

PUBLIC VERSION

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

In the Matter of:

CBW BANK
Weir, Kansas

(Insured State Nonmember Bank)

Docket No.:
FDIC-22-0171k

ORDER NO. 19: DENYING MOTION FOR SANCTIONS

The Federal Deposit Insurance Corporation (“FDIC”) issued a Notice of Charges against Respondent CBW Bank (“Respondent” or “the Bank”) in the above-captioned enforcement proceeding on November 19, 2024. On April 4, 2025, Respondent moved for the imposition of sanctions (“Motion”), up to and including dismissal of this action, on the grounds that the FDIC had improperly collected large quantities of privileged material from Respondent prior to the commencement of the action that it “now seeks to use . . . to pursue its case here.” Motion at 1. On April 14, 2025, Enforcement Counsel for the FDIC (“Enforcement Counsel”) filed a response in opposition to Respondent’s Motion (“Opposition”). The undersigned then granted limited leave for Respondent and Enforcement Counsel (together “the Parties”) to file a Reply and Surreply, respectively, in support of their positions, which they did on May 12, 2025, and May 19, 2025. Having reviewed the Parties’ filings and accompanying declarations and exhibits, and for the reasons set forth below, the Motion is denied, and the Parties are directed to work together to identify documents to which Enforcement Counsel presently has access that Respondent believes to contain privileged communications so that they may be clawed back as appropriate pursuant to the terms of the April 1, 2025 Protective Order in this case.¹

¹ See Order No. 13: Protective Order ¶¶ 10(a)-(c).

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Background

Based on the declarations and exhibits submitted by each side in support of their respective positions regarding the Motion,² the relevant facts are as follows:

The [REDACTED]

In November 2022, the FDIC sent the Bank a letter informing it that the agency was considering imposing a civil money penalty (“CMP”) on the Bank for potential violations of the Bank Secrecy Act (“BSA”) and its anti-money laundering compliance (“AML/CFT”) regulations.³ The FDIC then issued a [REDACTED] directing it to preserve and protect, until further notice, all records pertaining to AML/CFT related activities in conjunction with the FDIC’s [REDACTED].⁴

The Document Productions

From June 2023 through September 2023, the FDIC sent [REDACTED] [REDACTED] to the Bank as part of the FDIC’s “review of previously discovered activities related to the Bank’s [AML/CFT] compliance program.”⁵ Among the documents sought by the FDIC were “[a]ll electronic messages originated from or received by” three of the Bank’s in-house attorneys—Jay Hall, Dustin Kirk, and James Eric Durr.⁶

² In support of its Motion, Respondent submitted the declaration of Allen H. Denson, one of the attorneys presently representing Respondent (“Denson Decl.”), as well as four exhibits (“RX”) denoted A-D. In opposition, Enforcement Counsel submitted thirty-six exhibits (“EX”) numbered 1 through 36, including declarations from John H. Pankratz, Assistant Regional Director of the FDIC’s Kansas City Regional Office (EX-3 or “Pankratz Decl.”); J. Spencer Culp, FDIC Enforcement Counsel (EX-10 or “Culp Decl.”); and Daniel Stein, FDIC Senior IT Specialist (EX-26 or “Stein Decl.”). All of Enforcement Counsel’s exhibits were filed under seal pursuant to its discretionary authority under 12 C.F.R. § 308.33(b).

³ See Pankratz Decl. ¶ 3; EX-1 (Nov. 18, 2022 letter from J. Jilovec to Bank Board of Directors) at 1. The term AML/CFT stands for “Anti-Money Laundering/Countering the Financing of Terrorism.” See <https://www.fdic.gov/banker-resource-center/anti-money-laundering-countering-financing-terrorism-amleft>.

⁴ See Pankratz Decl. ¶ 6; EX-5 (May 15, 2023 letter from J. Jilovec to Bank Board of Directors) at 1.

⁵ EX-6 (June 21, 2023 letter from J. Pankratz to Bank Board of Directors) at 1; see Pankratz Decl. ¶ 7.

⁶ EX-7 (June 30, 2023 letter from J. Pankratz to Bank Board of Directors) at 1; EX-8 (Aug. 1, 2023 letter from J. Pankratz to Bank Board of Directors) at 1.

