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' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

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Plaintiffs S&A Capital Partners, Inc. ("S&A"), Mortgage Resolution Servicing, LLC ("MRS") and 1st Fidelity Loan Servicing, LLC ("1st Fidelity"), through their attorneys, Chaitman LLP, submit this memorandum of law in opposition to the motion for a protective order pursuant to Federal Rule of Civil Procedure 26(c) of Defendants JPMorgan Chase Bank, N.A., JPMorgan Chase & Company, and Chase Home Finance LLC (collectively, "Chase" or "Defendants"),. The facts relevant to this motion are set forth in the Chaitman Declaration filed herewith. For the reasons set forth there and below, Chase's motion should be denied.

PRELIMINARY STATEMENT

Defendants have moved for what they characterize as a "routine" protective order to shield their "confidential information" from public disclosure. Chase Mem[1] at 1. But this is not the routine case: as Chase's insinuation regarding the *Wall Street Journal's* interest in this matter shows, the public has an overwhelming interest in this lawsuit.

However, even if that were not the case, Chase would still be wrong from the start. There is nothing routine about an order which shields from the public the discovery in a litigation. *E.g., In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 145 (2d Cir.1987)); *U.S. v. Hooker Chemical & Plastics Corp.*, 90 FRD 421, 424, 426 (W.D.N.Y. 1981) "(Hooker states that such an order is a "common protective device" often employed in complex litigation…. However, the fact that something may be the general practice does not mean that the practice must be adopted by an unwilling party.").

The requisite showing is good cause, and it is not a formalistic requirement. As this Court explained in *Pitsiladi v. Guerrero,* No. 07 Civ. 6605(JGK)(JCF), 2008 WL 5454234 at *2 (S.D.N.Y. Dec. 30, 2008):

[1] References to Defendants' Memorandum of Law in Support of their Motion for a Protective Order appear throughout as "Chase Mem."

> good cause [for a protective order] exists 'when a party shows that disclosure will result in a clearly defined, specific and serious injury.' "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test. [Citations omitted].

The burden of proving good cause is on the party seeking the protective order. *Id.* at *1. *Accord*, *Agent Orange*, 821 F. 2d at 145. Where, as here, a party is seeking a blanket confidentiality order rather than one limited to specific documents, that burden is particularly heavy:

> "… the State argues, a blanket order in the absence of any specific showing of privilege, trade secret material, or the like is not authorized by the rules….Hooker has alleged in a most conclusory fashion that it will suffer certain injuries. No specific instances are cited where trade secrets will be disclosed or where Hooker will be put at a competitive disadvantage. On this record, the court cannot evaluate these claims of particularized need, and the order cannot issue on this basis.

Hooker , 90 F.R.D. at 426.

Chase does not approach, much less meet its burden. While Plaintiffs do not dispute that a confidentiality stipulation is appropriate to keep confidential the personally identifying information of all of the borrowers of loans Defendants sold to Plaintiffs in this case (and of the third party borrowers whose information must also be produced), or to shield information protected by law, beyond that, Chase's proposed order is unjustified, is sought without any showing of specific potential harm, and seeks to place unreasonable burdens upon Plaintiffs without explanation or justification. It should, therefore, be rejected.

ARGUMENT

POINT I

THE ORDER CHASE SEEKS IS OVERBROAD AND IS SO OVERBROAD AS TO BE MEANINGLESS

Courts must be vigilant to ensure that "confidentiality" is not so widely defined as to thwart the good cause requirement or compromise other important policies. "Common sense tells us that

the greater motivation a corporation has to shield its operations, the greater the public's need to know." *Brown & Williamson v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983).

Here, Chase is seeking protection for categories of documents that are so capacious and ill-defined as to include whatever the designating party wants them to include, *e.g.* "confidential or proprietary business information or communications…or commercial information or communications." Chase does not even limit this category to a legally cognizable definition, for example, "trade secrets." Nor does it limit the category, as it did in other instances, to information "not previously disclosed to the public." Nor does it limit the designation to documents that have current or prospective, as compared to long stale, information. And it provides no concrete examples of what documents it is talking about, nor how disclosure will cause it legally cognizable harm.

The fact that an employer tells its employees that anything they learn on the job is "confidential" does not make it so. *In re Parmalat Securities Litigation*, 258 F.R.D. 236, 256 (S.D.N.Y. 2009). In *Parmalat*, Bank of America ("BoA") sought to keep confidential: (1) its "process for conducting credit review and analysis", (2) "financial and strategic business information of [BoA's] clients," (3) information regarding "methods used to structure and market transactions to clients", (4) information "detail[ing] confidential communications with potential or actual investors in a transaction", (5) descriptions of BoA's "pricing strategy and fee arrangements," and (6) "transaction documents."

