

**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 SANCTIONS**

Complainant Colleen A. Graham's latest Motion to Compel and for Sanctions is full of hyperbolic accusations that Respondent Credit Suisse Securities (USA) LLC ("Credit Suisse USA") has purportedly "concealed" or "withheld" relevant documents from Complainant. But what is absent from Complainant's Motion is any actual evidence supporting her myriad accusations of wrongdoing. There is a good reason for that. The discovery record here is clear: Credit Suisse USA has produced all documents responsive to Complainant's document requests that it located after reasonable, good faith searches. In total, Credit Suisse USA collected and reviewed more than 22,000 documents, and produced each and every responsive, non-privileged document identified in its review—more than 2,000 documents spanning over 11,000 pages in total. Credit Suisse USA's efforts more than satisfy its discovery obligations.

The Court need look no further than Complainant's own Motion for confirmation of Credit Suisse USA's good faith discovery efforts. Outside of unsubstantiated allegations that Credit Suisse USA has "concealed" or "withheld" documents, Complainant's Motion does not identify *a single responsive document* in Credit Suisse USA's possession, custody, or control that was not produced. Nor has Complainant identified any specific deficiency with the way in which Credit

Suisse USA searched for and produced documents. Instead, Complainant speculates that Credit Suisse USA must be withholding documents because the documents that have been produced do not support any of her conclusory allegations. Such speculation is baseless. The reason Credit Suisse USA has not produced documents supporting Complainant's contentions is not because they have somehow been "concealed" or "withheld." It is because such documents do not exist and never did. That comes as no surprise given that Complainant's underlying claims are themselves spun from whole cloth.

Sadly, Complainant's reckless and irresponsible accusations of misconduct by Credit Suisse USA come as no surprise. Over the last three years, Complainant has accused Respondents in this and other related legal proceedings of all manner of dishonesty and misconduct without a shred of credible evidence. Complainant first accused Credit Suisse of wrongfully withholding documents in the JAMS arbitration action she brought in 2017 (the "JAMS Arbitration"). (Ex. A, JAMS Award.) The Arbitrator repeatedly rejected those accusations, and ultimately denied Complainant's claims in full. Complainant then accused Credit Suisse of withholding evidence before the New York Supreme Court, as part of her efforts to overturn the JAMS Arbitration award. (Ex. B, Order.) The court rejected those accusations outright, denied Complainant's petition to vacate, and, instead, confirmed the JAMS Arbitration award in Credit Suisse's favor. (*Id.*) Complainant also accused Credit Suisse USA of concealing information from the OSHA investigator in this case. Rather than credit those baseless accusations, the OSHA investigator dismissed Complainant's retaliation claims after months of investigation, including a review of the entire evidentiary record from the JAMS Arbitration, determining that he "was unable to conclude that there is reasonable cause to believe that a violation of the [SOX] statute occurred."

This Court should do the same with Complainant's latest meritless accusations. Credit Suisse USA has produced all responsive, non-privileged documents it was able to locate after numerous good faith, reasonable, and diligent searches. Credit Suisse USA has certified to Complainant and this Court that it has done so—and Complainant has no legitimate basis to question that certification. The time has come for Complainant to accept Credit Suisse USA's representations about its discovery efforts, just as Credit Suisse USA has accepted Complainant's corresponding representations. This is especially true given that Complainant has not offered any evidence to substantiate her allegation that a single responsive and non-privileged document exists in Credit Suisse USA's files but was withheld from production. For these reasons, and as discussed below, the Court should deny Complainant's Motion in its entirety.

FACTUAL BACKGROUND

On August 2, 2019, Complainant served its first requests for production on Credit Suisse USA. (Ex. C, Complainant's First RFPs.) Respondents moved to dismiss, and the parties agreed to stay discovery pending resolution of that motion. On January 16, 2020, the Court granted Respondents' motion to dismiss, in part. Discovery then resumed.

