

**UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY**

In the Matter of

**Carrie Tolstedt, Former Head of the
Community Bank**

OCC AA-EC-2019-82

**Claudia Russ Anderson, Former
Community Bank Group Risk Officer**

OCC AA-EC-2019-81

**James Strother, Former General
Counsel**

OCC AA-EC-2019-70

David Julian, Former Chief Auditor

OCC AA-EC-2019-71

**Paul McLinko, Former Executive
Audit Director**

OCC AA-EC-2019-72

Wells Fargo Bank, N.A.
Sioux Falls, South Dakota

ALJ McNeil

**ORDER REGARDING ENFORCEMENT COUNSEL’S MOTION TO QUASH
DISCOVERY DEPOSITION SUBPOENAS ISSUED TO OCC EXAMINERS
MARK DEY ET AL.**

Upon applications received on September 22, 2020, Respondents Russ Anderson, Strother, and McLinko obtained from this Tribunal discovery deposition subpoenas directing depositions of OCC Examiners Mark Dey, Jeff Gregory, and Kevin Swanson. As provided for under OCC Uniform Rules of Practice and Procedure,¹ the requested subpoenas were issued on September 23, 2020. By a Motion filed September 24, 2020, Enforcement Counsel seeks an order quashing these discovery deposition subpoenas.²

In support, Enforcement Counsel aver the extant prehearing schedule set a deadline of September 11, 2020 for parties to file requests for discovery depositions of persons other than expert witnesses, making the September 22, 2020 requests untimely.³ The schedule also limits a

¹ See 12 C.F.R. §§ 19.170 (Discovery Depositions) and 19.171 (Deposition Subpoenas).

² Enforcement Counsel’s Motion to Quash Discovery Deposition Subpoenas Issued to OCC Examiners Mark Dey, Jeff Gregory, and Kevin Swanson, dated September 24, 2020.

³ *Id.* at 3-4, citing March 17, 2020 Notice of Hearing, Scheduling Order and Supplemental Prehearing Orders and September 18, 2020 Order Regarding Respondents’ Motion to Amend Schedule.

party to five non-expert witnesses, and Enforcement Counsel aver that with these deposition subpoenas, Respondents “have now exceeded their five-deposition limit.”⁴

The prehearing schedule referred to by Enforcement Counsel was one the parties introduced by mutual agreement.⁵ The Schedule sets forth terms that were materially different than the prehearing schedule established by this Tribunal.⁶ The agreed-upon schedule was adopted in full by this Tribunal, and it appears to be the product of a significant deliberative process by all of the parties, reflecting a reasonable and balanced negotiated settlement arrived at by well-informed participants. Material to the issues presented in Enforcement Counsel’s Motion to Quash is the deadline by which a party must provide notice of the party’s intention to take discovery depositions of expert witnesses and the maximum number of fact witnesses who could be deposed absent cause shown to exceed that number.

As originally established by the Tribunal’s March 17, 2020 Notice of Hearing, disclosure of the names of all witnesses – fact, expert, or hybrid – was due by May 15, 2020.⁷ The parties sought and received leave for this deadline to be amended to September 11, 2020.⁸

From the parties’ Joint Motion Requesting Reconsideration Regarding Scheduling, consensus at the time included consideration based on the existing state of the record, described in part in these terms:

Respondents believe that the current schedule does not allow them sufficient opportunity to develop the factual support for their defense. Enforcement Counsel acknowledges that the OCC’s investigation into Wells Fargo’s sales practices has taken place over the course of more than two years, during which time the OCC conducted more than 90 interviews of witnesses and reviewed at least a million Wells Fargo documents. In contrast, Respondents have not yet had the opportunity to depose a single witness and have only recently begun receiving document productions from the OCC.⁹

The parties appear to have acted in good faith between the time they submitted their Joint Motion Requesting Reconsideration Regarding Schedule, such that by September 2020 they were able to present initial witness lists.¹⁰ At no time did any party raise any claim regarding the five-person limit (absent cause shown) for fact and hybrid witnesses, nor to the unlimited number of experts who could be deposed.

