

**FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.**

In the Matter of

BANK OF LOUISIANA
NEW ORLEANS, LOUISIANA

(INSURED STATE NONMEMBER BANK)

FDIC- 20-0086b

ALJ McNeil

**EXCLUSION ORDER AND ORDER STRIKING RESPONSE TO NOTICE OF
CHARGES**

On October 6, 2020, the Federal Deposit Insurance Corporation, acting through Serena L. Owens, Deputy Regional Director for the Dallas Regional office of the FDIC's Division of Risk Management Supervision, gave Respondent Bank of Louisiana notice that the FDIC had cause to find the Bank had engaged in unsafe or unsound banking practices and violations of law and regulation.¹ The Notice stated the FDIC had initiated the above-captioned administrative enforcement action for the purposes of determining whether an appropriate order should be issued against the Bank under the provisions of 12 U.S.C. § 1818(b)(1). A copy of a proposed Cease and Desist Order accompanied the Notice of Charges.²

After the FDIC appointed an administrative law judge from the Office of Financial Institution Adjudication (OFIA) to preside over the enforcement action, Respondent Bank filed with OFIA a "Response to Notice of Charges," signed by G. Harrison Scott, Attorney. There were no other signatories. Under the FDIC's Uniform Rules of Practice and Procedure, any individual acting as counsel on behalf of a party shall file a notice of appearance with OFIA at or before the time that individual submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of the applicable Rule section and is authorized to represent the particular party.³ To date, neither Mr. Scott nor anyone acting on his behalf has filed with OFIA the required notice establishing Mr. Scott's appearance as the Bank's attorney in this enforcement action.

A scheduling teleconference was held on November 17, 2020, with Respondent Bank appearing through Mr. Scott and with the FDIC appearing by Enforcement Counsel Bryan R. Sup, Senior Attorney, and José A. Romanach, Counsel.

Pursuant to the Appointment Notice and Initial Prehearing Orders issued by this Tribunal on October 7, 2020,⁴ the discovery period in this case began with the filing of the Respondent's

¹ Notice of Charges and of Hearing, issued October 6, 2020, at 1.

² See Exhibit A, Proposed Order to Cease and Desist, attached to the Notice of Charges.

³ See 12 C.F.R. § 308.6(a)(3).

⁴ See Appointment Notice and Initial Prehearing Orders issued October 7, 2020 at 3.

Response to Notice of Charges, which was filed on October 23, 2020. By an Order issued on October 26, 2020, the parties were directed to confer by November 3, 2020 regarding discovery planning.⁵

At a minimum, by November 3, 2020 the parties were to discuss the location of potentially relevant electronically stored information (ESI), methods to be used for identifying relevant ESI, potential issues related to software compatibility, reasonable timing to complete discovery, the identity of each party's ESI liaison, and minimization of the costs and burdens associated with discovery of ESI.⁶ The parties also were directed to file by no later than November 13, 2020 a proposed written plan for discovery, which, at minimum, addressed each of the items listed above. If unable to agree upon such a plan, the parties were to report either jointly or separately by that date regarding the areas of agreement and of dispute regarding discovery.⁷

Similarly, the October 26, 2020 Order directed the parties to confer by November 3, 2020, regarding the establishment of an agreed-upon proposed protective order.⁸ The parties were directed to file by no later than November 13, 2020 their jointly proposed Protective Order addressing issues pertaining to restrictions upon the delivery and maintenance of documents containing sensitive information (or the parties could use a proposed Protective Order that accompanied the October 26, 2020 Order). Further, if unable to agree upon such an Order, the parties were to file by that date a statement regarding the areas of agreement and of dispute regarding the issuance of such an Order.⁹

On November 13, 2020, Enforcement Counsel filed their proposed discovery plan and a proposed Protective Order. Respondent Bank did not comply with the Order of October 26, 2020, as Mr. Scott offered neither a jointly agreed-to plan and proposed order, or a statement regarding the issues to be resolved regarding the two submissions.