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Through its then-counsel, Davis Polk & Wardwell LLP (“Davis Polk” or “Prior Counsel”), the Bank produced documents in response to the FDIC’s [REDACTED], including documents responsive to the requests regarding Hall, Kirk, and Durr.⁷ The productions included approximately one thousand documents either withheld or redacted on the basis of attorney-client or work product privilege, for which privilege logs or redaction overlays were also provided.⁸

During this process, the Bank’s production letters made it clear that it was not waiving any applicable privilege by producing the documents. In its October 18, 2023 letter to the FDIC on behalf of the Bank, for example, Davis Polk stated that “[t]his production contains materials that are subject to the attorney-client privilege and attorney work product protection,” adding that the Bank’s production was being made “with the understanding that production of these materials shall not affect any privilege that CBW Bank asserts to such information.”⁹ Likewise, the Bank’s October 30, 2023 production letter stated that “[t]he production of these materials is not intended to, and does not, waive any applicable privilege or other legal basis under which this information may be protected from disclosure. . . . Should any of the enclosed documents be found to contain privileged or protected information, such disclosure would be inadvertent and in no way intended to constitute a waiver.”¹⁰

⁷ See Culp Decl. ¶ 7. These productions appear to have been “limited to responsive documents based on a set of search terms relating to AML/BSA compliance.” EX-11 (June 30, 2023 email from D. Stipano to J. Culp) at 1; *see also* EX-16 (email chain including Oct. 1, 2023 response from D. Stipano to M. Drefchinski) at 1, 3-22 (search terms chart).

⁸ EX-16 (email chain including Oct. 1, 2023 response from D. Stipano to M. Drefchinski) at 1 (“The totality of the Hall, Kirk, and Durr email productions includes approximately 730 documents that were withheld based on privilege and at least several hundred . . . that were redacted. . . . In lieu of providing a privilege log, we will provide an overlay for the redacted and withheld materials.”); EX-14 (Oct. 18, 2023 email from I. Nolan to J. Culp et al.) at 1 (“Please note that a small subset of documents remain withheld or redacted for attorney work product privilege. We will provide a privilege log for those materials for prior and forthcoming productions.”); EX-15 (Oct. 30, 2023 email from I. Nolan to J. Culp et al.) at 1 (“Also attached as Appendix C is a privilege log for certain documents that remain redacted or withheld on the basis of privilege.”); EX-13 (email chain including Dec. 22, 2023 email from S. Padmanabhan to A. Pruett) at 1 (“This production contains 76 documents that were withheld or produced with redactions based on attorney work product privilege.”).

⁹ EX-14 (Oct. 18, 2023 email from I. Nolan to J. Culp et al. attaching letter from D. Stipano to J. Culp et al.) at 2.

¹⁰ EX-15 (Oct. 30, 2023 email from I. Nolan to J. Culp et al. attaching letter from D. Stipano to J. Culp et al.) at 3.

The Direct Collection

In December 2023, the Bank and the FDIC reached a tentative agreement to resolve the prospective CMP assessment against the Bank via [REDACTED].¹¹ The two sides also agreed, around this time, that going forward the FDIC would no longer send [REDACTED] to the Bank, but would instead use its third-party vendor CACI to collect responsive records directly from the Bank with the Bank's assistance ("Direct Collection").¹² Enforcement Counsel notes that the Parties were "[m]indful of [the Bank's] desire to protect its privileged documents" from the outset of this process.¹³ Consequently, "the [P]arties considered a filter system relating to those documents, and the FDIC told Respondent's counsel" in January 2024 that the Parties "could 'arrange for a claw back of those emails' after the Direct Collection."¹⁴

During February 2024, as the terms of the proposed [REDACTED] were being negotiated, the FDIC worked with Davis Polk on the logistics of the Direct Collection.¹⁵ With respect to privilege issues, Davis Polk initially provided a broad list of email domains of outside counsel to be segregated by CACI at the collection level, but this list was ultimately winnowed down to firms and lawyers "that have advised [the Bank] with respect to the enforcement action."¹⁶ The FDIC also told the Bank that it would not filter out emails from in-house Bank attorneys but would instead "address privilege issues regarding these accounts prior to release to the FDIC through

¹¹ See Pankratz Decl. ¶ 9; Culp Decl. ¶ 9.

