

**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 STRIKE  
PORTIONS OF RESPONDENT MCLINKO'S ET AL. FOURTH REQUEST FOR  
PRODUCTION OF OCC DOCUMENTS**

On October 20, 2020, Enforcement Counsel filed a Motion seeking an order striking document discovery requests that had been filed on behalf of Respondents McLinko and Strother.<sup>1</sup> In this Motion, Enforcement Counsel aver that certain discovery requests have been submitted that would require itemization of every document that each hybrid fact/expert witness considered in forming his or her opinions, or that supported or formed the basis for those opinions.

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<sup>1</sup> Enforcement Counsel's Motion to Strike Portions of Respondent McLinko's Fourth Request and Respondent Strother's Third Request for Production of Documents to the Office of the Comptroller of the Currency, dated October 20, 2020.

Enforcement Counsel aver that the requested documents already have been produced and that producing more would not comport with the OCC's Uniform Rules concerning discovery the production of which would be unreasonable, oppressive, or unduly burdensome.<sup>2</sup>

Enforcement Counsel also assert that as presented, the Requests function as interrogatories – which the OCC's Uniform Rules do not provide for – and are a premature request for information the parties are not due to exchange until May 20, 2021, when final prehearing submissions are due.<sup>3</sup>

Writing in opposition, Respondents aver the witness reports provided thus far fail to provide sufficient support for the opinions expressed therein, and that without more “Respondents cannot properly probe the Experts at deposition and prepare a fulsome record for the Tribunal to consider the reliability (or lack thereof) of any purported expert testimony.”<sup>4</sup>

Respondents further assert the disputed Requests are not interrogatories, arguing that they served the Requests “because it was not apparent from the Expert Reports that Enforcement Counsel had produced all of the documents and communications the Experts relied upon, considered, and reviewed in preparing their opinions.”<sup>5</sup>

Enforcement Counsel's Motion concerns the following Requests:

Respondent McLinko Request No. 48: “All Documents upon which each Hybrid Witness's expert opinions offered in this case are based.”

Respondent Strother Request No. 45: “All Documents or Communications upon which each Hybrid Witness's expert opinions offered in this case are based.”

Respondent McLinko Request No. 49: “All Documents each Hybrid Witness reviewed, obtained, or prepared in connection with his or her work as an expert witness in this case, including in connection with the preparation of his or her expert report.”

Respondent Strother Request No. 46: “All Documents or Communications each Hybrid Witness reviewed, obtained, or prepared in connection with his or her work as an expert witness in this case, including in connection with the preparation of his or her expert report.”

Respondent McLinko Request No. 50: “All Documents considered by each Hybrid Witness in forming his or her expert opinions.”

Respondent Strother Request No. 47: “All Documents or Communications considered by each Hybrid Witness in forming his or her expert opinions.”

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<sup>2</sup> Enforcement Counsel's Motion to Strike Portions of Respondent McLinko's Fourth Request and Respondent Strother's Third Request for Production of Documents to the Office of the Comptroller of the Currency at 7-14.

<sup>3</sup> *Id.* at 14-15.

<sup>4</sup> Respondents McLinko's and Strother's Opposition to Enforcement Counsel's Motion to Strike Portions of Respondent McLinko's Fourth Request and Respondent Strother's Third Request for Production of Documents to the Office of the Comptroller of the Currency at 5.

<sup>5</sup> *Id.* at 10.

Respondent McLinko's Request No. 51: "All Documents any Hybrid Witness will use at the hearing to summarize or support his or her expert opinions."

Respondent Strother Request No. 48: "All Documents or Communications any Hybrid Witness will use at the hearing to summarize or support his or her expert opinions."

With respect to McLinko Request No. 51 and Strother Request No. 48, Enforcement Counsel assert that documents that "will be used at the hearing to summarize or support" the witnesses' opinions include demonstrative evidence that has not yet been created and is not due until the parties exchange prehearing submissions.<sup>6</sup> Enforcement Counsel otherwise aver that all extant documents responsive to the above (excepting those that may be available through means other than discovery, such as through OCC handbooks public lawsuits) have been delivered to Respondents.<sup>7</sup>

Enforcement Counsel note that under an Order from this Tribunal, Respondents were entitled to receive copies of the reports and curriculum vitae from each of the five witnesses by October 2, 2020 – and that those reports and CVs were timely produced.<sup>8</sup> Enforcement Counsel supplied the required documents to Respondents and to this Tribunal on October 2, 2020. Having examined those documents, I find no basis to conclude more was required in advance of the depositions of the OCC's experts. Each report sufficiently sets forth the factual premises and the basis for those premises, and provides an analysis explaining the import of those facts in reaching the conclusions contained therein.