In their submission, Enforcement Counsel averred they contacted Respondent through Mr. Scott, with the stated purpose of discussing issues regarding both the proposed protective order and a joint discovery plan.¹⁰ They further averred that Mr. Scott "declined to materially discuss issues related to the protective order or discovery."¹¹ Enforcement Counsel averred that on November 6, 2020, they sent to Respondent a proposed protective order and discovery plan, and offered to schedule a follow-up conference to discuss both documents.¹²

Enforcement Counsel further averred that on November 12, 2020, "Respondent declined to discuss or submit any joint submissions to the Court regarding a protective order or discovery plan, referring instead to the document submitted by Respondent ('Motion for an Order to Produce Documents and Stay These Proceedings') on November 9, 2020, which by its terms was directed to the FDIC Chairman and board of directors, with a copy delivered to the Office of Financial Institution Adjudication (OFIA)."¹³ This position was similar to that taken by Mr.

⁵ Order to Attend Scheduling Conference and Supplemental Prehearing Orders, issued October 26, 2020, at 1.

⁶ *Id.* at 1-2.

⁷ *Id.* at 2.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ FDIC Submission Regarding Protective Order and Discovery Plan, dated November 13, 2020 at 1.

¹¹ *Id.* at 1.

¹² *Id.* at 2.

¹³ *Id.*

Scott during the scheduling conference, and indicated a deliberate and strategic decision by Mr. Scott not to participate in the prehearing scheduling process.

Respondent's November 9, 2020 "Motion for an Order to Produce Documents and Stay These Proceedings" was filed directly with the Chair and Members of the Board of Directors of the Federal Deposit Insurance Corporation. A related Supplement was filed, again with the Chair and Members of the Board of Directors, on November 13, 2020. Presently no stay has been issued and the issues that were raised in Respondent's Motion and Supplement are not within the scope of this Tribunal's jurisdiction.

During the scheduling conference, Mr. Scott made clear his objection to proceeding in this administrative enforcement action prior to there being an order issued by the FDIC Chair and Board responsive to his Motion for an Order to Produce Documents and to Stay These Proceedings. After the undersigned overruled that objection, Mr. Scott advised that he would not participate further in the conference, and the conference was adjourned.¹⁴

Pursuant to the FDIC's Uniform Rules, at the conclusion of the scheduling conference, two orders were issued on November 17, 2020 relating to Mr. Scott's statement that he would not participate further in the conference.¹⁵

First, Mr. Scott was given notice that cause existed to determine whether because of his noncompliance with the orders of this Tribunal he should be excluded as the Bank's attorney in this enforcement action; and second, that cause existed to determine whether Mr. Scott should be required to elect between serving as counsel to the Bank and serving as a potential witness, inasmuch as he serves as an officer of the Bank.¹⁶ Briefs addressing these two issues would be timely if filed by December 18, 2020; and responses to those briefs would be timely if filed by December 30, 2020. Enforcement Counsel filed their response on December 10, 2020.¹⁷

Respondent has not filed a brief as directed; nor has the Bank responded to Enforcement Counsel's brief. Upon this record and for the reasons set forth below, Mr. Scott is excluded as the Bank's legal representative in this administrative enforcement action. Because of this exclusion, Mr. Scott may be called as a witness in any hearing conducted in this action.¹⁸

¹⁴ During the scheduling conference, Mr. Scott offered the analogy that to proceed in discovery in this enforcement action before the FDIC Board and Chair ruled on his Motion for an Order to Produce would be akin to proceeding with the execution of a capital convict, while the debate continued over whether the convict should be presented to a firing squad, placed in the electric chair, or administered a lethal dose of chemicals. Overruling Mr. Scott's objection to proceeding with the scheduling conference, which struck me as bordering on the bizarre, I found the analogy inapt here, as the FDIC's Uniform Rules, and the Federal Deposit Insurance Act, make no provision for the filing of a Motion for an Order to Produce like that submitted by Mr. Scott to the FDIC.

¹⁵ See 12 C.F.R. § 308.31.

¹⁶ Notice of Hearing, Scheduling Order, and Supplemental Prehearing Orders at 3-4.

