UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORTGAGE RESOLUTION SERVICES, LLC, 1ST FIDELITY LOAN SERVICING, LLC, and S & A CAPITAL PARTNERS, INC.,	
Plaintiffs,	
-against-	No. 15 CV 293-LTS-JCF
JPMORGAN CHASE BANK, N.A., CHASE HOME FINANCE LLC, and JPMORGAN CHASE & CO.,	
Defendants.	

PLAINTIFFS' MOTION AND INCORPORATED MEMORANDUM OF LAW CHALLENGING THE DESIGNATION OF THE DEPOSITION TRANSCRIPTS OF THIRD-PARTY WITNESSES BRIAN BLY AND ERIKA LANCE

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Plaintiffs S&A Capital Partners, Inc. ('S&A"), Mortgage Resolution Services, LLC ("MRS"), and 1st Fidelity Loan Servicing, LLC ("1st Fidelity")(collectively, "Plaintiffs"), by and through the undersigned counsel, move this Court pursuant to Rule 26 of the Federal Rules of Civil Procedure for an order setting aside the designation of the deposition transcripts of third-party witnesses Brian Bly ("Bly") and Erika Lance ("Lance") as "Confidential" or "Attorneys' Eyes Only".

FACTUAL BACKGROUND

The Court entered a Protective Order (DE 127) on August 30, 2016, enabling parties and non-parties to this action. Paragraph 8 of the Protective Order provided as follows regarding deposition testimony:

> Deposition testimony may be designated as Confidential or Attorneys' Eyes Only either on the record during the deposition or within thirty (30) days of receipt of the transcript. Until such time period expires without designation having been made, the entire deposition transcript shall be treated as Attorneys' Eyes Only Discovery Material unless otherwise specified in writing or on the record of the deposition by the disclosing person. If the disclosing person designates deposition testimony as Confidential or Attorneys' Eyes Only, the final transcript of the designated testimony shall be bound in a separate volume and marked "Confidential Information Governed By Protective Order" or "Attorneys' Eyes Only Information Governed by Protective Order" by the reporter.

Paragraph 7 of the Protective Order defines "Attorneys' Eyes Only" as follows:

> A person producing any given Discovery Material may designate as "Attorneys' Eyes Only" such material where: (i) the producing person reasonably and in good faith believes that disclosure of the Discovery Material to the full extent permitted by this Order reasonably could result in substantial competitive, commercial or personal harm to any person; or (ii) such Discovery Material includes highly personal information including medical, financial or personnel records, trade secrets within the meaning of Fed. R. Civ. P. 26(c)(1)G), and/or non-public financial information of a third party.

To challenge such designations, Paragraph 13 of the Protective Order provides as follows:

> Any party who either objects to any designation of confidentiality or who requests still further limits on disclosure (such as "Attorneys' Eyes Only"), may at any time prior to the trial of this action serve upon counsel for the designating person a written notice stating with particularity the grounds of the objection or request. If agreement cannot be reached promptly, counsel for all affected persons will convene a joint telephone call with the Court to obtain a ruling.

On or about February 17, 2017, Plaintiffs served two employees of non-party Nationwide Title Clearing, Inc. ("NTC"), Bryan Bly and Erika Lance, with subpoenas to appear as witnesses at their respective depositions to obtain their personal knowledge as to the preparation process and filing of documents by NTC, an entity whose actions have contributed to the injuries suffered by Plaintiffs at issue in this action.

Both depositions were taken on March 21, 2017. Mr. Bly was deposed first, and provided information regarding his positions at NTC, which included serving as a Title Policy Researcher, Document Inspector (a quality control position), a notary, as well as an authorized representative to sign documents on behalf of banks and mortgage companies, including Chase, and other duties and responsibilities at NTC. He testified that he had signed documents for Chase, such as Lien Releases, but had no knowledge as to whether Chase actually had a lien on the properties or as to how mortgage-related documents such as a Lien Release were prepared or whether they were accurate. At the end of the deposition. Chris Barker, counsel for Mr. Bly, designated under the Protective Order the entire transcript "For Attorneys' Eyes Only", claiming that dissemination of Mr. Bly's personal information could cause problems for him and because he didn't want any "harassment".

Plaintiffs then began the deposition of Erika Lance, whose name was disclosed as having prepared the actual fraudulent documents, such as the lien releases, that had damaged Plaintiffs in

their business and property. At first, she testified that she knew the types of work or the types of clients NTC has and that she prepared the lien releases and other mortgage related documents on behalf of Chase contained in Composite Exhibit 1 to her deposition transcript, which pertained to notes and mortgages owned by Plaintiffs, not Defendants. She also testified that she had the personal knowledge as to how NTC's systems worked to create those documents, the content of the forms, and the systems used to create the documents, but she refused to testify about that information. The witness, however, claimed that she was "not there on behalf of NTC" and then Mr. Barker – who is also representing Ms. Lance – directed her not to answer questions, claiming she was not authorized to testify *even based on her personal knowledge*. Mr. Barker admitted that his claim that Ms. Lance's employer, NTC, might take action against her was purely hypothetical. After an exchange among the lawyers where it became obvious that no progress could be made on this issue, Plaintiffs were forced to terminate the deposition since Ms. Lance continued to refuse to provide answers to highly relevant questions within her personal knowledge. As with the deposition transcript of Mr. Bly, Mr. Barker designated the entire transcript of Ms. Lance's deposition "For Attorneys' Eyes Only" under the Protective Order as well.

