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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO INTERVENE AND FOR AN ORDER DE-DESIGNATING DISCOVERY MATERIALS

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Proposed Intervenor The New York Times Company ("The Times") respectfully submits this reply brief in further support of its motion to intervene and for the removal of "protected information" designations from the transcripts of the depositions of Edward DeMarco and Mario Ugoletti. At issue on this motion is the public's ability to monitor litigation that directly deals with critical decisions and acts of public officials during the financial crisis. The Government's response – to conjure up every possible roadblock to greater public knowledge of those decisions and acts – is both disappointing and based on multiple misconceptions of the law.

ARGUMENT

I.

INTERVENTION BY NEWS ORGANIZATIONS TO CHALLENGE CONFIDENTIALITY DESIGNATIONS IS A WELL-ESTABLISHED PROCEDURE REPEATEDLY RECOGNIZED BY COURTS

For all of the Government's procedural hand-wringing over the law of intervention, a simple fact remains: The Federal Circuit, like every circuit and court to consider the issue, has held that a third party, including media organizations, may properly seek to intervene in a pending case in order to challenge confidentiality or protective orders. *See 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."); *see also Ross-Hime Designs, Inc. v. United States*, 109 Fed. Cl. 725, 731 (Fed. Cl. 2013); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) ("We agree with other courts that have held that the procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action."); *Dorsett v. Cnty. of Nassau*, 289 F.R.D. 54, 74 (E.D.N.Y. 2012) ("Indeed, '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.'" (quoting *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998)). (*See* The New York Times's Motion to Intervene and for an Order De-Designating Discovery Materials ("NYT Mem."), Docket No. 177, at 4-5.)

Despite this clear judicial consensus, the Government claims that because of a change to the Federal Rules of Civil Procedure thirteen years ago, The Times's motion to intervene should be denied because the challenged protective order relates, as most protective orders do, to discovery documents exchanged between parties but not yet filed in court. (*See* Defendant's Reasons in Opposition to The New York Times Company's Motion to Intervene and for an Order De-Designating Discovery Materials ("Gov. Mem."), Docket No. 221, at 6-7, 18-19.) Specifically, the Government argues that because a 2002 amendment to Federal Rule of Civil Procedure 5(d), which removed the requirement that discovery material be filed with the court, such material is not subject to a public right of access under the First Amendment or the common law and that therefore The Times has no "common question of law or fact" with the underlying action that would provide a basis for permissive intervention under Federal Rule of Civil Procedure 24(b), and its identical counterpart under the Rules of the United States Court of Federal Claims ("RCFC").[1]

Such an argument fundamentally misunderstands the law of permissive intervention as interpreted by federal courts and ignores the relevant case law from both before and after the rule

[1] The requirements for permissive intervention under RCFC 24(b) are: "On a timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact. … In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." RCFC 24(b); *see also Progressive Indus. v. United States*, No. 14-1225C, 2015 U.S. Claims LEXIS 460, *7 (Fed. Cl. Apr. 17, 2015).

change. As federal courts have long observed, Rule 24(b) is the procedurally proper vehicle for limited intervention to challenge confidentiality, even though the rule on its face would appear to be an awkward fit for such purposes. *See, e.g.*, *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1045 (stating that while on "its face, Rule 24(b) would appear to be a questionable procedural basis for a third-party challenge to a confidentiality order" courts have definitively concluded that such interventions are proper). The basis for this conclusion is a straightforward one: "Intervenors do not ask the district to rule on additional claims or seek to become parties to the action. They ask the court only to exercise the power which it already has, *i.e.*., the power to modify the protective order. For that reason, no independent jurisdictional basis is required." *Beckman Indus. v. Intn'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992).

