues that Schneider has already placed before another federal court." (*Id.* at 11). Defendants are bound by their past positions.

C. <u>Defendants' Motion for a Protective Order and Partial Stay Should be Denied</u>

Defendants belated motion for a stay of discovery that they claim is relevant "solely to Plaintiffs' RICO allegations" (Def. Mem. at 12) is frivolous because Defendants cannot distinguish between the discovery relevant to the RICO claim and the discovery relevant to the other claims. The small universe of requests that are even arguably not directly relevant to Plaintiffs' claims of breach of contract form the motive, basis and methodology for Defendants' wrongful conduct.

This is fatal to Defendants' argument. A motion to dismiss does not automatically stay discovery. *Brooks v. Macy's, Inc.*, 2010 WL 5297756, at *1 (S.D.N.Y. Dec. 21, 2010) (citing cases), reh'g denied, 2011 WL 1362191 (S.D.N.Y. Apr. 8, 2011). The cases cited by Defendants acknowledge that "[t]he party seeking a protective order bears the burden of establishing that good cause for the order exists." *Duling*

v. Gristede's Operating Corp., 266 F.R.D. 66, 71 (S.D.N.Y.2010), and that "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. Moreover, the harm must be significant, not a mere trifle." *Id. In re Term Commodities Cotton Futures Litig.*, No. 12 CIV. 5126 ALC KNF, 2013 WL 1907738, at *5 (S.D.N.Y. May 8, 2013). Plaintiffs do not dispute that courts must generally consider whether the stay could potentially "obviate burdensome discovery" and whether the motion to dismiss has a legitimate "foundation in law." (Def. Mem. at 13).

The stay Defendants seek would accomplish nothing except to further Defendants' desire for delay. If this Court decides on this motion that discovery should be coordinated with discovery in the *qui tam* Case, then no matter the disposition of the motion to dismiss, Defendants' motion for a stay is moot, since Defendants have made no claim that Plaintiffs have made even a single request for documents that are not relevant to either case. Conversely, if discovery is not coordinated, there should be only a very narrow universe of requests at issue—those that relate only to the RICO claims. Thus, a decision on Defendants' motion to dismiss should have only a small impact on the scope of discovery.

However, the stay will be an invitation to further mischief. Defendants reference only four specific requests, Requests 27, 29, 36 and 38 (Def. Mem. at 13-14), that are relevant solely to the RICO claim,[2] but they imply in a footnote that it might also apply to Requests 5, 7, 26, 27, 29, 31 and 33-41. (Def. Mem. n. 20). Without real boundaries, the stay would require multiple applications to this Court.

i. Even if some discovery could be "obviated," it is not disproportionately burdensome

Defendants claim that the four cited requests would compel them to spend "several million dollars undertaking" what they consider to be unnecessary discovery, "grossly disproportionate to the $200,000 that Plaintiffs paid under the MLPA contract." (Def. Mem. at 14). This strains, if not shatters,

[2] The TAC's RICO allegations involve detailed claims of predicate acts that all directly address Defendants' improper activities with regard to the Plaintiffs. (TAC ¶¶ 212 a-j, 215 a-e). Notably, at least one of the four requests Defendants do list, # 27, seeks documents that are highly relevant to all of Plaintiffs' claims, not just the RICO allegations, insofar as it seeks documents that relate to the "selection of, and/or criteria for the selection of, and the methodology actually used for the selection of, recipients of debt forgiveness letters". The criteria would shed light on how Plaintiffs' loans came to be chosen for debt forgiveness, whether those loans even met the criteria used, all of which go towards the elements of Plaintiffs' breach of contract and tort claims.

all credibility and Plaintiffs need a full R. 30(b)(6) deposition to evaluate this claim, including questions that relate to storage and retrieval of documents Defendants claim are too burdensome to access. This will allow the parties to explore sensible ways of minimizing Defendants' costs. But since such a deposition will also allow Plaintiffs to show this argument is a sham, to date Defendants have refused to produce a 30(b)(6) witness on all the areas Plaintiffs seek. For Defendants to assert this claim without allowing Plaintiffs to assess it by deposition, when one program can cull through hundreds of thousands of pages of documents in seconds is ludicrous.

