

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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COLLEEN A. GRAHAM, :

Complainant, :

v. :

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CREDIT SUISSE SECURITIES (USA) LLC, :  
and SIGNAC LLC :

Case No. 2019-SOX-00040

Respondents. :

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**COMPLAINANT COLLEEN A. GRAHAM'S MEMORANDUM OF LAW IN  
OPPOSITION TO RESPONDENT CREDIT SUISSE SECURITIES (USA) LLC'S  
MOTION TO COMPEL COMPLAINANT'S DEPOSITION, EXTEND TIME TO FILE  
FOR SUMMARY DECISION, AND FOR SANCTIONS**

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On the theory that the best defense is a good offense, Respondent Credit Suisse Securities (USA) LLC's ("CS USA"<sup>1</sup>) Motion to Compel Complainant's Deposition, Extend Time to File for Summary Decision, and for Sanctions seeks to deflect attention from its own wrongdoing by blatantly distorting the facts to support baseless claims of wrongdoing by Complainant Colleen Graham ("Complainant" or "Graham"). Its motion lacks any merit. In stark contrast to CS USA's claims, Graham has not "refused to appear at the scheduled deposition," nor does she now. Rather, Graham always informed CS USA that she would appear when it produced the documents it was required to produce under two separate Court Orders (the first of which sanctioned CS USA for its blatant discovery defaults). The discovery dispute between CS USA and Graham is not about whether Graham will appear for her deposition. Instead, the issue is whether CS USA should first comply with two outstanding Court Orders requiring the production of documents materially relevant to her deposition.

This Court should deny CS USA's Motion because Graham will appear voluntarily, notwithstanding that the discovery deadline passed long ago. Second, this Court should deny CS USA's request to adjourn the December 31 deadline for summary decision motions because CS USA, even though sanctioned once already, remains in default of its discovery obligations. Third, this Court should deny CS USA's request for reimbursement for "all fees, expenses, and costs associated with this Motion" because such sanctions are not warranted where, as here, Graham has not ignored CS USA's deposition notices — which were not even served until well

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<sup>1</sup> Credit Suisse USA is a wholly owned subsidiary of Credit Suisse AG ("CS AG"), a global investment bank headquartered in Switzerland. As part of the fully integrated entity, CS USA and CS AG share a compliance function. Lara Warner, the Chief Compliance Officer and James Barkley, Global Head Core Compliance Services, during the relevant period, headed the compliance effort across all of the bank's subsidiaries, including CS USA.

after the discovery deadline had passed — nor has she refused to appear for her deposition in this case.

### **BACKGROUND**

On September 24, 2020, the Court held a teleconference with the parties to discuss the case schedule. Graham noted that she had not received the documents that CS USA had been required to produce under this Court's Order dated June 26, 2020 (the "June 26 Order"). As Graham's counsel recalls, the Court inquired whether that was the only discovery remaining outstanding and all parties agreed that it was. The Court (Timlin, J.), in its September 25, 2020 Order (the "September 25 Order") then asked CS USA how much time it needed to complete production required by the June 26 Order (which compelled production of THS documents and sanctioned CS USA for its inexcusable failure to produce such documents); CS USA answered that one month was sufficient, and the Court extended its time to complete production until October 30. CS USA never advised the Court it was unable to locate the documents that it had been sanctioned for not producing, nor did it advise that other material discovery remained outstanding, such as a deposition for Graham.

Contrary to its representation that no further discovery was needed, on October 14, 2020, CS USA served a deposition notice on Graham, with her deposition scheduled for October 29, 2020. Seeking to avoid needless motion practice, Graham agreed to appear for her deposition once CS USA completed its document production, then required to by October 30 by this Court's order:

The deposition notice is inconsistent with respondents' representation to the Court during our last conference call that only the completion of paper discovery remained outstanding. Nonetheless, provided we can agree on some parameters, I'm willing to consider a consensual modification of the court's order.

Accordingly, please advise whether respondents (all of them) agree to the following parameters:

Credit Suisse will produce a witness to be deposed. Plaintiff[s] will have a reasonable period of time to identify the witness after respondents complete their document production, which will be by no later than October 30th.

Depositions will be conducted virtually and be completed by no later than December 14, 2020.

Ex. “A” (emphasis supplied). Graham never refused to be deposed but instead properly insisted that CS USA’s anticipated document production be completed first, then required by October 30 in compliance with the Court’s Order.

CS USA made an obviously incomplete document production on October 30, once again defying this Court’s orders. On November 6, 2020, after reviewing the document production, Graham promptly notified CS USA of its continuing discovery defaults, carefully detailing the missing documents. Ex. “B”. On November 17, at Graham’s request, the parties held a meet and confer conference call wherein Graham addressed CS USA’s need to produce the missing documents, emphasizing that motion practice would necessarily follow. CS USA agreed to conduct a further review to determine whether any additional production should be made.

Graham thereafter agreed to be deposed on December 1, provided CS USA produced the documents required by the Court Orders. It failed to do so. On November 29, Graham informed CS USA that she would not appear for her deposition because of the “missing discovery.” Her email summarized the repeated notice to CS USA that Graham would only appear once it had produced the required discovery:

Nathan,

I hope you had a safe and enjoyable holiday. I still have not heard from CS on the missing discovery (particularly, the first, third and 4th bullet points below). We had our meet and confer two weeks ago. The issue was raised for the first time about a month ago. CS

should have supplemented and completed its court ordered document production by now. I will not produce Colleen for a deposition until CS completes its production.

Ex. “C” (emphasis supplied).

In response to another attempt to schedule Graham’s deposition by CS USA, Graham, on December 8, again informed CS USA that she was ready and willing to appear for her deposition as soon as it complied with its discovery obligations:

Please advise when your client intends to produce the documents required by the June 26th [order]. Although [I] am not required to do so, once the court ordered production is completed by you, [I] will agree to produce my client for a deposition.

Ex. “D”.

Although still in default of its discovery obligations and well after the October 30 Court-ordered deadline for the close of discovery, CS USA again served Graham with a deposition notice, this time on December 11, scheduling the deposition for December 21 (some 7 weeks after the close of discovery!). Although the deposition notice was a nullity, having been well after the Court-ordered close of discovery, Graham did not object on that basis. Instead, the objection remained the same as raised from the start: CS USA had not produced the documents required by the June 26 Order. On December 18, Graham wrote:

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.

Ex. “E”.

Graham never refused to appear for her deposition but, rather, repeatedly notified CS USA that she would appear, provided only that CS USA produced the documents that this Court twice ordered it to produce (and which are materially relevant to her deposition). Despite Graham’s repeated notice that she would appear for her deposition, CS USA has crafted the false

narrative that Graham refused to appear for her deposition. In fact, when CS USA pushed this narrative in an email to Graham, Graham clarified that she would appear for her deposition once CS USA completed its Court-ordered production of documents. *See* Ex. “F”.

## **ARGUMENT**

### **I. The Court’s granting of CS USA’s Motion to Compel would be superfluous.**

CS USA claims that Graham “has repeatedly refused to appear for deposition” and that it has been, and continues to be, prejudiced by Graham’s failure to appear for her deposition. *Mov. Memo* at 8. Each claim is demonstrably false, manufactured by CS USA to gain further delay, and frustrate the prompt and fair administration of justice.

A party moving to compel discovery must have “in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without the judge’s action.” 29 C.F.R. § 18.57(a)(1). Although Graham repeatedly met and conferred with CS USA regarding its failure to produce documents, CS USA never asked to meet and confer about its supposed dispute, as it was required to do before interposing its motion. CS USA cannot claim prejudice when its failure to operate in good faith and in conformity with the rules is the direct cause of that prejudice. Graham informed CS USA on several occasions that she was ready and willing to appear for a deposition as soon as it complied with its discovery obligations. CS USA elected to disregard -- three times now -- its obligations to produce documents. The first default was so inexcusable that it led to sanctions (the June 26 Order); it then violated that order and was afforded an additional month to comply by the September 25 Order. Notwithstanding the two Court Orders, CS USA still hasn’t produced all of the required THS documents.

Notably, Graham informed CS USA promptly that it needed to comply with the Court's orders and produce the required documents before she would appear for her deposition. Graham did not wait until the "last minute" as CS USA contends. She clarified with CS USA that she did not have an objection to appearing for her deposition, but simply that she wanted to wait until CS USA fully complied with its discovery obligations. It was completely appropriate to insist that CS USA comply with the Court's discovery orders and make production, particularly since the Court determined the documents were materially relevant to the dispute and, therefore, likely will be at issue at Graham's deposition. Moreover, Graham has not sought a protective order because she had expected compliance by CS USA with its Court-ordered discovery obligations and always made clear that she would sit for her deposition once that was done.

Also relevant to CS USA's attempt to create issues to cause further delay is the fact that CS USA agreed with the Court on September 24, 2020, that the only open discovery item was the completion of its document production. Its current motion contravenes that agreement. Assuming this Court decides under the circumstances to extend the discovery deadline, Graham remains ready and willing to appear for her deposition. However, Graham should not be compelled to appear prior to the date when CS USA produces all of the materially relevant THS documents.

**II. The December 31 deadline for summary decision motions should not be adjourned because CS USA should not profit from its misconduct.**

Revealing its true motives, CS USA seeks to adjourn the December 31 deadline for summary decision motions on the grounds that "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." Mov. Memo at 8. This

Court should deny the request because CS USA’s own misconduct led to its failure to meet the deadline. *Aptix Corp. v. Quickturn Design Sys.*, 269 F.3d 1369, 1376 (Fed. Cir. 2001) (emphasizing that there is a general principle that “equity will not lend its aid to enable a party to reap the benefit of his misconduct . . .”) (internal citation omitted). The only reason that CS USA failed to interpose a motion for summary decision by the Court-ordered December 31 deadline was because it chose not to. CS USA’s vexatious litigation tactics should not be rewarded. In response to Graham’s simple 10-item document demand CS USA raised a number of frivolous objections, which inexorably led to this Court’s sanctioning it and ordering production (the June 26 Order). CS USA then failed to comply with the Court Order, but upon its request was given one additional month to complete production. On the eve of the extended deadline, CS USA made a minimal, plainly deficient production, claiming that it engaged in a good faith search of CS USA’s records and produced all the “non-privileged documents” it could locate.

But in this era of electronically stored documents, it is simply inconceivable that CS USA, a highly regulated investment bank, can only locate weeks 6 and 8 of a set of weekly status reports regarding the development of its highly touted, revolutionary THS compliance software, but not locate weeks 1-4 and 7 and whatever number of weeks follow 8. It is inconceivable that CS USA cannot locate the THS dashboard on the date of the product roll-out.<sup>2</sup> It is inconceivable that CS USA cannot locate notes of its regular meetings with regulators regarding its revolutionary THS software. It is inconceivable that CS USA cannot locate its due diligence file for the statements made in securities filings about the software it has been so actively promoting.

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<sup>2</sup> What CS produced was a video from its investor day presentation that contained in its background a cartoon of the dashboard, a copy of which is attached as Ex. “H”. That is not the dashboard which actually sits on the desktops of thousands of CS USA and CS AG employees.

CS USA’s claimed inability to locate electronic records of documents that necessarily exist — CS USA never claimed, even to this date, that the documents do not exist — is completely inconceivable, except perhaps in one circumstance: the documents are in the custody of its parent entity, CS AG, and CS USA has relied on the distinction between the two legal entities to close its eyes toward the CS AG files. But the law does not permit CS USA to avoid producing THS documents in the possession of CS AG.

A. **CS USA has an obligation to produce documents belonging to its parent company, CS AG.**

The formalities separating CS USA and CS AG cannot act as a shield for CS USA’s failure to comply with its Court-ordered discovery obligations. *See In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1153 (N.D. Ill. 1979). Courts have found subsidiary companies obliged to produce the documents of their parent companies where they have sufficient control over those documents. *See Choice-Intersil Microsystems, Inc. v. Agere Sys.*, 224 F.R.D. 471, 472–473 (N.D. Cal. 2004); *First Nat’l City Bank v. Internal Revenue Service*, 271 F.2d 616, 618 (2d Cir. 1959). There are two basic tests in determining whether a subsidiary has sufficient control over its parent company’s documents so as to require the subsidiary to produce them. The first test is the “legal right” test, which provides that a subsidiary has control over documents when it has the “legal right to obtain the documents on demand.” *In re Bankers Trust*, 61 F.3d 465, 469 (6th Cir. 1995) (internal citation omitted). *See also Cooper v. Sherman*, 2018 U.S. Dist. LEXIS 191468, \*15 (M.D. Pa. Nov. 8, 2018) (emphasizing that control means “the legal right, authority, or ability” to obtain documents on demand) (internal citation omitted). Other courts apply the “practical ability” test, which provides that a subsidiary has an obligation to produce documents when it has the practical ability to obtain them. *See Bank of New York v. Meridien BIAO Bank Tanzania*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997); *Petersen Energía Inversora, S.A.U.*

*v. Argentine Republic*, 2020 U.S. Dist. LEXIS 243806, \*3 (S.D.N.Y. Dec. 28, 2020). Under either test, CS USA has an obligation to produce the documents it claims are in the possession of CS AG.

Lara Warner, the Chief Compliance and Regulatory Affairs Officer during the relevant period, and James Barkley, then Global Head Core Compliance Services, have compliance responsibilities across the fully integrated, global investment bank. They ran the effort to “develop” THS, the revolutionary compliance software tool. Toward that end, it is significant to note that nowhere among the careful detailing of its copious discovery efforts does CS USA ever claim to have searched the files of CS AG or inquired of any CS AG employee. *See* Opp. Memo at 9. Since CS AG now claims to have developed THS on its own, it is fair to presume that it actually is the custodian of the records. And while that explanation might allow CS USA to at least advance the proposition that it could not locate the THS Documents on the basis that the custodian is CS AG, the claim is utterly inconsistent with the facts and law and should be rejected.

As Chief Compliance and Regulatory Affairs Officer and Global Head Core Compliance Services, Lara Warner and James Barkley have the practical ability and the legal right to access the documents in question even if technically owned by CS AG. Indeed, Lara Warner testified that she has compliance responsibilities across all CS AG entities. *See* Ex. “G” at 1495. Certainly, if there is an embedded role for compliance across all Credit Suisse entities, then the person in that role must have the right and the ability to obtain compliance documents across all entities. CS USA’s willful flouting of this Court’s orders has delayed discovery and prejudiced Graham enough already. Its misconduct should not be rewarded with further delay.

**B. CS USA has waived any privilege.**

In its Motion to Compel, CS USA reaffirms its claim that it has produced all non-privileged documents it could locate. Mov. Memo at 6. But to have preserved any claim of privilege, CS USA must have produced a privilege log indicating what documents are privileged and why they possess such a privilege. Fed. R. Civ. P. 26(b)(5)(A). *See also Pitts v. Francis*, 2008 U.S. Dist. LEXIS 41894, \*13 (N.D. Fla. May 28, 2008) (emphasizing that “to preserve the privilege, the objecting party must provide a log or index of withheld materials that includes for each separate document, the authors and their capacities, the recipients (including copy recipients) and their capacities, the subject matter of the document, the purpose for its production, and a detailed, specific explanation of why the document is privileged or immune from discovery”) (internal citation omitted). Indeed, “General or blanket claims of privilege are insufficient for a party to withhold materials under a claim of privilege.” *Id.* CS USA never produced any privilege log and having failed to do so, CS USA cannot now use the privilege to avoid producing the THS documents required by the June 26 Order. Moreover, like its claimed inability to locate documents that necessarily exist, CS USA’s claim of privilege is entirely fanciful. Meetings with regulators, weekly status reports regarding the development and roll-out of THS, documents regarding the valuation of Signac, and approvals for Investor Day statements to the public do not implicate the attorney-client privilege.

**III. Sanctions are not warranted here because Graham has not ignored CS USA’s deposition notices nor has she refused to appear for her deposition.**

Finally, CS USA seeks sanctions for Graham’s “unilateral refusal to appear for deposition.” Mov. Memo at 9. Much like CS USA’s other claims, sanctions are not warranted here — except as against CS USA as sought by Graham’s pending motion to compel and for sanctions —because Graham never refused to appear for her deposition. Moreover, CS USA

failed to meet and confer with Complainant prior to interposing its baseless motion. This Court should not allow CS USA to ignore its orders, intentionally misrepresent Graham's repeated notice of her position — *i.e.*, she will sit for a deposition after CS USA produces the documents required by this Court's orders — and interpose a motion without seeking to meet and confer. CS USA should not benefit from its bad faith attempts to frustrate discovery and delay the prompt administration of justice. The only sanctions that should be awarded are, once again, against CS USA.

### **CONCLUSION**

For the foregoing reasons, Colleen A. Graham respectfully requests that this Court deny CS USA's Motion to Compel in its entirety, including its request that this Court order her to appear for her deposition, its request seeking an extension of the deadline for summary decision motions, and its request seeking sanctions.

Dated: New York, New York  
January 12, 2021

KRAUS & ZUCHLEWSKI LLP

*/s/ Robert Kraus* \_\_\_\_\_  
Robert D. Kraus, Esq.  
Jonathan Sclar, Esq.  
*Attorneys for Complainant*  
60 East 42<sup>nd</sup> Street, Suite 2534  
New York, New York 10165  
(212) 869-4646  
(212) 869-4648 (Facsimile)