

**UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND**

Bureau of Consumer Financial  
Protection,

Plaintiff,

v.

Citizens Bank, N.A.,

Defendant.

Case No. 1:20-cv-00044-WES-LDA

Hon. William E. Smith

Magistrate Judge Lincoln D. Almond

**PLAINTIFF’S MOTION FOR A PROTECTIVE ORDER PROHIBITING THE  
DEPOSITIONS NOTICED BY DEFENDANT ON DECEMBER 21, 2022**

Plaintiff Bureau of Consumer Financial Protection (Bureau) moves pursuant to Fed. R. Civ. P. 26(c)(1) for a protective order prohibiting the depositions noticed by defendant Citizens Bank, N.A. (Citizens or the Bank) on December 21, 2022, of the Deputy Associate Director of the Bureau’s Supervision, Enforcement, and Fair Lending (SEFL) Division; the Assistant Director of the Bureau’s Office of Consumer Response; and a Field Examination Manager in the Bureau’s Office of Supervision.

**INTRODUCTION**

By serving these deposition notices at the close of the parties’ two-year discovery period, Citizens ignores the discovery the Bureau has already provided to Citizens and the Court’s orders setting forth the proper scope of discovery in this case. Further, as made clear during the parties’ most recent conferral, Citizens is seeking privileged information. Because the depositions do not seek nonprivileged information within that scope, they are not proportional to the needs of the case and should be prohibited.

## STATEMENT OF FACTS

On March 25, 2022, Magistrate Judge Almond issued a Discovery Order (Discovery Order) denying Citizens' Motion to Compel. In that Discovery Order, Judge Almond cited the following issues permitted for discovery: (1) "Plaintiff's theory and basis for asserting liability against it," and (2) "if [Plaintiff] proves liability, the basis and calculation of the proposed relief sought from the Court." Dkt. No. 68 at 2–3. Citizens moved to amend or modify Magistrate Judge Almond's Discovery Order, and on June 7, 2022, this Court adopted Magistrate Judge Almond's Order with one narrow exception, ruling that "Citizens may seek narrow, reasonable discovery as to whether Plaintiff knew or should have known of the bank's alleged violations prior to February 23, 2014." June 7, 2022 Text Order (emphasis in original).

In August 2022, in response to Citizens' discovery requests, the Bureau produced every complaint from its internal Consumer Response Database from July 21, 2011 to February 29, 2016, concerning Citizens and its predecessors, where a consumer identified their complaint as relating to a "credit card" product or sub-product. *See* Watson Declaration (Watson Decl.) at 4. In addition, the Bureau produced every complaint (and associated attachments) from its Consumer Response Database from July 21, 2011 to February 23, 2014, concerning Citizens and its predecessors where the consumer identified their complaint as relating to "credit reporting," "credit repair services," "debt collection," or "prepaid card services." Watson Decl. at 5.

In September 2022, Citizens noticed a deposition of the Bureau under Fed. R. Civ. P. 30(b)(6) on 14 wide-ranging topics (30(b)(6) Notice), which included, among others: "The scope, timing, and number of Supervisory Exams YOU conducted of CREDIT CARD SERVICES for the period January 1, 2010 to February 29, 2016";

“YOUR supervision, investigation, or knowledge of any acts, practices, or conduct by CITIZENS that relates to YOUR claims in this action”; and “The PERSONS, processes, and facts YOU rely upon to bring and maintain YOUR claim(s) for civil monetary penalties from CITIZENS in this ACTION, specifically, the factors, evidence, comparators, and other information YOU consult, review, or otherwise consider in making YOUR claim(s) and demand(s) for civil monetary penalties, including with respect to applying the statutory penalty amounts and mitigating factors, 12 U.S.C. § 5565(c)(2)-(3), in specific amounts or amounts yet to be determined, against CITIZENS.” *See* Watson Decl., Ex. 1.

The Bureau objected to Citizens’ 30(b)(6) Notice and detailed why Citizens’ topics sought privileged information and were also outside the scope of the discovery allowed by the Court. *See* Watson Decl. at 7. As part of the negotiations that followed, the Bureau provided, through written discovery, a timeline of the Bureau’s supervisory exam of Citizens that gave rise to this action, including key dates, relevant processes, findings, and personnel; a timeline of when Citizens disclosed to the Bureau the conduct alleged in the Bureau’s Complaint; and facts relating to Citizens’ compliance with the Bureau’s civil investigative demands served as part of the Office of Enforcement’s investigation on this matter. *See* Watson Decl. at 8. In addition, although the Court was clear that “this is now a court action, and this Court will ultimately determine the scope of relief if liability is proven,” Dkt. No. 68 at 2, the Bureau repurposed a section of its May 2021 Settlement Statement for discovery, to demonstrate how the Court could calculate a Civil Money Penalty under 12 U.S.C. § 5565(c)(2)(A), based on the duration of each alleged violation in this matter. Watson Decl. at 8. In that response, the Bureau also previewed

arguments it would make to the Court concerning the factors in 12 U.S.C. § 5565(c)(3).  
*Id.*

The parties agreed that the Bureau would designate a fact witness, pursuant to an amended notice, to testify regarding the following two topics:

1. The facts supporting the allegations in the Bureau's complaint.
2. The facts related to whether the Bureau discovered the alleged violations prior to February 23, 2014.

Watson Decl. at 9, Ex. 2.

The Bureau designated a fact witness in response to the two topics in the amended notice, and, on December 1, 2022, that Bureau witness sat for a nearly seven-hour deposition. The witness was prepared for, and testified for several hours about, the two noticed topics, including extensive testimony concerning the facts supporting the allegations in the Bureau's Complaint. Watson Decl. at 10–11.

But as the deposition progressed, Citizens disregarded the agreed-upon topics in its amended notice, and used the occasion to conduct a wide-ranging and, at times, harassing inquiry into the Bureau. Watson Decl. at 12. As just some examples, Citizens questioned the Bureau's fact witness about whether the Bureau was withholding exculpatory evidence in this matter; the process for ratifying Bureau enforcement actions; Bureau decision-making relating to bringing this action; the witness' personal legal opinion of whether certain hypotheticals would constitute violations of Regulation Z; who paid the salary of Bureau personnel; and whether the Bureau had used money from its Civil Penalty Fund to pay for work done by its Office of Enforcement. Watson Decl. at 13–14, Ex. 3.

On December 21, 2022, without any preview or discussion with the Bureau, Citizens issued its three latest deposition notices. Watson Decl. at 15, 18–20, Exs. 4–6.<sup>1</sup> During the parties’ January 10, 2023 conference with the Court (Conference), Citizens made several misleading statements to the Court, including that it sought to depose a Bureau “investigator.” Watson Decl. at 21. In fact, none of its deposition notices are for a Bureau investigator. *Id.* Citizens also represented that it had always been willing to discuss with the Bureau what information it was seeking through its latest deposition notices. In fact, Citizens had, up to that point, refused to provide such information despite multiple Bureau requests.<sup>2</sup> *See* Watson Decl. at 16.

Following the Conference, the parties conferred again on January 12, 2023 (Conferral). Watson Decl. at 23. During the Conferral, Citizens stated that it now seeks to depose Mr. Bleicken, or some other Bureau personnel, about the Office of Enforcement’s Policies and Procedures Manual (Enforcement Manual), and how that Enforcement Manual applies to the Bureau’s civil money penalty demand in this case. Watson Decl. at 24. Citizens also stated that it seeks to depose Mr. Johnson, or some other Bureau personnel, about two consumer complaints that Citizens introduced during its 30(b)(6) deposition, as well as the Bureau’s Office of Consumer Response’s processes for handling complaints more generally. Watson Decl. at 29. Finally, Citizens

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<sup>1</sup> Citizens sent its deposition notices via email to Bureau counsel. As of this filing, Citizens has not subpoenaed any of the three Bureau witnesses. Watson Decl. at 17.

<sup>2</sup> Citizens also represented that the Bureau had not served any privilege logs compliant with the Court’s Orders. In fact, since the Court denied Citizens’ motion to compel on this issue, the Bureau voluntarily supplemented its 2021 log with three more detailing, on a document-by-document basis, documents and communications being withheld. Watson Decl. at 22.

stated that it seeks to depose Robert Gutierrez about the Bureau's 2015 exam of Citizens' credit card account management practices. Watson Decl. at 31.

Given that the information sought by Citizens is beyond the scope of proper discovery outlined by the Court and, in large part, privileged, on January 18, 2023, the Bureau informed Citizens of its intention to file this motion.

### **LEGAL STANDARD**

This Court is "empowered by Fed. R. Civ. P. 26(c) to grant a protective order from discovery for 'good cause shown.'" *Bogan v. City of Bos.*, 489 F.3d 417, 423 (1st Cir. 2007). Pursuant to Rule 26(c)(1), a court may "enter a protective order prohibiting or limiting discovery to protect a party 'from annoyance, embarrassment, oppression, or undue burden or expense.'" *Thompson v. UBS Fin. Servs., Inc.*, No. CIV.A. 09-033S, 2009 WL 2986395, at \*1 (D.R.I. Sept. 15, 2009).

