IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

METLIFE, INC., Plaintiff, v. FINANCIAL STABILITY OVERSIGHT COUNCIL, Defendant.	Civil Action No. 15-cv-45 (RMC)

REPLY BRIEF OF BETTER MARKETS, INC. ADDRESSING THE QUESTIONS PRESENTED ON REMAND

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INTRODUCTION AND BACKGROUND

This case concerns the viability of a uniquely important regulatory measure created in the Dodd-Frank Act that is essential for maintaining the financial stability of the United States. The FSOC's designation authority, attacked in this case, was designed to help avoid financial crises like the one that devastated our markets and our economy in 2008. *See MetLife, Inc. v. Financial Stability Oversight Council,* 177 F. Supp. 3d 219 (D.D.C. 2016) ("*MetLife I"*). Yet over half of the record remains redacted or fully under seal. These are the core documents selected by the parties from a vastly larger administrative record and deemed most essential for proving their respective claims and defenses on the merits.[1] The public has thus been deprived of its presumptive right of access to the record in a case with enormous implications for the public interest.

Better Markets intervened for the purpose of lifting the veil of secrecy from the record. After being denied relief in this Court, *MetLife, Inc. v. Fin. Stability Oversight Council,* No. CV 15-0045, 2016 WL 3024015, at *5 (D.D.C. May 25, 2016), *rev'd,* 865 F.3d 661 (D.C. Cir. 2017) ("*MetLife II*"), it appealed to the D.C. Circuit. The Circuit Court held that the records at issue, including the briefs and the Joint Appendix, are judicial records subject to the public's presumptive right of access, notwithstanding the confidentiality provision in Section 5322, 12 U.S.C. § 5322(d)(5)(A) (2012). *MetLife, Inc. v. Financial Stability Oversight Council,* 865 F.3d 661 (D.C. Cir. 2017) ("*MetLife III"*). As explained by the Circuit Court:

> The right of public access is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of the Judicial Branch. Although the right

[1] References in this memorandum to the "parties" are intended to denote the original parities to the case, MetLife and FSOC, unless otherwise indicated. In addition, references in this memorandum to the "sealed" or "redacted" materials encompass any and all of the information that has been withheld from the public record in this case, including documents that were never filed in the public record and documents that were filed but with portions redacted.

> is not absolute, there is a strong presumption in its favor, which courts must weigh against any competing interests.

MetLife III, 865 F.3d at 663.

The Circuit Court remanded the case to this Court so that it could apply the six-factor test established in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), for determining whether any asserted privacy interests in judicial records are sufficiently compelling to justify abrogating the firmly rooted presumption that all of the documents should be accessible to the public. The court highlighted some of the core principles that must guide the process on remand: "A seal may be maintained only 'if the district court, after considering the relevant facts and circumstances of the particular case, and after weighing the interests advanced by the parties in light of the public interest and the duty of the courts, concludes that justice so requires.'" *Id.* at 665 (quoting *In re Nat'l Broad. Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981). In distinguishing this case from *Hardaway v. District of Columbia Housing Authority*, 843 F.3d 973 (D.C. Cir. 2016), the court further explained that applying *Hubbard* to the voluminous records in this case would require a more "complex and intensive" analysis. *MetLife III*, 865 F.3d at 676. The court added that "this case involves a diverse array of financial data, some of which may include sensitive business information, some of which may not." *Id.* (emphasis added). Finally, the appellate court re-affirmed that this Court "must supply its reasoning 'with specific reference to the particular documents or group of documents to which each reason is applicable.'" *Id*. (quoting *Hubbard*, 650 F.2d at 324).

On November 8, 2017, this Court issued an order directing the parties "to proceed to briefing on the questions presented on remand," pursuant to a schedule. Order at 3, *MetLife I*, 177 F.Supp.3d 219 (No. 15-cv-45), ECF No. 120.

On December 20, 2017, Better Markets filed its opening memorandum of points and authorities, ECF No. 121 ("Open'g Br."), setting forth the basic principles that should guide this Court's application of the *Hubbard* factors pursuant to the D.C. Circuit's decision of August 1, 2017. Better Markets also demonstrated, even though it had no access to large portions of the record, that the *Hubbard* factors clearly favored unsealing the record, including the parties' briefs and the Joint Appendix.

On January 31, 2018, MetLife and FSOC each filed a memorandum of points and authorities in opposition to Better Markets' memorandum, ECF Nos. 124, 125 ("ML Br." and "FSOC Br."). On that same day, MetLife and FSOC also filed, for the first time, public versions of five volumes of the Joint Appendix that had previously been completely redacted. *See* ECF Nos. 123-1 to 123-5 (volumes 2, 3, 6, 7, and 10 of the Joint Appendix). Those volumes are still missing hundreds of pages that have been kept from public view, and they also contain pages with partial redactions. Also on that day, the parties re-filed one volume of the Joint Appendix (Volume 13), this time adding a 44-page memorandum that had been completely redacted from Volume 13 when it was originally filed. *See* ECF No. 123-6. Notwithstanding the additional portions of the record that were unsealed by virtue of these recent filings, more than half the record remains sealed or redacted.

Better Markets now respectfully submits this memorandum in reply to both MetLife and FSOC.[2] As shown below, the arguments made by MetLife and FSOC do not alter the conclusions that Better Markets set forth in its opening memorandum: Based on the information currently available in the public domain, the six *Hubbard* factors strongly favor the unsealing of the record.

