

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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COLLEEN A. GRAHAM, :  
  
Complainant, :  
v. :  
CREDIT SUISSE SECURITIES (USA) LLC, :  
and SIGNAC LLC :  
  
Respondents. :  
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Case No. 2019-SOX-00040

**CLAIMANT’S MEMORANDUM OF LAW IN SUPPORT  
OF MOTION TO COMPEL AND FOR LEAVE TO AMEND**

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## INTRODUCTION AND RELIEF SOUGHT

The Rules governing proceedings before the United States Department of Labor, Office of Administrative Law Judges, are designed to secure the just, speedy, and inexpensive determination of every proceeding. 29 C.F.R. §18.10. Respondents' continued refusal to produce any responsive documents is plainly intended to thwart that purpose. Respondents know well that the Rules forbid a party from withholding responsive documents without first moving for a protective order. And to the extent that Respondents were unfamiliar with the Rules, plainly inexcusable in itself, this Tribunal invited Respondents on two separate occasions -- the first on September 5<sup>th</sup> -- to submit a motion for a protective order. But Respondents, interested only in delay and burdening claimant with needless expense, willfully thumbed their nose at this Tribunal and its Rules. As set forth below, Graham's motion to compel should be granted and production ordered immediately, in addition to awarding other appropriate relief.<sup>1</sup>

Graham also seeks leave to amend her complaint. Leave should be granted to allow Graham to provide more information about her claims and Respondents' defenses, information which was not available at the time of her initial complaint. The information includes sworn arbitration testimony from Credit Suisse's two most senior compliance officers (one of whom also was a Signac Board Member) and public disclosures by Credit Suisse and its then Chief Executive Officer. These hardly objectionable binding admissions bear directly on whether Signac, under Graham's leadership, produced a viable trader holistic surveillance software product which was then used, and continues to be used, by both Credit Suisse AG and its subsidiaries, including Respondent Credit Suisse, to detect and deter misconduct by its greater than one thousand traders around the world (hereinafter, "THS"). The issue is critical because if

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<sup>1</sup> The good faith certification of Claimant's counsel, required by 29 C.F. R. §18.57(d)(2), accompanies this motion. "Ex." refers to the exhibits attached to the Certification.

THS was not viable and not used, as Respondents claim, then they can at least offer a business justification for some of the adverse actions at issue herein, such as not paying a bonus to Graham, not paying her severance, not valuing Signac or its THS software, and not paying Graham anything on account of her Signac equity. On the other hand, if THS was viable and was/is being used by Credit Suisse, then the proffered defense is plainly pretextual.

### **Factual Background**

This matter arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes Oxley Act of 2002, 18 U.S.C. §1514A.

Graham's complaint was originally filed with OSHA in November 2017. It alleges that Credit Suisse began to retaliate unlawfully shortly after Graham refused to participate in conduct that she believed violated securities laws. She alleged that Credit Suisse, alone or in concert, retaliated against her by taking a number of adverse personnel actions, including failing to pay her a bonus on account of 2016; depriving her of employment opportunities; harassing her with false claims of misconduct; bully and intimidating by openly surveilling her and her family; threatening to forfeit substantial amounts of Credit Suisse deferred compensation she held; and refusing to value and or pay her for her equity stake in Signac. A copy of Graham's proposed Amended Complaint is attached as Ex. "A" to the accompanying Certification.

Credit Suisse filed its answer on or about on or about December 20, 2017. Among other things Credit Suisse claimed that Signac's trader holistic surveillance software product ("THS") never became a viable product. As a result, Signac's sole customer, Credit Suisse AG, became

completely dissatisfied<sup>2</sup> and elected not to use the product. Id. Credit Suisse is a wholly owned subsidiary of Credit Suisse AG.

Even though Signac paid Graham during the period it directly employed her, Credit Suisse continued to hold her securities licenses and listed itself as her employer on her registrations. Ex. “B”. Credit Suisse also maintained Graham’s company email address.