Similarly, as the court in *Pansy* explained, in the context of efforts to modify protective orders the statutory requirement of a "common question of law or fact" is satisfied regardless of whether the same legal theory was raised in the main action. *See Pansy*, 22 F.3d at 778 ("We … reject the district court's conclusion that the Newspapers have not shown their claim has anything in common with a question of law or fact in the case, and therefore cannot intervene. By virtue of the fact that the Newspapers challenge the validity of the Order of Confidentiality entered in the main action, they meet the requirement of Fed. R. Civ. P. 24(b)(2) that their claim must have 'a question of law or fact in common' with the main action."); *see also Beckman Indus.*, 966 F.2d at 474 ("Specificity, *e.g.*, that the [intervenors'] claim involve … the same legal theory [that was raised in the main action], is not required when intervenors are not becoming parties to the litigation. There is no reason to require such a strong nexus of fact or law when a party seeks to intervene only for the purpose of modifying a protective order."); *Charlie H. v. Whitman*, 213 F.R.D. 240, 245 (D.N.J. 2003) ("Essentially, *The Times'* and *The Ledger's*

purpose for intervention is to gain greater access to Defendants' case records, and to provide the public with a more comprehensive view of DYFS, and specifically, the children in its care. As such, *The Times* and *The Ledger* satisfy the Third Circuit's interpretation of Rule 24(b)'s requirement that a 'question of law or fact in common' with the main action is not necessary when the applicant is not an original party to the action and is seeking to challenge the confidentiality order.").[2] Indeed, federal courts have explicitly found that a liberal interpretation of Rule 24(b) is particularly appropriate in the context of third-party disputes over protective orders. *See Nat'l Children's Ctr., Inc.*, 146 F.3d at 1045 ("[C]ourts have been willing to adopt generous interpretations of Rule 24(b) because of the need for an effective mechanism for third-party claims of access to information generated through judicial proceedings." (collecting cases)).

The Government's sole authority for the proposition that The Times has not met this well-established standard is *AT&T Corp. v. Sprint Corp.,*407 F.3d 560, 562 (2d Cir. 2005), which rejected a motion to intervene by a third party – a lawyer trying to gain an improper advantage in a related state case – to modify a protective order. (*See* Gov. Mem. at 7-8.) That court simply held, correctly, that asking for modification of a protective order, without more, does not automatically result in the granting of permissive intervention. *Id.*[3] In that case, intervention

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[2] The Government also suggests that because The Times did not attach a separate pleading, its motion should be rejected for failure to comply with FCRC 26(c). (Gov. Mem. at 8 n. 4.) Again, in the context of challenges to protective orders where, as here, the basis for that challenge is amply provided to the court, courts decline to reject motions based on such formalisms. *Beckman Indus.*, 966 F.2d at 475 ("[W]here, as here, the movant describes the basis for intervention with sufficient specificity to allow the district court to rule, its failure to submit a pleading is not grounds for reversal." (collecting cases)); *see also Public Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 784 (1st Cir. 1988) ("[F]ederal courts have been quite lenient in permitting participation by parties who failed to comply strictly with Rule 24.").

[3] As the Second Circuit noted, the proposed intervenor "largely ignored" the sole issue before the court – whether the denial of intervention was proper – and was trying to use intervention and modification of a protective order in federal court to circumvent the close of discovery in a state case. *AT&T Corp.*, 407 F.3d at 561.

was rejected for a clear, and separate, substantive reason: Modification would prejudice the parties, a consideration specifically mandated by the rule. *Id.* It is simply irrelevant to the issue of whether "a question of law or fact in common" was raised.[4]