### **ARGUMENT**

#### **I. CITIZENS' DEPOSITION NOTICE TO DEPUTY ASSOCIATE DIRECTOR BLEICKEN FOR TESTIMONY REGARDING THE BUREAU'S CIVIL MONEY PENALTY DEMAND AND OFFICE OF ENFORCEMENT POLICIES GENERALLY IS IMPROPER**

##### **A. Citizens Has Not Demonstrated the Exceptional Circumstances Required to Depose Deputy Associate Director Bleicken**

High-ranking government officials are normally not subject to depositions. *See, e.g., Church of Scientology of Bos. v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990) (collecting cases). "[T]o depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition—for example, that the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means."

*Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013).

Mr. Bleicken holds a Bureau Executive-level role, currently serving as the Deputy Associate Director for the Bureau's SEFL Division, which includes three Bureau Offices and more than 700 employees. Watson Decl. at 25. Further, Mr. Bleicken's personal involvement in or knowledge of this matter is minimal at best.<sup>3</sup> Watson Decl. at 26. Citizens has not demonstrated the exceptional circumstances required to justify its deposition notice to Mr. Bleicken in this case.

**B. Citizens Is Not Entitled to Depose Deputy Associate Director Bleicken or Another Bureau Witness About the Bureau's Request for Civil Money Penalties or the Enforcement Manual**

Citizens conceded a willingness to depose another Bureau official, instead of Mr. Bleicken, during the parties' Conferral. But its concession hinged on whether the witness could provide information about (1) the Bureau's request for civil money penalties in this matter; and (2) the Enforcement Manual generally, and how the Enforcement Manual was applied in making the civil money penalty demand in this case. Given the information the Bureau has already provided concerning its request for civil money penalties in this case, as well as this Court's prior rulings on discovery, an attempt to depose Mr. Bleicken or any other Bureau personnel on such matters is improper.

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<sup>3</sup> Specifically, the Office of Enforcement's 2019 recommendation memo for the Director of the Bureau seeking settlement and suit authority (including authority concerning settlement parameters) went through the SEFL Front Office, where Mr. Bleicken's position is located. *See* Dkt. No. 60-15 at 1. Mr. Bleicken also sat in on one presentation by Citizens and its counsel later that year. Mr. Bleicken was also serving as Acting Associate Director for SEFL (the head of the Division) at the time the Office of Enforcement's investigation opened in 2016. Watson Decl. at 27-28.

**1. Citizens Has Already Received All Relevant Non-Privileged Information Regarding the Bureau's Request for Civil Money Penalties in this Case**

Judge Almond's March 25, 2022 Order addressed discovery concerning civil money penalties, stating Citizens was entitled to know "the basis and calculation of the proposed relief sought from the Court." Dkt. No. 68 at 2–3. The Bureau already has provided that information to Citizens. As noted above, the Bureau detailed for Citizens in discovery how the Court could calculate a Civil Money Penalty under 12 U.S.C. § 5565(c)(2)(A), based on the duration of each alleged violation. The Bureau also previewed for Citizens the arguments it would make to the Court concerning the factors in 12 U.S.C. § 5565(c)(3) now that this is a filed action. Finally, the Bureau has produced and identified documents already in Citizens' possession that the Bureau would rely on for arguments concerning those statutory factors. *See, e.g.*, Dkt. No. 61 at 15–16. To depose Mr. Bleicken, or another Bureau official in their personal capacity, on such discovery would be repetitive and disproportional to the needs of the case.

Further, Judge Almond explicitly excluded from discovery internal pre-suit communications or settlement negotiations in connection with the Bureau's efforts to seek civil money penalties. *See* Dkt. No. 68 at 2 ("[T]his is now a court action, and this Court will ultimately determine the scope of relief if liability is proven. Discovery regarding Plaintiff's internal pre-suit discussions or consideration of proposals to resolve this matter by consent decree is not now relevant."). Indeed, how Bureau attorneys analyzed and applied the factors in 12 U.S.C. § 5565(c)(3) during internal deliberations, whether in its 2019 recommendation memorandum to the Director of the Bureau or at any other time before filing this action, is privileged. A deposition for such



testimony now, whether of Mr. Bleicken or any other Bureau personnel, should be prohibited.

## **2. Citizens' Notice Constitutes an Attempt to Depose Bureau Enforcement Attorneys and Their Managers**

During the parties' Conferral, Citizens stated that, through its deposition notice to Mr. Bleicken, it wishes to proceed with further questioning about the Bureau's Enforcement Manual, and specifically whether the Bureau followed certain sections in that Manual addressing civil money penalties when it comes to Citizens Bank and this filed action. *See* Watson Decl. at 24.

