UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHERYL WULTZ, et al., Plaintiffs, v. BANK OF CHINA LIMITED, Defendant.	)	No. 11 Civ. 1266 (SAS)

NON-PARTY OFFICE OF THE COMPTROLLER OF THE CURRENCY'S REPLY IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION

AMY S. FRIEND
Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

HORACE G. SNEED
Director of Litigation

GREGORY F. TAYLOR
Assistant Director of Litigation

GABRIEL A. HINDIN
Litigation Attorney

/s/ Peter C. Koch
PETER C. KOCH
Counsel (admitted *pro hac vice*)

Office of the Comptroller of the Currency
400 7th Street SW
Washington DC 20219
Telephone: (202) 649-6313

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In its Memorandum in Support of Motion for Reconsideration ("OCC Memorandum" or "OCC Mem. [Doc. 249]"), the Office of the Comptroller of the Currency ("OCC") explained why the Court's April 9, 2013 Opinion and Order ("April 9 Order") unnecessarily overrides the bank examination privilege with respect to a broad category of confidential supervisory information that extends well beyond what would be necessary for the specific purpose of discovering evidence that Bank of China was on notice of deficiencies. The OCC also explained how the Court's misapplication of the factors set out in *In re Subpoena (Fleet)*, 967 F.2d 630, 633 (D.C. Cir. 1992), threatened to undermine the bank examination privilege. The OCC demonstrated its entitlement to relief by explaining the factual and legal bases for concluding that this Court incorrectly ruled: (i) that the OCC had waived the bank examination privilege with respect to non-public OCC information in the possession of Bank of China; and (ii) that the privilege should be overridden under the *Fleet* factors. Plaintiffs have failed to identify any persuasive reason that the relief sought by the OCC should not be granted.

A. The Court Incorrectly Found the OCC Waived the Bank Examination Privilege

In its motion memorandum, the OCC demonstrated that it had not waived the bank examination privilege with respect to non-public OCC information in the Bank's possession. In their opposition brief, Plaintiffs assert that the Court "did not rely upon waiver" when it concluded that such documents were not privileged. Pls.' Opp. [Doc. 263], p. 3. Plaintiffs' assertion is surprising given that the Court clearly *did* find that the OCC waived its privilege with respect to documents in categories (a) and (b), *see* April 9 Order, p. 24, and given the fact that later in their brief Plaintiffs themselves argue that the OCC "failed to assert the bank examination privilege" with respect to documents in the Bank's possession. *See* Pls.' Opp., p. 4. Nevertheless, the factual record in the case is clear that the OCC did not waive its privileges with

respect to the documents at issue and was diligent in preserving those privileges. For the reasons set forth in the OCC's initial memorandum of law, *see* OCC Mem., pp. 3-6, this Court should conclude it erred in finding the OCC waived the bank examination privilege.

B. The *Touhy* Regulations Are the Appropriate Procedural Mechanism for Determining Whether the OCC Will Assert the Bank Examination Privilege as to Documents in the Bank's Possession

In support of its motion, the OCC explained why it was necessary that Plaintiffs submit a new *Touhy* request with respect to all potentially privileged documents in the Bank's possession. *See* OCC Mem., p. 2. In their opposition, Plaintiffs argue that the OCC should not be given this opportunity because the Agency's *Touhy* regulations cannot "limit a federal court's ability to order private litigants to produce documents under the Federal Rules." Pls.' Opp., p. 3 (citing April 9 Order, pp. 20–21).

This argument mischaracterizes the OCC's position. The OCC does not contend that its regulations promulgated under the Housekeeping Statute, 5 U.S.C. § 301, provide a federal agency with authority to limit the Court's discovery powers under the Federal Rules of Civil Procedure. Rather, the OCC maintains that because the bank examination privilege is not waived when OCC documents or information covered by the privilege are in a bank's possession, *see* 12 C.F.R. § 4.37(d), the OCC must be afforded, as the holder of that privilege, an opportunity to review such documents prior to their production in a civil litigation. *See, e.g.*, *Merchants Bank v. Vescio*, 205 B.R. 37, 41-42 (D. Vt. 1997) (federal banking agencies' *Touhy* regulations alone do not create privilege exempting documents in a bank's possession from production, but documents in the bank's possession subject to the bank examination privilege cannot be compelled unless banking agencies are joined in a motion to compel and provided an

opportunity to assert the privilege).[1]

