

**U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

COLLEEN A. GRAHAM

COMPLAINANT,

v.

CREDIT SUISSE SECURITIES (USA) LLC
and SIGNAC LLC,

Respondents.

ALJ No. 2019-SOX-00040

**RESPONDENT CREDIT SUISSE SECURITIES (USA) LLC'S OPPOSITION TO
COMPLAINANT'S MOTION TO COMPEL AND FOR LEAVE TO AMEND,
AND CROSS MOTION FOR ENTRY OF CONFIDENTIALITY ORDER**

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PRELIMINARY STATEMENT

On March 19, 2020, the Office of Administrative Law Judges (“OALJ”) served a notice upon all parties that all procedural deadlines in this action were suspended through May 15, 2020 due to complications relating to COVID-19. Thereafter, on April 10, 2020, the OALJ sent a follow-up notice extending the suspension of all such deadlines through June 1, 2020. Yet, on April 17, 2020, Complainant Colleen Graham—without any effort whatsoever to first meet and confer with Respondent Credit Suisse Securities (USA) LLC (“Credit Suisse”)—filed the instant Motion, seeking, among other things, an order (1) granting her leave to amend her Complaint in this action (for the first time in two-and-a-half years) to assert “new” allegations that she has already litigated, and lost, in two other proceedings; (2) compelling Credit Suisse to produce reams of irrelevant, but highly sensitive, documents concerning a proprietary tool named “THS” that has nothing to do with this case; and (3) claiming that Credit Suisse has “flouted” a discovery rule that has no application whatsoever in these circumstances. There is no legal basis for Complainant to seek any of the relief demanded in her Motion. To the extent the Court is even addressing motions at this time, the Court should deny Complainant’s motion in full and Credit Suisse respectfully cross-moves for entry of a brief protective order providing, among other things, that materials exchanged in discovery between the parties to this action and marked “confidential” may be used only in connection with the litigation of this dispute and may not be disclosed to third parties.

I. COMPLAINANT’S MOTION FOR LEAVE TO AMEND IS UNTIMELY, IMPROPER, AND SHOULD BE DENIED.

The applicable Rules in these proceedings do not provide any specific guidance on amendments of pleadings.¹ Those Rules make clear, however, that the “Federal Rules of Civil

¹ The only rule on this topic is 29 CFR § 18.36, which states only that administrative law judges “may allow parties to amend and supplement their filings” after referral of a case to the OALJ, but provides no further guidance on what should, or should not, be allowed or what standard should be used.

Procedure (FRCP) apply in any situation not provided for or controlled by these rules” 29 CFR § 18.10. Under Federal Rule 15, a court should “freely give” leave to amend “when justice so requires.” Fed. R. Civ. P. 15(a)(2). Applying this rule, the Second Circuit has held that “motions to amend should generally be denied in instances of futility, undue delay, bad faith or dilatory motive . . . or undue prejudice to the non-moving party.” *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008). Here, Complainant’s proposed amendments should all be denied each of these reasons.

First, there has been substantial “undue delay.” Complainant did not seek leave to amend her Complaint until April 17, 2020—more than *two years and five months* after her original Complaint in this action was filed. The only explanation Complainant offers is that certain “information” relating to the amendments “was not available at the time of her initial complaint.” (Mot. at 4.) But the vast majority of the “information” referenced in her proposed amendments is hearing testimony from the JAMS arbitration between Complainant and Credit Suisse, Palantir and Signac from March 2018. (Ex. A, Proposed Amendments ¶¶ 39-51.) The remaining “information” is a single “Investor Day” slide presentation that Credit Suisse AG, a non-party to this proceeding, presented on December 12, 2018. (*Id.* ¶¶ 53-56.) Thus, by December 2018, Complainant had all of the “information” she needed to seek the amendments in question. Yet, Complainant still waited another *492 days* before seeking leave to amend. In the interim, Complainant has allowed significant milestones in this case to pass—including the Secretary of Labor’s dismissal of her claims in April 2019, the referral of her Complaint to the OALJ in June 2019, and the Court’s ruling on the parties’ motions for summary decision in January 2020. There is no excuse for such delay. *See Trezza v. NRG Energy, Inc.*, No. 06CIV11509PKCDF, 2008 WL

540094, at *6 (S.D.N.Y. Feb. 28, 2008) (denying leave to amend where amendment was based on facts and party “was aware of those facts prior to and throughout the course of this litigation”).

Second, Complainant’s belated request to amend the Complaint appears to be little more than an improper attempt to relitigate claims that she has already asserted, and lost, in two separate proceedings. Indeed, all of the “new” allegations at issue are, in actuality, old allegations relating to her claim that Credit Suisse and Palantir misappropriated a trader surveillance software tool created by Signac (known as “BRM”) and, specifically, her claim that a separate surveillance software tool developed independently by Credit Suisse, “Trader Holistic Surveillance” (known as “THS”), was based on “BRM.” Complainant already raised, litigated, and lost these very claims in two separate legal proceedings. The first proceeding was the JAMS arbitration, in which the Tribunal specifically addressed, and rejected, Complainant’s claims regarding the “misappropriation” of Signac’s technology in its Final Award. (Huang Decl. at Ex. 1, JAMS Award.²) The second proceeding was an action she filed in New York Supreme Court in March 2019 to vacate the Final Award. (See Huang Decl. at Ex. 2, Petition to Vacate.) In that proceeding, Complainant made the *exact same allegations* that she is now attempting to add to her Complaint here. This includes citing the exact same pages and lines of JAMS arbitration testimony, as well as the exact same December 2018 “Investor Day” presentation. (Compare Ex. A, Proposed Amendments ¶¶ 42-46, 55 with Huang Decl. at Ex. 2, Petition to Vacate ¶¶ 29-39, 47.) In fact, the “new” allegations in the proposed amendments were lifted almost verbatim from her prior Petition to Vacate (including the same typos):

Petition to Vacate (NY State Court)	Proposed Amendments (This Action)
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² All references to “Huang Decl.” are to the Declaration of Kuangyan Huang in Opposition to Complainant’s Motion to Compel and for Leave to Amend, filed May 1, 2020.

<p>¶ 31: [REDACTED]</p>	<p>¶ 44: “Warner also was clear with the arbitrator that CS AG was building the completely different trader surveillance software ‘from scratch.’”</p>
<p>¶ 32: [REDACTED]</p>	<p>¶ 45: “As to when the new holistic surveillance tools purportedly built from scratch would be ready, CCRO Warner testified before this Tribunal that it would be <i>sometime later in in 2018</i>.”³</p>

Thus, there can be no dispute that Complainant had all of the information she needed to try and include such allegations in this case by the time she filed the New York action in March 2019. She did not do so at that time. Instead, she played a tactical game of “wait and see,” delaying any amendment of her Complaint here until after the New York court had ruled on those claims. And that is exactly what happened. On May 14, 2019, the New York court denied Complainant’s request to vacate the Final Award and, in so doing, specifically rejected her claim that these portions of the JAMS arbitration transcript and the 2018 Investor Day Presentation supported any inference that Credit Suisse misappropriated Signac technology or that “THS” belonged to Signac. (Huang Decl. at Ex. 3, NY Court Tr. Excerpts at 33:22-34:11; 48:5-25; 58:2-18.) Nearly a year later, Complainant now seeks to once again insert the same allegations here and, in so doing, take a third bite at the apple. Such an amendment is not just “dilatatory,” it is in “bad faith” and is barred by both the doctrines of claim and issue preclusion and, thus, is also “futile” as a matter of law. *See Burch*, 551 F.3d at 126.