The court found these documents were largely not secret, sensitive or protectable at all, based on a number of factors including the types of information, the lack of detail, applicability to competitors and a host of other reasons. Moreover, protection should not be granted to documents just because they once might have been properly claimed as confidential. The party seeking the order has the burden of showing the need for continued protection of the documents at issue. *Cipollone v. Ligget Group,* 785 F. 2d 1108, 1121 (3d Cir. 1986). Chase makes no showing here on either issue.

Similarly, Chase seeks to protect its communications with bank regulators that are not confidential by law. Chase Mem at 6-7. It does not describe the documents nor what it is they contain that constitutes confidential information subject to protection under R. 26(c). Undoubtedly, some of these documents may be embarrassing to Chase given the penalties that apply to false filings with the Government, but such embarrassment is not good cause where confidentiality is not otherwise prescribed by law. *See Cipollone*, 785 F2d at 1121-22; *Vassiliades v. Israely,* 714 F. Supp. 604 (D. Conn. 1989).

POINT II

CHASE'S PROPOSED ORDER WOULD PLACE UNREASONABLE RESTRAINTS ON PLAINTIFFS

The failings of Chase's proposed order go far beyond overbreadth and Chase's inability to argue anything but broad allegations of harm, unsubstantiated by specific examples or articulated reasoning. Most pointedly, Chase seeks to bar Plaintiffs from using discovery produced in this case in other cases Chase has brought, or caused Plaintiffs to bring, even if the same confidentiality obligations apply. Chase Mem at 8-9. Chase never explains why it needs this restriction and, absent the requirements of Rule 26(c) being met and a protective order issuing, the "parties to a law suit may disseminate materials obtained during discovery as they see fit.", *Pitsiladi supra* at *1 (citations omitted). Indeed, not only is the sharing of discovery between litigants in different cases permissible, but courts have encouraged it.

> Defendants' desire to make it more burdensome for Intervenors to pursue their collateral litigation is not legitimate prejudice. *Id.* at 1300-01. …Any legitimate interest the defendants have in continued secrecy as against the public at large can be accommodated by placing Intervenors under the restrictions on use and disclosure contained in the original protective order.

United Nuclear Corp v. Cranford, 905 F2d 1424, 1428 (10th Cir. 1990)). *Accord, Hooker,* 90 FRD at 426 (use of the discovery fruits disclosed in one lawsuit in connection with other litigation, and even in

collaboration among plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure…. Such cooperation among litigants promotes the speedy and inexpensive determination of every action as well as conservation of judicial resources…. This is particularly the case in lawsuits where the resources available to the parties are uneven.") (citations omitted); *William v. Johnson & Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970) ("… there is no merit to the all-encompassing contention that the fruits of discovery in one case are to be used in that case only.)

Moreover, assuming Chase had established that the requisite good cause exists, the Court should then consider the interests of both parties before fashioning an order. *Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66, 71 (S.D.N.Y. 2010). Plaintiffs would be greatly prejudiced by such a restriction. The allegations in this case include claims that, among other things, Defendants have released over one hundred of the Plaintiffs' liens, and continue to do so, and issued debt forgiveness letters to borrowers that Defendants had previously sold to the Plaintiffs. In addition, Plaintiffs claim that Defendants have advised third parties that Plaintiffs purchased liens that they did not purchase, loans which suffer from Defendants' improper servicing practices. Defendants do not address the fact that as a result of Defendants' conduct with regard to releasing over one hundred liens or forgiving loans that they had already sold to the Plaintiffs, Plaintiffs are involved in dozens of claims and enforcement actions throughout the country. **See Chaitman Declaration at ¶¶ 6-18.** This means that in some instances, documents and information about a given loan, the borrower and his or her history with Defendants, much of which is expected to be produced in this action, is of critical importance.

As another example, documents and information regarding Defendants' robo-signing practices is of vital importance to resolve some of the harms Defendants have caused, both to the Plaintiffs and, in some instances, the borrowers. It is essential that Plaintiffs be able to use documents obtained in this action to be able to deal with the harms that Chase has caused them. Notably, despite

Defendants' focus on the MLPA as a single, $200,000 transaction, there are numerous other loans that Defendants sold to S&A and 1st Fidelity, and the value of the liens released alone run into the millions of dollars.