The OCC's regulations provide the agency with the opportunity to assert, where appropriate, any applicable privileges. A federal banking regulator should not be precluded from determining, in the first instance, whether supervisory information in the possession of a bank is subject to the bank examination privilege prior to that information's production in civil litigation. As this Court has recognized, a federal banking regulator must be allowed the opportunity to determine whether it will assert and defend the bank examination privilege before a court can determine whether good cause exists to override it. *See* April 9 Order, pp. 12-13. The OCC's regulations also provide the Agency with an opportunity to determine for itself whether the materials withheld by a financial institution pursuant to the regulations are in fact subject to a claim of privilege belonging to the OCC. The regulations also allow the OCC the opportunity to waive the privilege in appropriate circumstances, potentially avoiding a discovery dispute altogether. These practical benefits can occur only after the OCC is afforded an opportunity to review the materials at issue. The OCC's *Touhy* regulations, which largely track the *Fleet*

[1] The Second Circuit views the *Touhy* process as the appropriate mechanism for obtaining documents from a federal agency where the Government is not a party to the litigation. *See* April 9 Order, p. 4 (citing *In re S.E.C. ex rel. Glotzer*, 374 F.3d 184, 190 (2d Cir. 2004)); *id.* at 6-7. *See also In re Countrywide Fin. Corp. Sec. Litig.*, No. 07-CV-5295, 2009 WL 5125089, *2 (C.D. Cal. Dec. 28, 2009) ("The Court holds that Plaintiffs must first exhaust all administrative procedures and submit requests to use the documents in this litigation to the FRB and OCC, pursuant to federal regulations. If the FRB and OCC do not authorize disclosure of the information that is relevant to this litigation, then the parties can seek the appropriate relief from this Court regarding document production"); *F.D.I.C. v. Flagship Auto Center, Inc.*, No. 3:04 CV 7233, 2005 WL 1140678, *5-6 (N.D. Ohio May 13, 2005); *Union Planters Bank, N.A. v. Continental Casualty Co.*, No. 02 CV 2321, 2003 WL 23142200, *7-8 (W.D. Tenn. Nov. 26, 2003); *Raffa v. Wachovia Corp.*, 242 F. Supp. 2d 1223, 1225 (M.D. Fla. 2002); *Am. Sav. Bank v. Painewebber Inc.*, 210 F.R.D. 721, 723 (D. Haw. 2001).

factors, *see* OCC Opp. to Mot. to Compel [Doc. 224], p. 17, provide the orderly and appropriate "mechanism," *see* OCC Mem., p. 6, by which the OCC conducts such a review.

Ultimately, the crux of Plaintiffs' argument is that the Court should validate their decision to ignore[2] the OCC's *Touhy* procedures because these Executive Branch regulations purportedly conflict with the rules of the Judicial Branch. But, as the Supreme Court recognized long ago, these agency regulations do not conflict with the Federal Rules of Civil Procedure, but are a necessary component of the operations of federal agencies. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) ("When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether *subpoenas duces tecum* will be willingly obeyed or challenged is obvious"). This Court should give effect to these rules by granting the relief requested in the OCC's motion for reconsideration.

C. The Court Failed to Properly Weigh the *Fleet* Factors in Reaching Its Decision to Override the Bank Examination Privilege

In support of its motion, the OCC demonstrated that the Court misapplied the factors articulated in *In re Subpoena (Fleet)*, 967 F.2d at 634, when it ordered the production of non-public OCC information that is subject to the bank examination privilege. *See* OCC Mem., p. 2. The Court failed to give appropriate consideration to the overbreadth of Plaintiffs' requests, the availability of other evidence, the seriousness of the litigation and the role of the government in the case, and the chilling effect that overriding the privilege could have on the free flow of information between bank and bank regulator. With regard to the last factor – the

[2] Plaintiffs never made an administrative request to the OCC asking it to release non-public OCC information in Bank of China's possession, even though the OCC had apprised Plaintiffs of the process by which such requests should be made as far back as April 22, 2011.

chilling effect – the Court considered matters, including the OCC's role in the so-called "London Whale" derivative trading episode, that plainly have no place in a proper analysis under *Fleet*. The OCC's Memorandum explained that, unless corrected, the Court's analysis will erode the protections provided by the bank examination privilege which, as the OCC previously noted, would undermine the bank supervisory process. *Ibid.*

Regarding the overbreadth of the Plaintiff's requests, which goes to *Fleet*'s relevancy factor, the Court's ruling authorized the production of confidential regulatory material well beyond what is likely to be substantively probative or temporally relevant even where a *recklessness* standard of *scienter* is applied. *See* OCC Mem., pp. 6-7. In their opposition brief, Plaintiffs argue that the Court had appropriately limited the production of bank examination privileged materials to "OCC reports and communications 'related to problems or deficiencies in BOC's AML/CTF compliance function.'" Pls.' Opp., p. 4. Plaintiffs add that "BOC's compliance is at the core of whether it was on notice of the offending banking activity." *Ibid.* But the request fails to discriminate between supervisory communications that could be relevant to the *scienter* question at issue in this case and those that clearly could not be. With regard to temporal relevance, even if the Court ultimately were to apply a *recklessness* standard, relevant supervisory communications sufficient to place the bank on notice inquiry necessarily would be limited in time to those communications occurring *prior* to the terrorist attack at issue in this lawsuit. In terms of substance, Plaintiffs' request is overbroad in that it seeks to compel Bank of China to produce *all* privileged documents "related to problems or deficiencies in BOC's AML/CTF compliance function" regardless of whether the material has any remote connection to the type of financial transactions that are alleged to have occurred at Bank of China which give rise to this litigation. Plaintiffs simply have provided no justification for the Court to order

the production of *all* privileged materials concerning the Bank's AML/CTF compliance function, particularly in light of the non-privileged information available to Plaintiffs on how the Bank actually conducted this function, as discussed immediately below.

With regard to the second *Fleet* factor, the availability of other evidence, the OCC explained that the Bank's own internal documentation would be sufficient to show what actions the Bank took in response to any notice provided by the OCC.[3] *See* OCC Mem., p. 7. In their opposition paper, Plaintiffs respond that the Court "presumably considered and rejected this argument, given that BOC asserted it in its opposition to Plaintiffs' motion to compel." Pls.' Opp. Br., p. 5 (citing BOC Opp. to Mot. to Compel, p. 15).[4] Given that the OCC's Motion for Reconsideration challenges this aspect of the Court's analysis, it was incumbent upon Plaintiffs to explain why internal bank documentation regarding what the Bank actually did in response to any notice of compliance deficiencies could not be used instead of confidential supervisory information on this particular point. Plainly, the availability of non-privileged internal bank information from the relevant time period would provide Plaintiffs with "other evidence" as to

[3] The Court's April 9 Order finds that "the opinions, analysis, and deliberations communicated by the OCC to BOC are themselves relevant to the issue of *scienter* under the ATA." April 9 Order, p. 29. The Court has ordered Bank of China to release privileged information far broader than necessary for any legitimate discovery needs of Plaintiffs, even assuming supervisory criticism of the Bank's AML/CTF compliance practices could constitute *notice* under a *recklessness* standard of liability in an ATA private action. Once evidence of notice is established, the nature of the Bank's response to that notice is best demonstrated by the Bank's documentation of what it did subsequent to receiving that notice.

[4] The portion of the Bank's brief that Plaintiffs cite addresses a different matter; namely, that the Shurafa Report was not a contemporaneous record of the Bank's actions in response to any supervisory notice of compliance deficiency. The Court was silent on the question of whether the Bank's own non-privileged records would be available to show how the Bank conducted its AML/CTF compliance program subsequent to any such notice. *See* April 9 Order, pp. 29-30.

what the Bank did after learning from bank examiners of any AML/CTF compliance deficiencies. *See In re Subpoena*, 967 F.2d at 634. *See also* 12 C.F.R. § 4.33(a)(3)(iii)(B).

With regard to the third and fourth *Fleet* factors, the seriousness of the litigation and the role of the government in it, the OCC pointed out in its motion paper that the Court had failed to consider the primacy of the OCC's interests and role in enforcing the Nation's AML/CTF laws and mistakenly had elevated the discovery needs of Plaintiffs in this one case over the needs of the federal government in combatting terrorist financing. *See* OCC Mem., pp. 7-8. In opposition, Plaintiffs argue that the Court "rejected the primacy of the 'supervisory work of the OCC' as a 'principal weapon' in combating use of U.S. banking systems by terrorist organizations."[5] (Pls.' Opp., p. 5.) Neither the Antiterrorism Act ("ATA") nor any other statute supports this conclusion.

Congress has charged the OCC, as part of the Agency's supervisory responsibilities, with ensuring that financial institutions comply with the Bank Secrecy Act ("BSA").[6] The BSA,

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[5] In the April 9 Order, the Court speculated:

> But to the extent that *Fleet* rested in part on judge-made hypotheses regarding the likely effects of overriding the bank examination privilege, it is at least worth noting that the *Fleet* court's observations on the regulatory process were not statements of immutable law, nor the result of empirical investigation. While the risk of a chilling effect is serious, the risk of regulatory inaction is as well — as the U.S. Congress recognized through the ATA by empowering private parties to enforce the public interest using the weapons of civil litigation. Given the limited resources of bank regulators, the OCC's supervisory mission might in some cases be helped as much as hindered by the intervention of private litigants.

April 9 Order, p. 37.