Finally, allowing Complainant to add the proposed new claims and allegations to this case would be highly prejudicial to Respondents. This action relates solely to Complainant’s Sarbanes-Oxley whistleblower retaliation claims, which arise only from the alleged retaliation she suffered

³ The examples above are only two of the allegations in common. A full list of such matching allegations is attached hereto as Exhibit B.

after she purportedly refused to “distort the facts” in conversations with Signac’s auditor, KPMG, in early-to-mid 2017. (Compl.) Permitting allegations regarding “THS” and the alleged misappropriation of Signac’s technology to be added to this case would necessarily require the Court to rule on matters outside of its authority, including claims outside of the SOX whistleblower framework that OSHA did not investigate below. *See Bechtel v. Admin. Review Bd., U.S. Dep’t of Labor*, 710 F.3d 443, 450 (2d Cir. 2013) (upholding underlying dismissal of claim by ALJ where “the ALJ dismissed this claim, determining that she had no authority to consider a claim that OSHA had not investigated”).

II. COMPLAINANT’S REQUESTS FOR “THS RELATED DOCUMENTS” SEEK ONLY IRRELEVANT INFORMATION AND SHOULD BE DENIED.

Complainant also seeks to compel the production of all “THS related documents” sought in her discovery requests. (Mot. at 10-12.) Complainant offers no explanation for why such documents are relevant except the claim that such discovery “relates directly to Respondents’ professed justification” for “failing to pay Graham either (i) the (\$810,000) bonus due [sic] her on account of 2016 performance, or (ii) the value of her equity stake in Signac” that “THS was not viable and not used because the sole customer was dissatisfied.” (*Id.* at 10-11.) This fails.

Neither Credit Suisse nor Signac—the only remaining Respondents—has ever offered “THS” as a “justification” for anything they, or anyone else, did in this case. Indeed, Credit Suisse’s Response to the Complaint makes no reference to “THS.” (Credit Suisse Response.) Nor does “THS” appear in Complainant’s original Complaint, or either of the two supplemental “declarations” Claimant filed with OSHA below. There is no reason it would. “THS” is shorthand for “Trader Holistic Surveillance”—a proprietary trader monitoring software solution created internally at, and by, Credit Suisse. “THS” has nothing to do with the surveillance tool that Signac was developing, “BRM.” Complainant knows “THS” has nothing to do with Signac. The specific

difference between “THS” and “BRM,” and whether “THS” had anything to do with Signac, were the subjects of extensive testimony in the JAMS arbitration referenced above. Nevertheless, she now once again conflates “THS” with “BRM” and has demanded all manner of documents relating to “THS.” But the fact of the matter is that such discovery does not relate in any way to Signac, much less the early 2017 KPMG audit of Signac that is at the center of the specific whistleblower-retaliation claims Complainant has actually pled in this action.

Complainant’s request for “THS related documents” is all the more improper given that such documents are likely to contain highly proprietary and sensitive information belonging to Credit Suisse, including non-public information regarding the development, design, and operation of THS, and information that relates to individual Credit Suisse traders, employees, accounts and customers. Complainant not only knows these sensitivities; she appears to be trying to take advantage of them here. To be sure, Complainant has made it clear that she will *not* agree to enter into any form of protective confidentiality agreement in this case despite having voluntarily entered such an agreement in the JAMS arbitration. It appears that Complainant’s true intent is to thrust Credit Suisse’s documents into the public domain—something she has attempted to do in the past.⁴ Absent the entry of some protective confidentiality order, the Court should deny Complainant’s motion to compel “THS related documents” in full.

⁴ In the New York Supreme Court proceeding, Complainant moved to seal those proceedings in their entirety. After her sealing motion was granted, Complainant then uploaded hundreds of documents that were unrelated to her Petition to Vacate that she had obtained from the JAMS arbitration—including a large volume of documents belonging to Credit Suisse and Palantir that had specifically been labeled “Confidential”—to the court’s sealed docket over the course of several weeks. Thereafter, Complainant moved to “unseal” the very docket she had sealed—a series of actions the New York court denounced as “[REDACTED]” (Huang Decl. at Ex. 3, NY Court Tr. Excerpts at 25:12-16.)

III. COMPLAINANT’S CLAIM THAT CREDIT SUISSE WITHHELD DOCUMENTS IN VIOLATION OF 29 CFR § 18.57 IS WRONG AS A MATTER OF LAW.

In a single, throwaway paragraph, Complainant argues that Credit Suisse has improperly “withheld” documents because Credit Suisse did not affirmatively move for a “protective order” under 29 CFR § 18.57(d)(2). (Mot. at 10.) This rests on a fundamental misreading that rule, which states: “A failure described in paragraph (d)(1)(i) of this section is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under § 18.52(a).” *Id.* But there are only two “failures” set forth in 29 CFR § 18.57(d)(1) to which this rule applies. The first, set forth in § 18.57(d)(1)(A), occurs when a party “fails, after being served with proper notice, to appear for that person’s deposition.” No deposition notices have been served, let alone disregarded. The second, set forth in § 18.57(d)(1)(B), occurs when a party, “after being properly served with interrogatories under § 18.60 or a request for inspection under § 18.61, *fails to serve its answers, objections, or written response.*” *Id.* (emphasis added). Credit Suisse also has not failed to “serve its answers, objections, or written response” to Complainant’s discovery requests. Quite to the contrary, and as Complainant concedes in her Motion, “Credit Suisse timely served Responses and Objections.” (Mot. at 10.) Having timely served such objections, Credit Suisse has no affirmative obligation under 29 CFR § 18.57(d)(2) to also seek a “protective order” to prohibit production of the objected-to material. Such a reading would mean that all discovery requests—no matter how improper—are self-executing even if timely objections are served. This would obviate the need for such objections, as well as all of 29 CFR § 18.57(a), which governs motions to compel.

IV. THE COURT SHOULD ENTER A PROTECTIVE ORDER PROTECTING ANY “CONFIDENTIAL” INFORMATION PRODUCED BY THE PARTIES.

Credit Suisse’s prior references to the need for a “protective order” were not references to orders to prohibit the production of discovery, as contemplated by 29 CFR § 18.57(d)(2). Rather,

Credit Suisse’s prior references were, instead, references to the need for a routine protective order meant to protect potentially confidential information that the parties do exchange from improper disclosure or use outside of these proceedings. ALJs have the power to order the parties to enter such orders. *See Massell v. Tenn. Valley Auth.*, OALJ 2019-ERA-00010, slip op. at 1 (OALJ Nov. 27, 2019). Specifically, 29 C.F.R. § 18.52 provides that this Court may, for “good cause,” issue an order “[r]equiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” 29 C.F.R. § 18.52(a)(7). Such confidentiality orders are “routinely granted in litigation” and hearings. *Bassett v. Boeing Co.*, OALJ No. 2018-AIR-00027, slip op. at 1 (OALJ Nov. 9, 2018).⁵ And courts in this Office have recognized that such orders provide discovery materials with “reasonable protection” and “fall[] squarely within the provisions of 29 C.F.R. § 18.52.” *Id.*

