

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENNSYLVANIA PUBLIC SCHOOL
EMPLOYEES' RETIREMENT SYSTEM,
Individually and on behalf of all others
similarly situated,

Plaintiff,

v.

BANK OF AMERICA CORPORATION, et al.,

Defendants.

No. 11 Civ. 733 (WHP)

**NON-PARTY OFFICE OF THE COMPTROLLER OF THE CURRENCY'S RESPONSE
IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY WITHHELD
BASED UPON THE ASSERTION OF THE BANK EXAMINATION PRIVILEGE**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
I. The Mission of the OCC as the Primary Federal Regulator of National Banks	2
II. Discovery Dispute Over Confidential and Privileged Non-Public OCC Information in this Case.....	4
A. <i>Plaintiff’s Motion to Compel</i>	6
B. <i>Defendant’s Response</i>	6
THE OCC ASSERTS THE BANK EXAMINATION PRIVILEGE OVER THE EXEMPLARS AND OTHER WITHHELD DOCUMENTS	7
ARGUMENT	9
I. The Bank Examination Privilege	9
A. <i>The OCC Properly Asserts the Bank Examination Privilege</i>	9
1. Communications from the OCC to the Bank (PE02, PE08, PE19, PE21, PE22, DE1, DE7, DE10, DE13, DE15, DE20-DE22, DE25)	11
2. Communications from the Bank to the OCC (PE01, PE16, PE17, DE3-DE5, DE8, DE11).....	12
3. Internal Communications and Deliberations of the Bank (PE03- PE07, PE09, PE11-PE14, PE20, PE23, PE24, DE9, DE14, DE16, DE17, DE19).....	13
4. Factual Information that Cannot Practically Be Segregated.....	14
5. Depositions	16
B. <i>There Are No Grounds to Support Overriding the Bank Examination Privilege in this Case</i>	16
1. Relevance	18
2. Availability of Other Evidence	19
3. Seriousness of Litigation.....	19
4. Role of the Government in the Litigation	20
5. Preserving Candid Communications Between Banks and Regulators	20
II. Defendant Properly Withheld Records and Directed Plaintiff to the OCC’s Administrative Process as the Appropriate Mechanism to Seek Disclosure of the Information Sought	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Bancorp v. F.D.I.C.</i> , No. CIV A 99-3799 (JCL), 1999 WL 1332312 (D.N.J. Nov. 10, 1999)	24
<i>Bank of China v. St. Paul Mercury Ins. Co.</i> , No. 03 Civ. 9797, 2004 WL 2624673 (S.D.N.Y. Nov. 18, 2004)	10, 17, 21
<i>Degnan v. Burwell</i> , 765 F.3d 805 (8th Cir. 2014)	23
<i>Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc.</i> , No. 11 CIV. 6189 DLC, 2014 WL 1909446 (S.D.N.Y. May 13, 2014).....	11, 12, 15, 19
<i>Fed. Hous. Fin. Agency v. JPMorgan Chase & Co.</i> , 978 F. Supp. 2d 267 (S.D.N.Y. 2013) ..	9, 13, 18, 21
<i>Feinberg v. Hibernia Corp.</i> , No. CIV. A. 90-4245, 1993 WL 8620 (E.D. La. Jan. 6, 1993).....	14
<i>Forstmann Leff Assocs., Inc. v. AM Brands, Inc.</i> , No. 88 CIV. 4485 (JMC), 1991 WL 168002 (S.D.N.Y. Aug. 16, 1991)	20
<i>In re Atlantic Fin. Fed. Sec. Litig.</i> , No. CIV. 89-645, 1992 WL 50074 (E.D. Pa. Mar. 3, 1992) ..	12, 13
<i>In re Bank One Securities Litig.</i> , No. 00-C-767, 222 F.R.D. 582 (N.D. Ill. 2004).....	17
<i>In re Citigroup Bond Litig.</i> , No. 08-civ-9522, 2011 WL 8210671 (SHS) (S.D.N.Y. Dec. 5, 2011)	9, 16, 17, 21
<i>In re Franklin Nat'l Bank Sec. Litig.</i> , 478 F. Supp. 577 (E.D.N.Y. 1979)	17
<i>In re Providian Fin. Corp. Sec. Litig.</i> , 222 F.R.D. 22 (D.D.C. 2004)	passim
<i>In re S.E.C. ex rel. Glotzer</i> , 374 F.3d 184 (2d Cir. 2004).....	23
<i>In re Subpoena Served upon the Comptroller of the Currency and Sec'y of Bd. of Governors of Fed. Reserve Sys.</i> , 967 F.2d 630 (D.C. Cir. 1992).....	passim
<i>In re Wells Fargo Residential Mortgage Lending Discrimination Litig.</i> , No. C 08-1930 MMC (JL), 2009 WL 1578920 (N.D. Cal. June 4, 2009)	13
<i>Linde v. Arab Bank, PLC</i> , No. CV-04-2799 (NG) (VVP), 2009 WL 3055282 (E.D.N.Y. Sept. 21, 2009)	10, 12, 16, 21
<i>Lundy v. Interfirst Corp.</i> , 105 F.R.D. 499 (D.D.C. 1985)	13
<i>McKinley v. Bd. of Govs. of the Fed. Res. Sys.</i> , 647 F.3d 331 (D.C. Cir. 2011).....	11
<i>Principe v. CrossLand Sav. FSB</i> , 149 F.R.D. 444 (E.D.N.Y. 1993)	20
<i>Raffa v. Wachovia Corp.</i> , No. 8:02-CV-1443-T-27-EAJ, 2003 WL 21517778 (M.D. Fla. May 15, 2003)	17, 18
<i>Schreiber v. Soc'y for Sav. Bancorp, Inc.</i> , 11 F.3d 217 (D.C. Cir. 1993).....	14, 15
<i>Sharkey v. J.P. Morgan Chase & Co.</i> , No. 10 Civ. 3824, 2013 WL 2254553 (S.D.N.Y. May 22, 2013)	12
<i>Shirk v. Fifth Third Bancorp</i> , No. 1:05-CV-049, 2008 WL 2661955 (S.D. Ohio July 2, 2008) .	19, 20
<i>United States ex rel. Touhy v. Ragen</i> , 340 U.S. 462, 71 S. Ct. 416 (1951)	4
<i>United Western Bank v. Office of Thrift Supervision</i> , 853 F. Supp. 2d 12 (D.D.C. 2012) ..	10, 17, 21
<i>Wultz v. Bank of China</i> ("Wultz I"), No. 11 Civ. 1266 (SAS), 2013 WL 1453258 (S.D.N.Y. Apr. 9, 2013)	9, 22
<i>Wultz v. Bank of China</i> ("Wultz II"), 291 F.R.D. 42 (S.D.N.Y. 2013)	9, 23

Statutes

12 U.S.C. § 1	2
12 U.S.C. § 1 <i>et seq.</i>	2
12 U.S.C. § 1818.....	2

12 U.S.C. § 1820.....	3
12 U.S.C. § 191.....	2
12 U.S.C. § 203.....	2
12 U.S.C. § 21.....	2
12 U.S.C. § 30.....	2
12 U.S.C. § 36.....	2
12 U.S.C. § 481.....	2, 3
12 U.S.C. § 5412.....	2
12 U.S.C. § 7.....	2
12 U.S.C. § 9.....	2
5 U.S.C. § 301.....	4

Other Authorities

Bank Supervision Process, Comptroller’s Handbook, Sept. 2007	3, 4, 11, 22
Large Bank Supervision, Comptroller’s Handbook, Jan. 2010	3, 4, 22

Rules

FED. R. CIV. P. 26.....	18
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Regulations

12 C.F.R. § 4.31 <i>et seq.</i>	5, 17
12 C.F.R. § 4.32.....	5
12 C.F.R. § 4.33.....	17
12 C.F.R. § 4.36.....	4, 8, 22
12 C.F.R. § 4.37.....	5, 8, 22
12 C.F.R. § 4.6.....	3

Non-party Office of the Comptroller of the Currency (“OCC”), by its undersigned counsel, respectfully submits this Response in Opposition to Plaintiff’s Motion to Compel Discovery Withheld Based Upon the Assertion of the Bank Examination Privilege.