¹² See Pankratz Decl. ¶ 10; Culp Decl. ¶¶ 10, 13; Stein Decl. ¶ 5.

¹³ Surreply at 2.

¹⁴ *Id.* (quoting RX-A (Jan. 25, 2024 email from M. Drefchinski to D. Stipano) at 1).

¹⁵ See Culp Decl. ¶¶ 11-13.

¹⁶ EX-20 (email chain including Feb. 15, 2024 email from D. Stipano to M. Drefchinski and J. Culp) at 1; *see also* Culp Decl. ¶ 13; EX-19 (February 2024 email chain between D. Stipano and M. Drefchinski); EX-21 (February 2024 email chain between D. Stipano and M. Drefchinski); EX-22 (Feb. 16, 2024 email from D. Stipano to M. Drefchinski and J. Culp); EX-27 (email chain between CACI and FDIC including Feb. 20, 2024 email from J. Culp to S. McCloskey et al.) at 8 (stating that the FDIC discussed with Bank counsel "paring the domain exclusion list down to just firms and lawyers that worked on the enforcement matters at issue").

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exclusionary key word searches.”¹⁷ These key word searches would be applied to six specific Bank attorneys—Hall, Kirk, Durr, Jim Freis, Diane Mary Minear, and Mary Kuckelman—as well as any emails to or from those attorneys that had been forwarded internally by other Bank employees,¹⁸ and the results would be “placed in a secure folder in [the Relativity database platform] that the FDIC will not have access [to].”¹⁹

Overall, the Direct Collection comprises a total of 11,850,000 documents collected by CACI from the Bank and stored on Relativity.²⁰ Of this, approximately 27,000 documents are housed in Relativity workspaces that are and have been inaccessible to the FDIC but are accessible to Morgan, Lewis & Bockius LLP (“Morgan Lewis”), the Bank’s current counsel.²¹ This segregated material includes the documents associated with the outside counsel domain names and email addresses excluded at the collection level as well as the documents associated with in-house Bank attorneys that were identified through the aforementioned full-text key word searches.²² In addition, and as set forth more fully below, the segregated workspaces now contain the six records

¹⁷ EX-24 (email chain between CACI and FDIC including March 5, 2024 email from M. Drefchinski to K. Mitchell et al.) at 1; *see also* Culp Decl. ¶ 13; EX-27 (email chain between CACI and FDIC including Feb. 20, 2024 email from J. Culp to S. McCloskey et al.) at 8 (stating that the FDIC also discussed with Bank counsel “[e]xcluding [in-house] custodians who at some point gave the Bank legal advice on the relevant enforcement matters” and “[n]egotiating some search terms to limit the above exclusions to just legal advice on the enforcement matters”); EX-23 (email chain between CACI and FDIC including Feb. 20, 2024 email from S. McCloskey to M. Drefchinski et al.) at 2 (“For the in-house attorneys, it is recommended that we collect and process all email and google files. . . . CACI will apply the agreed upon search terms and produce a report that identifies the number of records that hit upon each term and the FDIC can work with the Bank on what if any data can be released to the FDIC.”).

¹⁸ *See* RX-B (email chain including Feb. 21, 2024 email from M. Drefchinski to D. Stipano) at 2 (“To exclude privileged emails from counsel that were forwarded, discussed, or referenced, CACI will apply an exclusionary search after loading but before any data is released to the FDIC. The exclusionary search terms would include any identified email domains as well as the key words that we agree upon.”); *see also* EX-24 (email chain between CACI and FDIC including March 5, 2024 email from M. Drefchinski to K. Mitchell et al.) at 1; EX-25 (Apr. 17, 2024 email from B. Curtiss to M. Drefchinski et al.).

¹⁹ EX-23 (email chain between CACI and FDIC including Feb. 20, 2024 email from S. McCloskey to M. Drefchinski et al.) at 2.

²⁰ *See* Stein Decl. ¶ 7; Motion at 3.

