

**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
MOTION TO COMPEL COMPLAINANT'S DEPOSITION, EXTEND TIME
TO FILE FOR SUMMARY DECISION, AND FOR SANCTIONS**

For the last several months, Respondent Credit Suisse Securities (USA) LLC (“Credit Suisse USA”) has been working diligently to complete discovery so that this case—now more than three years old—may proceed to a resolution on the merits. In particular, Credit Suisse USA has been trying to conduct the deposition of Complainant Colleen A. Graham. Credit Suisse USA timely and properly served a deposition notice for Ms. Graham on October 14, 2020. Complainant did not file any motion for a protective order to prevent Credit Suisse USA from taking her deposition, or otherwise seek any relief from this Court with regard to such deposition. Quite to the contrary, Complainant *agreed* to sit for the noticed deposition. On two separate occasions, Credit Suisse USA has scheduled, prepared for, and sought to take Ms. Graham’s deposition. And on both occasions, Complainant refused to appear at the scheduled deposition—waiting until the last minute to tell Credit Suisse USA that she would not be appearing and forcing Credit Suisse USA to go through the time and expense of preparing for the deposition twice to no avail. Now, after stringing Credit Suisse USA along for weeks, Complainant has unilaterally refused to sit for her deposition altogether. Worse, Complainant has taken the position that she may ignore this

Court's discovery deadlines and Credit Suisse USA's deposition notice without even *seeking* this Court's prior permission or leave, let alone *obtaining* it. That conduct is the subject of this Motion.¹

Notably, Complainant does not argue that the request for her deposition is burdensome or seeks information not relevant to these proceedings. Nor could she credibly do so. Indeed, in addition to the fact that Credit Suisse USA seeks only one deposition in these proceedings, Complainant is the sponsor of all allegations in the Statement of Claim. In order to challenge those allegations, as is Credit Suisse USA's undeniable right, Credit Suisse USA must be allowed to examine Complainant under oath before the final hearing. Complainant's purported justification for unilaterally ignoring Credit Suisse USA's repeated notices for her deposition appears to be based on her unfounded speculation that Credit Suisse USA has not complied with its document production obligations. As described below, Complainant's position is wrong as a matter of fact and law.

The upshot is that Credit Suisse USA has tried at significant effort and cost for nearly two months to schedule Ms. Graham's deposition—and extended numerous courtesies to Complainant in doing so—but Complainant has continually refused to appear, including on an *agreed-upon* deposition date. Complainant's conduct has left Credit Suisse USA with no choice but to file this Motion seeking three forms of relief.

First, this Court should compel Complainant to appear for her deposition at a date and time convenient for Credit Suisse USA. Second, this Court should adjourn the December 31 deadline for summary decision motions to fourteen (14) days after Ms. Graham's deposition. Third,

¹ Credit Suisse USA will respond to Complainant's meritless Motion to Compel and for Sanctions separately and within the time allotted by the rules.

because Complainant had no right to ignore Credit Suisse USA's deposition notices without first filing a "motion for a protective order under § 18.52(a)," Complainant should be ordered to reimburse Credit Suisse USA for all fees, expenses, and costs associated with this Motion. 29 C.F.R. § 18.57(d)(2).

BACKGROUND

On September 24, 2020, the Court held a teleconference with the parties to discuss the case schedule. (Sept. 17, 2020 Notice of Conference Call.) The Court entered a schedule providing for (a) the close of discovery on October 30, 2020, which, under 29 C.F.R. § 18.64(b)(1), meant that the deadline for serving deposition notices was October 16, 2020, (b) motions for summary decision to be filed no later than December 31, 2020, and (c) final hearings to commence on March 8, 2021.

On October 14, 2020, Credit Suisse USA timely and properly served a deposition notice on Ms. Graham, scheduling her deposition for October 29, 2020. (Ex. A, Oct. 14, 2020 Deposition Notice.) As a courtesy, Credit Suisse USA noted that it was "willing to confer with Ms. Graham to find and substitute another mutually agreeable date, if Ms. Graham is unavailable on October 29." (*Id.* at 1.)