OALJ’s Initial Prehearing Order and Notice of Hearing in this matter is dated June 19, 2019 (“PHO”)<sup>3</sup>. Among other topics, the PHO contains a section entitled “The consequences of a Failure to Comply”. In relevant part, it states:

Failure to comply with the provisions of this prehearing Order may result in the imposition of sanctions including but not limited to the following: the exclusion of evidence, the dismissal of the claim, the entry of a default judgment or the removal of the offending representative from the case.

On August 2, 2019, Graham served a 10 item discovery request on Signac and Credit Suisse. (the Requests are included as part of Credit Suisse’s Responses and Objections attached hereto as Ex. “C”). One group of related requests sought documents concerning Credit Suisse’s claim that Signac’s THS was never viable and it had not continued to use it after in or about May 2017, when Signac was shuttered. Id., Nos. 2, 3, 7 and 10(b)(d)(e)(f)(g) and (h). Graham also sought her personnel file from Credit Suisse. Ex. “C”.

Graham also served Credit Suisse with a notice to take the deposition of Lara Warner (“Warner”), the Chief Compliance and Regulatory Affairs Officer (“CCRO”) for Credit Suisse AG. As CCRO, Warner was responsible for all compliance and regulatory matters for Credit

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<sup>2</sup> Although not dispositive, the purported lack of commercial viability and dissatisfaction of the sole customer CS AG, at least offers a legitimate business justification for several of the adverse personal actions at issue, such as failure to pay a bonus, withdrawal of an offer of employment, refusal to pay Graham’s equity stake.

<sup>3</sup> Because of the recently ordered 50 page limit on attachments, copies of Orders in this matter have not been appended to the accompanying Moving Decl., and reference is respectfully made to the docket for copies thereof.

Suisse AG globally across all business and functions, including Respondent Credit Suisse.

Warner also served as a member of the Board of Directors of Signac.

On July 31, 2019 Respondents moved for a Stay of Discovery and for Dismissal or Summary Decision. On September 5<sup>th</sup>, ALJ Timlin conducted a pre-hearing conference call following the submission of Respondents' motions. During the call, Judge Timlin asked Credit Suisse if it might need a Protective Order ("PO"). Credit Suisse declined to move however, citing a professed concern that Judge Timlin already had a "number of motions in her hands already". See Final Determination: Notice of Intent to Disclose, dated November 20, 2019, at pg. 5. During the same period, Respondents began to receive numerous letters "from OALJ notifying them of three, separate pending FOIA requests" to release the submissions on the pending motions, which Respondents claimed were confidential and exempt from disclosure. Id.

On September 12<sup>th</sup>, 2019, Judge Timlin issued a stay of discovery pending the outcome of the motions for summary decision. The Order recites in relevant part that "the joint motions to Stay are GRANTED pending the outcome of the Motions for Summary Decision."

On November 20<sup>th</sup>, this court issued its Final Determination and Notice of Intent to Disclose all the responsive documents within 10 business days, unless the Respondents were to file a "reverse FOIA" suit preventing disclosure. Respondents elected NOT to file a reverse FOIA suit. See Final Determination, supra. The Final Determination addressed Respondents' failure to move for a PO, noting as follows:

Respondents were still within their rights to file a protective order at any time. They took no action to do so, despite their receipt of numerous letters from OALJ notifying them of three separate pending FOIA requests for these documents, and OALJ's willingness to hear their responses before issuing this Exemption 4 determination letter.

Id., at pg. 5. The Final Determination continued by noting that,

Judge Timlin not only raised the issue of protective orders with the parties, see page 12 of the transcript, but also told the parties to “make the appropriate motions... Sooner rather than later,” page 13 of the transcript. Respondents still did not seek a protective order.

Id. Because Respondents never received an assurance of privacy from the presiding ALJ, they could not establish that the file should be exempt from disclosure. (Id., at pg. 6).

