

STATE OF NORTH CAROLINA
WAKE COUNTY

IN A MATTER
BEFORE THE COMMISSIONER OF BANKS
DOCKET NO. 2005:008:CF

IN RE:)
)
ADVANCE AMERICA, CASH ADVANCE)
CENTERS OF NORTH CAROLINA, INC.)
_____)

**OPPOSITION TO JOINT MOTION
TO QUASH AND FOR A PROTECTIVE ORDER**

Advance America, Cash Advance Centers of North Carolina, Inc. ("Advance America-NC"), respectfully submits this Opposition to the Joint Motion to Quash and for a Protective Order filed by the Office of the Commissioner of Banks ("OCOB") and the Office of the Attorney General ("OAG") (together, "Petitioners").

INTRODUCTION

On April 18, 2005, Advance America-NC noticed the depositions of Attorney General Roy Cooper, Senior Deputy Attorney General Joshua N. Stein, Special Deputy Attorney General L. McNeil Chestnut, Assistant Attorney General Philip A. Lehman, Assistant Attorney General M. Lynne Weaver, and Director of Consumer Finance Division, Office of the Commissioner of Banks, W. Reitzel Deaton. Petitioners filed a Joint Motion to Quash and for a Protective Order on April 25, 2005. Petitioners have not opposed the deposition of the OCOB's Mr. Deaton, which was noticed for May 11, 2005. Counsel for Petitioners has advised counsel for Advance America-NC of a conflict on that date and, accordingly, the deposition will be scheduled for sometime shortly after May 11, as we expect will be agreed upon by the parties.

Advance America-NC contends that the Joint Motion to Quash should be denied, and all the depositions noticed should go forward. We will agree, however, to conduct such depositions within the limiting framework articulated by the Commissioner pursuant to: i) the ruling of April 26, 2005, limiting the scope of permissible discovery to public statements made by the government and statements made to representatives of Advance America-NC during private meetings or otherwise; ii) the pre-hearing order of April 21, 2005, dismissing the Check Casher Act allegations, removing the retrospective focus of this proceeding, and clarifying that the only issue will be whether Advance America-NC's "current operations" violate the Consumer Finance Act; and iii) the ruling of April 26, 2005, removing allegations from this proceeding that Advance America-NC violated the Consumer Finance Act pursuant to N.C.G.S. § 53-166(b) by engaging in an unlawful "device, subterfuge, or pretense" to evade the Act's coverage. Petitioners already have produced some documents pertaining to public statements made by government representatives (including Messrs. Cooper, Stein, Chestnut and Lehman), their meetings with Advance America-NC, and the portions of Consumer Finance Act which remain at issue in this case. By the Commissioner's ruling on April 26, this evidence constitutes relevant information pertinent to Advance America-NC's defense. We respectfully submit that Advance America-NC is entitled to depose the government representatives regarding these statements and possibly others because this discovery would be "reasonably calculated to lead to the discovery of admissible evidence." N.C. R. Civ. P. 26(1).

Despite the force of their desire to avoid depositions, what is notable is that Petitioners have not claimed specifically that they do *not* have personal, first-hand knowledge of the matters that remain at issue in this case. In fact, the documents they have produced and their responses to interrogatories demonstrate exactly the opposite – given that *they made* the

statements at issue and *they attended* the pertinent meetings with representatives of Advance America-NC. According to the Rules of Civil Procedure, the statements and meetings already disclosed by Petitioners, and any others, are subject to deposition. In order to fairly complete the record in this matter, Advance America-NC should be permitted to inquire regarding these issues – as limited by the Commissioner's rulings set forth above. Accordingly, Advance America-NC asks that the Joint Motion to Quash and for a Protective Order be denied, in whole or in part.

ARGUMENT

At the hearing on April 26, 2005, the Commissioner granted Petitioners' Joint Motion for a Protective Order regarding the majority of Advance America-NC's discovery requests. However, the Commissioner required Petitioners to produce all public statements made by the OCOB or OAG, and Petitioners also produced certain speeches, opinions, studies, press releases, litigation-related documents, and consumer complaints pertaining to payday lending, as well as correspondence with Advance America-NC. *See* Transcript of Hearing at 57-58, 93-94. Petitioners have admitted, in their responses to interrogatories and at the April 26 hearing, *see id.* at 67-68, that meetings occurred between representatives from Advance America-NC and the Petitioners' offices, and that all six of the noticed deponents were present at such meetings -- thereby providing them with personal knowledge regarding what occurred. According to the rules of discovery and civil procedure providing a right to depositions to discover evidence calculated to lead to relevant information, *see, e.g.*, N.C.G.S. § 150B-39, Advance America-NC should be entitled to inquire regarding these meetings and statements.

