

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	
CONFERENCE OF STATE BANK)	
SUPERVISORS,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 1:18-CV-02449 (DLF)
OFFICE OF THE COMPTROLLER OF)	
THE CURRENCY,)	
)	
and)	
)	
JOSEPH M. OTTING, in his official)	
capacity as Comptroller of the Currency,)	
)	
Defendants.)	
)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S ALTERNATIVE MOTION FOR
LEAVE TO CONDUCT JURISDICTIONAL DISCOVERY**

INTRODUCTION

Plaintiff CSBS has failed to provide a meaningful explanation of how the questions of jurisdictional standing and ripeness could be substantively informed through discovery. As the Court previously ruled, CSBS will not have standing to challenge the OCC’s Special Purpose National Bank (“SPNB”) chartering authority as it relates to financial technology (“fintech”) companies until such time as the Agency should actually issue such a Charter. *See CSBS v. OCC* (hereinafter, “*CSBS I*”), 313 F. Supp. 3d 285, 296 (D.D.C. 2018) (“[E]ach of those [alleged] harms is contingent on whether the OCC charters a Fintech.”); *id.* at 298 (“The OCC’s national bank chartering program does not conflict with state law until a charter has been issued.”). CSBS is precluded from re-litigating this issue, either in its opposition to the OCC’s Motion to Dismiss or here in the context of a discovery motion. *See Defendants’ Memorandum of Points and*

Authorities in Support of Defendants' Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim, at p. 9. The Court's analysis in *CSBS I* makes clear that the decision to accept applications—the first of the four chartering-process milestones identified by the Court—does not, on its own, create an injury in fact. Until the OCC grants final approval of an application for an SPNB Charter, CSBS will not be able to establish that any of its members has suffered an injury. *See CSBS I*, at 313 F. Supp. 3d 296, 298.

Discovery is not necessary to establish whether the OCC has granted an SPNB Charter or the pendency of any application for such a Charter. The public record reflects that (1) the OCC has not granted an SPNB Charter, and (2) no fintech has filed an application for an SPNB Charter. Discovery regarding this latter contingency, the filing of an application for an SPNB Charter, is not necessary because the filing of an application seeking a bank charter from the OCC is not an event that is shrouded in secrecy. The fact that a party has filed an application for a national bank charter is a matter of public record. *See* 12 C.F.R. § 5.8 (detailing public notice requirements); Declaration of Stephen A. Lybarger, Deputy Comptroller for Licensing, Office of the Comptroller of the Currency, in Opposition to Plaintiff's Motion for Leave to Conduct Jurisdictional Discovery ("Lybarger Decl.") at ¶¶ 8-9, attached hereto as Exhibit 1. *See also CSBS I*, 313 F. Supp. 3d at 300. The OCC also promptly posts notification that a charter application has been filed on the OCC's website, the "Weekly Bulletin." Lybarger Decl. at ¶ 8. *See Comptroller's Licensing Manual, General Policies and Procedures* at 6, available at <https://www.occ.gov/publications/publications-by-type/licensing-manuals/gpp.pdf>.

Accordingly, the discovery CSBS seeks is both unnecessary and overbroad. The requested discovery is entirely unnecessary because, as outlined above, all of the relevant information that is necessary to determine whether the OCC is actively considering an SPNB Charter application is available through public records. There is *no* meaningful dispute that, as

of the date of filing, no fintech has filed an SPNB Charter application and the OCC has issued no such Charter. The requested discovery is overbroad because it seeks information far beyond the limited factual inquiry that the Court has previously deemed to be relevant to the standing issue, *i.e.* has the OCC issued a Charter. The Court should conclude that the proposed discovery, which seeks to track informal discussions between the OCC and parties interested in a Charter or draft submissions, would adduce information that is not relevant to the disposition of the threshold standing and ripeness issues. Indeed, given that there is no meaningful dispute as to the relevant operative facts necessary to determine whether CSBS can demonstrate standing and ripeness, CSBS's apparent motivation for seeking what it calls "limited" discovery becomes plain: it is less interested in adducing necessary facts relevant to the motion than it is in seeking to insert itself as a monitor over the OCC's chartering process (and, as a byproduct, to dissuade potential applicants¹ from discussing a federal SPNB Charter with the OCC).

