

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

IN RE WILMINGTON TRUST SECURITIES LITIGATION,)))))	Master Civ. No. 10-990-ER-SRF (Consolidated Securities Class Action)
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MEMORANDUM ORDER

At Wilmington this 19th day of September, 2017, the court having considered the parties’ submissions and oral argument regarding: (1) the Board of Governors of the Federal Reserve System’s (the “Federal Reserve”) motion to quash the deposition subpoenas of four employees of the Federal Reserve Bank of Philadelphia (the “Reserve Bank”) and one employee of the Federal Reserve issued by defendant Wilmington Trust Corporation’s (“Wilmington Trust”) (D.I. 680), and (2) Wilmington Trust’s motion to compel compliance with the subpoena *duces tecum* served on the Board of Governors of the Federal Reserve System (the “Federal Reserve”) (D.I. 677), IT IS HEREBY ORDERED that the Federal Reserve’s motion to quash is granted, and Wilmington Trust’s motion is denied without prejudice, for the reasons set forth below.

1. Background. Plaintiffs¹ are institutional investors who purchased the common stock of Wilmington Trust between January 18, 2008 and November 1, 2010 (“the class period”). (D.I. 149 at ¶¶ 25-30) Plaintiffs claim that Wilmington Trust’s lending practices were part of a “massive criminal conspiracy that ‘fraudulently conceal[ed] the Bank’s true financial condition’

¹ Plaintiffs in this action are the Merced County Employees’ Retirement Association, the Coral Springs Police Pension Fund, the St. Petersburg Firefighters’ Retirement System, the Pompano Beach General Employees Retirement System, and the Automotive Industries Pension Trust.

and ‘deceive[d] regulators and the public.’” (*Id.* at ¶ 1) Plaintiffs commenced the instant civil action on November 18, 2010 (D.I. 1), and filed their fourth amended complaint on June 13, 2013 (D.I. 149). Plaintiffs’ fourth amended complaint focus on three main areas of allegedly fraudulent conduct: (1) loan underwriting; (2) loan risk-rating; and (3) past-due and nonaccrual accounting.

2. Subpoenas *ad testificatum*. On March 30, 2017, Wilmington Trust served deposition subpoenas demanding testimony from four bank supervisors of the Reserve Bank and one employee of the Federal Reserve. (D.I. 594-98) The proposed deponents include: (1) James Corkery, the Examiner In Charge for the 2009 and 2010 Full Scope Examinations as well as the 2010 Target Examination of Wilmington Trust; (2) David Fomunyan, the Lead Examiner for commercial real estate in the 2010 Target Examination who performed credit risk, asset quality, and loan reviews in the 2010 Full Scope Examination; (3) James Adams, who reviewed loans for fraudulent accounting practices in the 2009 Full Scope Examination; (4) Eric Sonnheim, who interacted with Wilmington Trust regarding supervisory issues such as the 2010 Capital Raise; and (5) Robert Walker, a Federal Reserve employee who was involved in the creation and subsequent clarification of the Federal Reserve’s October 2009 guidance on prudent commercial real estate loan workouts addressing deteriorating commercial real estate loan portfolios. (*Id.*)

3. The Federal Reserve objected to Wilmington Trust’s deposition subpoena of Robert Walker on April 5, 2017, and objected to the deposition subpoenas of the remaining deponents on May 9, 2017, alleging that the subpoenas were premature because the Federal Reserve had not yet responded to Wilmington Trust’s March 16, 2017 administrative *Touhy* request. (D.I. 688, Exs. A & B) Wilmington Trust responded to the Federal Reserve’s objections on April 14, 2017 and May 17, 2017, respectively, indicating that the submission of the *Touhy* request was

sufficient to exhaust its administrative remedies. (*Id.*, Exs. C & D)