Petitioners advance several arguments in support of their motion to quash and for a protective order. They contend in general that depositions of government officials are "rarely allowed," and that Advance America-NC has shown no "compelling need" to take any of the

requested depositions. Petitioners also claim (again only generally) that the putative deponents "have no competent or relevant evidence to provide," and that any evidence Advance America-NC might need is otherwise available. Finally, Petitioners posit that requests to depose opposing counsel are frowned upon. (Mem. in support of Joint Motion at 5-6.) None of these positions should carry the day.

I. DEPONENTS POSSESS INFORMATION THAT IS RELEVANT TO THIS PROCEEDING.

A. Petitioners, As Government Officials, Personally Possess Unique, Relevant Information And Advance America-NC Has The Right To Learn Such Information Through Deposition.

Advance America-NC should be entitled to take depositions of the government officials, even if such depositions are to be limited in time or scope, because these deponents have relevant information known only to them. The test applied by courts to determine whether to allow depositions of government officials requires a showing that the deposition i) is necessary to obtain information that is not available from another source, and ii) would not significantly interfere with the performance of official duties. *See, e.g., Sanstrom v. Rosa*, No. 93 Civ. 7146, 1996 U.S. Dist. LEXIS 11923 (S.D.N.Y. Aug. 16, 1996) (allowing deposition of Governor Cuomo because he possessed unique pertinent information). Petitioners argue that depositions of high-ranking officials are not allowed as a matter of course; the cases, however, including the cases cited by Petitioners, hold that in appropriate cases such depositions *are* permitted. Accordingly, they should be permitted here.

Courts regularly require the depositions of high-ranking government officials, order the depositions of alternative individuals (such as deputies or assistants to the high-ranking official), and provide for the submission of offers of proof from the deposing party

or declarations from the prospective deponents. In *Gibson v. Carmody*, No. 89 Civ. 5358, 1991 WL 161087 (S.D.N.Y. Aug. 14, 1991), for example, the plaintiff sought the deposition of the former Police Commissioner in a case alleging that several police officers had violated his civil rights. The court allowed the deposition to go forward, but placed parameters regarding the length of time and the date. The court did not limit the topics to be explored at the deposition, but acknowledged that "this does not constitute a ruling on the admissibility of evidence elicited with respect to [plaintiff's] theories." *Id.* at *1. The court continued:

While the taking of depositions of present or former government officials at the level of Police Commissioner should not lightly be granted, it is clear that Commissioner Ward *personally participated in proceedings* relating to or stemming from the investigation of the facts underlying this case . . . and fairness to the parties requires that, under the conditions described above, they be permitted to depose him.

Id. (emphasis added) The documents provided in the instant proceeding by Petitioners and their responses to interrogatories, as outlined in part by Advance America-NC's counsel during the April 26, 2005 hearing, show that the representatives whose depositions have been noticed participated personally in meetings, made pertinent public statements, and otherwise "participated in proceedings relating to or stemming from the investigation of the facts underlying this case." Therefore, as in *Gibson v. Carmody*, fairness dictates that the depositions sought here should be permitted to go forward.

Similarly, in *Lederman v. Giuliani*, No. 98 Civ. 2024, 2002 WL 31357810 (S.D.N.Y. Oct. 17, 2002), artists brought suit against New York City, the mayor and several officials alleging selective enforcement of anti-defacement ordinances. The court permitted the deposition of Mayor Giuliani because "it is Giuliani who best knows whether he decided to selectively enforce the City's anti-defacement provisions against plaintiffs" *Id.* at *2. The

court also allowed the depositions of the Police Commissioner and the Communications Director for the City because they "*may* also have unique, personal knowledge that would assist plaintiffs in the development of their remaining claims." *Id.* (emphasis added).¹ In the instant case, the Commissioner should permit all of the depositions, and limit their scope by application of his discovery ruling propounded at the April 26, 2005, hearing. At a minimum, prior to issuance of a protective order or otherwise quashing the deposition notices, the Commissioner should require all of the prospective deponents to submit declarations indicating their knowledge as to the issues on which discovery has been ordered. *See also Friedlander v. Roberts*, Nos. 98 Civ. 1684 and 8007, 2000 WL 1471566 (S.D.N.Y. Sept. 28, 2000) (calling it a "close question," but quashing the deposition of Mayor Giuliani because the court had *allowed* the deposition of a deputy who had pertinent information and the mayor's declaration did not indicate that he had unique knowledge).

Moreover, as noted above, even the cases cited by Petitioners in their Memorandum do not support the blanket denial of depositions of government officials and representatives. For instance, in *Marisol A. v. Giuliani*, No. 95 Civ. 10533, 1998 U.S. Dist. LEXIS 3719 (Mar. 23, 1998), the chief case relied upon by Petitioners, the court quashed the deposition of Mayor Giuliani, but *only* because the court had i) allowed the depositions of several other government officials, and ii) determined that Mayor Giuliani did not have any information that the other government officials – whose depositions *were* permitted – did not

¹ The court granted the motion to quash several other depositions, but only after those individuals had submitted declarations stating that they lacked material knowledge going to plaintiffs' claims. *Id.* The putative deponents here have submitted no such declarations, nor could they, given admissions already made concerning their personal participation in meetings with Advance America-NC representatives, and in the making of public statements relevant to Advance America-NC's defense.

have. *See id.* at **4-5 ("[s]ince Mayor Giuliani had made public comments regarding advice received from [another official], which were reported in the press, this Court ordered that [the other official's] deposition could include the factual underpinnings of these publicized recommendations and conclusions").² Here, Petitioners have argued that Attorney General Cooper's deposition should be quashed, and contended (only in general terms) that he has no unique information, but they have not offered that other government representatives and officials – such as the others whose depositions were noticed – share that information or could testify to the "factual underpinnings" of public statements.³

The other cases cited by the Petitioners similarly are inapposite here, because they *recognize* the right to depose government officials under appropriate circumstances. In *United States v. Morgan*, 313 U.S. 409 (1941), the district court had *permitted* the deposition of the Secretary of Agriculture, and the Supreme Court, in *dicta*, only criticized the decision to allow the "prob[ing] of the mental processes of the Secretary" due to the fact that the Secretary had acted as the judge in the matter. *See id.* at 421-22. In *In re United States*, 985 F.2d 510 (11th Cir. 1993), the court quashed the deposition of the Commissioner of the Food & Drug Administration because i) he was not the Commissioner at the time the challenged decision occurred, and ii) other officials with pertinent knowledge *had* appeared for depositions. *N.F.A. Corporation v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 84-85 (M.D.N.C. 1987), granted a motion for a

² We note as an aside that, in *Giuliani*, the City produced over 25,000 pages of documents to the plaintiffs.

³ While personnel from the Office of the Commissioner of Banks were present at certain meetings and involved in the making of certain public statements, Petitioners' discovery responses establish that other information is uniquely possessed by the deponents of the Office of the Attorney General.

protective order as to a party's primary attorney on the basis that "[i]f there are other persons available who have the information, they should be deposed first." *Id.* at 86; *see also id.* at 85 n.2 (noting that "[e]xamples where deposition of an attorney is *both necessary and appropriate* [include where] [t]he attorney may be a fact witness") (emphasis added). In sum, Petitioners cite *no* case where depositions were completely precluded where a party sought the depositions of government officials to support the development of facts for its case.

B. The Fact that Deponents Are Attorneys Is Beside the Point and Does Not Preclude the Right to Take their Depositions.

Petitioners state that "it is highly unusual and irregular for counsel in a case to attempt to depose opposing counsel." (Mem. in support of Joint Motion at 1.) Petitioners also cite *State v. Simpson*, 314 N.C. 359, 373, 334 S.E.2d 53, 62 (1985) for the proposition that there is "a natural reluctance to allow attorneys to appear in a case as both advocate and witness." (Mem. in support of Joint Motion at 5.) It is ironic that Petitioners now cite the very same cases and rationale that were cited by Advance America-NC in opposing the OAG's intervention based on our need to preserve the right to call these government representatives as witnesses. These depositions would not be of "opposing counsel" if the OAG had not intervened in this case and created the very obstacle to which they hope to cling; status as counsel does not make the potential testimony that these government representatives would offer any less relevant to this proceeding. Similarly, the fact that Petitioners' counsel have never "experienced any previous attempt by opposing counsel to depose them in a case brought by the State," *id.* at 2, is not a colorable argument. This is a unique case of enormous importance to Advance America-NC and of statutory first impression. Petitioners, both of their own volition and by order of the Commissioner, have assessed as relevant and consequently produced public statements,

correspondence, and other pertinent documents – many of which were authored by the potential deponents. They also have conceded personal participation at meetings relevant to this proceeding and important to Advance America-NC's defense. To now argue – without any specifics – that the same individuals lack relevant personal information is disingenuous.

Similarly, Petitioners' argument to the effect that Advance America-NC was present at any meetings and therefore should know what happened is immaterial to the question of whether relevant evidence could be derived from deposing others present. First, the argument presumes that the Advance America-NC representatives at the referenced meetings can recall completely what occurred. Second, even if they do recall, Advance America-NC is entitled to discover evidence that may corroborate these recollections, or undercut them. This is one important purpose of discovery. Finally, the civil discovery rules expressly provide that Advance America-NC's knowledge of facts does not preclude discovery. *See* N.C. R. Civ. P. 26(1) ("nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought"). This rule makes sense: when two parties get into a car accident, Driver A would not be precluded from deposing Driver B because "Driver A was there and therefore should know what happened." It would be legal error to rely upon such a rationale as the basis for denying Advance America-NC's right to take depositions and discover relevant information in this matter. *See* N.C.G.S. § 150B-39 (depositions should be conducted according to the Rules of Civil Procedure, which provide that "any party may take the deposition of any person").

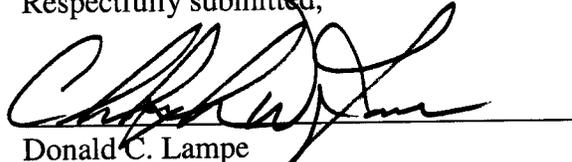
Advance America-NC recognizes the Commissioner's rulings narrowing permissible discovery and the legal issues at stake in this proceeding. We have noted our exception to the April 26 ruling limiting discovery, and we fully intend to abide by that ruling.

The ruling *narrowed* our discovery; however, it did not eliminate it. Given the rules of this contested case proceeding, including the Commissioner's rules and the Rules of Civil Procedure, Advance America-NC still is entitled to gather facts calculated to lead to the discovery of admissible evidence, including facts learned through depositions. The deponents possess pertinent information necessary to Advance America-NC's defense, some of which has been produced in documentary form or in admissions responding to our interrogatories. The deponents possess this information personally, having been present at relevant meetings with Advance America-NC representatives, speaking privately with those representatives, and having made public and statements concerning among other things the "out-of-state" bank model at issue in this case. Given this, it would be legal error to wholly preclude the depositions sought. The Rules of Civil Procedure and the Administrative Procedure Act, the case law, and fairness dictate that Advance America-NC should be permitted some leeway through depositions to discover facts of pertinence to this proceeding.

WHEREFORE, the Joint Motion to Quash and for a Protective Order should be denied, in whole or in part, and the noticed depositions should go forward.

Dated: May 2, 2005

Respectfully submitted,



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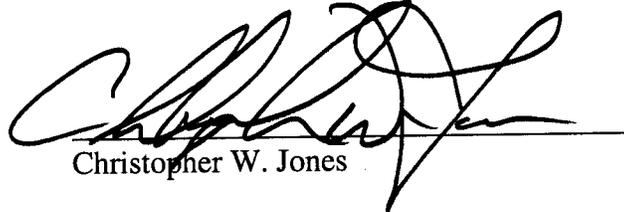
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **OPPOSITION TO JOINT MOTION TO QUASH AND FOR A PROTECTIVE ORDER** on all parties to this action by sending a copy by electronic mail and by United States mail, postage prepaid, addressed as follows:

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This the 2nd day of May, 2005.


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