When exchanged on September 11, 2020, the parties’ respective preliminary witness disclosures made it clear that there was a significant potential for duplication of testimony among

⁴ Enforcement Counsel’s Motion to Quash Discovery Deposition Subpoenas Issued to OCC Examiners Mark Dey, Jeff Gregory, and Kevin Swanson at 5, citing March 17, 2020 Notice of Hearing, Scheduling Order and Supplemental Prehearing Orders at 3.

⁵ See Joint Submission Regarding Schedule, dated March 17, 2020; Notice of Hearing, Scheduling Order, Supplemental Prehearing Order, issued March 17, 2020; Joint Motion Requesting Reconsideration Regarding Schedule, dated March 24, 2020; and March 25, 2020 Order Regarding Joint Motion Requesting Reconsideration Regarding Schedule.

⁶ See *id.*

⁷ Notice of Hearing, Scheduling Order, Supplemental Prehearing Order at 2-3.

⁸ Joint Motion Requesting Reconsideration Regarding Schedule, dated March 24, 2020; and Order Regarding Joint Motion Requesting Reconsideration Regarding Schedule.

⁹ Joint Motion Requesting Reconsideration Regarding Schedule at 4.

¹⁰ See Enforcement Counsel’s Preliminary Fact and Hybrid Fact-Expert Witness List

the named witnesses. Respondents noted this potential when they moved for an order to amend the deposition schedule.¹¹

Through their Motion to Amend, Respondents argued that the disclosures provided by Enforcement Counsel presented for the first time a comprehensive initial view of the number of OCC employees who were to be presented as expert witnesses having first-hand knowledge of the facts supporting their opinions – thus, “hybrid fact/expert witnesses”.

Respondents averred:

These witnesses are OCC employees, which means they are likely “off limits to [Respondents’] counsel.” *Id.* [*sic*¹²] And even if they were hypothetically available, “none would be required to provide information to [Respondents’] counsel informally.” *Id.* Nor do Enforcement Counsel’s disclosures provide reasonable notice regarding the substance of the expected testimony. Four of the witnesses – Ms. Candy, Ms. Crosthwaite, Ms. Moses, and Ms. Smith – have pages of nearly verbatim disclosures, and a fifth – Gregory Coleman – “incorporate[s] by reference the opinions that Enforcement Counsel expect other hybrid fact-expert witnesses to provide.” While the witness list is full of ultimate conclusions, it is short on details or explanations of the basis for those conclusions. Depositions are the only way Respondents will be able to elicit the information.¹³

Finding merit in the assertion that conditions existed that warranted treating OCC employees Elizabeth Candy, Gregory Coleman, Jennifer Crosthwaite, Karin Hudson, Christine Moses, and Tanya Smith as experts, I held on September 18, 2020 that the six named OCC witnesses are now deemed as having been identified by Enforcement Counsel as experts.¹⁴ Given that this expert-witness identification had been made prior to the scheduled deadline, all deadlines related to these witnesses (and these witnesses alone) were advanced, with a requirement that their reports and CVs be submitted in advance of discovery depositions, and with a deadline of October 16, 2020 for providing notice of the proposed depositions.

As expert witnesses, rather than hybrid fact/expert witnesses, the six named OCC employees no longer are presented in the record as either fact or hybrid witnesses – a change precipitated by the Order of this Tribunal. Under these conditions and with one exception (regarding Ms. Moses, addressed below), Respondents are entitled to supplement their applications for fact or hybrid fact/expert witnesses, so that each Respondent may depose that number to equal five per Respondent.

This determination reflects that the initial Scheduling Order did not impose an absolute limit of five on the number of fact or hybrid witnesses, but coupled the limit with a provision that more depositions could be ordered upon “sufficient cause shown”.¹⁵ In keeping with the terms of the Scheduling Order, I find Respondents’ Motion to Amend Scheduling Order constituted a sufficient memorandum supporting their request, and that cause has been shown – primarily

¹¹ Respondents’ Motion to Amend Scheduling Order, dated September 11, 2020.

