

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	No. 13-465C
v.)	(Judge Sweeney)
)	
THE UNITED STATES,)	
)	
Defendant.)	

PLAINTIFFS’ OPPOSITION TO DEFENDANT’S AND GRANT THORNTON’S MOTIONS FOR AN ENLARGEMENT OF TIME TO FILE RESPONSES TO PLAINTIFFS’ MOTIONS TO REMOVE THE PROTECTED INFORMATION DESIGNATION FROM MATERIALS PRODUCED IN DISCOVERY

Plaintiffs respectfully submit this response to the motions filed by Defendant and by Grant Thornton LLP for an additional enlargement of time, until August 17, 2015, to file their responses to Plaintiffs’ pending motions to remove the Protected Information designation from certain materials produced in discovery.¹ The responses to the motions at issue are currently due on July 13, but Plaintiffs had previously agreed to Defendant’s and Grant Thornton’s (as well as several other producing parties’) request for a two-week extension of that deadline. Defendant and Grant Thornton now seek, however, to extend that already-extended deadline by another three weeks, until August 17. The motions should be denied, and the Court should order that any responses to the pending motions be filed no later than July 27.²

¹ Grant Thornton LLP’s Motion for an Enlargement of Time to Respond to Plaintiffs’ Motion to Remove the “Protected Information” Designation from Certain Grant Thornton Documents (Doc. 195); Defendant’s Motion for Enlargements of Time Within Which to File Coordinated Briefs in Response to Plaintiffs’ Various Motions to Remove the “Protected Information” Designation from Certain Documents, and The New York Times Company’s Motion to Intervene (Doc. 198).

² The other producing parties (Freddie Mac, Fannie Mae, Deloitte, and PricewaterhouseCoopers) have filed their own motion seeking to extend their deadline until July 27, but noting as

The motions at issue present two very straightforward questions: (1) whether the information at issue meets the Protective Order’s definition of “Protected Information,” and (2) whether the Protective Order forbids the “de-designation” of redacted versions of documents produced in discovery. Although Plaintiffs chose, primarily for logistical reasons, to file a separate motion for each entity that produced the information at issue, the motions collectively cover a relatively small handful of documents and deposition transcripts, especially when compared to the thousands of documents that have been produced in discovery. The motions have been pending for weeks, and in one case (Doc. 162) for more than a month, and Plaintiffs have already agreed to multiple deadline extensions, including a recent request to extend the deadline for responding to the motions for another two weeks, until July 27. Moreover, since Plaintiffs consulted with the producing parties regarding their de-designation requests before filing their motions, the producing parties have known about – and have presumably been thinking about – the issues raised by the motion for a long time.

Simply put, the producing parties have already been afforded more than ample time to formulate and prepare their responses to the straightforward questions raised by the motions. Notably, although it tries to do so, Defendant can no longer credibly point to its other discovery obligations as an excuse for putting off responding to the motions. Defendant has finished its document productions, and it produced “final” privilege logs to Plaintiffs on July 10. And the

well that if the Court grants Defendant’s and Grant Thornton’s extension motions, judicial economy would support a similar additional extension of their deadline. Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, PricewaterhouseCoopers, and Deloitte & Touche LLP’s Unopposed Motion for an Enlargement of Time to Respond to Plaintiffs’ Motions to Remove the “Protected Information” Designation from Certain Documents at 2 n.1 (Doc. 196). For the same reason Defendant’s and Grant Thornton’s motions should be denied, so should any similar request by the remaining producing parties.

last of the currently-scheduled depositions will be completed on July 15.³ Although Defendant notes that it “anticipate[s]” that additional depositions will take place, Doc. 198 at 2, none have yet been noticed, and there is no realistic prospect that any depositions that may eventually be noticed will take place between now and July 27. The mere possibility that additional depositions may be scheduled for August or early September, therefore, provides no support for yet another extension of the deadline. While the parties will certainly need to devote some time to discussions, and perhaps motions practice, regarding Defendant’s privilege assertions now that they have been finalized, Plaintiffs are still in the process of reviewing the recently-produced final logs, and it is unlikely that Defendant will need to devote significant time to this issue between now and July 27. Grant Thornton, for its part, does not even attempt to identify any particular discovery item that it is currently working on, and Plaintiffs know of only one such item (the preparation of a corrected privilege log that is much smaller than the FHFA and Treasury privilege logs prepared by Defendant). There is therefore no reason Defendant and Grant Thornton cannot prepare their responses to the de-designation motions by July 27.

Finally, Plaintiffs and the public are prejudiced by the continuing delays in the resolution of these motions. Absent a showing of good cause, the presumption is that information produced in discovery is available to the parties and to the public. Every day that the producing parties are allowed to maintain a Protected Information designation for materials that do not qualify for such a designation, therefore, is a day in which Plaintiffs are denied their right to review information that is relevant to their claims and to thereby assist in the prosecution of their claim for the taking

³ Although Defendant cites its work on these tasks, all of which have been or soon will be completed, as supporting its motion, Doc. 198 at 2, it knew about these tasks when it asked for and received Plaintiffs’ consent to extend the deadline until July 27. Defendant has not adequately explained how this fully anticipated and substantially completed work now justifies another three week extension on top of the multiple extensions it has already received.

of their property without just compensation.⁴ Consistent with the importance placed on the protection of that right, the Protective Order itself includes fairly strict timeframes that are designed to require the parties to work together as expeditiously as possible to seek to resolve de-designation disputes.⁵ The spirit of the Protective Order would therefore be frustrated if Defendant were allowed, for no good reason, to further delay the resolution of this dispute.⁶

Plaintiffs fully agree that it makes sense for the briefing on Plaintiffs' de-designation motions to proceed "in a coordinated and efficient manner." Doc. 198 at 2. But such coordination can be easily accomplished without also further delaying the briefing and resolution of these straightforward, though important, motions. For the foregoing reasons, Plaintiffs respectfully submit that Defendant's and Grant Thornton's requests for an additional enlargement be denied, and that the Court require the producing parties to respond to the motions at issue by no later than July 27.

⁴ For this reason, Defendant's claim that its motion seeks to "delay only the determination of whether these discovery materials should also be made *public*," Doc. 198 at 3 (emphasis in original), is incorrect.

⁵ See, e.g., Protective Order ¶ 17 (Doc. 73) (requiring parties to try to resolve dispute within five business days after notice is given, and allowing challenging party to file motion after providing three business days' notice).

⁶ In addition, in the event that the de-designation motions are still pending at that time, Plaintiffs intend to discuss the issues relating to those motions at the status conference currently scheduled for August 13, 2015. Given the difficulties of aligning the parties' schedules, additional extensions of the briefing schedule for the de-designation motions threaten to result in further prejudicial delays in the resolution of this dispute.

Date: July 14, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 14th day of July, 2015, via the Court's Electronic Case Filing system.

s/ Charles J. Cooper
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