[2] Better Markets received a 12-day extension, from the original due date of February 14, 2018 set forth in the Court's scheduling order, to February 26, 2018, in which to file this reply.

Furthermore, it is clear to that fulfill the mandate of the D.C. Circuit, this Court must conduct an intensive review of the sealed or redacted documents and each sealed or redacted portion thereof; must unseal the documents unless there are compelling reasons for maintaining secrecy; and must explain with particularity its reasoning with reference to the documents.

SUMMARY OF ARGUMENT

The *Hubbard* factors strongly favor the unsealing of the record in this case.

The need for public access. The need for public access is at its height because this case will have an enormous impact on the public interest and because the documents at issue—the briefs and the Joint Appendix—played a central role as the basis for the Court's decision on the merits. Contrary to MetLife's claims, no specific, individualized need for the documents is required. In addition, the D.C. Circuit has expressly rejected the notion that the briefs and the Joint Appendix are less deserving of transparency than this Court's opinions and orders, or that the partial access to the record made available so far is sufficient.

The extent of previous public access. At least some of the sealed or redacted documents or the information contained therein have previously been in the public domain, and it is highly implausible that *none* of the other voluminously sealed records have ever been publicly released. In any event, under the case law, this factor can never affirmatively support maintaining a seal.

The fact of objection and the identity of those objecting. Here, there are no non-parties objecting to the unsealing of the record, which is the most important consideration when applying this factor. While MetLife certainly objects to unsealing the record, FSOC's concerns are primarily focused on a smaller subset of the Joint Appendix. Moreover, the D.C. Circuit and this Court as well (in granting MetLife's motion to compel) have already rejected concerns that disclosure of the sealed information might inhibit future cooperation in the designation process.

The strength or nature of any property and privacy interests asserted. The parties' confidentiality concerns, and MetLife's in particular, are still weak on their face. Furthermore, the information already unsealed in this case, including the recently unredacted portions, confirm that the claims for secrecy have been grossly exaggerated. While Section 5322 must be afforded the appropriate weight in accordance with the Circuit Court's opinion, it has no impact on documents that were not "submitted to" FSOC in the designation process, and it remains one factor among six that must be applied under *Hubbard.*

The possibility of prejudice to those opposing disclosure. Just as claims about the nature of the sealed information are unconvincing, claims of the supposedly "incalculable" business harms or regulatory chilling effects that will attend public release of that information are also incredible. The recently unsealed material confirms this point as well.

The purposes for which the documents were introduced. This was the single most important factor in the *Hubbard* decision, and it powerfully supports unsealing of the record in this case. In *Hubbard,* the court's focus was on the peripheral role of the documents seized; in stark contrast here, the Joint Appendix was the evidentiary foundation of the case on the merits. MetLife attempts to avoid the force of this analysis by redefining the "purpose" test, but to no avail.

Finally, to ensure that the application of the *Hubbard* test is a meaningful exercise and not merely a perfunctory ritual, this Court must adhere to the well-established principles governing the six-factor test. The burden rests squarely on MetLife and FSOC to try to overcome the presumption of access, if possible, with specific justifications for confidentiality as to each sealed document or redacted portion; the Court must conduct an "intensive" analysis of all of the sealed documents and must unseal those documents absent compelling reasons; and, after weighing the competing interests at stake, it must explain its decisions with specificity.

ARGUMENT

I. THE *HUBBARD* FACTORS SUPPORT THE UNSEALING OF THE RECORD IN THIS CASE.

None of the arguments or authorities advanced in MetLife's and FSOC's briefs alter the fundamental fact that the *Hubbard* factors strongly favor the unsealing of the record.

A. The need for public access strongly favors unsealing, given the extraordinary importance of the case and the central role of the briefs and the Joint Appendix.

The first *Hubbard* factor is "the need for public access to the documents at issue." *MetLife III*, 865 F.3d at 665; *see also Hubbard*, 650 F.2d at 317. The impact of this consideration is a function of the importance of the case and the role the documents play in relation to the merits. Here, both considerations strongly favor unsealing the Joint Appendix: This litigation concerns the viability of the regulatory tools necessary to ensure the financial stability of the United States, an issue of immense public interest. *See* Open'g Br. at 16-18. In addition, the sealed documents pertain directly to the merits of the case. *See* Open'g Br. at 19-25. The D.C. Circuit underscored the point by observing that "by definition, the joint appendix contains information with which the parties hope to influence the court, and upon which the court must base its decision." *MetLife III*, 865 F.3d at 667. The parties' attempts to undercut this analysis all fail.

1. No particularized interest is necessary to exercise the public right of access.

MetLife erroneously claims that the need for public access is less compelling here because Better Markets is not asserting "any specific, individualized need" for access to the sealed records. ML Br. at 10. That is not the test enunciated in *Hubbard* or its progeny. *Hubbard* and subsequent decisions have made clear that this factor hinges not on any concrete motive for seeking access, but on the importance of the case to the public interest and whether the documents at issue pertain to the merits as opposed to a peripheral matter, such as a suppression hearing. *See, e.g.*, *Hubbard*

at 423; *United States v. Thompson*, 199 F. Supp. 3d 3, 11 (D.D.C. 2016) (finding a need for public access to addendum to sentencing memorandum because violations involved campaign finance laws and were "clearly a matter of public interest"). As demonstrated in Better Markets' Opening Brief, these elements clearly favor unsealing: This case has been and remains of historic importance, and all of the documents were central to the disposition of the merits of the claims and defenses presented.