In fact, the courts have held, both before and after the 2002 amendment to Rule 5(d), that permissive intervention was appropriate when the proposed intervenor sought discovery documents to which no First Amendment or common law right of access attached – a separate matter from whether the modification of a protective order being sought is warranted. *See, e.g. Dorsett*, 289 F.R.D. at 73 (granting media entity's motion for permissive intervention to modify a confidentiality order as procedurally proper after specifically discussing the fact that the document sought was a non-judicial document not subject to a First Amendment or common law right of access); *Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, No. 05 Civ. 2745 (JGK)(RLE), 2010 U.S. Dist. LEXIS 19510, *10 (S.D.N.Y. Mar. 2, 2010) (granting permissive intervention to third party seeking to modify protective order concerning non-judicial documents following detailed discussion of Rule 24(b) standards). That mirrored the approach that had long been taken by the courts. *See, e.g., Public Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 787-88 (1st Cir. 1988) (public interest group had standing to demand good cause under Fed. R. Civ. P. 26(c) to maintain a protective order covering discovery materials); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 354-56 (11th Cir. 1987) (per curiam) (journalists had standing to bring a Rule 26(c) challenge to a protective order even though they had no First Amendment right of access to discovery documents). Intervention is particularly appropriate when, as here, one of the parties is a public entity or official. (*See* NYT Mem. at 7 and cases cited therein.)

[4] Later, the Government also cites *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009). (Gov. Mem. at 19.) That case merely held that an intervenor must establish separate Article III standing to challenge a protective order *after a case has been dismissed*, and that no such standing was demonstrated in the context of a request for discovery material. *Id.*, at 1071 n. 7 (question of intervention in a pending case is not before the court and will not be decided). Here, the case remains pending, and *Bond* does not apply.

Those cases recognize that, irrespective of whether discovery was filed with the court, misapplication of Rule 26(c) protective orders burdens news organizations in their constitutionally protected efforts to cover the courts. *See Bond v. Utreras*, 585 F.3d 1061, 1081 (7th Cir. 2009) (Tinder, J., concurring). "Although unfiled discovery does not fall within the public's presumptive right of access, the public still 'has an interest in what goes on at all stages of a judicial proceeding.'. . . [T]hird-party Rule 26(c) claims may prevent litigants from abusing a court-approved confidentiality order to seal whatever they want." *Id.* (quoting *Citizens First Natn'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) and *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994)). Likewise, to the extent a protective order prevents a "willing speaker" from discussing a case publicly, the press has an injury that intervention and a challenge to confidentiality will redress. *See United States v. Wecht*, 484 F.3d 194, 204 (3d Cir. 2007) (finding that non-party press challengers to a gag order had standing where a party to the case was a "willing speaker" and that what matters for the standing inquiry is "whether third parties would obtain the information they seek if successful on the merits of their claim"); *see also Pansy*, 23 F.3d at 777 (stating that to establish standing "[w]e need only find that the Order of Confidentiality being challenged presents an obstacle to the Newspaper's attempt to obtain access.").

The Government also argues, without citing any relevant authority, that The Times lacks Article III standing to permissively intervene. (*See* Gov. Mem. at 8-9.) The Government has, tellingly, identified no cases that have so held, and for good reason: "[T]hird parties have standing to challenge protective orders and confidentiality orders in an effort to obtain access to information or judicial proceedings." *Pansy*, 23 F.3d at 777. Moreover, the court need not even address this argument because Plaintiffs in this case, who undeniably have standing, also seek to

modify the protective order. That is dispositive because "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimately relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998)).[5]

Finally, the Government claims that permitting The Times to intervene to seek modification of the protective order here would result in prejudice to its case by generating unnecessary delay. (Gov. Mem. 12-13.) The Government tries to buttress its claim with elaborate speculation that permitting intervention in this case would unleash a tide of intervention motions (presumably in other cases) from "any Twitter commentator, blogger, or other member of the general public." The Government also is concerned that The Times could raise other objections beyond those it has and that and that responding to this motion would distract the Government from other important litigation matters.

Of course, the issue is simply whether prejudice would occur as a result of this motion in this case and the Government turns a blind eye to the single most important fact: Plaintiffs have similarly moved to de-designate materials, so consideration of The Times's arguments has a negligible effect on what the Government and the Court would be required to do in the absence of intervention.[6] As for the Government's claim that it will be distracted from other aspects of

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[5] Little needs to be said about the Government's suggestion that the Court of Federal Claims lacks jurisdiction to entertain an intervenor's challenge to a protective order. (Govt. Mem. at 10.) As the Federal Circuit has said, "Intervention is the proper means for a non-party to challenge a protective order." *Baystate Techs.*, 283 Fed. Appx. at 810. This Court, just like Article III courts, has "very broad inherent and implied powers to manage a case," especially in matters pertaining to discovery. *Applegate v. United States*, 35 Fed. Cl. 47, 56 (Fed. Cl. 1996); *see also Lab. Corp. of Am. v. United States*, 108 Fed. Cl. 549, 558 (Fed. Cl. 2012).