4. The parties presented oral argument regarding their dispute on June 14, 2017. (6/14/17 Tr. at 51:15-66:14) Following the hearing and the completion of supplemental briefing on the dispute in the present case, Wilmington Trust became aware of a memorandum of an interview between the government and David Fomunyan indicating that the Federal Reserve was aware that “WT never reported their matured loans,” and engaged in a process of “perpetual” extension. (D.I. 780, Ex. A at 2)

5. On July 3, 2017, the Federal Reserve received an access request for testimony by Reserve Bank employees at the October 2017 criminal trial in *United States v. Wilmington Trust Corp.*, Crim. No. 15-23-RGA (D. Del.). (D.I. 718, Ex. A) The request seeks testimony from Eric Sonnheim, James Corkery, and David Fomunyan. The Federal Reserve granted the request. (D.I. 718 at 1)

6. The Federal Reserve’s motion to quash the deposition subpoenas is granted. The need for the deposition testimony of the Reserve Bank employees in the civil proceeding is lessened by the fact that similar testimony by three of the same witnesses² is expected in the criminal action. *See U.S. v. Mellon Bank, N.A.*, 545 F.2d 869, 873 (3d Cir. 1976) (concluding that resolution of the criminal case could “moot, clarify, or otherwise affect various contentions in the civil case” because the civil and criminal matters involved “substantial matters of the same nature”). Allowing similar depositions to go forward in the civil case prior to the criminal trial would also create the potential for Wilmington Trust to “improperly exploit civil discovery for the advancement of [the] criminal case.” *Id.* (citing *Campbell v. Eastland*, 307 F.2d 478, 487-88

² Although James Adams was not named as a trial witness in the criminal matter, the parties agree that his testimony would be of a similar nature to the testimony of Mr. Fomunyan, relating to his review of loans. (D.I. 688 at 2; D.I. 718 at 1)

(5th Cir. 1962)).

7. Moreover, the documents produced constitute the primary evidence in this case and establish Wilmington Trust's actual condition during the relevant period more reliably than the recollections of bank examiners regarding events which occurred six years ago. (6/14/17 Tr. at 53:10-14)

8. The court must also give special consideration to the costs imposed on the Federal Reserve as a result of the subpoenas in the present case, which involves third-party subpoenas to government agencies or employees. *See Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007) (citing Fed. R. Civ. P. 45, 26(b)); *see also Exxon Shipping Co. v. Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994) (noting the "government's interest in not being used as a speakers' bureau for private litigants."). The Federal Reserve has represented that providing the deposition testimony would "divert[] resources from the agency's mission of ensuring the safety and soundness of the banking system." (6/14/17 Tr. at 52:6-13) These costs are substantial, particularly in light of the fact that the majority of the depositions are likely to be duplicative of witness testimony during the criminal trial. The authority cited by Wilmington Trust is distinguishable because the subpoenaed non-parties were not government entities. *See Blagman v. Apple Inc.*, 2014 WL 12607841, at *3 (C.D. Cal. Jan. 6, 2014) (holding that non-parties are not immune from the burdens of discovery, but receive an extra degree of protection).

9. Robert Walker's responsibilities as a supervisory analyst at the Federal Reserve differ from those of the Reserve Bank employees, and his testimony has not been sought in the criminal proceeding to date. However, the court's ruling applies equally to the subpoena for Mr. Walker's deposition testimony regarding the October 2009 guidance for commercial real estate loan portfolios. The fourth amended complaint identifies problems with the accounting practices

regarding the way the loans were rated by the Bank as non-performing or performing. (D.I. 149 at ¶¶ 163-167) The document production includes loan ratings by the examiners, and Wilmington Trust has not established why corresponding deposition testimony is also necessary. (See Crim. No. 15-23-RGA, D.I. 342 at 2) (“Assuming the state of mind of the FDIC in 2004-07 is relevant, which is an extremely doubtful proposition, the CAMELS ratings will reveal what it thought.”)

10. To the extent that Wilmington Trust seeks Mr. Walker’s testimony regarding industry practices and understanding regarding commercial lending, such information is more appropriately obtained through expert discovery. Fed. R. Civ. P. 45(d)(3)(B)(ii) (permitting courts to quash subpoenas requiring “disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party.”).

