



Issue Date: 26 June 2020

Case No.: 2019-SOX-00040

In the Matter of

COLLEEN A. GRAHAM,
Complainant

v.

CREDIT SUISSE SECURITIES, et al.,
Respondent

**ORDER ADDRESSING COMPLAINANT’S MOTION TO COMPEL,
COMPLAINANT’S MOTION TO AMEND, AND RESPONDENTS’ CROSS MOTIONS**

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.

I. PROCEDURAL BACKGROUND

On April 17, 2020, Complainant filed a Motion to Compel and for Leave to Amend, along with a Good Faith Moving Declaration. In Complainant’s Motion to Compel, Complainant requested that the undersigned compel Respondents to produce responsive documents. Complainant makes three primary arguments for why the undersigned should grant her Motion to Compel: 1) Signac failed to timely serve responses and objections; 2) Credit Suisse cannot unilaterally withhold responsive documents without moving for a protective order; and 3) THS related documents¹ and Claimant’s personnel file are directly relevant to this matter. In Complainant’s Leave to Amend, Complainant requested that the undersigned grant her leave to amend her Complaint in order to “provide more information based on statements made by Credit Suisse since the date of [Complainant’s] initial filing, including sworn testimony and SEC Filings that bear directly on the claims and defenses herein.” In Complainant’s Good Faith Moving Declaration, Complainant attached Exhibits A, B, C, and D.²

¹ According to Respondent Credit Suisse, “THS” is short for “Trader Holistic Surveillance,” a proprietary trader monitoring software solution created internally at, and by, Credit Suisse.

² Complainant’s Exhibit A is a copy of Complainant’s proposed Amended Complaint. Complainant’s Exhibit B is evidence Complainant is providing to demonstrate that during the period that Signac directly employed her, Credit Suisse continued to hold her securities licenses and listed itself as her employer on her registrations. Complainant’s Exhibit C is the August 2, 2019 ten-item discovery request that Complainant served on Respondents.

On May 1, 2020, Respondent Signac submitted its Opposition to [Complainant's] Motion to Compel and for Leave to Amend, and Cross-Motion to Extend Signac's Time to Respond, along with the Declaration of Marybeth Shreiner and the Declaration of Joseph D. Lockinger. In its Opposition and Cross-Motion, Respondent Signac asserted that Signac's late responses to Complainant's Requests for Production were the result of excusable neglect and the undersigned should extend the deadline, but requested that, even if the undersigned does not grant Respondent Signac's cross-motion, the undersigned should deny the relief that Complainant seeks under 29 C.F.R. § 18.57. Respondent Signac further asserts that the undersigned should issue a protective order for the reasons articulated by Respondent Credit Suisse in its cross-motion. In Respondent Signac's Declaration of Marybeth Shreiner, Respondent Signac attached two exhibits.³ In Respondent Signac's Declaration of Joseph D. Lockinger, Respondent Signac attached two exhibits.⁴

On May 1, 2020, Respondent Credit Suisse submitted its Opposition to Complainant's Motion to Compel and for Leave to Amend, and Cross Motion for Entry of Confidentiality Order, along with a Declaration of Kuan Huang in Opposition to Complainant's Motion to Compel and for Leave to Amend. In Respondent Credit Suisse's Opposition, Respondent Credit Suisse asserted that 1) the undersigned should deny Complainant's Motion because 1) Complainant's Motion for Leave to Amend is untimely and improper; 2) Complainant's requests for "THS related documents" seek only irrelevant information; and 3) Complainant's claim that Credit Suisse withheld documents in violation of 29 C.F.R. § 18.57 is wrong as a matter of law. Respondent Credit Suisse, in its cross-motion, requests that the undersigned enter a protective order protecting any "confidential" information produced by the parties. In Respondent Credit Suisse's Declaration of Kevin Huang in Opposition to Complainant's Motion to Compel, Respondent Credit Suisse attached three exhibits.⁵

Complainant's Exhibit D is Complainant rejecting Signac's March 3, 2020 attempted service of its purported Responses and Objections "as an untimely nullity."

³ Respondent Signac's first exhibit from its Declaration of Marybeth Schreiner is an e-mail that Marybeth Schreiner sent to Complainant's counsel on January 31, 2018 regarding Signac's production of documents in the JAMS arbitration captioned *Graham, et al. vs. Palantir Technologies Inc., et al.*, JAMS No. 1425025009. Respondent Signac's second exhibit from its Declaration of Marybeth Schreiner is a second email that Marybeth Schreiner sent to Complainant's counsel producing documents on behalf of Signac "through a file transfer site which contained 7,647 documents, comprised of 52,882 pages Bates labeled SI_00000001 - SI_00052882".

⁴ Respondent Signac's first exhibit from its Declaration of Joseph D. Lockinger is a copy of e-mail correspondence from January 30, 2020 where the parties collectively discussed discovery deadlines and Respondents Signac and Credit Suisse "made clear to Complainant that no additional documents would be produced until a protective order was put into place". Respondent Signac's second exhibit from its Declaration of Joseph D. Lockinger is a copy of Respondent Signac's March 13, 2020 interposition of its own Responses and Objections to the Requests for Production.

⁵ Respondent Credit Suisse's first exhibit from its Declaration of Kevin Huang in Opposition to Complainant's Motion to Compel is a copy of the JAMS final award entered In the Matter of the Arbitration Between Complainant and Credit Suisse First Boston Next Fund, Inc., Palantir Technologies, Inc., and Signac, LLC. Respondent Credit Suisse's second exhibit from its Declaration of Kevin Huang in Opposition to Complainant's Motion to Compel is a copy of excerpts from Complainant's Notice of Petition filed with the Supreme Court of the state of New York on March 8, 2019. Respondent Credit Suisse's third exhibit is a copy of excerpts from the transcript of a hearing before the Supreme Court of the State of New York on June 6, 2019.