Given Complainant’s refusal to enter into any joint confidentiality agreement here, which itself raises troubling concerns as to Complainant’s intent, Credit Suisse requests that the Court enter a routine protective order substantially in the form attached hereto as Exhibit C that (a) permits all parties, Complainant and Respondents, to mark information and documents exchanged in discovery as “confidential,” and (b) provides that “confidential” documents shall be used only for purposes of the prosecution and defense of claims asserted in this action. Any restrictions imposed or protections afforded by such an order would apply equally to all parties. And the entry of such an order would in no way prejudice any party’s ability to seek discovery or use discovery materials in this action. Indeed, Credit Suisse does not seek a protective order to withhold

⁵ 29 C.F.R. § 18.85 also grants authority, upon motion or on its own, for the Court to “issue orders to protect against undue disclosure” or “order any material that is in the record to be sealed from public access.” 29 C.F.R. § 18.85; *see also Graham v. Credit Suisse Securities, et al.*, 2019-SOX-00040, Initial Prehearing Order and Notice of Hearing (OSHA June 19, 2019); *see also* 5 U.S.C. § 552(b)(4) (exempting “trade secrets and commercial or financial information obtained from a person and privileged or confidential” from the information that is required to be made publicly available through FOIA requests).

documents from discovery on the basis of confidentiality. Rather, Credit Suisse seeks a protective order merely to ensure that sensitive materials exchanged between the parties in connection with these proceedings do not wind up on Page Six of the New York Post or some other public medium. ALJs have repeatedly recognized that the use of such protective orders are reasonable measures to balances the need for discovery with the need to protect confidential and sensitive information from damaging public disclosure. *See, e.g., Katzel v. Am. Int'l Grp., Inc.*, OALD No. 2019-SOX-00014, slip op. at 1–2 (OALJ Oct. 16, 2019) (entering similar protective order); *see also Meek v. BNSF Railway Co.*, 2019-FRS-00070, slip op. at 2–4, 7 (OALJ Jan. 29, 2020); *Esparza et al. v. Am. Airlines, Inc.*, OALJ No. 2019-AIR-00015-17, slip. op. at 1–3 (OALJ June 25, 2019) (same); *Bassett v. Boeing Co.*, OALJ No. 2018-AIR-00027, slip op. at 2–6 (OALJ Nov. 9, 2018) (same); *Aiken v. CSX Transp., Inc.*, OALJ 8018-FRS-00031, slip op. at 1–3 (OALJ Oct. 30, 2018) (same).

CONCLUSION

For the foregoing reasons, Respondent Credit Suisse respectfully requests that the Court (1) deny Claimants' Motion in its entirety as it pertains to Respondent Credit Suisse and (2) enter a protective order substantially in the form set forth in Exhibit C to protect confidential information exchanged during these proceedings.

Dated: May 1, 2020

Respectfully submitted,

/s/ Kuangyan Huang
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885 Third Avenue
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*Attorneys for Respondent Credit Suisse
Securities (USA) LLC*

Exhibit A

Proposed Amendments

~~November 17~~ April,
~~2017~~ 2020

VIA EMAIL AND OVERNIGHT MAIL

United States Department of Labor
Office of Administrative Law Judges
Honorable Theresa C. Timlin
Administrative Law Judge
2 Executive Campus, Suite 450
~~Occupational Safety and Health Administration~~
~~Federal Building~~
~~201 Varick Street, Room 670~~
~~New York, New York 10014~~
Cherry Hill, NJ 08002

Re: Amended Complaint of Retaliation

Dear Sir/Madam:

~~We represent~~ This law firm represents Colleen Graham (“Graham”) and ~~submit this whistleblower submits this Amended Whistleblower~~ respondents Credit Suisse Securities (USA) LLC (“Credit Suisse”), ~~Credit Suisse First Boston Next Fund Inc. (“CSFB”), Palantir Technologies Inc. (“Palantir”),~~ and Signac LLC (“Signac”) (collectively, “Respondents”) for violations of the Sarbanes-Oxley Act of 2002 (“SOX”) 18 U.S.C. §1514A.

INTRODUCTION

Respondents first ~~began to retaliate~~ retaliated against Graham shortly after she refused to participate in conduct ~~by Credit Suisse and Palantir~~ that she reasonably believed violated securities laws. Graham refused to distort facts related to the recognition of revenue by Signac, and affiliated corporate entities, including Credit Suisse ~~and Palantir, revenue which would have been deemed critical for Palantir relating to its widely rumored intention to go public.~~ The adverse action began gradually as Credit Suisse ~~and Palantir~~ started to exclude Graham from certain meetings and communications, made thinly veiled threats of termination, withheld her discretionary bonus for 2016, ~~and~~ deprived her of employment opportunities otherwise provided to substantially all of Signac Staff as the company was ~~unwound~~ shuttered.

The initial retaliatory acts began in March and continued ~~into June 2017. Then, when Graham’s counsel asserted unlawful retaliation thereafter, sharply escalating~~ in early June 2017, ~~Credit Suisse and Palantir immediately and sharply escalated their abusive conduct after Graham’s counsel claimed unlawful retaliation.~~ Graham was singled out for conduct suffered from others. She was bullied, harassed and intimidated, and made the subject of knowingly false allegations of misconduct, including misconduct that, if true, would violate

Swiss law. No less than six different (6) lawyers were called on to harass Graham in a number of different ways, including threatening to cancel substantial amounts of her deferred compensation and to pursue any and all remedies available if she didn't submit to a host of ever changing, unreasonable demands. Respondents also ~~refused to value Graham's~~ retaliated by refusing to pay Graham for her valuable equity, ~~although required to do so~~ stake in Signac.

Graham agreed to demand after demand, believing she would assuage the professed concern about alleged unauthorized disclosure of confidential information. After all, Credit Suisse had employed Graham for twenty years in senior compliance functions and had personal knowledge of her impeccable integrity. Respondents knew and appreciated the absence of any improper motive (like competition), or evidence of actual misconduct. ~~Nonetheless~~, Graham was pursued with a singular aggressiveness, yet at the same time no action was taken against others who had used personal email for company business. Nor was any action taken against ~~Palantir's designated representative, serving as~~ Signac's CIO, who suggested that all Signac's laptops be reformatted so as to destroy all confidential information on them, ~~which was~~ plainly improper conduct in light of the duty to preserve evidence.

Ultimately, after Graham withstood the pressurized tactics, the CS demands were simply abandoned. The feigned "serious concern" with unauthorized disclosure evaporated just as suddenly as it had appeared after ~~she had~~ Graham first raised the issue of securities law violations.[†]

In or about November 2017, Graham filed an arbitration against Credit Suisse, Signac and others. At issue were various non-employment related claims arising principally under the Signac LLC Agreement and at law, which were subject to compulsory arbitration before JAMS ("JAMS 1"). Relying on sworn testimony from Credit Suisse's two most senior compliance officers, one also a member of the CS AG Executive Board, Credit Suisse represented that the trader holistic surveillance product that Signac delivered in late Spring 2017 was never viable, thereby leading to the complete dissatisfaction of its sole customer Credit Suisse AG. The compliance officers were emphatic that THS was not being used by Credit Suisse or CSAG as of March 2018. Credit Suisse was in the midst of building its own product as of March 2018, and it only had a "concept" by then.

Lacking a viable THS product and losing CS AG as its sole customer is also offered by Respondents as a defense in this proceeding and would, if true, offer a non-discriminatory reason for taking several of the adverse personnel actions at issue herein, such as refusing to pay Graham a bonus, refusing to re-employ her at Credit Suisse, failing to assign and value to and or pay Graham for or her equity stake in Signac.