¹⁷ In their Response to the Court's Order of November 17, 2020, Enforcement Counsel stated: "While the FDIC remains committed to working cooperatively with the Bank's representatives in this proceeding, the FDIC does not take a position regarding the consequences which the Court may determine to be appropriate in light of its findings." They also took no position with respect to whether Mr. Scott could serve as both lawyer and witness. See FDIC's Response to Court's Order of November 17, 2020 at 1-2.

¹⁸ The Order excluding Mr. Scott is limited in its scope to the above-captioned administrative enforcement action. It does not determine Mr. Scott's status as counsel to the Bank in the proceedings Mr. Scott filed directly with the FDIC under the title "Motion for an Order to Produce Documents and Stay These Proceedings" dated November 9, 2020.

Order Regarding Non-Compliance

As noted above, the “Motion for an Order to Produce Documents and Stay These Proceedings” that Mr. Scott relied upon in support of his refusal to participate in the prehearing process is not before this Tribunal, but is instead pending before the Board of Directors and the Chair of the FDIC. There is no stay of this administrative enforcement action currently in effect, and no excuse has been presented justifying Mr. Scott’s failure to comply with the Tribunal’s Order of October 26, 2020.

The relevant Supplemental Prehearing Order, issued by this Tribunal on November 17, 2020, provided Mr. Scott with the opportunity to show cause why his refusal to comply with the Tribunal’s prehearing orders should not result in his exclusion from further representing the Bank in this administrative enforcement action.

The Order stated as follows:

Having considered the issues and claims presented by the FDIC’s Notice of Charges and Respondent’s October 23, 2020 Response to Notice of Charges, and having considered Mr. Scott’s present and ongoing failure to comply with the orders of this Tribunal regarding the discovery plan and protective order to be both dilatory and obstructionist, I find probable cause exists to exclude Mr. Scott from continued service as the Bank’s counsel in this administrative enforcement action, or to suspend his further service as counsel in this proceeding. Briefs in support of or in opposition to such action as is permitted by the FDIC’s Uniform Rules will be timely if filed by not later than December 18, 2020.¹⁹

The FDIC’s Uniform Rules provide that “[d]ilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudicatory proceeding may be grounds for exclusion or suspension of counsel from the proceeding.”²⁰

The two courses of conduct reported above give rise to two causes for concern. First, cause for concern exists that Mr. Scott’s failure to conform to the pleading requirements imposed by this Tribunal regarding the production of a proposed discovery plan and a proposed protective order was a deliberate and strategic determination on Mr. Scott’s part to attempt to delay without good cause the present enforcement action. Mr. Scott’s decision to not comply with this Tribunal’s order that the parties meet and confer prior to the scheduling conference, coupled with his oral statement that he would not participate further until the FDIC’s Board of Directors acted on his Motion for an Order, constitute sufficient and preponderant evidence that Mr. Scott has engaged in and continues to engage in dilatory and obstructionist conduct intending to improperly delay these proceedings. Upon this finding, Mr. Scott shall be excluded as the Bank’s legal representative in this enforcement action.

While orders of this administrative tribunal may be presented to the FDIC’s Board of Directors through the FDIC’s process allowing for interlocutory review,²¹ Mr. Scott’s “Motion

¹⁹ Notice of Hearing, Scheduling Order, and Supplemental Prehearing Orders at 3.

²⁰ 12 C.F.R. § 308.6(b).

²¹ See 12 C.F.R. § 308.28.

for an Order to Produce Documents and Stay These Proceedings” is not a request seeking interlocutory review of any order of this Tribunal but is instead directed exclusively to the FDIC’s Board of Directors, not to any order issued by the Administrative Law Judge presiding over this enforcement action. Even were the Motion for an Order to Produce be regarded as a motion seeking interlocutory review, however, “[n]either a request for interlocutory review nor any disposition of such a request by the Board of Directors under [12 C.F.R. § 308.28] suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Board of Directors.”²² As no order has issued staying these proceedings, no good cause has been shown for Mr. Scott’s conduct. I find his conduct was deliberately dilatory and obstructionist.

The November 17, 2020 Order also included the following:

Respondent Bank of Louisiana presently appears through attorney G. Harrison Scott, who, upon information and belief also is the Bank’s Director.²³ During proceedings conducted in 2019 under the caption of Bank of Louisiana, FDIC-12-489b, Respondent was represented by Mr. Scott. During the evidentiary hearing conducted in that matter, Mr. Scott sought to give sworn testimony in support of the Bank’s case.²⁴

Pursuant to Louisiana State Bar Rules, a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness.²⁵ Exceptions to this prohibition are when the testimony “relates to an uncontested issue,” or relates to “the nature and value of legal services rendered in the case,” or when “disqualification of the lawyer would work substantial hardship on the client.”²⁶

Upon taking administrative notice of the proceedings conducted in 2019 under Bank of Louisiana, FDIC-12-489b, cause is shown to provide the parties with the opportunity to establish whether Louisiana State Bar Rules provide guidance regarding Mr. Scott role, either as counsel or witness (or both) in this administrative enforcement action. Motions that address this issue will be timely if filed by not later than December 18, 2020. Responses to such motions will be timely if filed by not later than December 30, 2020. In the absence of cause shown to proceed otherwise, Mr. Scott will be permitted to either serve as counsel to the Respondent or provide testimony on behalf of Respondent, but shall not be permitted to perform in both capacities.²⁷

With the order excluding Mr. Scott as the Bank’s legal representative in this enforcement action, the issue regarding his service as both lawyer and witness is now moot. Mr. Scott may not

²² 12 C.F.R. § 308.28(d).

²³ See Response to Notice of Charges, dated October 23, 2020 at 2; see also FDIC Submission Regarding Protective Order and Discovery Plan at 1, ¶2, and the administrative record in re Bank of Louisiana, FDIC-12-489b.

²⁴ See in re: Bank of Louisiana, FDIC-12-489b, Transcript of September 24, 2019 at 126.

²⁵ State Bar Articles of Incorporation, Art. 16, Rules of Prof. Conduct, Rule 3.7, LSA-R.S. foll. 37:222 Rule 3.7. Lawyer as Witness.

²⁶ *Id.* at (a)(1)-(3).

²⁷ Notice of Hearing, Scheduling Order, and Supplemental Prehearing Orders at 4-5.

appear as the Bank's attorney, or as a contributing attorney, in this enforcement action. There is thus no impediment to his serving as a witness.

Also addressed in the November 17, 2020 Order was the sufficiency of the pleading Mr. Scott filed with OFIA instead of filing an Answer. The Order had this language:

Further cause includes the submission of what presents as an Answer but which fails to conform to the FDIC's Uniform Rules regarding answers. Included in those rules is the requirement that the answer "specifically respond to each paragraph or allegation of fact contained in the notice, and must "fairly meet the substance of each allegation of fact denied."²⁸

As noted above, Mr. Scott was the sole signatory presenting the Bank's Response to OFIA; and his submission was neither accompanied by nor preceded by his entry of appearance in this administrative enforcement action.

Further, the Response failed to conform to the minimum requirements of an Answer, as those requirements are set forth in the FDIC's Uniform Rules of Practice and Procedure.²⁹ In particular, Mr. Scott's Response repeatedly failed to specifically respond to each paragraph or allegation of fact contained in the Notice, and his responses failed to fairly meet the substance of each allegation of fact denied.

First, Mr. Scott's Response made no reference to any of the factual claims presented in Paragraphs 1 through 3 of the Notice.³⁰ Any Answer filed on the Bank's behalf must respond to these claims.

Next, Paragraph 4 of the Notice of Charges states as follows:

The Bank's risk management examination reflects that the Bank's financial condition is critically deficient as recorded by the FDIC and the Louisiana Office of Financial Institutions in a joint report of examination based on Bank financial information as of September 30, 2019 ("2019 ROE").

Mr. Scott submitted the following Response:

"The Bank's risk management examination reflects that the Bank's financial condition is critically deficient ..."

Deny. This is an assertion contrary to fact, with the exception of Earnings, which reflects that the vendetta to fire Scott has had a direct effect on earnings. *Ipsa Dixit*.³¹

Responding that the factual premises in this paragraph constitute "an assertion contrary to fact" does not specifically respond to the allegations, and fails to fairly meet the substance of each allegation of fact in the paragraph.

Further, Mr. Scott's response with the phrase "*Ipsa Dixit*" contributes nothing to the substance of the response and does not constitute an answer under the FDIC's Uniform Rules. *Ipsa dixit* is a Latin phrase that translates to "he said it himself." *Ipsa dixit* refers to a person's

²⁸ 12 C.F.R. § 308.19(b).

²⁹ See 12 C.F.R. § 308.19(b).

³⁰ Response to Notice of Charges at 1-2.

³¹ *Id.* at 2; ¶

own assertion without relying on any authority or proof. It usually implies that an assertion (such as those factual claims in the Notice of Charges) is true based wholly on the speaker's authority and nothing else. In a legal setting the term is archaic, and usually is used to criticize allegations that the speaker claims have been based solely upon authority and not backed by any proof. For an example of usage: "An expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his statement to link his conclusions to the facts."³² Mr. Scott's use of the phrase here does not constitute a sufficient answer.

The facts alleged in the Notice identified the source of the factual claim as the Bank's risk management examination. The Notice also identified the source of the claims: the sources were the FDIC's examiners and examiners from the Louisiana Office of Financial Institutions, who produced a joint Report of Examination based on Bank financial information as of September 30, 2019. Mr. Scott's Response neither specifically responded to each allegation of fact contained in the Paragraph, nor did it fairly meet the substance of each allegation of fact denied.

Mr. Scott's Response to the factual claims presented in Paragraph 5 of the Notice was equally deficient, for the same reasons as was the case with Paragraph 4. His Responses degenerated further, such that by the time responses were given to the factual allegations presented in Paragraph 6 the responses became almost cryptic and unintelligible. Where in the Notice of Charges the factual averment is that "The Bank's overall financial condition remains critically deficient," Mr. Scott responded "Deny. General assertion with no specifics. *Ipse Dixit*. Repetitious." Where in the same Paragraph the Notice averred that "As of the most recent examination, only 23 percent of the Bank's [Owned Real Estate] was listed for sale with a realtor, down from 45 percent as of the previous examination" and "[f]or a majority of those properties that were listed, the Bank set asking prices that were notably above the appraised values for such properties, which, in combination with the Bank's limited marketing strategy, resulted in the Bank receiving offers on only 10 of the 53 ORE properties in over a year's time," Mr. Scott responded "A general assertion, neither admit nor deny." Such a response does not constitute a proper Answer under the FDIC's Uniform Rules.

Upon finding that the Response supplied by Mr. Scott dated October 23, 2020 was not accompanied by an entry of Mr. Scott's appearance as the Bank's authorized legal counsel, and upon finding the contents of the Response failed to conform to the requirements applicable to Answers filed in response to the FDIC's Notice of Charges, the Response is stricken, and will remain in the record as a proffer only.

The Bank, through legal counsel other than Mr. Scott, may submit an Answer that conforms to the FDIC's Uniform Rules. Such Answer shall be timely if filed – with a qualified representative's signature and *without* Mr. Scott's signature – by January 21, 2021. Without such a qualified timely Answer Respondent Bank will be in default. Should Mr. Scott's signature appear as counsel in such Answer, that Answer shall be stricken and retained in the record as a proffer only. In the absence of a timely and properly filed Answer, leave is now granted to Enforcement Counsel allowing for the filing of a motion seeking an order granting judgment by default.

³² *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999).

Pursuant to the extant Scheduling Order, the deadline for requests seeking the production of documents thought to be held by custodians not a party to this administrative action was December 29, 2020.³³ That deadline now has passed and will not be extended, absent sufficient cause shown to proceed otherwise. The deadline for filing notices identifying fact, hybrid, and expert witnesses, currently set at January 8, 2021, is extended to January 26, 2021. All other deadlines established through the Scheduling Order remain in effect, as written in that Order.

It is so ordered.

Date: December 31, 2020

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Christopher B. McNeil
Administrative Law Judge
Office of Financial Institution Adjudication

CERTIFICATE OF SERVICE

On December 31, 2020, I served by electronic mail the foregoing Exclusion Order and Order Striking Response to Notice of Charges upon:

Executive Staff:

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³³ Notice of Hearing, Scheduling Order, and Supplemental Prehearing Orders at 3.

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