Prior to filing this Motion, Plaintiffs wrote further to Mr. Barker to object to the wholesale designations of these deposition transcripts as "Confidential and Attorneys' Eyes Only". This objection was renewed during a telephonic conference with the Honorable James Francis IV on April 11, 2017, and the Court instructed Plaintiffs to file a motion challenging the confidentiality designations, outlining the bases for their objections to the designations, by April 14, 2017.

The blanket designation of both transcripts as "ATTORNEYS" EYES ONLY" was improper under the Protective Order because neither the questions asked nor the answers provided revealed highly personal information, non-public financial information, or could otherwise result

in substantial competitive, commercial or personal harm to either deponent. The answers provided by both deponents were based solely on publicly available employment background and job responsibilities. No highly personal information such as medical, financial, personnel records, competitive information or trade secrets were contained in the transcripts.

Mr. Barker's purported justification of his wholesale designations of the deposition testimony of Mr. Bly and Ms. Lance as "ATTORNEYS' EYES ONLY" was that NTC employees had been subject to harassment in the past based on the contents of prior deposition transcripts. However, the transcripts at issue in this action provide no non-public information regarding NTC or these employees, particularly with regard to Ms. Lance's transcript, wherein she refused to answer any specific questions.

LEGAL STANDARD

"Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *In re Parmalat Securities Litigation*, 258 F.R.D. 236, 242, *citing In re Zyprexa Injunction*, 474 F.Supp.2d 385, 415 (E.D.N.Y. 2007), *quoting Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984). "The touchstone of the court's power under Rule 26(c) is the requirement of 'good cause.'" *In re Parmalat*, 258 F.R.D. at 242, *quoting In re Zyprexa*, 474 F.Supp.2d at 415. "Where . . . [the discovery] is relevant, the burden is upon the party seeking nondisclosure or a protective order to show good cause." *Yukos Capital S.A.R.L. v. OAO Samaraneftegaz*, No. 10 Civ. 6147(PAC), 2012 WL 3055863, at *10 (S.D.N.Y. July 24, 2012), *citing Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992), *quoting Penthouse Int'l. Ltd. v. Playboy Enterprises, Inc.*, 663 F.2d 371, 391 (2d Cir. 1981).

"A blanket protective order temporarily postpones the good cause showing until a party or intervenor challenges the continued confidential treatment of particular documents. The burden of establishing good cause then lies with the party seeking to prevent the disclosure of documents." *In re Parmalat*, 258 F.R.D. at 242, *citing Gambale v. Deutsche Bank AG*, 377 F.3d 133, 139 (2d Cir. 2004); *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987); 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2035 (2d ed. 2008).

ARGUMENT

I. PLAINTIFFS' MOTION TO CHALLENGE THE BLANKET DESIGNATION OF THE DEPOSITION TRANSCRIPTS OF BRIAN BLY AND ERIKA LANCE AS CONFIDENTIAL AND ATTORNEYS' EYES ONLY SHOULD BE GRANTED.

Counsel for Plaintiffs subpoenaed two non-parties, Brian Bly and Erika Lance, for their depositions, and counsel took their depositions on March 21, 2017. Both non-party witnesses were asked questions related to the discovery permitted by the July 14, 2016 Order entered by the Honorable James Francis IV in this action. In that Order, the Court specifically stated that Defendants shall produce documents related to Plaintiffs' loans purchased from Chase and the commercial dispute between the parties, which includes the wrongful lien releases and other documents recorded that adversely affected Plaintiff's lien rights:

> "Documents focused on the loans that the defendants sold to the plaintiffs", which the Court recognized as being "relevant to 'the private, commercial dispute between the parties';
>
> "Documents relating to communications, investigations, research, policies, or selection criteria connected to loan forgiveness letters sent on September 13, 2012, December 13, 2012, and January 13, 2012," which the Court also held were relevant, "as are similar documents relating to the pre-DOJ Lien Release Program, even though these documents relate also to loans not sold to the plaintiffs." July 14, 2016 Memorandum and Order, at 11-12 (DE No. 111).

The questions directly related to the ordered discovery – documents prepared by deponents which affected Plaintiffs' rights in the loans purchased from Chase. The questions asked solely related to their personal knowledge. Mr. Bly readily answered these questions, and then inexplicably, through counsel, elected to have the entire transcript designated Attorneys' Eyes Only. Ms. Lance answered a handful of questions before her deposition was terminated due to her refusal to answer further questions, and she too then elected to have her entire transcript designated Attorneys' Eyes Only.

There is a protective order in place in this action which protects any information that legitimately falls within any of the categories set forth in paragraph 7 of the protective order to qualify for "Attorneys' Eyes Only" treatment. Those categories are:

(1) material whose disclosure could result in substantial competitive, commercial or personal harm;

(2) material that is highly personal information, including medical, financial or personnel records, as well as trade secrets; and/or

(3) non-public financial information of a third party.

During Mr. Bly's deposition, he was asked about his employment at NTC, including what positions he has held there. He answered the question, and disclosed his job titles and also shared the scope of his duties and responsibilities at NTC. He was also asked, based on his personal knowledge, about the signing of Lien Releases and other mortgage related documents, and he testified that he signed documents for Defendants, including Lien Releases, but did not know whether Defendants had liens on the properties or how the Lien Releases were prepared.

His testimony about his job titles and responsibilities at NTC does not qualify as information that could cause him personal harm, or impose commercial harm or a substantial competitive threat to him or to his employer, NTC. Similarly, this testimony did not touch on his medical, financial or personnel records, and counsel for Plaintiffs cannot believe Mr. Bly believes his job titles and responsibilities are trade secrets. *See e.g., Yukos Capital*, 2012 WL 3055863, at *11 (court held that testimony about job titles "is not comparable to the type of personal information (medical files, criminal records, etc.) typically subject to a protection order.", *citing Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66, 74 (S.D.N.Y. 2010)). Finally, the testimony about his job titles and responsibilities did not divulge non-public financial information about a third party. Therefore, the designations of any portion of the transcript addressing those topics as Confidential or Attorneys' Eyes Only should be stricken.

Similarly, his testimony that he signed documents for Defendants, including Lien Releases, but did not know whether Defendants had liens on properties or how the Lien Releases were prepared does not result in the disclosure of any information that could result in substantial competitive, commercial or personal harm, or the disclosure of highly personal information or non-public financial information. Mr. Bly was presented with copies of documents that are in the public record and asked questions about those documents. His testimony about those documents does not warrant designation as Confidential or Attorneys' Eyes Only, and the designation of any portion of the transcript addressing those topics should also be stricken.

During Ms. Lance's more abbreviated deposition, she too was asked about her employment with NTC, including what positions she has held there. She was also asked, based on her personal knowledge, about the preparation of Lien Releases and other mortgage related documents on behalf of Defendants. She testified that she knew the types of work and the types of clients NTC

has, and that she prepared lien releases and other mortgage-related documents on behalf of Defendants. She further testified that she had personal knowledge as to how NTC's systems worked to create those documents and the content of the forms, and the systems used to create documents, but she did not in fact disclose any information about those topics.

As with Mr. Bly, Ms. Lance's testimony about her job titles and responsibilities at NTC in no way warrant protection under the Protective Order, and the designation of any portion of her deposition transcript regarding her job titles and responsibilities should be stricken. This is not non-public financial information, or otherwise highly personal information, or information whose disclosure would occasion significant competitive, commercial or personal harm on Ms. Lance or her employer, NTC.

Further, as the remainder of the transcript was an exercise in futility to get Ms. Lance to honor her obligation to answer questions based on her personal knowledge, there was no information ultimately disclosed during the deposition by Ms. Lance about any aspect of the operations of her employer, NTC. She was asked questions, and improperly refused to answer them. She does not have a right to shield her intransigence from discovery by the blanket assertion of the rights afforded under the governing Protective Order.

Legitimately confidential information that would have been revealed during her deposition would warrant the protections afforded by the Protective Order. However, the confidentiality of questions regarding publicly-filed documents produced by NTC without designation of confidentiality, and Ms. Lance's previous unfettered willingness to answer the same type of questions at prior depositions undermines any claim by Ms. Lance that her testimony regarding those documents is confidential.

The onus is upon deponents to show good cause for the blanket designation of their respective deposition transcripts as Confidential and Attorneys' Eyes Only, and they have not, and cannot:

> "[W]here as here, the confidentiality designation is contested, the party seeking to maintain confidential treatment for the challenged document will have the burden of establishing good cause for the continuation of that treatment." *Orwasher v. A. Orwasher, Inc.*, No. 09 Civ. 1081(VM)(JCF), 2010 WL 2017254, at *3, *quoting U2 Home Entertainment, Inc. v. KyLin TV, Inc.*, No. 06 CV 2770, 2008 WL 1771913, at *2 (E.D.N.Y. 2008)

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order striking the designation of the entire deposition transcripts of Erika Lance and Brian Bly as Confidential and Attorneys' Eyes Only.

CERTIFICATE OF MEET AND CONFER

Counsel for Plaintiffs have conferred with counsel for Brian Bly and Erika Lance in a good faith effort to resolve by agreement the issues raised in this motion but that counsel for Brian Bly and Erika Lance does not agree to the relief sought in this motion. The Court further instructed counsel for Plaintiffs to file this motion on or before April 14, 2017.

Dated: New York, New York.
April 14, 2017

Respectfully submitted,
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