BACKGROUND

[†]~~This complaint does not purport to recite all of the facts and circumstances relevant to this matter and the governing agreements contain expansive confidentiality provisions. Graham is fearful that Credit Suisse may object, however unreasonable it is, to additional disclosure.~~

1. Graham served as Chief Supervisory Officer of Signac²¹ and a member of its Board of Managers from on or about February 29, 2016 to on or about July 27, 2017.

2. Prior to Signac, Graham was employed by Credit Suisse for more than twenty years serving in a number of senior level management positions, including heading Compliance for the Americas and acting as the Chief Control Officer of its investment bank. Her employment record was impeccable and she had a stellar reputation for honesty and integrity.

3. Credit Suisse is a company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. §781) or that is required to file reports under section 15(d) of the SEC Act of 1934, 15 U.S.C §780 (d).

4. Credit Suisse ~~and Palantir~~ appointed Graham to serve as Signac’s Chief Supervisory Officer and a member of a Signac Board of Managers.

5. Signac is a Delaware Limited Liability Company. Its financial sponsors and principal equity stakeholders were CSFB Credit Suisse First Boston Next Fund, Inc., a wholly owned subsidiary of Credit Suisse, and Palantir Technologies, Inc. (“Palantir”), a privately owned technology services company. CSFB and Palantir each owned 50% of the Signac voting rights.

6. ~~CSFB Credit Suisse~~ is a wholly owned subsidiary of Credit Suisse ~~and its financial information is included in the financial statements of Credit Suisse, within the meaning of 18 U.S.C. §1514 A(a)(1).~~ AG (“CS AG”), a global investment bank whose American Depositary Receipt shares (“ADRs”) are listed as -----AD

7. CS and CSAG share certain functions, including regulatory and compliance.

8. At all times relevant to this dispute, Lara Warner, was CS AG’s Chief Compliance and Regulatory Affairs Officer (“CCRO”), responsible for all compliance and regulatory affairs globally across all CS AG businesses and functions, including Credit Suisse. Warner was also a member of CS AG Executive Board and a member of the Board of Directors of Signac, with 2 out of 6 votes.

9. James Barkley was the Global Head of Core Compliance Services, the 2nd most senior compliance officer. His responsibility also stretched across all CS AG businesses and functions, including Credit Suisse.

10. 7. Signac acted as a “contractor” of Credit Suisse or an affiliate thereof within the meaning of 18 U.S.C. §1514A and the regulations promulgated thereunder, 29 C.F.R. 1980.101 (f) and relevant precedent, and as such is a “covered person” subject to the provisions of SOX.

²¹ On or about February 29, 2016, Signac began to conduct its business. Signac was designed to leverage the financial services and trading expertise from Credit Suisse and certain technology made available by Palantir in order to build algorithms and analytics that track behavior to create a global, industry leading solution.

Signac's sole source of revenue was a contract under which Credit Suisse retained it to develop and provide certain software products, technology solutions, analytics and other services.

11. ~~8.~~ Graham remains an "employee" of Credit Suisse and is a "covered person" for purposes of SOX protections against retaliation because the relevant regulations define an "employee" as "an individual presently or formerly working for a covered person." 29 C.F.R. 1980.101 (f) and (g). Credit Suisse continues to hold substantial amounts of Graham's deferred compensation.

~~9. Palantir is currently a private corporation headquartered in Palo Alto, California. Palantir is a technology company that engages in the business of big data analysis. Although currently private, there has been much speculation in the financial and technology trade press that Palantir is planning an IPO of its stock, with reports speculating that it may receive a valuation of as much as Twenty Billion Dollars. Dr. Alex Karp is Palantir's CEO. Intellectual and other property rights derived from the products developed and owned by Signac are material to that valuation.~~

12. ~~10. Palantir and~~ Credit Suisse ~~each~~ had a designated "Manager" on the Signac Board of Managers, which had exclusive and complete authority to manage and control Signac, subject to the provisions of the Signac LLC Agreement. As one of the Managers of Signac, ~~who~~ which together undertook the retaliatory actions complained of herein, ~~Palantir and~~ Credit Suisse ~~are~~ is a also "covered persons" under the provisions of SOX, including 29 C.F.R. 1980.101(f) and relevant precedent.

GRAHAM OBJECTS TO PARTICIPATING IN UNLAWFUL PRACTICES

13. ~~11.~~ In or about March 2017, a Signac audit conducted by KPMG concluded that certain Signac revenue could not legally be recognized in calendar year 2016 under then existing software accounting rules; recognition had to be deferred until delivery of certain product, including THS.

14. ~~12.~~ Credit Suisse expressed strong frustration that it was unable to recognize the revenue in 2016. According to Credit Suisse, the lack of revenue recognition in 2016 would cause a significant loss to be recognized by it. According to Palantir, Signac's deferral of revenue also impacted it negatively.

15. ~~13.~~ Credit Suisse, through ~~a member of its' Executive Board~~ Warner, complained that Signac was not considering the impact of the Signac accounting on Credit Suisse. ~~Similarly, a representative of Palantir's CEO complained among other things about the lack of alignment of interest between Signac and Palantir.~~

16. ~~14. The Credit Suisse Executive Board Member Warner~~ advised Graham that the lack of revenue recognition would cause a significant loss to be recognized, and Credit Suisse and Palantir pressured Graham to distort the facts in order to convince the Signac auditor to allow the revenue recognition in 2016, revenue which was deemed critical to a widely reported potential Palantir IPO.

17. ~~15. Palantir and~~ Credit Suisse ~~pressed~~pressured Graham to adopt the knowingly false position that the product and services developed and rendered by Signac over the prior fourteen months involved only maintenance of, or otherwise solely deployed, ~~Palantir~~Palantir's pre-existing technology and analytics. Graham refused.

18. ~~16.~~ Credit Suisse and Palantir expressed open frustration at Graham's objecting to their mistaken directions regarding revenue recognition.

19. ~~17.~~ After Graham objected and refused to distort the facts, Credit Suisse ~~and Palantir~~ began to retaliate against her, excluding her from relevant communications and meetings, making thinly veiled threats of termination and withholding her discretionary bonus for 2016. These initial retaliatory acts began in March and continued into June 2016. It also terminated Graham's physical and systems access to Credit Suisse on or about May 19, 2017. On or about May 19, 2017, Credit Suisse also withdrew the opportunity to become reemployed with ~~Credit Suisse~~it, an opportunity it extended to substantially ~~all of the former Signac employees who previously had been~~ Credit Suisse employees ~~and other appropriate Signac employees~~.

GRAHAM OBJECTS TO THE RETALIATION AND THE BULLYING AND HARRASSMENT ESCALATES SHARPLY

20. ~~18.~~ On May 23, 2017, Graham's counsel communicated by email with Credit Suisse's counsel, expressing concern that Credit Suisse had made offers of future employment to all appropriate Signac employees except Graham. He expressed ~~a shared~~an interest in "avoiding retaliatory conduct that would give rise to claims under Sarbanes – Oxley ~~..~~“" (Emphasis supplied)

21. ~~19.~~ On June 1, 2017, Graham's counsel specifically raised the issue of whether Graham had been discriminated against for having objected to certain accounting treatment that Signac's members, including Credit Suisse, sought to pursue.

22. ~~20.~~ On June 8, 2017, only three days after Graham ~~had~~ raised a claim of actual retaliation, Graham's counsel received a letter alleging that Graham "has violated her ongoing contractual obligations to Signac and Credit Suisse Securities (USA) LLC". The letter expressed "extreme concern" that Graham had "misappropriated Confidential and proprietary information by forwarding such information to her and her husband's personal and non-secure email accounts" (emphasis added).