PRELIMINARY STATEMENT

Pursuant to the Court’s Order of January 22, 2015, the OCC was granted the opportunity to review 40 exemplar documents—out of a universe of approximately 30,000—that Bank of America Corporation (“B of A” or “the Bank”) had identified as being protected by the bank examination privilege to determine whether the OCC intended to assert the bank examination privilege. Based upon the OCC’s review of this sample of documents, the OCC confirms that the documents are protected by the bank examination privilege and that the OCC claims the privilege with respect to the documents. This Court should sustain the privilege with respect to the documents that are the subject of Lead Plaintiff Pennsylvania Public Schools Employees’ Retirement System’s Motion to Compel. Contrary to the conclusion urged by Plaintiff, an inspection of the 40 exemplar documents provided to the OCC supports a finding that (1) B of A has properly withheld and redacted documents protected by the bank examination privilege and (2) no grounds exist to override the privilege and order production of documents from the “BEP-only privilege log” created by Defendant. A review of the exemplars and a fair assessment of both Plaintiff’s and Defendant’s arguments, as well as those submitted by the OCC in this memorandum, demonstrate that no disclosure should be ordered in the present case.

FACTUAL BACKGROUND

I. The Mission of the OCC as the Primary Federal Regulator of National Banks

The OCC is an independent bureau of the U. S. Department of the Treasury with primary supervisory responsibility over national banks under the National Bank Act of 1864, codified at 12 U.S.C. § 1 *et seq.*, as amended. The OCC is charged with ensuring that the banks and savings associations¹ that it regulates operate in a safe and sound manner and in compliance with the laws requiring fair treatment of their customers and fair access to credit and financial products. 12 U.S.C. § 1(a). *See generally In re Subpoena Served upon the Comptroller of the Currency and Sec’y of Bd. of Governors of Fed. Reserve Sys.*, 967 F.2d 630, 633-34 (D.C. Cir. 1992) (explaining bank safety-and-soundness supervision). In the exercise of its supervisory responsibilities, the OCC determines, among other matters, whether grounds exist to initiate administrative enforcement actions, including cease and desist orders and civil money penalties for violations of law and “unsafe or unsound” practices, and to approve various applications that may involve new branches, mergers, and relocations. *See, e.g.*, 12 U.S.C. §§ 21, 27, 30, 36, 191, 203 and 1818(b).

The OCC accomplishes its mission chiefly through its staff of bank examiners (12 U.S.C. §§ 7, 9, 481), who are distributed among four district offices and approximately 48 field offices, as well as at the agency’s headquarters in Washington, D.C. *See generally* www.occ.gov/about. In performing their role assigned by Congress, OCC bank examiners are responsible for

¹ Prior to July 21, 2011, the Office of Thrift Supervision (“OTS”) was the primary federal regulator of Federal savings associations. On July 21, 2011, pursuant to Title III, section 312 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”) (*codified* at 12 U.S.C. § 5412(b)(2)(B)(i)), all functions of OTS relating to Federal savings associations were transferred to the OCC. As a result, on July 21, 2011, the OCC assumed responsibility for the ongoing examination, supervision, and regulation of Federal savings associations.

examining banking activities and practices of national banks and their affiliates as well as Federal branches of foreign banks. 12 U.S.C. §§ 481, 1820(d). The OCC is required to conduct a full-scope, on-site examination of each national bank every twelve months, with the exception that some smaller banks may be examined every eighteen months. 12 C.F.R. § 4.6. Moreover, the OCC is authorized to conduct additional examinations of national banks whenever the OCC deems it necessary. 12 U.S.C. § 481.

The OCC assigns staff to work full-time examining the largest and most complex institutions under its supervision to enable the OCC to maintain an ongoing program of risk assessment, monitoring, and communications with bank management and directors. *See Large Bank Supervision, Comptroller's Handbook*, Jan. 2010 ("LBS Booklet"), p. 1.² Supervision involves those on-site activities at a bank that result in a report of examination ("ROE") as well as activities undertaken to "discover[] a bank's condition; ensure[] correction of supervisory concerns about bank risks, deficient risk management practices, or violations; and monitor[] the bank's activities and progress." *Id.* p. 12. In large banks, such as B of A, "examiners perform their work throughout the supervisory cycle through various ongoing supervisory activities or targeted examinations." *Id.* p. 15.³ Communication between the examiners and the bank "includes formal and informal conversations and meetings, examination reports, and other written materials." *Id.* p. 18. OCC bank examiners will address in writing areas of particular

² Available electronically at <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/lbs.PDF> (LBS Booklet last accessed 3/10/2015).

³ *See also* Bank Supervision Process, *Comptroller's Handbook*, Sept. 2007 ("BSP Booklet"), p. 13 ("A targeted examination is any examination that does not fulfill all of the requirements of the statutory full-scope, on-site examination. The OCC sometimes combines several targeted examinations to accomplish the full-scope examination requirements. Targeted examinations may focus on one particular product (e.g., credit cards), function (e.g., audit), or risk (e.g., credit risk) or may cover specialty areas (e.g., municipal securities dealers).") Available electronically at <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/bsp-2.PDF> (BSP Booklet last accessed 3/10/2015).

concern in Matters Requiring Attention (“MRAs”) contained in ROEs or in other periodic formal written communications. *Id.*⁴ These examinations are conducted almost exclusively by using the books and records of the institution. Following the conclusion of an examination, OCC bank examiners will engage in follow-up communication with the bank to determine whether MRAs previously identified by the OCC have been adequately addressed through corrective action. *See Bank Supervision Process, Comptroller’s Handbook, Sept. 2007 (“BSP Booklet”), p. 103.*⁵ Under this regime, specific issues that OCC bank examiners have identified as warranting supervisory concern will be reflected in formal supervisory correspondence.

II. Discovery Dispute Over Confidential and Privileged Non-Public OCC Information in this Case

The current dispute focuses upon the Bank’s identification of certain documents that are subject to the bank examination privilege but apparently responsive to a series of broad discovery requests posed by the Plaintiff. OCC regulations⁶ require that a party receiving a discovery request that would require the party to disclose “non-public OCC information” (as that

⁴ *See also* BPS Booklet, pp. 13-14 (“Matters Requiring Attention (MRA) describe practices that

- Deviate from sound governance, internal control, and risk management principles, and have the potential to adversely affect the bank’s condition, including its financial performance or risk profile, if not addressed; or
- Result in substantive noncompliance with laws and regulations, enforcement actions, supervisory guidance, or conditions imposed in writing in connection with the approval of any application or other request by the bank.”).

⁵ *See supra* n.3.

⁶ The OCC’s disclosure regulations are issued pursuant to 5 U.S.C. § 301, the Housekeeping Statute in which Congress granted to the head of each Executive Department authority to “prescribe regulations for the government of [its] department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.” *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) (upholding the enforceability of such “*Touhy*” regulations). Under the OCC’s *Touhy* regulations, non-public OCC information is the property of the Comptroller. *See* 12 C.F.R. § 4.32(b)(2). The possession of non-public OCC information by a national bank “does not constitute a waiver by the OCC of its right to control, or impose limitations on, the subsequent use and dissemination of the information.” 12 C.F.R. § 4.37(d). Because “[a]ll non-public OCC information remains the property of the OCC[,] [n]o supervised entity . . . or other party to whom the information is available . . . may disclose non-public OCC information without the prior written permission of the OCC.” 12 C.F.R. § 4.36(d).

term is defined at 12 C.F.R. § 4.32(b)), must (1) decline to produce the material absent receiving the OCC's permission or upon receipt of an order by a federal court, 12 C.F.R. § 4.37(b)(1)(i), (2) notify the OCC, 12 C.F.R. § 4.37(b)(3), and (3) inform the requesting party of the requesting party's obligation to seek the OCC's approval, 12 C.F.R. §§ 4.37(b)(1)(i), (b)(3). In the present case, Plaintiff has not submitted an administrative request seeking the OCC's authorization for the disclosure of non-public OCC information. Instead, Plaintiff has sought to obtain access to privileged information belonging to the OCC directly from Defendant through party discovery in disregard of the procedures specified in 12 C.F.R. § 4.31 *et seq.*

Pursuant to the OCC's regulations, the Defendant objected to production, citing the bank examination privilege as well as the requirements of 12 C.F.R. § 4.31 *et seq.* The parties participated in a pre-motion conference with the Court on January 16, 2015 concerning the motion to compel now before the Court.