This type of inquiry into internal Bureau processes is not relevant. As the Enforcement Manual itself explicitly says, the Manual does not create any right or cause of action.<sup>4</sup>

Furthermore, such information is privileged, and Citizens is not entitled to it. Citizens is free to argue its position to the Court concerning the appropriate penalty pursuant to 12 U.S.C. § 5565(c) at the appropriate time. How the Bureau adhered to its Enforcement Manual before and after the filing of this action is only within the purview of the Bureau attorneys who investigated this matter, the Bureau attorneys who are currently litigating this matter, and their Litigation Deputy in the Office of Enforcement

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<sup>4</sup> "The Policies and Procedures Manual provides Internal guidance to Enforcement staff of the Bureau. It does not bind the Bureau and does not create any rights, benefits, or defenses—substantive or procedural—that are enforceable by any party in any manner." Consumer Financial Protective Bureau, Office of Enforcement, Policies and Procedures Manual at 2. Version 3.2 (February 2021), *available at* [https://files.consumerfinance.gov/f/documents/cfpb\\_enforcement-policies-and-procedures-memo\\_version-3.2\\_2022-02.pdf](https://files.consumerfinance.gov/f/documents/cfpb_enforcement-policies-and-procedures-memo_version-3.2_2022-02.pdf).

who supervises them.<sup>5</sup> Citizens is simply not entitled to depose Bureau investigation counsel, trial counsel, or their management on such matters.

**II. CITIZENS' DEPOSITION NOTICE TO ASSISTANT DIRECTOR JOHNSON FOR TESTIMONY ABOUT CONSUMER COMPLAINTS AND THE BUREAU'S OFFICE OF CONSUMER RESPONSE IS IMPROPER**

Mr. Johnson currently serves as the Assistant Director of the Bureau's Office of Consumer Response, which includes approximately 120 employees. Watson Decl. at 30. Mr. Johnson has held the position of Assistant Director since 2016. *Id.* Mr. Johnson has had no personal involvement in this matter. *Id.*

During the parties' January 12 Conferral, Citizens previewed that, through its deposition notice to Mr. Johnson, Citizens is seeking testimony about (1) two consumer complaints from the Bureau's Consumer Response database that Citizens introduced during its 30(b)(6) deposition of the Bureau; and (2) the Bureau's Office of Consumer Response processes more generally. Watson Decl. at 29.

During Citizens' December 1 deposition, the Bureau's 30(b)(6) witness faced extensive questioning about consumer complaints from the Bureau's consumer complaint productions, as well about the Bureau's Office of Consumer Response's processes more generally. Citizens' questions fell outside the scope of either noticed topic.

Indeed, the Bureau has not identified any evidence based on those documents, or in Citizens' productions relating to remediation efforts, that the two consumers whose complaints Citizens raised were subject to any of the violations alleged in the Bureau's

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<sup>5</sup> During its 30(b)(6) deposition of the Bureau, Citizens attempted to engage the Bureau's designated witness in several wide-ranging colloquies about the Enforcement Manual. Such questions were far outside the scope of the noticed 30(b)(6) topics and are also outside the parameters this Court has set for discovery.

Complaint.<sup>6</sup> Nor has Citizens provided any evidence that was the case, whether during its 30(b)(6) deposition of the Bureau or at any other point during discovery, despite Citizens possessing complete account files for both of these Bank customers.

The Court has ruled that any discovery “as to whether Plaintiff knew or should have known of the bank’s alleged violations prior to February 23, 2014” must be “narrow” and “reasonable.” A deposition now of the Assistant Director of the Bureau’s Office of Consumer Response—or another Bureau employee in the Bureau’s Office of Consumer Response—is neither narrow nor reasonable, particularly absent evidence of any consumer complaints concerning the violations alleged in this matter. Citizens’ deposition of Mr. Johnson should be prohibited.

**III. CITIZENS’ DEPOSITION OF MR. GUTIERREZ WOULD NOT PROVIDE NON-PRIVILEGED INFORMATION NOT ALREADY IN CITIZENS’ POSSESSION**

Mr. Gutierrez currently serves as a Field Manager in the Bureau’s Office of Supervision. Watson Decl. at 32. In this role, Mr. Gutierrez oversees examinations of a large financial institution (unrelated to Citizens) in the Bureau’s Northeast Region, including examinations that are presently ongoing. *Id.* Previously, from September 2014 to April 2018, Mr. Gutierrez held the position of Field Manager for Bureau examinations at Citizens Bank, including the Bureau’s 2015 exam of Citizens’ credit card account management practices (Exam). *Id.*

Citizens already has the Bureau’s Exam findings, along with all other finalized Bureau supervisory documents. Further, as part of the parties’ negotiations relating to

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<sup>6</sup> As the Bureau has represented to Citizens and the Court, the Bureau has not identified any consumer complaints concerning the alleged violations in this case. *See* Dkt. No. 70 at 6.