23. ~~21.~~ The letter referenced an ongoing "investigation," demanded affidavits attesting that all confidential information had been permanently deleted from electronic devices, and demanded that all "devices and email or other electronic accounts" be submitted for a forensic inspection. Graham was afforded little more than 48 hours to comply.

24. ~~22.~~ Upon information and belief, Signac ~~at the direction of~~ and Credit Suisse ~~and Palantir~~, singled out Graham for an “investigation” although it knew, or would have known if it had conducted a simple inquiry, that other employees had “forwarded” confidential information to personal email accounts. Moreover, Respondents knew that Graham had not engaged in any unauthorized disclosure and had properly used the information solely for purposes related **(a)** to her service as a manager as authorized by the relevant agreement; **(b)** and to ensure she had an opportunity to fulfill her own fiduciary obligations as a member of the Board of Signac; and **(c)** to preserve evidence in connection with her concerns about possible securities law violations. The false allegations were intended to bully and harass Graham in retaliation for her having (a) raised the issue of securities law violations, and (b) stated her intention to pursue her remedies under SOX.

25. ~~23.~~ Despite Graham’s assurances that she had used the information properly, only for purposes related to her services as a Manager, and to preserve evidence in connection with her personal obligations, and despite having no evidence to the contrary, Respondents pressed on and with a ferocity completely inconsistent with the allegations and the assurances they were receiving from Graham (who had been an extremely well respected senior level compliance officer at Credit Suisse for 20 years).

26. Credit Suisse directly threatened to cancel substantial deferred compensation that she had earned and that Credit Suisse continued to hold. It accused her of breaching her obligations;

27. Respondents demanded invasive forensic inspection of all her and her families’ personal electronic devices and email and electronic accounts. Respondents demanded the return of all Signac and Credit Suisse confidential information, including that Graham had shared with counsel for purposes of getting legal advice. Unfounded claims were made that the email transmissions violated Swiss laws, which amounted possibly to allegations of criminal misconduct.

28. **Respondents knew that the information they sought to bully Graham into deleting or returning included information directly relevant to her SOX retaliation claims.**

29. ~~24.~~ On or about June 19, 2017, Credit Suisse ~~and Palantir~~ instructed Graham not to attend or participate in the most significant operational risk industry conference scheduled for the next day. Graham was scheduled to be a panel participant.

30. ~~25.~~ Graham withstood the barrage of harassing tactics. On June 27th, with Respondents unable to secure any evidence that Graham actually had made any unauthorized disclosure and having received sworn affidavits from Graham confirming the same, Credit Suisse, by its counsel, advised that it “presently intends not to cancel Graham’s outstanding” deferred compensation awards. However, as part of the ongoing campaign of harassment, Credit Suisse imposed new³² and often unreasonable conditions on Graham in order to avoid future cancellation.

³² Graham had agreed to a forensic examination with reasonable parameters.

31. ~~26.~~ Graham's counsel immediately expressed concern, among other things, that demanding return of a vaguely defined "CS Client Related Information" might interfere with Graham's right to pursue her SOX claims. It was agreed that Graham would attest that she held neither:

- 1) ~~'CS Client Identifying Information'~~. Defined as information that identifies CS clients except to the extent it is already public, thematic or illustrative.
- 2) ~~'CS Swiss Data'~~. Defined as documents that contain CS Swiss business, data or investigations except to the extent not otherwise public, thematic or illustrative.

32. ~~27.~~ Credit Suisse continued to falsely allege that Graham had possessed two items of CS Swiss Data, essentially accusing her of violating both Swiss law and her contractual obligations. However, the two items had previously been public and or were thematic, and so did not constitute CS Swiss Data under any reasonable interpretation. Credit Suisse knew well that the items did not constitute CS Swiss Data and was making the allegations to intimidate Graham and deter her from pursuing her retaliation claim under SOX.

33. ~~28.~~ Graham's counsel offered to allow Credit Suisse's counsel to inspect any materials to confirm that they did not constitute CS Swiss Data or CS Client Identifying Information. Despite the professed "serious concern" surrounding possible legal violations, Credit Suisse elected not to review the documents.

34. ~~29.~~ With regard to the forensic examination of electronic devices and email accounts, Signac and Credit Suisse agreed that the forensic examiners would only conduct the review and access Graham's devices and email accounts in her attorney's offices. Credit Suisse and Signac expressed their clear desire "to promptly proceed and complete this important investigation."

35. ~~30.~~ Credit Suisse and Signac subsequently reneged on their agreement to access Graham's devices and email accounts only in her attorney's offices, falsely claiming it wasn't agreed upon. They then completely abandoned their "important investigation."

36. ~~31.~~ In or about July 2017, for a three-day period, Graham ~~believes she~~ was followed by a woman, the intention of which was to harass and intimidate Graham. ~~The woman Graham believes, followed her to an interview at a financial institution, that is an investor in Palantir.~~ Among other things, the woman followed Graham to her lawyer's offices and to a job interview. The woman also followed Graham to her home, and surveilled Graham and her family from curbside. The woman wanted to be seen and the intimidating message Credit Suisse intended to send was clear: you, and even your family, cannot escape our reach. Shortly thereafter, upon information and belief, Credit Suisse ~~and Palantir~~ interfered with a significant employment opportunity ~~being~~ that was about to be extended to Graham ~~by the financial institution.~~

37. ~~32.~~ Credit Suisse also ~~has~~ withheld interest payments due and owing to Graham on her deferred compensation.

Credit Suisse Refuses To Pay Graham For Her Signac Equity

38. ~~33. Credit Suisse and Palantir also refused to value Graham's valuable equity, although required to do so by the definitive documents, further retaliated against Graham by refusing to pay her fair value for her equity stake in Signac, which it was required to do following the termination of her employment.~~

39. As of March 2017, when the retaliatory acts began, Signac's principal product under development for use by CS AG across all of its businesses, including Credit Suisse, was a trader holistic surveillance tool. The trader holistic surveillance tool was often referred to at Signac (and in the Final Award rendered in JAMS 1) as BRM. However, Barkley found BRM a confusing term and Credit Suisse began to refer to it as THS. The following colloquy took place in JAMS 1:

Q: Now, did you tell your people in core compliance services not to use the term BRM?

A: BRM is a confusing term within the organization. The terminology going forward was to be "trader holistic surveillance".

40. Signac delivered its THS product to CS AG in or about May 2017 and CS AG began to use it.

41. Consistent with Respondent's defense herein, Barkley and Warner testified without equivocation in JAMS I that Signac's TI-IS was not viable; Credit Suisse was not using it and had not appropriated it. Instead, they claimed that CS AG was developing its own TITS, but had not done so as of the March 2018 hearing. At that point in time Credit Suisse only had a "concept"

42. Warner testified as follows:

Q I understand you have other business with Palantir, but isn't it true after Signac was shut, part of your business with Palantir concerned trader surveillance?

A We do not have anything going on with trader surveillance as it relates to any Signac product, and we are building it ourselves.

(emphasis supplied) (Ex 25, at 1571:16-24).

43. Warner's sworn testimony was that CS AG was not using Signac's trader holistic surveillance software as of March 12, 2018, but, rather, had abandoned it and begun to build its own "completely different" software.

Q But advanced detection scenarios and the idea behind Signac and its specialist software was described by Urs Rohner as a breakthrough, correct?

A Correct. It was described that way.

Q And you were progressing on this breakthrough, and there was an MVP³ about to be achieved on the product in May, correct?