Pursuant to the Court's Order of January 22, 2015 (ECF #279) the Bank produced a log of the documents it withheld based upon the bank examination privilege ("BEP-only privilege log"), dividing the log entries into (a) documents originating from a bank regulator and sent to the Bank (263 documents); (b) documents from the Bank to a bank regulator (1,052 documents); and (c) documents generated, distributed, or disseminated only among Bank employees, agents, representatives or counsel and not sent to a regulator (28,715 documents). The parties each designated 25 exemplar documents from the BEP-only privilege log for the Court's *in camera* inspection ("the Exemplars"). The OCC has received 40 of the 50 Exemplars for review and opportunity to assert the bank examination privilege with respect to particular documents before the Court.

A. *Plaintiff's Motion to Compel*

In its Motion to Compel dated February 23, 2015 (ECF ##291-93), Plaintiff argues that the Court should construe the bank examination privilege to be so limited in scope and application that it is essentially meaningless. Plaintiff argues that the privilege does not exempt from disclosure any factual statements, nor does it cover opinions, analyses, or directives from regulators, or any internal deliberations of the bank and its responses to regulators. To the extent the bank examination privilege applies to any parts of any documents withheld by the Bank, Plaintiff argues that the Court should override the privilege for cause and order disclosure of all factual portions of the 263 documents containing communications from the regulators to the bank, all 1,052 documents sent by the bank to the regulators, and all 28,715 internal bank documents withheld pursuant to the bank examination privilege.

Plaintiff asks the Court to issue “the same guidance” concerning depositions as concerning documents and override the bank examination privilege completely in the context of depositions as well. In particular, Plaintiff accuses Bank counsel of improperly instructing deponents to not answer deposition questions citing the bank examination privilege. At a minimum, Plaintiff asks the Court to compel answers to deposition questions concerning internal Bank communications about the OCC’s supervision of the Bank.

B. *Defendant's Response*

In its March 9, 2015 Response to Plaintiff’s Motion to Compel (ECF ##295-96), Defendant argues that Plaintiff improperly failed to exhaust the available administrative procedures to obtain the information it seeks. Defendant further argues that it properly withheld documents protected from disclosure by the bank examination privilege and that Plaintiff fails to meet its burden to show why the privilege should be overridden.

Defendant agrees that the same rules governing the bank examination privilege with respect to documents should apply to depositions and contends that Bank counsel's instructions to deponents regarding the bank examination privilege have been proper.

**THE OCC ASSERTS THE BANK EXAMINATION PRIVILEGE OVER THE
EXEMPLARS AND OTHER WITHHELD DOCUMENTS**

For ease of reference, the OCC adopts the numbering of the Exemplars introduced in the Exemplar Log, Exhibit B of the Declaration of Scott D. Musoff in Support of Defendant Bank of America Corporation's Response to the Plaintiff's Motion to Compel (ECF #296), Plaintiff's Exemplar ("PE") 01-25 and Defendant's Exemplar ("DE") 01-25. The OCC hereby asserts the bank examination privilege over the withheld and redacted portions of the 40 Exemplars⁷ that the OCC received for review⁸ with the exceptions set forth in Exhibit A to the Declaration of Amber N. Melton in Support of Non-Party Office of the Comptroller of the Currency's Response in Opposition to Plaintiff's Motion to Compel Discovery Withheld Based Upon the Assertion of the Bank Examination Privilege, a table entitled OCC Privilege Assertions by Exemplar ("Exhibit A").⁹ As explained below, the bank examination privilege protects from disclosure the non-factual portions of the types of records represented by the Exemplars:

⁷ The OCC has excluded PE25, the 41st Exemplar it received, from its analysis based on Defendant's statement in its Response that the document was withheld in error. *See* ECF #295 at 15 n.9.

⁸ The OCC believes it has not received for review the following exemplars: PE10, PE15, PE18, DE02, DE06, DE12, DE18, DE23, and DE24. We understand that we have not received these exemplars because they contain privileged information of other regulators. If this understanding is in error, the OCC respectfully requests the opportunity to review and assert privilege over any of these Exemplar documents and any other documents withheld by Defendant on the basis that the documents contain the privileged information of the OCC.

⁹ The OCC will communicate revised redactions to seven Exemplars to counsel for the Bank.

- (a) formal OCC supervisory communications to the Bank such as reports of examination (“ROEs”) (*e.g.*, DE13) and supervisory letters (*e.g.*, PE19, PE21, DE01, DE07), as well as other communications such as requests for information contained in letters and emails (*e.g.*, PE02, PE08, DE10, DE25);
- (b) communications from the Bank to the OCC in response to supervisory letters and examination conclusions (*e.g.*, DE03, DE04, DE05), periodic reviews of Bank progress addressing matters requiring attention (“MRAs”), and other updates contained in letters, spreadsheets, presentations, and emails (*e.g.*, PE01, PE17, DE11); and
- (c) internal Bank communications circulating and discussing (a) and/or (b) (*e.g.*, PE03-PE05, PE07, PE11, DE14, DE16), or preparing (b) (*e.g.*, PE06, PE12, PE24), including drafts of responses and reviews (*e.g.*, PE09).¹⁰

Based on its review of the Exemplars, the OCC concludes that Defendant’s withholdings and redactions correctly apply the bank examination privilege¹¹ such that the OCC anticipates that, if the sample were representative and if the OCC were to review the other documents

¹⁰ The OCC has made its best effort in the time provided to delineate facts contained in the withheld portions of a number of the Exemplars over which the OCC does not assert the bank examination privilege. *See* Exhibit A (specifying which seven Exemplars the OCC believes contain segregable, non-privileged information). To the extent the rest of the OCC’s supervisory correspondence to and from the Bank, and the Bank’s internal documents discussing the same, contain facts, those facts are so inextricably linked to the supervisory messages and responses contained and developed in the documents that their extraction is impracticable. *See infra* pp. 14-16.

¹¹ With respect to several Exemplars and their document families (*i.e.*, parents and attachments), the OCC believes additional redactions would have been appropriate to withhold information protected by the bank examination privilege. *See, e.g.*, PE07, PE13, PE14, PE20, DE19. Because the resulting disclosures are minor in nature, the OCC will not seek to have Defendant claw back these documents and reapply more suitable redactions. Nevertheless, these or any other inadvertent disclosures by the Bank do not constitute a waiver with respect to any other documents covered by the bank examination privilege. *See* 12 C.F.R. § 4.36(b) (“It is the OCC’s policy regarding non-public OCC information that such information is confidential and privileged.”); § 4.37(d) (“The possession by any of the entities or individuals described in paragraphs (a), (b), and (c) of this section [including any person or entity] of non-public OCC information does not constitute a waiver by the OCC of its right to control, or impose limitations on, the subsequent use or dissemination of the information.”).

entered on the BEP-only privilege log, the OCC would likely assert the privilege over those remaining 29,980¹² documents, and on that basis asserts the bank examination privilege as to the remaining 29,980 documents on the BEP-only privilege log.

The OCC also asserts the bank examination privilege as to answers to deposition questions that seek to solicit information about the OCC's supervisory activities at B of A, the Bank's communications with the OCC, and the Bank's response to the OCC concerning those activities, including internal Bank communications on these subjects.

ARGUMENT

I. The Bank Examination Privilege

A. *The OCC Properly Asserts the Bank Examination Privilege*

The bank examination privilege is “a qualified rather than absolute privilege which accords agency opinions and recommendations and banks’ responses thereto protection from disclosure.” *In re Citigroup Bond Litig.*, No. 08-civ-9522, 2011 WL 8210671, at *1 (SHS) (S.D.N.Y. Dec. 5, 2011) (quoting *In re Bankers Trust Co.*, 61 F.3d 465, 471 (6th Cir. 1995)). As Judge Stein highlighted in his *Citigroup Bond Litigation* ruling: “The primary purpose of the privilege is to preserve candor in communications between bankers and examiners.” *Ibid.* (quoting *In re Bankers Trust Co.*, 61 F.3d at 471); see *Fed. Hous. Fin. Agency v. JPMorgan Chase & Co.* (“*FHFA/JPMC*”), 978 F. Supp. 2d 267, 273 (S.D.N.Y. 2013) (citing, as an example, *Wultz v. Bank of China* (“*Wultz I*”), No. 11 Civ. 1266 (SAS), 2013 WL 1453258, *3 (S.D.N.Y. Apr. 9, 2013), *reconsideration denied*, 291 F.R.D. 42 (S.D.N.Y. 2013) (“*Wultz II*”)

¹² This total figure is approximate. The OCC understands that not every document on the BEP-only privilege log was withheld based on the OCC's bank examination privilege, but understands that the vast majority were.

(“[the bank examination privilege] arises out of the practical need for openness and honesty between bank examiners and the banks they regulate.” (citation omitted)); *see also United Western Bank v. Office of Thrift Supervision*, 853 F. Supp. 2d 12, 16 (D.D.C. 2012) (“The privilege exists to protect open communication between banks and regulators, which is essential to effective bank supervision”); *Linde v. Arab Bank, PLC*, No. CV-04-2799 (NG) (VVP), 2009 WL 3055282, at *1 (E.D.N.Y. Sept. 21, 2009) (the privilege “protects communications between banks and their examiners in order to preserve absolute candor essential to the effective supervision of banks”); *Bank of China v. St. Paul Mercury Ins. Co.*, No. 03 Civ. 9797, 2004 WL 2624673, at *4 (S.D.N.Y. Nov. 18, 2004) (the privilege “is intended to protect the integrity of the regulatory process by privileging such communications”); *In re Providian Fin. Corp. Sec. Litig.*, 222 F.R.D. 22, 26 n.2 (D.D.C. 2004) (“*In re Providian*”) (“[T]he purpose of the privilege is to protect the interactive process between a bank and its regulator”).

The D.C. Circuit has perhaps given the fullest explanation of the privilege in the seminal decision *In re Subpoena Served upon Comptroller of Currency and Secy. of Bd. of Govs. of Fed. Reserve Sys.* (hereinafter “*Fleet*”), 967 F.2d 630 (D.C. Cir. 1992):

However denominated, the bank examination privilege is firmly rooted in practical necessity. Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency. This relationship is both extensive and informal. It is extensive in that bank examiners concern themselves with all manner of a bank’s affairs: Not only the classification of assets and the review of financial transactions, but also the adequacy of security systems and of internal reporting requirements, and even the quality of managerial personnel are of concern to the examiners.

...

Because bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the

examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged. . . .

Fleet, 967 F.2d at 633-34. *Cf. McKinley v. Bd. of Govs. of the Fed. Res. Sys.*, 647 F.3d 331, 340 (D.C. Cir. 2011), *cert. den.*, 132 S.Ct. 1026 (2012) (affirming grant of summary judgment to bank regulator in FOIA challenge on basis of deliberative process privilege, noting that “[i]f supervised institutions no longer believe the Board could or would maintain the confidentiality of information it collects through the supervisory process, they would be less willing to provide the Board with the information it needs to ‘assure a robust supervisory environment’”). Thus, as explained more fully below, the bank examination privilege protects a broad spectrum of communications that are central to the supervisory process.

1. Communications from the OCC to the Bank (PE02, PE08, PE19, PE21, PE22, DE1, DE7, DE10, DE13, DE15, DE20-DE22, DE25)

It is unquestionable that the bank examination privilege protects communications from a regulator to a bank. *Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc.* (“*FHFA/HSBC*”), No. 11 CIV. 6189 DLC, 2014 WL 1909446, at *3 (S.D.N.Y. May 13, 2014) (“The bank examination privilege applies to communications between a bank and its regulator including ‘agency opinions and recommendations.’”). ROEs and supervisory letters generally document the OCC’s conclusions, recommendations, and decisions regarding a bank under its supervision or focus attention to a supervisory problem within a bank. *See* BSP Booklet, pp. 35, 39. These formal communications are primary examples of communications that fall within the ambit of the bank examination privilege because the privilege protects the agency’s recommendations and opinions to the Bank regarding the supervision process. *See FHFA/HSBC*, 2014 WL 1909446, at *3. The OCC also properly asserts the privilege over other types communications it has sent to

the Bank, such as letters and emails planning examinations, requesting information, and seeking updates on supervisory issues. *See, e.g., Linde*, 2009 WL 3055282 (“plaintiffs are not entitled to know . . . content of any of the requests—written or oral—made by the OCC in the course of their review of defendant’s operations”).

2. Communications from the Bank to the OCC (PE01, PE16, PE17, DE3-DE5, DE8, DE11)

Courts within the Second Circuit recognize “a qualified bank examination privilege that ‘accords agency opinions and recommendations and *banks’ responses thereto* protection from disclosure.’” *Sharkey v. J.P. Morgan Chase & Co.*, No. 10 Civ. 3824, 2013 WL 2254553, at *1 (S.D.N.Y. May 22, 2013) (emphasis added); *see In re Atlantic Fin. Fed. Sec. Litig.* (“*In re Atlantic*”), No. CIV. 89-645, 1992 WL 50074, at *4 (E.D. Pa. Mar. 3, 1992) (“Plainly, to prohibit disclosure only of those materials generated by the [federal regulator] as a result of the examination while allowing discovery of responsive documents prepared by the financial institution would circumvent the objective of the regulation - - to protect the confidentiality of the examination process.”). Thus, the OCC properly asserts the privilege with respect to communications from the Bank to the OCC in response to supervisory letters, periodic reviews of Bank progress addressing MRAs, and other updates contained in letters, spreadsheets, presentations, and emails. *See FHFA/HSBC*, 2014 WL 1909446, at *7 (documents sent to regulator reflecting items to be discussed in meeting and narrative answers sent to regulator privileged and properly withheld). The court in *FHFA/JPMC* succinctly summarized why the privilege must protect these communications, noting that because bank supervision is “an iterative process of comment by the regulators and *response by the bank*,” the candid communications required to facilitate this process could not be maintained if “communications

between the bank and the regulators were not privileged.” 978 F. Supp. 2d at 273 (emphasis added) (quoting *Fleet*, 967 F.2d at 633). Plaintiff’s citation to cases it asserts support a contrary position is unavailing.¹³

3. Internal Communications and Deliberations of the Bank (PE03-PE07, PE09, PE11-PE14, PE20, PE23, PE24, DE9, DE14, DE16, DE17, DE19)

The OCC properly asserts the bank examination privilege as to the Bank’s internal communications or deliberations relating to the examination process. *In re Atlantic*, 1992 WL 50074, at *4 (finding that the bank “may not be required to produce internally generated reports, supervisory correspondence, or other documents prepared as a direct result of or in connection with the examination process.”). These internal communications, which are prepared as part the supervisory process will often quote verbatim statements from the regulator, will include drafts of communications a bank is preparing to send the regulator, or will otherwise be directly reflective of (or indirectly disclose) confidential details of supervisory activities. For this reason, internal bank communications and deliberations are also protected by the bank examination privilege so as to not “circumvent the objective” of the privilege by disclosing communications that are necessary to maintain an effective constructive examination process. *Id.* Thus, Plaintiff’s contention that the Bank’s internal communications are only protected as to precise “recitations” of the OCC’s opinions and recommendations, *see* ECF #292 at 7 n.8, is incorrect

¹³ Both cases cited by Plaintiff are readily distinguishable. In *In re Wells Fargo Residential Mortgage Lending Discrimination Litig.*, the communications from the bank to the OCC were different from those at issue in this case in that they do not appear to have disclosed any specific MRAs or other supervisory concerns and were more fairly characterized as purely factual. No. C 08-1930 MMC (JL), 2009 WL 1578920, *1, 3 (N.D. Cal. June 4, 2009) (“Plaintiffs requested an order for production of all documents . . . that relate to the methodologies developed and used during the class period . . . [the bank] ha[d] provided statistics methodologies and the results of those methodologies to the OCC pursuant to a fair lending examination”). As for the footnote in *Lundy v. Interfirst Corp.*, cited by Plaintiff, the OCC did not even assert privilege as to the documents discussed in the footnote. 105 F.R.D. 499, 502 & n.3 (D.D.C. 1985) (stating only that the withheld documents were not “intragovernmental communications” and did not contain opinions” making the “intragovernmental opinion privilege” in applicable).

because it would impose an entirely impractical restriction on the Bank's ability to communicate effectively with the OCC in responding to supervisory concerns.