II. COMPLAINANT’S MOTION TO COMPEL

A. The Timeliness of Respondent Signac’s Responses and Objections

1. Positions of the Parties

Complainant asserts that, because of the stay and the issuance of the subsequent Order ending the stay, Responses and Objections were due within thirty days, on or by February 17, 2020. Complainant argues that Respondent Signac failed to deliver responses by that date, nor did it request a protective order, even though it asserts that the undersigned noticed the deadline to Respondent Signac in a teleconference. Complainant notes that Respondent Signac did not serve any Responses and Objections until March 3, 2020, more than three weeks after they were due. Complainant argues that Respondent Signac breached 29 C.F.R. 18.57(b)–(d) and has no excuse for its failure to serve its Responses or Objections or other related documents, and thus, Complainant requests that the undersigned compel Signac to serve responsive documents in its custody, possession, or control without regard to objections, preclude Signac from using the documents and information therein to oppose Complainant’s claims, and strike Signac’s defenses insofar as they relate to the requested documents.

Respondent Signac acknowledges that it served its responses on Claimant on March 13, 2020, “approximately three weeks after the February 17, 2020 deadline” and requests that the undersigned extend Respondent Signac’s time to interpose its responses under 29 C.F.R. § 18.32(b)(2) “from February 17, 2020, until March 13, 2020, based on excusable neglect resulting in Signac’s delayed filing of its Responses.” Respondent Signac asserts that if the undersigned is to apply the test for excusable neglect under 29 C.F.R. 18.32(b)(2), she would find that (i) there is no danger of prejudice to Claimant in granting Signac’s requested extension; (ii) given the stay on all procedural deadlines based on the Tolling and Suspension Order and the significant time until discovery is scheduled to close, the approximately three week delay in responding to RFPs will have no impact on discovery in this proceeding; (iii) there is a justifiable reason for the delay, as Signac is a dissolved entity that has largely followed the lead of the joint venture partners, including Credit Suisse, “to avoid unnecessary duplicative attorneys’ fees in this matter;” and⁶ (iv) Complainant did not attempt to schedule a meet-and-confer with Respondent Signac’s counsel to discuss “what, if any, additional documents she was seeking here before initiating the discovery dispute process.”⁷

⁶ Respondent Signac notes that it “interposed its own Responses to the RFPs on March 13, 2002 (sic), just weeks after the deadline and as soon as it reasonably could after learning that Credit Suisse had also served responses rather than filing a motion for a protective order.”

⁷ Respondent Signac notes that it “interposed the Responses to the RFPs as soon as it became clear that placeholder objections were appropriate while a Protective Order was still pending.”

2. Applicable Law and Regulations

29 C.F.R. § 18.32(b) governs the extension of time. Under 29 C.F.R. § 18.32(b), the judge may, for good cause, extend the time when an act may or must be done within a specified time:

- (1) With or without motion or notice if the judge acts, or if a request is made, before the original time or its extension expires; or
- (2) On motion made after the time has expired if the party failed to act because of excusable neglect.

Case law has established the test for what constitutes “excusable neglect” to be: (i) the danger of prejudice to the other party; (ii) the length of the delay and its potential impact on judicial proceedings; (iii) the reason for the delay; and (iv) whether the movant acted in good faith. *Pioneer Investment Servs. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 395 (1993); *see also Iopa v. Saltchuk-Young Bros., Ltd.*, 916 F.3d 1298, 1301 (9th Cir. 2019) (applying the excusable neglect test from *Pioneer* to 29 C.F.R. § 18.32(b)(2)).

29 C.F.R. § 18.57 governs the failure to make disclosures, failure to cooperate in discovery, and sanctions. 29 C.F.R. § 18.57(b)(1) discusses failure to obey a discovery order:

If a party or party’s officer, director, or managing agent—or a witness designated under §§ 18.64(b)(6) and 18.65(a)(4)—fails to obey an order to provide or permit discovery, including an order under § 18.50(b) or paragraph (a) of this section, the judge may issue further just orders. They may include the following: (i) Directing that the matters embraced in the order or other designated facts be taken as established for the purposes of the proceeding, as the prevailing party claims; (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) Striking claims or defenses in whole or in part; (iv) Staying further proceedings until the order is obeyed; (v) Dismissing the proceeding in whole or in part; or (vi) Rendering a default decision and order against the disobedient party.

29 C.F.R. § 18.57(c) discusses failure to disclose, failure to supplement an earlier response, or failure to admit:

If a party fails to provide information or identify a witness as required by §§ 18.50(c) and 18.53, or if a party fails to admit what is requested under § 18.63(a) and the requesting party later provides a document to be genuine or the matter true, the party is not allowed to use that information or witness to supply evidence on a motion or at a hearing, unless the failure was substantially justified or harmless. In addition to or instead of this sanction, the judge, on motion and after

giving an opportunity to be heard may impose other appropriate sanctions, including any of the orders listed in paragraph (b)(1) of this section.

29 C.F.R. § 18.57(d) discusses a party's failure to attend its own deposition, to serve answers to interrogatories, or to respond for requests for inspection. Under 29 C.F.R. § 18.57(d)(1)(i), the judge may, on motion, order sanctions if:

- (A) A party or a party's officer, director, or managing agent – or a person designated under §§ 18.64 and 18.65(a)(4) – fails, after being served with proper notice, to appear for that person's deposition; or
- (B) A party, after being properly served with interrogatories under § 18.60 or a request for inspection under § 18.60 or a request for inspection under § 18.61, fails to serve its answers, objections, or written response.