A I don't think I can attest to the fact it was about to be achieved.

Q Well, you were told in various status reports that that was - -

A True.

Q - - the timeline?

A That's true.

Q I haven't seen anything where you said we disagree.

A That's true.

Q So after May did you abandon this sort of progress towards this breakthrough effort?

A Yes, we chose a different breakthrough effort.

Q That's what you're building now?

A Correct.

Q It's completely different in our testimony?

A It is.

(Id. at 1574:24-1576:5).

44. Warner also was clear with the arbitrator that CS AG was building the completely different trader surveillance software "from scratch"⁴.

A I don't know. I would have to look at them, but I don't think these are the same things as what Signac built. We are obviously building them from scratch.

(Id. at 1592:2-5).

³ MVP means "Minimal Viable Product".

⁴ Although not relevant to the issue of whether the Award should be vacated on grounds of misconduct, CS AG had no right to reverse engineer, discover the source code, modify or adopt Signac's software, and certainly could not do so consistent with the obligations to act in good faith to maximize the value of Signac. (See below at 40 to 45).

45. As to when the new holistic surveillance tools purportedly built from scratch would be ready, CCRO Warner testified before this Tribunal that it would be sometime later in in 2018.

Q Okay. By the way, when will the next-generation tools be ready to deliver holistic surveillance at the scale required by Credit Suisse?

A Sometime this year. I don't have the exact date, but –

(Id. at 1606:13-19).

46. To the same effect, Warner testified that CS AG only had a concept as of the hearing in March 2018.

Q I understand that, but you said since May of 2017 you started to build your own product?

A Didn't build, but we began thinking about it.

Q Think about it. It's still not done, correct?

A When you say "done," what do you mean "done"?

Q You haven't come up with a tool or something like a BRM tool?

A We have a concept around trader — holistic trader surveillance.

(Id. at 1622:20-1623:16).

47. Warner also was clear that as of March 2018, CS AG did not yet have a trader holistic surveillance product:

Q Certainly once they built it, you could have taken it and just used it for a very little cost, correct?

A But I didn't, and that was not what we did. We built it from scratch- You made the point. We don't have a product yet.

(emphasis supplied) (Id. at 1640: 17-23).

48. James Barkley, Global Head Core Compliance Services with responsibilities across all CS AG entities, including Credit Suisse and Signac, also was clear that CS AG had not taken and was not using Signac's software, but rather as of March 8, 2018, was in the process of building its own trader surveillance software:

Q So, now, you developed a different product, is your testimony, that sits on the Foundry platform to surveil traders?

A I do not have a trader holistic surveillance solution at Credit Suisse at this time, to this date.

MR. KRAUS: Could you repeat that answer, please? (Whereupon Answer is Read Back.)

THE REPORTER: “I do not have a trader holistic surveillance solution at Credit Suisse at this time, to this date.”

(Id. at 1097:21-1098:15).

49. Elsewhere, but just as clearly, Barkley told the arbitrator that CS AG had no trader holistic surveillance as of March 2018.

Q At this point in time, have you developed a tool to replace the product that Signac had been developing that you were unhappy with?

A As I said, I still do not have a trader holistic surveillance tool that I can use.

(Id. at 1130:16-22).

50. As for the software that CS AG was using to surveil traders after Signac was shut in 2017 through the March 2018 arbitration, Barkley swore that the bank was using only “standard industry tools⁵” which had been in place before he arrived in October 2016.

Q And in the period between when Signac was shut in the end of May and this off-site, at some point in the end of 2017, what tools was core compliance services using to surveil traders?

A I have two tools that I use to surveil trading activity. One is called Actimize. The other one is called SMARTS. Those are the primary tools we use to surveil traders.

Q Actimize and what?
A SMARTS.

Q How long have those tools been in use?

⁵ In CEO Thiam’s investor Day, CS AG tells its investors that it “rolled out industry leading tools,” including trader holistic surveillance, in the first half of 2017. A standard industry tool by definition cannot also be an industry leading tool. (Ex. D). Warner also gave a presentation regarding THS.

A Those are industry tools, and I don't know how long they have been in use. They are standard industry tools that many firms use.

Q When did you begin to use them, if you know?
When did CS —

A They were in place before I got to Credit Suisse.

(emphasis supplied) (Id. at 1095:5-1096:4)

51. Barkley testified that the purportedly “new” software supposedly only under development in March 2018 would be known as “trader holistic surveillance”.

A I would show you what I would do. I did not have a trader holistic surveillance platform yet. It's under development.⁶

Q And as part of that trader holistic surveillance platform under development, there is a tool under development that focuses on traders as opposed to relationship managers, correct?

A Yes.

Q And there is a dashboard being developed - -

A Yes.

Q -- in connection with the focus -- the tool that focuses on the traders, correct?

A Yes.

Q Now, is there a name for this tool under development or you don't have a name yet?

A Trader holistic surveillance.

(Id. at 1102..2-21) (emphasis supplied).

Q So, now, you developed a different product, is your testimony, that sits on the Foundry platform to surveil traders?

A I do not have a trader holistic surveillance solution at Credit Suisse at this time, to this date.

Id. at 1097-98 (emphasis supplied).

⁶ Again, CS AG's investor Day represents that “Trader Holistic Surveillance” was rolled out in 2017.

Q At this point in time, have you developed a tool to replace the product that Signac had been developing that you were unhappy with?

A As I said, I still do not have a trader holistic surveillance tool that I can use.

Id. at 1130

A I would show you what I would do. I did not have a trader holistic surveillance platform yet. It's under development.

Such was the sworn testimony in JAMS 1 by CS AG's two most senior compliance officers - CS AG did not have a trader holistic surveillance solution as of March 2018 and was using only standard industry tools. (Such testimony also provides a legitimate business justification for taking some of the adverse personnel actions at issue herein, like reusing to pay Graham a bonus or assigning any value to her Signac equity)

52. But Credit Suisse subsequently admitted that the sworn defense testimony that Signac's THS product was not viable and was no longer being used is 100 % false.

