

[¶5,279] In the Matter of Randolph W. Lenz, J. Donald Weand, Jr., Marcial Cuevas, Jack W. Dunlap, Steven B. Levine, Timothy S. Reed, Brian A. Marks, and Marshall C. Asche, Connecticut Bank of Commerce, Stamford, Connecticut, Docket Nos. 02-174e, 02-158e, 02-160c&b, 02-161c&b, 02-175k, 02-176k, 02-177k, 02-178k, 02-179k, 02-180k, 02-181k, 02-182k (6-17-04). (*This order, only as pertaining to J. Donald Weand, was terminated by order of the FDIC dated 7-8-05; see ¶16,428.*)

FDIC denies respondent's Petition for Interlocutory Review, which challenged the portion of the ALJ's Order on Objections directing him to produce a privilege log.

The FDIC found Lenz's request for interlocutory review failed to satisfy the criteria contained in FDIC Rule 308.28(b).

[.1] Interlocutory Review—Standards—Modification of contested ruling—Inadequate Remedy

[.2] Constitutional Law—Fifth Amendment—Privilege Log

[.3] Disclosures—Privilege

**In the Matter of
RANDOLPH W. LENZ,
J. DONALD WEAND, JR.,
MARCIAL CUEVAS,
JACK W. DUNLAP,
STEVEN B. LEVINE,
TIMOTHY S. REED,
BRIAN A. MARKS, and
MARSHALL C. ASCHE,
individually and as former institution-affiliated parties of
CONNECTICUT BANK OF COMMERCE
STAMFORD, CONNECTICUT
(Insured State Nonmember Bank in Receivership)
DECISION AND ORDER ON INTERLOCUTORY REVIEW**

FDIC-02-174e
FDIC-02-158e
FDIC-02-160c&b
FDIC-02-161c&b
FDIC-02-175k
FDIC-02-176k
FDIC-02-177k
FDIC-02-178k
FDIC-02-179k
FDIC-02-180k
FDIC-02-181k
FDIC-02-182k

INTRODUCTION

Before the Executive Secretary of the Federal Deposit Insurance Corporation (FDIC), pursuant to authority delegated by the FDIC Board of Directors (Board) under 12 C.F.R. §308.102(b)(2)(ii), is a Petition for Interlocutory Review (Petition) referred by the Administrative Law Judge (ALJ) pursuant to 12 C.F.R. §308.28(c) by her order dated April 7, 2004. The Petition was filed by Respondent Randolph W. Lenz (Lenz) on March 16, 2004, and on April 2, 2004, enforcement counsel for the

FDIC (Enforcement Counsel) filed an opposition (Opposition).

BACKGROUND

The underlying matter involves an FDIC administrative proceeding pursuant to section 8 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. §1818, against former officers and directors of Connecticut Bank of Commerce, Stamford, Connecticut (Bank), which was closed by Connecticut bank regulators on June 26, 2002, with the FDIC being appointed as receiver. Specifically, the FDIC charged that Lenz, the Bank's chairman and controlling shareholder, among other things, engaged in unsafe and unsound banking practices and violated federal law and regulation and an FDIC cease and desist order which caused the Bank to lose tens of millions of dollars and directly contributed to its failure. The FDIC sought removal of Lenz from the banking industry pursuant to section 8(e) of the FDI Act, 12 U.S.C. §1818(e), and assessed a civil money penalty against him in the amount of \$2 million pursuant to section 8(i) of the FDI Act, 12 U.S.C. §1818(i).

On April 21, 2003, Enforcement Counsel served on Lenz its First Request for Production of Documents seeking, among other things, documents related to Lenz's finances, businesses and his business relationships. On May 12, 2003, Lenz filed Objections to the FDIC Document Request in which he invoked both generally and specifically his Fifth Amendment privilege with respect to each FDIC document request.¹ Lenz did not provide a privilege log identifying the privileged documents as required by Rule 308.25(e) of the FDIC's Rules of Practice. 12 C.F.R. §308.25(e). On June 13, 2003, the FDIC filed a response arguing that none of Lenz's asserted objections were supported by fact or law. On July 3, 2003, Lenz replied claiming that he did not have control of the documents and that he had properly invoked his Fifth Amendment privilege.

In the meantime, on June 12, 2003, the FBI, pursuant to a search warrant, seized from Lenz's Ft. Lauderdale, Florida business offices virtually all business and personal records on site and transferred them to the FBI field office in Fairfield, Connecticut. The next day, Lenz requested a stay arguing that the impending criminal investigation compromised his right to assert his Fifth Amendment privilege and limited his access to documents seized by the FDIC. On August 5, 2003, the ALJ granted his motion but on December 4, 2003, upon Enforcement Counsel's petition for interlocutory review, the Executive Secretary, acting pursuant to delegated authority, reversed the ALJ's order and lifted the stay.