The Court should deny the motion because *all* facts relevant to the question of standing and ripeness are already before the Court. Recognizing that, going forward, a decision by the OCC to grant an SPNB Charter would have an impact on the threshold jurisdictional issues currently before the Court, the OCC commits that it will promptly notify the Court and CSBS when an applicant makes public notice required under 12 C.F.R. § 5.8.

¹ Indeed, CSBS is actively championing efforts to streamline and increase uniformity among licensing and supervision standards, reportedly in response to complaints from fintechs that the state-by-state licensing process is overly burdensome. *See* Rachel Witkowski, *States Agree to Sweeping Reforms for Fintechs*, American Banker (Feb. 14, 2019, 4:28 PM), <https://www.americanbanker.com/news/states-agree-to-sweeping-reg-reforms-for-fintechs?feed=00000159-89d1-da1e-af7f-fdd7b5650000>.

ARGUMENT

Ordinarily, a plaintiff who wants to “unlock the doors of discovery” must file a complaint that “survives a motion to dismiss.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Complaint cannot survive the Agency’s Motion to Dismiss for the reasons stated therein, and the Court should not allow unnecessary and overbroad discovery, especially where such discovery may have a “chilling” effect on financial institutions interested in entering into preliminary discussions with the OCC about pursuing an SPNB Charter.

A. Discovery Is Unnecessary

The D.C. Circuit has held that before jurisdictional discovery may be granted, a plaintiff must make a good-faith showing that discovery will reveal facts sufficient to establish jurisdiction. *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090 (D.C. Cir. 1998); *see also Mwani v. bin Laden*, 417 F.3d 1, 17 (D.C. Cir. 2005) (affirming denial of jurisdictional discovery where facts plaintiffs sought to uncover would not “affect [the] jurisdictional analysis.”). CSBS cannot make this showing. No information learned in the discovery proposed by CSBS will alter the key facts that, as of the date of filing, no fintech company has filed an application for an SPNB Charter and the OCC has not granted an SPNB Charter. *See Lybarger Decl.* at ¶¶ 2-3; *see also CSBS I*, 313 F. Supp. 3d at 294 (explaining that a court may consider documents outside the pleadings to evaluate whether it has jurisdiction; noting that a court may consider the complaint supplemented by undisputed facts evidenced by the record). While discovery is normally granted freely, that liberality does not overcome core considerations such as whether the context suggests that discovery is unnecessary or that the court’s lack of jurisdiction is manifest, nor does it untether proposed discovery from the bounds of relevance. *See Acker v. Royal Merchant Bank and Finance Co., Ltd.*, 1999 WL 1273476, *5 (D.D.C. 1999) (“Although discovery should be granted freely, it can be denied when the plaintiff has failed to

present facts that could establish jurisdiction.”; collecting cases denying jurisdictional discovery); *see also APP Dynamic ehf v. Vignisson*, 87 F. Supp. 3d 322, 330-31 (D.D.C. 2015) (denying plaintiff’s request for jurisdictional discovery where plaintiff “ha[d] not . . . pointed to any fact that, if discovered, would indicate that a court in the District of Columbia might assert jurisdiction over [the defendant]”) (internal quotations and citations omitted); *Shaheen v. Smith*, 994 F. Supp. 2d 77, 89 (D.D.C. 2013) (denying plaintiff’s request for jurisdictional discovery because plaintiff had not indicated how discovery could provide new and relevant information that could supplement plaintiff’s existing jurisdictional claims).