[6] Codified at 12 U.S.C. § 1829b, 12 U.S.C. § 1951-1959, and 31 U.S.C. §§ 5311-5314, 5316-5332, as amended by Title III of the Providing Appropriate Tools Required to Intercept and

(footnote continues on next page)

which is a primary U.S. anti-money laundering law, is designed to prevent the U.S. financial system from being used for criminal activities, including money laundering, terrorist financing and other financial crimes. To that end, the BSA imposes certain recordkeeping and reporting requirements on U.S. financial institutions to assist law enforcement agencies in investigating and prosecuting these crimes. Under the BSA, Congress gave the Secretary of the Treasury authority to examine financial institutions to ensure their compliance with the Act (the Secretary has delegated his examination authority under the BSA for insured depository institutions to the appropriate federal banking agency). Thus, Congress explicitly established these mechanisms to help protect the United States and its citizens from criminal misconduct in various forms by reducing the possibility that the financial system would be used to support criminal activity, and the OCC has a central role in assuring that these protections are implemented.

In the ATA Congress gave private civil litigants a cause of action in federal court to recover damages for injuries suffered as a result of terrorist acts. Private civil litigation may have some positive *incidental* effect on preventing the use of the financial system to support terrorist activities. Nevertheless, it was error to elevate the importance of a civil suit to compensate private individuals over the importance of the Congressionally mandated program to protect all U.S. citizens in determining whether to override the bank examination privilege.

Finally, with respect to the fifth *Fleet* factor, the OCC's Memorandum demonstrated that the Court had failed to give adequate weight to the chilling effect that overriding the privilege would have on the free flow of information between bank and bank regulator, offering substantial case law in support. *See* OCC Mem., pp. 8-9. All Plaintiffs offer in response to this weight of authority is that the cited cases were decided prior to the Court's ruling. *See* Pls.'

Obstruct Terrorism Act of 2001, Public Law 107–56.

Opp., p. 5. In fact, Plaintiffs' tacit admission that the Court is out-of-step with how other courts have treated this issue confirms that the Court failed to give this factor proper consideration. In addition, the London Whale episode is irrelevant to the consideration of the factors to be weighed under *Fleet* or the facts of the discovery dispute before the Court, and the Court's use of this incident to support its conclusion to override the bank examination privilege is unjustified.

The OCC submits that the Court's recent May 1, 2013 Opinion and Order in this litigation [Doc. 261] properly recognizes the potential harm to the regulatory process that is posed when confidential communications between a bank and its regulator are subject to disclosure in private litigation. In denying Plaintiffs' motion to compel production of communications between Bank of China and Chinese bank regulators, the Court correctly reasoned:

> There is a risk that ordering BOC to produce internal communications or communications with the Chinese government concerning AML/CTF matters could have a chilling effect on future communications by Chinese banks, leading suspicious transactions to go unreported. This would undermine the interests of both China and the United States.

May 1, 2013 Order, pp. 30-31. The interests of the United States are served by proper application of the bank examination privilege to protect the free flow of communications between banks and bank regulators, which helps to assure the safety and soundness of the United States financial system. The chilling effect on these communications must be given appropriate weight in determining whether the bank examination privilege should be overridden and, if so, to what extent.

CONCLUSION

For the foregoing reasons, the OCC respectfully requests that the Court reconsider its April 9, 2013 discovery ruling and issue an order (1) that vacates its April 9 Order; and (2) that

directs Plaintiffs to submit a second *Touhy* request with respect to all materials that the Bank has withheld from production on grounds of the bank examination privilege, even those that were part of the prior *Touhy* request.

Respectfully submitted,

AMY S. FRIEND
Chief Counsel

DANIEL P. STIPANO
Deputy Chief Counsel

HORACE G. SNEED
Director of Litigation

GREGORY F. TAYLOR
Assistant Director of Litigation

GABRIEL A. HINDIN
Litigation Attorney

/s/ Peter C. Koch
PETER C. KOCH
Counsel (admitted *pro hac vice*)
Office of the Comptroller of the Currency
400 7th Street SW
Washington DC 20219
Telephone: (202) 649-6313
Facsimile: (202) 649-5709

May 10, 2013

CERTIFICATE OF SERVICE

I, Peter C. Koch, an attorney of record, do hereby certify that a copy of this Reply in Further Support of Motion for Reconsideration was served this 10th day of May 2013 by electronic filing pursuant to Local Civil Rule 5.2.

/s/ Peter C. Koch
PETER C. KOCH
Counsel – Litigation Division
Office of the Comptroller of the Currency
400 7th Street SW
Washington DC 20219
Telephone: (202) 649-6313
Facsimile: (202) 649-5709