The case MetLife principally relies upon, *United States ex rel. Schweizer v. Oce*, 577 F. Supp. 2d 169 (D.D.C. 2008), is not to the contrary. In fact, it rested on the bedrock principle that judicial records are presumptively accessible to **the public** in the broadest sense. "In this Circuit, 'the starting point in considering a motion to [un]seal court records is a 'strong presumption in favor of public access to judicial proceedings.'" *Id.* at 171 (quoted authorities omitted). Because *Schweizer* was a False Claims Act case, it presented unusual issues surrounding the defendant's need to see the exhibits to the relator's complaint in order to prepare an answer. But the court never adopted that motive as a required element, nor did it elevate that factor above the core concerns expressed in *Hubbard* over the public's right to have access to the record underlying any decision on the merits.[3]

[3] The court in *Schweizer* actually emphasized another general public interest, observing that U.S. taxpayers were the real parties in interest because the waste of taxpayer dollars is a concern in every False Claims Act case. *Schweitzer*, 577 F. Supp. 2d at 172. The interests of taxpayers who must inevitably bear the cost of financial institution bailouts also applies in this case. *See* Open'g Br. at 17. Furthermore, the court in *Schweizer* observed that the public interest is even more compelling—at its "apex"—when a case has reached the "adjudication stage," as the instant case certainly has. *Id.*, citing *Joy v. North*, 692 F.2d 880, 893 (2d Cir.1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.").

Other authority confirms the point. In *Apple Inc. v. Samsung Electronics Co., Ltd*., 727 F.3d 1214 (6th Cir. 2013), also cited by MetLife, the court expressly rejected the notion that a specific interest in accessing sealed information, such as information that might benefit particular shareholders or consumers in some concrete way, was necessary or even relevant to the common law right of access to judicial records. The court made clear that "The presumption in favor of public access to court documents is based on 'promoting the public's understanding of the judicial process and of significant public events." *Id.* at 1226 (quoted authority omitted). Thus, access does not hinge on any type of "specific, individualized need" for judicial records, contrary to MetLife's suggestion, ML Br. at 10.[4] *See also* Open'g Br. at 24 n.13 (noting that even under a "specific needs" test, Better Markets qualifies).

2. The briefs and the Joint Appendix are covered by the public right of access to the same degree as this Court's orders and opinions.

MetLife also mistakenly attempts to subordinate the importance of the sealed briefs and the Joint Appendix to this Court's orders and opinions. ML Br. at 11. The short answer to this argument is that the D.C. Circuit rejected it in this case. The Circuit Court expressly dismissed the notion that "a completely public opinion" issued by this Court could determine whether other documents, including the briefs and the Joint Appendix, were subject to the public's right of access. *MetLife III*, 865 F.3d at 668. And the fundamental rationale for the Circuit Court's decision emphasized the singular importance of the briefs and the Joint Appendix: It explained that all of the briefs and the entirety of the Joint Appendix were intended to influence this Court, were

[4] FSOC cites to *Apple* for the proposition that "extraordinary" public interest in a case does not necessarily justify public access to every document filed. FSOC Br. at 10. But the D.C. Circuit holds that the degree of public interest in a case is directly and persuasively relevant to the first *Hubbard* factor. *See* Open'g Br. at 16-17 and cases cited therein.

required under principles of administrative law to be reviewed by this Court, and had to be accessible for anyone to know "which parts of those materials persuaded the court and which parts failed to do so." *Id.* The court in *Hubbard* made the same point, noting that the need for public access was less acute because in that case, the public already had access to the "stipulated record which was the basis for the defendants' convictions." 650 F.2d at 317-18. Here, in contrast, the "stipulated record" is the Joint Appendix, and it remains heavily redacted.

3. The partial access to the record allowed so far does not undercut Better Markets' right to see the entire record.

MetLife and FSOC both advance the idea that further unsealing of the record is unnecessary because the public already has ample means of evaluating this Court's decision. *See* ML Br. at 11-13; FSOC Br. at 8-11 (claiming that unsealing is unlikely to improve the public's understanding of this Court's ruling). Both parties dwell on the amount of **un**redacted information in the briefs and the Joint Appendix, and MetLife in particular highlights the successively less redacted versions of the Joint Appendix that the parties have filed over time.

This line of argument fails for multiple reasons. First, it is inconsistent with the Circuit Court's holding. The D.C. Circuit rejected this type of "is it roughly sufficient?" analysis advanced by the parties. Rather, it held that the public was presumptively entitled to the briefs and the entire Joint Appendix, representing an already highly distilled collection of relevant documents: "Without access to the sealed materials, it is impossible to know which parts of those materials persuaded the court and which failed to do so (and why)." *MetLife III*, 865 F.3d at 668.

In addition, the argument ignores the very substantial amount of information still sealed from public view. Even with the recent filing of less redacted portions of the Joint Appendix, whole swaths of it remain under seal, and many portions contain redactions interspersed

throughout.[5] MetLife and FSOC also ignore that while the briefs themselves have comparatively few redactions—nevertheless covered by the right of access—those briefs relied extensively on citations to sealed portions of the record, and that remains true to this day.

In reality, the parties' filing of successively less redacted portions of the Joint Appendix cuts against their position in several respects: It validates Better Markets' point that a careful re-evaluation of all redactions by the parties was necessary and feasible; it casts grave doubt on the validity of their confidentiality and prejudice claims, since so much of the unredacted material—especially in the volumes of the Joint Appendix that were filed on January 31st—cannot reasonably be viewed as confidential; and it makes even more manageable the particularized scrutiny of the now-smaller universe of documents remaining under seal that this Court must conduct in accordance with the D.C. Circuit's ruling.

4. FSOC's emphasis on partial redactions begs the question.

FSOC cites to *McConnell v. Federal Election Commission*, 251 F. Supp. 2d 919, 925 (D.D.C. 2003), for the proposition that where the competing public and private interests are strong, "partial or redacted disclosure [may] satisfy both interests. FSOC Br. at 10. This is a dubious proposition, since the public right of access is curtailed, not "satisfied," with every redaction, regardless of how modest in scope. In addition, this argument is unhelpful because it presumes that the private interests asserted really are strong. But that is a matter yet to be decided by this Court, taking into account all the facts and circumstances, including the progressive unsealing of

[5] Still under seal is almost the entire voluntary submission from MetLife to FSOC; the entirety of the materials subject to the protective order, representing at least 500 pages, *see* Order on Motion to Compel, ECF 93 (Dec. 8, 2015), at 1; the entire Oliver Wyman study, on which MetLife and FSOC relied extensively in their briefs (and even during MetLife's oral argument); and a significant amount of other information hidden from view under redactions scattered throughout the Joint Appendix.

information that has turned out to be singularly non-confidential. It also leaves open exactly what should be redacted even if the parties' privacy interest were found to be strong, another issue for this Court to determine by balancing those private interests against the enormous public interests in this case.

In other respects, *McConnell* is instructive in ways that support Better Markets' claims, not the parties. The court in *McConnell* repeatedly affirmed the "stringent" presumption of disclosure, 251 F. Supp. 2d at 924; recognized a weaker privacy interest in parties as opposed to non-parties, since the parties "chose to litigate," *id.* at 926; framed the test for confidentiality strictly and consistently in terms of either "trade secrets" or "sensitive political information," *id.* at 934; acknowledged the especially strong public interest in "unique litigation," *id.* at 936; recognized the especially strong interest in disclosure where information "did not involve peripheral matters but facts at the heart of the [merits]," *id.* at 940; and even rejected government arguments similar to those made by FSOC to the effect that disclosure might prejudice the ability of the government to obtain cooperation from third parties in the future, *id.* at 941-42. Also noteworthy, the court in *McConnell* set forth a very detailed analysis of the information subject to its decisions on unsealing, down to specific paragraphs, quotes, and line numbers. *See, e.g.*, *McConnell*, F. Supp. 2d at 923 n. 3.

B. The full extent of previous public access is unknown; in any event at least some sealed information has been in the public domain.

The second *Hubbard* factor is "the extent of previous public access to the sealed documents" or the information they contain. *MetLife III*, 865 F.3d at 665; *Hubbard*, 650 F.2d at 318. As the court explained in *Hubbard*, "[P]revious access has been considered relevant to a determination whether more liberal access should be granted to materials formerly properly accessible on a limited basis through legitimate public channels." *Hubbard*, 650 F.2d at 318.

This factor is difficult to assess without more information regarding the information under seal and its origins. However, as argued in the Opening Brief, it is implausible to contend that absolutely none of the vast amount of information under seal has previously been made public. Moreover, we know that at least some of the information that the parties placed under seal was indeed in the public domain. *See* Open'g Br. at 25-27.

1. Contrary to MetLife's assertion, the inquiry under the second factor encompasses prior disclosure of information, not only specific documents.

MetLife asserts that the second *Hubbard* factor is solely concerned with whether the **documents** in question have previously been made public, not whether the **information** they contain has been in the public domain. ML Br. at 14-15. The weight of authority actually cuts the other way, starting with *Hubbard* itself, where the court began its analysis of the second factor by framing it in terms of whether the "contents" of the documents at issue have already been publicly revealed. *Hubbard*, 650 F.2d at 424. Even Section 5322 of the Dodd-Frank Act, on which MetLife has relied so heavily throughout this case, is worded primarily in terms of content, not form, as it covers any "**data, information**, or reports" submitted under the designation title. 12 U.S.C. § 5322(d)(5)(A) (emphasis added).

MetLife also attempts to show why previously public information might nevertheless need to be maintained under seal because of what it might reveal in context. ML Br. at 14 (pointing to its redaction of public information about GE's divestiture plan, already publicly reported). But the example is weak, since that information, even if made public immediately, would have revealed no genuinely sensitive information: Market observers and even shareholders of MetLife were undoubtedly well aware of the possibility that MetLife might have to make structural changes in its operations if it were designated, a fact that was plain on its face and even more apparent in light of GE's prior experience. All this debate really confirms is that a detailed and particularized

analysis of the redacted documents and information, both on their face and in context, is essential to determine whether the information has previously been released—and to assess the other *Hubbard* factors as well.[6]

C. The fact of objection and the identity of those objecting favor unsealing, as no non-parties are insisting on confidentiality, FSOC is focused on a discrete subset of documents rather than MetLife's competitive position, and Better Markets strongly supports unsealing.

The third *Hubbard* factor is "the fact that someone has objected to disclosure, and the identity of that person." *MetLife III,* 865 F.3d at 665; *Hubbard,* 650 F.2d at 319-20. This factor also favors unsealing in this case, primarily because no non-parties support the redactions—those whose privacy interests courts most assiduously protect. In addition, FSOC's concern is with a discrete subset of documents received from other regulators, not MetLife's allegedly confidential business information. Finally, Better Markets strongly supports unsealing the record. *See* Open'g Br. at 27-31.

