UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

In the Matter of: **LAURA AKAHOSHI,** Former Chief Compliance Officer RABOBANK, N.A. Roseville, California	Docket No.: AA-EC-2018-20

ORDER REVIEWING PRIOR ADMINISTRATIVE LAW JUDGES' PREHEARING ACTIONS

On August 21, 2018, the Comptroller of the Currency ("Comptroller"), as chief officer of the Office of the Comptroller of the Currency ("OCC"), issued an Order in Pending Enforcement Cases in Response to *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. The Board's order included certain instructions, including that the newly assigned ALJ was to allow the parties to object to any of the prior judge's orders and adopt or revise the orders as deemed appropriate. On August 24, 2018, Judge Miserendino issued a "Notice of Case Reassignment and Opportunity to File Objection and Response," which directed the parties to file objections to any order issued in this matter by October 5, 2018.

On October 5, 2018, Laura Akahoshi ("Respondent") filed an "Objection to Notice of Case Reassignment and Prior Orders" ("First Objection"). On November 9, 2018, Enforcement Counsel for the OCC filed a response to Respondent's objection ("First Response"). On November 20, 2018, Enforcement Counsel filed an unopposed motion for leave to amend its response to

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

Respondent's objection, along with its amended response ("First Amended Response"), which was granted by Judge Miserendino.[2] On December 4, 2018, Respondent filed a reply to Enforcement Counsel's amended response ("First Amended Objection").[3]

Judge Miserendino retired and this matter was reassigned to the undersigned on January 6, 2020 by Order of the Comptroller. The Comptroller's Order contained instructions that the undersigned was to review the prior ALJs' orders and adopt or revise the orders as deemed appropriate. On January 8, 2020, the undersigned issued a "Notice of Reassignment and Order Regarding the Comptroller of the Currency's Order in Pending Enforcement Cases," which directed the parties to file objections to the undersigned's assignment to this case, or to any of the previous actions taken by the prior ALJs by March 6, 2020.

On March 6, 2020, Respondent filed an objection in accordance with notice of case reassignment, which objected to the undersigned's reassignment to this matter ("Second Objection"), as well as incorporated by reference all of the prior objections filed on October 5, 2018. Respondent's objections reasserted Respondent's prior objections to Judge McNeil's June 20, 2018 and July 6, 2018 orders. On March 19, 2020, Enforcement Counsel filed an opposition to the objections ("Second Response").

Respondent's Appointments Clause Objections

In its First Objection, Respondent objected to the OCC's August 21, 2018 order reassigning the case to Judge Miserendino, as well as Judge Miserendino's August 24, 2018 notice of case

[2] See "Order Granting Enforcement Counsel's Unopposed Motion for Leave to Amend" issued on November 26, 2018.

[3] Replies are not permitted as a matter of right; however, Judge Miserendino issued an Order granting Respondent the right to file a reply. See "Order Granting Enforcement Counsel's Unopposed Motion for Leave to Amend" issued on November 26, 2018.

reassignment. According to Respondent, both the notice and order are void as unconstitutional and violated Respondent's due process rights because they prejudged a number of legal and factual issues related to *Lucia* without providing Respondent an opportunity to be heard. As to the "Ratification of Administrative Law Judge Appointments," signed by Secretary of Treasury Steven T. Mnuchin on November 15, 2018, Respondent asserts that the ratification exacerbates, rather than mitigates, Respondent's prior objections because Secretary Mnuchin does not have to power to ratify an improper delegation retroactively. First Amended Objection at 1, 6-7. And if Secretary Mnuchin indeed failed to properly appoint any ALJ for the OCC, Respondent asserts that the OCC's April 17, 2018 Notice of Charges itself is therefore invalid. First Amended Objection at 15.

