UNITED STATES OF AMERICA
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

In the Matter of: **FANG FANG,** A former institution-affiliated party of J.P. Morgan Securities (Asia Pacific) Limited, Central, Hong Kong, China (A non-bank subsidiary of a registered bank holding company)	Docket Nos. 17-006-E-I 17-006-CMP-I

ORDER REJECTING RESPONDENT'S OBJECTION TO THE PRIOR ADMINISTRATIVE LAW JUDGE'S ORDER REGARDING RESPONDENT'S JUNE 30, 2017 MOTION FOR SUMMARY DISPOSITION

On March 9, 2017, the Board of Governors of the Federal Reserve System ("Board") commenced this action against Respondent Fang Fang ("Respondent"), seeking an order of prohibition and assessment of a civil money penalty ("Notice") in connection with Respondent's alleged misconduct while participating in the Asia-wide Client Referral Program ("CRP" or "referral hiring program") of his former employer, JPMorgan Securities (Asia Pacific) Limited ("JPMorgan").

On September 11, 2018, the Board issued an "Order Reassigning Case to Judge Miserendino and Remanding the Above-Captioned Case for Further Proceedings" in response to the Supreme Court's decision in *Lucia v. SEC.*[1] Pursuant to the Board's Order, Administrative Law Judge ("ALJ") C. Richard Miserendino replaced Judge Christopher B. McNeil as presiding judge in this matter, and the parties were directed to raise any objections they might have to the orders or decisions of the prior ALJ for Judge Miserendino's reconsideration. Judge Miserendino

[1] *Lucia v. SEC*, 585 U.S. __, 138 S.Ct. 2044, 201 L.Ed.2d 464, 2018 LEXIS 3836, 2018 WL 3057893 (2018).

subsequently retired without ruling on any of the parties' objections, and the Board reassigned this matter to the undersigned on January 13, 2020. On January 14, 2020, the undersigned issued a "Notice of Reassignment and Order Requiring Joint Status Report," which directed the parties to file a joint status report by February 28, 2020, including a list of pending objections or motions, if any, which require rulings.

On February 28, 2020, Enforcement Counsel for the Board ("Enforcement Counsel") and Respondent filed a joint status report stating, among other things, that Respondent's November 2, 2018 objection to Judge McNeil's July 24, 2017 Order denying Respondent's June 30, 2017 motion for summary disposition ("Objection") remained pending. Enforcement Counsel filed an opposition to Respondent's Objection on December 20, 2018 ("Opposition"). The undersigned now addresses the parties' briefing on the instant Objection and concludes that Respondent's motion for summary disposition was properly denied.

Respondent contends in this Objection that his June 30, 2017 motion for summary disposition should have been granted on the following bases: first, that the Board's action against him is time-barred under the applicable statute of limitations because the Notice does not allege any "acts of misconduct that occurred on or after March 9, 2012"—that is, in the five-year period prior to commencement of proceedings, Objection at 1; second, that the Board lacks the authority to bring enforcement actions arising from an alleged violation of the Foreign Corrupt Practices Act ("FCPA"), *see id.* at 22-24; and third, that Respondent is entitled to a jury trial rather than an agency adjudication because his private rights are implicated by the remedies sought by the Board in this action, *see id.* at 24-25.

Enforcement Counsel, by contrast, asserts that (1) the action was timely brought on multiple grounds, *see* Opposition at 5-19; (2) the Board has statutory authority to bring actions

involving the alleged violation of "any law or regulation," including the FCPA, *see id.* at 19-22; and (3) Respondent is not entitled to a jury trial, *see id.* at 22-23.