On February 17, 2020, Credit Suisse USA timely served its responses and objections to Complainant's document requests. (Ex. D, Credit Suisse USA's Resps. to First RFPs.) Credit Suisse USA also investigated the sources of documents in its possession that were potentially responsive to Complainant's requests. (Taylor Decl. ¶ 2.) These efforts included:

- interviewing Credit Suisse USA personnel to determine the custodians likely to possess responsive documents;
- investigating other potential sources on Credit Suisse USA's systems that may contain responsive documents;
- conducting broad keyword searches of potential sources of electronic documents responsive to Complainant's requests;

- conducting additional targeted searches for specific documents requested by Complainant; and
- collecting potentially responsive materials the parties exchanged as part of prior litigations.

(Id.)

On April 17, 2020, without any effort to confer with Respondents, Complainant filed a motion to compel and to amend its Statement of Claim. Complainant asked the Court to compel Credit Suisse USA to produce certain categories of documents primarily related to Trader Holistic Surveillance or “THS.” (Apr. 17, 2020 Mot. to Compel at 10.) As Credit Suisse USA explained at the time, THS is a compliance tool that Credit Suisse USA and its affiliates independently developed following the dissolution of Signac LLC (“Signac”). (May 1, 2020 Opp. to Mot. to Compel at 6-7.)

On June 26, 2020, the Court granted Complainant’s motion in part (the “Order”), ordering Credit Suisse USA to produce specific categories of documents relating to THS with respect to a limited time period. (Order at 13-16.) Credit Suisse USA continued to search for documents responsive to both the Court’s Order and Complainant’s document requests. (Taylor Decl. ¶ 3.) Credit Suisse USA began making rolling productions on July 1, 2020. *(Id.)*

On September 16, 2020, the Court contacted the parties to schedule a conference to set a final hearing date. (Ex. E, September 16, 2020 Email Chain.) Prior to the conference, and again without any effort to meet and confer, Complainant informed the Court that “[t]here is an outstanding discovery issue to be addressed in connection with setting a hearing date.” *(Id.)*

During the conference, despite never raising it with Credit Suisse USA beforehand, Complainant accused Credit Suisse USA of failing to produce documents called for by the Court’s Order: specifically, a video of the December 12, 2018 Investor Day Presentation and the “THS dashboard.” Credit Suisse USA responded that it had already made several rolling productions,

and it expected to complete its production, including the two documents identified by Complainant, by October 30, 2020. The Court entered a schedule providing that the close of discovery would be October 30, 2020, the deadline for summary decision motions would be December 31, 2020, and the final hearing would commence on March 8, 2020. The Court further directed that, if Complainant had any disputes about discovery, Complainant should meet and confer with Respondents prior to bringing them before the Court.

As promised, Credit Suisse USA completed its production on October 30, 2020. (Taylor Decl. ¶ 5.) That production contained both categories of documents that Complainant had raised at the hearing, namely the Investor Day presentation video and the THS dashboard. (*Id.*) All told, Credit Suisse USA's counsel reviewed more than 22,000 potentially responsive documents collected from these searches, comprising over 200,000 pages. (*Id.*) Following that review, Credit Suisse USA produced each responsive, non-privileged document it was able to locate: totaling more than 2,200 documents comprising over 11,000 pages. (*Id.*) Credit Suisse USA did not withhold any non-privileged, responsive documents that were identified as part of its collection and review.

On November 6, 2020, Complainant purported to identify certain documents that were "missing" from Credit Suisse USA's production. (Ex. F, Nov. 6, 2020 Letter.) Complainant described four categories of documents that were allegedly "missing": (1) "[t]he dashboard for THS on the day it was rolled out," (2) the "Video presentation," (3) "All project plans, presentations, and reporting regarding the development of THS," and (4) "Requests 10(b) and 10(d)-(h) in [the] period between March 1, 2017 and August 1, 2017." (*Id.*) The next business day, Credit Suisse USA represented that it had produced all of the categories of documents identified by Complainant. (Ex. G, Dec. 9, 2020 Email Chain at 7-8.) Credit Suisse USA provided

Complainant with the bates numbers and other identifying information for the supposedly “missing” documents. (*Id.*) Credit Suisse USA even offered to meet with Complainant if she still had questions. (*Id.*)