According to Respondent, *Lucia* did not "contemplate reassignment, but [requires] a new hearing before a properly appointed official," and "[o]nly a notice issued anew by a validly appointed officer and calling for a hearing in a validly constituted tribunal would be properly assigned for adjudication in compliance with *Lucia*," which Respondent asserts is now time-barred. Second Objection at 15. Respondent contends that the OCC's claims are time-barred because, at the time this matter was initiated, it was brought before an unconstitutionally appointed ALJ, which in turn ostensibly voided the original Notice of Charges. *Id.* at 13, 15. Enforcement Counsel responds that the reassignment of this matter provides Respondent with the full remedy contemplated by *Lucia*, and furthermore that the Notice of Charges was properly issued and unaffected by the disposition of that case. The undersigned agrees with Enforcement Counsel and finds that there is no nexus between the OCC's ability to validly initiate an enforcement action and any challenge to the constitutionality of the appointment of the ALJ subsequently assigned to preside over the proceedings.

Respondent's arguments are founded on three premises: first, that neither of the two ALJs to whom this matter was originally assigned had been constitutionally appointed at the time of assignment; second, that the appropriate remedy for a proceeding tainted with an Appointments Clause violation would be a voiding and refiling of the Notice of Charges and the institution of an entirely fresh enforcement action before a properly appointed ALJ; and third, that the OCC is precluded from commencing a new proceeding against Respondent by operation of the general five-year statute of limitations applicable to the accrual of civil claims brought in enforcement actions by the federal government. Second Objection at 11-15. Even presuming that Office of Financial Institution Adjudication ("OFIA") ALJs who preside over OCC enforcement actions are sufficiently similarly situated to the ALJs at issue in *Lucia* as to be subject to the same constraints on the manner of their appointment, a question which has not been determined by the Comptroller and which is not for this tribunal to decide,[4] none of Respondent's premises follow from that conclusion under logic or the law.

Contrary to Respondent's contention, there is no relationship between the validity of the Notice of Charges filed against Respondent and the question of whether the ALJ assigned to preside over the subsequent enforcement proceedings was properly appointed. Nothing in the operative statutes requires that an OCC enforcement action, once initiated, be adjudicated by an ALJ, as opposed to the Comptroller or other agency official.[5] The OCC's Uniform Rules and

[4] In an interlocutory decision in a Federal Deposit Insurance Corporation ("FDIC") case issued prior to *Lucia*, the Fifth Circuit concluded that OFIA ALJs likely were "inferior Officers" within the meaning of the Appointments Clause, but did not have occasion to rule upon the constitutionality of their prior method of appointment. *Burgess v. FDIC*, 871 F.3d 297, 301-04 (5th Cir. 2017); *contra Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000) (holding that OFIA ALJs are not inferior Officers). To the undersigned's knowledge, the question has not been addressed by any court since *Lucia* was decided.

[5] *See* 5 U.S.C. §§ 554(a), 556(b) (providing that "the agency," "one or more members of the body which comprises the agency," or "one or more administrative law judges" "shall preside at the taking of evidence" in adjudicatory proceeding); 12 U.S.C. § 1818(e), (i).

Regulations likewise expressly provide that "[t]he Comptroller may, at any time during the pendency of a proceeding, perform . . . any act which could be done or ordered by the administrative law judge."[6] Such a result upon remand—rehearing by the agency rather than an ALJ—also was contemplated by the *Lucia* Court.[7] Put plainly, the OCC is entitled to bring an enforcement action even if there is no ALJ available to hear the action at all. It therefore follows that the presence or absence of a validly appointed ALJ at the commencement of an enforcement action has no bearing on the underlying legitimacy of the action itself.