On October 19, 2020, Complainant's counsel responded to the deposition notice. Complainant's counsel first made the mystifying claim that Respondent purportedly represented "to the Court during our last conference call that only the completion of paper discovery remained outstanding." (Ex. B, Oct. 28, 2020 Email Chain at 1.) Complainant's counsel also stated that Complainant would only appear for deposition if Credit Suisse USA also produced a witness for deposition, but no such witness was identified at the time. (*Id.* at 1-2.) In response, Credit Suisse USA noted that "Credit Suisse made no representation to the Court that it was only seeking document discovery." (*Id.* at 1.) Credit Suisse USA also pointed out that Complainant's request

to conduct a deposition was untimely and required leave of the Court, as the deadline for deposition notices had passed on October 16, 2020. (*Id.*) Nonetheless, in hopes of obviating the need for judicial intervention, Credit Suisse USA agreed to work with Complainant in good faith to schedule Ms. Graham's deposition at a workable time after October 30, and to schedule a deposition of a Credit Suisse USA witness once Complainant identified the witness she wanted. (*Id.*) Discovery closed on October 30, and Complainant still had not identified the witness she wished to depose.

On November 6, Complainant wrote to Credit Suisse USA purporting to identify deficiencies in Credit Suisse USA's document production. (Ex. C, Nov. 6, 2020 Letter.) Complainant expressly stated that "Ms. Graham is available to be deposed virtually in the last 10 days of November." (*Id.*) Complainant still did not identify a Credit Suisse USA witness who she wished to depose. Instead, Complainant suggested, for the first time, that she wanted to take a corporate representative deposition under 29 C.F.R. § 18.64(b)(6): "Claimant will depose Credit Suisse by an officer or employee with personal knowledge of Respondent's defenses herein." (*Id.*) Credit Suisse USA promptly looked into a potential corporate representative to produce for deposition.

On November 9, Credit Suisse USA responded to Complainant's November 6 letter, dispelling each alleged deficiency in Credit Suisse USA's document production. (Ex. D, Dec. 9, 2020 Email Chain at 7-8.) The parties then agreed to meet and confer on November 17. Before that meeting, in another about-face, Complainant notified Credit Suisse USA that she now wanted to depose James Barkley of Credit Suisse USA rather than obtain a corporate representative deposition. (*Id.* at 5.) Though Complainant's request for Mr. Barkley's deposition came more

than one month after the October 16, 2020 deadline for deposition notices, Credit Suisse USA, as yet another courtesy, agreed to make Mr. Barkley available for deposition.

On November 17, the parties met and conferred. Despite the fact that Credit Suisse USA had already produced all documents responsive to Complainant's written document requests, Complainant's counsel insisted that Credit Suisse USA redo certain searches and undertake even more new searches for new documents. Credit Suisse USA agreed, notwithstanding the fact that most of these searches focused on documents Complainant had never demanded throughout 18 months of discovery. With respect to depositions, as confirmed in writing by Complainant's counsel two days later, the parties agreed that Ms. Graham would sit for deposition on December 1 and Mr. Barkley would sit on December 17. (Ex. E, Nov. 19, 2020 Email.) In reliance on that communication, Credit Suisse USA began preparing for the agreed-upon depositions, including hiring a court reporter for Ms. Graham's deposition.