1. The case for sealing is relatively weak where no outsiders to the litigation seek to protect their privacy interests.

Contrary to MetLife's contention, ML Br. at 16, the case for sealing is comparatively weak where, as in this case, it is only the parties who are objecting to disclosure as opposed to outsiders seeking to protect a privacy interest. The court in *Hubbard* made the point expressly:

> We think that where a **third party's** property and privacy rights are at issue, the need for minimizing intrusion is especially great and the public interest in access to materials which have never been judicially determined to be relevant to the crimes charged is especially small.

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[6] Contrary to MetLife's claim, the weight of authority holds that lack of prior public access is at most a neutral factor. *See* cases cited in the Open'g Br. at 25; *see also American Professional Agency, Inc,* 121 F. Supp.3d at 25 ("the second *Hubbard* factor is 'neutral' where there has been no previous access").

650 F.2d at 293 (emphasis added). Conversely, it follows that where the only people objecting to unsealing are the parties rather than innocent bystanders to the litigation, and where the materials have been judicially determined to be highly relevant to the "crimes charged" or the merits, as in this case, then the public interest in access is especially strong. *See American Professional,* 121 F. Supp. 3d at 25 (noting that there had been no objections to unsealing by third parties, an important factor in *Hubbard*); *see also Shane Group Inc. v. Blue Cross Blue Shield of Mich.,* 825 F.3d 299, 308 (6th Cir. 2016) (privacy interests of third parties should weigh heavily in court's balancing equation).[7]

2. FSOC's objections to unsealing are largely derivative of MetLife's.

MetLife and FSOC both challenge Better Markets' argument that FSOC's opposition to unsealing is largely derivative of MetLife's. ML Br. at 16; FSOC Br. at 11. But the derivative and secondary nature of FSOC's position cannot be denied. First, as pointed out in the Opening Brief, FSOC admits that it accommodated MetLife's desire to keep its business information under seal. Open'g Br. at 28-30. Second, because the bulk of the information at issue relates to MetLife, the thrust of FSOC's objection cannot be the same as MetLife's: FSOC obviously cannot harbor any fears that release of MetLife's information will harm **FSOC's** competitive position. *See* Open'g Br. at 29.

FSOC raises the indirect concern that the release of information received from firms or regulators during the designation process might discourage companies and third parties from sharing confidential information with FSOC in the future. FSOC Br. at 12. That is a speculative

[7] None of the regulators who supplied information to FSOC have sought to intervene to protect whatever interests they may have in the sealed information. Moreover, even if they had, this Court would still have to assess whether the information they sought to hide was truly sensitive and if so, whether that sensitivity was strong enough to outweigh the public's presumptive right to see it.

scenario, and in any case one that the Circuit Court addressed and rightly set aside. It made two salient points, first that companies will still have incentives to voluntarily provide information to FSOC to fend off possible designation, and second, the Dodd-Frank Act grants FSOC the "trump card," the power to compel the production of information. *MetLife III*, 865 F.3d at 672.

This Court has also discounted FSOC's concerns about the potentially chilling effect of disclosing the information it received from other regulators. Initially, FSOC refused to produce that information even to MetLife, notwithstanding the existence of a protective order. MetLife consequently filed a motion to compel its production, which is now sealed in Volume 16 of the Joint Appendix. *See* Order on Motion to Compel, ECF No. 93, at 4. While "not insensitive" to FSOC's concerns, this Court did not find the argument persuasive and it appropriately granted the motion to compel. The Court ruled that the production of documents to MetLife was "an inevitable and (foreseeable) consequence of gathering the information and reviewing it as part of MetLife's designation." *Id.* The Court also cited the right of judicial review found in Section 5323(h), *id.* at 4, thus implicitly establishing that FSOC and the other regulators were aware, or should have been aware, that the documents could become relevant to a judicial proceeding and thereby subject to the attendant public right of access. As explained by the Court:

> It was FSOC's choice to request the information, and the regulators' choice to give it. Their memoranda of understanding are irrelevant; they cannot bargain among themselves to diminish MetLife's right to challenge the full record considered by the agency.

Order on Motion to Compel, at 4. Although the Court was also influenced by the safeguards in the protective order, its rationale regarding the inevitable possibility of disclosure are relevant here. In addition, if memoranda of understanding with other regulators cannot overcome MetLife's right to challenge its designation based on a full record, then those memoranda are even less capable of overcoming the public's strong, presumptive right of access to judicial records. *Cf. Shane Group,*

Inc., 825 F.3d at 307 (protective order restricting access to discovery materials is not reason enough to seal materials in the court record).[8]

D. The strength of any property and privacy interests favor unsealing on the current record because the interests asserted are comparatively weak.

The fourth *Hubbard* factor is "the strength of any property and privacy interests asserted." *MetLife III*, 865 F.3d at 665; *Hubbard*, 650 F.2d at 320. This factor also favors disclosure. Section 5322 has less significance than the parties claim. In addition, their general assertions about the allegedly sensitive nature of the sealed information and the harm supposedly threatened from its release do not pass muster under the case law. The recently unredacted portions of the Joint Appendix confirm the point. The net effect of the fourth *Hubbard* factor, as applied to this case, is that an independent, "complex," and "intensive" analysis is necessary by this Court to identify with particularity which portions of the record truly warrant continued sealing. *See* Open'g Br. at 31-38 and authorities cited therein.

1. Notwithstanding the weight that Section 5322 has under the D.C. Circuit's ruling, that statutory provision remains one factor among six in the *Hubbard* analysis.