While not binding in this administrative enforcement proceeding, I find that the submissions meet the requirements found in the Federal Rules of Civil Procedure, as they set forth "the basis and reasons for them," and "the facts or data considered by the witness in forming them."<sup>9</sup> To the extent Respondents wish to challenge the "incredibly broad sweep of claimed expertise in regard to the subject matter," they will have the opportunity to conduct *voir dire* of the experts during the hearing.

It also bears noting that the authority supporting the use of the reports of the OCC's expert examiners comes from its Uniform Rules, which provide that a document like these reports, when "prepared by an appropriate Federal financial institutions regulatory agency or by a state regulatory agency, is admissible either with or without a sponsoring witness," if otherwise admissible under the OCC's Uniform Rules on Evidence.<sup>10</sup>

As the Comptroller has previously held, the OCC's expert examiners were not hired to give testimony, and are thus distinguishable from traditional experts. As hybrid fact/expert witnesses, their testimony will stem from the witnesses' "role as a participant in the examination of Respondent banks, not from being an 'expert' in the traditional sense."<sup>11</sup> Our record

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<sup>6</sup> Enforcement Counsel's Motion to Strike Portions of Respondent McLinko's Fourth Request and Respondent Strother's Third Request for Production of Documents to the Office of the Comptroller of the Currency at 7.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 8.

<sup>9</sup> Fed. R. Civ. P. 26(a)(2)(B)(i)-(ii).

<sup>10</sup> 12 C.F.R. § 19.36.

<sup>11</sup> *In re Texas National Bank*, No. OCC-AAEC-88 et al. (Feb. 26, 1993) at 6, citing *In re: The One Bankcorp Securities Litigation*, 134 F.R.D. 4, 12 (D. Me. 1991).

establishes the same set of conditions are present here, such that – as the Comptroller found in *Texas National Bank* – the expertise of the witness “is established as a matter of law.”<sup>12</sup>

Respondents offer *Atlantic Richfield*, for the proposition that “[d]iscovery in administrative proceedings encompasses both an interest in proper preparation of a defense and an interest in fair treatment of an accused party.”<sup>13</sup> In that case, the Court of Appeals endorsed the application of evidentiary sanctions for recalcitrance in discovery as “part and parcel of the power conferred upon the Secretary of Energy to adjudicate the factual issues related to remedial orders.”<sup>14</sup> Nothing in the Court’s decision suggests that Respondents are entitled to more than what has already been provided in order to “prepare a fulsome record for the Tribunal to consider” when testimony from these witnesses is taken during the hearing.<sup>15</sup>

Respondents aver that they are “without access to the documents relied upon by the Experts,” coupling that assertion with the averment that receipt of the documents already delivered “do not satisfy the disclosure requirement.”<sup>16</sup> I find these averments have not been sufficiently supported to warrant the present discovery requests. The parties thoroughly addressed the delivery of documents and the means by which the contents of those documents could be researched and evaluated. Without more, there is no basis to find Respondents have not already been provided with the documents relating to the expert reports in question.

Quoting this Tribunal, Respondents offer that “the opinions expressed by these witnesses may, if properly qualified and based on sufficient information, be given great weight.”<sup>17</sup> In context, the Tribunal’s Order established the role *discovery* depositions would play at this stage of the enforcement proceedings:

As the parties jointly have averred, the hearing requested by Respondents is likely to require close analysis of the observations and conclusions of these six witnesses, given the witnesses’ close supervisory relationship with employees of the Bank during the relevant time period. Also clear is that the opinions expressed by these witnesses may, if properly qualified and based on sufficient information, be given great weight.

Notable in this analysis is the impact of the OCC’s Uniform Rules of Practice and Procedure regarding the reports each of these witnesses may have either prepared or participated in preparing. Under those Rules, reports of examinations, supervisory activity, inspection or visitation prepared by witnesses such as these six OCC employees are “admissible either with or without a sponsoring witness.”<sup>18</sup>

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<sup>12</sup> *Id.*, (emphasis *sic*), citing *Sunshine State Bank v. Federal Deposit Ins. Corp.*, 783 F.2d 1580, 1583 (11th Cir. 1986).

<sup>13</sup> Respondents McLinko’s and Strother’s Opposition to Enforcement Counsel’s Motion to Strike Portions of Respondent McLinko’s Fourth Request and Respondent Strother’s Third Request for Production of Documents to the Office of the Comptroller of the Currency at 5 quoting *Atl. Richfield Co. v. U.S. Dep’t of Energy*, 769 F.2d 771, 795 n.174 (D.C. Cir. 1984) (internal quotation marks omitted).

<sup>14</sup> *Atl. Richfield Co.*, 769 F.2d at 795.

<sup>15</sup> Respondents McLinko’s and Strother’s Opposition to Enforcement Counsel’s Motion to Strike Portions of Respondent McLinko’s Fourth Request and Respondent Strother’s Third Request for Production of Documents to the Office of the Comptroller of the Currency at 5.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> 12 C.F.R. § 19.36(c)(2).

In practical terms, this Rule would permit the introduction at hearing of examination reports or other documentation prepared by any of these six witnesses, without the presence of the preparing witness. The only express limitation – at least the only limitation relevant in this analysis – is that the report not be “unduly repetitive.”<sup>19</sup> Allowing Respondents access to these witnesses through deposition is perhaps the most cost-effective means for identifying redundancy and eliminating it prior to the evidentiary hearing.<sup>20</sup>

With the delivery of the expert’s reports and CVs, Respondents have been sufficiently supplied with information complementing discovery already in their possession to achieve the results anticipated by this Tribunal’s September 18, 2020 Order. If there is evidence of redundancy, this Tribunal is confident Respondents will be able to detect it during discovery depositions, if indeed Enforcement Counsel do not accomplish the same on their own. My reading of the parties’ respective preliminary list of witnesses leads me to believe all parties have an equal interest in avoiding wasting time with repetitive testimony during the hearing.

Respondents offer *Salgado* in support of the proposition that they are entitled to require Enforcement Counsel to “identify the documents or communications the Experts relied upon in preparing their Reports.”<sup>21</sup> In *Salgado*, the Court of Appeals affirmed the determination by the trial court that sanctions were warranted where the plaintiff had failed to comply with the court's deadline for the submission of the reports of expert witnesses and therefore barred the testimony of those witnesses at the trial.<sup>22</sup> In describing the authority of the trial court on this question, the Court of Appeals held:

Nor did the district court abuse its discretion in determining that the defendants had not waived their right to the report contemplated by Rule 26. We also can find no fault with the district court's determination that Salgado's failure ought not be deemed harmless. No matter what GM's experience with this issue or with Salgado's counsel may have been in the past, a matter that Salgado declined to pursue fully by failing to depose opposing counsel, GM had a right to know the conclusions of these particular expert witnesses with respect to this particular accident. Moreover, the court has a right, independent of the parties, to conduct trial preparation in a manner that husbands appropriately the scarce judicial resources of that busy district.<sup>23</sup>

As was true in *Salgado*, prehearing orders extant in this enforcement action have been crafted to make the best use of limited resources. As Respondents correctly noted, the key function that the Tribunal intended the expert depositions to serve as identifying redundancies among the OCC’s experts.<sup>24</sup> As was the case in *Reed*, cited by Respondents in their description of the purpose of expert reports – to “identify[] redundancy and eliminate[e] it prior to the

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<sup>19</sup> 12 C.F.R. § 19.36(a)(1).

<sup>20</sup> Order Regarding Respondents’ Motion to Amend Schedule at 5.

<sup>21</sup> Respondents McLinko’s and Strother’s Opposition to Enforcement Counsel’s Motion to Strike Portions of Respondent McLinko’s Fourth Request and Respondent Strother’s Third Request for Production of Documents to the Office of the Comptroller of the Currency at 9, quoting *Salgado* by *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 741–42 (7th Cir. 1998).

<sup>22</sup> 150 F.3d at 737.

<sup>23</sup> *Id.* at 742

<sup>24</sup> *Id.*, quoting Order Regarding Respondents’ Motion to Amend Schedule, issued September 18, 2020, at 5.

evidentiary hearing”<sup>25</sup> – the Order authorizing these depositions was satisfied with the delivery of the reports in advance of the requested depositions. With the delivery of the reports, sufficient information has been provided to Respondents to permit them to ferret out potential duplication and redundancy among these five witnesses. Nothing more was called for by the Order of September 18, 2020. Nothing more is due now.

With respect to terms in the Requests seeking information about what will be presented to the witnesses during the hearing (Respondent McLinko’s Request No. 51 and Respondent Strother’s Request No. 48), there has been no legal basis shown for such discovery. Respondents assert that they served these Requests “because it was not apparent from the Expert Reports that Enforcement Counsel had produced all of the documents and communications the Experts relied upon, considered, and reviewed in preparing their opinions.”<sup>26</sup> Without more, this averment is bereft of indicia that supports Respondents’ claim. Respondents aver that when Enforcement Counsel countered the claim by stating they “had largely produced the materials underlying these Reports,” Respondents then “requested that Enforcement Counsel identify and cite those documents, but they refused.”<sup>27</sup>

Contrary to the conclusion advanced by Respondents on this point, seeking to have Enforcement Counsel “identify and cite” documents relied upon by the experts does indeed emulate the interrogatory form of discovery. Given that interrogatory forms of discovery are not within the scope of allowable discovery under the OCC’s Uniform Rules,<sup>28</sup> there is no legal basis to allow such discovery. Through their final prehearing submissions (which are due in 2021), all parties will be required to exchange information identifying the documents each witness will be presented with during the hearing, and will be required to disclose the areas of direct testimony each witness will be expected to cover.<sup>29</sup> Nothing in the OCC’s Uniform Rules provides for the exchange of such information as a precursor to the conducting of discovery depositions.

As in any question regarding the scope and burdens of document discovery, principles of proportionality aid in making the proper determination. In this regard, I consider the importance of the issues at stake in the action; the amount in controversy; the parties’ relative access to relevant information; the parties’ resources; the importance of the discovery at issue in resolving the issues; whether the burden or expense associated with the discovery sought outweighs its likely benefit; whether the discovery sought is unreasonably cumulative or duplicative; whether the discovery sought can be obtained from some other source that is more convenient, less burdensome, or less expensive; whether the party seeking discovery had ample opportunity to obtain the information by discovery in the action; whether the discovery sought can be staged or tiered to reduce the burden and then proceed further incrementally only as needed; whether the

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<sup>25</sup> Respondents McLinko’s and Strother’s Opposition to Enforcement Counsel’s Motion to Strike Portions of Respondent McLinko’s Fourth Request and Respondent Strother’s Third Request for Production of Documents to the Office of the Comptroller of the Currency at 10, quoting *Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996).

<sup>26</sup> Respondents McLinko’s and Strother’s Opposition to Enforcement Counsel’s Motion to Strike Portions of Respondent McLinko’s Fourth Request and Respondent Strother’s Third Request for Production of Documents to the Office of the Comptroller of the Currency at 10.

<sup>27</sup> *Id.*

<sup>28</sup> 12 C.F.R. § 19.24(a)(3).

<sup>29</sup> See Notice of Hearing, Scheduling Order, Supplemental Prehearing Orders issued March 17, 2020 at 5.

discovery is directed to nonparties; and whether the discovery sought affects the rights of nonparties (*e.g.*, privacy, trade secrets, etc.).<sup>30</sup>

Guided by these legal and factual principles, I find Respondents have not advanced a sufficient basis justifying the disputed Requests. I find Respondents have already gained access to relevant information through the documents already provided to them. I find scant evidence that granting the Requests would resolve material issues presented in the Notice of Charges and Respondents' Amended Answers. I find the burden and expense associated with the Requests outweighs its likely benefit. I find the parties now have similar access to the information being sought, and that Respondents have had ample opportunity to obtain the information through the review of documents already produced. And I find granting the requested document discovery would be unreasonably duplicative of documents already presented.

Upon these findings, Enforcement Counsel's Motion to Strike is GRANTED.

SO ORDERED.

October 30, 2020

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

#### **CERTIFICATE OF SERVICE**

On October 30, 2020 I served by email transmission a copy of the foregoing Order Regarding Enforcement Counsel's Motion to Strike Portions of Respondent McLinko's et al. Fourth Request for Production of OCC Documents upon:

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<sup>30</sup> See Hon. Elizabeth D. Laporte, Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26, 9 Fed. Cts. L. Rev. 19, 49 (2015)

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