Neither deposition went forward. On Sunday, November 29, just two days before Ms. Graham's deposition was scheduled to take place, Complainant advised Credit Suisse USA that Ms. Graham would not appear for her deposition. (Ex. D at 4-5.) Without even seeking a protective order from this Court, Complainant unilaterally refused to appear for the scheduled deposition. As her counsel put it: "I will not produce Colleen for a deposition until CS completes its production." (*Id.* at 5.) Though Credit Suisse USA's document production had been complete for weeks—and the production of any further documents demanded by Complainant during the November 17 meet and confer had nothing to do with the deposition of Ms. Graham—Credit Suisse USA agreed to temporarily postpone Ms. Graham's deposition in an attempt to resolve the issue without burdening the Court. (*Id.* at 4.) Credit Suisse USA also asked about Ms. Graham's

availability for deposition that week, or the following week, but Complainant did not respond. (*Id.*)

On December 4, Credit Suisse USA produced certain additional documents, such as “weekly status reports,” that Complainant had first requested during the November 17 meet and confer. Credit Suisse USA also asked about Ms. Graham’s availability for deposition. (*Id.* at 3.) But Complainant ignored that request and asserted, without explanation, that Credit Suisse USA’s document production was still incomplete. (*Id.* at 1-2.) On December 9, 2020, Credit Suisse USA confirmed in writing that “we have now twice conducted searches for documents in response to Complainant’s requests . . . and produced all non-privileged responsive documents located from those searches.” (*Id.* at 1.) Credit Suisse USA also confirmed that “[t]o the extent our production does not include documents you wanted or hoped for, that is because no such non-privileged documents were located after a good faith search for same.” (*Id.*) Believing that it had cleared the last supposed impediment to Ms. Graham’s deposition, Credit Suisse USA again asked for Ms. Graham’s availability for deposition and informed Complainant as follows: “[i]f we do not receive her availability by close of business today, we will be forced to notice her deposition for a date and time that is workable for us.” (*Id.*) Complainant again ignored Credit Suisse USA’s request. So on December 11, 2020, Credit Suisse USA served an Amended Notice of Deposition (the “Amended Notice”) scheduling Complainant’s deposition for 10:00 a.m. on December 21, 2020. (Ex. F, Amended Deposition Notice.) Complainant did not acknowledge or respond to the Amended Notice, much less move for a protective order.

Complainant exhibited the same contumacious behavior with respect to her request to depose Mr. Barkley. On December 15, just two days before Mr. Barkley’s scheduled deposition, and after Credit Suisse USA had incurred significant expenses preparing for Mr. Barkley’s

deposition, Complainant cancelled the deposition without explanation: “[p]lease advise Mr. Barkley that we will not be proceeding with his deposition on December 17th and his virtual attendance will not be required.” (Ex. G, Dec. 15, 2020 Email Chain.) Complainant did not mention Ms. Graham’s deposition in that December 15 email.

In fact, Credit Suisse USA heard nothing about Ms. Graham’s deposition, which had been properly noticed for Monday, December 21, until Friday, December 18. At that time, Complainant advised that “we will not be producing Colleen Graham for a deposition on Monday.”

From:	Jonathan Sclar <JS@kzlaw.net>
Sent:	Friday, December 18, 2020 12:52 PM
To:	Taylor, Nathan (NY); Robert Kraus
Cc:	Serino, Joseph (NY); Huang, Kuan (NY); jlockinger@cooley.com
Subject:	RE: Graham v. Credit Suisse Securities USA et al: Amended Notice of Deposition for Colleen Graham

Nathan,

Further to Robert’s December 8 email and in light of Credit Suisse’s lack of compliance with the court-ordered production of documents, we will not be producing Colleen Graham for a deposition on Monday.

Best regards,

Jonathan

(Ex. H, Dec. 18, 2020 Email Chain.) This marked the second time that Ms. Graham had, at the last minute, refused to appear for a properly noticed deposition. Although she cited Credit Suisse USA’s alleged “lack of compliance with the court-ordered production of documents” as purported justification for her refusal to honor the agreed-upon deposition date, Complainant did not identify a single missing document or any other deficiency in Credit Suisse USA’s production. Nor has Complainant ever explained what, if anything, the document production by *Credit Suisse USA* has to do with the deposition of *Ms. Graham*.

As a result of the foregoing, it is now two months after the close of discovery and days before the deadline for motions for summary decision, yet Complainant has not sat for, and refuses to appear for, deposition. Accordingly, Credit Suisse USA has been forced to file this Motion to

compel Ms. Graham's deposition, for an extension of the deadline for motions for summary decision, and for appropriate sanctions.