Moreover, *Lucia* makes it clear that the "appropriate remedy" for an Appointments Clause violation of the kind alleged here is not dismissal of the action and refiling of the Notice of Charges, but simply "a new hearing before a properly appointed official" in the extant action.[8] The remedial analysis in *Lucia* centered on whether the previous ALJ could continue to hear the case upon remand if he were to be constitutionally appointed in the interim; it concluded he could not.[9] At no point did the Court appear to entertain the possibility that the action itself was invalid and should be brought from scratch, or that respondents before an unconstitutionally appointed tribunal are entitled to have the proceedings dismissed in full.[10] Rather, the *Lucia* Court took for granted that the existing case would be remanded and that proceedings would continue, albeit upon assignment to a different ALJ or before the agency itself.[11] So too, here, is it both unnecessary and inappropriate for the OCC to void the entire action and start again in order to correct whatever

[6] 12 C.F.R. § 19.4; *see also id.* § 19.101 (requiring enforcement proceedings to be conducted by OFIA ALJs "[u]nless otherwise ordered by the Comptroller").

[7] *See Lucia*, 138 S.Ct. at 2055 n.6 (noting that "[t]he SEC may decide to conduct Lucia's rehearing itself").

[8] *Id.* at 2055 (internal quotation marks and citation omitted).

[9] *See id.* n.5.

[10] *See id.* ("To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.").

[11] *See id.* n.6.

Appointments Clause deficiencies may have existed previously; it is enough for the case to be heard anew by an ALJ who has been properly appointed. Given that, the OCC's claims against Respondent are not time-barred, because they were brought within the applicable limitations period in the first instance and need not be reasserted.

Respondent also objects on the grounds that the Notice of Charges was issued by a non-officer, namely Michael R. Brickman, Deputy Comptroller for Special Supervision, who was not constitutionally appointed. Second Objection at 13-14. Enforcement Counsel opposes the objection because Deputy Comptroller Brickman is an appropriately delegated signatory. Second Response at 16 (citing 12 U.S.C. §§ 4(a), 9 and 481). The undersigned agrees that the Notice of Charges was properly issued and rejects Respondent's objection.

As to the constitutionality of the undersigned's appointment to this matter, the undersigned does not find Respondent's argument to be persuasive. While Respondent acknowledges that the undersigned was appointed as an ALJ for the OCC by the Secretary of the Treasury in November 2019, Respondent asserts that because the undersigned enjoys dual for-cause removal protections, the undersigned is unconstitutionally insulated from presidential oversight, and therefore, the undersigned's appointment is unconstitutional. Second Objection at 9-10. In support of this position, Respondent cites *Free Enterprise Fund v. Public Company Accounting Oversight Board* ("*Free Enterprise Fund*"), in which the Supreme Court held that the members of the Public Company Accounting Oversight Board ("PCAOB") were unconstitutionally appointed due to the multiple levels of protection from removal that they enjoyed.[12] Respondent also argues that the undersigned's appointment is constitutionally defective because OFIA, the office on behalf of which the undersigned presides over enforcement proceedings, is not an agency but an "executive

[12] 561 U.S. 477 (2010).

body charged with overseeing the administration of administrative enforcement" for certain federal banking agencies—thus confirming, in Respondent's view, that all OFIA ALJs, including the undersigned, "wield executive power but have a dispersion of responsibility that is unconstitutional at its core." Second Objection at 10-11 (quoting 12 C.F.R. § 747.3(i) in first quote).

Enforcement Counsel opposes Respondent's objection, asserting that the undersigned was constitutionally appointed by the Secretary of the Treasury on November 14, 2019, and that the OCC is a bureau within the Treasury Department, of which the Secretary is head. Second Response at 6-7. Enforcement Counsel asserts that the undersigned was, in addition, constitutionally appointed by the Board of the Federal Deposit Insurance Corporation ("FDIC") on October 28, 2019, and that the OCC may use an ALJ appointed by the FDIC Board because that ALJ is part of a pool of ALJs established for the agencies' use under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). *Id.* at 7-8. Enforcement Counsel contends that "[t]he Appointments Clause does not prevent Congress from requiring the OFIA agencies to establish a joint pool of ALJs, provided that there is a constitutional grant of authority to appoint such officers and that a head of department makes the appointment," as are both the case here. First Amended Response at 12. In addition, Enforcement Counsel asserts that the removal provisions for ALJs do not violate the Appointments Clause. Second Response at 8-11.