The parties had a conference to discuss discovery on November 17, 2020. (*Id.* at 5.) Complainant’s counsel asked Credit Suisse USA to search for new documents, including “weekly status reports” related to THS, that it had never before requested. (*Id.* at 3-4.) Complainant’s counsel also acknowledged that Credit Suisse USA had in fact produced the THS dashboard, but suggested that Complainant was looking for “something else.” (*See id.*) But Complainant’s counsel was unable to explain what that “something else” was. (*See id.*) Accordingly, Credit Suisse USA requested, and Complainant’s counsel agreed, that Complainant would follow up with a description of the additional documents it sought regarding the “THS dashboard.” (*Id.*) For its part, Credit Suisse USA noted that there were unaddressed deficiencies with Complainant’s document production, including apparently missing emails related to Complainant’s efforts to obtain subsequent employment, that Credit Suisse USA had originally raised in July 2020. (*Id.*) Complainant agreed to look into that issue. (*Id.*)

Following that call, Credit Suisse USA searched for the new documents identified by Complainant during the November 17 call, and produced any such documents it could find, including “weekly status reports.” (Taylor Decl. ¶ 7.) For her part, on November 30, 2020, Complainant made a production of more than 140 pages of additional emails regarding her subsequent employment efforts that she had never before produced. (*Id.*) Complainant never explained why those plainly responsive documents were not produced sooner.

Following these productions, Credit Suisse USA tried repeatedly to schedule the deposition of Complainant, so it could complete the remaining discovery in advance of the December 31,

2020 deadline for motions for summary decision. (Ex. G at 2-3.) Complainant, however, refused to appear for deposition. (*Id.* at 1-2) Instead, Complainant argued that Credit Suisse USA had not completed its production, and asserted, without identifying the allegedly missing documents, that she would not appear for deposition until Credit Suisse USA had done so. (*Id.*) In response, Credit Suisse USA made crystal clear that it had produced every responsive, non-privileged document it was able to locate after its good faith search:

Robert,

Our production is not incomplete in any way. As set out below, we have now twice conducted searches for documents in response to Complainant's requests, including the five categories of documents you identified on our November 17 call, and produced all non-privileged responsive documents located from those searches. To the extent we found responsive and non-privileged documents after a good faith search, those documents have been produced. To 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. By any measure, that more than satisfies Credit Suisse USA's obligations under the discovery rules and the Court's order on Complainant's motion to compel.

Notwithstanding the certification above, and without ever identifying any purported deficiencies, Complainant filed the present Motion to Compel on December 16, 2020.¹ Complainant spends the bulk of her Motion disparaging Credit Suisse USA and its counsel for purportedly “ignor[ing]” the Court’s Order, “conceal[ing]” documents, acting in “bad faith,” and allegedly spoliating documents. Yet Complainant does not and cannot identify a single responsive document in Credit Suisse USA’s possession, custody or control that has not been produced, or any deficiencies with respect to Credit Suisse USA’s efforts to search for and produce documents. Instead, Complainant’s Motion relies entirely on rank speculation and a mischaracterization of both the facts in this case and the discovery record to claim that Credit Suisse USA is improperly “withholding” responsive documents.

¹ Complainant did not serve the Motion on Respondents until December 17, 2020.