Citizens' 30(b)(6) Notice, the Bureau provided to Citizens, through supplemental written discovery, a timeline of key events from the Bureau's 2015 Exam, along with relevant Exam processes, findings, and personnel. *See* Watson Decl. at 8.

During the parties' January 12 Conferral, Citizens represented that it is seeking Mr. Gutierrez's personal view of the Bureau's 2015 Exam findings. The personal opinions of any individual Bureau employee regarding the 2015 Exam is not relevant, and is likely to be privileged.<sup>7</sup> It is the Bureau's burden to prove, and ultimately up to the Court to determine, whether Citizens violated the law. Mr. Gutierrez's personal view of whether Citizens did so, and how the Bureau's Office of Supervision gathered information, is not relevant to that determination. *See generally Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-CV-101, 2018 WL 2088760, at \*4 (M.D. Pa. May 4, 2018) ("In the end, the fact finder will be called upon to determine if Defendants engaged in any . . . violation of the Consumer Financial Protection Act. What agency staff said in communication leading up to the issuance or non-issuance of rules, policies, or guidance has no bearing on that determination." (citation omitted)).

Further, as Citizens well knows, the Bureau's 2015 Exam included numerous inquiries and findings unrelated to the specific allegations in this lawsuit. And while Citizens first disclosed information regarding the violations alleged in the Complaint during the Exam, Citizens stated during the parties' January 12 Conferral that it is

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<sup>7</sup> A deposition of Mr. Gutierrez would almost certainly seek the conclusions, observations, communications, and analyses of Bureau supervisory personnel, including those attorneys in the Bureau's Office of Supervision Policy. Such testimony would be protected under the attorney-client and deliberative process privileges.

seeking to depose Mr. Gutierrez about the facts of the Exam, not Citizens' statute of limitations defense.<sup>8</sup>

On December 1, the Bureau's 30(b)(6) witness testified for several hours concerning "the facts supporting the allegations in the Bureau's complaint." A deposition of Mr. Gutierrez now, at the close of discovery, is disproportional to the needs of the case, is outside the bounds of the Court's rulings on discovery, and is also highly likely to seek information that is privileged. For all these reasons, Citizens' deposition of Mr. Gutierrez should be prohibited.

### CONCLUSION

The parties previously engaged in extensive negotiations about the appropriate topics for a 30(b)(6) deposition and additional information that the Bureau could produce by less burdensome means. The Bureau negotiated in good faith, and undertook significant efforts to produce additional written discovery and prepare its witness for nearly seven hours of testimony.

Now (and only after the Court ordered the parties to meet and confer in good faith), Citizens has made clear that what it really seeks through its three latest deposition notices is another a 30(b)(6) deposition. The Court should reject Citizens'

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<sup>8</sup> Even if Citizens did hope to elicit information from Mr. Gutierrez to support its statute of limitations defense, Mr. Gutierrez could provide little, if any, relevant information. Mr. Gutierrez began his tenure as a Field Manager for Citizens exams in September 2014, which is after the period that the Court set for discovery related to Citizens' statute of limitations defense. June 7, 2022 Text Order ("Citizens may seek narrow, reasonable discovery as to whether Plaintiff knew or should have known of the bank's alleged violations prior to February 23, 2014.") (emphasis in original). Moreover, the Bureau's 30(b)(6) witness already testified concerning whether the Bureau discovered the alleged violations prior to February 23, 2014. That testimony was consistent with the Bureau's previous representations to Citizens and the Court that the Bureau did not discover the violations alleged in its Complaint before, at the earliest, its 2015 exam. *See* Dkt. No. 70 at 4-6.

obvious attempt to end-run around the parties' previous negotiations and the limitations in Fed. R. Civ. P. 30(d), which limits depositions, including depositions under Fed. R. Civ. P. 30(b)(6), to "1 day of 7 hours."

For the foregoing reasons, and for good cause shown, the Bureau respectfully requests that the Court issue a protective order prohibiting the three depositions noticed by Citizens Bank on December 21, 2022.

Dated: January 18, 2023

Respectfully submitted,

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Deborah Morris  
*Deputy Enforcement Director*

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 18, 2023, a copy of the foregoing Plaintiff's Motion For a Protective Order Prohibiting the Depositions Noticed By Defendant on December 21, 2022 was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

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