[6] While the Plaintiffs bring a similar motion to modify the protective order, Plaintiffs and The Times's interests do not align. Most significantly, Plaintiffs have proposed a remedy merely allowing

the case to address confidentiality issues, the Government signed on for that task when it agreed during negotiations of the Protective Order to a process for review and challenge to designations. Briefing as to The Times's motion, as of this filing, is complete. The Government has failed to show what undue burden or delay will result from having The Times's motion decided. *See Pansy*, 23 F.3d at 779 ("[W]here an intervenor is litigating an ancillary issue, the potential for prejudice to the original parties due to the delay in intervention is minimized."); *Public Citizen*, 858 F.2d at 786 ("Because [the intervenor] sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties in this case.").[7]

II.

THE GOVERNMENT HAS FAILED TO SHOW GOOD CAUSE FOR THE BLANKET DESIGNATION OF THESE TRANSCRIPTS

The Government cannot demonstrate that good cause exists for the continued shielding of the depositions sought here, as required by law under Fed. R. Civ. P. 26(c). Rather than address this straightforward issue, the Government instead casts a fog over the applicable legal standards by falsely asserting that no such inquiry is necessary because The Times "acknowledges that there is no public interest in discovery documents not filed as part of the public judicial record, Times Mot. at 4." (Govt. Mem. at 18.) Such a statement appears nowhere in The Times's brief. To the contrary, The Times repeatedly asserts that there is significant public interest in these discovery documents, and that the good cause standard must apply. (*See, e.g.*, NYT Mem. at 7 ("The public's interest in the underlying facts of this case is undeniable").) What The Times did

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them to use the sought-after documents in another case while maintaining them under seal. Such an outcome would be unacceptable to The Times.

[7] Moreover, to the extent that redaction of the requested depositions may be appropriate, only two documents need be addressed – hardly a great burden for the Government.

acknowledge was that 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." (NYT Mem. at 4.) The law sets up two distinct bodies of law: one addressing whether court-filed documents can be sealed (*see generally Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006)) and the second – relevant here – addressing whether the "good cause" requirement of Fed. R. Civ. P. 26(c) has been met and permits the parties to keep unfiled discovery documents confidential. That unfiled discovery documents are not subject to a common law or First Amendment right of access has no bearing on the requirement that good cause must be shown to restrict such discovery documents as confidential.

Not surprisingly, these two similar but distinct issues are often discussed within a single opinion. *See, e.g., Gambale v. Deutsche Bank*, 377 F.3d 133 (2d Cir. 2004) (addressing both court-filed documents and an unfiled settlement agreement). Thus, the Government's observation (Gov. Mem. at 18) that certain cases cited by The Times address filed court documents is disingenuous at best. The Times is not asking the Court to apply the legal tests applicable to judicial documents to the two depositions. It asks that the Rule 26(c) jurisprudence be applied, and the Government concedes that Rule 26(c) must be met here. (*See, e.g.,* Govt. Mem at 14.)[8]

[8] Similarly, the Government's objections to case citations that predate the amendment of Rule 5(d) are irrelevant. (*See* Gov. Mem. at 18-19.) As The Times pointed out in its opening memorandum (NYT Mem. at 5 n. 1), the amendment only served to eliminate the presumption of public access under the common law and First Amendment. That change had no bearing at all on the right of news organizations to challenge confidentiality designations, a fact reflected in the cases cited by The Times that were decided after the amendment was adopted. (*See* NYT Mem. at 4-5, 6.) "Although unfiled discovery does not fall within the public's presumptive right of access, the public still 'has an interest in what goes on at all stages of a judicial proceeding.' *Citizens First Nat'l Bank*, 178 F.3d at 945. As noted, third-party Rule 26(c) claims may prevent litigants from abusing a court-approved confidentiality order to seal whatever they want." *Bond v. Utreras*, 585 F.3d at 1081 (Tinder, J., concurring).