“A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without the judge's action.” 29 C.F.R. § 18.57(d)(1)(ii).

3. Discussion

It is Complainant's position that Respondent Signac, in its failure to submit its responses by the February 17, 2020 deadline, has breached 29 C.F.R. § 18.57(b)–(d). Respondent Signac, meanwhile, requests that the undersigned formally extend its deadline under 29 C.F.R. § 18.32(b) from the original February 17, 2020 deadline until March 13, 2020, the date upon which Respondent Signac served its responses on Complaint, as a finding in Respondent Signac's favor on its request for a deadline extension would render Complainant's argument of breach under 29 C.F.R. § 18.57(b)–(d) moot.

Respondent Signac asserts that its delay in submitting its responses was due to excusable neglect, and it requests that the undersigned extend the deadline because of this excusable neglect. To see if Respondent Signac has established excusable neglect, the undersigned must evaluate Respondent Signac's argument under the four elements to consider for excusable neglect:

- (i) the danger of prejudice to the other party;
- (ii) the length of the delay and its potential impact on judicial proceedings;
- (iii) the reason for the delay; and
- (iv) whether the movant acted in good faith.

Pioneer, 507 U.S. at 395; *see also Iopa*, 916 F.3d at 1301.

The undersigned finds that there is no danger of prejudice to Complainant in granting Respondent Signac's extension. Complainant has made no argument that it the delay prejudiced her, and, as Respondent Signac has submitted the discovery responses, albeit late under the February 17, 2020 deadline, so Complainant has these documents in her possession. The

undersigned also finds that the length of the delay and its impact on judicial proceedings is limited in light of the Tolling and Suspension Orders issued by the Office of Administrative Law Judges (“OALJ”)⁸ and the date on which discovery is scheduled to close in this matter.

The undersigned further finds that Respondent Signac provided a reasoned explanation for the delay. Respondent Credit Suisse served its responses and objections on February 17, 2020, explaining that it would not produce any documents without a Protective Order, but it did not submit a Motion for a Protective Order at that time.⁹ On February 27, 2020, the undersigned held a conference call with the parties to address scheduling issues, wherein Respondent Credit Suisse again explained that it would not produce documents without a Protective Order. However, Respondent Credit Suisse had not yet filed a motion before the undersigned concerning a Protective Order. Respondent Signac notes that it has been largely following the lead in litigation of Respondent Credit Suisse, as Respondent Signac is no longer operating as a company, and it wishes to avoid duplicative attorney’s fees in this matter. It asserts that it “interposed its own Responses to the RFPs on March 13, 2002 (sic), just a few weeks after the deadline and as soon as it reasonably could after learning that Credit Suisse had also served responses and objections rather than filing a motion for a protective order.” This explanation is reasonable in light of the timeline and events surrounding discovery in this matter.

Finally, the undersigned finds Respondent Signac acted in good faith. Respondent Signac’s delay related to waiting to see whether Respondent Credit Suisse would make a Motion for a Protective Order. It interposed its own responses after learning that Credit Suisse had served its responses rather than filing a motion for a protective order, and it noted that Complainant did not initiate any meet-and-confer prior to initiating the discovery dispute process. Respondent Signac delayed because they deferred to Respondent Credit Suisse.

Given the circumstances surrounding discovery in this matter, the undersigned finds that Respondent Signac has established that its delay in submitting its responses and objections was due to excusable neglect, and she thus grants an extension of Respondent Signac’s deadline under 29 C.F.R. § 18.32(b) to March 13, 2020. As Respondent Signac filed its responses and objections on March 13, 2020, the undersigned finds Complainant’s argument that Respondent Signac breached 29 C.F.R. § 18.57(b)–(d) to be moot and denies Complainant’s motion on that issue.

⁸ On March 19, 2020, OALJ issued an Order, effective March 23, 2020, suspending all procedural deadlines in cases currently pending before the OALJ until May 15, 2020. *In re: Suspension of Hearings and Procedural Deadlines Due to COVID-19 National Emergency*, 2020-MIS-00006 (Mar. 19, 2020). On April 10, 2020, OALJ extended procedural deadlines until June 1, 2020 and further modified to set forth that the new deadline would be determined by the date on which the tolling period ends. *In re: Suspension of Hearings and Procedural Deadlines Due to COVID-19 Pandemic*, 2020-MIS-00006 (April 10, 2020).

⁹ See Exhibit C to Complainant’s Motion.

B. Respondent Credit Suisse's Withholding of Documents Without a Protective Order in Place

1. Positions of the Parties¹⁰

Complainant argues that Respondent Credit Suisse timely served its Responses and Objections, but it refused to produce any documents on the grounds of confidentiality. Complainant notes that under 29 C.F.R. § 18.57(d)(2), “the failure to respond to a document request ‘is not excused on the grounds that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under 18.52(a).’” She states that Respondent Credit Suisse was also “invited, if not urged, by Judge Timlin on two separate occasions to interpose a [Motion for a Protective Order].” She asserts, “Credit Suisse’s continued wrongful withholding of responsive documents seeks to make a mockery of this tribunal and prejudices [Complainant’s] right to receive a just and speedy hearing.”

Respondent Credit Suisse asserts that Complainant’s argument that it has withheld documents because it did not affirmatively move for a “protective order” under 29 C.F.R. § 18.57(d)(2) rests on a fundamental misreading of the rule. It argues that neither of the two “failures” set forth in 29 C.F.R. § 18.57(d)(1) are applicable. It notes that Complainant conceded in her motion that it timely served responses and objections, and that, having timely served its objections, Respondent Credit Suisse has no affirmative obligation under 29 C.F.R. § 18.57(d)(2) to seek a protective order to prohibit production of objected-to material. It argues, “[s]uch a reading would mean that all discovery requests—no matter how improper—are self-executing even if timely objections are served. That would obviate the need for such objections, as well as all of 29 C.F.R. § 18.57(a), which governs motions to compel.”