11. **Subpoena *duces tecum*.** On March 16, 2017, Wilmington Trust served a subpoena *duces tecum* on the Federal Reserve, seeking the production of documents generated by the Federal Reserve from 2005 to 2010, documents provided by Wilmington Trust and reviewed by the Federal Reserve, and documents related to the October 2009 guidance on Prudent Commercial Real Estate Loan Workouts. (D.I. 547; D.I. 677 at 2)

12. The Federal Reserve objected to Wilmington Trust’s subpoena *duces tecum* on March 29, 2017, alleging that the subpoena is premature because Wilmington Trust has failed to first exhaust its administrative remedies, the requested supervisory documents are subject to the bank examination, deliberative process, and attorney-client privileges, and the subpoena is overbroad, unduly burdensome, disproportionate to the needs of the case, irrelevant, and cumulative of information already in Wilmington Trust’s possession. (D.I. 677, Ex. A at 2-3)

Wilmington Trust responded to the Federal Reserve's objections on April 7, 2017, indicating that the submission of the *Touhy* request was sufficient to exhaust its administrative remedies, the asserted privileges are waived, and the request does not present an undue burden. (*Id.*, Ex. B)

13. After further efforts to resolve the dispute failed, the parties presented oral argument regarding their dispute on June 14, 2017. (6/14/17 Tr. at 24:10-47:20) Following the hearing and the completion of supplemental briefing on the dispute, Wilmington Trust became aware of a memorandum between the government and three regulators from the Delaware Office of the State Bank Commissioner ("OSBC") showing that bank examiners conducted a reconciliation of the bank's Call Reports, which highlights that Wilmington Trust did not report all of its matured loans as "past due." (D.I. 780 at 2) Moreover, an interview memorandum by Examiner-In-Charge James Corkery indicates that Wilmington Trust provided discs containing data which were never produced by the Federal Reserve. (*Id.*)

14. In the related criminal matter, Judge Andrews granted Wilmington Trust's motion to serve Rule 17(c) subpoenas *duces tecum* on the Federal Reserve on February 15, 2017. (Crim. No. 15-23-RGA, D.I. 334) Judge Andrews subsequently granted the Federal Reserve's motion to quash the Rule 17(c) subpoenas on July 11, 2017, ordering Wilmington Trust to more narrowly tailor its request. (*Id.*, D.I. 362 at 4) On September 15, 2017, Wilmington Trust renewed its motion to serve a Rule 17(c) subpoena *duces tecum* on the Federal Reserve to require the production of documents prior to trial. (*Id.*, D.I. 506) By way of the pending motion, Wilmington Trust seeks two categories of documents: (1) past due and matured loan information from 2008 to 2010, and (2) communications between or among Federal Reserve personnel about past due and matured loan information on or after January 1, 2008. (*Id.*, D.I. 506 at ¶ 3)

15. The subpoena presently before the court in the civil action encompasses the

requested categories of documents in the Rule 17(c) subpoenas under consideration by Judge Andrews. Consequently, Wilmington Trust's motion to compel compliance with its subpoena *duces tecum* in the present civil action is denied without prejudice pending the resolution of parallel issues before Judge Andrews in the criminal proceeding, Crim. No. 15-23-RGA.

16. Conclusion. In view of the foregoing analysis, the Federal Reserve's motion to quash the subpoenas *ad testificandum* (D.I. 680) is granted, and Wilmington Trust's motion to compel compliance with the subpoena *duces tecum* (D.I. 677) is denied.

17. This Memorandum Order is filed pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72(a), and D. Del. LR 72.1(a)(2). The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Memorandum Order. Fed. R. Civ. P. 72(a). The objections and responses to the objections are limited to ten (10) pages each.

18. The parties are directed to the court's Standing Order For Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the court's website, www.ded.uscourts.gov.



Sherry R. Fallon
UNITED STATES MAGISTRATE JUDGE