As the Government notes, under *Daniels v. City of New York*, 200 F.R.D. 205, 207 (S.D.N.Y. 2001), "when a private party asserts a public interest in order to gain access to information, the burden is on the party seeking to maintain the confidentiality order to show that there is 'good cause' for continued confidentiality." (Gov. Mem. at 17-18.) That is precisely the case here. *See also Schiller v. City of New York*, No. 04 Civ. 7922 (KMK) (JCF), 04 Civ. 7921 (KMK) (JCF), 2007 U.S. Dist. LEXIS 4285, at *10 (S.D.N.Y. Jan. 19, 2007) (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); *Havens v. Metro Life Ins. Co.*, No. 94-cv-1402 (CSH), 1995 U.S. Dist. LEXIS 5183, at *28-29 (S.D.N.Y. Apr. 20, 1995) (requiring defendant to show good cause for keeping discovery confidential when newspaper intervenes for modification of protective order). While the Protective Order places the burden *on plaintiffs* to justify a challenge to confidentiality designations (Protective Order at ¶ 17), plaintiffs clearly stand in a different position from an intervenor. Plaintiffs have seen the materials at issue and can speak to whether confidentiality is permitted under Rule 26(c). The Protective Order is silent on where the burden of persuasion lies when a challenge is raised by a non-party that has not had access to the materials. In those circumstances, *Daniels* sets the appropriate standard: The party that desires confidentiality and knows what the documents say is properly tasked with persuading the court that Rule 26(c) has been met.

But wherever the burden of persuasion lies, there is no basis on this record for concluding that these two depositions deserve confidentiality.[9] The Government says that the transcripts

[9] In its opening memorandum of law, The Times raised the issue of whether permissive wording in the definition of "protected information" falls short of the good cause standard. (Times Mem. at 8.) That issue need not be resolved on this motion. The Court was clear that, despite initially marking all materials confidential under the Protective Order, the Government had the obligation to go back and make specific determinations as to whether confidentiality was warranted. (Transcript of July 16, 2014 Status Conference (Docket No. 75) at 29.) The Court then went on to admonish the parties to make the

contain "market-sensitive and confidential information regarding the future of the conservatorships and the wind down of Fannie Mae and Freddie Mac and confidential testimony regarding the projections of profitability for these entities." (Govt. Mem. at 15.) To make its case, the Government principally cites to the declaration of Melvin L. Watt, Director of the Federal Housing Finance Agency, that "disclosure of projections that suggested (or that market participants interpreted as suggesting) that the Enterprises' financial conditions were worse than previously assumed could . . . increase current prices in the primary and secondary market." (*Id.* at 16.) The Government also expresses concern that disclosure might improperly provide certain types of confidential information to Freddie Mac and Fannie Mae. (*Id.*)

But Mr. Watts was not speaking to the deposition testimony of either Mr. DeMarco or Mr. Ugoletti. His declaration was made a year before either one of them testified and was based on his review of plaintiffs' document requests. (*See* Declaration of Melvin L. Watt ("Watt Dec.") (Docket No. 49, Appendix A), ¶ 3.) Mr. Watts may be correct that certain documents called for by plaintiffs' request could be market-sensitive, but that says nothing about the sensitivity of the testimony actually given in the two depositions at issue here. Currently, the only subject before the court is a jurisdictional dispute, and as a result, the testimony in the depositions was limited to the time period prior to September 30, 2012. (Govt. Mem. at 15-16.) The two deponents were speaking to their former roles at Treasury and FHFA and their actions in the period from 2008, when the bailout occurred, to the 2012 cutoff date. The Government states that projections made before that date "cover years far in the future." (Gov. Mem. at 16.) But the Government conveniently stops short of saying whether any such projections were in the deposition transcripts themselves and stands silent on whether the information is so stale – three