Plaintiff argues that internal Bank communications regarding MRAs cited by the OCC bank examiners are not covered by the bank examination privilege. ECF #292 at 16. Yet disclosure of internal bank discussion of the issues necessary to address MRAs would reveal bank examination details in substantially the same way as disclosure of communications between the regulator and bank.¹⁴ Nothing prevents Plaintiff from seeking discovery about the business and risk management practices at the Bank and what Bank personnel and officials knew about those practices and procedures. Plaintiff can obtain discovery on those topics without reference to internal or external communications regarding the OCC's supervisory activities.

4. Factual Information that Cannot Practically Be Segregated

Plaintiff correctly states that the privilege does not generally shield from disclosure "purely factual material." *Schreiber v. Soc'y for Sav. Bancorp, Inc.*, 11 F.3d 217, 220 (D.C. Cir. 1993); *see also In re Banker's Trust, Co.*, 61 F.3d at 471 ("Purely factual material falls outside the privilege, and if relevant, must be produced."). The bank examination privilege shields from discovery, in the most general sense, "agency opinions or recommendations," *Fleet*, 967 F.2d at

¹⁴ *Feinberg v. Hibernia Corp.*, cited by Plaintiff to support its position that internal bank communications are not protected by the bank examination privilege, was rightly decided in part. No. CIV. A. 90-4245, 1993 WL 8620, at *5 (E.D. La. Jan. 6, 1993) ("the Court now concludes that the *supervisory correspondence* between Hibernia and the OCC and the Federal Reserve Bank *that was prepared as a direct result of or in connection with the examination process* does not have to be disclosed by Hibernia. . . . Thus, this supervisory correspondence should be sought from the appropriate government agencies.") (emphasis in original). As for "documents such as the Hibernia committee minutes, audit reports, memoranda of meetings, analyses of loans or loan losses or reserves, that were not prepared, possessed, or otherwise controlled by the federal agencies," the court ordered them disclosed. *Id.* at *6. In so doing, the *Feinberg* court held that internal bank documents were not privileged unless they contained "verbatim recitation" of the contents of exam reports. *Id.* It is unsurprising that no court has cited this reasoning and holding in *Feinberg* with approval as it leads to absurd results. That a paraphrase of a supervisory letter is unprotected by the bank examination privilege, but a direct quote is protected is nonsensical. It is also illogical that a response from a bank to the OCC would be privileged, but an internal draft or discussion of a response would not be privileged.

634, and records reflective of deliberation. *Schreiber*, 11 F.3d at 220. The Exemplars demonstrate that agency opinions or recommendations and related deliberations regarding supervisory issues are the subject of the communications from the OCC to the Bank and from the Bank to the OCC, and are embedded in internal Bank communications reacting to the OCC's supervisory activities. Moreover, courts within the Second Circuit have acknowledged that when factual material “cannot practically be segregated and released” from an agency's recommendation and opinion, the factual information falls within the privilege's ambit. *See FHFA/HSBC*, 2014 WL 1909446, at *3 (citing *Schreiber*, 11 F.3d at 222); *see also In re Providian*, 222 F.R.D. at 26 (when factual and privileged material are “inextricably linked, then the court must determine whether the privilege . . . should be overridden for good cause”) (citing *Schreiber*, 11 F.3d at 220). The OCC asserts the bank examination privilege as to any factual material withheld or redacted in the Exemplars¹⁵ because it is inextricably intertwined with the agency's opinions and recommendations such that extracting it is impractical. It would be overly burdensome for the OCC, let alone the Court, to scour the many pages of the documents described in the BEP-only privilege log in search of “pure facts” embedded in supervisory materials that could be isolated and extracted.¹⁶ The wastefulness of trying to

¹⁵ As detailed in Exhibit A, the OCC has not asserted privilege over the factual information contained in seven Exemplars because it was readily identifiable and could be segregated.

¹⁶ One case that suggests that every segregable fact in an otherwise privileged document should be disclosed is readily distinguishable from the present case. In *In re Providian*, plaintiffs submitted an administrative request for non-public OCC information on a discreet and narrow topic in response to which the OCC identified three documents consisting of 29 pages. 222 F.R.D. at 24, 26. Given the limited scope of the material sought in that case, the court performed a page-by-page review of the 29 pages, segregating and ordering production of cover pages to supervisory reports, signature pages, and dates of examinations. *Id.* at 27-28. The exercise of performing redactions to extract arguably “factual” statements from documents and communications which overall are *not* “purely factual in nature” is of little utility and overly burdensome when hundreds, let alone thousands, of pages responsive to objectionably broad document requests are at issue. The court's decision in *In re Providian* to order disclosure “indicat[ing] what elements the OCC reviewed and how it chose to organize its findings and conclusions,” *id.*, may have similarly been influenced by the specific nature of the administrative request in that case. Similar disclosures

extract these isolated pieces of factual information from the privileged communications upon which the supervisory process relies is compounded by the ready availability of the same factual information in records of the Bank, the source upon which the OCC typically relies in conducting its examinations.

5. Depositions

The OCC agrees with the parties that the law governing the bank examination privilege, as it relates to documents and written communications, should also apply with equal force to deposition testimony. ECF #292 at 17; ECF #295 at 16-17. Thus, to the extent a deposition question seeks to elicit information covered by the bank examination privilege as discussed above, an instruction to a deponent to not answer such a question would be proper. *See generally Linde*, 2009 WL 3055282 (questions seeking information covered by the bank examination privilege not to be answered).

B. There Are No Grounds to Support Overriding the Bank Examination Privilege in this Case

The bank examination privilege is “a *qualified* rather than absolute privilege which accords agency opinions and recommendations and banks’ responses thereto protection from disclosure.” *In re Citigroup Bond Litig.*, 2011 WL 8210671, at *1 (emphasis added) (quoting *In re Bankers Trust Co.*, 61 F.3d at 471). A review of the Exemplars and fair assessment of both Plaintiff’s and Defendant’s arguments, as well as those submitted by the OCC, demonstrates that in the present case the privilege should be sustained.

in this case, would allow Plaintiff access to confidential (and privileged) material with no demonstrated relevance unwarranted by the broad discovery requests.

In its *Fleet* decision, the D.C. Circuit adopted the holding of *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577 (E.D.N.Y. 1979), that a court must consider at least the following factors when deciding whether the bank examination privilege should be overridden and disclosure of confidential, privileged information required:

- (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the “seriousness” of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Fleet, 967 F.2d at 634 (quoting *Franklin Nat'l Bank*, 478 F. Supp. at 583); accord *In re Citigroup Bond Litig.*, 2011 WL 8210671, at *2; *United Western Bank*, 853 F. Supp. 2d at 17; *Bank of China*, 2004 WL 2624673, at *4; *In re Providian*, 222 F.R.D. at 26; *In re Bank One Securities Litig.*, No. 00-C-767, 222 F.R.D. 582, 590 (N.D. Ill. 2004); *Raffa v. Wachovia Corp.*, No. 8:02-CV-1443-T-27-EAJ, 2003 WL 21517778, at *3 (M.D. Fla. May 15, 2003).¹⁷ The *Fleet/Franklin* factors support sustaining the bank examination privilege in this case. A review of the Exemplars shows that the supervisory issues raised by the OCC bank examiners are so indirectly and remotely related to any of Plaintiff's remaining claims that they are unlikely to play any role in the resolution of the issues in this suit. To the extent any relevance can be identified, it would be so minimal and tangential that overriding the privilege would be heavily outweighed by factors that disfavor disclosing these privileged communications. In particular, the voluminous party discovery Plaintiff has already obtained and the essential public interest in