The undersigned notes at the outset that the Board's January 30, 2018 Determination on Request for Interlocutory Appeal ("Board Order") in connection with Judge McNeil's denial of the June 30, 2017 summary disposition motion specifically addresses each of the three arguments raised by Respondent in the instant Objection. To the extent that the Board Order compels particular conclusions, then, Respondent has offered no authority to suggest that this tribunal may disregard the express interpretation of the Board in favor of its own alternative holdings, and the undersigned declines to do so.[2] If Respondent wishes for the Board to revisit its conclusions on the matter, it must ask the Board directly at some later stage of these proceedings. The undersigned notes, however, that the issues raised in the Objection will now be *four times addressed* by this tribunal or the Board—once in response to the original motion, once in response to Respondent's August 7, 2017 motion for reconsideration,[3] once in response to Respondent's August 7, 2017 motion for interlocutory review,[4] and now again in response to the Objection. Respondent is advised to consider carefully whether seeking review of the same issues for a fifth time would be a prudent and productive use of the parties', and the Board's, time and resources.

Summary Disposition Standard

The Board's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to

[2] *Cf. Iran Air v. Kugleman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) ("[O]nce the agency has ruled on a given matter, . . . it is not open to reargument by the administrative law judge.") (internal quotation marks and citation omitted); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (noting that ALJs are "subordinate to the [agency] in matters of policy and interpretation of the law").

[3] Judge McNeil issued an order denying the motion for reconsideration on August 29, 2017.

[4] Judge McNeil transmitted the request for interlocutory review on August 25, 2017.

any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[5] A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."[6] The summary disposition standard for federal banking agency enforcement actions under the Uniform Rules "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[7] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."[8] That means that this tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true," although "mere allegations or denials" will not suffice.[9]

The Action Was Timely Brought Under the Applicable Statute of Limitations

This action was filed on March 9, 2017. Under 12 U.S.C. § 2462, the general five-year statute of limitations applicable to the accrual of civil claims brought in enforcement actions by the federal government, an agency has "five years from the date when the claim first accrued" in which to commence proceedings.[10] Therefore, to the extent that the claims in the Notice "first accrued" prior to March 9, 2012—five years before the filing of the Notice—the action is untimely

[5] 12 C.F.R. § 263.29(a).

[6] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[7] *In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (OCC July 10, 2017), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1161 (D.C. Cir. 2018).

[8] *Scott v. Harris*, 550 U.S. 372, 380 (2007).

[9] *Heffernan v. Azar*, 417 F. Supp. 3d 1, 7 (D.D.C. 2019) (quoting *Anderson*, 477 U.S. at 248, 255).

[10] Enforcement Counsel contends that Section 2462 does not apply to actions for the imposition of orders of prohibition under 12 U.S.C. § 1818(e), because an order of prohibition is an equitable rather than punitive remedy and therefore does not constitute a "civil fine, penalty, or forfeiture" for Section 2462's purposes. *See* Opposition at 15-19. The Board concluded that it was unnecessary to decide this question, because the action was timely filed as alleged even under Section 2462. Board Order at 6 n.4. The undersigned agrees, and further observes that enforcement actions seeking the assessment of civil money penalties, as this one does, have been held to be subject to Section 2462's limitation period, and thus some application of Section 2462 would be necessary in any event. *See, e.g.*, *Gabelli v. SEC*, 568 U.S. 442, 445 (2013) (applying Section 2462 to actions under 15 U.S.C. § 80b(9)); *Blanton*, 909 F.3d at 1171 (applying Section 2462 to actions under 12 U.S.C. § 1818(i)).

and this tribunal cannot entertain it.[11] Conversely, any claim that first accrued on or after March 9, 2012 is timely if filed on March 9, 2017, and Respondent is precluded from contesting the action on that basis.

Respondent argues that the action is untimely because he is not alleged to have "committed substantive acts constituting violations within the relevant period." Objection at 5. This argument is unavailing in multiple respects: not only does Respondent misconstrue the applicable standard for the accrual of claims within Section 2462's limitation period in this instance, but—as the Board likewise finds—the Notice was timely filed even under the standard proffered by Respondent. *See* Board Order at 6-7.