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discussion of whether a particular item should remain confidential "meaningful and not just 'I want it, you can't have it' . . . I want you to really explain your reasoning . . ." (*Id.* at 41.) That is no more and no less than what The Times seeks of the Government here.

or more years later – as to eliminate any concern about market-sensitivity. While the Government cannot be expected to reveal confidential information in making its argument against de-designation, describing the testimony actually given by these two witnesses in their depositions does not require any disclosure of secret information. For the same reason, the Government errs in relying on the Court's decision on the Howard motion (*see* Gov. Mem. at 3), which did not and could not address the contents of the two deposition transcripts at issue.

Tellingly, Mr. Watt did speak directly at one point in his declaration to information that dates to a time before his administration. He said that disclosure of older documents "that reflect prior thinking of Agency personnel concerning matters about which the Agency may follow a different course during my tenure as Director are likely to lead to *the public and market participants second-guessing every decision . . .*" (Watt Dec. at ¶ 13 (emphasis added).) Stated plainly, Mr. Watt is not concerned with the financial sensitivity of the information, but whether the public will have the temerity to raise questions about the decisions his agency makes. Putting aside that breathtaking "don't bother me" view of the public from a public servant, it is clear that a fear of public criticism does not rise to either good cause under Rule 26(c) or protected information under the Protective Order.

Before finding good cause for confidentiality the Court should be satisfied that the record shows "defined, specific, and serious injury" will arise from disclosure and that the harm is established through "particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." Wright & Miller, Federal Practice and Procedure: Civil § 2035; *Carlson v. Geneva City Sch. Dist*., 277 F.R.D. 90, 94 (W.D.N.Y. 2011); *see also Allen v. City of New York*, 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006); *Havens*, 1995 U.S. Dist. Lexis

5183, at *29. Nothing approaching that exists in this record, and the necessarily dated nature of the testimony undermines the case for continued confidentiality.[10]

The Government's case is not helped by its half-hearted claim that the witnesses "reasonably relied" on the Protective Order. (Govt. Mem. at 21.) Where confidentiality designations are specifically subject to review and challenge, reliance is not reasonable. *See, e.g., Schiller,* 2007 U.S. Dist. LEXIS 4285, at *14; *Allen*, 420 F.Supp.2d at 300-0; *In re Iwasaki*, No. M19-82, 2005 U.S. Dist. LEXIS 10185, at *4-5 (S.D.N.Y. May 26, 2005); *Fournier v. McCann Erickson*, 242 F.Supp.2d 318, 341 (S.D.N.Y. 2003); *see also SEC v. TheStreet.com*, 273 F.3d 222, 230-31 ("some protective orders may not merit a strong presumption against modification [such as] protective orders that are on their face temporary or limited"). Here, of course, prior to the depositions the parties had agreed that confidentiality would be subject to review and negotiation and, ultimately, court adjudication in the event of a dispute. More than that, both witnesses, like all witnesses, had an obligation to testify fully and truthfully and cannot now say they would have testified otherwise except for the Protective Order.

There can be no doubt that protection of sensitive market information is a proper basis for a protective order. But there is also no doubt that the public has a powerful interest in monitoring this litigation and understanding more fully the consequential decision-making that led to the conservatorship and to the steps taken by the Government in the years that followed. Here, broad and unspecified generalities about possible market effects, none anchored to the specific transcripts at issue, are insufficient to warrant confidentiality. The Court advised the parties that they were required to "explain [their] reasoning" for the confidentiality of particular

[10] To the extent some sections in fact cover legitimately sensitive information, redaction remains the appropriate remedy. *See Charlie H.*, 213 F.R.D. 240.

documents in a "meaningful" way. (Transcript of July 16, 2014 Status Conference (Docket No. 75) at 41.) That is notably absent here.

CONCLUSION

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

Dated: New York, New York
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