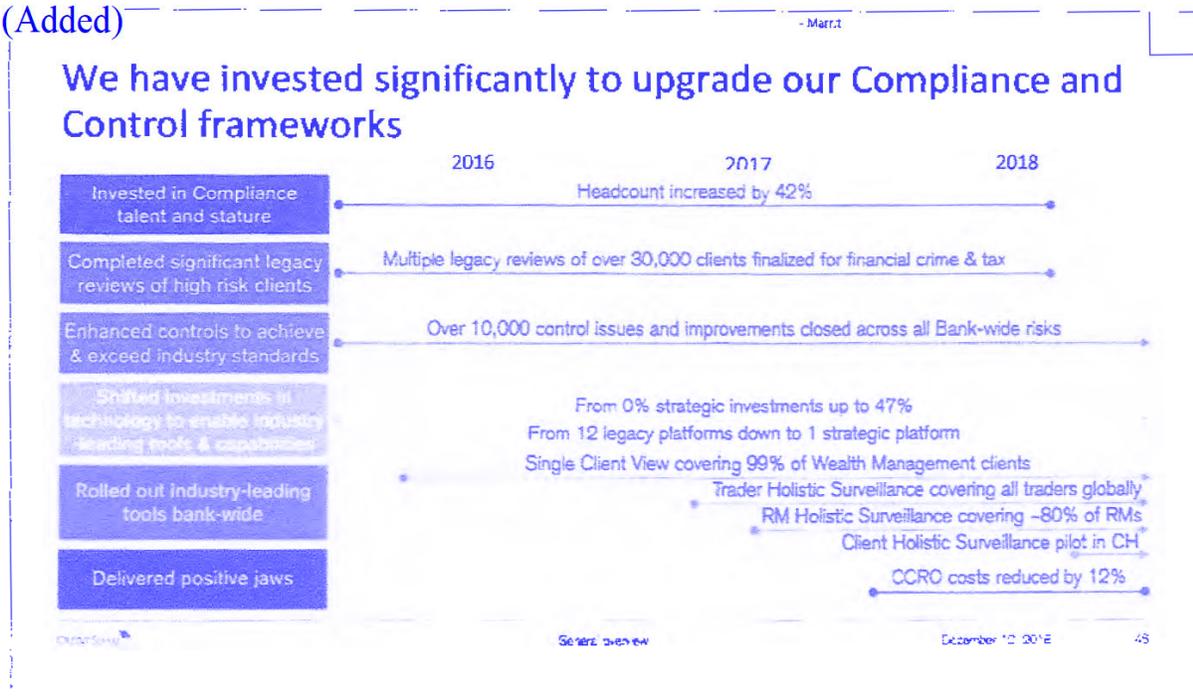
CS AG's Investor Day

53. Credit Suisse AG's annual Investor Day held in December 2018 admits that the THS product delivered by Signac in or about May 2017 has been used since that date with great effectiveness and at substantial savings on an annual basis. Critically, both Warner and Barkley swore that Credit Suisse only had a concept as of the March 2018 JAMS I hearings and had been using standard industry tools to that point in time.

54. On December 12, 2018, CS AG gave its annual Investor Day presentation in Zurich, Switzerland. It subsequently made corresponding disclosures in securities filings later that month.

55. The Investor Day materials and securities filings include a presentation by CS AG's Chief Executive Officer, Tidjane Thiam in which he presents shareholders with a chart showing that CS AG had "rolled out industry leading tools", including "Trader Holistic Surveillance covering all traders globally" in or about spring/summer 2017.

(Added)



56. Credit Suisse’s Investor Day directly undercuts a key premise of Credit Suisse’s defense; specifically, it disproves the claim that TI-IS was not a viable product, leading to the dissatisfaction of Credit Suisse AG, Signac’s sole customer, and thereby providing a nondiscriminatory justification for many of the adverse personnel actions at issue herein, such as not paying any bonus, not offering continued employment, not valuing the equity and not making any payment on it.

SARBANES-OXLEY- THE RELEVANT LAW

Section 806 of SOX protects employees against retaliation where they have provided information to their supervisors that the employees “reasonably believe constitutes a violation of [18 U.S.C.] section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission [“SEC”], or any provision of Federal law relating to fraud against shareholders . . .” 18 U.S.C.S. § 1514A(a)(J). To invoke the protection of Section 806, an employee “must show by a preponderance of the evidence that (1) [he] engaged in protected activity; (2) the employer knew of the protected activity; (3) [he] suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.” *Fraser v.*

Fiduciary Trust Co. Int'l, 2009 U.S. Dist. LEXIS 75565, 2009 WL 2601389, at *4 (S.D.N.Y. Aug. 25, 2009). There is ample evidence showing that Graham meets the four elements required to enjoy the protections of Section 806 of SOX and that Respondents, as “covered persons” under the Regulations promulgated under SOX, 29 C.F.R. 1980.100 *et. seq.*, and relevant case law, retaliated against her in violation of SOX because she had complained about securities law violations. SOX also prohibits a “covered person”, like each of Credit Suisse, and Signac ~~and Palantir~~, from retaliating against employees for seeking to protect their rights under SOX to be free from retaliation. In this case, Credit Suisse sharply escalated, its retaliatory conduct after Graham, through counsel complained that she was being retaliated against for having made complaints protected by SOX and intended to pursue her statutory rights and remedies.

RELIEF SOUGHT

Complainant seeks the following relief:

- A. Reinstatement to a position at Credit Suisse;
- B. Back pay, raises, bonuses, front pay, the reasonable value of her equity in Signac, deferred compensation and interest payments therein, benefits, overtime, reinstatement of seniority and tenure, and other orders and relief necessary to make complainant whole;
- C. An order: (1) requiring respondent to abate and refrain from any further violations of the whistleblower provisions of the Acts; (2) requiring respondent to explicitly rescind any and all policies that restrain or direct employees in connection with reporting of compliance issues; (3) requiring respondent to prohibit harassment of those who engage, or are suspected of engaging in protected activity; and (4) requiring respondent to take prompt and effective action against any reported violations;
- D. An order prohibiting Respondents from disclosing any disparaging information about complainant to prospective employers, or otherwise interfering with any applications he might make in the future;
- E. Compensatory monetary damages in an amount determined to be fair and equitable compensation for complainant’s emotional distress and loss of reputation;
- F. Exemplary damages in an amount sufficient to deter Respondents from future violations of the law;
- G. Reasonable attorney fees;
- H. Costs of this proceeding, including reimbursement for deposition fees, travel expenses, and other expenses to collect and produce evidence in this matter;
- I. Order requiring Respondents to issue a notice, and provide copies to all its employees that: (1) the Department of Labor has found that respondent violated the rights of a whistleblower, and ordered that this person be made whole, (2) describes the laws protecting whistleblowers, setting out the ALJ’s orders to respondent as policies of respondent, (3) provides

the name and address where complaints of violations may be sent, and (4) informs employees that complaints must be filed within specified time limits after any adverse action;

- J. Pre-judgment interest on all amounts due; and
- K. Such other and further relief as may be just and proper.

Very truly yours,
Kraus & Zuchlewski LLP
Attorneys for Colleen Graham

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cc: Colleen Graham

Exhibit B

Comparison Between Proposed Amendments and Petition to Vacate

Petition to Vacate (NY State Court)	Proposed Amendments (This Action)
¶ 30: [REDACTED]	¶ 43: “Warner’s sworn testimony was that CS AG was not using Signac's trader holistic surveillance software as of March 12, 2018, but, rather, had abandoned it and begun to build its own ‘completely different’ software.”
¶ 31: [REDACTED]	¶ 44: “Warner also was clear with the arbitrator that CS AG was building the completely different trader surveillance software ‘from scratch.’”
¶ 32: [REDACTED]	¶ 45: “As to when the new holistic surveillance tools purportedly built from scratch would be ready, CCRO Warner testified before this Tribunal that it would be <i>sometime later in in 2018.</i> ”
¶ 33: [REDACTED]	¶ 46: “. . . Warner testified that CS AG only had a concept as of the hearing in March 2018.”
¶ 34: [REDACTED]	¶ 47: “Warner also was clear that as of March 2018, CS AG did not yet have a trader holistic surveillance product.”
¶ 35: [REDACTED]	¶ 48: “James Barkley . . . was clear that CS AG had not taken and was not using Signac's software, but rather as of March 8, 2018, was in the process of building its own trader surveillance software
¶ 37: [REDACTED]	¶ 49: “Elsewhere, but just as clearly, Barkley told the arbitrator that CS AG had no trader holistic surveillance as of March 2018.”
¶ 38: [REDACTED]	¶ 50: “As for the software that CS AG was using to surveil traders after Signac was shut in 2017 through the March 2018 arbitration, Barkley swore that the bank was using only ‘standard industry tools’ which had been in place before he arrived in October 2016.”
¶ 39: [REDACTED]	¶ 51: “Barkley testified that the purportedly ‘new’ software supposedly only under development in March 2018 would be known as ‘trader holistic surveillance.’”