On January 16, 2020, this court issued an order granting in part and denying in part the motions for dismissal or summary decision. Since the motion was denied with regard to Credit Suisse and Signac, the stay of discovery was automatically lifted, thereby requiring Responses and Objections and responsive documents on or by February 17, 2020. The Order also directed the parties to present the Court with hearing dates by January 26<sup>th</sup>. See Order with Issue Date January 16, 2020.

Credit Suisse served Responses and Objections on February 17, 2020. Ex. “C”. Credit Suisse refused to produce any documents without Graham agreeing to a protective order, which Graham refused to do. Credit Suisse failed to interpose any motion for a protective order. In addition to withholding all documents on the grounds of confidentiality, Credit Suisse also refused to produce documents related to THS or Graham’s personnel file on the grounds of relevance (among other objections). Ex. “C”.

On February 27<sup>th</sup>, Judge Timlin held a telephonic conference to address scheduling issues caused by Respondents’ refusal to produce documents. Among other things, Judge Timlin noted that under the Rules a party may not withhold documents without making a motion for protective order. ALJ Timlin expressed surprise that Respondents had not moved for a PO earlier in September, when the issue first arose. Reference also was made to the Final Determination that the public is entitled to access to the OALJ files in this matter. Credit Suisse was again invited to make a motion for a Protective Order, but none was forthcoming. Moving Decl. at 6.

On March 3<sup>rd</sup>, Signac purported to serve Responses and Objections. Graham rejected the attempted service as an untimely nullity (Ex. “D”).

### DISCUSSION

1) Respondents Willfully flout The Rules by Withholding Discovery

A) Signac Failed to Timely Serve Responses and Objections

The September 12<sup>th</sup> Order stayed discovery pending the outcomes of the dismissal motions. The dismissal motions were decided adverse to Signac and Credit Suisse on January 16, 2020. Accordingly, under 29 C.F.R.18.61(b)(2), Responses and Objections were due within 30 days, or on or by February 17, 2020. Signac failed to serve any discovery responses by that date. Even with a telephonic conference subsequently noticed by the ALJ Timlin in connection with the pending discovery and related scheduling dispute, no Responses and Objections were forthcoming from Signac, nor did it ask for an extension or move for a protective order. In fact, Signac did not bestir itself to even attempt to serve Responses and Objections until March 3<sup>rd</sup>, more than three (3) weeks after they were due.

Under 29 C.F.R. 18.57(b) – (d), the consequences of a party’s failure to obey a discovery order, as Signac has done with regard to the PHO, includes compelling the discovery at issue, limiting the offending party from using information at the hearing, or striking defenses in whole or in part. Because it has no excuse for breaching the Rules by failing to serve its Responses or Objections and related documents, Signac should be compelled to serve responsive documents in its custody possession or control without regard to any objections, and be precluded from using the documents and information therein to oppose Graham’s claims. It should also have its defenses stricken in so far as they relate to the requested documents.

B) Credit Suisse Cannot Unilaterally Withhold Responsive Documents without Moving for a Protective Order

Credit Suisse timely served Responses and Objections but refused to produce any responsive documents on the grounds of confidentiality. But, as Credit Suisse knows, under 29 C.F.R. 18.57(d)(2), the failure to respond to a document request “is not excused on the grounds that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under 18.52(a).” Not only is there a Rule directly on point requiring the submission of a motion before withholding discovery, but Credit Suisse was invited, if not urged, by Judge Timlin on two separate occasions to interpose such a motion. Apparently, Credit Suisse has decided simply to ignore the Rules, as well as this Tribunal’s specific admonitions. Credit Suisse’s continued wrongful withholding of responsive documents seeks to make a mockery of this tribunal and prejudices Graham’s rights to receive a just and speedy hearing.

C) THS Related Documents and Graham’s Personnel File Are Directly Relevant

In addition to its blanket withholding of documents on the grounds of confidentiality, Credit Suisse refuses to produce (i) any THS related documents and (ii) Graham’s Credit Suisse personnel file on the grounds of relevance. Credit Suisse raises relevancy objections with regard to all of Graham’s request for documents related to THS. There are five: Request No. 2 (THS dashboard) No. 3 (Investor Day Video Presentation); No. 7 (THS Development plans) and Nos.10 (b) and (d) – (h)<sup>4</sup>(collectively, the “THS Discovery”).