ARGUMENT

I. CREDIT SUISSE USA HAS COMPLIED WITH THE COURT’S ORDERS AND ITS DISCOVERY OBLIGATIONS.

To satisfy its obligations to respond to document requests, a party is “require[d] only” to conduct a “reasonable search for responsive information” and produce any responsive, non-privileged documents located by that search. *Enslin v. Coca-Cola Co.*, No. 2:14-CV-06476, 2016 WL 7042206, at *3 (E.D. Pa. June 8, 2016); *see also* 29 C.F.R. § 18.50 (requiring that a party need only certify that after “a reasonable inquiry” its discovery is complete to satisfy its disclosure obligations). Because courts recognize that this is “an era where vast amounts of electronic information [are] available for review,” *Enslin*, 2016 WL 7042206 at *3, the rules “do not impose a duty upon litigants to examine every scrap of paper in its potentially voluminous files in order to comply with its discovery obligations,” *Velocity Press, Inc. v. Key Bank, N.A.*, No. 2:09–CV–520 TS, 2011 WL 1584720, at *3 (D. Utah Apr. 26, 2011). Instead, to satisfy its obligation to conduct a reasonable search for responsive information, a party must conduct a “diligent search” pursuant to a “reasonably comprehensive search strategy.” *Id.* To challenge a responding party’s discovery efforts, “*the burden appropriately lies with the requesting party to show that the responding party’s search was inadequate.*” *Enslin*, 2016 WL 7042206 at *3 (emphasis added). Absent evidence that the steps taken in the search were unreasonable, a producing party “sufficiently complie[s]” with its discovery obligations, including a “previous order compelling discovery,” when the party’s counsel “certifie[s] and represent[s], as officers of the Court” that it has searched for and “provided the relevant information and . . . is not withholding any relevant documents.” *Richards v. Lufkin Indus., LLC*, No. 9:14-CV-136, 2017 WL 11472540, at *3 (E.D. Tex. Feb. 2, 2017); *see also Thomas v. Saafir*, No. C 06-0184MMCPR, 2007 WL 1063474, at *2 (N.D. Cal. Apr. 9, 2007) (finding that a party’s supplemental response stating that a

“diligent search and reasonable inquiry of all available sources” was conducted satisfied the party’s obligation under Rule 34).

Here, there is no question that Credit Suisse USA conducted a “diligent” search of its files pursuant to a “reasonably comprehensive search strategy.” *Velocity Press, Inc.*, 2011 WL 1584720, at *3. Indeed, as the following chart shows, Credit Suisse USA went above and beyond to locate documents responsive to Complainant’s requests:

CREDIT SUISSE USA’S COMPLIANCE WITH ITS DISCOVERY OBLIGATIONS	
✓	Acted promptly to preserve any potentially relevant materials, including by issuing legal hold notices to all custodians reasonably likely to possess relevant materials.
✓	Interviewed Credit Suisse USA personnel to determine whether they possessed any potentially relevant documents.
✓	Restored backup tapes of email files at significant expense to ensure all potentially responsive emails were collected (even though Credit Suisse USA was not obligated to do so under 29 C.F.R. § 18.51(b)(2)).
✓	Conducted comprehensive keyword searches of the entire email drives of targeted custodians over a more than four-year period for documents that hit on 19 potentially relevant search terms. Such terms included, among others, “Colleen,” “Graham,” “THS,” and “Trader Surveillance.”
✓	Conducted targeted searches for specific documents that may not have been captured by search terms, including for Complainant’s personnel file, the Investor Day Presentation video, the THS dashboard, and documents and contracts related to Complainant’s employment.
✓	Engaged outside counsel to review more than 22,000 potentially responsive documents collected from these searches, comprising over 200,000 pages, at great effort and expense.
✓	Produced each non-privileged, responsive document identified by these searches.
✓	Conducted broader follow up searches on four categories of documents following a meet and confer with Complainant.
✓	Produced an additional 19 responsive documents located by those searches.
✓	Made 8 separate rolling productions, totaling 2,227 documents and over 11,000 pages.

Nor is there any question that Credit Suisse USA's outside counsel, as officers of this Court, have twice certified in writing to Complainant that Credit Suisse USA has searched for, produced, and is not withholding any non-privileged documents responsive to this Court's Order to Complainant's formal and informal discovery requests. This alone warrants the denial of Complainant's Motion. Indeed, as discussed in more detail below, Complainant's Motion does not identify any specific deficiency in Credit Suisse USA's extensive discovery efforts or any credible reason to question the representations of counsel for Credit Suisse USA. And, in any event, there is no question that Credit Suisse USA's extensive discovery efforts and assurances, as detailed above, greatly outweigh Complainant's cavalier and untimely discovery efforts in response to Credit Suisse USA's document demands.

II. THE ALLEGED “DEFICIENCIES” IN CREDIT SUISSE USA’S PRODUCTIONS ARE MERITLESS.

Complainant makes no effort to point to any flaws or inadequacies in Credit Suisse USA's search strategy. In fact, prior to filing this Motion, Complainant never even bothered to inquire about the parameters of Credit Suisse USA's searches. Instead, Complainant tries to attack Credit Suisse USA's production efforts by pointing to certain categories of documents that Complainant believes should have been produced. But, as is demonstrated below, Complainant has no evidence that such documents ever existed in the first place.