2. Applicable Regulations and Discussion

29 C.F.R. § 18.57(d) discusses a party’s failure to attend its own deposition, to serve answers to interrogatories, or to respond for requests for inspection. Complainant cites to 29 C.F.R. § 18.57(d)(2) in asserting that the undersigned should not excuse Respondent Credit Suisse from failing to respond to a document request, as Respondent Credit Suisse did not have a pending motion for a protective order pending. Respondent Credit Suisse, meanwhile, takes the position that Complainant’s reading of the regulations is improper and that it has no affirmative obligation under 29 C.F.R. § 18.57(d)(2) to seek a protective order to prohibit production of materials that it objects to.

Under 29 C.F.R. § 18.57(d)(1)(i), the judge may, on motion, order sanctions if:

¹⁰ Respondent Signac provides an argument that even if the undersigned were not to grant its request for an extension of time, the undersigned should still deny Complainant’s Motion for Sanctions against it. As the undersigned has granted Signac’s request for an extension of time and has thus found its responses to be timely, the undersigned finds that it is not necessary to address Respondent Signac’s argument in the alternative on this issue, as it is moot.

- (A) A party or a party's officer, director, or managing agent – or a person designated under §§ 18.64 and 18.65(a)(4) – fails, after being served with proper notice, to appear for that person's deposition; or
- (B) A party, after being properly served with interrogatories under § 18.60 or a request for inspection under § 18.60 or a request for inspection under § 18.61, fails to serve its answers, objections, or written response.

“A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without the judge's action.” 29 C.F.R. § 18.57(d)(1)(ii).

Under 29 C.F.R. § 18.57(d)(2), “[a] failure described in paragraph (d)(1)(i) of this section is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under § 18.52(a).”

A reading of 29 C.F.R. § 18.57(d)(2) is necessarily predicated on a reading of 29 C.F.R. § 18.57(d)(1)(ii). 29 C.F.R. § 18.57(d)(1)(ii) requires that the movant for a motion for sanctions must include a certification that they have, in good faith, conferred or attempted to confer with the party that failed to act to obtain the answer or response without the judge's action. Complainant has provided a certification wherein Complainant's counsel certified as follows: “I affirm that I have made a good faith effort to resolve the discovery dispute that underlies the discovery dispute that underlies this Motion to Compel.” (RK Declaration.¹¹) The undersigned finds that this certification satisfies the requirements of 29 C.F.R. § 18.57(d)(1)(ii).

The undersigned finds that sanctions are appropriate given the circumstances present in this matter. The judge may order sanctions if a party, “after being properly served with...a request for inspection under § 18.61, fails to serve its answers, objections, or written response.” Under § 18.57, Respondent Credit Suisse's failure to produce the requested documents cannot be excused, as Respondent Credit Suisse did not have a pending motion for a protective order at the time it failed to produce the documents. *See* § 18.57(d)(2). It was not sufficient to state that Respondent would not answer without a protective order in place, when Respondent had taken no steps to obtain such a protective order at the time the discovery responses were due. The undersigned thus finds that the appropriate sanction is to exclude the THS-related requests for production and Complainant's personnel file from the protection of the protective order. Respondent Credit Suisse must answer these requests for production in full.

C. The Relevancy of THS Related Documents and Complainant's Personnel File, and Respondent Credit Suisse's Motion for a Protective Order

1. Positions of the Parties – Relevance of THS Documents and Complainant's Personnel File

¹¹ “RK Declaration,” for the purposes of this Order, stands for the Good Faith Moving Declaration of Robert D. Kraus that Complainant submitted with her Motion to Compel.

Complainant asserts that Respondent Credit Suisse has refused to provide “(i) any THS related documents and (ii) [Complainant’s] Credit Suisse personnel file on the grounds of relevance.” She notes that Respondent Credit Suisse has raised relevancy objections with regard to “all of [Complainant’s] request for documents related to THS...Request No. 2 (THS dashboard); No. 3 (Investor Day Video Presentation); No. 7 (THS Development plans) and Nos. 10(b) and (d)–(h)(collectively, the “THS Discovery”).”¹² Complainant argues that the THS discovery relates directly to “Respondents’ professed justification for taking a number of adverse employment actions at issue, such as failing to pay [Complainant] either (i) the (\$810,000) signing bonus due her on account of 2016 performance, or (ii) the value of her equity stake in Signac.” Complainant further asserts that the THS discovery bears directly upon the veracity of Respondent Credit Suisse’s “proffered justification for these disputed personnel actions...that THS was not viable and not used because the customer was dissatisfied.”

Complainant additionally notes that Respondent Credit Suisse has failed to produce Complainant’s personnel file, stating that Respondent Credit Suisse “objects to producing [Complainant’s] personnel file claiming that since she was last directly employed at Signac her Credit Suisse personnel file is irrelevant.” Complainant rejects Respondent Credit Suisse’s arguments because, although Signac was Complainant’s direct employer during the relevant period, “Credit Suisse continued to hold [Complainant’s] securities licenses through June 2017...Holding a securities license for an associated person carries with it the important legal obligation to keep certain personnel records, particularly if there was an investigation into potential criminal misconduct.” Complainant alleges that Respondent conducted a trumped-up investigation into “extremely serious allegations of misconduct, including of a criminal nature,” and that “[u]nder 17 C.F.R. 240.17a – 3(a)(12), a broker-dealer has a fundamental obligation to maintain records related to associated persons for whom it holds a license, including the person’s employment and disciplinary history.” She asserts that Respondent Credit Suisse “cannot accuse [Complainant] of terrible wrongdoing, purport to conduct an investigation, hold her securities licenses, and then withhold her personnel file when litigation ensues.”

Complainant further argues that Respondent Credit Suisse “claims to have made [Complainant] an offer of employment, which then didn’t materialize purportedly because of her inaction.” Complainant contends that if ever made, Respondent Credit Suisse withdrew any offer, “when she refused to abandon her objections to attempt to violate securities laws.” Complainant asserts that why Respondent Credit Suisse may have made the offer, or why the offer did not materialize, is relevant to her claims and defenses herein, along with Complainant’s personnel file being relevant to Complainant’s allegation in her Complaint that “Credit Suisse harassed her by threatening to take her Credit Suisse deferred compensation.”

¹² Complainant provided the following footnote to this statement: “Documents regarding: 10(b)(communications with regulators about THS); 10(d)(decision making process re use of Signac products); 10(e) (Signac’s valuation); (f)(maintenance services for THS); 10(g)(roll-out of THS as shown in Investor Day chart); and 10(h) approvals and diligence for the Investor statements about THS.”

Respondent Credit Suisse argues that Complainant offers an insufficient explanation as to why “all THS related documents” are relevant. It asserts that neither it nor Respondent Signac have ever “offered ‘THS’ as a ‘justification’ for anything they, or anyone else, did in this case.” Respondent Credit Suisse notes that its response to the complaint does not refer to “THS,” nor does “THS” appear in Complainant’s original complaint or “either of the two supplemental ‘declarations’ Claimant filed with OSHA.” It notes that “THS” is short for “Trader Holistic Surveillance,” a proprietary trader monitoring software solution created internally at, and by, Credit Suisse, and that “THS” has nothing to do with the surveillance tool that Signac was developing, “BRM.” It asserts that Complainant is conflating “BRM” with “THS,” “but the fact of the matter is that such discovery does not relate in any way to Signac, much less the early 2017 KPMG audit of Signac that is at the center of the specific whistleblower-retaliation claims Complainant has actually pled in this action.” Respondent Credit Suisse further asserts that Complainant’s request for “all THS documents” is “improper given that such documents are likely to contain highly proprietary and sensitive information belonging to Credit Suisse, including non-public information regarding the development, design, and operation of THS, and information that relates to individual Credit Suisse traders, employees, accounts and customers.” It is Respondent Credit Suisse’s position that Complainant not only knew of these sensitivities, but also “appears to be taking advantage of them here.” It acknowledges that “Complainant has made it clear that she will *not* enter into any form of protective confidentiality agreement in this case,” and that it “appears that Complainant’s true intent is to thrust Credit Suisse’s documents into the public domain – something she has attempted to do in the past.” Credit Suisse asserts that, absent the entry of some protective confidentiality order, the Court should deny Complainant’s motion to compel “THS related documents” in full.

2. Positions of the Parties – Respondent Credit Suisse’s Motion for a Protective Order

Respondent Credit Suisse asserts that its prior references to the need for a “protective order” were not “references to orders to prohibit discovery, as contemplated by 29 C.F.R. § 18.57(d)(2),” but rather were “references to the need for a routine protective order meant to protect potentially confidential information that the parties do exchange from improper disclosure or use outside of the proceedings.” It requests that, given Complainant’s refusal to enter into any joint confidentiality agreement, the undersigned enter the following:

[A] routine protective order substantially in the form of Exhibit C that (a) permits all parties, Complainant and Respondents, to mark information and documents exchanged in discovery as “confidential” and (b) provides that “confidential” documents shall be used only for purposes of the prosecution and defenses of claims asserted in this section. Any restrictions imposed or protections afforded by such an order would apply equally to all parties. And the entry of such an order would in no way prejudice any party’s ability to seek discovery or use discovery materials in this action.

Respondent Credit Suisse asserts that it does not seek a protective order merely to ensure that sensitive materials exchanged between the parties in connection with this proceeding do not “wind up on Page Six of the New York Post or some other public medium.” It further states that other administrative law judges have repeatedly recognized that the use of protective orders are reasonable measures to balance the need of discovery with the need to protect confidential and sensitive information from damaging public disclosure.¹³

Respondent Signac asserts that the undersigned should issue a protective order for the reasons asserted by Respondent Credit Suisse.

Complainant did not submit a response to Respondent Credit Suisse’s Motion for a Protective Order.

3. Applicable Law

The scope of discovery and its limitations is governed under 29 C.F.R. § 18.51. 29 C.F.R. § 18.51(a) discusses discovery in general:

Unless otherwise limited by a judge’s order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense – including the existence, description, nature, custody, condition, and location of any documents or any other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the judge may order discovery of any matter relevant to the subject matter involved in the proceeding. Relevant information need not be admissible at the hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by paragraph (b)(4) of this section.

On motion or on his or her own, the judge must limit the frequency or extent of discovery otherwise allowed by these rules when:

- (i) The discovery sought is unreasonably cumulative or duplicative, or can be obtained;
- (ii) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’

¹³ Respondent cited the following cases: *Katzel v. Am. Int’l Grp., Inc.*, 2019-SOX-00014 (Oct. 16, 2019); *Meek v. BNSF Railway Co.*, 2019-FRS-00070 (Jan 29, 2020); *Esparaza et. al. v. Am. Airlines, Inc.*, OALJ No. 2019-AIR-00015– 17 (Jun. 25, 2019); *Bassett v. Boeing Co.*, 2018-AIR-00027 (Nov. 9, 2018); *Aiken v. CSX Transp., Inc.*, OALJ 2018-FRS-00031.

resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

29 C.F.R. § 18.51(b)(4).

29 C.F.R. § 18.52 governs protective orders. In general:

A party or any person from whom discovery is sought may file a written motion for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to solve the dispute without the judge's action. The judge may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) Forbidding the disclosure or discovery;
- (2) Specifying terms, including time and place, for the disclosure or discovery;
- (3) Prescribing a discovery method other than the one selected by the party seeking discovery;
- (4) Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (5) Designating the persons who may be present while the discovery is conducted;
- (6) Requiring that a deposition be sealed and opened only on the judge's order;
- (7) Requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- (8) Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the judge directs.