¹⁷ Significantly, the factors that the OCC considers in evaluating a request by a private litigant for release of non-public OCC information under 12 C.F.R. § 4.31 *et seq.* largely track the *Fleet/Franklin* factors set out above. *See, e.g.*, 12 C.F.R. § 4.33(a)(3)(iii)(A)-(D) (requiring that a requester for non-public OCC information show: (1) that the requested information is relevant to the purpose for which it is sought; (2) that other evidence reasonably suited to the requester's needs is not available from any other source; (3) that the need for the information outweighs the public interest considerations in maintaining the confidentiality of the OCC information and outweighs the burden on the OCC to produce the information; and (4) how the issues in the case and the status of the case warrant that the OCC allow disclosure).

supporting candid and open communications between banks and their regulators weigh decidedly against compelling disclosure of the withheld or redacted portions of the Exemplars and other documents on the BEP-only privilege log.¹⁸

1. Relevance

While the OCC takes no position as to the claims or defenses of either party in this litigation, its review of the Exemplars supports a conclusion that neither the Exemplars, nor any other documents on the BEP-only privilege log, are sufficiently relevant to the remaining claims brought by Plaintiff to warrant overriding the bank examination privilege. Plaintiff is entitled to discovery appropriate to vigorously pursue its claims. However, the Federal Rules of Civil Procedure recognize that this entitlement is not unlimited and that a court should not order production of information sought by a litigant unless it bears an appropriate relation to the issues in the case. *See* FED. R. CIV. P. 26. Plaintiff should be required to demonstrate a much stronger connection between the claims and the information sought when that information is privileged. Plaintiff speculated that the supervisory communications identified on the BEP-only privilege log would contain highly relevant information. Speculation does not create cause to set aside the bank examination privilege. *See Raffa*, 2003 WL 21517778, at *3 (“The showing of relevancy made by Plaintiff at this point is speculative and not strong. The OCC Supervisory Report relates to a period of time post-dating the acts which allegedly injured Plaintiff.”).

¹⁸ Even if the Court determined that cause existed to override the privilege with respect to a particular Exemplar, the OCC does not believe that warrants overriding the privilege with respect to every document on the BEP-only privilege log. Individual consideration of documents must take place with analysis of the *Fleet/Franklin* factors before the Court should override the privilege. *See FHFA/JPMC*, 978 F. Supp. 2d at 279 (“It is self-evident that the fact-intensive *Franklin* test cannot be applied in generalized form in the absence of specific facts to form the substance of the balancing test.”). The OCC recognizes the unworkability of a document-by-document judicial inspection of thousands of documents, and through the administrative process contained in the OCC’s *Touhy* regulations seeks to offer a more workable resolution of these issues.

2. Availability of Other Evidence

Defendant describes the discovery Plaintiff has already received in this case as including over 8 million pages of documents, 20 depositions, and, notably, the entirety of the Bank's production to the SEC during that agency's investigation into the Bank's accounting for and disclosure of representation and warranty liability during the same time period as the class period, as well as the SEC's various comment letters to the Bank on the Bank's public SEC filings. ECF #295 at 21. Based on the scope and nature of this discovery, this factor clearly militates against compelled disclosure of bank examination privileged information. *See FHFA/HSBC*, 2014 WL 1909446, at *4 ("documents subject to the privileges have marginal relevance to the litigation and defendants have already obtained voluminous discovery"); *Shirk v. Fifth Third Bancorp*, No. 1:05-CV-049, 2008 WL 2661955, at *3 (S.D. Ohio July 2, 2008). Plaintiff has failed to satisfy its burden of demonstrating how the voluminous discovery it has received is insufficient. *See id.* ("In particular, [the bank]'s own internal business records of the facts, which are not subject to the bank examination privilege, are likely to show when [the bank] became aware of these issues and how it remediated.").

3. Seriousness of Litigation

Plaintiff has also failed to demonstrate that the seriousness of the issues presented in this case support an order to compel disclosure. While the OCC acknowledges that there is a public interest in publicly traded companies making accurate and complete public disclosures to protect the investing public from misinformation and material omissions, "the policies underlying the bank examination privilege are not necessarily eclipsed whenever the policy in favor of securities disclosures surfaces." *In re Providian*, 222 F.R.D. at 29 ("While the importance of the policies underlying the federal securities laws cannot be overstated, those policies do not

presumptively preempt the policies underlying the bank examination privilege.”). The present case is distinguishable from *Wultz*, which dealt with efforts to hold enablers of terrorist financing accountable. *See Wultz I*, 2013 WL 1453258, at *9 (“The interest of the United States in depriving international terrorist organizations of funding that could be used to kill American citizens [] is a profound and compelling interest.”). The court’s opinion in *Wultz* reflects the highly charged security issues that resulted in overriding of the bank examination privilege in that case.

4. Role of the Government in the Litigation

Plaintiff has conceded that the government has no role in this case as a party or potential intervenor. Nor does Plaintiff contend that the government has any direct interest in the outcome of this case. *Cf. Principe v. CrossLand Sav. FSB*, 149 F.R.D. 444, 449 (E.D.N.Y. 1993) (FDIC as receiver and conservator “will benefit if defendant prevails in this action”); *Forstmann Leff Assocs., Inc. v. AM Brands, Inc.*, No. 88 CIV. 4485 (JMC), 1991 WL 168002, at *4 (S.D.N.Y. Aug. 16, 1991) (disclosure favored when OTS would indirectly benefit from failed institution prevailing). As a result, this factor does not support overriding the bank examination privilege. *See Shirk*, 2008 WL 2661955, at *3; *In re Providian*, 222 F.R.D. at 29.

5. Preserving Candid Communications Between Banks and Regulators

Candid communication between banks and regulators is the core value protected by the bank examination privilege, and must be preserved to protect the iterative process that is essential to the effectiveness of the OCC’s supervision and examination process.¹⁹ Recent

¹⁹ Plaintiff contends that public statements that regulators may have issued related to events connected to this case obviate concerns to preserve candid communications. *See* ECF #292 at 11-12. The OCC has made no public statements that reduce its concern about this factor. *See FHFA/JPMC*, 978 F. Supp. 2d at 276 (noting that the release of “high level reports” from regulating officials regarding their supervision of financial institutions “simply do[es] not pose the same chilling effect on communication” between the regulator and the financial institution “as

Federal court decisions – including decisions from the Southern District of New York – acknowledge the need to protect the candor and free flow of information between regulator and bank. *See, e.g., In re Citigroup Bond Litig.*, 2011 WL 8210671, at *1 (“The primary purpose of the privilege is to preserve candor in communications between bankers and examiners”). *See also United Western Bank*, 853 F. Supp. 2d at 16; *Linde*, 2009 WL 3055282, at *1; *Bank of China*, 2004 WL 2624673, at *4; *In re Providian*, 222 F.R.D. at 26 n.2.

Overriding the bank examination privilege in this case would unduly chill communications between the OCC and its regulated institutions and undermine the OCC supervisory process. If *any* criticism or finding of deficiency (or positive comment for that matter) by OCC bank examiners, no matter how tentative or tangentially related to a litigated case, was routinely made available to private parties, perverse incentives and disincentives would be created that would undermine the OCC’s supervisory mission. The OCC may best achieve its mission when examiners and bank personnel may communicate openly without second-guessing how their observations, criticisms, and statements concerning efforts to address areas of concern identified by examiners (including voluntary corrective actions) will be construed and characterized in the future. Given that none of the *Franklin/Fleet* factor strongly supports overriding the bank examination privilege here, the Court should find that the strong public interest in preserving the candid, iterative bank examination process is paramount in this case.²⁰

would be created by disclosure of individual communications” by the regulator or by the employees of financial institutions).