A. Credit Suisse USA produced the THS dashboard months ago.

Complainant first claims that “[t]he June 26th Order required CCSU to produce the THS dashboard on the date of its roll-out, but it failed to do so.” (Mot. at 6.) This accusation is remarkable in its brazenness. As Complainant knows, Credit Suisse USA produced the THS dashboard on October 30, 2020, ***and specifically informed Complainant that it did so.*** As Credit Suisse USA explained to Complainant in its November 7, 2020 email, the THS dashboard is

contained in the Investor Day Presentation video, and Credit Suisse USA provided Complainant with the exact timestamps where the dashboard could be found:

- The dashboard for THS on the day it was rolled out. We have produced the dashboard. In particular, the video presentation that we produced displays the THS “Super User Dashboard” at 00:48 – 01:14 of the video. Accordingly, we have satisfied Complainant’s request. We are, however, willing to meet and confer if you have any further questions.

(Ex. G.) That fully satisfies Credit Suisse USA’s obligation to comply with this Court’s Order to produce the THS dashboard, and should put an end to this issue.

But Credit Suisse USA went even further and twice offered to search for additional documents if Complainant could describe any other “THS dashboard” she sought:

There also are remaining open items, regarding your demands and ours, on which we still have not heard from Complainant. In particular, on our November 17 call, we noted that we produced the THS dashboard as ordered by the Court. While on the call you suggested you were seeking some other document(s) in addition to the dashboard we produced, you were unable to describe what those documents were when we asked. Instead, you told us that you would check on it and get back to us with a description, but we still have not heard from you. We are willing to do another search to see if such documents exist, but we need to understand what documents Claimant is seeking to do so. In addition, we noted on the call that the email record Complainant produced regarding her pursuit of employment with Blackrock appears to be incomplete. You indicated that you would check whether additional emails existed, but again, we have not heard from you and you did not mention those in your latest note of Sunday, November 29. Please promptly provide us this information so that we have it for Ms. Graham’s deposition.

(*Id.*) Complainant ignored both offers, suggesting that the “THS dashboard” produced by Credit Suisse USA on October 30, 2020 was the only dashboard.

Incredibly, Complainant’s Motion does not even mention the fact that Credit Suisse USA had already produced the dashboard called for by the Court’s Order. Nor does Complainant mention Credit Suisse USA’s offers to conduct additional searches if the THS dashboard she received was not the one she had in mind. This supports the notion that Complainant’s Motion is intended to mask the weakness of her claims and delay the day-of-reckoning.

B. Credit Suisse USA produced all the “weekly status reports” regarding THS it located.

Complainant also seeks an order compelling Credit Suisse USA to produce “weekly status reports regarding the development of THS.” (Mot. at 8.) Though Complainant acknowledges that Credit Suisse USA produced such reports, Complainant accuses Credit Suisse USA of withholding other similar reports. This accusation is meritless. Indeed, this is not a case where, for example, Complainant has obtained deposition testimony that a certain “weekly status report” was prepared and filed, yet never produced. This is a case where Complainant simply says, “I thought and hoped there would be more.” That is not close to enough to carry Complainant’s burden on a motion to compel.

As an initial matter, Complainant ignores the fact that Credit Suisse USA produced THS status reports other than those mentioned in her Motion, including reports circulated on February 6, 2017 and February 20, 2017. (Ex. H, Status Report Examples.) Instead, Complainant latches on to two reports labelled “Week 6” and “Week 8” and then assumes there must be other reports labelled Weeks 1-5, 7, etc. There is no basis for such an assumption. As is evidenced from Credit Suisse USA’s production, many of the THS status reports that Credit Suisse USA produced are not labelled by “Week” nor do any of these documents suggest that such reports were generated every single week, as Complainant now assumes.