Exhibit C

Proposed Confidentiality Agreement

**U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

COLLEEN A. GRAHAM

Complainant,

v.

CREDIT SUISSE SECURITIES (USA) LLC
and SIGNAC LLC,

Respondents.

ALJ No. 2019-SOX-00040

[PROPOSED] PROTECTIVE ORDER

The Court finds that Complainant and Respondents (collectively, the “Parties”) in the above-captioned matter (the “Action”) will be producing confidential and sensitive information, the disclosure of which would reasonably be expected to cause substantial competitive harm and/or implicate the privacy rights of the Parties or of third parties. This Protective Order is intended to advance discovery in this Action and to protect each Party’s confidential and sensitive information.

THEREFORE, IT IS HEREBY ORDERED:

1. Each Party may designate as “Confidential” any documents and things that it produces in connection with this Action by stamping or otherwise affixing the word “CONFIDENTIAL” upon the documents and things so designated (the “Confidential Material”). A document or thing, or a part thereof, shall be designated as Confidential Material for good cause, including, but not limited to:

- (a) proprietary or confidential trade secrets, or financial, accounting, technical, research, development, marketing, planning, or otherwise commercially sensitive information not readily available to the public;

- (b) information related to the privacy interests of a Party, their employees, customers, or other specific third party;
- (c) information that all Parties agree in writing to treat as Confidential Material, and
- (d) information found to be Confidential Material after appropriate review by the Court.

2. If a Party objects to the designation of Confidential Materials, that Party shall give written notice of such objection to the other Party and shall continue to treat such material as Confidential Material until otherwise agreed or ordered. Counsel for the Parties shall confer to resolve any such objections. If no resolution is reached, the objecting Party may apply to the Court under seal for a ruling whether the material in question should be treated as Confidential Material under this Protective Order.

3. Confidential Material shall be used by the Parties solely for the purpose of this Action and shall not be used, directly or indirectly, for any other purpose or in any other proceeding or matter. Notwithstanding this provision, this Protective Order shall not limit a Party from using or disclosing its own Confidential Materials for any purpose or in any other action or proceeding.

4. Confidential Material shall be maintained safely and securely, and shall be reasonably safeguarded from disclosure by the Parties, their employees, representatives, and/or agents.

5. Confidential Material shall not be produced, disclosed, or otherwise disseminated, to any person or entity except those persons and entities specifically identified in the following subparagraphs:

- (a) The Parties, including their employees, representatives, and agents who are necessarily involved in this matter;

- (b) Counsel of record for each Party, including their employees, representatives, and agents who are necessarily involved in this matter;
- (c) Employees, representatives, and agents of the U.S. Department of Labor, Office of Administrative Law Judges;
- (d) Any experts, consultants, and independent contractors acting on behalf of the Parties in connection with this matter, so long as such experts, consultants, and independent contractors are provided with a copy of and agree to be bound by this Protective Order by signing the “Agreement to be Bound by Protective Order” (the “Agreement”) attached hereto as Exhibit A;
- (e) Any person that a Party believes in good faith to be a potential fact witness in this Action, provided such person is provided with a copy of and agrees to be bound by this Protective Order by signing the Agreement attached hereto as Exhibit A;
- (f) Any person or entity as may be required by law, order of any court of competent jurisdiction, or any governmental agency, or regulatory authority.

6. (a) If a Party is called upon to disclose Confidential Material, directly or indirectly, to any person or entity pursuant to subparagraph 5(f) of this Protective Order, the Party so called upon shall promptly (and prior to any disclosure) notify the producing Party’s counsel in writing of the proposed disclosure and specify the name, employment, and/or affiliation and address of the person or entity seeking disclosure and describe with specificity the documents, things, and/or information being sought.

(b) If a Party objects to the disclosure under subparagraph 6(a), the objecting Party shall, within twenty (20) days, provide written notice of such objection to the Party called upon to disclose the documents and things. If the dispute cannot be promptly resolved, the objecting Party

may apply to the court or tribunal that issued the demand, subpoena, order, or other legal process seeking the disclosure of the Confidential Materials and establish the basis for any ruling sought. There shall be no disclosure pending such resolution.

7. If a Party wishes to file Confidential Material with the Court, such material shall be (a) with the consent of the producing Party, filed only as a redacted copy, (b) provided solely for *in camera* review, or (c) submitted in an envelope bearing a statement in substantially the following form: “THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL SUBJECT TO A PROTECTIVE ORDER.”

8. At least thirty (30) days prior to the date of the final hearing in this Action, the Parties shall confer and submit a proposed plan to the Court setting forth the procedures for the use of any Confidential Material at the formal hearing.

9. A Party’s inadvertent production of documents or things without a designation as Confidential shall not be deemed to waive a Party’s right to later designate those documents or things as Confidential Material. Documents or things later designated as Confidential Material by the producing Party shall be treated as Confidential Material from the date such written notice of the designation is provided to the receiving Party.

10. A Party’s inadvertent production of documents or things that would otherwise be protected from disclosure by any privilege, immunity, or doctrine of law, shall not be construed as a waiver of any such privilege, immunity, or doctrine. Any such Action Material that is inadvertently produced shall, after written notice by or to the Party receiving the privileged documents, be promptly returned to the producing Party, and no copies or records shall be kept by the receiving Party.

11. The terms of this Protective Order shall continue beyond the conclusion of this Action. Within sixty (60) days of the conclusion of this Action, including any appeal, each Party shall return or destroy all Confidential Materials, including any reproductions, except that counsel for a Party is entitled to retain an archival copy of all documents, including pleadings, motion papers, hearing and deposition transcripts, legal memoranda, correspondence, deposition and hearing exhibits, expert reports, attorney work product, and consultant and expert work product. Any such archival copies that contain or constitute Confidential Material remain subject to this Protective Order.

12. A breach of this Protective Order shall subject the producing Party to substantial and irreparable harm, the nature and extent of which is not readily quantifiable, entitling the producing Party to obtain injunctive relief, seek damages, and/or apply for other relief or further protective orders before a court or tribunal of competent jurisdiction.

13. This Protective Order shall have no bearing upon and shall not affect the relevancy, authenticity, and/or admissibility of any documents and things or information contained therein.

14. Nothing herein is intended to reflect the position of a Party on the admissibility of any documents or things or to constitute a waiver of any evidentiary objections.

* * *

Dated: _____, 2020

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Attorneys for Respondent Signac LLC

* * *

IT IS SO ORDERED:

Dated: _____, 2020

THERESA C. TIMLIN
Administrative Law Judge

EXHIBIT A

AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

I, _____, hereby state:

I have received and read a copy of the Protective Order entered into in this Action, and I hereby agree to be bound by its terms.

I understand that I am to retain all copies of any Confidential Material (as defined in the Protective Order) in a secure manner and that all copies are to remain in my custody or control until the completion of my duties in this Action, whereupon I will return to Party's counsel all copies of Confidential Material provided to me as well as all writings prepared by me containing any Confidential Material.

I will not disclose or divulge any Confidential Material to persons other than those specifically authorized by the Protective Order, and I will not copy or use any Confidential Material except solely in connection with this Action.

I further agree to voluntarily submit myself to the jurisdiction of the Court should proceedings be initiated in this Action for the resolution of any dispute which might arise in connection with my compliance with the terms of this Protective Order.

Dated: _____

Signature: _____

Printed Name: _____

Title: _____