29 C.F.R. § 18.52(a).

29 C.F.R. § 18.61 governs requests for the production of documents. A party may serve on any other party a request within the scope of § 18.51 to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

- (i) Any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either

directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(ii) Any designated tangible things.

29 C.F.R. 18.61(a)(1).

A request (i) must describe with reasonable particularity each item or category of items to be inspected; (ii) must specify a reasonable time and place and manner for the inspection and for performing the related acts; and (iii) may specify the form or forms in which electronically stored information is to be produced. 29 C.F.R. 18.61(b)(1). For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons. 29 C.F.R. 18.61(b)(2)(ii). An objection to part of a request must specify the part and permit inspection of the rest. 29 C.F.R. 18.61(b)(2)(iii).

4. Discussion

Complainant, in her Motion to Compel, requests the production of the following documents: Request No. 2 (THS Dashboard), Request No. 3 (Investor Day Video Presentation), Request No. 7 (THS Development Plans), Request Nos. 10(b) and (d)–(h).

Request for Production No. 2

Request for Production No. 2 reads as follows: “The ‘dashboard’ for the Trader Holistic Surveillance Software referred to on Ex. A (‘THS’) on the day it was ‘rolled out’ and on the first day of every three month period thereafter.”

(RK Declaration, Exhibit C.)

Respondent Credit Suisse objected to this Request for Production as follows:

Credit Suisse objects to this Request on the grounds of Relevance. This Request does not pertain in any way to the claims pled in this Action. Credit Suisse further objects to this Request on the grounds of Burden and Proportionality. Credit Suisse further objects to the phrases “dashboard,” “Trader Holistic Surveillance,” and “rolled out” on the ground of Ambiguity. Credit Suisse will not produce any documents responsive to this Request.

(*Id.*)

OBJECTION OVERRULED IN PART.

Complainant argues that “THS” is relevant to her claim because “the THS Discovery relates directly to Respondents’ professed justification for taking a number of adverse employment actions at issue, such as failing to pay [Complainant] either (i) the (\$810,000) bonus due her on account of 2016 performance, or (ii) the value of her equity stake in Signac.” The

standard for relevancy in discovery is broad. “Relevant information need not be admissible at the hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” 29 C.F.R. § 18.51(a); *see also* § 18.401 (employing the traditional definition of the term “relevant evidence”). Complainant has established that these documents are relevant to her claim and Respondent Credit Suisse must produce them. However, the undersigned finds the phrase “and on the first day of every three month period thereafter” unreasonably broad in time and limits the request to the day of the THS software rollout, only.

Request for Production No. 3

Request for Production No. 3 reads as follows: “The video presentation of THS showcased at the December 12, 2018 CS AG Investor Day (see Ex. B).” (RK Declaration, Exhibit C.)

Respondent Credit Suisse objected to this Request for Production as follows:

Credit Suisse objects to this Request on the grounds of Relevance. This Request does not pertain in any way to claims pled in this Action. Credit Suisse further objects to the phrase “video presentation” on the ground of Ambiguity. Credit Suisse further objects to this Request because it seeks documents that are publicly available, in Complainant’s possession, available from other sources to which the Complainant has access, or otherwise available through more convenient, more efficient, less burdensome, or less expensive means. Credit Suisse will not produce any documents responsive to this Request.

(*Id.*)

OBJECTION OVERRULED.

As discussed above, Complainant asserts that THS is relevant to her claim, and the standard for relevancy in discovery is broad.

Request for Production No. 7

Request for Production No. 7 reads as follows: “All project plans, presentations and reporting regarding the development of THS on or after July 1, 2017.”

(RK Declaration, Exhibit C.)

Respondent Credit Suisse objected to this Request for Production as follows:

Credit Suisse objects to this Request on the grounds of Relevance. This Request does not pertain in any way to the claims pled in this Action. Credit Suisse further objects to this Request on the grounds of Burden and Proportionality. Credit Suisse further objects to the phrases “project plans,” “reporting,” and “development” on the ground of Ambiguity. Credit Suisse further objects to this

request to the extent it seeks documents outside of its possession, custody, or control. Credit Suisse will not produce any documents responsive to this Request.

(*Id.*)

OBJECTION OVERRULED.

As discussed above, Complainant asserts that THS is relevant to her claim, and the standard for relevancy in discovery is broad.

Request for Production Nos. 10(b) and (d)–(h)

The relevant Requests for Production as part of Number 10 are as follows:

All documentations and communications in the period beginning March 1, 2017 and continuing through the hearing in this matter, concerning the following matters:

(b): meetings with the federal reserve bank, the Swiss Financial Market Supervisory Authority, and [/] or the United States and Exchange Commission, regarding THS;

(d): determining whether CS AG might utilize any Signac’s (sic) products;

(e): the valuation of Signac;

(f): maintenance or other services rendered by Palantir in connection with THS;

(g): the development and roll out of the THS software identified in the chart attached as Ex[.] A;

(h): 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.