²¹ *See* Stein Decl. ¶ 7.

²² *See id.* ¶¶ 16-19.

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and related attachments—a total of twelve documents—identified by Morgan Lewis as privileged and communicated to the FDIC as such during the course of briefing the instant Motion.²³

The Bank Retains New Counsel

On May 10, 2024, the FDIC transmitted to the Bank’s Prior Counsel “what it anticipated would be the final agreement resolving the CMP, including a [REDACTED].”²⁴ The Bank’s Prior Counsel returned edits on the [REDACTED] to the FDIC on May 15, 2024, but then advised the FDIC the following day that it was no longer representing the Bank and that Morgan Lewis would be the Bank’s counsel on the enforcement matter from that point forward.²⁵ Sometime around or after that date, negotiations on the [REDACTED]—and therefore amicable resolution of the CMP—apparently ceased, although Morgan Lewis continued to cooperate with the FDIC in facilitating the Direct Collection.²⁶

In late September or early October 2024, Morgan Lewis raised for the first time concerns regarding privileged communications being contained in the portions of the Direct Collection to which the FDIC has access.²⁷ Morgan Lewis stated that it had “crafted a set of very targeted, unique phrases excerpted from the documents that we have found to be privileged” that it intended to share with CACI “to capture potentially privileged communications involving . . . [Bank] in-house counsel.”²⁸ Nevertheless, Morgan Lewis did not identify at that time any specific documents in the general Direct Collection that it believed to be privileged, nor—as far as the record before the undersigned reflects—did it provide its list of additional search terms to CACI or follow up on

²³ See *id.* ¶ 21; Motion at 11-13; Opposition at 10-11.

²⁴ Opposition at 8; see EX-30 (email chain including May 10, 2024 email from J. Culp to D. Stipano).

²⁵ See EX-31 (email chain including May 15, 2024 email from D. Stipano to J. Culp et al.); EX-32 (email chain including May 16, 2024 email from D. Stipano to J. Culp and M. Drefchinski).

²⁶ See EX-33 (email chain including June 7, 2024 email from A. Denson to J. Culp and M. Drefchinski).

²⁷ See Opposition at 9; Culp Decl. ¶¶ 14-15; EX-34 (email chain including Oct. 11, 2024 email from D. Tehrani to M. Drefchinski and J. Culp) at 1.

²⁸ EX-34 (email chain including Oct. 11, 2024 email from D. Tehrani to M. Drefchinski and J. Culp) at 2.

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its stated intention “to produce to [the FDIC] an overlay production of redacted documents and slipsheets, and an accompanying privilege log, in about two weeks.”²⁹

Instead, Morgan Lewis “asked the FDIC to stop its review of the entire Direct Collection and segregate the information from the FDIC.”³⁰ According to Enforcement Counsel, “[t]he FDIC declined, asserting that the Respondent [i.e., the Bank] and the FDIC had negotiated the Direct Collection with Respondent in good faith and represented by sophisticated Prior Counsel, and the Respondent had waived any privilege it might otherwise assert against the FDIC.”³¹

The Enforcement Action

The FDIC initiated these adjudicatory enforcement proceedings against Respondent on November 19, 2024, seeking the assessment of a \$20,448,000 CMP for alleged violations related to the BSA.³² On January 10, 2025, the undersigned granted Respondent’s request for a hearing on the CMP assessment. Following repeated denials of motions by Respondent to dismiss or stay this action, the Parties proceeded towards discovery, and the undersigned issued a Protective Order governing these proceedings on April 1, 2025. Among other things, the Protective Order contains detailed clawback provisions for documents that one side believes to be privileged that have been inadvertently produced to the other side.³³

²⁹ *Id.*

³⁰ Culp Decl. ¶ 16; *see* EX-34 (email chain including Oct. 3, 2024 email from M. Drefchinski to D. Tehrani et al.) at 2 (referencing Morgan Lewis’s identification of “additional attorneys and firms” whose communications in the Direct Collection it “would like segregated”); *id.* (email chain including Oct. 11, 2024 email from D. Tehrani to M. Drefchinski and J. Culp) at 2 (requesting that the FDIC “screen for all emails involving outside counsel . . . [and] not review any documents involving outside counsel or that you identify as potentially privileged” until Morgan Lewis’s privilege concerns were resolved).

³¹ Culp Decl. ¶ 17; *see also* Denson Decl. ¶ 4.

³² *See* Notice of Charges at 2.

³³ *See* Order No. 13: Protective Order ¶¶ 10(a)-(c).

The Instant Motion

In late January 2025, the Parties commenced a lengthy dialogue regarding privilege issues, during which Respondent’s counsel raised repeated concerns as to Enforcement Counsel’s stated position that “the FDIC reserves the right to use materials gathered [in the Direct Collection] subject to any objections your client might have as resolved by the ALJ.”³⁴ In the course of this dialogue, Enforcement Counsel noted on February 13, 2025 that “[s]ince the negotiated March 2024 collection, [Respondent] has not specifically identified any privileged documents that were inadvertently included in the documents accessible to the FDIC, nor has it taken any steps to claw such inadvertently-disclosed documents back.”³⁵ Enforcement Counsel then reiterated its invitation for Respondent’s counsel “to search the database of the documents obtained in the [Direct Collection] so that you can identify any inadvertently-disclosed documents,” adding that “[i]n the event that you identify documents you believe were not screened according to the parties’ agreement, we are prepared to enter into discussions about the treatment of such documents.”³⁶ Enforcement Counsel also represented that it was “willing to temporarily forgo accessing or attempting to access any documents in the Direct Collection” while Respondent’s counsel utilized its own access of the Relativity workspaces to identify privileged documents for clawback.³⁷

Rather than do so, however, Respondent filed the instant Motion on April 4, 2025, seeking dismissal of the case and the imposition of sanctions on Enforcement Counsel. Respondent argues

³⁴ RX-B (email chain including Jan. 23, 2025 email from J. Culp to E. Renshaw et al.) at 20; *see id.* (Jan. 24, 2025 email from E. Renshaw to J. Culp et al.) at 18 (stating that the Bank “has serious concerns about, among other things, the FDIC’s access to materials plainly protected by various privileges and protections”); *id.* (Jan. 25, 2025 email from J. Culp to E. Renshaw et al.) at 18 (stating that “we could have a productive discussion regarding utilizing documents from the [Direct Collection] in the hearing,” which “could include some ways to address concerns about privileges, identification, resources, and time”).

³⁵ *Id.* (Feb. 13, 2025 email from J. Culp to E. Renshaw et al.) at 3.

³⁶ *Id.*

³⁷ *Id.* (Feb. 14, 2025 email from J. Culp to E. Renshaw et al.) at 1.

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that this action has been irremediably “tainted” by the fact that the 11.8 million documents in the Direct Collection to which the FDIC has had access include documents that Respondent says are protected by the attorney-client privilege and as attorney work product.³⁸ Although Respondent asserts that it “has discovered countless” such privileged communications in the Direct Collection, it provides only six examples.³⁹ Respondent also contends that identifying privileged documents on a broader scale would be counterproductive because doing so would alert Enforcement Counsel to the existence of, and thus allow it to read and utilize, “the very documents [Respondent] asserts are properly protected from disclosure.”⁴⁰

In response, Enforcement Counsel first maintains that Respondent waived all claims of privilege over documents in the Direct Collection by allowing the FDIC to collect them without first screening them for privilege or taking any other reasonable steps to prevent disclosure of privileged information.⁴¹ Enforcement Counsel recognizes that the FDIC’s Uniform Rules of Practice and Procedure provide that “[p]rivileged documents are not discoverable,” but asserts that this protection, by its own terms, does not apply “until the FDIC issues a notice to start the adjudicatory process.”⁴² Enforcement Counsel then states that, potential waiver notwithstanding, once Respondent’s Motion identified the six assertedly privileged documents noted above, “Enforcement Counsel immediately contacted counsel for Respondent to arrange for those documents to be excluded from the folder accessible to the FDIC” without Enforcement Counsel

³⁸ Motion at 1-2.

³⁹ *Id.* at 12; *see id.* at 11-13.

⁴⁰ *Id.* at 5.

⁴¹ *See* Opposition at 11, 13-17.

⁴² *Id.* at 11-13 (quoting 12 C.F.R. § 308.24(c)); *see also* 12 C.F.R. §§ 308.24(a)-(b) (further providing that “[a] party may obtain document discovery regarding any *non-privileged* matter that has material relevance to the merits of the pending action” and that “[a]ny request to produce documents . . . that seeks to obtain privileged documents will be denied or modified”) (emphasis added).

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itself reviewing them.⁴³ To this end, Enforcement Counsel again invites Respondent’s counsel “to identify any documents it believes should be clawed back,”⁴⁴ noting that “[w]ithout a privilege log or some other way of identifying the documents Respondent wished to protect, there is no way for the FDIC to sequester these documents.”⁴⁵

Respondent’s Reply disagrees with the Opposition’s characterization of the Direct Collection as a “voluntary production” amounting to a waiver of privilege, asserting that, to the contrary, “the FDIC compelled [Respondent] to allow the agency to collect its documents under threat of legal process.”⁴⁶ Respondent further argues that Enforcement Counsel’s contention that it can utilize privileged communications collected before the beginning of the proceeding as part of its case against Respondent “would render the privilege protections in the Uniform Rules a complete nullity.”⁴⁷ And Respondent expands on its claim regarding the amount of privileged material in the unsegregated Direct Collection, representing that there are “more than 2,000 documents in the database that contain the phrase ‘Attorney Client Privilege,’ more than 1,300 documents that contain the phrase ‘Attorney Work Product,’ and more than 1,800 documents that contain the phrase ‘Work Product Privilege.’”⁴⁸

Finally, Enforcement Counsel’s Surreply once more points to the screening review and privilege logs done by Respondent in connection with the 2023 production requests as evidence that privilege was voluntarily waived when Respondent did not do the same for the Direct Collection—although Enforcement Counsel does acknowledge that, “[m]indful of Respondent’s

⁴³ Opposition at 21; *see id.* at 23 (stating that “the FDIC was able to segregate the six examples Respondent cited in its Motion without reviewing them”); Stein Decl. ¶ 21.

⁴⁴ Opposition at 23.

⁴⁵ *Id.* at 21.

⁴⁶ Reply at 1.

⁴⁷ *Id.* at 5; *see also id.* at 2.

⁴⁸ *Id.* at 9 (adding that “[t]hese figures only capture the compelled documents explicitly marked as privileged and do not count any others that contain privileged communications or work product without such labels”).

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desire to protect its privileged documents,” the FDIC told Respondent that the clawback of privileged communications in the Direct Collection could be arranged after the fact.⁴⁹ Regardless, Enforcement Counsel concludes its Surreply by stating that it “would be amenable to setting a date certain for Respondent to do what it failed to do in the first instance: 1) review its own records from the Direct Collection; 2) identify with particularity those documents Respondent believes to be privileged; and 3) provide a detailed, document-by-document privilege log to the FDIC.”⁵⁰

Analysis

This Motion should not have been brought at this juncture, nor was it remotely necessary for the Parties to spend so many pages arguing the nuances of waiver and the nature of compulsion.⁵¹ This is because there is a straightforward solution to the present dispute that the Parties should and could have worked together to effectuate—or at least to attempt—before requiring the undersigned to weigh in.⁵² Specifically, the Parties agree that there is a universe of over eleven million documents in the Direct Collection that have not undergone privilege review beyond the exclusion of certain external law firm domain names and a narrow and targeted keyword search relating to Bank in-house counsel. Moreover, Respondent’s counsel has access to

⁴⁹ Surreply at 1-2; *see also* RX-A (Jan. 25, 2024 email from M. Drefchinski to D. Stipano) at 1 (“After collection, CACI will be able to filter out and prohibit our access to emails to and from your firm and any others specified law firm email domains, and we can arrange for a claw back of those emails.”).

⁵⁰ Surreply at 8.

⁵¹ Regarding waiver, the undersigned finds that there is not enough on the present record to demonstrate that the Bank affirmatively waived its privilege over the unsegregated documents in the Direct Collection, particularly given (a) repeated statements by the Bank’s Prior Counsel that the Bank was reserving its privilege in connection with the 2023 production requests, and (b) Enforcement Counsel’s own admission that the Parties, through the Bank’s Prior Counsel, had contemplated that there would be a claw back process for privileged documents following the Direct Collection’s completion. *See supra* at 3, 4. Regardless, it is unnecessary at this time to decide the waiver issue.

⁵² *See* Order No. 5: Issuance of Ground Rules § 4.1 (“Before engaging in vigorous motions practice, parties should take care to note that OFIA is a small office with limited staff. Good faith efforts to practice parsimony in determining whether a matter merits the time and attention of the ALJ are therefore appreciated.”). The undersigned notes in particular that Respondent’s rush to file a motion for sanctions in this instance rather than endeavoring to cooperate is all the more wasteful of this Tribunal’s time because the declaration and exhibits submitted in connection with Respondent’s Motion do not come close to establishing that Enforcement Counsel has engaged in any behavior thus far for which sanctions would be warranted.

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this universe and has already represented that it has crafted additional keywords to capture privileged communications that may have been inadvertently disclosed.⁵³ Respondent’s counsel should therefore review the Direct Collection, identify documents that it believes to be privileged and that it wishes to claw back, and make that request of Enforcement Counsel—to be done through CACI—along with a privilege log. Enforcement Counsel has already stated that it is amenable to this approach.

In undertaking this process, both sides should comply with the clawback provisions of the April 1, 2025 Protective Order. If the Parties disagree about whether a given document identified by Respondent for clawback in fact constitutes attorney-client communications or attorney work product, then Respondent may “present the information under seal to the [undersigned] for a determination of the merits of the [privilege] claim,” and Enforcement Counsel may not “make use of the material in question until the matter is resolved.”⁵⁴ Likewise, if Respondent’s counsel believes that Enforcement Counsel is relying on privileged documents at any point during the pendency of this action, it may raise that issue at the proper time as well.

Sanctions are not an appropriate remedy at this point, and dismissal of the action is certainly not appropriate. What is appropriate right now is for the Parties to work together in good faith. Respondent’s Motion is therefore DENIED, and Respondent has until **July 31, 2025** to perform its keyword searches, compile its privilege log, and make its clawback requests. If one or both of

⁵³ See EX-34 (email chain including Oct. 11, 2024 email from D. Tehrani to M. Drefchinski and J. Culp) at 2; Reply at 9; *see also* Stein Decl. ¶ 20.

⁵⁴ Order No. 13: Protective Order at 5, 6. Presenting documents under seal for *in camera* review should be an option of last resort, and any motion seeking such relief would need to extensively detail the Parties’ attempts to resolve the dispute themselves per section 4.1 of the undersigned’s Ground Rules. *See* Order No. 5: Issuance of Ground Rules § 4.1 (“If a motion is opposed, the motion must contain a statement that the parties have made a good faith effort to resolve the dispute giving rise to the motion[,] . . . with the hope that the parties come to a resolution of the dispute without having to file a motion.”).

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the Parties do not believe that this is sufficient time for Respondent to undertake a privilege review, they may confer and propose an alternate schedule to the undersigned.

Further, because certain portions of Enforcement Counsel's Opposition and supporting exhibits thereto contain information that Enforcement Counsel has deemed to be confidential, this Order is being issued under temporary seal. Within seven days of the date of this Order, the Parties are to contact the undersigned's Senior Attorney Jason Cohen at jcohen@fdic.gov and give their positions as to whether any portion of this order should remain under seal. Upon review of the Parties' joint submission, the undersigned will issue a public version of this order with redactions made as appropriate.

SO ORDERED.

Issued: June 3, 2025



Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

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CERTIFICATE OF SERVICE

On June 12, 2025,* I served a copy of this **Order** upon the following individuals via email:

*A confidential version of this order was issued on June 3, 2025. This public version contains certain limited redactions requested pursuant to Enforcement Counsel's discretionary authority under 12 C.F.R. § 308.33(b).

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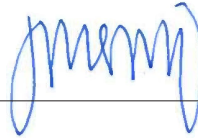
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