Defendants' argument that Plaintiffs' damages might only be $200,000 is similarly laughable. As shown above, the argument relates to merely one transaction, despite the thousands of loan sale agreements between the parties. Under New York law, Plaintiffs are entitled to damages for breach of the warranties in all of the agreements. These damages vastly exceed the purchase price for the loans. Had the warranties been true, Plaintiffs would have realized hundreds of millions of dollars on the purchased loans. Moreover, under RICO, a party is entitled to recover treble damages and attorneys' fees. 18 U.S.C. § 1964(c). The damages that are trebled must place [the injured parties] in the same position they would have been in but for the illegal conduct." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 122 (2d Cir. 2013), *quoting Commercial Union Assurance Co., plc v. Milken,* 17 F.3d 608, 612 (2d Cir.1994). Where, as here, the RICO violations "interfere with a contract extant at the time of the conduct" this includes 'benefit of the bargain' damages. *Id.* at 612. Even if Defendants successfully argued that the 'benefit of the bargain' should not be measured by the full face value of the loans, trebled, it still amounts to hundreds of millions of dollars.

ii. Plaintiffs will be severely prejudiced if a stay is granted

Plaintiffs have produced well over 100,000 pages of documents, with more to come. Defendants have not produced even one document to date. Defendants' access to Plaintiffs' discovery documents while Plaintiffs "must wait on the resolution of" motions to dismiss creates a "substantial" advantage for the Defendants. It prejudices Plaintiffs, making it more difficult for them to "formulate their litigation and settlement strategy". *In re AOL Time Warner, Inc. Sec. Litig.,* 2006 WL 1997704, at *3 (S.D.N.Y. July 13, 2006).

Defendants did not seek a stay for more than six months after they filed the motion to which it is attached. They have offered to search only a very narrow list of custodians by a list of terms that mostly comprise the Plaintiffs' names. As discussed above, Defendants have admitted that there is considerable overlap in terms of the factual issues and have not articulated the documents to which they claim their belated application for a stay applies. Potentially, therefore, a stay would be virtually impossible to police and could require multiple applications to the Court to determine its proper scope and whether it applies to any number of documents. The cross-motion should be denied.

POINT II

DEFENDANTS MUST PRODUCE DOCUMENTS RELATED TO ALL OF THE LOANS

Defendants offer an incomprehensible justification for refusing to produce loan-related documents responsive to Requests 3, 16, 17, 18, 21, 28 and 32 (the "Loan Requests") simply because Plaintiffs cooperated by providing a copy of the Corrupted List (which Defendants had initially given to the Plaintiffs in any event). Defendants have agreed only to produce such documents related to loans if (1) the loans are ones Defendants sold to Plaintiffs; (2) Plaintiffs provide a list identifying those loans; and (3) Defendants may elect to consider any loan so identified as one they did not sell.

Defendants' response does not take into account that: (1) Plaintiffs have requested documents that relate to several different universes of loans, not simply ones which Defendants sold to them; (2) as Plaintiffs explained in their moving papers, Defendants turned the loans over to the Plaintiffs without ever providing any loan numbers and, we understand, Defendants have since changed some of the loan numbers that would have applied in any case, 3) as alleged in the TAC, Chase deliberately "changed the loan numbers of numerous valuable loans sold to MRS after the MLPA had been fully executed." (TAC ¶ 60 i); and (4) one of Plaintiffs' main complaints is that Defendants have treated many loans as ones they did not sell. If, as Defendants contend, they cannot identify the loans they *did* sell to the Plaintiffs, how can they be trusted to identify the ones they did not?

Request 3 specifically asks Defendants to produce documents to identify the loans they "sold, transferred, *put into the name of, designated as belonging to, or offered to sell to*" the Plaintiffs. This request is based on Plaintiffs' contentions that Defendants have taken actions on loans (and the security for them) that they had already sold to the Plaintiffs, and have passed off loans as belonging to Plaintiffs when they do not. By its terms, the request requires the *Defendants* to identify the loans, not for Plaintiffs to identify them. Plaintiffs need to know what loans Defendants believe that they sold to the Plaintiffs, not simply to gather information about loans Plaintiffs know that they own.