¹² Respondent’s Motion to Amend cited to “*Scott*, 298 F.R.D. at 402” – without providing a complete citation; accordingly I make no finding that the OCC witnesses were or are in fact “off limits” to Respondents’ counsel.

¹³ Respondents’ Motion to Amend Scheduling Order at 4.

¹⁴ Order Regarding Respondents’ Motion to Amend Schedule, dated September 18, 2020, at 6.

¹⁵ Notice of Hearing, Scheduling Order, Supplemental Prehearing Order at 3.

based on the likelihood that without depositions the testimony of the six identified OCC witnesses may prove to be repetitive.

Responding to the September 18, 2020 Order, Enforcement Counsel filed a Notice amending their initial identification of witnesses.¹⁶ Through a submission dated September 24, 2020, they have re-designated one previously identified hybrid witness – Christine Moses – and now identify this witness as a fact witness, with no expert testimony anticipated.¹⁷ With this re-designation, Enforcement Counsel assert, Respondent McLinko (who requested Ms. Moses’ deposition) “is only entitled to one additional deposition witness rather than the two he noticed.”¹⁸

Through Enforcement Counsel’s September 24, 2020 Notice, I find the record now reflects OCC employee Christine Moses would appear as a fact witness, and that Enforcement Counsel no longer are presenting her as a witness who would be giving expert testimony.¹⁹ As now designated, the deposition of this witness would not fall within the unlimited number of witnesses subject to deposition and may be deposed only if counted against the five-deposition limit.

Enforcement Counsel also assert the requests that led to the September 22, 2020 deposition subpoenas lacked a sufficient showing of cause that would warrant additional depositions of fact witnesses, when considered under the appropriate proportionality analysis.²⁰ Along these lines, Enforcement Counsel assert that allowing additional examiner testimony “is likely to be duplicative of other OCC examiners’ testimony,” a point which, according to Enforcement Counsel, Respondents “appear to concede.”²¹

Enforcement Counsel also aver that taking the time needed to prepare for these depositions will “divert OCC examiners’ attention away from their important everyday responsibilities actively supervising the federal banking system,” at a time when “[f]inancial institutions ‘are beginning to see the adverse credit effects of the economic shock’ related to the COVID-19 pandemic.”²² Further, Enforcement Counsel aver Respondents failed to confer with them regarding their September 22, 2020 requests, such that the first time Enforcement Counsel learned that Respondents sought to depose additional OCC examiners was when the September 22 requests were filed.²³

With respect to the failure of Respondents to confer, the record suggests that none of the parties to this enforcement action understood there was an obligation to confer before requesting

¹⁶ Enforcement Counsel’s Notice of Re-Designation of Christine Moses as a Fact Witness, dated September 24, 2020.

¹⁷ *Id.* at 8.

¹⁸ *Id.*

¹⁹ Enforcement Counsel’s Notice of Re-Designation of Christine Moses as a Fact Witness, dated September 24, 2020.

²⁰ Enforcement Counsel’s Motion to Quash Discovery Deposition Subpoenas Issued to OCC Examiners Mark Dey, Jeff Gregory, and Kevin Swanson at 6, quoting *Vallejo v. Amgen*, 903 F.3d 733, 742-43 (8th Cir. 2018) and *State Farm Mut. Auto. Ins., Co.*, 312 F.R.D. 459, 468 (N.D. Tex. 2015)).

²¹ Enforcement Counsel’s Motion to Quash Discovery Deposition Subpoenas Issued to OCC Examiners Mark Dey, Jeff Gregory, and Kevin Swanson at 6.

