

**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 RESPONDENTS' OBJECTION PURSUANT TO 12 U.S.C.
§ 1818(H)(1) AND MOTION FOR RECONSIDERATION¹**

On September 1, 2021 Respondents filed a motion seeking reconsideration of certain aspects of the August 23, 2021 Notice of Prehearing Location and Supplemental Prehearing Orders, accompanied by notice of their objection pursuant to 12 U.S.C. § 1818(h)(1).

Through their Motion for Reconsideration, Respondents seek six amendments to

¹ This Order is entered *nunc pro tunc*, replacing the prior Order to reflect the editorial correction to the first Order. The correction replaces the existing sentence: "Such an assertion does constitute a basis for finding the Order does not comply with the provisions of Section 1818(h)(1)" with the sentence: "Such an assertion does not constitute a basis for finding the Order does not comply with the provisions of Section 1818(h)(1)."

the Order relating to (a) the presentation of direct testimony by Respondents, (b) the order of Respondents' cross examination of Enforcement Counsel's witnesses, (c) the order of Respondents' direct examination of witnesses, (d) the timing of Respondents' cases-in-chief, (e) the public nature of the hearing and the need for the Tribunal's involvement, and (f) Respondents' due process right to confront witnesses.²

In articulating their objection to the Order, Respondents aver that provisions of the August 23, 2021 Order do not conform to the provisions of 12 U.S.C. § 1818(h)(1), which require that any hearing conducted pursuant to 12 U.S.C. Section 1818 be held in the Federal judicial district in which the home office of the depository institution is located unless the party afforded the hearing consents to another place.³

The record reflects the home office of the depository institution is located in the Federal judicial district of the District of South Dakota. The record further reflects that the Notice of Hearing established the hearing location to be Sioux Falls, South Dakota – which is in the District of South Dakota.

Respondents assert that the August 23, 2021 Order establishes “a mechanism by which most – if not all – non-Party witnesses will seek to offer their testimony by deposition outside of the District of South Dakota.”⁴ Such an assertion does not constitute a basis for finding the Order does not comply with the provisions of Section 1818(h)(1). The record reflects that that most, if not all, party witnesses will be available to testify in South Dakota. Should any Respondent, seeking protection against the spread of viruses, elect to testify remotely, he or she will be permitted to do so. Enforcement Counsel has indicated most, if not all, OCC-employed witnesses will participate in South Dakota.⁵

Finding the objection to be without merit, the objection is overruled.

In support of their Motion for Reconsideration, Respondents aver the Order “does not articulate whether Respondents may conduct direct examination of Respondents themselves during their respective cases-in-chief”.⁶ The Order does address the presentation of testimony by a witness scheduled to testify on direct examination for both Enforcement Counsel and any Respondent:

Any witness who has been identified as a witness for more than one party shall testify in response to each subpoena before being released. Where the

² Respondents' Objection Pursuant to 12 U.S.C. 1818(H)(1) and Motion for Reconsideration, dated September 1, 2021, at 2.

³ Respondents' Objection Pursuant to 12 U.S.C. 1818(H)(1) and Motion for Reconsideration at 2.

⁴ Id.

⁵ Id. at Exhibit A, August 27, 2021 email from Jason Friedman to Dan Bruggebrew, at 9: “Our current expectation, and this may change, is that most, if not all, OCC examiner witnesses that Enforcement Counsel intend to call will appear in person”.

⁶ Respondents' Objection Pursuant to 12 U.S.C. 1818(H)(1) and Motion for Reconsideration at 3-4.

witness has been called by Enforcement Counsel and any Respondent, direct examination by Enforcement Counsel will be followed by cross examination by Counsel for Respondents Russ Anderson, Julian, and McLinko, in that order. Once Enforcement Counsel completes their direct examination and Respondents have completed their cross examination, the witness's direct examination by Respondents will begin, in the order shown above. Cross examination by Enforcement Counsel will follow the direct or cross examination by all Respondents seeking to examine the witness.⁷

The premise that the Order should be amended to treat Respondents in a way not applicable to all other witnesses is without legal support and is rejected.

The Order does not differentiate between Respondents and any other witness. In seeking a modification of this provision, Respondents rely on 12 C.F.R. § 19.35(a)(2), which provides that “[i]f there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the administrative law judge shall fix the order.”⁸ The order of presentation of Respondents cases was established in the August 23, 2021 Order – such that Respondent Russ Anderson's case would follow that of Enforcement Counsel, followed by Respondent Julian's case, followed by Respondent McLinko's case.⁹

The cited rule does not address the sequence of cross-examination of a given witness – only the order in which Respondents cases will be presented. Accordingly, the premise that Respondents may fix the sequence of cross-examination of any given witness is not supported by the relied-upon Rule and is rejected, as is – for the same reason – the premise that the Order should be amended to permit Respondents to choose the direct examination of their witnesses in the order of Respondents' choosing.