ARGUMENT

Under 29 C.F.R. § 18.64(a)(1), a party may "without leave" take the deposition of "any person, including a party." As the Complainant, Ms. Graham's testimony is undoubtedly relevant to the claims in this action. As a Respondent, Credit Suisse USA has a fundamental fairness right to confront and contest those claims. Moreover, as set forth above, there can be no dispute that Credit Suisse USA timely served Ms. Graham with a proper deposition notice on October 14, 2020. It is likewise indisputable that Credit Suisse USA has bent-over-backwards to accommodate Complainant. But Complainant has repeatedly refused to appear for deposition.

Credit Suisse USA has been, and continues to be, prejudiced by Complainant's failure to sit for deposition. In addition to all of the effort and expense that Credit Suisse USA has incurred to prepare for the depositions of Ms. Graham and Mr. Barkley, Credit Suisse USA is facing a December 31, 2020 deadline for filing a summary decision motion.

Credit Suisse USA has exhausted all avenues for obtaining Ms. Graham's deposition without Court intervention. Accordingly, Credit Suisse USA respectfully requests that the Court enter an order compelling Complainant to appear for a deposition within seven (7) days of the order. Credit Suisse USA also respectfully asks the Court to adjourn the December 31, 2020 deadline for filing summary decision motions to fourteen (14) days after the completion of Ms. Graham's deposition. Absent such an adjournment, Credit Suisse USA would be further prejudiced by having to choose between filing its summary decision motion without the ability to pressure test any of Complainant's allegations, or forgo the motion altogether. Stated differently,

absent an adjournment of the summary decision filing date, Complainant would actually benefit from her discovery misdeeds.

Complainant should also be sanctioned for her obstructionist conduct to date, particularly her unilateral refusal to appear for deposition. 29 C.F.R. § 18.57(d)(1)(i)(A) could not be more clear or on point: the “judge may, on motion, order sanctions if [a] party . . . fails, after being served with proper notice, to appear for that person’s deposition.” As explained above, that is exactly what happened.

Ms. Graham’s attempt to justify her refusal to appear for deposition by claiming that Credit Suisse USA’s document production is “incomplete” is both baseless and, more germane to this Motion, provides no excuse for Complainant’s willful conduct in ignoring Respondent’s deposition notices and this Court’s discovery deadlines. Indeed, engaging in such unilateral “self-help” by refusing to appear for a deposition is expressly prohibited by the rules. 29 C.F.R. § 18.57(d)(2) makes clear that “[a] failure described in paragraph (d)(1)(i) of this section [*i.e.*, not appearing for a deposition] 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).***” If Complainant truly believed she had a legitimate objection to Credit Suisse USA’s multiple notices for her deposition testimony, she was required to move for a protective order with respect to that deposition. She was ***not*** entitled to rely on her motion to compel additional documents from Credit Suisse USA as justification for blowing off Credit Suisse USA’s deposition notices. By doing that, Complainant engaged in the very misconduct that 29 C.F.R. § 18.57(d)(2) is intended to deter and caused the very harm it is intended to prevent.

Even worse, this was hardly an inadvertent violation, as Complainant is no stranger to 29 C.F.R. § 18.57(d)(2). The Court will recall that Complainant sought, and obtained, sanctions

against Credit Suisse USA on these exact grounds. Specifically, Complainant argued that Credit Suisse USA's withholding of confidential documents subject to entry of an appropriate confidentiality agreement or protective order warranted sanctions because "*there [is] a Rule directly on point requiring the submission of a motion before withholding discovery.*" (Graham Mot. to Compel at 10 (emphasis added).) This Court agreed, granting such relief despite finding that Credit Suisse USA was within its rights to request a confidentiality agreement and that such an agreement was in order. Complainant is now violating the very same rule that she convinced this Court to turn on Credit Suisse USA. Complainant cannot have it both ways: having successfully enforced 29 C.F.R. § 18.57(d)(2) against Credit Suisse USA, Complainant must also comply with that same rule, or face the consequences.

