

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CONFERENCE OF STATE BANK SUPERVISORS,)	
)	
Plaintiff,)	
)	
v.)	
)	C.A. No. 1:18-CV-02449 (DLF)
OFFICE OF THE COMPTROLLER OF THE CURRENCY,)	
)	ORAL ARGUMENT
and)	REQUESTED
)	
JOSEPH M. OTTING, COMPTROLLER OF THE CURRENCY,)	
)	
Defendants.)	
)	

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS ALTERNATIVE MOTION
FOR LEAVE TO CONDUCT JURISDICTIONAL DISCOVERY**

The Conference of State Bank Supervisors (“CSBS”) submits this Memorandum of Points and Authorities In Support of Its Motion for Leave to Conduct Jurisdictional Discovery and respectfully requests that the Court order limited jurisdictional discovery, in the alternative to denying the Defendants’ Motion to Dismiss for Lack of Jurisdiction and For Failure to State a Claim (Doc. 12). The proposed discovery will enable the Court to resolve factual disputes with respect to standing (specifically, under the actual and future injury tests) and ripeness, and will allow CSBS to show that the Court has subject matter jurisdiction over this challenge to the Nonbank Charter Program, to the extent the Court finds the current allegations insufficient.

As summarized below, and further detailed in Plaintiff’s Opposition to Defendants’ Motion to Dismiss (“CSBS Opp.”) (Doc. 15), OCC seeks to dismiss this lawsuit on the grounds that CSBS cannot establish injury and ripeness, because OCC has not yet issued a nonbank charter, and that

issuance is not imminent. OCC depicts the eventual granting of a nonbank charter as far off, speculative, and contingent. But the facts belie OCC's assertions. OCC publicly announced its decision to offer nonbank charters in July 2018 and, since then, has stated that it has held "hundreds of meetings" with interested companies, a number of which are finalizing applications, and further, that the OCC expects to approve a charter by mid-2019. To the extent the Court deems even these extensive activities to be insufficient to establish subject matter jurisdiction, CSBS should be given an opportunity for jurisdictional discovery to obtain additional information about the status of these forthcoming applications and the imminence of OCC's charter approvals.

BACKGROUND

On July 31, 2018, OCC announced it had begun accepting applications for Nonbank Charters, issued a Policy Statement explaining that OCC "is open and receptive to charter applications from qualified fintech companies," and published its Comptroller's Licensing Manual Supplement, "*Considering Charter Applications from Financial Technology Companies.*" Compl. Ex. A-C (Doc. 1-1, 1-2 and 1-3). This Supplement outlined the eligibility criteria, application process, OCC's considerations when evaluating applicants, the requirements for the charter holder, and OCC's approach to supervising chartered nonbank entities. *Id.* Ex. C.

In the ensuing months, OCC made numerous public statements stressing its rapid progress with the Nonbank Charter Program, and its belief that applications and charter decisions were imminent:

- "[I]nterest in the charter remains robust, and we expect multiple applications by the end of the year" (Article authored by Comptroller Otting in Sept. 2018 in *American Banker* (Compl. Ex. I; Doc. 1-9);
- OCC in active discussions with "a number of highly interested institutions" and will receive applications by the end of the year, with charter decisions expected shortly thereafter, no later than mid-year 2019 (Comptroller Otting quoted in October 2018 article in *Politico* (Ex. J; Doc. 1-10);

- A "number of institutions are currently going through the application process, and the agency expects to receive its first application by the end of [2018] or early next year." (statements of Comptroller Otting, reported in "Fintechs interested in OCC charter despite lawsuits: Otting," *American Banker*, Nov. 7, 2018 (CSBS Opp. Ex. 2) (Doc. 15-2);
- "[H]undreds of meetings" Comptroller Otting has had with fintechs interested in the Nonbank Charter--and "most of these entities that today would apply to be a bank, many of them are operating today as a state-chartered or state-licensed lender . . ." (statements of Comptroller Otting reported in "Fed not an impediment to fintechs' charter ambitions: OCC's Otting," *American Banker*, Jan. 16, 2019 (CSBS Opp. Ex. 3) (Doc. 15-3); and
- Media report of statements by Comptroller Otting, "that a number of fintech companies are finalizing their applications," reported in "Fintech Charter Seekers Shouldn't Fret About Fed Access: Otting," *Bloomberg Law*, Jan 16, 2019 (CSBS Op. Ex. 4) (Doc. 15-4).