As explained in the OCC’s briefing in support of its motion to dismiss, *see Defendants’ Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim* at pp. 9-13, in terms of satisfying the Court’s four prerequisites for when CSBS might have standing to sue, the OCC remains several steps away from actually granting an SPNB Charter. *See CSBS I*, 313 F. Supp. 3d at 296. As was the case in *CSBS I*, no fintech company has yet filed an application for an SPNB Charter, let alone advanced to either the third or final step of receiving SPNB Charter approval² from the OCC. *See id.* at 296-97. Indeed, there is no guarantee that an application for an SPNB Charter will ever be filed.

² The “data” advanced by CSBS to suggest that a charter grant is impending is inaccurate, misleading, and unverifiable. *See Lybarger Decl.* at ¶¶ 12-16. First, contrary to Mr. Townsley’s declaration, it is not possible to derive information relating back to 1991 from the public website. *Id.* at ¶ 11. Second, the analysis that was done is inaccurate. *Id.* at ¶¶ 12-16. Third, the most recent data derived from the OCC database regarding applications reveal timeframes from receipt of an application to the grant of a charter that diverge from the analysis offered by Mr. Townsley. *Id.* at ¶ 15. *Cf. Clapper v. Amnesty Int’l*, 568 U.S. 398, 409 (2013) (stating that threatened injury must be certainly impending to constitute injury in fact, and allegations of possible future injury are not sufficient). Each charter application is unique and the Court (and the parties) should not infer that processing times for SPNB Charters (or any charter application) will necessarily fall within the timeframe predicted by such analyses. *Id.* at ¶ 17. As noted above, the OCC commits that it will promptly notify the Court and CSBS when an SPNB Charter applicant makes the public notice required by 12 C.F.R. § 5.8.

Turning to the arguments proffered by CSBS to support its motion, the cases cited by CSBS do not, as it suggests, support the broad notion that jurisdictional discovery is liberally granted in this Circuit in all contexts. *See Davis v. United States*, 196 F. Supp. 3d 106, 120-21 (D.D.C. 2016) (jurisdictional discovery granted “in this context” where plaintiffs challenged application of exceptions to FTCA). Further, none of the cases present the same issue as the instant matter, *i.e.* whether discovery should be granted when *all* facts relevant to the question of standing and ripeness are already before the Court, and when any factual development that might alter the Court’s analysis will be a matter of public record. *See, e.g., Natural Resources Defense Council v. Pena*, 147 F.3d 1012 (D.C. Cir. 1998) (jurisdictional discovery on remand appropriate to establish prospective injury that would provide standing to seek injunction); *Citizens for Responsibility and Ethics in Washington v. Office of Administration*, Case No. 07-964 (CKK) (D.D.C. February 11, 2008) (granting limited discovery to determine whether office was “agency” for purposes of Freedom of Information Act, noting that “most of the discovery that [the plaintiff] seeks in its Opposition is entirely unnecessary in light of the limited question at issue.”).

The remaining cases primarily relied upon by CSBS stand for the unremarkable proposition that jurisdictional discovery is appropriate in order to establish personal jurisdiction or contacts to a particular forum. *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1343, 1352 (D.C. Cir. 2000); *Lopes v. Jetsetdc, LLC*, 4 F. Supp. 3d 238, 240 (D.D.C. 2014) (limited discovery on issue of defendant’s home state of domicile following motion to dismiss for lack of subject matter jurisdiction for lack of complete diversity between parties). Cases such as *GTE* and *Lopes*, where jurisdiction hinged on “fact-specific” questions of degree of personal contacts with the forum and of domicile, *see Lopes*, 4 F. Supp. 3d at 241, have little, if any, relevance to the standing and ripeness questions that are presently before the Court. Here, the key facts relevant to the instant jurisdictional question are uncontested: no fintech company has yet filed an

application for an SPNB Charter, let alone received a final SPNB Charter approval from the OCC. Accordingly, *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 69 (D.D.C. 2004), cited by Plaintiff, actually cuts against permitting jurisdictional discovery in the present context. *Cf.* 350 F. Supp. 2d at 69 (“Most important, if the facts alleged in the Petition were shown to be true, there would be habeas jurisdiction in this matter. The Court will therefore authorize jurisdictional discovery in this case.”).