(RK Declaration, Exhibit C.)¹⁴

Respondent Credit Suisse objected to this Request for Production as follows:

Credit Suisse objects to this Request on the grounds of Relevance, Burden, Proportionality, and Privilege. To the extent this Request seeks any documents regarding “THS,” such documents do not pertain in any way to the claims pled in this action. Credit Suisse further objects to this Request to the extent it seeks documents outside of its possession, custody, and control. Credit Suisse further objects to this Request because it seeks documents and information that are in

¹⁴ The undersigned omitted the parts of this Request for Production that are not in dispute from this quotation.

Complainant's possession. Credit Suisse further objects to the phrases "might utilize," "maintenance," "development and roll out," and "Performance Bonus" on the ground of Ambiguity. Credit Suisse further objects to the Request to the extent it seeks documents "beginning March 1, 2017 and continuing through the hearing in this matter." Such a Request is overbroad on its face.

Subject to these Objections, Credit Suisse will produce non-privileged documents in its possession, custody, or control from March 1, 2017 until August 1, 2017, that are responsive to Requests 10(a), (c), (i), and (j) to the extent it can locate such documents after a reasonable search.

(Id.)

OBJECTION OVERRULED IN PART.

As discussed above, Complainant asserts that THS is relevant to her claim, and the standard for relevancy in discovery is broad. The undersigned agrees with Respondent Credit Suisse that Complainant seeks documents for an overly expansive period and directs Credit Suisse to respond in full, but only for the period from March 1, 2017 until August 1, 2017.

Request for Production No. 4: Complainant's Personnel File

Complainant, in addition to the Requests for Production related to THS set forth above, also asserted that Respondent Credit Suisse refused to produce Complainant's Personnel File. Complainant's Personnel File is the subject of Request for production No. 4, which reads as follows: "[Complainant's] personnel file and all performance evaluations while at Signac and Credit Suisse." (RK Declaration, Exhibit C.)

Respondent Credit Suisse objected to this Request for Production as follows:

Credit Suisse objects to this Request on the grounds of Relevance, Burden, Proportionality, and Privilege. Credit Suisse further objects to the phrase "personnel file" and "performance evaluations" on the ground of Ambiguity. Credit Suisse further object[s] to this request to the extent it seeks any "personnel file" or "performance evaluation" from Signac, as such documents and information are outside of Credit Suisse's possession, custody, and control. To the extent that this Request seeks any "personnel file" or "performance evaluation" for [Complainant] from her previous employment at Credit Suisse, such documents have no bearing on this Action. Credit Suisse will not produce any documents responsive to this request.

(Id.)

OBJECTION OVERRULED IN PART.

Complainant asserts that that her personnel file and performance evaluations is relevant to her claim, and as discussed above, the standard for relevancy in discovery is broad. The undersigned also disagrees that this request is over-burdensome or non-proportional, and Respondent Credit Suisse has neither provided an explanation as to why this information is privileged, nor sought a protective order for this information. To the extent that the information is within Respondent Credit Suisse's possession, custody, or control, the undersigned finds that Respondent Credit Suisse's objection is overruled. The undersigned, however, sustains Respondent Credit Suisse's objection for any personnel file or performance evaluation from Respondent Signac, as that information would not be in Respondent Credit Suisse's possession, custody, or control.

For the reasons denoted above, the undersigned sustains Respondent Credit Suisse's objections to Complainant's Requests for Production. The undersigned has also read and reviewed Respondent Credit Suisse's proposed protective order and finds it reasonable. The undersigned, however, has revised the protective order to account for the sanctions discussed above. The undersigned hereby approves the protective order that she has attached to this Order.

III. COMPLAINANT'S MOTION FOR LEAVE TO AMEND HER COMPLAINT

A. Positions of the Parties

Complainant asserts that she is entitled to provide more information in her filings "based on statements made by Credit Suisse since the date of her initial filing, including sworn testimony and SEC filings bearing directly on the claims and defenses herein." She argues that the "information tends to show that Credit Suisse's defense that THS was not viable and not used is pretextual" and "Respondents' binding admissions are plainly additive to her complaint and should be allowed."

Respondent Credit Suisse asserts that Complainant's Motion for Leave is untimely, improper, and the undersigned should deny it. Respondent Credit Suisse first argues that there has been substantial "undue delay" because Complainant did not seek leave to amend her complaint until April 17, 2020, which is more than two years and five months after she filed her original Complaint in this action. Respondent Credit Suisse notes that "[t]he only explanation Complainant offers is that certain 'information' relating to the amendments 'was not available during her initial complaint,' but 'the vast majority of 'information' referenced in her proposed amendments is hearing testimony from the JAMS arbitration between Complainant and Credit Suisse, Palantir and Signac from March 2018,' with the remaining information being 'a single 'Investor Day' slide presentation that Credit Suisse AG, a non-party to this proceeding, presented on December 12, 2018.'" Respondent Credit Suisse thus asserts that by December 2018, Complainant had all of the "information" she needed to seek the amendments in question, but notes that she still waited another 492 days before seeking leave to amend. Respondent Credit Suisse further asserts that Complainant has allowed, in the interim, significant milestones to pass, including the Secretary of Labor's dismissal of her claims in 2019, the referral of Complainant's Complaint to the OALJ in June 2019, and the undersigned's ruling on the parties' motions for summary decision in January 2020. Respondent Credit Suisse argues that there was no excuse for such delay.

Respondent Credit Suisse next argues that Complainant’s “belated request to amend the Complaint appears to be little more than an improper attempt to re-litigate claims that she has already asserted, and lost, in two separate proceedings.” Respondent Credit Suisse asserts that all of Complainant’s “new” allegations are:

[I]n actuality, old allegations relating to her claim that Credit Suisse and Palantir misappropriated a trader surveillance software tool created by Signac (known as “BRM”) and, specifically, her claim that a separate surveillance software developed independently by Credit Suisse, “Trader Holistic Surveillance” (known as “THS”), was based on “BRM.” Complainant already raised, litigated, and lost these very claims in two separate legal proceedings.¹⁵

Respondent Credit Suisse argues that there can be no dispute that Complainant had all of the information she needed to try and include such allegations in this case by the time she filed the New York action in March 2019.

