IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Peoples First Community Bank,

Plaintiff,

vs. CASE NO.: 5:12-cv-00398-RS-GRJ

GREG M. BRUDNICKI,
JOSEPH F. CHAPMAN, III,
HENRY CLAYTON FUTRELL,
PHILIP W. GRIFFITTS,
JOHN ROBERT MIDDLEMAS, JR.,
RODNEY C. MORRIS,
RAYMOND E. POWELL, and
JOHN STEPHEN WILSON, II,

Defendants.
_____/

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF PROTECTIVE ORDER RELATING TO CONFIDENTIALITY AND NON-DISCLOSURE

Defendants, Greg M. Brudnicki, Joseph F. Chapman, III, Harry Clayton Futrell, Philip W. Griffitts, John Robert Middlemas, Rodney C. Morris, Raymond E. Powell, and John Stephen Wilson, II ("Defendants"), hereby oppose the Plaintiff's Motion for Entry of Protective Order Relating to Confidentiality and Non-Disclosure (Doc. #13) filed by the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for Peoples First Community Bank (the "Bank").

Introduction

The FDIC's motion attempts to hide its documents under a blanket of secrecy. The FDIC has proposed that virtually all information in this case be subject to "blanket" confidentiality. This includes every piece of paper and all information related to the loans, borrowers, collateral, real estate developments, bank exams, and policies of the Bank. Even though the loans date back six to eight years and have been subject to public foreclosure actions, the FDIC has attempted to impose a shroud of silence on the facts. Under the FDIC's proposal, potential witnesses would have to sign an "agreement" before they could review or discuss the details of any of the loans or other information. (Pl.'s Mot. Entry Protective Ord. Ex. A at 7, ¶ 7.) The names of all individuals who sign the non-voluntary "agreement" would then be turned over to the FDIC, allowing it to track the interviews of potential witnesses. (*Id.*) Part of the witness "agreement" also requires that each individual submit to potential "monetary damages and/or injunctive relief" for any disclosure of information not authorized by the FDIC. (Pl.'s Mot. Entry Protective Ord. Ex. A Attach. A.) This is intimidating, overreaching, and completely unnecessary.

The FDIC has failed to establish good cause for entry of such an onerous proposal. The loans in question date back to 2005 through 2007, some six to eight years ago. The Bank has not operated since 2009. Ten out of the eleven loans in question have been the subject of public foreclosure actions. *See* Exhibit A. There is therefore nothing confidential about the loans, borrowers, collateral, or real estate projects in question. Unfortunately, there are no current depositors of the Bank and prior examinations have no bearing on any ongoing operations. The FDIC has failed to show any evidence in the

record as to why "blanket" confidentiality should apply, especially to these stale transactions. To the extent that the documents in question contain any personal confidential financial information, such as Social Security numbers or personal financial statements, Defendants have proposed an adequate confidentiality order. *See* Exhibit B. Defendants urge the Court to reject the FDIC's proposal and enter a simple order, if at all, to protect any legitimate confidentiality concerns.

Procedural Background

Defendants served a detailed document request on April 4, 2013. The FDIC responded and objected on May 9, 2013. Counsel for Defendants have made repeated demands for production of documents. After numerous requests, the FDIC stated that it would refuse to produce any documents whatsoever without the entry of its own lengthy, complex, and intrusive protective order. Defendants suggested an alternative, simple order that covers any legitimate confidentiality concerns. *See* Exhibit B.

Argument

The FDIC is hampering Defendants' ability to defend themselves from the overreaching and abusive allegations of this case. The order proposed by the FDIC unduly restricts the Defendants' access to and use of documents and information needed for the defense of this case. The FDIC has failed to satisfy its burden to establish confidentiality for specific documents or information as required by Rule 26, Federal Rules of Civil Procedure. For this reason alone, the FDIC's motion should be denied. It is irrelevant that some counsel in other cases have acceded to the FDIC's demands and stipulated to the entry of the FDIC's proposal. No such stipulation exists in this case.

None of the orders cited by the FDIC involved contested motions such as this one.

I. This Court should not Enter Blanket Findings of Confidentiality.

The FDIC's protective order requires the Court to make questionable findings without any record evidence. The FDIC proposal at paragraph 2, pages 2 to 4, impermissibly makes findings that would cover essentially all the documents and information related to this case. Such an order would effectively grant the confidentiality of an untold number of documents without any independent oversight or examination of such documents. The FDIC's proposal would force Defendants to incur substantial time and expense in challenging the designation of documents as confidential. This would also impose an added burden on the Court in resolving disputes over confidentiality designations.

In contrast, Defendants' protective order requires no such preliminary findings of confidentiality by the Court. Instead, Defendants' proposed order strikes the proper balance between legitimate confidentiality concerns and avoiding unnecessary restrictions on information. Defendants' proposal provides for redaction of social security numbers and personally identifiable, nonpublic, financial information, and it provides that "[e]ach recipient of Confidential Material shall keep the information confidential, and shall use it only for the purposes of this litigation." *See* Exhibit B at 2-3, ¶¶ 4-6.

II. Specific Categories of Documents are not Subject to Confidential Treatment.

A. Loan Information.

The loans in question are simply not confidential. Borrowers obtained loans for real estate developments between 2005 and 2007, some six to eight years ago. Many of

these projects were widely publicized at the time and numerous individuals have knowledge about the loans. Mortgages were recorded in the public record. After the real estate crash, foreclosure actions were filed against the borrowers and guarantors. *See* Exhibit A.[1] At this point, there is virtually nothing that could remain confidential about the loans, with the exception of personal financial information such as Social Security numbers. This information can be protected in a far less restrictive manner than that proposed by the FDIC.

Under the FDIC proposal, all information related to loans, including the names of the borrowers, would become "Confidential Material." (*See* Pl.'s Mot. Entry Protective Ord. Ex. A at 2, ¶ 2.) Defendants could not discuss this "Confidential Material" with anyone who did not sign the onerous and legally incorrect Attachment A, "Agreement to Maintain Confidentiality." This "Agreement" will have a chilling effect on Defendants' ability to gather information because it requires the signatory to "acknowledge that I may be subject to claims for monetary damages and/or injunctive relief for unauthorized disclosure or use of Confidential Material …." (Pl.'s Mot. Entry Protective Ord. Ex. A Attach. A.) This draconian restriction does not differentiate between inadvertent disclosure and intentional disclosure. It merely says "unauthorized," which presumably refers to authorization from the FDIC. This would impose liability for innocent, yet "unauthorized," disclosures. It would also impose liability for discussing information that is already widely available in the public domain. Defendants will not stand for a secret trial. The information related to the loans will necessarily become a part of the

[1] Defendants believe that Exhibit A accurately reflects the foreclosure cases. However, the FDIC has refused to produce any documents whatsoever so this cannot be confirmed.

public record in hearings and at trial. Defendants, potential witnesses, and those with information related to the defense should therefore not be forced to sign the FDIC's agreement to secrecy, which subjects them to unfounded penalties, only to have the information disclosed in Court and at trial. The agreement is unnecessary and only serves to discourage cooperation from witnesses.[2]

In addition, the FDIC's proposed order incorporates statutory and regulatory provisions that should not be used to define confidential material in this case. First, the FDIC asserts that documents specified in 5 U.S.C. § 552, the Freedom of Information Act, should be confidential. (Pl.'s Mot. Entry Protective Ord. Ex. A at 3, ¶ 2(b).) But, that statute is inapplicable in this litigation.[3] Second, the Court may overrule the statute and order disclosure under 12 C.F.R. Part 309. *See* 12 C.F.R. § 309.5(g), n. 1 ("Classification of a record as exempt from disclosure under the provisions of this paragraph (g) shall not be construed as authority to withhold the record if it is otherwise subject to disclosure under … any directive or order of any court of competent jurisdiction."). Accordingly, Defendants refuse to agree to blanket approval under contested regulations and

[2] Moreover, the FDIC has not established a sound basis for claiming individuals will be subject to damages outside of any agreement to such effect. The loans are 6 to 8 years old, the Bank has closed, and there will be no harm to competitors if information about the stale transactions is made public. The mere threat of such penalties will likely inhibit witness participation and prevent Defendants' attempts to get unfettered access to facts and witnesses in connection with preparing their defense. Accordingly, the agreement proposed is overreaching and serves no useful purpose, especially considering Defendants' proposal adequately ensures information is only used for the purpose of this litigation. *See* Exhibit B at 2, ¶ 4.