B. The Specific Discovery Requests Are Overbroad

Jurisdictional discovery is not warranted where a plaintiff’s requests are not narrowly tailored to produce information relevant to the issue of jurisdiction. *See Coalition for Mercury-Free Drugs v. Sebelius*, 725 F. Supp. 2d 1, 4 (D.D.C. 2010). CSBS’s specific discovery requests are far from narrowly tailored to the issue of standing. CSBS is asking the Court to allow sprawling and time-consuming discovery on irrelevant matters, and thereby requests that the Court impose an extraordinary burden on the OCC.

The discovery that CSBS seeks—consisting of interrogatories, document requests, and depositions related to, *inter alia*, which companies have prepared or submitted draft applications, the content of the draft applications, and the nature and number of companies with which the OCC has met—would allow CSBS to probe into information that (1) is irrelevant to the Court’s four prerequisites for when CSBS might have standing to sue; and (2) may otherwise be deemed confidential and privileged “non-public OCC information” as defined at 12 C.F.R. § 4.32(b), or Confidential Business Information exempted from disclosure under Freedom of Information Act (“FOIA”) Exemption 4, *see* 5 U.S.C. § 552(b)(4); 5 C.F.R. § 10000.9. Lybarger Decl. at ¶ 7; *Cf.* *APP Dynamic*, 87 F. Supp. 3d at 329 (D.D.C. 2015) (“Where there is no showing of how jurisdictional discovery would help plaintiff discover anything new, it is inappropriate to subject defendants to the burden and expense of discovery.”) (internal modifications and quotations omitted).

The discovery that CSBS seeks would not reveal any information relevant to the existence of a specific future injury-in-fact that is cognizable under the Court's opinion in *CSBS I*. For example, discovery seeking information regarding whether interested parties have filed draft applications with the OCC is not probative for the rather obvious reason that draft applications are not, in fact, an application upon which the OCC will act. The OCC's purpose in reviewing a draft application during the pre-filing phase is not to assess whether a potential application will satisfy the requirements for approval. Rather, it is intended to identify policy, legal, and supervisory issues that may bear on the appropriateness of a potential application. Lybarger Decl. at ¶ 5. "The OCC employs the draft application process to better understand the potential challenges inherent in unusual or complex filings and the major obstacles from a policy or risk perspective. Filing a draft application does not guarantee that the OCC will approve a formal application."

Comptroller's Licensing Manual Supplement, Considering Charter Applications From Financial Technology Companies at p. 4, n.11.³ Further, a party may ultimately decide to not apply for a Charter after submitting a draft application. Declaration of Stephen A. Lybarger, Deputy Comptroller for Licensing, Office of the Comptroller of the Currency, in Support of the OCC's Motion to Dismiss, dated January 7, 2019 (ECF No. 12, attachment 2, Ex. B) at ¶ 13-14.

CSBS's reliance on *Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987), which CSBS asserts is "particularly on point and supportive of this discovery," see *Plaintiff's Memorandum of Points and Authorities in Support of Its Alternative Motion for Leave to Conduct Jurisdictional Discovery* at p. 7, is misplaced. First, as noted above, CSBS is precluded from seeking to re-litigate the Court's ruling that its members will not suffer a cognizable injury until the OCC issues an SPNB Charter. *Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion*

³ Retrieved from <https://occ.gov/publications/publications-by-type/licensing-manuals/pub-considering-charter-apps-from-fin-tech-co.pdf>.

to Dismiss for Lack of Jurisdiction and for Failure to State a Claim at p. 9. Second, the case is distinguishable on the basis of the nature of the information sought through discovery. In a scenario that the *Wilderness Society* district court described as “basically a problem of proper land accounting,” the plaintiff conservation groups were unable to identify any specific land that (a) their members intended to use, and (b) would have been affected by a new policy promulgated by the Department of Interior. *See Wilderness Society*, 824 F.2d at 10, 15. Following a dismissal for lack of standing based, in part, on a finding of no injury, the D.C. Circuit reversed and remanded in part to allow discovery pertaining to the effect of the new policy on specific lands. *See id.* at 10, 15-17. Significantly, the discovery sought by the plaintiffs in the *Wilderness Society* case largely concerned existing classifications of land, acreage selections, and the availability of certain land for conveyance—facts that the D.C. Circuit deemed “directly relevant” to the jurisdictional dispute over standing. *Id.* at 19-20.