²⁰ In *Wultz*, Judge Scheindlin concluded that in that case other *Franklin/Fleet* factors outweighed the risk of a chilling effect, which is a “serious concern,” “present in every case” evaluating cause for overriding the privilege. *Wultz I*, 2013 WL 1453258, at *31. Her opinion continued, in what should be understood as *dicta*, to make unfounded characterizations of the bank examination process, including the unsupported view that “[t]he description of the ‘iterative process’ of communication between banks and regulators . . . is more the prescription of an ideal than the description of an observed state of affairs.” *See id.* at *33-37 (comparing the general description of the

II. Defendant Properly Withheld Records and Directed Plaintiff to the OCC's Administrative Process as the Appropriate Mechanism to Seek Disclosure of the Information Sought

Plaintiff has requested that the Bank provide it with a wide range of documents containing non-public OCC information. *See* 12 C.F.R. § 4.32(b) (defining non-public OCC information). The Bank properly withheld this information from Plaintiff because its disclosure is prohibited pursuant to the OCC's regulations. *See* 12 C.F.R. § 4.36(d) (prohibiting disclosure of non-public OCC information "without the prior written authorization of the OCC"); 12 C.F.R. § 4.37(b)(1)(i) (requester must seek OCC permission in absence of a federal court order); 12 C.F.R. § 4.37(b)(1)(ii) (absent permission, a person disclosing non-public OCC information may be subject to criminal penalties provided in 18 U.S.C. 641).

Plaintiff relies on the holding in *Wultz* for the proposition that a party to litigation does not have to abide by the OCC's *Touhy* process when seeking non-public OCC information in the possession of a private party. There is no fundamental distinction, however, between seeking non-public OCC information *directly from the OCC* and seeking non-public information from *another party*. The non-public OCC information retains its fundamental character as privileged information shared between the OCC and its regulated entity in order for the OCC to carry out its responsibilities under Federal law. Following the OCC's motion for reconsideration of the court's ruling in *Wultz I*, the court declined to rule differently but explained that it "gives this

examination process in *Fleet* to the specific example of one bank, JP Morgan Chase, failing to provide information about risks associated with its investment activities to OCC bank examiners as related in congressional testimony). The importance of confidential and open communication between examiners and banks is best reflected in the activities of the over 2,500 OCC bank examiners who supervise over 1,600 entities day-in and day-out according to the concepts and procedures contained in the Comptroller's Handbook. *See* <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/index-comptrollers-handbook.html> (last accessed March 17, 2015); *see also supra* pp. 3-4 (discussing key aspects of the Comptroller's Handbook found in the BSP and LBS Booklets). The OCC submits that the opinion in *Wultz* is an outlier, as compared to the overwhelming majority of decisions which recognize that what Judge Scheindlin deemed to be merely an "ideal" is worthy of support. *See supra* pp. 9-11, 21.

Court pause that [the] plaintiffs have cited *no* opinions in which a court compelled a private party to produce non-public OCC materials that would have required a *Touhy* request to obtain from the OCC.” *Wultz II*, 291 F.R.D. at 47 n.31 (emphasis in original). Thus, even the *Wultz* court acknowledged the outlier status of the *Wultz* holding upon which Plaintiff relies.

The OCC believes that its administrative processes are the proper (and preferable) mechanism for a party to seek confidential and privileged non-public OCC information. Compliance with the administrative process allows, among other practical benefits, the agency to develop a factual record with respect to factors including relevance and need for privileged information sought,²¹ narrow the issues in controversy for judicial review, and ensure that a proper protective order is in place prior to release of confidential and privileged information. *See Degnan v. Burwell*, 765 F.3d 805, 808 (8th Cir. 2014) (“Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.” (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)); *In re S.E.C. ex rel. Glotzer*, 374 F.3d 184, 192 (2d Cir. 2004) (fully exhausting an agency’s *Touhy* regulations “allow[s] the agency an opportunity to apply its expertise and correct its mistakes, ... avoid[s] disrupting the agency’s processes, and ... relieve[s] the courts from having to engage in piecemeal review which is at the least inefficient and upon completion of the agency process might prove to have been unnecessary.” (internal quotation marks and citations omitted)); *Bancorp v. F.D.I.C.*, No. CIV 99-3799 (JCL), 1999 WL 1332312, at *4 (D.N.J. Nov. 10, 1999) (granting the OCC’s motion to quash for failure to exhaust stating, “following such

²¹ See *supra* n.17 detailing the similarities between the factors the OCC evaluates when considering a request made pursuant to its *Touhy* regulations and the factors courts consider in evaluating cause for overriding the privilege.

administrative procedures would have the salutary effects of allowing OCC to take a position on the White deposition and the information sought before the judicial process is invoked. It also would develop a record for judicial review in the event that OCC refuses the request.”).

CONCLUSION

For the foregoing reasons, the OCC respectfully submits to the Court that Plaintiff's motion to compel should be denied.

Respectfully submitted,

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March 23, 2015

CERTIFICATE OF SERVICE

I, Ashley W. Walker, an attorney of record, do hereby certify that a copy of this Response in Opposition to Plaintiffs' Motion to Compel was served this 23rd day of March 2015 by electronic filing pursuant to Local Civil Rule 5.2.

/s/ Ashley W. Walker
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PENNSYLVANIA PUBLIC SCHOOL	:	
EMPLOYEES' RETIREMENT SYSTEM,	:	
Individually and on behalf of all others	:	No. 11 Civ. 733 (WHP)
similarly situated,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
BANK OF AMERICA CORPORATION, et al.,	:	
	:	
Defendants.	:	

**DECLARATION OF AMBER N. MELTON IN SUPPORT OF NON-PARTY OFFICE OF
THE COMPTROLLER OF THE CURRENCY'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL DISCOVERY WITHHELD BASED UPON THE
ASSERTION OF THE BANK EXAMINATION PRIVILEGE**

I, Amber N. Melton, declare pursuant to 28 U.S.C. § 1746 as follows:

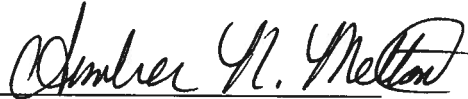
1. I am a member of the State Bar of Maryland and I have been admitted to practice Pro Hac Vice in the above captioned case in the United States District Court for the Southern District of New York. I am an attorney for non-party Office of the Comptroller of the Currency (the "OCC").

2. I respectfully submit this declaration in support of the OCC's Response in Opposition to Plaintiff's Motion to Compel Discovery Withheld based upon the Assertion of the Bank Examination Privilege.

3. Attached hereto as Exhibit A is a true copy of a chart created by the OCC asserting the bank examination privilege over the parties' exemplar submissions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 23, 2015.

A handwritten signature in black ink, appearing to read "Amber N. Melton", is written over a horizontal line.

Amber N. Melton

Attorney (admitted *pro hac vice*)

EXHIBIT A

EXHIBIT A**OCC Privilege Assertions by Exemplar**

<i>Exemplar Number</i>	<i>OCC's Position</i>	<i>Basis for Application of Bank Examination Privilege to Withheld/Redacted Text</i>
PE01	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege, EXCEPT the page bearing Bates number BAC-PPSERS-03-000462939 partially contains information which the OCC believes is not covered by the bank examination privilege with the result that the OCC does not assert privilege over the entire page but does assert the bank examination privilege over portions of the page. The OCC asserts the bank examination privilege over all of the other redacted information from the other pages of PE01.	Presentation prepared by Bank for OCC describes processes created to address MRAs and status of addressing MRAs and topics of upcoming OCC examinations.
PE02	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Email from OCC to Bank asks for information as part of ongoing supervision.
PE03	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Slide apparently circulated within Bank contains updates with details on status of ongoing examination
PE04	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank email circulating letter from OCC detailing objectives and information needed from Bank for upcoming examination. Bank email summarizes highlights of OCC letter and discusses Bank preparation for examination.
PE05	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Draft of internal Bank presentation references progress addressing MRAs and risks associated with MRAs.
PE06	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank email summarizes and reacts to supervisory statements made by OCC examiners on telephone call and discusses Bank response.