More fundamentally, Credit Suisse USA has twice conducted searches that would have captured such reports and has produced each responsive, non-privileged status report that it was able to locate. Indeed, Credit Suisse USA conducted a supplemental search specifically for these documents after Complainant requested that Credit Suisse USA search for them during the November 17, 2020 meet and confer. This search included reviewing documents that broadly contained any of the following terms: “THS,” “Trader Surveillance,” or “Trader Holistic

Surveillance.” All responsive reports identified by these searches have been produced. At this point, Credit Suisse USA has not located any other such reports despite these diligent search efforts. Complainant’s “[m]ere distrust” of Credit Suisse USA’s document production efforts does not entitle her to continue to demand documents that do not exist. *See Boyd v. Etchebehere*, No. 11301966LJOSABPC, 2017 WL 1278047, at *3 (E.D. Cal. Jan. 13, 2017) (“Absent evidence to the contrary, . . . Plaintiff is required to accept defense counsel’s representation that such documentation either does not exist or cannot be located, and Defendant cannot be compelled to provide copies of documents that do not exist.”); *Scott v. Palmer*, No. 1:09-CV-01329, 2014 WL 6685810, at *3 (E.D. Cal. Nov. 26, 2014).

C. Credit Suisse USA searched for any responsive documents relating to meetings with regulators regarding THS.

Also meritless is Complainant’s accusation that Credit Suisse USA is withholding documents related to “[m]eetings with the Federal Reserve Bank, the Swiss Financial Market Supervisory Authority, and / or the United States and Exchange Commission (sic), regarding THS.” (Mot. at 7.) As ordered by the Court, Credit Suisse USA searched for responsive documents dated between March 2017 and August 2017. (*See Order at 16.*) That no such documents were contained in Credit Suisse USA’s production is merely reflective of the fact that no such meetings took place.

Complainant offers no basis to conclude otherwise. In her Motion, Complainant attempts to rely on testimony from a Credit Suisse USA employee, Jim Barkley, given in the 2017 JAMS Arbitration in which he describes a particular meeting he attended with the SEC in March 2017. Complainant then suggests that this testimony establishes that “[r]egulators in the United States and Switzerland received frequent updates on THS.” (Mot. at 7.) That is pure deception. As Complainant knows, Mr. Barkley’s testimony does not refer to, or involve, THS in any way. Mr.

Barkley was describing a March 2017 meeting between the SEC and *Signac* regarding an ultimately unsuccessful tool that *Signac* was developing, called BRM, that it hoped to market to third parties. (*See* Mot., Ex. E.) That meeting had nothing to do with Credit Suisse USA or THS, which, as noted, is a compliance tool that Credit Suisse developed long after Signac shut down. In fact, at the same arbitration, Mr. Barkley testified repeatedly that Credit Suisse USA did not have a complete Trader Holistic Surveillance tool as of March 2018. (*See* Amended Complaint at 10-12.) Thus, it is no surprise that documents relating to meetings with regulators about THS in mid-2017 were not found to exist in Credit Suisse USA’s possession, custody, or control.

D. Credit Suisse USA produced any responsive non-privileged documents regarding Credit Suisse AG’s utilization of any purported Signac products.

Complainant also claims that Credit Suisse USA failed to produce documents relating to “whether CS AG might utilize any Signac’s [sic] products.” (Mot. at 7.) This is plainly untrue. Credit Suisse USA has produced volumes of documents related to this issue: including documents showing Credit Suisse USA’s and Credit Suisse AG’s dissatisfaction with Signac’s purported “products,” the decision to dissolve Signac, and the decision by Credit Suisse to develop a new trader holistic surveillance tool in-house. (*See* Taylor Decl. ¶ 9.) This production includes emails from Ms. Graham, Lara Warner, Jim Barkley, and numerous other Credit Suisse, Signac, and Palantir employees. (*Id.*) Nor should this production come as any surprise to Complainant, given that these materials were produced in the JAMS Arbitration where Complainant’s claim that Credit Suisse is using Signac’s products was already litigated, albeit unsuccessfully.

At bottom, Complainant’s dissatisfaction is not that Credit Suisse USA failed to produce documents, but that Credit Suisse USA has not identified any evidence to support Complainant’s fatuous, already twice-rejected claim that THS is a Signac product or that Credit Suisse USA is using or developing any Signac products. It is well settled, however, that a “Plaintiff’s mere

expectation and desire to see certain documents does not necessarily mean that such documents exist.” *246 Sears Rd. Realty Corp. v. Exxon Mobil Corp.*, No. 09-CV-889 (NGG) (JMA), 2011 WL 13254283, at *2 (E.D.N.Y. Apr. 1, 2011). It is similarly well settled that the Court “cannot compel a party to produce documents based solely on opposing speculation and belief that responsive documents exist and that the producing party is withholding them.” *Susko v. City of Weirton*, No. 5:09-CV-1, 2011 WL 98557, at *5 (N.D. W. Va. Jan. 12, 2011). That is especially true here given that Complainant has already litigated and lost this issue in the JAMS Arbitration and before the New York Supreme Court.

E. Credit Suisse USA has searched for and produced any documents related to the “valuation” of Signac.

Complainant argues that the “June 26th Order required production of any documents regarding the valuation of Signac but CSSU has not produced any.” (Mot. at 8.) This is the first Credit Suisse USA has heard of any such deficiency. (*See Ex. G at 3-4.*) In any event, Complainant’s accusation is not correct. Credit Suisse USA searched for and produced documents specifically related to the “valuation” of Signac. In particular, Credit Suisse USA produced meeting minutes in which Signac stakeholders expressly discussed whether to conduct a valuation of Signac or its intellectual property. (Ex. I, June 23, 2017 Minutes.) Notably, the participants at that meeting professed “skepticism that there would be a buyer of the [Signac] IP for any significant value,” and “Ms. Graham concurred” with that skepticism. (*Id.*) As such, Complainant’s accusation that Credit Suisse USA “has not produced any” documents regarding the valuation of Signac is baseless: Credit Suisse USA searched for and produced any responsive documents it located.

F. Credit Suisse USA has searched for and produced any responsive THS documents.

Complainant also generally takes issue with the volume of documents related to THS in Credit Suisse USA's production, describing Credit Suisse USA's production as a "smattering" of emails. As noted above, this complaint is unwarranted as a matter of fact and law. Credit Suisse USA conducted broad searches for and produced numerous responsive documents related to THS, including the specific documents Complainant identified in its requests. Moreover, Complainant's "[m]ere distrust and suspicion regarding discovery responses do *not* form a legitimate basis to further challenge responses which are facially legally sufficient," nor does it entitle Complainant "to continue demanding additional and/or different evidence in support of discovery responses already provided." *See Scott*, 2014 WL 6685810, at *3.

It is also worth noting that Complainant cannot seem to get her story straight regarding Credit Suisse USA's production. Complainant castigates Credit Suisse USA in this Motion for purportedly stonewalling in discovery and withholding relevant documents. Yet, on December 22, 2020, less than a week after she filed the present Motion with this Court, Complainant filed another JAMS arbitration action relating to Signac's software against, among others, Credit Suisse AG. As purported justification for her failure to include these claims in the initial JAMS Arbitration, Complainant boasts to JAMS about the purported treasure trove of "new" evidence Credit Suisse USA produced in these OSHA proceedings—the very same discovery process and efforts that she characterizes as deficient and sanctionable here. (Ex. J, Notice of Claim at 1-2.) Such conduct by Complainant simply proves what Credit Suisse USA has suspected all along: Complainant is wrongfully using discovery in this OSHA proceeding not to gather information in support of her retaliation claims but, rather, to fish for information to use for other purposes. At any rate, the Court should reject out of hand any claim by Complainant that Credit Suisse USA's production regarding THS is insufficient.

G. Credit Suisse USA has searched for and produced any responsive documents relating to diligence leading up to the Investor Day Presentation.

Complainant suggests that Credit Suisse USA withheld documents responsive to Request 10(h), which seeks “Approvals for and or diligence regarding December 12 Investor Day statements . . . related to THS.” (Mot. at 8.) Not so. To be clear, Credit Suisse USA specifically searched for documents responsive to this Request and produced anything that could be deemed responsive. While Complainant is apparently dissatisfied with the absence of responsive documents, however, there is a simple explanation for that. The Investor Day Presentation referred to in Complainant’s document request occurred on December 12, **2018**—more than one year after the events at issue in this litigation and more than one year after the August 1, 2017 cutoff date for discovery on this Request adopted by the Court in its Order. (*See* Order at 16 (directing Credit Suisse USA “to respond in full, but only for the period from March 1, 2017 until August 1, 2017”).) It is not surprising that Credit Suisse USA would not be undertaking due diligence in mid-2017 for a presentation that was to occur more than one year later in December 2018. It is, therefore, also not at all surprising that no documents reflecting such due diligence exist.

III. COMPLAINANT’S CLAIMS OF SPOILIATION ARE IMPROPER AND IRRESPONSIBLE.

Complainant also concludes her Motion by lobbing an accusation that, because Credit Suisse USA has not produced documents Complainant evidently hoped existed, Credit Suisse USA must have failed to preserve them. To the extent Complainant is seeking spoliation sanctions, this half-hearted accusation should be rejected out of hand, and is itself frivolous.

“A party seeking spoliation sanctions has the burden of establishing the elements of a spoliation claim by a preponderance of the evidence.” *Dilworth v. Goldberg*, 3 F. Supp. 3d 198, 200 (S.D.N.Y. 2014). These elements are “(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a

culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” *Id.* This is no easy showing. A party cannot establish spoliation by “show[ing] nothing beyond a mere lack of production.” *Kinnally v. Rogers Corp.*, No. CV-06-2704-PHX-JAT, 2008 WL 4850116, at *5 (D. Ariz. Nov. 7, 2008). Nor can a “successful claim for spoliation of evidence [] be premised on mere speculation on the existence of such evidence.” *Wimbush v. Matera*, No. CIV. SAG-11-1916, 2014 WL 7239891, at *11 (D. Md. Dec. 17, 2014). Instead, courts are clear that “naked accusations of spoliation, bad faith, and fraud on the part of defendant fall woefully short” of showing spoliation, especially where a producing party “has repeatedly confirmed, in writing and in telephone conversations, that their production is complete.” *246 Sears Rd. Realty Corp.*, 2011 WL 13254283, at *2.

Complainant comes nowhere close to meeting the exacting standard for spoliation. Instead, pages of her Motion are devoted to lecturing Credit Suisse USA on its duties to preserve evidence. But strikingly absent from Complainant’s Motion is any evidence that Credit Suisse USA, in fact, destroyed or failed to preserve any documents, much less destroyed any relevant documents “with a culpable state of mind.” There is none. Credit Suisse USA has complied with all of its preservation obligations related to this case and is unaware of any document relevant to Complainant’s claims in its possession, custody, or control that has been either destroyed or not preserved. Complainant’s spoliation argument relies on the same kind of “mere speculation” and “conclusory assertions” about the purported existence of documents that courts routinely reject. *Alaimo v. Trans World Airlines, Inc.*, No. 00 CV 3906 (GBD), 2005 WL 267558, at *3 (S.D.N.Y. Feb. 3, 2005) (“Since plaintiff has not establish[ed] that the records and documents she sought ever

existed, there can be no finding of spoliation [sic] of evidence.” (internal citations omitted)); *see also Kinnally*, 2008 WL 4850116, at *6.

The fact of the matter is that Complainant *knows* that no spoliation has occurred. Complainant has twice accused Credit Suisse and others of similar conduct. And such allegations have been flatly rejected each time. At this point in time, such allegations appear to be just part of Complainant’s counsel’s playbook. But the repeated deployment of such irresponsible allegations by Complainant—allegations that Complainant knows are false—are not well taken. Indeed, courts have repeatedly held that such baseless, “hair trigger” motions for sanctions are themselves sanctionable conduct. *See All. to End Repression v. City of Chicago*, 899 F.2d 582, 583 (7th Cir. 1990) (“It is essential to maintain the line between vigorous advocacy . . . and frivolous conduct. Hair-trigger motions for sanctions by lawyers who do not recognize the difference are themselves sanctionable.”).

CONCLUSION

For the foregoing reasons, Credit Suisse USA respectfully requests that the Court deny Complainant’s Motion in its entirety.

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Respectfully submitted,

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