MetLife and FSOC stress the role of Section 5322 in applying the fourth *Hubbard* factor, but its application in this case is more limited than they claim. ML Br. at 17; FSOC Br. at 3. First, as a threshold point, Section 5322 has no bearing whatsoever on the portions of the sealed material that were not "submitted" to FSOC in the designation process. *See* 12 U.S.C. § 5322(d)(5)(A);

[8] MetLife asserts incorrectly that Better Markets' objection to the sealing of the record is irrelevant to the *Hubbard* analysis. In fact, courts do consider whether anyone objects to the sealing of judicial records in ruling on motions to seal. For example, in *Thompson,* 199 F. Supp. at 11, a case cited by MetLife, the court granted a sealing request and was influenced by the fact that "both parties" sought to place material under seal, while no one—no intervenor or other member of the public—appeared to have objected to the sealing of the record.

MetLife III, 865 F.3d at 675 (Section 5322(d)(5)(A) represents a congressional judgement about the confidentiality of "nonpublic information **submitted to FSOC**") (emphasis added). This is yet another reason why a detailed analysis of the documents under seal is so important, so that the Court may differentiate information that was submitted to FSOC from that which was not.

Second, although Section 5322 must be given the weight afforded to it by the Circuit Court, it is nonetheless still one factor among six for this Court to consider with respect to information that **was** submitted to FSOC. Indeed, the thrust of the D.C. Circuit's decision in this case is that Section 5322 does not displace the *Hubbard* factors, and that this Court must apply all of them to the sealed information. In the words of the court, "[t]here is nothing in the language of Dodd-Frank to suggest that Congress intended to displace the long-standing balancing test that courts apply when ruling on motions to seal or unseal judicial records." *Id.* at 663. For that reason, MetLife is off the mark when it argues there is "no reason for this Court to second-guess" the congressional judgment embodied in Section 5322, ML Br. at 17. Weighing all of the *Hubbard* factors is not second-guessing anyone; it is following the mandate of the Circuit Court, which held that Section 5322 is not dispositive.

Both MetLife and FSOC also seek to re-litigate issues surrounding Section 5322 that the D.C. Circuit laid to rest. Specifically, to bolster the idea that Congress intended secrecy to prevail over all documents submitted in the designation process, they point to the clause preserving any privileges that may apply to information submitted to FSOC, Section 5322(d)(5)(B). They also cite to the clause preserving the application of FOIA to information submitted to FSOC, Section 5322(d)(5)(C). But the D.C. Circuit focused solely on the congressional judgment about confidentiality embodied in Section 5322(d)(5)(A), which simply requires FSOC to maintain confidentiality. With respect to the other two sections, the Court clearly rejected the notion that

they fortified any arguments against disclosure. To the contrary, the Court cited those provisions to make the very point that congress did not intend 5322(d)(5)(A) to be an absolute guarantee of confidentiality. *MetLife III*, 865 F.3d at 670. For example, as to FOIA (which is a transparency **enhancing** statute), the Court stated: "[B]y subjecting that material to FOIA at all, Congress made clear that it did not intend that the information be absolutely exempt from disclosure." *Id.*

2. MetLife's claims about the privacy interests at stake are suspect based on the information that has been unredacted.

MetLife expends considerable effort attempting to show that the sealed information is so sensitive and the prospective harm from its disclosure so great that the presumption of public access to all judicial records is overwhelmed. ML Br .at 17-23. However, those claims are insufficient to satisfy the fourth *Hubbard* factor, given the exacting standards governing the public's common law right of access to judicial records.

The weight of the case law makes clear that only bona fide trade secrets or information having equally intense privacy characteristics can overcome the public's right of access. In *American Professional*, for example, the court observed that the documents at issue did not contain "information of the kind for which a seal might be appropriate, for example, 'to protect trade secrets, or the privacy and reputation of victims of crimes,' or 'to guard against risks to national security interests.'" 121 F. Supp. 3d 21, 25 (D.D.C. 2013) (citing *Hubbard*); *see also McConnell*, 251 F. Supp. 2d 919 (using "trade secrets" as the core test). In *Shane*, the Sixth Circuit declared that "'in civil litigation, only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault),' is typically enough to overcome the presumption of access." 825 F.3d at 307-08. MetLife has consistently refrained from asserting that the sealed material rises to the level of a trade secret.

In short, judging from MetLife's conclusory characterizations of the business information it seeks to hide from public view, and based upon the nature of the information that has been unredacted to date, there is little basis for concluding that it is sufficiently sensitive to outweigh the public's right of access.

Consequently, it is especially important that this Court carefully scrutinize the sealed information and make an independent judgment. The case law—including especially the D.C. Circuit's opinion in this case—requires this Court to conduct a "complex" and "intensive" analysis to sift through all of the allegedly confidential information and separate the truly "sensitive" information from that which is not. *MetLife III*, 865 F.3d at 675-76. And even if the Court finds that the information constitutes bona fide trade secrets, it must still conduct a careful balancing test to determine if the threatened harm from its release outweighs the public interest in access to the documents. *See Apple Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1225 n. 4 (Fed. Cir. 2013) (even where trade secrets are involved, the analysis does not end, and the court must still weigh the private and public interests). And, as instructed by the D.C. Circuit, this Court "must supply its reasoning 'with specific reference to the particular documents or groups of documents to which each reason is applicable.'" *MetLife*, 865 F.3d at 675 (citing *Hubbard*).