²² *Id.*, quoting OCC, Semiannual Risk Perspective (June 29, 2020); and citing OCC, OCC Mortgage Metrics Report (Sept. 2020); and FDIC, Remarks by FDIC Chairman Jelena McWilliams and Director of the Division of Insurance and Research Diane Ellis on the First Quarter 2020 Quarterly Banking Profile (June 16, 2020) (citations omitted).

²³ Enforcement Counsel’s Motion to Quash Discovery Deposition Subpoenas Issued to OCC Examiners Mark Dey, Jeff Gregory, and Kevin Swanson at 7-8.

the issuance of deposition subpoenas.²⁴ Moreover, I find the conditions presented – arising first upon the parties’ mutual disclosure of witnesses on September 11, 2020 – to be sufficiently anomalous as to warrant that kind of prompt action taken by Respondents upon their receipt of the September 18, 2020 Order Regarding Respondents’ Motion to Amend Schedule. That Order imposed relatively short time-frames by which Respondents could timely request additional depositions. Under these conditions, and in the absence of harm alleged or shown, the failure to first confer shall be deemed not material.

Regarding Enforcement Counsel’s proportionality argument, I find compelling conditions are shown here, from the well-demonstrated averment that by pursuing the controverted depositions the parties likely will be able to better focus their attention on the issues in controversy by reducing the risk that redundant testimony will be offered during the hearing. I agree with the premise, advanced by all parties, that if we draw from the initial prehearing witness disclosures provided by Enforcement Counsel, there is cause to be concerned that there would be significant overlapping and redundant testimony among these witnesses. Inasmuch as Enforcement Counsel has had significantly more access to the OCC experts identified above relative to access by Respondents or their Counsel, depositions appear to be the most cost-effective way to prepare the case both for dispositive motions and for the hearing itself, with one aim being to expose and address potential redundancies.

Regarding Enforcement Counsel’s concern that depositions will consume time that would draw these witnesses away from performing their duties under the current pandemic, the record is silent regarding how – after naming each of these OCC employees as potential hybrid fact/expert witnesses – the time they would spend preparing for and participating in depositions would be any different than the time they would spend preparing for hearing.

One deposition requires special attention. Respondents note that Mr. Dey is expected to retire on October 31, 2020, and upon this premise the witness should be understood to “have greater availability afterward.”²⁵ I am not persuaded, however, that retirement status would, or should, make a witness more available. Accordingly, the deposition of Mr. Dey shall be scheduled so that it can be completed before October 31, 2020.

Respondents have accurately posited that the potential for redundancy and repetition is a key concern for this Tribunal.²⁶ The determinations made in the September 18, 2020 Order were designed to minimize the risk that the hearing requested by Respondents would be burdened with repetitive testimony. In keeping with those determinations, I find an insufficient legal and factual basis has been advanced in support of Enforcement Counsel’s Motion to Quash Discovery Depositions addressed to Mark Dey, Jeff Gregory, and Kevin Swanson. Upon these findings, the Motion is DENIED.

SO ORDERED.

²⁴ Respondents Russ Anderson’s et al. Response to Enforcement Counsel’s Motion to Quash Discovery Depositions Issued to OCC Examiners Mark Dey, Jeff Gregory, and Kevin Swanson, dated October 9, 2020, at 13, n.27.

²⁵ *Id.* at 10.

²⁶ See *id.* at 11: “Even if Enforcement Counsel is correct that Messrs. Dey, Gregory, and Swanson each will offer nearly duplicate testimony, each of these depositions nonetheless serves the objective of reducing duplication at the hearing, which is wholly consistent with the Tribunal’s Order. See September 18 Order, at 5 (“The opportunity that may be realized through the deposition of these witnesses is that through such process, the parties may be in a position to identify redundant or duplicative testimony.”).

October 13, 2020

Christopher B. McNeil
Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On October 13, 2020 I served by email transmission a copy of the foregoing Order Regarding Enforcement Counsel's Motion to Quash Discovery Deposition Subpoenas Issued to OCC Examiners Mark Dey et al. upon:

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