After the stay was lifted, the ALJ, on March 2, 2004, issued her Order on Objections to FDIC Document Requests (Order on Objections) which is the subject of Lenz's Petition. Specifically, Lenz challenges that portion of the Order on Objections which directs that he produce to Enforcement Counsel a privilege log.²

DISCUSSION

[.1] As a threshold matter, Lenz must demonstrate that the arguments presented in his Petition satisfy one or more of the four criteria for interlocutory review set forth in 12 C.F.R. §308.28(b). In this case, Lenz points to the final two standards as the bases for his request for interlocutory review. In particular, he asserts that subsequent modification of the Order on Objections at the conclusion of the proceeding would be an inadequate remedy or that it would cause unusual delay or expense. See 12 C.F.R. §308.28(b)(3) and (4). Petition at 5–6. In fact, his assertions notwithstanding, Lenz has presented no basis on which to overturn the ALJ's Order.

[.2] First, Lenz's argument that subsequent modification of the ALJ's ruling would be an inadequate remedy is based on the flawed premise that the act of producing a privilege log is testimonial and, therefore, in violation of his Fifth Amendment privilege. See Petition at 7–10, 11–14. Contrary to Lenz's assertion, the Supreme Court's decision in *United States v. Hubbell*, is not controlling here because unlike

the circumstances in *Hubbell*, where the Court found that "collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents..." the documents at issue in this case are already in the government's possession. 530 U.S. 27, 43 (2000).

Instead, the situation in this case is analogous to the facts in *Fisher v. United States* where the Supreme Court, in rejecting the taxpayer's Fifth Amendment privilege claim, noted that "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." 425 U.S. 391, 411 (1976). Likewise, in this case, because the FDIC and the U.S. Department of Justice are well aware of the existence and the location of documents belonging to Lenz and his business entities, the act of producing or acknowledging the existence of the documents communicates nothing of substance to the government. Inasmuch as Lenz has failed to demonstrate that his constitutional right against self-incrimination is at stake, he cannot establish that interlocutory review is warranted under Rule 308.28(b)(3).

Lenz's argument for review under 308.28(b)(4) is similarly unpersuasive. He asserts that production of a privilege log would be burdensome and expensive because of the travel costs and attorney fees associated with conducting a document review in Connecticut.³ Petition at 17. Litigation expenses are not the type of expense that Rule 308.28(b)(4) contemplates. See *In the Matter of Citizens Bank of Clovis*, FDIC Enforcement Decisions and Orders, ¶ 8016, 1–58, 1–60 (1992); 1992 WL 812920, at *2 (May 5, 1992). Treating costs and time inevitably involved in litigation as an adequate basis for interlocutory review would completely undermine the extraordinary nature of the relief. *Id.*

[.3] FDIC Rules of Practice recognize that a party may have privileged documents which are not discoverable. 12 C.F.R. §308.24(c). But the FDIC Rules do not permit parties to make a blanket assertion of privilege—instead, consistent with Federal Rules of Civil Procedure, FDIC Rules require that "the producing party reasonably identify all documents withheld on grounds of privilege and produce a statement of the basis for the assertion of the privilege." 12 C.F.R. §308.25(e); see F.R. Civ. P. 25(c) and 45(d). Courts have routinely held that the Federal Rules require a party resisting disclosure to produce a document index or privilege log. See, e.g., *In re Grand Jury Subpoena*, 274 F. 3D 563, 575 (1st Cir. 2001); *Avery Dennison Corp. v. Four Pillars*, 190 F.R.D. 1, 1 (D.D.C. 1999) (describing privilege logs as "the universally accepted means" of asserting privilege claims in federal court). But Lenz has not made any submission that would warrant a claim of privilege.

CONCLUSION

Lenz's request for interlocutory review fails to satisfy the criteria contained in FDIC Rules 308.28(b). Therefore, he is required, as directed by the ALJ's Order on Objections and in accordance with FDIC Rules of Practice, to produce—by a date established by the ALJ upon receipt of this order—a log reasonably describing each document for which he asserts a claim of privilege.

ORDER

For the reasons set forth above, it is hereby ORDERED that Respondent's Petition for Interlocutory Review is DENIED.

Pursuant to delegated authority, upon the advice and recommendation of the Deputy General Counsel for Litigation.

Date at Washington, D.C., this 17th day of June, 2004.

¹ Lenz raised additional challenges to each of the FDIC's document requests

including claims of attorney-client and work product privilege, irrelevance, and assertions that the FDIC's requests were overbroad and ambiguous but it is his assertion of his Fifth Amendment privilege that is the basis for his refusal to produce a privilege log and the subject of his Petition. Petition at 1.

² Lenz's co-respondent, Donald Weand, who has not sought interlocutory review, was also directed in the Order on Objections to produce a privilege log.

³ In rendering this decision, we implicitly reject Lenz's claim that he no longer controls the document in question for purposes of producing them or creating a privilege log. See Petition at 15–16. Control is defined not as possession but as whether a party has the legal right to obtain access to the documents at issue. See, e.g., *Tavoulareas v. Piro*, 93 F.R.D. 11, 20 (D.D.C. 1981). As noted in our previous decision on interlocutory review, "although the FBI's custody of Lenz's documents may be inconvenient for him and, perhaps, pose some logistical difficulties, he is by no means deprived of access to the records in question." *In the Matter of Randolph Lenz, et al.*, FDIC Enforcement Decisions and Orders, ¶ 5276, A-3301 (2003); 2003 WL 23273837, at *4 (Dec. 4, 2003).

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