The OCC's description of "hundreds of meetings" with potential Nonbank Charter applicants is consistent with OCC's extensive pre-filing vetting, which OCC undertakes prior to the formal submission of a charter application. Specifically, OCC's Licensing Manual Supplement explains that the application process begins with a "prefiling phase" that includes initial discussions with OCC's Office of Innovation and further discussions with OCC Staff and the Licensing Department. *See* Compl. Ex C at 3-4. If "the company decides to pursue a charter," additional meetings are held with Licensing, and Licensing may determine that a "draft application" should be submitted prior to the formal application.¹ *Id.*

To defeat jurisdiction over this case, OCC has submitted a declaration attesting that "no application for an SPNB Charter has been filed with the OCC" (Lybarger Decl. at ¶ 6) (Doc. 12-2). But OCC's declaration is silent as to the status of any *draft* applications OCC has received, and

¹ OCC's regulations provide that submission of draft materials may expedite the filing review process. 12 C.F.R. 5.4(f). OCC uses this draft application process to obtain information from the applicant and to better ensure that a formal application is complete and merits approval. *See* Comptroller's Licensing Manual Supplement at pp. 3-4. (Compl. Ex. C) (Doc. 1-3).

says nothing about OCC's ongoing vetting of forthcoming final applications. Yet, as explained above, it is clear from the Comptroller's repeated public references to "hundreds" of meetings with applicants and the imminent submission of a final charter application, that OCC's extensive vetting process is well underway. CSBS must rely on this inference, because OCC has no obligation to notify CSBS or the public of the submission of any draft applications or of the status of any anticipated formal applications.

OCC's declaration also says nothing about the formation of corporate entities seeking the fintech charter--significant because the OCC has taken the position that preemption of state law can occur as early as formation of the entity and applies retroactively to activities occurring *before* the company becomes a national bank. *See* CSBS Opp. at 8. OCC's declaration also downplays the significance of any pre-charter-approval activities--asserting that a preliminarily approved applicant has up to 18 months to commence business, and that preliminary approval of an application is no guarantee of final approval. *See* Lybarger Dec. ¶¶ 17-18. This depicts an unrealistic view of the process. As noted above, the Comptroller himself has publicly stated that approval of a Nonbank Charter is likely by the middle of 2019, reflecting an approval process that is well underway. Moreover, OCC's own empirical data for charter applications received since January 1, 1991 demonstrates that the time from preliminary approval of a charter to final approval averages a mere 111 days. CSBS Opp. at 8-9; Ex. 7 (Doc. 15-7). And OCC approves applications at a very high rate: 87% of applicants have received preliminary approval, and more than 93% of preliminarily approved applicants receive final approval. *Id.* The number of applications denied by OCC (as opposed to abandoned or withdrawn) is *de minimis*-- roughly 1%. *Id.* Indeed, in the last 11 years, OCC has denied only *one* national bank charter application. OCC Corporate Decision #2008-10 (Dec. 2008) (available at <https://www.occ.gov/topics/licensing/interpretations-and->

[actions/2008/cd08-10.pdf](#)). Moreover, for Nonbank Charter applicants, the timing of approval is likely to be even swifter than traditional national banks, and the likelihood of final approval even greater, because no input and approval from the FDIC or Federal Reserve is required.

LAW AND ARGUMENT

I. THIS COURT MUST APPLY A "LIBERAL STANDARD" FOR PERMITTING JURISDICTIONAL DISCOVERY.

This Circuit's standard for permitting jurisdictional discovery is "quite liberal." *Davis v. United States*, 196 F. Supp. 3d 106, 120 (D.D.C. 2016) (quoting *Chemical Co., Inc. v. Atofina Chemicals, Inc.*, 268 F. Supp. 2d 1, 15 (D.D.C. 2003)); see also *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, C.A. No. 07-964 (CKK), 2008 U.S. Dist. LEXIS 111094, *10 (D.D.C. Feb. 11, 2008) (same, and collecting cases). Specifically, "[D.C. Circuit] precedent allow[s] jurisdictional discovery and factfinding if allegations indicate its likely utility." *Natural Resources Defense Council v. Pena*, 147 F. 3d 1012, 1024 (D.C. Cir. 1998)(collecting cases). Put differently, "if a party demonstrates that it can supplement its jurisdictional allegations through discovery, then jurisdictional discovery is justified." *Davis*, 196 F. Supp. 3d 106 at 120. (quoting *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 135 (D.C. Cir. 2000)).

Under this standard, the D.C. Circuit and other judges of this District have granted jurisdictional discovery against federal agencies in an array of litigation, including under the Administrative Procedure Act and in constitutional cases. See e.g., *Wilderness Society v. Griles*, 824 F.2d 4, 6, 10, 19-20 (D.C. Cir. 1987) (holding District Court abused discretion in denying jurisdictional discovery in APA case); *Long Term Care Pharm. Alliance v. Leavitt*, 530 F. Supp. 2d 173, 180 (D.D.C. 2008) (recounting in APA case that "[i]n order to give plaintiffs the opportunity to develop the record on standing, the Court permitted them to take jurisdictional discovery relating to the issues of causation and redressability"); *Citizens for Responsibility &*

Ethics, 2008 U.S. Dist. LEXIS 111094 at *1, 5-7 (ordering limited jurisdictional discovery to determine jurisdictional question whether federal agency was covered by FOIA, when agency had moved for judgement on the pleadings on this issue); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 67-69 (D.D.C. 2004) (granting petitioners jurisdictional discovery in order to establish the Court's jurisdiction over their habeas petition, based on the U.S. Constitution and other law, in order to show that detainee is in the actual or constructive custody of the United States).

II. TO THE EXTENT THE COURT DETERMINES THAT CSBS HAS NOT SUFFICIENTLY ESTABLISHED SUBJECT MATTER JURISDICTION IN RESPONSE TO OCC'S MOTION TO DISMISS, IT SHOULD PERMIT JURISDICTIONAL DISCOVERY BEFORE DISMISSING CSBS'S ACTION.

The Court should allow CSBS to conduct jurisdictional discovery because it will allow CSBS to supplement its jurisdictional allegations to establish standing and ripeness--specifically, to resolve factual disputes concerning the status of OCC's implementation of the Nonbank Charter Program (to the extent the Court finds the current allegations insufficient). On its 12(b)(1) Motion, OCC argues that CSBS is merely "conjur[ing] supposed harms to its members . . . which will not occur until such time as the OCC grants final approval for an SPNB Charter," which OCC says is not imminent. OCC Br. at 10 (Doc. 12-1). OCC suggests, rather, that the granting of a nonbank charter is far off, and even uncertain altogether: "CSBS's claims depend on the OCC's potential regulation of future third-party applicants, meaning that CSBS must allege or show that these third-party applicants will indeed submit successful applications in a way that creates the substantial risk." *Id.* at 11. But as shown above, the known facts sharply belie this. CSBS asserts that OCC has held "hundreds of meetings" with interested fintechs, a number are "currently going through the application process" and "finalizing their applications," and the agency expects charter decisions by mid-2019. *See supra*. Further, OCC takes the position that corporate entities that are formed now for this purpose will have the benefit of the retroactive preemption of state law.

CSBS therefore seeks leave to propound limited, targeted discovery seeking information directly relevant to OCC's assertions that there is no injury-in-fact and that the matter is not ripe for consideration because the granting of a nonbank charter (and any resulting harm to CSBS's members) is speculative and not imminent. More specifically, CSBS requests discovery in the form of narrowly tailored interrogatories, document requests and depositions to determine the following:

- The nature and number of the companies with which OCC has met concerning the Nonbank Charter, including whether:
 - the companies are subject to state licensing
 - the meetings have involved discussions about pre-emption of state regulation
 - discussions have been held regarding how the companies' operations would be folded into the nonbank charter
- The status of any draft applications, including which companies are preparing or have submitted draft applications, the content of the draft applications, and the following:
 - whether the application contemplates that any regulatory approvals would be required to file a formal application or to obtain preliminary approval
 - whether the application contemplates any conditions being placed in granting preliminary conditional approval
 - the status and content of the OCC "Charter Application Checklist" for each applicant
 - whether an application number or proposed charter number have been assigned
- The status and anticipated submission dates of any expected formal applications, and the same information outlined above regarding each expected formal applicant.
- Whether articles of association and/or an organization certificate been drafted, signed, or adopted for any applicants or potential applicants.
- Whether a home state for the nonbank's main office been contemplated or chosen.

The D.C. Circuit's decision in *Wilderness Society* is particularly on point and supportive of this discovery. 824 F.2d at 4, 6, 10, 19-20. There, conservation groups brought an APA challenge to the Department of Interior's new land surveying and allocation policy, which allegedly had the

effect of shifting acreage out of federal ownership, injuring the groups who use federal lands in Alaska. Although the new policy was currently being implemented, plaintiffs were unable to point to any specific land that they intended to use that had been affected by the policy, and were thus unable to show a sufficient threat of injury. *Id.* at 12, 15. The D.C. Circuit held that the District Court abused its discretion in denying "[p]laintiffs interrogatories and document requests [which] were directly relevant to the standing question"--*i.e.*, "the specificity of the lands which will be affected by the new policy so as to cause them injury." The Circuit faulted the District Court for holding the plaintiff's pleadings to an unduly high standard, while at the same time denying discovery:

When review of plaintiff's standing claim is restricted to the pleadings, the Court has required a less specific showing. To subject plaintiffs to a more stringent review, as the District Court here did, while at the same time denying their discovery requests for the very materials that might enable them to satisfy that more stringent review, amounts to an abuse of discretion. Accordingly, we hold that plaintiffs should have been permitted to seek discovery pertaining to more specific information about the lands that will be affected by the new policy.

Id. at 20 (citation omitted).

Here, Plaintiff's proposed discovery is even more critical, because CSBS's facts call into serious doubt OCC's contentions regarding the status of the charter process, as relevant to standing and ripeness. Thus, to the extent the Court finds jurisdiction lacking based on the current pleadings, discovery is necessary because the Court "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Lopes v. JetSetDC*, 4 F. Supp. 3d 238, 241 (D.D.C. 2014) (quoting *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 30 (D.C. Cir. 2000)). CSBS's proposed discovery therefore is necessary and reasonable, and brought in good faith, and is limited to establishing the Court's jurisdiction over this dispute.

CONCLUSION

The proposed discovery will enable CSBS to show that the Court has subject matter jurisdiction over this dispute. Accordingly, CSBS respectfully requests that this Court grant Plaintiff's Motion for Leave to Conduct Jurisdictional Discovery.

Date: February 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with LCvR 5.3, I hereby certify that on February 5, 2019, a true and correct copy of the foregoing was served on all counsel of record through the Court's CM/ECF system.

/s/ Jennifer Ancona Semko

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