[3] The cited Section even specifically states: "This section does not apply to matters that are… contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C.A. § 552.

procedures that will hinder discovery. Defendants request that the Court reject the FDIC's attempt to determine the confidentiality of numerous unseen documents under these provisions.

Moreover, the FDIC itself has made very public allegations concerning the loans and Defendants are entitled to defend themselves in open court. Yet, the FDIC's proposal requires that all "Confidential Material" be filed under seal. (*See* Pl.'s Mot. Entry Protective Ord. Ex. A at 8, ¶ 9.) This requirement is unreasonable and extreme as the loans in question are all public knowledge. Under the FDIC's proposal, not even the name of the borrower can be mentioned in a court document unless it is filed under seal. This would be an absurd result, yet it is precisely the result dictated by the FDIC proposal. How can we have an open trial if the FDIC insists that the evidence remain secret? Defendants' proposal ensures the information will only be used for the purposes of the litigation. *See* Exhibit B at 2-3, ¶¶ 4-6. Defendants' proposal also avoids unnecessarily burdening the parties and Court with filing under seal and unnecessarily intimidating potential witnesses by forcing them to agree to be subject to penalties for cooperating with the litigation. *Johnson & Johnson Vision Care, Inc. v. CIBA Vison Corp.*, 303CV800J99TEM, 2005 WL 2063785 (M.D. Fla. Aug. 18, 2005) ("[P]arties should narrowly tailor the list of documents desired to be kept under seal with the understanding that whether documents may be filed under seal is a separate issue from whether the parties may agree that the documents are confidential, that motions to file under seal are disfavored, and that the Court will permit documents to remain under seal only upon a finding of extraordinary circumstances and particularized need.") (citations

omitted); *Crable v. State Farm Mut. Auto. Ins. Co.*, 5:10-CV-402-OC-37TBS, 2012 WL 933197 (M.D. Fla. Mar. 20, 2012) ("The sealing of court records is highly disfavored.… This Court pays particular attention to motions to seal because the public and press have a common-law right to inspect and copy judicial records.… The First Amendment also provides the public and press with a constitutional right of access to court records.") (citations omitted).

B. Bank Examinations.

The examinations in question relate to Peoples First Community Bank, which has not operated since December 2009. Therefore, there is no risk that the disclosure of the examinations will affect the operation of the Bank, its depositors, or others previously involved with the closed Bank. Also, the FDIC has publicly alleged a substantial amount of information related to the regulatory supervision of the Bank in the complaint. The FDIC has waived any claim to confidentiality by making these public allegations and selective disclosures. The FDIC is trying to have it both ways: make public allegations, yet keep the truth under wraps. Defendants believe that they complied with all bank examinations and other requests and should be allowed to file documents openly that support their defense. Defendants are entitled to unfettered access to the examinations in question in order to defend themselves against the FDIC's abusive allegations. Defendants are also entitled to discuss the bank examinations with potential witnesses without having to turn their names over to the FDIC so that the FDIC can track the interview process and Defendants' case.

C. Internal Bank Documents.

Because this Bank is no longer in operation, its historical documents should not be subject to the strict confidentiality sought by the FDIC. Likewise, the FDIC has made public allegations about internal operations and has thus waived any claims to confidentiality. For the same reasons listed above, the FDIC cannot abridge Defendants' due process and First Amendment rights by requiring such information to be filed under seal or discussed in a closed forum.

III. Adverse Impact on Defense of Claim.

The FDIC's blanket of secrecy will unduly limit Defendants' ability to gather information and facts in their defense. Several features of the proposal are unduly restrictive and heavy-handed. The FDIC's proposed protective order impermissibly restricts the Defendants' free speech and due process guarantees. The FDIC's proposed protective order also invades Defendants' attorneys' work product by restricting their ability to interview witnesses and obtain expert consultations without having to disclose those communications and consultations to the FDIC. This Court should reject the FDIC's proposal because it restricts Defendants' ability to prepare their defense, abridges their rights, and restricts their access to the Court.

/s/Charles Wachter
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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on this 24th day of May, 2013, this document was electronically filed with the Clerk of this Court by using the CM/ECF system, which will serve a copy on all counsel of record.

/s/Charles Wachter
Attorney