Defendants' statement that "it simply is not possible" to identify what loans they sold because they cannot search their Recovery One or RCV1 database on that basis is tantamount to an admission that Defendants cannot check whether they owned certain loans before they forgave them or released their liens or, indeed, claimed credit for doing so under their settlements with government entities. It further illustrates the need for a 30(b)(6) deposition of Chase's document custodian. Defendants' contention that Plaintiffs "do not meaningfully dispute that they know which loans they purchased from Chase"[3] and can "easily provide" identifiers to Chase completely misses the point. The point is that Plaintiffs are entitled to ask whether **Defendants** know which loans they sold. Evidently, they do not.

Plaintiffs agree with Defendants that requests 16, 17, 18 and 21 call for documents related to the list of borrower information that Plaintiffs have provided. However,[4] Defendants have not agreed to produce all of the documents and information that the Plaintiffs have requested. Defendants have said only that in addition to reviewing documents from a narrow group of custodians that can be elicited by plugging in search terms that almost entirely consist of variations of the Plaintiffs' names, they will "query

[3] As set forth in their moving papers, Plaintiffs in fact strongly dispute this because as alleged in the TAC, Chase attempted to pull back some of the loans originally subject to the MLPA and deliberately "changed the loan numbers of numerous valuable loans sold to MRS after the MLPA had been fully executed." (TAC ¶ 60 i)

[4] Defendants' misstatement that Plaintiffs objected to their response to Requests 16-18 and 21 "solely on the ground that Plaintiffs believed they should not have to provide Chase with a list" (Def. Mem. at 17) deliberately ignores Plaintiffs' other objections, not least that Chase insisted that it could nonetheless decide to "determine[ ] that a given loan was not purchased" before it would produce any documents. Furthermore, to simply use a list provided by Plaintiffs significantly narrows the sphere of damages to only those loans for which the Plaintiffs are aware. Pistilli Dec. Exh. J at p.3

the appropriate database(s) and retrieve any reasonably accessible data". This is not a statement that Defendants will produce the responsive documents.

Request 16 sought all documents related to servicing the loans, including documents to and from Chase's loan servicers. Request 17 sought all documents related to foreclosure of the loans. Request 18 sought all documents related to principal balance and Chase's charge off amounts on the loans. Request 21 sought all documents related to receipt by Chase or its agents of any post-sale payments on the loans. All of these requests are relevant, specific and targeted. It is highly unlikely that many, much less all, responsive documents can be retrieved by plugging Plaintiffs' names or the terms "First Lien Walk(s)", "Pre DoJ Lien Release Project" or "forgiveness letter(s) OR debt forgiveness" into the electronic files of the eight individuals Defendants **believe** had contact with the Plaintiffs.[5] Additionally, terms such as "appropriate database(s)" and "reasonably accessible data" gives Defendants far too much license to withhold responsive documents.

Finally, Requests 28 and 31 seek documents that are sufficient to identify the loans that received debt forgiveness letters on or around three specific dates in late 2012 and early 2013, and documents related to Defendants' release of liens pursuant to the Pre-DOJ Lien Release Project. Defendants have already stated, over and over, that it is impossible to determine what loans were sold to the Plaintiffs. They do not contest, at least on this motion, that they changed some of the loan numbers relating to the loans sold to the Plaintiffs. If Defendants provide the identity of those loans that were forgiven and liens that were released, this provides a failsafe mechanism for Plaintiffs to check their loans against the full list of those that were forgiven without allowing Defendants the option of concealing that information if it resides in an inappropriate database or somehow proves not to be "reasonably accessible."

[5] Contrary to Defendants' contention, Plaintiffs have challenged their selection of custodians and search terms. However, Plaintiffs have agreed to try to meet and confer to resolve this issue after this Court's ruling on the scope of discovery.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in their moving papers, Plaintiffs' Motion to Compel and to define the scope of discovery in this case should be granted in its entirety and Defendants' cross-motion for a protective order should be denied.

Dated: New York, New York
June 17, 2016

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