Chase also tries to impose an obligation on Plaintiffs to challenge every document that they believe should **not** be subject to a confidentiality order. But the appropriate procedure is to place the burden on the party seeking to hold evidence confidential. Chase's submission does not even allow for a procedure to release documents they have labelled confidential when such problems develop with the loans, beyond requiring Plaintiffs to seek relief from this Court in every instance. It is Defendants' burden to establish the confidentiality of their documents, not Plaintiffs. *See e.g.*, *McCarthy v Burnett Bank of Polk County*, 876 F.2d 89, 90 (11th Cir. 1989). Defendants' claim that this Court will be overwhelmed if Defendants do not have the right to designate anything they deem appropriate as confidential is an inadvertent, but telling, admission. Although Defendants say thus far they have only identified 35 documents as confidential, Chase Mem at 4, if they fear the Court will be overwhelmed in the future, they must intend to designate a great many more such documents going forward.[2]

For completeness, it should be noted that the case cited by Defendants for the proposition that what they refer to as a "commonplace feature of the proposed order" being "amply" supported in the case law (Chase Mem. at 8) does not support the Defendants" position. *Brookdate 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). In fact, *Brookdale* arose because the parties were seeking to confirm whether certain documents containing personally identifying health records should

[2] Notably, the documents that Chase has produced to date are all emails that have been stripped of their attachments and are drawn from the mailboxes of a very narrow universe of people, all of whom are in some way connected only to the loans that MRS purchased under the terms of the MLPA. At least with regard to the documents produced this far, the production does not even relate to any of Defendants' employees who dealt with Plaintiffs regarding any of the multiple S&A Capital or 1st Fidelity loan purchases.

continue to be confidential. The court noted, in reaching its decision, that it had already conducted an *in camera* review of all the documents.

Likewise, in *Kamyr AB v. Kamyr, Inc.*, No. 91-CV-0453, 1992 WL 317529 (N.D.N.Y., Oct. 30. 1992), the court was addressing a challenge by a third party to a protective order agreed upon by the parties to the case in which it was entered. The case was an antitrust and patent suit with issues of unfair competition. The documents in question were all to be protected because they were deemed to be trade secrets whose exposure would likely injure the parties' businesses, something the court would inevitably rely on the parties to demonstrate in any event. In the event that Defendants provide documents relating to confidential trade secrets or business practices, it does not warrant a blanket confidentiality designation as contemplated by the proposed protective order.

None of these cases concerned a situation such as this, where there is the chance that the Plaintiffs must use documents Defendants wish to designate as confidential to defend itself against problems Defendants' actions have caused. In the event that documents relevant to this action would also prove relevant to assist Plaintiffs in maintaining ownership of loans sold to them by Chase, as well as to assist third party borrowers, Plaintiffs should be able to do so. This Court should refuse to impose the costs of challenging confidentiality upon the Plaintiffs, and should deny Defendants' motion for a protective order.[3]

POINT III

CHASE'S UNSUPPORTED INSINUATIONS ABOUT DISCLOSURE OF SEALED INFORMATION TO THE WALL STREET JOURNAL PROVIDES NO BASIS FOR A CONFIDENTIALITY ORDER

Perhaps recognizing that it has no legitimate basis for the Confidentiality Order it proposes, Chase complains that someone has "apparently" disclosed to the Wall Street Journal unspecified

[3] The proposed protective order also does not permit any challenge to a confidentiality designation after the litigation is concluded. This would prevent Plaintiffs from using such documents in state court litigations in which the validity of Plaintiffs' liens has been challenged because of Defendants' improper practices.

"details" contained in sealed documents filed in *United States, et al.* ex rel *Schneider v. J.P. Morgan Chase Bank, N.A., et al.*, No. 114-CV-01047-RMC, pending in the United States District Court for the District of Columbia (the "*Qui Tam* Action"). Chase implies, but does not allege, that Plaintiffs or their counsel must have been the source. Chase Mem at 2-3.

Chase's unsupported insinuation is regrettable and has no place in a courtroom. Suffice it to say that, if Chase wants to make an accusation against Plaintiffs or their counsel, it should do so, and we will respond appropriately — although any such accusation, assuming Chase believes it can make one consistent with Rule 11, should properly be made in the District of Columbia court which issued the sealing order[4].

In *Pitsiladi*, *supra,* at *1, the plaintiffs alleged that the defendants had defamed them in the past and would do so again if no constraints were placed on the use of information in the case. This Court admonished:

> …as a factual matter, the plaintiffs have not demonstrated that the defendants were the perpetrators of the prior harassment. The plaintiffs have proffered no evidence from persons with direct knowledge of the facts alleged, but only declarations of counsel. Absent far more conclusive proof, I cannot adopt the plaintiffs' conclusion that "the information contained [in the harassing communications] could only have come from the Defendant Guerrero."

A like result should follow here.

[4] It is interesting that, when it suits Defendants' purposes to treat the *qui tam* Case and this one as interconnected, they freely do so. However, when it does not suit Defendants' purposes, they argue that the two cases should be treated separately for purposes of discovery as outlined in Defendants' response to Plaintiffs' Motion to Compel.

CONCLUSION

For all the foregoing reasons, Defendants' motion for a protective order should be denied in its entirety.

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August 12, 2016

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