First, it is not the case that an enforcement action seeking an order of prohibition under 12 U.S.C. § 1818(e) and the assessment of civil money penalties under 12 U.S.C. § 1818(i) is timely only if the respondent engaged in some actionable misconduct in the five years prior to the action being filed. As the Supreme Court has stated, "the 'standard rule' is that a claim accrues when the plaintiff has a complete and present cause of action"—that is, when all of the elements of an actionable claim have been met and can be pled.[12] It therefore necessarily follows that if not all of the elements of a cause of action have been met, then a claim has not accrued for purposes of a limitations period.

Yet "misconduct" is one of only three necessary elements that must be satisfied for an agency to bring a prohibition action under Section 1818(e), distinct from "effect" and

[11] The full relevant text of Section 2462 is as follows: "Except as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462.

[12] *Gabelli*, 568 U.S. at 448 (internal quotation marks and citation omitted); *see also*, *e.g.*, *Savory v. Cannon*, 947 F.3d 409, 427 (7th Cir. 2020) (all "essential element[s] of [a] claim" necessary for accrual); *Blanton*, 909 F.3d at 1171 ("A claim normally accrues when the factual and legal prerequisites for filing suit are in place.") (internal quotation marks and citation omitted).

"culpability." An individual (1) who engaged in actionable misconduct under Section 1818(e)(1)(A) and (2) who showed the requisite culpability under Section 1818(e)(1)(C) nevertheless could not be the subject of an agency prohibition action unless and until (3) the agency also had determined that the individual's misconduct had caused some harmful effect—for example, "financial loss or other damage" to the institution—under Section 1818(e)(1)(B).[13] In such a case, the agency's cause of action might not become "complete and present," and its claim not yet accrued, until some lengthy time after the misconduct had occurred, and the limitations period likewise would not begin to run until then.[14]

Section 1818(i) also contains an "effect" element with respect to the criteria necessary for the imposition of the second-tier penalty sought by the Board.[15] The statute authorizes different levels of money penalties contingent on an increasingly stringent showing by the agency regarding the nature and consequences of the alleged misconduct. The lowest level, a first-tier penalty, may be assessed solely upon a showing of misconduct: specifically, that an institution-affiliated party has violated some law, regulation, order, or written condition or agreement with a federal banking agency.[16] For a second-tier penalty to be assessed, by contrast, the agency must show not only misconduct,[17] but also some external consequence or characteristic of the misconduct: (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such

[13] *See Proffitt v. FDIC*, 200 F.3d 855, 862-63 (D.C. Cir. 2000) (discussing elements of Section 1818(e)).

[14] *See id.* at 863 (noting that "the question of accrual becomes complex when considerable time intervenes between the underlying conduct and the harmful effect").

[15] *See* Notice ¶ 60; *see also Blanton*, 909 F.3d at 1171 (discussing dual elements of 12 U.S.C. § 1818(i)(2)(B)).

[16] 12 U.S.C. § 1818(i)(2)(A).

[17] In addition to the violations described in Section 1818(i)(2)(A), a second-tier showing of misconduct can be made as to a breach of a fiduciary duty or the reckless engagement in unsafe or unsound practices while conducting the institution's affairs. *Id.* § 1818(i)(2)(B)(i).

party."[18] As with Section 1818(e), then, it is possible for all of the necessary elements of a second-tier civil money penalty under Section 1818(i) to not be met until some time after the alleged misconduct has taken place.

That being said, it is unnecessary at this stage of the present case to determine when the "effect" element of each of the claims in the Notice first accrued, because Respondent is alleged to have committed actionable misconduct—that is, "violations of law or regulation, unsafe or unsound practices, or breaches of fiduciary duty"[19]— on or after March 9, 2012, and any "effect" of that misconduct must necessarily have occurred on or after that date as well. *See* Board Order at 6-7. The Board finds that the Notice alleges multiple discrete instances of Respondent engaging in misconduct related to the referral hiring program in the five years prior to the commencement of this action. *See id.* (citing Notice ¶¶ 18, 38, 41, 42). In its Opposition, Enforcement Counsel identifies additional allegations of "misconduct relating to improper hiring practices" during that period. Opposition at 8 (citing Notice ¶¶ 35-38).