Courts routinely impose sanctions on parties who, like Complainant here, use "self-help" in ignoring or refusing to appear for deposition. *See Hernandez v. Simmons*, No. 3:15-CV-00954, 2017 WL 11508334, at *5 (M.D. Tenn. June 21, 2017) ("Neither can the Court disregard Hernandez's frank statement that he intended to thwart his deposition as a self-help means of compelling discovery. The Court will not condone such deliberate obstruction."); *Soyring v. Fehr*, No. CV 05-1900 (ADM/RLE), 2006 WL 8443343, at *3-4 (D. Minn. Feb. 23, 2006) (sanctioning defendant because "[t]he Rules discourage the sort of self-help that resulted here, when defense counsel unilaterally advised that Fehr would not be attending a deposition in Minnesota" because the proper "approach would have required Fehr to seek a Protective Order"); *Chapman v. Charles Schwab & Co.*, No. 02 C 0291, 2002 WL 2012476, at *2 (N.D. Ill. Sept. 3, 2002) (sanctioning plaintiff because "[i]nstead of coming to court to oppose the notice of deposition, Chapman incorrectly decided to rely on 'self-help'"). It is also settled practice that sanctions for such obstructionist, self-help tactics often include the award of "reasonable attorney's fees and

expenses.” *Daniel F. Kelleher Auctions, LLC v. Huh*, No. 3:16 CV 878 (JBA), 2019 WL 296522, at *4 (D. Conn. Jan. 23, 2019) (awarding fees and costs to plaintiff in connection with defendant’s failure to appear for a deposition); *Lee v. Sunrise Senior Living, Inc.*, No. CIV.A. 09-5720 AET, 2011 WL 1402764, at *2 (D.N.J. Mar. 4, 2011) (awarding defendant attorneys’ fees and costs where “Plaintiff was aware of the time and date of the scheduled deposition and . . . [i]t was not until the eve of her deposition that she informed the Court that she was not going to attend her deposition”).

Here, Credit Suisse USA has been forced to expend time, resources and effort obtaining deposition testimony to which it is plainly entitled. Having willfully violated 29 C.F.R. § 18.57, Complainant should be required to reimburse Credit Suisse USA for the attorneys’ fees and costs it has incurred to compel Complainant’s compliance with her discovery obligations in an action that she voluntarily chose to commence.

CONCLUSION

For the foregoing reasons, Credit Suisse USA respectfully requests that the Court grant this Motion together with the following relief: (a) an order compelling Complainant to appear for her deposition within seven (7) days of the order, (b) an order extending the deadline for Respondents to file motions for summary decision until fourteen (14) days after Complainant is deposed, and (c) as a sanction for Complainant’s wrongful conduct to date, an order directing Complainant to reimburse Credit Suisse USA for its reasonable attorneys’ fees, costs, and expenses in bringing this Motion.

Dated: December 29, 2020

Respectfully submitted,

LATHAM & WATKINS LLP

/s/ Kuangyan Huang

Joseph Serino, Jr.
Kuangyan Huang
Nathan Taylor
885 Third Avenue
New York, New York 10022
Email: Joseph.Serino@lw.com
Kuan.Huang@lw.com
Nathan.Taylor@lw.com
Telephone: (212) 906-1200
Facsimile: (212) 751-4864

*Attorneys for Respondent Credit Suisse
Securities (USA) LLC*

CERTIFICATE OF CONFERENCE

Pursuant to 29 C.F.R. § 18.57(d)(1)(ii), Credit Suisse USA certifies that it has, in good faith, attempted to confer with Complainant regarding the relief in this Motion. Complainant has repeatedly refused to appear at previously scheduled depositions, or schedule a new date for deposition.

Dated: December 29, 2020

/s/ Kuangyan Huang