Finally, Respondent Credit Suisse asserts that, if the undersigned allows Complainant to add the proposed new claims and allegations, it would be highly prejudicial to Respondents. Respondent Credit Suisse asserts, “[t]his action relates solely to Complainant’s Sarbanes-Oxley whistleblower retaliation claims, which arise only from the alleged retaliation she suffered after she purportedly refused to ‘distort the facts’ in conversations with Signac’s auditor, KPMG, in early-to-mid 2017.” It argues that “[p]ermitting allegations regarding ‘THS’ and the alleged misappropriation of Signac’s technology to be added to this case would necessarily require the Court to rule on matters outside of its authority, including claims outside of the SOX whistleblower framework that OSHA did not investigate below.¹⁶

Respondent Signac joins in with Respondent Credit Suisse’s opposition to Claimant’s Motion for Leave to Amend and incorporates by reference all relevant factual and legal recitations provided.

B. Applicable Regulations

¹⁵ Respondent describes these two proceedings as follows:

The first proceeding was the JAMS arbitration, in which the Tribunal specifically addressed, and rejected, Complainant’s claims regarding the “misappropriation” of Signac’s technology in its Final Award. The second proceeding was an action she filed in New York Supreme Court in March 2019 to vacate the Final Award. In that proceeding, Complainant made the exact same allegations that she is now attempting to add to her Complaint here. This includes citing the exact same pages and lines of JAMS arbitration testimony, as well as the exact same December 2018 “Investor Day” presentation.

(Emphasis omitted) (internal citations omitted).

¹⁶ Respondent Credit Suisse cited to the following case in support of this proposition: *See Bechtel v. Admin. Review Bd., U.S. Dep’t of Labor*, 710 F.3d 443, 450 (2d Cir. 2013) (upholding underlying dismissal of claim by administrative law judge where “the ALJ dismissed this claim, determining that she had no authority to consider a claim that OSHA had not investigated”).

Under 29 C.F.R. § 18.36, “[t]he judge may allow parties to amend and supplement their filings” for amendments after referral to OALJ, but this section provides no standards for such amendment and supplementation. “If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.” 29 C.F.R. § 18.10.

Under Rule 15 of the Federal Rules of Civil Procedure, “[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” Fed. R. Civ. P. 15(a)(1). “In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Fed. R. Civ. P. (a)(2).

C. Discussion

Respondents rely on a case in which the Second Circuit has applied this rule to hold that “motions to amend should generally be denied in instances of futility, undue delay, bad faith, or dilatory motive...or undue prejudice to the non-moving party.” *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008). Complainant, meanwhile, cites to an ARB case where the Board held that “ALJ[s] should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint.” *Martens v. Berkshire Hathaway, Inc.*, ARB No. 09-025, 2011 WL 2614301 (Jun. 26, 2011).

To the extent that Complainant’s added complaints fall under statutes within the jurisdiction of OALJ, the undersigned will allow Complainant to amend her Complaint. The undersigned, however, cannot allow Complainant to add claims to her complaint that are outside of the jurisdiction of OALJ. Respondent Credit Suisse asserts that Complainant is amending her Complaint to include claims outside of OALJ’s jurisdiction: “Permitting allegations regarding ‘THS’ and the alleged misappropriation of Signac’s technology to be added to this case would necessarily require the Court to rule on matters outside of its authority, including claims outside of the SOX whistleblower framework that OSHA did not investigate below.”

Complainant’s amendments relating to THS are part of a new section that she has added to the Complaint entitled “Credit Suisse Refuses to Pay [Complainant] for her Signac Equity.”¹⁷ She asserts in her Amended Complaint that “Credit Suisse further retaliated against [Complainant] by refusing to pay her fair value for her equity stake in Signac, which it was required to do following the termination of her employment.” These amendments within this section related to Complainant’s assertion that, while representatives for Respondent Credit Suisse provided testimony that Respondent Credit Suisse did not use Signac’s BRM software because it was non-viable and instead developed a THS software of their own, “Credit Suisse

¹⁷ Complainant attached the original version of her Amended Complaint to the Good Faith Moving Declaration of Robert D. Kraus. Respondent Credit Suisse attached a redlined copy of the Amended Complaint to its Motion in Opposition to show the differences between the original Complaint and the Amended Complaint.

subsequently admitted that the sworn defense testimony that Signac's THS product was no longer viable and was no longer being used is 100% false." Complainant provides statements and testimony relating to Respondent Credit Suisse's Investor Day, before concluding this new section in her Amended Complaint as follows:

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

To the extent that Complainant's amendments relate back to her SOX claim and Respondent's defenses to her SOX complaint, the undersigned finds it reasonable for Complainant to amend her complaint and grants her Motion on these grounds.

IV. CONCLUSION

The undersigned GRANTS Complainant's Motion to Compel on the grounds of sanctions related to Complainant's assertion of untimeliness of Respondent Signac's responses. She DENIES Complainant's Motion to Compel on the grounds of sanctions related to Respondent Credit Suisse's withholding of documents. She also DENIES in part and GRANTS IN PART Complainant's Motion to Compel related to the Requests for Production in question, as discussed above. The undersigned GRANTS Respondent Credit Suisse's Motion for a Protective Order, Respondent Signac's Motion for an Extension of Time and the undersigned also GRANTS Complainant's Motion for Leave to Amend.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Chery Hill, New Jersey