Respondents assert the Order should be amended to “make it clear that Enforcement Counsel must rest their case-in-chief first prior to Ms. Russ Anderson beginning her case-in-chief”.¹⁰ Finding the amendment to be unwarranted, the amendment will not be issued. Both parties have already proceeded to take the testimony of Respondents' witnesses prior to Enforcement Counsel resting their case.¹¹ Respondents assert that if Enforcement Counsel were to exhaust their in-person witnesses but not rest their case prior to September 24, 2021, “the live hearing should adjourn immediately and

⁷ Notice of Hearing Location and Supplemental Prehearing Orders at 2.

⁸ Respondents' Objection Pursuant to 12 U.S.C. 1818(H)(1) and Motion for Reconsideration at 5.

⁹ Notice of Hearing Location and Supplemental Prehearing Orders at 2.

¹⁰ Respondents' Objection Pursuant to 12 U.S.C. 1818(H)(1) and Motion for Reconsideration at 7.

¹¹ Enforcement Counsel's deposition of David Otsuka (conducted on August 18, 2021) and Respondents' deposition of Deanna Lindquist (conducted on August 11, 2021).

Enforcement Counsel should begin to take their remaining witnesses by deposition.”¹² Such an approach would likely result in a gross and unjustifiable waste of time.

Such a process is not supported under the conditions presented, and is rejected. The conditions presented for this hearing include a significant and an increasing risk of exposure to the Covid-19 virus and its variants in South Dakota.¹³ Against this logistical backdrop is the core imperative of the evidentiary hearing requested by Respondents – that they be given the opportunity to be heard in a meaningful way at a meaningful time. There is no clear means to be assured that another opportunity will arise in a meaningful time; thus, the imperative is best served by providing Respondents with the opportunity to appear and give testimony in person. The August 23, 2021 Order prioritizes their ability to testify in person, notwithstanding the uncertainties brought about by the current pandemic as it exists in South Dakota.

Due process generally requires a “meaningful opportunity” to be heard before one is deprived of life, liberty, or property.¹⁴ Here, virtual hearings protect the procedural due process rights of participants. These hearings, like in-person hearings, will be secure and provide the safeguards and protocols that are also available to the participants in the hearing rooms. Specifically, the participants have been provided notice of the hearing, the hearing will take place before an impartial administrative law judge, the participants are represented by attorneys who will be present at the hearing, evidence can be presented, attorney will have the opportunity to cross-examine witnesses and rebut evidence presented by opposing parties. This process will culminate with a written decision by the ALJ that will contain findings of fact and conclusions of law limited to the record evidence submitted at the hearing. Thus, the participants will have a meaningful opportunity to be heard, and their due process rights are sufficiently protected in this proceeding.

Upon these premises, Respondents’ motion to require Enforcement Counsel to rest their case-in-chief before evidence is presented in Respondents’ cases-in-chief is overruled.

Respondents seek modifications to provide for the depositions to be open to the public, and that the ALJ preside over such depositions. The modification is approved, as proposed by Respondents:

Should the parties agree to do so, or upon sufficient cause shown in the

¹² Respondents’ Objection Pursuant to 12 U.S.C. 1818(H)(1) and Motion for Reconsideration at 7.

¹³ See Notice of Hearing Location and Supplemental Prehearing Orders at 3, “According to the South Dakota Department of Health, the state, with a population of approximately 902,000, has confirmed more than 112,000 cases of COVID-19, and for the period from August 12 to 18, 2021 reported a polymerase chain reaction (PCR) Test Positivity Rate of 14.4%.

¹⁴ See *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)).

absence of such agreement, they may take depositions in lieu of presenting witnesses through live testimony in South Dakota pursuant to 12 C.F.R. § 19.27. Enforcement Counsel are ordered to announce the date and time of each such deposition in a readily accessible location on the OCC website and to make such depositions publicly accessible in real time via a teleconference service. The Administrative Law Judge will preside over all such depositions. No hearings will be conducted in South Dakota between September 25 and November 7, 2021.

Respondents seek a modification of the Order to provide “that one representative of each Party may, at that Party’s option, attend each deposition in person.” For sufficient cause shown, the request is granted and the Order is now amended to provide as set forth here.

Given the limited time between the filing of Respondent’s Objection and Motion for Reconsideration and the start of the hearing, this Order has been entered on an *ex parte* basis, without awaiting Enforcement Counsel’s response. Should Enforcement Counsel seek to respond, their response will be timely if filed by 5 p.m. ET on Thursday, September 9, 2021.

It is so ordered.

Date: September 6, 2021

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

CERTIFICATE OF SERVICE

On September 6, 2021, I served by email transmission a copy of the foregoing Order Regarding Respondents’ Objection Pursuant to 12 U.S.C. 1818(h)(1) and Motion for Reconsideration upon:

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