MetLife's cites *Suture Express, Inc. v. Owens & Minor Distribution, Inc.*, 851 F.3d 1029 (10th Cir. 2017), to support the continued sealing of its allegedly confidential business information, but that case lends scant support to MetLife's position. There, the Tenth Circuit summarily granted the parties' motions to seal unredacted portions of their briefs and portions of the Joint Appendix in an antitrust case. However, no one objected to the sealing of the documents, which puts that case on a very different footing than the instant one. Moreover, the court in *Suture Express* confirmed the requirement that parties seeking to seal information must present "a real and

substantial interest that justifies depriving the public of access to the records that inform our decision-making process." *Suture Express,* 851 F.3d at 1046-47 (citation to quoted authority omitted). And while the Court found that the parties had met this burden, the case provides no detail about the exact nature of the information at issue, nor how the parties satisfied the court that sealing was warranted under the court's own rigorous test.

MetLife's reliance on *Apple Inc. v. Samsung Electronics Co., Ltd.,* 727 F.3d 1214 (Fed. Cir. 2013), is also misplaced. *Apple* was a Federal Circuit decision involving claims for patent infringement and it did not concern the application of the D.C. Circuit's *Hubbard* test. Nevertheless, it supports Better Markets' position on numerous issues. For example, the court established "trade secrets" as the benchmark for the type of business information that might be sufficiently compelling to overcome the public's right of access. *Id.* at 1221-22. In addition, the court's ultimate decision in *Apple* to seal records was shaped by three important facts that are absent in this case. The court noted that the parties had limited their claims for secrecy to "a small subset of the documents they originally sought to seal," *id.* at 1226, and even as to those items, they had carefully honed their request to only "their most confidential information." *Id.* In contrast here, the parties continue to assert confidentiality as to the majority of documents originally filed under seal, and as shown by the materials so far unredacted, they have clearly been overbroad, not austere, in asserting their secrecy claims. In addition, the parties fighting for confidentiality in *Apple* provided sworn declarations from officers or managers of the companies detailing the precise nature of the sealed information, the measures they took as a matter of standard practice to maintain the secrecy of that information, and the specific harm that they alleged would follow from disclosure of the information. MetLife has not supplied such detailed and credible support for its redactions. Finally, and especially significant, in *Apple*, the documents were not introduced into

evidence, making them more suitable candidates for sealing. *Id.* at 1226. This is in stark contrast with this case where the briefs and the Joint Appendix were by definition and according to the Circuit Court's opinion the very core of the record on which this Court's merits decision was based.

MetLife and FSOC repeatedly insist that the information under seal is deserving of confidential treatment because, for example, "MetLife has deemed [it] to contain confidential information," or it "contains supervisory information submitted to FSOC in confidence by state insurance regulators." FSOC Br. at 5. But the fact that MetLife insists that the information is confidential, or the fact that FSOC wishes to broadly protect documents containing supervisory information from other regulators, is simply insufficient. Moreover, those claims do nothing to show that even if true, they outweigh the public's presumptive right of access to judicial records. The Court must independently scrutinize the information, determine if it is intensely confidential, and then balance the strength of that privacy interest—whatever it may be—against the public's right of access.

E. The possibility of prejudice to those opposing disclosure favors unsealing based on the current record.

The fifth *Hubbard* factor is "the possibility of prejudice to those opposing disclosure." *MetLife III*, 865 F.3d at 665; *Hubbard*, 650 F.2d at 320-21. This factor also hinges very largely on exactly what lies beneath the redactions. As the court in *Hubbard* explained, a true assessment of the likelihood of prejudice would depend "on a number of factors, including most importantly, the nature of the materials disclosed." *Hubbard*, 650 F.2d at 320-21. And as the court further explained, understanding the nature of any of the sealed materials, and assessing the threat of prejudice from their disclosure, first requires a thorough examination of the documents at issue, to the point of "**complete familiarity**." *Hubbard*, 650 F.2d at 321 (emphasis added).

The case law makes clear that the party seeking to keep documents under seal must show that "disclosure will work a clearly defined and serious injury," an exercise where "specificity is essential" and "platitudes" will not suffice. *Shane Group Inc.*, 825 F.3d at 307-08; *cf. Hubbard,* 650 F.2d at 321 (court was concerned about the weighty matter of preserving the right to a fair trial). The parties have failed to make a convincing showing of prejudice. MetLife offers stock descriptions of supposedly dire harm expected to flow from disclosure of the information, but they amount to platitudes. Moreover, those claims lack credibility in light of the inconsequential nature of the revelations made in un-redacted portions of the record. And FSOC's concerns about discouraging future cooperation deserve little weight, as this Court concluded when it granted MetLife's motion to compel.

F. The purposes for which the documents were introduced strongly favors unsealing, as they were offered for the purpose of supporting the parties' arguments on the merits.

The sixth *Hubbard* factor requires the Court to consider "the purposes for which the documents were introduced during the judicial proceeding." *MetLife III*, 865 F.3d at 665; *Hubbard,* 650 F.2d at 321. The court in *Hubbard* found this to be "the single most important element" in its analysis, and as applied in this case, it weighs strongly in favor of unsealing the Joint Appendix: It was assembled, filed with the Court, and relied upon as the complete record basis for the respective parties' claims and defenses on the merits. There could be no more compelling example of documentary "purposes" that satisfy the sixth *Hubbard* factor.