The undersigned is not persuaded by Respondent's objection that the removal provisions for ALJs, and OFIA ALJs in particular, violate the Appointments Clause. As the FDIC Board of Directors recently observed, the Supreme Court specifically excluded ALJs from the scope of its holding in *Free Enterprise Fund* because it recognized that ALJs exercise purely adjudicative powers that are far different from the significant enforcement and policymaking powers exercised

by PCAOB members.[13] Respondent has not shown that ALJs generally, let alone OFIA ALJs, are similarly situated to PCAOB members such that *Free Enterprise Fund* controls. There is therefore likewise no showing that the removal provisions for ALJs violate the separation of powers principles as identified in *Free Enterprise Fund*.

While the *Lucia* Court addressed the issue of whether SEC ALJs are "Officers of the United States," it specifically did not address the issue of constitutionality of the removal of ALJs.[14] That issue was, however, addressed extensively in the partial concurring opinion by Justice Breyer, who noted that "[t]he substantial independence that the Administrative Procedure Act's removal protections provide to administrative law judges is a central part of the Act's overall scheme."[15] In any event, the undersigned finds that any potential removal issue does not warrant any further delay in the case, and Respondent's objection is hereby rejected.

The undersigned likewise rejects Respondent's contention that the nature or structure of OFIA bears somehow on the constitutionality of the undersigned's appointment. FIRREA directed that "the appropriate Federal banking agencies," including the FDIC and OCC, "jointly establish their own pool of administrative law judges."[16] This the agencies did, in a manner amply described by Enforcement Counsel in its briefing. *See* First Amended Response at 11-12. The undersigned wields no greater degree of "executive power" merely because OFIA is the product of a statutorily-mandated collaboration among, and subject to the oversight of, multiple agencies rather than existing under the aegis of one agency alone. Respondent does not and cannot dispute that the Secretary of the Treasury is the head of the department of which the OCC is a constituent part. *See*

[13] *In re Michael R. Sapp*, 2019 WL 5823871, *19 (FDIC Sept. 17, 2019) (citing *Free Enterprise Fund*, 561 U.S. at 501 n.10).

[14] *Lucia*, 138 S.Ct. at 2051, n.1.

[15] *Id*. at 2060 (Breyer, J., concurring in part); *see generally id.* at 2057-64.

[16] FIRREA, Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures).

First Objection at 10 (OCC is "within the umbrella of the Department of the Treasury, the head of which is the Secretary of the Treasury").[17] The undersigned was appointed to preside over OCC enforcement actions by Secretary Mnuchin on November 14, 2019. *See* First Amended Response, Ex. 1. For the purpose of Respondent's instant objection, such appointment ends the inquiry.

Furthermore, Respondent offers no reason to conclude that the undersigned has the jurisdiction in the first instance to decide arguments regarding the constitutionality of the limitations on the removal of ALJs, or indeed regarding the constitutionality of OFIA, and those arguments are accordingly preserved for appeal. As such, the case will proceed with the undersigned as the assigned ALJ.

Respondent's Objection to Judge McNeil's June 20, 2018 Order Granting a Partial Stay

On May 9, 2018, Judge McNeil issued an "Initial Prehearing Order," which stated that "dispositive motions seeking a determination of the merits of Respondent's First, Second, Sixth, and Tenth through Twentieth Affirmative Defenses shall be due by not later than September 6, 2018." See May 9, 2018 Order at 2. Respondent objects to that order because she asserts that the affirmative defenses raised include factual issues requiring discovery, and that requiring any such motion to be filed before such discovery would be premature.