Here, the nature and scope of discovery sought by CSBS is not “directly relevant” to the jurisdictional dispute over standing because it is not aimed at discovering any facts that the Court has determined to be relevant to standing and ripeness. Those facts are, and will be, matters of public record. *See Lybarger Decl.* at ¶ 8 (noting that notice of the filing of an application for an SPNB Charter will be published in the OCC’s Weekly Bulletin, *available at* <https://occ.gov/>; noting that the public portion of a Charter application will be available in the OCC Electronic Reading Room, *available at* <https://foia-pal.occ.gov/App/ReadingRoom.aspx>); at ¶ 9 (noting that issuance of an SPNB Charter will be published in a newspaper). In addition, the OCC voluntarily will undertake to immediately inform the Court and CSBS when an SPNB Charter applicant makes public notice required by 12 C.F.R. § 5.8.

Finally, the Court should consider the impact that granting overbroad discovery concerning confidential OCC information would have upon the ability of the Agency to conduct discussions with

parties that are interested in an SPNB Charter. Proprietary or confidential business information provided to an agency such as the OCC during the course of discussions⁴ is normally exempted from disclosure under Freedom of Information Act Exemption 4, *see* 5 U.S.C. § 552(b)(4); 5 C.F.R. § 10000.9, because the disclosure could cause substantial competitive harm to the submitter. *See* 12 C.F.R. § 4.12(b)(4) and § 4.16. OCC regulations expressly designate materials created or obtained in connection with the Agency’s licensing of a national bank as “non-public OCC information” and do not make them available to the public. *See* 12 C.F.R. § 4.32(b)(1)(i)(A).

Granting CSBS (and presumably its members) access to OCC’s licensing materials on the terms proposed in CSBS’s motion for jurisdictional discovery would have a chilling effect on the interest of fintech companies in pursuing an SPNB Charter. Knowing that discussion materials—however informal—reflecting an entity’s potential business plans may be made available to the state regulators that make up CSBS and who view the SPNB Charter as a threat to their own jurisdiction and initiatives in the fintech area⁵ would intimidate anyone seeking to open a discussion with the OCC. And this may in fact be the primary purpose behind CSBS’s request: CSBS cannot seriously maintain that the Court is not able to resolve the sole factual question upon which the standing and ripeness issues depend absent discovery.

CONCLUSION

For the reasons stated above, the Court should deny CSBS’s Alternative Motion for Leave to Conduct Jurisdictional Discovery.

⁴ The OCC permits “applicants or an interested person” to designate specific information as “confidential.” *See, Comptroller’s Licensing Manual, General Policies and Procedures* at 4. Retrieved at <https://www.occ.gov/publications/publications-by-type/licensing-manuals/gpp.pdf>.

⁵ *Supra* note 1.

Date: February 19, 2019

Respectfully submitted,

/s/ Gregory F. Taylor

JONATHAN V. GOULD

BAO NGUYEN

GREGORY F. TAYLOR

D.C. Bar No. 417096

PETER C. KOCH

ASHLEY W. WALKER

GABRIEL A. HINDIN

MICHAEL K. MORELLI

HANNAH HICKS

Office of the Comptroller of the
Currency

400 7th Street S.W.

Washington, D.C. 20219

(202) 649-6300 – phone

(202) 649-5709 – fax

gregory.taylor@occ.treas.gov

peter.koch@occ.treas.gov

ashley.walker@occ.treas.gov

gabriel.hindin@occ.treas.gov

michael.morelli@occ.treas.gov

hannah.hicks@occ.treas.gov

Attorneys for Defendants