EXHIBIT A**OCC Privilege Assertions by Exemplar**

<i>Exemplar Number</i>	<i>OCC's Position</i>	<i>Basis for Application of Bank Examination Privilege to Withheld/Redacted Text</i>
PE07	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege EXCEPT some of the withheld internal Bank email contains information which the OCC believes is not covered by the bank examination privilege with the result that the OCC does not assert privilege over the entire email but does assert the bank examination privilege over portions of the email. The OCC asserts the bank examination privilege over all of the other redacted information from the other pages of PE07.	Internal Bank email and meeting minutes discuss status of and process for addressing MRAs. Presentation prepared for committee meeting discusses details of and status of addressing MRAs. Details information requested from Bank by OCC.
PE08	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Email from OCC to Bank asks for information as part of ongoing supervision.
PE09	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank email circulates draft Bank responses to an OCC supervisory letter including comments reacting to and detailing plans to address specific MRAs. Draft quotes OCC examiners.
PE10	NOT PROVIDED TO OCC FOR REVIEW	
PE11	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Slide apparently circulated within Bank contains updates with details on status of ongoing examination.
PE12	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank email circulates an OCC supervisory letter and summarizes the examiners' comments and opinions, details MRAs included in the letter, and indicates how the Bank's response will be coordinated.
PE13	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank email summarizes and reacts to supervisory statements made by OCC examiners on telephone call.

EXHIBIT A**OCC Privilege Assertions by Exemplar**

<i>Exemplar Number</i>	<i>OCC's Position</i>	<i>Basis for Application of Bank Examination Privilege to Withheld/Redacted Text</i>
PE14	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank email raises subject matter of MRA.
PE15	NOT PROVIDED TO OCC FOR REVIEW	
PE16	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege, EXCEPT the attachments to the email and letter correspondence from the OCC are documents which the OCC does not believe are covered by the bank examination privilege with the result that the OCC asserts the bank examination privilege over only portions of PE16, namely an email and a letter addressed to the OCC. It appears that the Bank may, however, have its own privileges to assert over these attachments and the OCC takes no position on the applicability of privileges not held by the OCC.	Email and letter from Bank to OCC conveys information requested by the OCC from the Bank as part of ongoing supervision.
PE17	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege, EXCEPT portions of this exemplar which the OCC believes constitute facts that are not covered by the bank examination privilege with the result that the OCC asserts privilege over only portions of PE17.	Email from Bank to OCC communicates a weekly update with information related to ongoing supervisory issues including specific MRAs and risk areas focused on by OCC examiners.
PE18	NOT PROVIDED TO OCC FOR REVIEW	
PE19	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Email from OCC to Bank discusses and attaches supervisory letter detailing examiners' conclusions and findings and MRAs.

EXHIBIT A**OCC Privilege Assertions by Exemplar**

<i>Exemplar Number</i>	<i>OCC's Position</i>	<i>Basis for Application of Bank Examination Privilege to Withheld/Redacted Text</i>
PE20	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank email attaches an outline of the scope of a planned OCC audit including description of the type of information requested by the OCC to perform the audit.
PE21	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Supervisory Letter from the OCC to the Bank containing conclusions and comments conveying examiners' opinions following a review and identifying MRAs.
PE22	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Email from OCC to Bank attaches letter informing Bank of upcoming examination, details the scope of the examination, and requests the preparation of specific information to provide to the examiners.
PE23	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank emails forwarding and discussing email from the OCC (contained in the email chain). OCC email to Bank asks for a Bank response on areas of supervisory concern identified by the OCC's examiners. In subsequent emails in chain, Bank employees summarize requests from OCC and plan response.
PE24	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank emails forwarding and discussing email from the OCC (contained in the email chain). OCC email to Bank asks for a Bank response on areas of supervisory concern identified by the OCC's examiners. In subsequent emails in chain, Bank employees summarize requests from OCC and plan response.
PE25	PRODUCED BY BANK	

EXHIBIT A**OCC Privilege Assertions by Exemplar**

<i>Exemplar Number</i>	<i>OCC's Position</i>	<i>Basis for Application of Bank Examination Privilege to Withheld/Redacted Text</i>
DE01	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Supervisory Letter from the OCC to the Bank contains conclusions and comments conveying examiners' opinions following a review and identifies MRAs.
DE02	NOT PROVIDED TO OCC FOR REVIEW	
DE03	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Letter from Bank to OCC provides response to issues raised by examiners following examination. Letter identifies areas of supervisory concern and states steps to be taken to address them.
DE04	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Letter from Bank to OCC responds to a Supervisory Letter by restating the MRAs identified by the OCC's examiners with comments and describes steps to be taken to address the MRAs.
DE05	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Letter from Bank to OCC responds to a Supervisory Letter by restating the MRAs identified by the OCC's examiners with comments and describing steps to be taken to address the MRAs.
DE06	NOT PROVIDED TO OCC FOR REVIEW	
DE07	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Supervisory Letter from the OCC to the Bank contains conclusions and comments conveying examiners' opinions following a review and identifying MRAs.
DE08	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Email from Bank to OCC comments on draft of Supervisory Letter with respect to issues of supervisory concern identified by the OCC's examiners.

EXHIBIT A**OCC Privilege Assertions by Exemplar**

<i>Exemplar Number</i>	<i>OCC's Position</i>	<i>Basis for Application of Bank Examination Privilege to Withheld/Redacted Text</i>
DE09	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege, EXCEPT for portions of the page bearing Bates number BAC-PPSERS-04-001913627 as well as the redaction on the page bearing Bates number BAC-PPSERS-04-001913628, which the OCC believes partially contain facts that are not covered by the bank examination privilege with the result that the OCC does not assert privilege over the entire withheld page and the entire redacted content. The OCC asserts the bank examination privilege over all of the other redacted information in the other pages of DE09.	An internal Bank presentation describes processes created to address MRAs, status of addressing MRAs, risks associated with MRAs, and topics of upcoming OCC examinations.
DE10	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Email from OCC to Bank discusses content of presentation to be made to OCC.
DE11	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Draft presentation circulated by Bank to OCC for review and comment discusses of actions on and status of MRAs.
DE12	NOT PROVIDED TO OCC FOR REVIEW	
DE13	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Annual ROE from OCC to the Bank summarizes conclusions resulting from supervisory activities over course of year.
DE14	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank spreadsheet details MRAs identified by the OCC, the status of efforts taken to address them, and steps taken to address them.
DE15	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Supervisory Letter from the OCC to the Bank communicates examiners' conclusions and comments following an examination and identifies MRAs.

EXHIBIT A**OCC Privilege Assertions by Exemplar**

<i>Exemplar Number</i>	<i>OCC's Position</i>	<i>Basis for Application of Bank Examination Privilege to Withheld/Redacted Text</i>
DE16	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege, EXCEPT the page bearing Bates number BAC-PPSERS-04-002722499 partially contains information which the OCC believes is not covered by the bank examination privilege with the result that the OCC does not assert privilege over the entire page but does assert the bank examination privilege over portions of the page.	Internal Bank slide provides regulatory update details status of MRAs, subject matter of recent meetings with OCC, status of OCC reviews and examinations, and issues of concern as expressed by OCC examiners.
DE17	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Internal Bank spreadsheet summarizes status of addressing MRAs as well as issues identified by the former OTS.
DE18	NOT PROVIDED TO OCC FOR REVIEW	
DE19	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege, EXCEPT the portions of the exemplar that concern the supervisory information of regulators other than the OCC or OTS, over which the OCC does not assert privilege, but other regulators may assert privilege.	Internal Bank presentation on external regulatory issues discusses the status of efforts to address MRAs and summarizes MRAs and other regulatory issues including former OTS identified issues.
DE20	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	A draft examiner memo from the former OTS to Country Wide describes the scope of a completed review and summarizes conclusions, findings, and needed corrective actions.
DE21	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Supervisory Letter from the OCC to the Bank contains conclusions and comments conveying examiners' opinions following an examination and identifies MRAs.

EXHIBIT A**OCC Privilege Assertions by Exemplar**

<i>Exemplar Number</i>	<i>OCC's Position</i>	<i>Basis for Application of Bank Examination Privilege to Withheld/Redacted Text</i>
DE22	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Supervisory Letter from the OCC to the Bank contains conclusions and comments conveying examiners' opinions following an examination and identifies MRAs.
DE23	NOT PROVIDED TO OCC FOR REVIEW	
DE24	NOT PROVIDED TO OCC FOR REVIEW	
DE25	All portions of exemplar withheld or redacted by Bank are protected by the bank examination privilege	Email from OCC to Bank requests the preparation of specific information and answers to questions to provide to the examiners.