On May 30, 2018, Enforcement Counsel filed a "Motion to Stay," under seal, requesting that the enforcement action be stayed due to a parallel criminal investigation. On June 13, 2018, Respondent filed an opposition to the stay regarding document discovery, but did not oppose a stay regarding the hearing date and taking depositions. On June 20, 2018, Judge McNeil issued an "Order Regarding Enforcement Counsel's Motion to Stay Proceedings" which granted the motion in part and denied the motion in part. The stay was granted with respect to document discovery,

[17] *See also* 31 U.S.C. §§ 301(b) (Secretary of the Treasury is head of that department), 307 (OCC is part of the Department of the Treasury).

depositions, and the hearing; however, the deadline for dispositive motions regarding the affirmative defenses (due September 6, 2018) was still in effect.

On August 16, 2018, Respondent filed a "Request to Adjourn Deadline to File Preliminary Dispositive Motions." In reply to that email, the parties received an email from ofia@fdic.gov on August 17, 2018 which stated the following:

> The parties are hereby notified that pursuant to the U.S. Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), all orders issued by Administrative Law Judge Christopher B. McNeil in this case are null and void and effectively this matter is stayed until such time as a new Office of Financial Institution Adjudication ("OFIA") administrative law judge is designated/assigned to this case. The parties are further notified that an OFIA administrative law judge will not be designated/assigned to this case until such time as the Office of the Comptroller of the Currency ("OCC"), appoints said OFIA administrative law judges as administrative law judges for the [] OCC.

As noted above, on August 21, 2018, the Comptroller issued a notice reassigning the case from Judge McNeil to Judge Miserendino, and on August 24, 2018, Judge Miserendino issued a notice regarding the case reassignment. Other than the notice of case reassignment and the issuance of one subsequent order regarding Enforcement Counsel's request for leave to amend its response to Respondent's objections regarding the case reassignment noted above,[18] Judge Miserendino did not make any other rulings in this matter before retiring.

There is a general dispute between the parties regarding the effect of the August 17, 2018 email and whether all of Judge McNeil's prior orders are rendered "null and void." The undersigned finds that the author of August 17, 2018 email is unknown, other than it being sent from the general "ofia@fdic.gov" email account, and that the email was not signed by an ALJ; therefore, it cannot stand. In addition, it is inconsistent with the Comptroller's order of case reassignment issued a few days later, stating that the newly assigned ALJ was to allow each party

[18] See n. 2.

to file an objection to "any of the actions taken by the prior ALJ." Had all of the prior actions taken by Judge McNeil been considered "null and void," there would be no reason to give the parties an opportunity to object to "any of the actions taken by the prior ALJ."

In addition, there is a general dispute between the parties regarding whether this matter remains stayed, based on Judge McNeil's June 20, 2018 order granting in in part the request for a stay, except with respect to the deadline for dispositive motions regarding the affirmative defenses. According to Respondent, on September 7, 2018, the U.S. Department of Justice ("DOJ") informed Respondent that it was declining to prosecute her and that there was no longer an active criminal investigation. Second Objection at 5. At that point, it would have made sense for one of the parties to request, or for the ALJ to issue an order *sua sponte*, that the stay be lifted. But given the procedural nature of the case at the time, including the *Lucia* reassignment, the mysterious "null and void" email, the subsequent retirement of Judge Miserendino, and the long lull before a new ALJ was appointed, the stay was never formally lifted. To the extent such a stay was never formally lifted, the undersigned does so now.

This brings us to the deadline for dispositive motions regarding the affirmative defenses, which were originally due on September 6, 2018. To the extent Respondent's affirmative defenses rely on "tribunal" objections, such as the Appointments Clause issue (i.e., Respondent's tenth through twentieth affirmative defenses), which were rejected above, the undersigned finds that such arguments have already been raised in Respondent's objections and are hereby preserved for appeal purposes. Therefore, they need not and should not be raised again in a dispositive motion before the undersigned and should be briefed directly to the Comptroller at the appropriate time.

As to Respondent's other affirmative defenses regarding "jurisdiction" and "timing" issues, such as the statute of limitations (first affirmative defense) and laches (second affirmative

defense), the undersigned finds that even though it does not appear that discovery is needed before briefing these issues, delaying the deadline for dispositive motions would not be unduly burdensome. During a telephonic conference on April 23, 2020, the parties agreed that the deadline for the initial dispositive motion regarding these issues will be filed by May 21, 2020. See April 23, 2020 Notice Regarding April 23, 2020 Scheduling Conference.

Respondent's Objection to Judge McNeil's July 6, 2018 Order Regarding Enforcement Counsel's Motion to Limit Respondent's Document Discovery Requests

On May 30, 2018, Enforcement Counsel filed an unopposed request for extension of the deadline to file motion to limit discovery, which was granted by Judge McNeil on that same day. On June 8, 2018, Enforcement Counsel filed a motion to limit Respondent's document discovery requests ("Motion"). On June 15, 2018, Respondent failed to file a response to Enforcement Counsel's motion, but filed a "Request to Adjourn Deadline," requesting an additional five days to respond to Enforcement Counsel's motion instead.

As noted above, on June 20, 2018, Judge McNeil granted a partial stay in the proceedings, which stayed discovery. On June 20, 2018, Judge McNeil issued an "Order Regarding Enforcement Counsel's Motion to Limit Respondent's Document Discovery Requests," which granted Respondent's request for additional time respond to Enforcement Counsel's motion. On June 27, 2018, Respondent filed a response to Enforcement Counsel's motion ("Response"). On July 6, 2018, Judge McNeil issued a "Second Order Regarding Enforcement Counsel's Motion to Limit Respondent's Document Discovery Requests," which granted Enforcement Counsel's motion as to requests 26 through 29 and deferred ruling on the remaining requests due to the stay. That order specified that Respondent could seek an extension of the September 6, 2018 deadline

for filing a dispositive motion if the deferral adversely affected Respondent.[19] As noted above, on August 17, 2018, the parties received an email from ofia@fdic.gov that all of Judge McNeil's prior orders were null and void, and the undersigned has already made a finding that the email has no effect.

The parties are in agreement that a ruling regarding Enforcement Counsel's motion to limit discovery is now ripe. Judge McNeil already issued a ruling striking Respondent's Request Nos. 26-29 regarding post-employment conflicts. The undersigned hereby adopts Judge McNeil's ruling striking those requests.

Enforcement Counsel asserts that all discovery should now be limited to the narrow scope of this proceeding. According to Enforcement Counsel, the undersigned should strike Respondent's discovery requests that seek (1) documents related to the then-possible criminal proceeding, (2) documents outside the relevant limited time span in the Notice of Charges, and (3) documents related to the Appointment Clause with respect to the ALJ and Deputy Comptroller appointments. Enforcement Counsel states that it agrees to produce all documents that form the basis for the charges set forth in the Notice of Charges, and any and all documents to be used by the OCC at the administrative hearing, that are relevant, non-privileged, and as kept in the usual course of business. Motion at 2-3.

Respondents asserts that Enforcement Counsel must also produce documents material to Respondent's defense. Response at 4. The undersigned agrees that Enforcement Counsel's production should include documents that could be material to Respondent's defense; however, it does not appear that the documents Enforcement Counsel has agreed to produce exclude such documents. Therefore, to the extent there is no dispute regarding this, the undersigned makes no

[19] As noted above, on August 16, 2018, Respondent filed a request to adjourn the deadline to file preliminary dispositive motions.

ruling. If, on the other hand, there is a dispute on the lack of production of material documents now or in the future, the undersigned directs the parties to resolve such dispute jointly, if possible, consistent with the direction above, and to bring the dispute to the undersigned's attention only if no resolution can be reached. In addition, in her response, Respondent agreed to revise Request Nos. 10 and 37 to limit the scope of those requests. Accordingly, the undersigned makes no ruling as to those document requests.

Enforcement Counsel asserts that documents related to the then-possible criminal proceedings are not relevant to this enforcement action. Respondent in turn contends that, because the OCC charged Respondent under a criminal obstruction statute, 18 U.S.C. § 1001, Respondent's alleged criminal state of mind is at issue and therefore the documents are relevant. Response at 4. The undersigned agrees with Enforcement Counsel that such documents are outside the scope of this enforcement action. Accordingly, Enforcement Counsel's motion to strike Respondent's Request Nos. 3, 22, 23, 24, 25, and 38 is hereby granted.

Enforcement Counsel asserts that the events that form the basis of the Notice of Charges occurred in March and April 2013 and relate to the OCC's 2012 examination of Rabobank, N.A; Enforcement Counsel therefore argues that any request for documents prior to 2012 and subsequent to 2013 is beyond the scope of this enforcement action. Respondent asserts that documents from 2008-2012 and 2014 and beyond are relevant as to the credibility of Lynn Sullivan's testimony. Response at 7-8. The undersigned agrees with Enforcement Counsel that the time frame of relevant documents is from 2012 through 2013. Accordingly, Enforcement Counsel's motion to strike Respondent's Request Nos. 5, 6, 7, 8, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, and 38 is hereby granted to the extent they request documents outside the 2012-2013 time period. Furthermore, with respect to Request No. 11, the undersigned agrees that a request for

documents reflecting work performed by the OCC in any examination or supervision of the Bank, not just the examination or supervision of the Bank at issue in the Notice of Charges, is overly broad and is hereby stricken.

As for the documents related to ALJ and Deputy Comptroller appointments, such information has been sufficiently provided to Respondent, or is publicly available; accordingly, no additional discovery is warranted. Enforcement Counsel's motion to strike Respondent's discovery Request Nos. 30-32 is hereby granted.

Enforcement Counsel also asserts that certain requests include privileged materials, i.e. Request Nos. 33, 34, 35, and 39. According to Enforcement Counsel, those document requests cover the deliberate process privilege, along with the attorney client privilege. Respondent agrees that privileged documents should not be produced; however, Respondent asserts that if there are privileged documents, a privilege log should be produced. Response at 10-11. The undersigned agrees with Respondent that if there are responsive documents to Request Nos. 33, 34, 35, and 39 that are privileged, a general privilege log should be provided. Accordingly, Request Nos. 33, 34, 35, and 39 are not stricken.

To the extent that the parties believe that the above rulings do not fully address and resolve all disputes over document requests that are the subject of Enforcement Counsel's instant motion, they may jointly make a submission to this tribunal to that effect within ten days of the issuance of this Order. Such a submission should specify, in sufficient detail to facilitate determination, which disputes regarding issues raised in the Motion remain to be resolved.

Reassignment Review of Prehearing Actions

Upon review of the record before the undersigned, the following additional pre-hearing orders not mentioned above were also reviewed:

Date	Description	Judge
4/17/18	Notice of Designation and Order Requiring Electronic Filing	Miserendino
8/24/18	Notice of Case Reassignment and Opportunity to File Objection and Response	Miserendino
11/26/18	Order Granting Enforcement Counsel's Unopposed Motion for Leave to Amend	Miserendino

Having examined the additional prehearing actions taken by Judge Miserendino, the undersigned finds that the actions taken by the prior ALJ are consistent with the OCC's Uniform Rules of Practice and Procedure, 12 U.S.C. § 1818 (pertaining to enforcement of provisions of the Federal Deposit Insurance Act), and with the provisions of the Administrative Procedure Act.[20] Upon finding that cause to revise these orders has not been shown, the undersigned hereby adopts them.

SO ORDERED.

Dated: April 24, 2020

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[20] 5 U.S.C. Part I, Ch. 5, Subch. II.