Moreover, and more significantly, "the Notice broadly alleges that Respondent was responsible for the referral hiring program—a program that, it is alleged, violated [JPMorgan's] internal policies aimed at preventing violations of anti-bribery laws—from 2008 through the end of that program in 2013." Board Order at 7; *see also*, *e.g.*, Notice ¶ 7 (alleging that Respondent managed CRP "[f]rom at least 2008 through 2013"). As the Board notes, "[t]hese actions are alleged to be unsafe or unsound banking practices and breaches of Respondent's fiduciary duties, whether or not they separately violated the [FCPA]," and therefore "Respondent's focus on

[18] 12 U.S.C. § 1818(i)(2)(B)(ii).

[19] Board Order at 6; *see also* 12 U.S.C. §§ 1818(e)(1)(A) (describing actionable misconduct under the provision); 1818(i)(2)(A) (same).

allegations that specifically involve violations of that Act are misplaced." Board Order at 7 (citing Notice ¶¶ 46-47, 53-54).

These allegations served as the basis of the Board's denial of Respondent's motion for interlocutory review on the statute of limitations issue, and they are likewise sufficient reason to reject Respondent's instant Objection to the denial of his June 30, 2017 motion for summary disposition.[20] The undersigned agrees with the Board that "[t]he allegations of wrongful acts within the limitations period necessitate that a hearing be held to determine disputed facts." *Id.* However, to the extent that it appears at a later stage in the proceeding that segregable claims against Respondent "first accrued" prior to March 9, 2012—meaning that every statutory element for the claim was met before that date, not simply misconduct—then Respondent is free to raise the statute of limitations as an affirmative defense at that point. It may also then become necessary to address Enforcement Counsel's arguments regarding continuing violations, *see* Opposition at 9-13, or Respondent's arguments regarding when and how JPMorgan suffered actionable harm, *see* Objection at 7-8. Not so at present.

The Board Has Authority to Bring This Action Against Respondent

The Board is statutorily authorized to institute enforcement proceedings under Section 1818(e) against institution-affiliated parties based on a broad range of alleged misconduct, as long as the "effect" and "culpability" elements of the statute are also met. To wit, the Board may bring a prohibition action against any such parties who have, "directly or indirectly,"

(i) violated—

(I) any law or regulation;

[20] There is therefore no need to address at this time "the parties' positions regarding the applicability of the continuing violation doctrine, and whether Respondent was present in the United States during the limitations period as necessary to implicate [S]ection 2462." Board Order at 7; *see* Objection at 14-21; Opposition at 9-13.

(II) any cease-and-desist order which has become final;

(III) any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or request by such depository institution or institution-affiliated party; or

(IV) any written agreement between such depository institution and such agency;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty.[21]

Similarly, an institution-affiliated party has engaged in actionable misconduct for which the Board is justified in seeking a second-tier civil money penalty under Section 1818(i) if the party has (1) violated "any law or regulation," federal banking agency order or directive, or written agreement between such agency and the affiliated institution; (2) recklessly engaged in unsafe or unsound practices "in conducting the affairs of such [institution]"; or (3) breached any fiduciary duty.[22]

Respondent argues that the Board lacks jurisdiction to bring this action against him because the action is premised on alleged violations of the FCPA over which other federal agencies have exclusive enforcement jurisdiction and that do not "relate to core functions of the supervised institution." Objection at 24; *see id.* at 22-24. As to the first portion of Respondent's argument, the undersigned agrees with the Board's conclusion that the unambiguous text of Section 1818(e) and Section 1818(i) should be taken at face value: enforcement actions are authorized based on the

[21] 12 U.S.C. § 1818(e)(1)(A).