The THS Discovery relates directly to Respondents’ professed justification for taking a number of the adverse employment actions at issue, such as failing to pay Graham either (i) the

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<sup>4</sup>Documents regarding: 10(b)(communications with regulators about THS); 10(d)(decision making process re use of Signac products); 10(e)(Signac’s valuation); 10(f)(maintenance services for THS); 10(g)(roll-out of THS as shown in Investor Day chart); and 10(h)approvals and diligence for the Investor statements about THS.

(\$810,000) bonus due her on account of 2016 performance, or (ii) the value of her equity stake in Signac. Credit Suisse's proffered justification for these disputed personnel actions is that THS was not viable and not used because the sole customer was dissatisfied. The THS Discovery bears directly on the veracity of the Credit Suisse assertions. No party can advance a defense and then deny its adversary discovery bearing directly on the truth of that defense. That self-evident proposition is particularly true in this case, where the sworn testimony from JAMS 1 and Credit Suisse's Investor Day already casts doubt on the Credit Suisse defense. Credit Suisse's relevancy objection is not even colorable and it should be ordered to produce the THS Discovery immediately.

Next, in a rarity among statutory employment disputes, Credit Suisse refuses to produce Graham's personnel file. Credit Suisse objects to producing Grahams' personnel file claiming that since she was last directly employed at Signac her Credit Suisse personnel file is irrelevant. Ex "C", pgs. 10-11. The argument fails for a number of reasons.

Although Signac was the direct employer of Graham during the relevant period, Credit Suisse continued to hold Graham's securities licenses through June 2017 (Ex. "B")<sup>5</sup>. Holding a securities license for an associated person carries with it the important legal obligation to keep certain personnel records, particularly if there was an investigation into potential criminal misconduct. *Id.* Here, Graham alleges that Credit Suisse conducted a trumped-up investigation into extremely serious allegations of misconduct, including of a criminal nature. Under 17 C.F.R. 240.17a-3(a)(12), a broker-dealer has a fundamental obligation to maintain records related to associated persons for whom it holds a license, including information regarding the person's employment and disciplinary history. Credit Suisse cannot accuse Graham of terrible

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<sup>5</sup> Credit Suisse also maintained Graham's company email address.

wrongdoing, purport to conduct an investigation, hold her securities licenses, and then withhold her personnel file when litigation ensues. That makes no sense whatsoever.

Moreover, Credit Suisse claims to have made Graham an offer of employment, which then didn't materialize purportedly because of her inaction. Graham claims any offer was withdrawn, if ever made, when she refused to abandon her objections to the attempt to violate securities laws. Why Credit Suisse may have made the offer in the first instance, assuming it actually made it, and then why it didn't materialize is relevant to the claims and defenses herein. Graham's Complaint also alleges that Credit Suisse harassed her by threatening to take her Credit Suisse deferred compensation. The personnel file is obviously relevant to that claim as well. Under the circumstances, an order should be entered requiring Credit Suisse to produce Graham's personnel file.

2) Leave to Amend Should Be Granted

Motions to amend a complaint are to be freely granted. See Martens v. Berkshire Hathaway, Inc., ARB No. 09-025, 2011 WL 2614301 (June 16, 2011) ("ALJ should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint.") Here, Graham is entitled to provide more information based on statements made by Credit Suisse since the date of her initial filing, including sworn testimony and SEC filings that bear directly on the claims and defenses herein. The information tends to show that Credit Suisse's defense that THS was not viable and not used is pretextual. Respondents' binding admissions are plainly additive to her complaint and should be allowed.

CONCLUSION

For the foregoing reasons, complainant's motion should be granted and an order entered compelling production of the requested discovery and granting leave for graham to serve and file her proposed Amended Complaint.

Dated: New York, New York  
April 17, 2020

KRAUS & ZUCILEWSKI LLP

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