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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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|------------------------------|---|--------------------------------------|
| FEDERAL DEPOSIT INSURANCE |) | Case No. CV 12-03448 DDP (CWx) |
| COMPANY AS RECEIVER FOR |) | |
| FIRST BANK OF BEVERLY HILLS, |) | ORDER GRANTING PLAINTIFF'S EX |
| |) | PARTE APPLICATION FOR |
| Plaintiff, |) | CONTINUATION OF HEARING AND |
| |) | RELATED BRIEFING SCHEDULE |
| v. |) | [Dkt. No. 131] |
| LARRY B. FAIGIN, CRAIG |) | |
| KOLASINSKI, ERIC ROSA, |) | |
| ANNETTE VECCHIO, HOWARD |) | |
| AMSTER, WILLIAM D. KING, |) | |
| STEPHEN GLENNON, ROBERT |) | |
| KANNER, KATHLEEN KELLOGG AND |) | |
| JOHN LANNAN, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

Before the Court is Plaintiff Federal Deposit Insurance Company as Receiver for First Bank of Beverly Hills ("Plaintiff")'s Ex Parte Application for Continuation of Hearing and Related Briefing Schedule. (Dkt. No. 131.) Defendants Larry B. Faigin, William D. King, and Stephen Glennon ("Defendants") oppose the Application. (Dkt. No. 140.) Having considered the parties' submissions, the court will grant the Application in part and modify it as set forth in the following order.

1 **I. Background**

2 On May 19, 2014, Defendants filed a motion for summary
3 judgement, which they noticed for June 23, 2014. (Dkt. No. 125.) In
4 the instant Application, Plaintiff requests that the hearing date
5 and briefing schedule for Defendant's summary judgment motion be
6 continued under Federal Rule of Civil Procedure 56(d) so that it
7 has an opportunity to conduct further discovery in support of its
8 opposition.

9

10 **II. Legal Standard**

11 Rule 56(d) provides:

12 If a nonmovant shows by affidavit or declaration that, for
13 specified reasons, it cannot present facts essential to
justify its opposition, the court may

14 (1) defer considering the motion or deny it;

15 (2) allow time to obtain affidavits or declarations or to
16 take discovery; or

17 (3) issue any other appropriate order.

18 Fed.R.Civ.Pro. 56(d).

19 Although Rule 56(d) "facially gives judges the discretion to
20 disallow discovery when the non-moving party cannot yet submit
21 evidence supporting its opposition, the Supreme Court has restated
22 the rule as requiring, rather than merely permitting, discovery
23 'where the nonmoving party has not had the opportunity to discover
24 information that is essential to its opposition.'" Metabolife
25 Int'l, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001) (quoting
26 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n. 5 (1986).

27 A party requesting time to conduct discovery before responding
28 to a summary judgment motion must show: "(1) it has set forth in

1 affidavit form the specific facts it hopes to elicit from further
2 discovery; (2) the facts sought exist; and (3) the sought-after
3 facts are essential to oppose summary judgment." Family Home & Fin.
4 Ctr., Inc. v. Fed. Home Loan Mortgage Corp., 525 F.3d 822, 827 (9th
5 Cir. 2008) (citation omitted).

6
7 **III. Discussion**

8 The court is persuaded that Rule 56(d) relief is appropriate
9 in this case.

10 As an initial matter, the summary judgment motion was brought
11 early in this case considering the fact-intensive nature of the
12 motion. The motion relies on 43 exhibits comprising 774 pages in
13 support of 123 asserted facts. (See Dkt. Nos. 133-136, 137-138.)
14 However, under the Scheduling Order, fact discovery does not close
15 until August 30, 2014 and initial expert disclosures and reports
16 are not due until September 5, 2014. (Dkt. No. 91.) It is premature
17 for a motion requiring such substantial fact analysis to be brought
18 at a stage when it can be expected that the facts are not fully
19 developed.

20 Plaintiff asserts that it has not had a sufficient opportunity
21 at this stage in the litigation to prove its case because, among
22 other things, (1) it has not had an opportunity to depose
23 Defendants or various third parties (indeed, it appears no
24 depositions have been taken on either side), and (2) with one
25 exception, the parties have yet to exchange documents responsive to
26 their discovery requests. (Declaration of Gregory P. O'Hara in
27 Support of Application ¶¶ 11, 12.) When "a summary judgment motion
28 is filed so early in the litigation, before a party has had any

1 realistic opportunity to pursue discovery relating to its theory of
2 the case, district courts should grant any Rule 56(f) motion fairly
3 freely." Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux
4 Tribes of Fort Peck Reservation, 323 F.3d 767, 773 (9th Cir.
5 2003).¹

6 Defendants contend that Plaintiff has ample evidence at its
7 disposal to support its opposition as a result of a prior Federal
8 Deposit Insurance Company Enforcement Division proceeding in which
9 defendants and certain FDIC examiners testified. (Opposition at 2.)
10 However, Plaintiff asserts that it was not consulted with respect
11 to the prosecution of the enforcement proceeding and raises
12 questions about the admissibility of the earlier testimony.
13 (Application at 6-7; Reply Declaration of Kathleen M. Balderston in
14 Support of Application ¶ 6-8.) Plaintiff also argues that there are
15 parties who did not testify in the earlier proceeding whose
16 testimony it expects to be important to the present case and other
17 sources of evidence on which it intends to rely in preparing its
18 opposition. (Application at 7-8.)

19 Specifically, Plaintiff asserts that it has not yet had the
20 opportunity to take the following categories of discovery:

21 A. Third-party witnesses with personal knowledge of the issues
22 raised in the Motion, including examiners from the FDIC and
23 California Department of Financial Institutions ("DFI") who
24 did not give testimony in the unrelated administrative
proceeding. The facts elicited from subpoena of these
witnesses will relate to the material reviewed and not
reviewed during the relevant examinations.

25
26 ¹ On December 1, 2010 amendments to the Federal Rules Of Civil
27 Procedure became effective. Those amendments renumbered and revised
28 the former text of Rule 56(f) as Rule 56(d), but did not
substantively change the rule in any manner that affects the
court's analysis.

1 B. Expert witnesses whose knowledge and opinions are required
2 in order to counter the factual assertions made in the Motion
3 which purport to establish that the 2006 FDIC and 2007 DFI
4 examinations were conducted according to certain standards.
5 The facts and opinions elicited during expert discovery will
6 relate to the standard of care required in a bank regulatory
7 examination, the depth, scope, care, and quality of the FDIC
8 and DFI examinations, and how the standard for examinations
9 differs from the standard of care and duties to which bank
10 directors and officers are subject.

11 C. Deposition testimony of the Moving Defendants themselves,
12 from whom the FDIC-R intends to elicit facts relating to the
13 nature of the Chinatrust loan participation purchase and other
14 loan approvals pertinent to each defendant, that were known by
15 the Moving Defendants but not by the FDIC and DFI examiners
16 during the 2006 and 2007 examinations.

17 D. Documentary evidence maintained by or in the custody or
18 control of third parties, which the FDIC-R intends to obtain
19 via subpoena. Using evidence produced in response to subpoenas
20 duces tecum, the FDIC-R will elicit further facts that pertain
21 to the information available to FBBH, and specifically to each
22 Moving Defendant, at the time of approving the loans at issue.

23 (O'Hara Decl. ¶ 9.) Plaintiff asserts that it has identified the
24 third-party witnesses with relevant knowledge who it intends to
25 subpoena for production of documents and things, as well as for
26 deposition testimony. (Id.)

27 As Defendant points out, Plaintiff's descriptions of its
28 anticipated sources of evidence are somewhat general. (Opp. at 5-
6.) However, "where, as in the present litigation, [virtually] no
discovery whatsoever has taken place, the party making a [Rule
56(d)] motion cannot be expected to frame its motion with great
specificity as to the kind of discovery likely to turn up useful
information, as the ground for such specificity has not yet been
laid." Burlington N. Santa Fe R., 323 F.3d at 774.

At this stage in the litigation, Plaintiff has sufficiently
identified the evidence it seeks to develop and its relationship to
Defendants' motion. Plaintiff points, by way of example, to

1 Defendant's assertion that "[o]ne of the reasons for FBBH's
2 contemplated move into [acquisition, development, and construction]
3 lending was in response to FDIC criticism of its decreased earnings
4 and low margins." (Defendant's Statement of Uncontroverted Facts
5 and Conclusions of Law ¶ 13 (citing *inter alia* Declaration of
6 Defendant Larry F. Faigan in Support of Motion ¶ 4).) Plaintiff
7 asserts that it "has not yet had an opportunity to question any of
8 the defendants, including those defendants who in 2006 held sizable
9 investment in the FBBH's holding company, as to whether a material
10 reason for FBBH's move into the large ADC lending relationships,
11 such as the ChinaTrust participations, was to quickly grow the bank
12 in order to sell it and realize profit on their investment."
13 (Balderston Decl. ¶ 11) Moreover, Plaintiff asserts, it "has not
14 yet had an opportunity to depose Mr. Faigin ... about discussions
15 with examiners about the Bank's loan underwriting standards, as
16 well as the impact of the Bank's decision to increase earnings by
17 entering into ADC lending upon those standards." (*Id.* ¶ 12.) As
18 illustrated by this example, the court is satisfied that the
19 information sought is reasonably necessary to enable Plaintiff a
20 full and fair opportunity to support its opposition.

21 In view of the foregoing, the court concludes that Plaintiff
22 has met its burden to establish that relief is warranted under Rule
23 56(d). However, because discovery is ongoing and new facts are
24 likely to be developed in support of both parties' positions, the
25 court finds that the most efficacious course of action is to vacate
26 the pending summary judgment motion, rather than grant a
27 continuance on its hearing and briefing schedule.

28

1 **IV. Conclusion**

2 For the reasons set forth herein, Plaintiff's Ex Parte
3 Application is granted in part and modified as follows:
4 Defendant's Motion for Summary Judgment (Dkt. No. 125) is vacated
5 because it is likely that the arguments will be further refined as
6 the result of additional discovery. A new motion for summary
7 judgment shall be filed by Defendant no earlier than September 22,
8 2014.

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10 IT IS SO ORDERED.

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12 Dated: June 2, 2014

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DEAN D. PREGERSON
United States District Judge

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