MetLife attempts to avoid this daunting obstacle by fundamentally rewriting the sixth *Hubbard* factor. Rather than adhering to *Hubbard* and focusing on the **purposes for which the documents were introduced in this Court**—clearly favoring the unsealing of the record—MetLife resorts to a sleight of hand. It supposes that the sixth *Hubbard* factor is somehow focused

on whether unsealing the documents would offend the **purposes underlying the statute** that authorized the litigation. MetLife strays far afield by arguing that unsealing would conflict with the judicial review clause in the Dodd-Frank Act by punishing MetLife for seeking to challenge FSOC's designation.

That strategy fails, not only because it reinvents rather than applies the sixth *Hubbard* factor, but also because even measured by its own terms, it is simply wrong. The D.C. Circuit expressly rejected this Court's conclusion (and FSOC's similar argument) that it would be "unthinkable" to condition categorical protection from disclosure of a company's information on abstention from judicial review. *MetLife III*, 865 F.3d at 671. The core rationale was that a company does not surrender confidentiality by seeking judicial review, since the statute in fact preserved the common law right of access, which is **subject to** the *Hubbard* test. Thus, far from offending the statute, unsealing the documents following a *Hubbard* analysis would be fully consistent with the statutory framework in Section 5322.

II. A DETAILED REVIEW OF THE DOCUMENTS IS REQUIRED, FOLLOWED BY A DETAILED EXPLANATION OF THE COURT'S CONCLUSIONS.

MetLife reiterates its objections to Better Markets' previous requests that the Court pursue certain steps as it applies the *Hubbard* test, steps which this Court has rejected. ML Br. at 25. But separate from these issues, and the challenges Better Markets faces in briefing the *Hubbard* factors without more information, is the nature of the review that the Court must conduct under the D.C. Circuit's opinion. Two points warrant emphasis.

1. This Court's review must be intensive.

As Better Markets argued in its opening brief, the review must be very granular, and nothing MetLife asserts in its opposition alters this fact. The consistent theme in the case law is that any court evaluating claims for secrecy against the public right of access to judicial records

must conduct a detailed analysis, carefully balance the competing interests, and provide specific reasons for its conclusions. The D.C. Circuit observed that "this case involves a diverse array of financial data, some of which may include sensitive business information, some of which may not." *MetLife III*, 865 F.3d at 676. The Court went on to say that "Applying *Hubbard* to the records in this case will require a more complex and intensive analysis than was required in *Hardaway." Id.* at 676. It would be impossible to follow this path of identifying which information is sensitive and which is not without a close examination of each piece of information contained in the sealed documents. Plainly, the Circuit Court envisions a detailed review of all of the redacted material.[9]

2. The Court must supply its reasoning with specificity and the D.C. Circuit's reference to "groups of documents" must be narrowly construed.

In addition, the D.C. Circuit made clear that this Court "must supply its reasoning 'with specific reference to the particular documents or group of documents to which each reason is applicable.'" *MetLife III*, 865 F.3d at 675. Here again, the instruction requires specificity.

[9] MetLife prefaces its analysis of the specific *Hubbard* factors with the erroneous assertion that a court may **unseal** judicial records only for compelling reasons. In fact, just the opposite is true. Because the right of public access is a presumptive one, it is the decision to **maintain** a seal that requires a compelling justification. MetLife cites no authority for its reading of the law. The heading in Better Markets' brief evidently relied on by MetLife contained an obvious typographical error, a fact that should have been evident from the substance of the brief, the many cases cited therein, and a host of additional authorities. *See, e.g., Apple,* 727 F.3d at 1221 (the parties seeking to seal judicial records "must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure") (quoted authority omitted); *Shane Group Inc.*, 825 F.3d at 305 (the burden of overcoming the presumption of access is a heavy one, and only the most compelling reasons can justify non-disclosure of judicial records); *Kline v. Williams*, No. CIV.A. 05-01102 HHK, 2012 WL 1431377, at *1 (D.D.C. Apr. 25, 2012) (the *Hubbard* factors are considered when a court is determining "whether a movant has shown sufficiently compelling circumstances to overcome the presumption in favor of public access").

Moreover, the D.C. Circuit's reference to "groups of documents" only relates to this Court's explanation for its unsealing decisions; it does not mean that the Court can refrain from examining each and every sealed or redacted document, or portion thereof, or assume that groups of documents have the same confidentiality characteristics. *See Shane Group Inc.*, 825 F.3d at 307 (faulting the parties and the court for failing to explain why the interest in secrecy was compelling, why they outweighed the public interest, and why the sealing of "broad swaths of the court record" could be considered "narrowly tailored"). Even as to this Court's explanation of its reasons, groups of documents must be interpreted narrowly so as to encompass only those collections of documents that have the same confidentiality characteristics. *See id.* at 308 (contemplating a "document-by-document, line-by-line" demonstration on remand to satisfy the "demanding requirements for a seal").

FSOC contends that requiring a detailed review of each redaction would waste judicial resources, ignore the protections for confidential information afforded by the Dodd-Frank Act, and provide "no conceivable public benefit." FSOC Br. at 2. On the contrary. The D.C. Circuit has required a complex and intensive analysis of the sealed documents; such a close review is necessary to apply the *Hubbard* factors, taking Section 5322 into account; and only with the fulfillment of this process can the Court ensure that the public interest in access to the judicial records in a case of historic importance is fully vindicated.

CONCLUSION

For all of the foregoing reasons, the *Hubbard* factors weigh heavily in favor of unsealing the record in this case, including the briefs and the Joint Appendix. MetLife and FSOC have failed to show otherwise.

Dated: February 26, 2018 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2018, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the CM/ECF system. In accordance with Local Rule 5.4(d), electronically filing a document operates to effect service of the document on all counsel.

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