[22] *Id.* § 1818(i)(2)(A), (B).

alleged violation of "*any* law or regulation," subject to the fulfillment of the other statutory elements, and this includes alleged violations of the FCPA.[23]

Moreover, as the Board also observes, the Notice does not simply allege violations of the FCPA, but also that Respondent engaged in broad-ranging unsafe and unsound practices and breach of fiduciary duty relating to the CRP, either one of which category of allegations would independently satisfy the "misconduct" element of the relevant statutes and authorize the institution of an enforcement action. *Id.* at 5; *see* Notice ¶¶ 46-47, 53-54. Respondent's rejoinder that these other forms of actionable misconduct are just repackaged allegations of FCPA violations is unpersuasive, particularly given the internal JPMorgan policies and procedures that Respondent is alleged to have violated.[24]

With respect to Respondent's supplemental argument that the Board lacks jurisdiction because the Notice's allegations are "unrelated to any core banking function or the stability of a financial institution," Objection at 22, the undersigned is likewise unpersuaded. To begin with, Respondent offers no compelling authority for the proposition that there must be some specific "nexus to the banking institution" to authorize an enforcement action under Section 1818, *id.* at 23, and the undersigned declines to impose such a restriction *sua sponte*.[25] Furthermore, contrary to Respondent's assertion that "conduct involv[ing] an intern hiring program" does not have any nexus to a banking institution, *id.*, the undersigned finds that the Notice's allegations that the

[23] *See* Board Order at 4 (quoting 12 U.S.C. § 1818(e)(1)(A)(i)(I)) (emphasis added by Board); *see also Cousin v. OTS*, 73 F.3d 1242, 1251 (2d Cir. 1996) ("misconduct" for prohibition action "may be met by violations of any law, banking-related or otherwise").

[24] *See* Notice ¶ 5 (alleging that "[o]ther applicable anti-bribery laws and [JPMorgan's] firm-wide policies prohibit the Firm's employees from offering, directly or indirectly, anything of value to existing or prospective commercial clients in order to obtain improper business advantages for the Firm").

[25] *See Cousin*, 73 F.3d at 1251 ("Had Congress intended for only banking-related violations to trigger [the enforcement statute], it could have limited the language of the misconduct prong accordingly.").

CRP—and by extension Respondent's management of that program—caused JPMorgan monetary and reputational harm is a sufficient nexus even under Respondent's proposed standard, at least for the purpose of defeating summary disposition.[26] *See* Notice ¶¶ 43-45.

Respondent Is Not Entitled to a Jury Trial

Finally, the undersigned agrees with the Board that Respondent is not entitled to a jury trial on the allegations against him on the basis that the action implicates Respondent's "private rights." *See* Board Order at 5-6. Respondent argues that the remedies sought by the agency, a prohibition order and an assessment of a civil money penalty, speak to Respondent's "inherent right to individual liberty" and "inherent property right," respectively. Objection at 25. But the Supreme Court has made it clear that where "the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact," there is no constitutional prohibition on Congress "assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[27] Agency enforcement actions such as those authorized under Section 1818 are one such example of proceedings that "clearly implicate public rights,"[28] and as such the undersigned finds Respondent's argument on this point to be without merit.

[26] *See Heffernan*, 417 F. Supp. 3d at 7 (court should "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true") (quoting *Anderson*, 477 U.S. at 248, 255).

[27] *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977); *accord, e.g.*, *Imperato v. SEC*, 693 Fed. App'x 870, 876 (11th Cir. 2017); *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994).

[28] *Cavallari*, 57 F.3d at 145; *see also Atlas Roofing Co.*, 430 U.S. at 451 ("[D]ue process of law does not require that the courts, rather than administrative officers, be charged with determining the facts upon which the imposition of fines depends.") (internal quotation marks, ellipsis, brackets, and citation omitted).

Conclusion

For the reasons stated above, the undersigned rejects Respondent's Objection to the Judge McNeil's July 24, 2017 Order denying Respondent's June 30, 2017 motion for summary disposition. To the extent the July 24, 2017 Order is consistent with the undersigned's findings above, or is otherwise not discussed specifically, the undersigned adopts hereby adopts it.

SO ORDERED.

April 17, 2020

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication