



Issue Date: 28 January 2021

Case No.: 2019-SOX-00040

In the Matter of

COLLEEN A. GRAHAM,
Complainant

v.

CREDIT SUISSE SECURITIES, et. al.,
Respondents

**ORDER ADDRESSING COMPLAINANT'S MOTION TO COMPEL AND
ADDITIONAL SANCTIONS**

This matter arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud, Accountability Act of 2002, Title VII of the Sarbanes Oxley Act of 2002 (hereafter, "SOX" or "the Act"), 18 U.S.C. § 1514A. A hearing in this matter is scheduled for March 8, 2021.

This order addresses Complainant's December 16, 2020 Motion to Compel. This motion, however, relates to a previous Motion to Compel ruled on by the undersigned. On April 17, 2020, Complainant filed a motion which, among other things, sought to compel Respondent's production of responsive discovery documents. On June 26, 2020, the undersigned granted Complainant's motion in part.¹ The undersigned ordered Respondents to respond to numerous requests for production and imposed sanctions for Respondents' withholding of certain documents.

On December 16, 2020, Complainant submitted the instant motion. Complainant alleges that Respondents have not fully complied with the undersigned's June 2020 Order. Specifically, Complainant avers that Respondents have not produced responsive documents relating to seven of its requests for production. Complainant also urges the undersigned to further sanction Respondents for its conduct during the discovery period.

Respondents submitted their Opposition to Complainant's Motion on December 31, 2020. Respondents argue, generally, that they have complied with the undersigned's order. Respondents also deny that its conduct during discovery was improper and oppose the imposition of additional sanctions.

The undersigned has carefully reviewed Complainant's allegations and Respondents response to each. Based on this review, the undersigned GRANTS IN PART and DENIES IN

¹ The undersigned issued an order on October 8, 2020 correcting a minor typographical error.

PART Complainant's Motion to Compel. Furthermore, the undersigned also DENIES Complainant's Motion for Additional Sanctions.

Complainant's Motion to Compel

Request for Production #2

In her April 2020 Motion to Compel, Complainant sought to compel the production of the "dashboard" of the Trader Holistic Surveillance ("THS") software. Specifically, Complainant sought the "dashboard" as it appeared on the day of its "roll out" and on the first day of every third month thereafter. Respondents objected to this request, claiming that it was both irrelevant and ambiguous. For the reasons stated in the June 2020 order, the undersigned found that Complainant's request was relevant to her claim, but was overly broad. Accordingly, the undersigned ordered Respondents to produce the "dashboard" of the THS software, but only on the day of its "roll out." Complainant now alleges that Respondents have not complied with the undersigned's order.

Respondents do not appear to have fully complied with the undersigned's June 2020 order. Respondents claim that they have produced the "dashboard" as it was included in the Investor Day Presentation video, which they provided to Complainant on October 30, 2020. However, Respondents have not confirmed that this video contains the "dashboard" as it appeared on the day of the THS software's "roll out," or introduction. And, although the undersigned did not direct Respondents to provide this document in any particular format in the June 2020 order, the undersigned would not have anticipated Respondents producing the "dashboard" in video format.

Thus, with respect to Complainant's request for production #2, the undersigned **GRANTS** Complainant's motion to compel. Respondents are ordered to produce the "dashboard" of the THS software on the day of its "roll out" in an appropriate format.

Request for Production #7

In her April 2020 Motion, Complainant sought to compel production of "[a]ll project plans, presentations and reporting regarding the development of THS on or after July 1, 2017." Respondents objected to this request, claiming that the requested documents were irrelevant. The undersigned overruled Respondents' objection and ordered the production of these documents.

In her current motion, Complainant explains that Respondents provided only two weekly status reports regarding the development of THS; the weekly reports for "Week 6" and "Week 8." Based on these descriptions, Complainant suggested that additional weekly reports existed (for at least the first five and seventh weeks and possibly for the ninth week and forward) but were not produced by Respondents. Respondents claim that they have produced "each responsive, non-privileged" weekly status report.

The undersigned acknowledges that Complainant's assertion regarding the existence of additional weekly reports is somewhat speculative. However, the undersigned also finds that Respondents' response to her assertions lacking in candor. In their response, Respondents do not

state whether additional weekly reports exist; if so, whether those reports are responsive to Complainant's request; and, if so, the basis for any claim that the weekly reports are privileged.

With respect to Complainant's request for production #7, the undersigned **GRANTS** Complainant's Motion to Compel. Respondents are ordered to produce all weekly status reports regarding the development of the THS software on or after July 1, 2017. If any additional weekly reports exist but are non-responsive or are privileged, Respondents must sufficiently explain why this is the case AND seek a protective order under 29 C.F.R. § 18.52.

Request for Production #10(b), 10(d), and 10(e)

In April 2020, Complainant sought to compel Respondents to produce the following documents:

- #10(b): Documents related to meetings with the Federal Reserve Bank, the Swiss Financial Market Supervisory Authority, and/or the United States Securities and Exchange Commission.
- #10(d): Documents related to Respondents' determination of whether Credit Suisse might utilize any of Signac's products.
- #10(e): Documents related to the valuation of Signac.

Respondents objected to these requests on the grounds of relevance, burden, proportionality, and privilege. In the June 2020 Order, the undersigned overruled Respondents' objections in part, finding that the documents sought were relevant but Complainant's request was overly broad. Thus, the undersigned ordered Respondents to produce all responsive documents dating from March 1, 2017 through August 1, 2017.

In her current motion, Complainant alleges that Respondents have not complied with this order. With respect to request #10(b), Complainant implies that the deposition testimony of Jim Barkley, an employee of Credit Suisse, shows that Respondents met with the Securities and Exchange Commission in March 2017. Yet, Complainant maintains that Respondents did not produce any documents relating to this meeting. Respondents state in reply that this meeting related to Signac's development of a separate software tool that was unrelated to Complainant's claim.

Complainant also alleges that Respondents failed to produce documents responsive to request #10(d). She claims that presentations made subsequent to her termination establish that Respondents continued to use and develop THS software. Complainant also claims that Respondents must not have searched for emails sent or received by Lara Warner because the only emails including Ms. Warner are those sent or received by Mr. Barkley. In response, Respondents claim that they have produced all responsive documents.

Similarly, Complainant alleges that Respondents failed to produce documents relating to the valuation of Signac (request #10(e)). She states that it is "hard to envision a scenario" where documents relating to Signac's valuation do not exist. Respondents, meanwhile, claim that they have searched for and produced all responsive documents. Respondents further note that the

minutes from a June 23, 2017 meeting (already provided to Complainant) show that Credit Suisse employees believed that Signac did not have “any significant value.”

Regarding request for production #10(b), 10(d), and 10(e), the undersigned finds Complainant’s assertions to be speculative. Specific to these three requests for production, Complainant does nothing more than allege that the absence of additional documents and information is implausible or unbelievable. Complainant, however, has not shown that any responsive documents or information actually exist and that Respondents have refused to produce them. While the undersigned understands that Complainant is not in a position to know which documents exist and are currently available to Respondents, Complainant’s allegations only amount to mere suspicions. Without more, the undersigned is not willing to conclude that responsive documents exist and that Respondents refuse to produce them in accordance with the regulations and the undersigned’s June 2020 order. *See, e.g., Hollis v. Dep’t of Mental Health & Addiction Servs.*, Civ. No. 3:14CV00516, 2016 U.S. Dist. LEXIS 47459 (D. Conn. Apr. 8, 2016) (a judge may accept the representations of counsel regarding its diligence during discovery absent a showing to the contrary); *Health Care Serv. Corp. v. Mylan Labs, Inc.*, 219 F.R.D. 12 (D.D.C. Dec. 23, 2003).

Accordingly, the undersigned **DENIES** Complainant’s motion to compel as it pertains to requests for production #10(b), 10(d), and 10(e). The undersigned notes, however, that this conclusion is based on Respondents’ good faith representation that it has complied with the June 2020 order. If this is later shown to be inaccurate, the undersigned will reexamine the necessity of sanctions under 29 C.F.R. § 18.57.

Request for Production #10(g)

Complainant sought to compel the production of any documents related to the development and “roll out” of the THS software in her April 2020 motion. Respondents objected, but the undersigned overruled their objections in part. The undersigned then ordered Respondents to produce all documents responsive to this request, but only for the period of March 1, 2017 through August 1, 2017. Complainant now claims that Respondents have not produced all responsive documents. In response, Respondents state that it has produced all responsive, non-privileged documents.

Because these documents will likely overlap with any documents produced in response to requests for productions #2 and 7, the undersigned **GRANTS** Complainant’s motion to compel. Respondent is ordered to produce all non-privileged documents responsive to this request. If such documents exist but are non-responsive or privileged, Respondents must sufficiently explain why this is the case AND seek a protective order under 29 C.F.R. § 18.52.

Request for Production #10(h)

In her April 2020 motion, Complainant also sought to compel the production of documents relating to “approvals for and/or diligence regarding December 12 Investor Day statements in Exs[.] A and B related to THS, including but not limited to its having been “rolled out” in 2017.” Respondents objected. As with the other request included in request #10, the undersigned

overruled Respondents' objections in part and granted Complainant's Motion to Compel, limited to the period of March 1, 2017 through August 1, 2017.

Complainant now explains that Credit Suisse executives "offered a presentation to shareholders in December 2018 in which they represented in one way or another - *e.g.*, a chart or a statement - that THS was rolled out globally across all traders starting in 2017." Based on the existence of this presentation, Complainant surmises that documents relating to the subject of the presentation (which included THS software) must also exist. Respondents, however, claim that they diligently searched for and produced all responsive documents. Also, because the presentation referenced by Complainant occurred in December 2018, Respondents point out that the documents that Complainant believes exist likely fall outside of the time frame set in the June 2020 order.

Complainant's Motion to Compel with respect to request for production #10(h) is **DENIED**. This assertion is also speculative. Complainant has not shown that responsive documents exist and have been withheld by Respondents. Moreover, as Respondents state, documents developed or compiled in preparation for the executives' December 2018 presentation would likely fall outside of the March 1, 2017 through August 1, 2017 period set in the June 2020 order.

Complainant's Motion for Additional Sanctions

Because Complainant has not shown that Respondents have failed to produce any responsive, non-privileged documents, or that Respondents have failed to obey the June 2020 order, the undersigned finds that additional sanctions under 29 C.F.R. § 18.57 are not appropriate at this time. Accordingly, the undersigned **DENIES** Complainant's motion for additional sanctions. However, the undersigned notes that any future disclosures or submissions that are deemed to be incomplete or evasive will be grounds for further sanctions. *See* 29 C.F.R. 22 18.57(a)(3).

Conclusion

For the reasons stated above, the undersigned **GRANTS IN PART** and **DENIES IN PART** Complainant's Motion to Compel. The undersigned also **DENIES** Complainant's Motion for Additional Sanctions.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey